following that in which the Commission considered the complaint to be justified.

Since that measure is not a penalty and is not conditional on a finding that the undertakings in question have committed any infringement, the Commission cannot delay taking action on the ground that it must await the outcome of the procedures which it had initiated against certain producers for infringing the rules on prices.

The Commission's refusal to act is therefore illegal.

REPORT FOR THE HEARING
delivered in Joined Cases 167 and 212/85 *

I — Facts and procedure

A — *Legislation*

In view of the persistence of the crisis in the European iron and steel industry, the Commission adopted towards the end of 1983 and the beginning of 1984 a series of decisions designed to reinforce the effect of certain measures which had been adopted previously and which consisted essentially of the Aids Code (Commission Decision No 2320/81/ECSC of 7 August 1981, Official Journal 1981, L 228, p. 14) and the system of production quotas (Commission Decision No 2177/83/ECSC of 28 July 1983, Official Journal 1983, L 208, p. 1). Those two decisions were subsequently amended many times.

Thus, on 23 November 1983, the Commission adopted Decision No 3715/83/ECSC fixing minimum prices for certain steel products (Official Journal 1983, L 373, p. 1) and Decision No 3716/83/ECSC establishing a guarantee system for certain steel products and a system for the verification of the minimum prices (Official Journal 1983, L 373, p. 5).

In addition, on 23 December 1983, the Commission adopted Decision No 3717/83/ECSC introducing for steel undertakings and steel dealers a production certificate and an accompanying document for deliveries of certain products (Official Journal 1983, L 373, p. 9). That decision was adopted pursuant to Article 95 of the ECSC Treaty with the assent of the Council for the purpose of monitoring traditional patterns of trade by means of a full and exact survey and identification of movements of steel products within the Community.

This system of monitoring was supplemented by the introduction, in Commission Decision No 234/84/ECSC of 31 January 1984 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry, of a new principle imposing an obligation to comply with traditional patterns of trade in products in category Ia

* Language of the Case: Italian.

(hot-rolled coils), category Ib (rolled or reduced sheet), and category III (beams).

It is apparent from the ninth recital in the preamble to that decision that, in the Council's opinion,

'the stability of traditional patterns of deliveries of steel products within the Community is an essential factor which must be preserved if the restructuring of the steel industry is to be carried out within a competitive context compatible with the solidarity imposed by the production quota system'.

Article 15B of Decision No 234/84/ECSC provides as follows:

'1. A Member State may submit a complaint to the Commission if it establishes, with regard to categories Ia, Ib, II and III, that deliveries of products in one of these categories have been altered during a quarter to a significant extent compared with traditional deliveries.

2. A complaint as referred to in paragraph 1 must be submitted not later than eight weeks following the end of the quarter in question.

3. The Commission shall examine whether such a complaint is justified, on the basis of the monthly statistics sent by the Member States pursuant to Decision No 3717/83/ECSC. When making its assessment it shall take account of all the circumstances pertaining to the case in question.

4. It shall consult the Member States concerned if it considers that the complaint is justified. In this event, it shall request the undertakings in question to give a commitment in writing that, during the following quarter, they will correct the imbalance in their traditional deliveries.

5. If an undertaking does not give such a commitment, or if the commitment is not honoured, the Commission may reduce the part of the undertaking's quota which may be delivered in the common market for the following quarter by a quantity not exceeding that which caused the imbalance in traditional deliveries.

6. The Commission shall inform the Member States concerned of the action taken on the complaint.'

B — Origin and course of the dispute

In accordance with Article 8 of Decision No 3717/83/ECSC, the competent Italian authorities communicated to the Commission for the first three quarters of 1984 statistical information on the importation into Italy of the products referred to in that decision (letters of 5 June, 3 August and 30 November 1984, set out in Annexes 1, 2 and 3 respectively to the application in Case 212/85).

It is clear from those statistics that Community undertakings have increased their penetration of the Italian market to the detriment of Italian producers, whose sales on the Italian market have gradually declined. As regards the products in categories Ia and II, sales of domestic products on the Italian market have fallen during the reference period from 80.1 to 67.6% and, in the case of products in category Ib, from 82.7 to 74.4% (Annex 12 to the application in Case 167/85).

By letter of 30 November 1984, the competent Italian authorities therefore requested the Commission to adopt the measures provided for by Article 15B of Decision No 234/84/ECSC.

By letter of 21 December 1984, the Commission confirmed the statistics sent by the Italian authorities for the first nine months of the year, drew up a summary table showing trade in the products in question between the Member States and requested the Member States to submit their observations on cases in which there had been a substantial excess in deliveries of Italian products to the other Member States, namely where deliveries had exceeded the usual quantity by more than 1%.

By letter of 26 January 1985, the Italian authorities contended that deliveries of Italian products to the other Member States had not exceeded the prescribed quantities. In view of the progressive increase in the volume of imports from the other Member States, to the detriment of Italian undertakings manufacturing products in categories Ia and Ib, the Italian authorities again asked for the immediate application of Article 15B of Commission Decision No 234/84/ECSC. The Italian authorities repeated that request in their letters of 25 February and 11 March 1985 (Annexes 7 and 8 to the application in Case 212/85).

By letter of 20 March 1985 (Annex 9 to the application in Case 212/85), the Commission acknowledged once again that the statistics supplied by Italy were correct, particularly as regards the excess over the usual quantity of imports from France and the Benelux countries, and stated that it had requested the competent authorities of those Member States to explain the reasons for the excess.

By letter of 22 March 1985 the Vice-President of the Commission informed the Italian Minister for Industry (Annex 2 to the application in Case 167/85) that following bilateral meetings with the competent authorities of the Member States concerned and having regard to all the complaints which it had examined in order to determine whether they were justified, the Commission had set in motion the procedures relating to the types of infringements found in the matter of pricing and was also pursuing the consultations begun in order to ascertain in each individual case whether it was advisable to continue the procedure provided for in Article 15B of Decision No 234/84/ECSC.

By letter of 18 February 1985 (Annex 1 to the application in Case 167/85), Assider requested the Commission, pursuant to Article 35 of the ECSC Treaty, to apply all the provisions of Article 15B of Decision No 234/84/ECSC.

By letter of 2 April 1985, the Italian Minister for Industry requested the Commission, pursuant to Article 35 of the ECSC Treaty, 'to comply with all the obligations laid down in Article 15B of Decision No 234/84/ECSC'.

By letter of 24 April 1985 (Annex 3 to the application in Case 167/85), the Vice-President of the Commission sent to Assider a copy of the letter which he had sent to the Italian Minister for Industry on 22 March 1985.

By letter of 2 May 1985 addressed to the Italian Minister for Industry (Annex 12 to the application in Case 212/85), the Commission reiterated the position set out in its letter of 22 March 1985.

Assider and the Italian Government brought actions under the first paragraph of Article 35 of the ECSC Treaty for the annulment of the Commission's implied decision refusing to apply to the provisions of Article 15B of Decision No 234/84/ECSC. Their

applications were received at the Court Registry on 31 May 1985 and 12 July 1985 respectively.

By order of 23 October 1985 the Court joined the two applications for the purposes of the oral procedure and the judgment.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, in accordance with Article 21 of the Protocol on the Statute of the Court of Justice of the EEC and Article 45 of the Rules of Procedure, to put three questions to the Commission to be answered before 31 October 1986.

The Commission answered the questions within the period laid down.

In accordance with Article 54 of the Rules of Procedure, the President of the Court fixed the date for the opening of the oral procedure at the expiry of the period within which the Commission was to answer the questions put to it by the Court.

II — Conclusions of the parties

Assider claims that the Court should:

declare void, or at least unlawful, the implied decision of refusal that may be inferred from the Commission's silence concerning the request it made on 18 February 1985;

alternatively, declare void the decision of refusal which may be contained in the letter of 22 March 1985 from the Vice-President of the Commission of the European Communities;

order, as a measure of enquiry, the production in so far as is necessary of all the documents showing deliveries of products covered by the rules on traditional trade patterns on the Italian market throughout 1984 and during the first quarter of 1985, and the percentage variations in relation to the reference period;

order in any event the production of all the documents preparatory to the adoption of Decision No 234/84/ECSC and, in particular, the Commission's working papers relating to the monitoring and maintenance of traditional trade patterns.

The *Government of the Italian Republic* claims that the Court should:

declare void or unlawful the implied decision of refusal that may be inferred from the Commission's silence concerning Assider's formal request (No 740342) of 2 April 1985;

order the defendant to pay the costs.

The *Commission* contends that the Court should:

dismiss the application for the annulment of the implied decision of refusal;

declare inadmissible, or in the alternative dismiss, the application for the annulment of the express decision of refusal,

order the applicant to pay the costs.

III — Submissions and arguments of the parties

Admissibility

The *Commission* considers that the claims in the application for the annulment of the implied decision of refusal are admissible under Article 35 of the ECSC Treaty in accordance with the case-law of the Court established in the judgment of 23 April 1956 in Joined Cases 7 and 9/54 *Groupement des industries sidérurgiques luxembourgeoises* v *High Authority* [1954-56] ECR 175, the

judgment of 15 July 1960 in Joined Cases 24 and 34/58 *Chambre syndicale de la sidérurgie de l'Est de la France* v *High Authority* [1960] ECR 281 and the judgment of 22 March 1961 in Joined Cases 42 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53.

Assider's alternative claim for the annulment of an express decision of refusal is, however, inadmissible since no such decision exists. In that regard, the Commission contends that neither the letter of 22 March 1985 nor that of 24 April 1985 expressly refuse the request made by the applicants pursuant to Article 35 of the ECSC Treaty. Those letters merely indicate the nature of the measures already adopted and state that the investigation will be pursued with a view to taking any further action which may be necessary.

The applicants have not formally stated their views on this point.

Substance

The applicants rely on two submissions, one alleging the infringement of Article 15B of Decision No 234/84/ECSC and of several provisions of the ECSC Treaty, and the other alleging a misuse of powers.

The first submission: infringement of Article 15B of Decision No 234/84/ECSC and of provisions of the ECSC Treaty

Assider and the Italian Government consider that the power conferred on the Commission is clearly defined in Article 15B of Decision No 234/84/ECSC, in so far as paragraph (4) of that article provides that if, as in this case, the Commission considers that a complaint submitted by a Member State is justified 'it shall request the undertakings in question to give a commitment in writing that, during the following quarter, they will correct the imbalance in their traditional deliveries'.

According to the applicants, it is clear from that provision that the Commission has no discretion but that it is, on the contrary, legally bound to take action where, as in this case, it acknowledges that a complaint submitted by a Member State is justified.

The applicants contend that by reiterating, in these cases, the views it had put forward in *EISA* v *Commission* (order of 28 March 1984 in Case 45/84 R [1984] ECR 1759) to the effect that Article 15B is subsidiary and ancillary to the other kinds of measures provided for in the matter of prices and quotas, and that a different interpretation of that provision is incompatible with the fundamental rules of the EEC Treaty, the Commission is in fact raising an objection of illegality which is unacceptable inasmuch as the Commission is the body which drew up Decision No 234/84/ECSC.

The applicants also consider that the Commission's argument leads to the recognition of the existence of purely formal rules which have no legislative effect and do not impose any specific penalties. That argument is therefore contrary to the second paragraph of Article 5 of the ECSC Treaty, in so far as it leads to a serious imbalance between those who have complied with the rule in question and those who have not. Moreover, that argument is contrary to Article 58 of the ECSC Treaty since the alteration in traditional patterns of trade and consequently the breach of the principle of solidarity are not remedied on an equitable basis.

The applicants therefore consider that by failing to adopt the measures provided for,

the Commission has manifestly infringed Article 15B of Decision No 234/84/ECSC. The infringement of that article entails the infringement of Article 58 of the ECSC Treaty, on the basis of which Decision No 234/84/ECSC was adopted, and of Article 5 of the ECSC Treaty which imposes an obligation to ensure, amongst other things, the maintenance of normal competitive conditions.

Assider also alleges that the Commission has infringed the first paragraph of Article 14 and the first paragraph of Article 35 of the ECSC Treaty, which require it to take all the necessary measures.

Should the Court consider that the Commission has, in this case, expressly communicated its decision by sending Assider a copy of its letter of 22 March 1985 sent to the Italian Ministry of Industry, Assider contends that that decision is unlawful not only for the aforesaid reasons but also because it fails to state the reasons on which it was based, contrary to the first paragraph of Article 15 of the ECSC Treaty. In addition, that decision contains inaccurate and contradictory statements, in so far as it states that there had been no serious alteration in normal patterns of trade although the Commission had already acknowledged that this was so.

According to the *Commission*, which refers to the observations concerning the function of Article 15B of Decision No 234/84/ECSC which it submitted in Case 45/84 R, the literal interpretation suggested by the applicants disregards the subsidiary function of that provision in relation to all the means made available to the Commission to enable it to ensure compliance with Community law.

According to the *Commission*, Article 15B was conceived as a derogation designed to deal with an exceptional situation which was threatening the common market in steel. That situation resulted from the threat or the finding of a gradual penetration of the markets of certain Member States by undertakings from other Member States searching for new outlets after covering their operating losses by State aid or, in certain cases, after breaking the Community rules on prices or quotas.

Article 15B of Decision No 234/84/ECSC was adopted for the purpose, first of all, of preventing the Member States from adopting unilateral countermeasures and, secondly, of reinforcing all the Community measures that had lost their deterrent effect with a supplementary measure capable of producing the desired effect, preferably by virtue of its existence alone. Article 15B thus constitutes the ultimate weapon which is used after the usual methods of penalizing undertakings have been exhausted.

The Commission considers that the interpretation of Article 15B suggested by the applicants, namely that its provisions should be applied automatically once a complaint submitted by a Member State is considered justified, is contrary to the ECSC Treaty inasmuch as it renders the aforesaid article incompatible with the very foundations of the Community. The ECSC Treaty therefore limits recourse to that article to circumstances in which other means have failed.

With regard to the alleged infringement of various provisions of the ECSC Treaty, the Commission contends that the procedure under Article 15B, which was initiated well before the applicants made their formal requests, is still in progress. However, the penalties imposed by that provision can be

applied only where the Commission has established a link between the imbalance noted in traditional deliveries and the conduct of certain Community undertakings and where the specific penalties imposed for infringements that are established prove to be ineffective.

Accordingly, the submission alleging an infringment of Decision No 234/84/ECSC and of certain provisions of the Treaty is unfounded.

The second submission: misuse of powers

Assider and the Italian Government contend that, if the Court considers that the implementation of all the remedial measures provided for by Article 15B of Decision No 234/84/ECSC involves the exercise of a discretion, the contested decision is the product of a misuse of powers since the Community authorities pursued an objective other than that which led to the adoption of Article 15B or at the very least of a misinterpretation of that provision.

Assider refers to the Commission's arguments concerning the allegedly subsidiary or ancillary character of those measures in relation to the usual measures provided for in the matter of prices and production quotas. In Assider's view, that restrictive interpretation of Article 15B is baseless and divests the rule embodied in that provision of any practical effect, or in effect abolishes it.

According to the applicants, Article 15B should be interpreted in accordance with the principles laid down by the Court in its judgment of 1 June 1961 in Case 15/60 *Simon* v *Court of Justice* [1961] ECR 115, according to which 'in the absence of working documents clearly expressing the intention of the draughtsmen of a provision, the Court can base itself only on the scope of the wording as it is and give it a meaning based on a literal and logical interpretation'. The interpretation suggested by the Commission, which is not based either on another provision or on the working documents preparatory to the adoption of Decision No 234/84/ECSC, is contradicted both by the wording of Article 15B and by the ninth recital in the preamble to that decision.

The applicants contend that although the principle of the maintenance of traditional patterns constitutes, like the measures provided for in the matter of prices and production quotas, an instrument for combating the crisis in the Community's steel industry, it is an independent measure compliance with which is enforced by specific penalties.

Assider considers that since that principle has been incorporated in the legal system of the Community, it is of general application. Accordingly it is no longer necessary to raise the question whether it is sufficient, but to comply with it as such by giving effect to all the provisions and penalties laid down.

The Italian Government considers that the defendant's implied or express refusal to apply Article 15B of Decision No 234/84/ECSC in full is the result of a misuse of powers stemming from a manifest misconception of the essential purpose and scope of that provision.

That contention cannot be invalidated by the mere fact that, as the Commission states, the procedure under Article 15B has been set in motion and is still in progress. The Italian Government and Assider claim to have furnished evidence of non-

compliance with traditional patterns over a period of three years on the basis of statistics which the Commission has not contested. That situation has not been remedied.

The *Commission* states first of all that the interpretation of Article 15B of Decision No 234/84/ECSC is in conformity with the spirit of that provision. However, even if that interpretation is incorrect, it constitutes a breach of the law and not a misuse of powers.

Moreover, the Commission considers that a submission alleging a misuse of powers cannot be relied upon on the ground that the letters which it sent to the Italian Government and Assider are said to distort the facts and to be contradictory.

In its view, the second submission does not therefore constitute a legitimate plea.

IV — Answers to questions asked by the Court

Question 1

What is meant by an alteration in traditional deliveries 'to a significant extent' referred to in Article 15B (1) of Decision No 234/84/ECSC?

Answer:

The Commission considers that traditional patterns of deliveries are altered to a significant extent where, in the case of a given category of products, a Member State exceeds by one percentage point the traditional share of the market which it holds in another Member State.

Question 2

The Commission maintains that Article 15B is of a subsidiary character and is only meant to reinforce all the legislative machinery for penalizing undertakings guilty of infringements. Does the Commission therefore intend to refrain systematically from applying Article 15B to an undertaking which has both complied with all the Community rules on prices, quotas, competition and State aids and increased, to a significant extent, its deliveries to other Member States?

Answer:

The Commission considers that, although it may apply and pursue the procedure provided for in Article 15B, 'it must systematically refrain from applying the measure provided for in paragraph 5 unless consideration of the situation reveals a breach of the rules of Community law in the matters specified'.

Question 3

In a letter of 20 March 1985 (Annex 9 to the application in Case 212/85), the Commission acknowledged that the statistical information supplied by Italy (in particular in a letter of 11 March 1985 from the Italian Minister for Industry — Annex 12 to the application in Case 167/85) concerning the excess over the usual volume of trade to the detriment of Italian producers in 1984 was correct.

The Commission is requested to state whether, to what extent and by what means that situation has been remedied.

Answer:

The Commission states that in the course of the procedure initiated pursuant to Article 15B it found that six undertakings had infringed the Community rules on prices. It therefore imposed on those undertakings the penalties laid down for infringing Article 60 of the ECSC Treaty, in the manner set out in the table annexed to its answer.

The Commission adds that consideration of the figures for the first quarter which followed the imposition of those penalties (fourth quarter of 1985) has not yet made it possible to establish whether the situation has been remedied, since the investigation initiated to that end is still in progress.

Next, the Commission states that on 27 November 1985 it adopted Decision No 3485/85/ECSC (Official Journal 1985, L 340, p. 5) with the assent of the Council and the Italian Republic. Unlike Decision No 234/84/ECSC, Decision No 3485/85/ECSC, which has been in force since 1 January 1986, no longer provides for the possibility of reducing the quotas. The reason for the amendment of Article 15B (5) is that the Council and the Commission considered that the most acute phase of the crisis in the steel industry was over, with the result that the justification for that provision, namely the need to ensure the survival of the common market, no longer existed. The Commission emphasizes that in any event Article 15B (5) of Decision No 234/84/ECSC has been inapplicable since 1 January 1986.

Finally, the Commission states that it advised the Council to repeal Article 15B in its entirety as from 1 January 1987.

V — Oral procedure

At the sitting on 16 December 1986 oral argument was presented by the following: G. Greco, Advocate, for Assider; I. M. Braguglia, Avvocato dello Stato, for the Italian Republic; and G. Campogrande and R. Wägenbaur, members of the Legal Department of the Commission of the European Communities, acting as Agents, for the Commission.

The Advocate General delivered his Opinion at the sitting on 10 February 1987.

Y. Galmot
Judge-Rapporteur