There is no such justification in the case of undertakings which do not fulfil the special conditions characterizing monoproducers, with the result that the Commission was under no obligation to extend the guarantee of an undertaking's relative position on the market to undertakings 90% of whose total reference production consists of products from two categories.

REPORT FOR THE HEARING
delivered in Case 219/87 *

I — Facts

1. By Decision No 3485/85/ECSC of 27 November 1985 (Official Journal 1985, L 340, p. 5), the Commission extended the system of monitoring and production quotas for certain products of undertakings in the steel industry for the period from 1 January 1986 to 31 December 1987. Article 4 of that decision establishes a system of production quotas in respect of Categories Ia, Ib, Ic, II, III, IV and VI.

2. According to Article 15(1) of that decision, in certain circumstances the Commission may, at the request of an undertaking made in the first quarter of 1986, authorize transfers of references within the two groups of categories of products listed below, with effect from the second quarter of 1986:

(i) Ia, Ib, Ic, II and III (Group 1);

(ii) III, IV and VI (Group 2).

In the case of undertakings which only produce one category or whose reference production of one category represents not less than 80% of its total reference production of the products referred to in Article 4, the Commission is to grant the necessary adjustments if, as a result of those transfers, it finds that there is a substantial reduction in the ratio between their reference figures and those for all other Community undertakings.

According to Article 15(2), where the undertakings concerned so request in advance, the Commission may authorize exchanges, sales or transfers of all or part of the reference production or quantities if the plants corresponding to the reference figures to be transferred were permanently closed or sold and transferred to a third country after 1 January 1980. The Commission may also, where the undertakings concerned so request in advance, authorize exchanges, sales or transfers of all or part of the reference production and

* Language of the case: Dutch.

quantities within the framework of restructuring plans which it has approved.

Article 15(3) provides that, in the case of permanent closure or of sale and transfer of a plant to a third country after 1 January 1980, the Commission may authorize the undertaking to transfer the reference figures corresponding to that plant within the two groups of categories of products set out in Article 15(1). However, those transfers of references are subject to certain conditions laid down in Article 15(3).

3. Article 18(1) of Decision No 3485/85/ECSC provides that if radical changes occur on the iron and steel market or if the application of that decision encounters any unforeseen difficulties, the Commission is to carry out the necessary adjustments by general decision.

4. By Decision No 3524/86/ECSC of 19 November 1986 amending Decision No 3485/85/ECSC (Official Journal 1986, L 325, p. 35), based on Article 18 of Decision No 3485/85, the Commission decided, having regard to the fact that the products in Category Ic would no longer be subject to the quota system with effect from 1 January 1987 and that it was necessary to avoid disruption of the steel market brought about by artificial inflation of the references of products remaining subject to quota as a result of transfers of references of products soon to be liberalized, to limit with immediate effect the application of Article 15(2) and (3) of Decision No 3485/85 to products in Categories Ia, Ib, II, III, IV and VI.

5. By Decision No 3746/86/ECSC of 5 December 1986 amending Decision No 3485/85/ECSC (Official Journal 1986, L 348, p. 1), based on Article 18 of Decision No 3485/85, the Commission decided, having regard to the fact that there was very little excess production capacity in the galvanized sheet sector (Category Ic), to exclude that category of products from the system of quotas provided for by Article 4(1) of Decision No 3485/85.

6. By Decision No 1434/87/ECSC of 20 May 1987 (Official Journal 1987, L 136, p. 39), the Commission repealed Decision No 3524/86 with effect from 19 November 1986. In the preamble to Decision No 1434/87, the Commission stated that Decision No 3524/86 had been adopted with the aim of preventing the transfer of references of products in Category Ic from leading to the artificial swelling of the references of products remaining under the quota system, but that a fresh verification of the data available led to the conclusion that the repercussions of possible transfers of references were not of such a serious nature as to justify the measure in question.

II — Written procedure and conclusions of the parties

1. By application lodged at the Court Registry on 15 July 1987, Hoogovens Groep BV (hereinafter referred to as 'Hoogovens') brought an action in which it claimed that the Court should:

take formal note of the evidence it relies on and, for the reasons set out in its application:

(1) (a) declare admissible its action against Commission Decision No 1434/87/ECSC;

(b) declare Decision No 1434/87/ECSC void in its entirety, or at least in part, in so far as that decision is vitiated by a misuse of powers in respect of the applicant;

(2) order such measures as the Court may consider appropriate;

(3) order the Commission to pay the costs.

2. The Commission, the defendant, contends that the Court should:

(i) declare the action inadmissible, or at least unfounded, and consequently dismiss it;

(ii) order the applicant to pay the costs.

3. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory enquiry. The Commission was asked to reply to a number of questions in writing. It complied with that request within the period set by the Court.

4. On 12 October 1988 the Court decided, pursuant to Article 95(1) and (2) of the Rules of Procedure, to assign the case to the Sixth Chamber.

III — Submissions and arguments of the parties

A — *Admissibility*

1. The Commission calls in question the admissibility of the action on the ground that the applicant has no interest in instituting proceedings.

The action is directed against the abolition of a derogation from the general system established by Decision No 3485/85. The applicant has never contested that decision but merely made representations to the Commission challenging requests for transfers made by its competitors. The actions in Cases 226 and 285/86 seek the annulment of individual decisions fixing production and delivery quotas for Hoogovens in respect of the third and fourth quarters of 1986. An objection of illegality was raised against Decision No 3485/85, on which those individual decisions are based, on the ground that it does not permit an adjustment of quotas for delivery on the common market, and not because it adversely affects the applicant's relative position on the market. The aim of the contested decision is not to re-establish the status quo with regard to the relative position of undertakings on the market but to redress the legal position created by Decision No 3485/85. The contested decision did not alter the applicant's legal position since the rights and obligations resulting from Decision No 3485/85 have been re-established.

2. In reply, Hoogovens states that since 1986 it has taken a stand against the contested effects of Decision No 3485/85. It raised an objection of illegality against

that general decision in Cases 226 and 285/86, seeking the annulment of individual decisions. The Commission cannot argue that it has re-established the status quo by adopting the contested decision since, in the meantime, Category Ic has been liberalized with adverse consequences — which are well known — for the applicant's relative position. The acceptance of a general decision by an undertaking at a given time does not deprive it of the right to challenge in the future a measure which affects its legal position. If that measure is of general application, it is sufficient for it to satisfy the criteria laid down in the second paragraph of Article 33 of the ECSC Treaty, namely that it involves a misuse of powers affecting the applicant.

B — *Substance*

1. Hoogovens alleges that the Commission was guilty of misuse of powers in adopting the contested decision, No 1434/87.

The Commission misused its powers by exercising the powers it holds under Article 58(2) of the ECSC Treaty for purposes other than those for which they were conferred upon it. Contrary to the aim of Article 58(2) of the ECSC Treaty, namely the determination of quotas on an equitable basis in the Community, the Commission failed to make the necessary adjustments to the contested decision so as to ensure, in an equitable manner, the recovery or at least the maintenance by the applicant of its relative position.

The Commission was also guilty of misusing its powers in acting arbitrarily and not in keeping with the facts and economic circumstances affecting the applicant, which it had itself established and are in fact so serious that the contested decision should not in all fairness have been adopted.

The Commission has also misused its powers inasmuch as, acting in serious breach of the combined provisions of Articles 4 and 58 of the ECSC Treaty and the general legal principles of equal treatment and careful preparation of legislation, it maintained or brought about an unjust and inequitable deterioration in Hoogovens' position relative to other Community steel undertakings against which Hoogovens has to compete in the Community.

Enlarging on those complaints, Hoogovens recalls that, as a semi-monoproducer, it does not benefit from the transfer possibilities offered by Article 15 in the same way as competitors whose production encompasses all categories of products, nor does it benefit from the adjustments provided in favour of genuine monoproducers. Its relative position has already deteriorated since 1984 with regard to the reference production and reference quantities for products in Categories Ia, Ib and II. Eurofer data show that the transfers of references for products in Category Ic resulted, for the applicant, in losses in terms of its relative position of more than 1% as regards the production and delivery references for Categories Ia, Ib and II. That loss of relativity led to a drop in turnover of more than HFL 18 000 000.

Article 58(2) of the ECSC Treaty requires the Commission to determine the quotas on an equitable basis and to ensure that an undertaking's losses in terms of its relative position remain within certain limits. According to the case-law of the Court, an essential feature of the quota system is that, if an undertaking is placed at an unjustified and disproportionate disadvantage, that disadvantage must be offset (judgment of 9 April 1987 in Joined Cases 167 and 212/85 *Assider and Italy* v *Commission* [1987] ECR 1725).

In that connection, Hoogovens points out that Article 7 of Decision No 3485/85 provides that the Commission is to take appropriate measures where the reference adjustments which it grants, on the basis of Articles 14 and 14a, to undertakings in exceptional difficulties, lead to an overall loss of relativity of more than 1%. To that end, Article 18 confers on the Commission a discretion and an overriding duty to make the adjustments required by radical changes or unforeseen difficulties occurring on the market. It follows from the preamble to Decision No 3524/86 that the Commission made the findings referred to in Article 18 and the adjustments required by those findings. In adopting Decision No 1434/87, however, the Commission took no account of the unforeseen difficulties encountered by the applicant.

Certain sacrifices which were imposed upon Hoogovens seemed reasonable at the time of the adoption of Decision No 3485/85, which was conceived as a transitional decision on the way to total liberalization. However, that is no longer the case at a time when requests for the adjustment of references recently approved by the Commission relate almost exclusively to the transfer of references from categories which have already been liberalized (Category Ic) or which are about to be liberalized (Category IV) to categories which continue to be subject to the quota system.

The Commission wrongly contends that the applicant's losses are the result of certain features peculiar to that undertaking. The applicant's dependence on exports is attributable to unfavourable references in the past. The applicant is not dependent on the Netherlands market alone but is strongly represented on the other Community markets. Its structure of direct sales to buyers without intermediaries in fact has the effect of increasing the profit margin. Similarly, the Commission is wrong in maintaining that the applicant has only limited possibilities of processing its own products.

2. The Commission replies that, according to the Court's case-law, the aim of measures adopted pursuant to Article 58 of the ECSC Treaty is to permit the Community's steel industry as a whole to defend itself, on a collective basis and by a cooperative effort, against the consequences of a crisis in the event of a fall in demand.

In adopting the contested decision the Commission had not misused its powers since it merely restored the situation created by Decision No 3485/85 which, moreover, the applicant has never contested. The applicant can scarcely compare this action with that brought in the *Assider* case in order to offset a disproportionate competitive disadvantage. The applicant

alleges that the Commission failed to exercise the power provided for in Article 18 of Decision No 3485/85. Although Decision No 3524/86, which has been repealed, could be justified under Article 18 by the fear that transfer possibilities would be abused, the Commission was required by the general principles of sound administration and by Article 18 to withdraw that decision once it proved to be unjustified.

The contested decision is not arbitrary since the aim it pursues is to restore the balance between supply and demand in the iron and steel market. Hoogovens' material and financial position was not a decisive factor in the adoption of the contested decision, which was based solely on the question of whether the previous decision, No 3524/86, was justified.

The principles of fairness and equal treatment on which the quota system is based require the Commission to maintain a balance between the undertakings, without obliging it to protect in absolute terms their relative position on the market. The contested decision was adopted in compliance with the rules of proper administration and in the light of the information available to the Commission.

The criticism that the Commission failed to limit Hoogovens' loss of relativity to 1% could have been put forward in an action for failure to act but not in proceedings for annulment.

The contested decision complies with the principle of proportionality, inasmuch as it achieves the aim of deregulation. By giving priority to the protection of the relative position of undertakings on the market, the Commission could scarcely make progress in restoring freedom of competition on the market.

The quota system is designed to ensure restructuring and to resolve the problems of structural overcapacity. Adjustments under Article 14 or 14a, or compensation under Article 7, constitute short-term economic measures. Article 15, by contrast, is intended to support structural alterations to adjust production capacity to demand. The applicant cannot claim that the Commission is under an obligation to grant compensation as it does in the case of short-term measures. Furthermore, the applicant merely made representations against the requests for transfers submitted by its competitors without challenging, on the basis of the principle of fairness, the system of transfers authorized by Decision No 3485/85 and the precautionary measure embodied in Decision No 3524/86.

The liberalization of Category Ic and the possibility of making transfers did not bring about a significant shift in references. The figures for the fourth quarter of 1986 show that the loss actually suffered by Hoogovens in terms of its relative position with regard to reference production and reference quantities for Categories Ia, Ib and II is around 1%.

The expression 'semi-monoproducer' is not a precise concept and the applicant, a producer of large quantities of products in Categories Ia, Ib, IV and VI that are subject to quota, cannot be treated as a monoproducer.

Hoogovens' financial difficulties in 1987 derived to a large extent from its extensive reliance on exports outside the Community, from the fact that in view of the small size of the Netherlands market it was obliged to sell its products in other Member States, from the specific structure of sales made exclusively to wholesalers and from the limited possibilities of processing its own products.

IV — Answers to questions from the Court

(a) In answer to the question when traders could have been aware that Category Ic would no longer be subject to the quota system after 1 January 1987, the Commission recalled the facts in chronological order: in Article 19 of general Decision No 3485/85 of 27 November 1985 it expressed the intention of seeking before the end of 1986 the Council's assent to the exclusion of new categories of products. On 2 October 1986 it adopted the document on the organization of the steel market in 1987, which provides, in particular, for the liberalization of Category Ic. That document, which was forwarded on 6 October 1986, was discussed by the Council which gave its assent to it on 20 October 1986. Decision No 3746/86/ECSC of 5 December 1986 liberalized Category Ic as from 1 January 1987. From the beginning of October 1986 at the latest, therefore, all the indications were that Category Ic was going to be liberalized.

(b) In response to the questions as to the quantities in respect of which, as from that date, a transfer from that category had been sought, the Commission produced a table of the transfers sought by certain undertakings. In the case of production quotas, the figures vary between 12 000 and 36 000 tonnes; in the case of delivery quotas, they are as a rule lower and vary from 10 000 to 31 000 tonnes.

(c) As to the question of the objectives of the contested decision retroactively repealing the suspension of the possibility of transfers from Category Ic after the end of the financial year in question, the Commission emphasized that general Decision No 1434/87 was designed to restore to general Decision No 3485/85 all its effects and thus to enable transfers to be made from Category Ic. The Commission established, upon examination of the actions brought for the annulment of the individual decisions, that Thyssen and Hoesch had sound reasons for seeking the annulment of the basic general decision, No 3524/86. That decision was based on Article 18 of Decision No 3485/85, which referred to unforeseen difficulties consisting, in the circumstances, in the fear of massive transfers to the categories still subject to quota. However, that fear proved unfounded. Acting on the basis of the principles of legal certainty and sound administration, the Commission repealed its decision retroactively when it found that it was based on incorrect forecasts.

F. A. Schockweiler
Judge-Rapporteur