JUDGMENT OF THE COURT
14 July 1988 *

In Joined Cases 33, 44, 110, 226 and 285/86

Stahlwerke Peine-Salzgitter AG, having its registered office at Salzgitter, represented by Deringer, Tessin, Herrmann and Sedemund, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 8, rue Zithe,

and

Hoogovens Groep BV, having its registered office at IJmuiden, represented by B. H. ter Kuile and F. O. W. Vogelaar, Advocates at the Hoge Raad (Supreme Court) of the Netherlands, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 8, rue Zithe,

applicants,

v

Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbauer, and Thomas van Rijn, a member of its Legal Department, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATIONS for declarations that Article 5 of Commission Decision No 3485/85/ECSC of 27 November 1985 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (Official Journal 1985, L 340, p. 5) and individual decisions of the Commission of the 30 December 1985 and 21 March 1986 fixing the quotas for Stahlwerke Peine-Salzgitter AG for the first and second quarters of 1986 and of 14 July 1986 (as amended by decision of 5 August 1986) and of 6 October 1986 (as amended by a decision of 28 November 1986) fixing the quotas for Hoogovens Groep BV for the third and fourth quarters of 1986 are void,

* Languages of the Case: German and Dutch.

THE COURT

composed of: G. Bosco, President of Chamber, acting for the President, O. Due and G. C. Rodríguez Iglesias, Presidents of Chambers, T. Koopmans, K. Bahlmann, C. Kakouris, R. Joliet, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: J. Mischo
Registrar: H. A. Rühl, Principal Administrator

having regard to the Report for the Hearing and further to the hearing on 22 October 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 1 December 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 7 February 1986 Stahlwerke Peine-Salzgitter Aktiengesellschaft (hereinafter referred to as 'Stahlwerke Peine-Salzgitter') brought an action under the second paragraph of Article 33 of the ECSC Treaty for a declaration that Article 5 of Commission Decision No 3485/85 of 27 November 1985 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (Official Journal 1985, L 340, p. 5) is void in so far as that article does not make provision for the part of production quotas which may be delivered in the common market (hereinafter referred to as the 'delivery quota') to be adjusted equitably in the case of undertakings whose delivery quotas are significantly lower than the Community average.

2 By applications lodged at the Court Registry on 17 February and 9 May 1986, Stahlwerke Peine-Salzgitter brought two actions (Cases 44/86 and 110/86) under the abovementioned provision of the ECSC Treaty for a declaration that the Commission's individual decisions addressed to it on 30 December 1985 and 21 March 1986 are void in so far as they determine that undertaking's delivery quotas as regards categories Ia, Ib, Ic and III for the first and second quarters of 1986 respectively.

3 By applications lodged on 20 August and 20 November 1986, Hoogovens Groep BV (hereinafter referred to as 'Hoogovens') brought two actions (Cases 226 and 285/86) under the abovementioned provision of the ECSC Treaty for a declaration that the Commission's individual decisions of 14 July 1986 (as amended by a decision of 5 August 1986) and 6 October 1986 (as amended by a decision of 28 November 1986) concerning that undertaking's quotas for the third and fourth quarters of 1986 and, secondly, Commission Decision No 3485/85 are void, either wholly or at least in part.

4 In the five applications it is submitted essentially that Decision No 3485/85, in particular Article 5 thereof, is unlawful.

5 Since the five cases were related, the Court (Sixth Chamber) joined them for the purposes of the hearing and of the judgment by order of 30 June 1987. Hoogovens was granted leave to intervene in Case 33/86 in support of the applicant's conclusions.

6 Under the system of monitoring and production quotas for certain products of undertakings in the steel industry the Commission fixes each quarter the production quotas and the part of such quotas which may be delivered in the common market on the basis of the reference production and quantities fixed when the system was introduced and after applying to such reference production and quantities certain abatement rates fixed each quarter.

7 The applicants are steel undertakings. Stahlwerke Peine-Salzgitter manufactures *inter alia* products in categories Ia, Ib, Ic and III. Hoogovens manufactures in particular products in categories Ia and Ib. For all those categories the ratio between the production quota and the proportion of that quota which may be delivered in the common market (known as the 'I:P ratio') is exceptionally unfavourable in the applicants' case, both in absolute terms and in comparison with the Community average and at times is nearly 25% lower than that average. It is an established and undisputed fact that these unfavourable I:P ratios entail exceptional economic difficulties for the applicants.

8 Aware of those difficulties, the Commission has repeatedly stated its willingness to re-examine the question of the I:P ratio before extending the quota system for a further two-year period. After consulting the Consultative Committee it asked the Council to give its assent to the new provisions proposed in a communication sent to the Council on 25 September 1985 concerning the 'Introduction of a system of production quotas under Article 58 of the ECSC Treaty after 31 December 1985'. The Commission stated in that communication that there had been a profound change in the pattern of steel trade between the Community and the rest of the market since the introduction of the quota system and that it was necessary to review the situation of undertakings whose ratio between the proportion of production quotas which may be delivered in the Community and the overall production quotas was, for all the products covered by the system, much lower than the Community average because those situations were no longer in line with the objectives of the Community steel policy. The Commission intended to adjust the I:P ratio, in respect of each undertaking's production, so that it was no more than 10% below the Community average.

9 The Council examined that document on 29 October 1985. In reply to a question asked by the Court, the Council stated that it had not given its assent to the adjustment of the I:P ratio.

10 On 27 November 1985 the Commission adopted Decision No 3485/85 which did not provide for an adjustment of the I:P ratio as proposed by the Commission to the Council. Article 5 of that decision provides that the Commission is to fix each quarter, for each undertaking, the production quotas and the part of such quotas which may be delivered in the common market on the basis of the reference production and quantities and by applying abatement rates to such reference production quantities. Within certain limits the Commission may, if necessary, upon application by the undertaking concerned, adjust the quotas fixed in this way but that adjustment, for which the detailed rules are laid down by that article, may not lead to quotas in excess of a certain quarterly maximum limit for all categories for any one undertaking.

11 Reference is made to the Report for the Hearing for a fuller account of the facts of the cases, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility (Case 33/86)

12 The Commission disputes the admissibility of only the application in Case 33/86 brought by Stahlwerke Peine-Salzgitter against Decision No 3485/85. It submits that the applicant has not shown that that decision constitutes a misuse of powers affecting it.

13 The second paragraph of Article 33 of the ECSC Treaty provides that undertakings or the associations referred to in Article 48 of that Treaty may institute proceedings against individual decisions concerning them or against general decisions which they consider to involve a misuse of power affecting them.

14 It should be recalled that the Court has consistently held that in order for an application to be admissible it need only be shown that the applicant is an undertaking or an association of undertakings meeting the conditions laid down in the second paragraph of Article 33 and Article 48 of the EEC Treaty and that it alleges a misuse of powers affecting it and adduces relevant arguments to sustantiate the alleged misuse of powers. Those conditions are fulfilled in this case. However, the question whether it has actually been proved that there has been a misuse of powers affecting the applicant is a matter to be examined as part of the substance of the case.

15 It follows that the application in Case 33/86 is admissible.

Substance (Cases 33, 44, 110, 226 and 285/86)

16 The parties do not dispute the fact that the Council did not give its assent to the Commission's proposal to alter delivery quotas in the case of certain undertakings whose I:P ratios were very unfavourable. The question arising is whether the Commission was obliged to seek the Council's assent or whether, on the contrary, the Commission should have acted alone and did not do so.

17 In the view of Stahlwerke Peine-Salzgitter and Hoogovens, it follows from the very wording of Article 58 (2) of the ECSC Treaty that the Commission alone is empowered to determine the quotas on an equitable basis. According to the division of powers provided for in Article 58, the assent of the Council is required only for the decision in principle to establish a quota system whereas the Commission alone has the power to determine equitable quotas.

18 The Commission submits that although the Council's assent to the establishment of quotas is necessary under Article 58 (1) of the ECSC Treaty, that does not mean that the details of the organization, the extension or the amendment of that system may be decided upon without the Council's consent. Under the provisions of the general decision in force, which, according to Article 58 (1), must be adopted with the Council's assent, the Commission determines the quotas on an equitable basis pursuant to Article 58 (2). In the Commission's view, there is therefore a close relationship between paragraphs 1 and 2 of Article 58 which cannot be considered separately from one another.

19 The Commission takes the view that it may amend the general decision in order to carry out quota adjustments for reasons of fairness only within the context of the procedure laid down for that purpose, that is to say either by amendment of the general decision with the assent of the Council or through the application of Article 18 of the general decision in force, pursuant to which the Commission may carry out the necessary adjustments by general decision, in particular if radical changes occur on the iron and steel market.

20 In this case, after the Council had refused to give its assent to the Commission's proposals regarding the necessity of adjusting the I:P ratio, it was, in the Commission's view, impossible to ignore that vote when adopting Decision No 3485/85. Since the period of validity of Decision No 234/84 was about to expire, it was not possible to base a quota adjustment on Article 18 of that decision. Although that same Article 18 was inserted in Decision No 3485/85, a decision based on that provision could not have been considered a possibility at a date so close to the adoption of the general decision and in the absence of radical changes.

21 The first subparagraph of Article 58 (1) and the first subparagraph of Article 58 (2) of the ECSC Treaty provide as follows:

'1. In the event of a decline in demand, if the High Authority considers that the Community is confronted with a period of manifest crisis and that the means of action provided for in Article 57 are not sufficient to deal with this, it shall, after consulting the Consultative Committee and with the assent of the Council, establish a system of production quotas, accompanied to the necessary extent by the measures provided for in Article 74.

...

2. The High Authority shall, on the basis of studies made jointly with undertakings and associations of undertakings, determine the quotas on an equitable basis, taking account of the principles set out in Articles 2, 3 and 4. It may in particular regulate the level of activity of undertakings by appropriate levies on tonnages exceeding a reference level set by a general decision.'

22 It should be recalled that the Court stated in its judgment of 11 May 1983 in Case 244/81 (*Klöckner-Werke AG* v *Commission* [1983] ECR 1451) that in laying down a form of consultation between the Commission and the Council, Article 58 did not determine its detailed arrangements. The Court went on to state that the requirements of Article 58 are satisfied if such cooperation culminates in the Council's assenting to the quota system which the Commission proposes to set up, without its being necessary to require the two institutions to examine a detailed draft decision. It follows from that judgment that Article 58 must be interpreted as requiring the assent of the Council only for the establishment and the essential features of the quota system and that it is for the Commission, acting under its own powers, to lay down the details of the system in order to determine the quotas on an equitable basis.

23 As the Court has held, most recently in its judgment of 21 February 1984 in Joined Cases 140, 146, 221 and 226/82 (*Walzstahl-Vereinigung and Thyssen AG* v *Commission* [1984] ECR 951), the powers conferred on the Commission by the ECSC Treaty would be diverted from their lawful purpose if it appeared that the Commission had made use of them for the exclusive, or at any rate the main, purpose of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances with which it is required to cope. The same is true if the Commission wrongly uses the procedure laid down for the establishment of the quota system and thereby fails to exercise its own powers to adopt the rules which it considers necessary to ensure that the quotas are equitable.

24 In order to determine whether there has been such a misuse of procedure in this case it is necessary to examine first of all the question whether the Commission had the power to adopt a decision to amend the I:P ratio without the Council's consent. If that is the case, then the fact that the Commission, when adopting Article 5 of Decision No 3485/85, considered itself bound by the Council's refusal to give the assent it had requested may indeed constitute a misuse of power.

25 It is apparent from the judgment of the Court cited above that the Council's assent mentioned in Article 58 (1) is necessary in the case of a proposal for a general adjustment of the quotas for an entire group of undertakings characterized by their structure.

26 However, a distinction must be drawn between the adjustment of quotas for an entire group of undertakings characterized by their structure and thus by a situation which is permanent and the adjustment of quotas for the undertakings involved in this case, which are characterized by the ratio between their exports and their deliveries within the common market during a certain period before the quota system was introduced. If the quota system had not been introduced, this ratio might have changed according to the economic situation on the common market and on the export market. It was therefore foreseeable, once the system had been introduced, that a particularly unfavourable development on the export market might require an adjustment of that ratio in order to enable the Commission to comply with its obligation to determine the quotas on an equitable basis. Such an adjustment must therefore be considered as forming part of the details of the system for which the Council's assent is not necessary.

27 In this case the Commission examined the specific situation of undertakings such as Stahlwerke Peine-Salzgitter and Hoogovens as it is required to do by Article 58 (2) and concluded that in order to determine the quotas on an equitable basis, the I:P ratios of those undertakings should be adjusted. However, instead of adopting the requisite provisions pursuant to Article 58 (2), the Commission merely submitted a proposal to the Council pursuant to Article 58 (1). Having failed to retain the Council's assent, it adopted a new general decision, No 3485/85, which maintained the quota system unchanged. By failing to alter the I:P ratio which it considered necessary in order to determine the quotas on an

equitable basis pursuant to Article 58 (2), the Commission pursued a purpose different from that laid down by that provision and thus committed a misuse of power. Since the Commission had established that it was necessary to eliminate the imbalance in the I:P ratio which characterized the particular situation of undertakings such as the applicants, it must be considered that it committed a misuse of power affecting the applicants.

28 It must therefore be held that Article 5 of Decision No 3485/85 represents a misuse of powers affecting the applicants and that it must therefore be declared void.

29 Since the individual decisions addressed to Stahlwerke Peine-Salzgitter on 30 December 1985 and 21 March 1986 are partly based on Article 5 of Decision No 3485/85, those decisions must be declared void in so far as they determine that undertaking's delivery quotas in respect of categories Ia, Ib, Ic and III for the first and second quarters of 1986.

30 Similarly, since the individual decisions of 14 July 1986 (as amended by decision of 5 August 1986) and 6 October 1986 (as amended by decision of 28 November 1986) addressed to Hoogovens are partly based on Article 5 of Decision No 3485/85, those decisions must be declared void in so far as they determine that undertaking's delivery quotas for the third and fourth quarters of 1986.

Costs

31 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares void Article 5 of Commission Decision No 3485/85/ECSC of 27 November 1985 in so far as it does not enable delivery quotas to be fixed on a basis which the Commission considers fair for undertakings having ratios between their delivery quotas and production quotas which are significantly lower than the Community average;

(2) Declares void the individual decisions addressed by the Commission on 30 December 1985 and 21 March 1986 to Stahlwerke Peine-Salzgitter Aktiengesellschaft in so far as they fix its delivery quotas for categories Ia, Ib, Ic and III for the first and second quarters of 1986 respectively;

(3) Declares void the individual decisions of the Commission of 14 July 1986 (as amended by the decision of 5 August 1986) and 6 October 1986 (as amended by the decision of 28 November 1986) addressed to Hoogovens Groep BV in so far as they fix its delivery quotas for the third and fourth quarters of 1986 respectively;

(4) Order the Commission to pay the costs.

Bosco Due Rodríguez Iglesias Koopmans

Bahlmann Kakouris Joliet O'Higgins Schockweiler

Delivered in open court in Luxembourg on 14 July 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President