OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 19 April 1988 *

Mr President,
Members of the Court,

1. This action essentially concerns the allocation of additional references on a merger of undertakings within the framework of Decision No 3485/85/ECSC. [1] But first, the Court has to examine the objection of inadmissibility based on the allegation that the action brought by the Dillinger company is out of time.

Admissibility

2. Article 33 (3) provides, as we know, that an action for annulment must be brought within a period of one month of publication or notification of the decision.

3. The application states that it was informed by a letter from Eurofer dated 14 May 1986 — which came to its notice later — of the allocation to the British Steel Corporation (BSC), in respect of the merger with Alpha Steel, of special references on the basis of Article 13 of Decision No 3485/85/ECSC. Also, the Commission sent to the Wirtschaftsvereinigung Eisen- und Stahlindustrie on 27 May 1986 a document containing references fixed for the second quarter of 1986. According to the applicant, a comparison of the lists for the first and second quarters enabled the increase in BSC's references to be ascertained.

4. In the light of these factors, may the view be taken that the limitation period began to run in the absence of publication or notification? It may be observed that in the *Könecke* case, [2] decided under the EEC Treaty, the Court did not rule out as a matter of principle a *dies a quo* resulting from circumstances other than these publicity formalities, although it considered, in that case, that the 'communication' addressed to the applicant was not sufficient in order to enable it 'to identify the decision taken and to ascertain its precise content in such a way as to enable it to exercise its right to institute proceedings.'

5. In the present case, the information available to the applicant related to the allocation to BSC of additional reference quantities with no indication of the reasons therefor other than a reference to Article 13 of the general decision. To put it in other words, only the formal references in the preamble and the operative part were known, not the reasons. In its judgment in *Tezi Textiel* v *Commission* [3] the Court held that a communication from the Commission under Article 115 of the EEC Treaty which contained only a summary of the provisions of the decision in question did not enable the applicant 'to acquire knowledge of the text of the contested decision or, *in particular, of the reasons on which it was based*'.

* Translated from the French.

1 — Commission Decision 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).

2 — Case 76/79, judgment of 5 March 1980 [1980] ECR 665.

3 — Case 59/84, judgment of 5 March 1986 [1986] ECR 887 (emphasis added).

6. I should point out that the applicant, without being contradicted in this respect, states that, in a letter from Eurofer dated 2 June 1986, the Commission was requested to provide more detailed information on the 'BSC case'. The defendant refused to communicate the decision, merely referring to Article 13 (4) and to the second paragraph of the eighth recital of the general decision. Moreover, it argued that the action brought by Sacilor and Usinor[4] meant that it had to refuse to give any further explanation.

7. Particularly as regards the exercise of rights of action, the statement of the reasons on which a decision is based is too essential a requirement for the view to be taken that a person to whose knowledge it has not come is sufficiently apprised of its precise contents. I may remind the Court at this point of the terms of its judgment in *Federal Republic of Germany* v *Commission*[5] where the Court held that a duty to give reasons, such as that laid down in Article 190 of the EEC Treaty:

'seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty.'

8. Thus, in the present case it cannot be said that the period of time for bringing an action has begun to run, in view of the incomplete nature of the information brought to the applicant's notice. Certainly, the reasons given for the contested decision seem, to say the least, succinct. But it would be paradoxical to hold this fact against the applicant. The result of such a solution would be that the period of time for bringing an action could run in the case of a 'compact' statement of reasons, whereas a more substantial statement of reasons would leave intact the possibility of bringing proceedings.

9. Therefore, I propose that the Court dismiss the objection of inadmissibility.

Substance

10. According to the first of the submissions relied on, Article 13 of Decision No 3485/85/ECSC did not constitute a valid legal basis for allocating additional references.

11. First of all, I cannot agree with the applicant when it argues that Article 13 (4) only covers the situations referred to in paragraphs 2 and 3 of the article. Any doubt on this point is dispelled by the second paragraph of the eighth recital of Decision No 3485/85/ECSC which makes clear that:

'this option [the necessary adjustments] should also be extended to mergers, and in particular to mergers resulting in closures of hot-rolling mills which account for an exceptionally large share of the capacity shedding.'

12. The phrase 'any adjustments needed' mentioned in Article 13 (4) must be capable of covering corrections, alterations and, if necessary, increases of references as a result of the method of calculation laid down in Article 13 (1). But it remains necessary to try to define the scope of the power thereby conferred on the Commission.

4 — Case 150/86 was initially joined with this case but ordered to be removed from the Register after withdrawal of the application.

5 — Case 24/62, judgment of 4 July 1963 [1963] ECR 63.

13. I would observe in this connection that the objective of eliminating surplus production capacities cannot warrant an excessively wide interpretation which would reduce the rigour of the provisions laying down references for undertakings. It is therefore necessary to give preferment to the application of objective, predetermined rules and, at all events, circumscribe the possibilities of evading them. In that perspective, the requirement that the adjustments to be carried out be 'needed' establishes the yardstick to be applied. In other words, the requirements of the principle of proportionality are thus given expression. For it should not be overlooked that, if mergers result in the elimination of surplus production capacities, the allocation of additional references leads to a new tension in the supply of the products concerned.

14. It is in the light of these observations that I propose the Court should examine the contested decision.

15. The applicant argues that the merger obtained for BSC a considerable economic advantage merely by virtue of the fact that it benefited from Alpha Steel's references in category Ia. Therefore, this transaction, which moreover comprised the absorption of an unprofitable unit of production which had in fact been closed down since 1984, did not justify the allocation of additional references. I would first point out that evidence of the applicant's assertion as to the date of closure of the Newport factory has not been adduced, whereas the Commission submits in evidence an Inspectors' report showing that the plants concerned were functioning at the end of 1985.

16. Therefore, in view of the very large production capacities which were eliminated by the merger in this case — about 15% of Community surplus capacity in the sector of hot-rolled wide strip — the allocation of additional references seems to me — in principle — to be in accordance with the terms of Article 13 (4) as interpreted in the light of the second paragraph of the eighth recital.

17. However, in the present case, the Commission granted additional references to BSC in product categories Ib, Ic and II relating to products which Alpha Steel did not manufacture. Furthermore, these references in themselves represent a quantity greater than the references held by Alpha Steel in category Ia. Finally, a rapid calculation shows that BSC thus enjoyed an increase of 12%, both as to production and delivery, in the relevant categories.

18. Let it be stated clearly: both the scheme of the general decision and the principles mentioned above cause me to have very serious doubts as to the lawfulness of these increases.

19. The general decision seems to me to preclude the solution adopted by the Commission. On the one hand, it is difficult to accept that the adjustments mentioned in Article 13 (4) can, in principle, relate to products other than those covered by the references mentioned in Article 13 (1), namely those which are affected by the merger. On the one hand, Article 15 (3) of the general decision which relates, it is true, to closures, adopts a very restrictive policy with regard to transfers between categories.

20. Certainly, the complexity of merger operations should not be ignored or the

need to take into account all the underlying industrial, economic and social aspects.

21. Indeed, the Commission argues that a concentration of additional quantities in category Ia alone would have disturbed the market in this area. . The conclusion is unavoidable that the possibility of this risk in no way necessitates a massive allocation of additional references in categories Ib, Ic and II.

22. This reasoning presupposes that the very principle of granting additional references in categories not affected by the merger is justified. However, as we have seen, that has still be proven. In any event, the extent of the references granted in categories of products which Alpha Steel did not manufacture leads me to express the strongest reservations as to whether the contested decision complies with the requirements of the principle of proportionality, and thus to propose that the Court declare it void.

23. In its second submission, the applicant maintains that the interpretation accepted by the Commission was not covered by the Council's assent.

24. There has been much discussion as to the conditions under which Article 13 (4) was introduced by the Commission after the Council had refused to accept a proposed Article 14B the text of which has moreover not been produced. In the context of this action brought against the individual decision of 16 March 1986, I strongly doubt the relevance of this submission and of the discussion which has taken place regarding it.

25. In fact, the individual decisions undoubtedly fall within the Commission's responsibility. It is not necessary to examine here in detail the division of responsibilities as regards the quota system laid down by the Treaty as between the Council and the Commission. Suffice it to quote in this connection Mr Advocate General Mischo [6] who, after analysing the Court's case-law, expressed the opinion that:

'the Council must give its assent only to the essential structure of the system . . . it is for the Commission . . . to regulate all the other aspects'.

It cannot therefore be argued that an individual decision requires the Council's assent, in view of this division of responsibilities. [7] In accordance with the fundamental principle of the hierarchy of legal norms, individual decisions adopted by the Commission must observe general rules. And it is those rules, but only those, assuming that they establish the 'basis' of the quota system, which must have received the Council's assent. I propose that the Court should therefore reject this submission.

26. However, should the Court consider that, by necessary implication, a plea of illegality is raised with regard to Article 13 (4), I would make the following observations. It is not disputed that a proposed draft Article 14B, which would *generally* have enabled additional references to be

6 — Opinion of 1 December 1987 in Joined Cases 33, 44, 110, 226 and 285/86 *Stahlwerke Peine-Salzgitter and Others* [1988] ECR 4309, at p. 4323.

7 — Even if we accept the analysis according to which it is the draft decision which must be submitted to the Council (see to that effect, Kovar, *Le pouvoir réglementaire dans la CECA*, LGDJ, Paris 1964, p. 174), that does not call in question the fact that only general decisions must be the subject of the Council's assent.

allocated, was rejected by the Council. In my opinion, a distinction must be drawn between such a possibility and the *specific* situation of additional adjustments in the case of a merger. Should then the refusal of the Council's assent be regarded also as relating to the latter possibility? I would observe in this connection that it was maintained in the recent renewal of the quota system,[8] and there is no disputing the fact that that system received the Council's assent. In any event, Article 13 (4), in spite of its intrinsic importance, cannot be regarded as being beyond question a constituent element of the system. Let me point out finally that the Commission limited itself to extending to mergers a possibility which already existed under Decision No 234/84/ECSC[9] in the case of the separation or formation of an undertaking.

27. The submission alleging misuse of powers cannot succeed either. Although the applicant claims that Article 13 (4) was adopted merely to be applied to the specific BSC-Newport case, there is no escaping the fact that the Commission has stated, without being contradicted, that it has applied this provision to other situations. Moreover, the allegation of misuse of powers presupposes that an objective was pursued other than the reduction of surplus production capacities. There is nothing to indicate, in the context of this merger, that it was for any other purpose that additional references were allocated.

28. The submission based on a breach of the principle of non-discrimination should also be rejected. In fact, it is sufficient to state, as the Commission did, that there was nothing to compel undertakings to shed their surplus production capacity.

29. The applicant makes a submission as to 'the requirement that relative market shares be preserved', and relies on the Court's judgment in *Alpha Steel*[10] in which, let us remember, the Court noted, in order moreover to reject an argument directed against a criterion for distributing quotas, that the latter enabled 'global production to be reduced without however altering the respective positions of the undertakings on the market.'

30. The Commission maintains that 'the argument that quotas must be shared on an equitable basis is certainly pertinent but has nothing to do with the principle of preserving relative market shares'. And, in its view, the applicant failed to base this submission on an infringement of Article 58 (2). I cannot agree with this analysis. In fact, the application expressly refers to this provision and the principle therein contained. In addition, the applicant relies on the *Alpha Steel* judgment in which the Court had to consider a claim that the quotas had been inquitably distributed in breach of Article 58 (2). Thus, the Commission's attitude on this point seems to me excessively formalistic. Whatever description is used by the applicant, it is evident that an inequitable distribution of references is alleged.

31. The applicant stated that it had lost, as a result of the contested decision, 1.9% of its production and delivery references in

8 — Commission Decision No 194/88/ECSC of 6 January 1988 (Official Journal L 25, 29.1.1988).

9 — Commission Decision of 31 January 1984 (Official Journal L 29, 1.2.1984).

10 — Case 14/81, judgment of 3 March 1982 [1982] ECR 749.

category II in which category alone it is a manufacturer, whereas BSC gained 12.4% in production and 12.2% in delivery quotas.

32. Certainly, references may not be fixed once and for all. Corrections and alterations may become indispensable for economic and technological reasons. But, in the context of steel production governed by quotas, this case concerns significant variations relating, it must be stressed, to products unaffected by the merger. The Commission's bare assertion that it was 'convinced that it was not at fault in this respect' is not a sound enough justification. Its decision in fact entails a significant alteration in market share, particularly to the detriment of single-product undertakings like the applicant, whilst they derive no benefit from the closure of Alpha Steel. Consequently, it seems to me that the requirement that quotas be distributed on an equitable basis was not observed by the contested decision.

33. The penultimate submission does not seem to warrant an examination distinct from the one I have just undertaken, as Article 13 (4) itself takes for granted, in my opinion, the requirement that the principle of proportionality be observed.

34. Finally, the applicant argues, in the alternative, that even in the context of the interpretation of Article 13 advocated by the Commission, the conditions laid down in this provision did not allow the contested decision to be adopted. Again, I would refer to my observations on the first submission.

35. In the result, I propose that the Court should:

Declare void individual Commission Decision No SG (86) D/3794 of 26 March 1986 addressed to the British Steel Corporation in pursuance of Article 13 (1) and (4) of Commission Decision No 3485/85/ECSC of 27 November 1985 to the extent that it allocates additonal references in categories not affected by the merger operation;

Order the Commission to pay the costs.