OPINION OF ADVOCATE GENERAL DARMON
delivered on 15 December 1993 *

Mr President,
Members of the Court,

1. The power of the High Authority to establish a system of steel production quotas is based on Article 58(1) of the ECSC Treaty.

2. The system of production quotas for certain products of undertakings in the steel industry, introduced by Commission Decision No 2794/80/ECSC of 31 October 1980, [1] was extended for the years 1986 and 1987 by Commission Decision No 3485/85/ECSC of 27 November 1985 [2] and, for the first six months of 1988, by Commission Decision No 194/88/ECSC of 6 January 1988 [3] which provides in Article 1(3)(e) that

'Where an undertaking does not expect to attain its quotas during the quarter in question, the Commission may (...) allow the undertaking an advance on the quotas for the following quarter not exceeding 20% of the quotas for the current quarter'.

3. Relying on that article, Finsider requested on 9 June 1988 an advance, during the second quarter of 1988, on production quotas for the third quarter, up to a ceiling of 20%.

4. Although there was never an express reply to that request, Finsider's production during the second quarter of 1988 exceeded the quotas allocated to it.

5. On the basis of Article 58(4) and 92 of the ECSC Treaty and of Article 12 of the Decision No 194/88/ECSC, [4] the Commission, by decision of 21 March 1990, found that Finsider had exceeded during the second

* Original language: French.

1 — Decision establishing a system of steel production quotas for undertakings in the iron and steel industry (OJ 1980 L 291, p. 1).

2 — Decision on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ 1985 L 340, p. 5). See in particular Article 18(2)

3 — Decision extending the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ 1988 L 25, p. 1). See in particular Article 18(2).

4 — Which attributes to the Commission the power to impose fines in the event that production quotas are exceeded.

quarter of 1988 the portions of production quotas which could be delivered in the common market by 50 359 tonnes in category Ia and by 64 497 tonnes in category Ib and imposed upon it a fine of ECU 2 153 550.

6. By judgment of 5 June 1992, the Court of First Instance dismissed the action brought against that decision. [5]

7. By application of 28 July 1992 Finsider appealed against the judgment of the Court of First Instance, sought the annulment of the decision of the Commission and, in the alternative, a reduction in the amount of the fine. Furthermore, it requested as a measure of measure of inquiry the production of a letter. [6]

8. The Court of First Instance refused to order that document to be produced. [7] Such a decision is not included among those against which an appeal lies under Article 49 of the Statute of the Court of Justice of the ECSC. That claim is therefore inadmissible.

9. Finsider puts forward four pleas in law in support of its appeal.

10. The first plea criticizes the attitude of the Commission following the request for the advance on quotas.

11. The second is based on the absence of any legal basis for the contested decision on account of the judgment of the Court of Justice in *Hoogovens Groep and Others* v *Commission* of 14 June 1989 [8] which, by annulling Articles 5 and 17 of Decision 194/88/ECSC, had retroactively eliminated the criteria enabling any overshooting of quotas to be assessed.

12. The third is founded on the principle of the right to be heard, as expressed in the first paragraph of Article 36 of the ECSC Treaty.

13. According to the fourth plea, the decision of the Court of First Instance does not give sufficient reasons with respect to the application for a reduction of the fine.

14. The first plea (see paragraphs 67 to 103 of the judgment of the Court of First Instance) may be divided into three limbs: (i) the Commission did not give a formal, reasoned reply to the request for the advance on quotas; (ii) although the contested decision allows the inference to be drawn that the request for an advance had been implicitly rejected, Article 11(3)(e) of Decision No

5 — Case T-26/90 [1992] ECR II-1789.

6 — Appeal, page 45 of the French translation.

7 — Paragraph 103 of the contested judgment.

8 — 218/87, 223/87, 72/88 and 92/88 [1989] ECR 1711.

194/88/ECSC was infringed; (iii) finally, bearing in mind the practice observed by the Commission until then, the principle of the protection of legitimate expectations was infringed.

15. May the silence of the Commission be construed, under the ECSC Treaty, as implicit acceptance of a request for advance on quotas?

16. The Court has already answered that kind of question in its judgment in *Boël* v *Commission*. [9] The Court held that

'(...) the system of restrictions on the production of steel undertakings allows of adjustments to individual quotas allocated to particular undertakings only in exceptional cases, and for such an adjustment a *positive decision granting supplementary quotas* is indispensable. The Commission's silence, regrettable though it may be, can therefore be treated only as an implied decision of refusal and not as tacit consent to an adjustment'. [10]

17. More recently, with regard to the rules on steel quotas in force in the second quarter of 1983, the Court considered that the request for the allocation of an additional annual production reference to which the Commission had not replied explicitly should be regarded as having been implicitly rejected by the first decision fixing the production quotas adopted after the submission of the request and without taking it into account. The Court further stated that only that decision was capable of adversely affecting the applicant. [11]

18. It follows, on the one hand, that modification of a quota must be effected by express decision and, on the other, that a decision finding that quotas have been exceeded over a given period and imposing a fine on the steel undertaking concerned may, where appropriate, mean that a request for an increase of quotas submitted prior to the quota being exceeded was implicity refused for that period.

19. It is to no avail that the applicant claims [12] that Article 15 of the ECSC Treaty on the obligation to provide a statement of reasons leaves no room for 'implicit' decisions. It is sufficient to note that the third paragraph of Article 35 of the Treaty expressly mentions such decisions and, moreover, prescribes the legal regime which governs them.

9 — Judgment in Case 76/83 [1984] ECR 859, delivered in the context of the system of quotas established by Commission Decision No 1831/81/ECSC of 24 June 1981 establishing for undertakings in the iron and steel industry a monitoring system and a new system of production quotas in respect of certain products (OJ 1981 L 180, p. 1).

10 — Paragraph 11, my emphasis.

11 — Paragraph 21 of the judgment in Joined Cases 81/85 and 119/85 *Usinor* v *Commission* [1986] ECR 1777.

12 — Page 13 of the French translation of the appeal.

20. In declaring that the reasons for that refusal had been provided to Finsider, the judgment of the Court of First Instance properly referred to the preamble to the contested decision [13] which notes, in particular, that 'the system of quotas is quarterly and mandatory and gives no automatic entitlement to advances' and that during a meeting which took place on 24 May 1989 between the representatives of the parties, it was emphasized that the advance on quotas was no longer possible during the course of the last quarter of application of the quota system. The judgment also took into account the context in which the decision had been adopted, [14] in particular, a letter of 2 August 1988 in which the Commission explained to Finsider its reasons for refusing to grant advances on quotas for the second quarter of 1988 and the telex by which Eurofer informed its members on 6 April 1988 that it would not be granted advances on quotas from the third quarter for the second quarter of 1988, in view of the fact that the quota system would end on 30 June 1988.

21. It appears from those documents, without any possible ambiguity, that Finsider had been informed of the reasons for the refusal to grant those advances in such a way that a court could review the legality of the decision and the party concerned would have sufficient information available to make it possible to ascertain whether the decision was well founded or whether it is vitiated by a defect allowing its legality to be contested. [15]

22. With regard to the alleged error of interpretation by the Court of First Instance of Article 11(3)(e) of Decision No 194/88/ECSC, I would make the following observations.

23. As the Court of First Instance has clearly shown, the system of Article 11 implies that '(...) the overshooting of the quota during a quarter may be offset by not using up the quota during the next quarter'. [16] Consequently, Finsider could not claim any advance on quotas after 30 June 1988 since, as noted above, the system of quotas had been brought to an end from the third quarter of that year.

24. Finsider also maintains before this Court that the conditions for an advance on quotas have been met, since an advance is offset by an actual reduction of the production or delivery quantities during the course of the quarter following that for which the advance has been granted, even if quotas have been abolished. [17]

25. In my view, such an argument gives rise to perplexity. How can advances be made on quotas which will never exist? More specifically, how can account be taken of quotas by reference to a period during which the market is totally liberalized and production is no

13 — Paragraph 71 of the contested judgment.

14 — Paragraph 72 of the contested judgment.

15 — See in that respect the judgment in Case C-181/90 *Consorgan* v *Commission* [1992] ECR I-3557.

16 — Paragraph 83 of the contested judgment.

17 — See page 17 of the French translation of the appeal.

longer subject to the Commission's power of surveillance and its power to impose sanctions?

26. Finsider also argues that the interpretation accepted by the Court of First Instance of Article 11(3)(e) would have the effect of rendering the system of advances inapplicable during half the period of validity of Decision No 194/88/ECSC. [18]

27. I would like to note at this point, first, that the advance is not a right which is automatically granted to undertakings, and secondly, that a quota may be 'moved' from one quarter to another only if those two periods are subject to the quota system. Thus, carry-overs — the opposite of advances — to the first quota of 1988 from the fourth quarter of 1987 was possible only because quotas existed for that period (see Article 11(3)(b) of 194/88/ECSC and Article 18(2) of Decision No 3485/85/ECSC).

28. As regards the third limb of the plea, Finsider cannot invoke a breach of the principle of the protection of legitimate expectations since the end of the quota system no longer enabled advances to be granted, the end was entirely foreseeable, in view of the actual wording of Decision No 194/88/ECSC, [19] and the Court of First Instance considered that it had not at all been established that the Commission had earlier followed a practice to the contrary.

29. It follows that all three limbs of the first plea must be rejected.

30. The second plea is based on the judgment in *Hoogovens* in which the Court of Justice annulled Articles 5 and 17 of Decision No 194/88/ECSC (hereinafter referred to as 'Article 5' and 'Article 17'). The former gave the Commission the power to fix each quarter, for each undertaking, the production quotas and the part of such quotas which could be delivered in the common market. The latter authorized undertakings, subject to certain conditions, to convert each quarter a portion of the difference between their production quota and the proportion of the quota which may be delivered in the common market into quotas for delivery in the common market at the rate of 1: 0.85 — referred to as I: P [20] —, thus allowing them to increase their deliveries on that market.

31. That plea (see paragraphs 42 to 66 of the contested judgment) is divided into two limbs.

18 — Reply, page 9 of the French translation.

19 — See paragraph 1 of the recital and Article 18(2), as well as paragraph 97 of the judgment of the Court of First Instance.

20 — The ratio between production quotas and delivery quotas.

32. In the first limb, the applicant maintains that the judgment in *Hoogovens* had retroactively eliminated the criteria which allowed possible excesses over quotas to be assessed. Any excess was therefore 'radically excluded'. [21] Since Article 5 had been annulled, it could not be infringed. The contested decision of the Commission consequently lacked a legal basis.

33. The sole ground for the annulment of Article 5 given in the judgment in *Hoogovens* is the following:

'Article 5 of Decision No 194/88/ECSC takes over the wording of Article 5 of Decision No 3485/85/ECSC. Consequently, it must be annulled for the same reasons which led to the annulment of that provision in the judgment of 14 July 1988'. [22]

34. It follows that, as the Court of First Instance rightly points out, [23] the grounds of the judgment in *Peine-Salzgitter and Others* v *Commission* of 14 July 1988 [24] must be referred to in order to determine the scope of the judgment in *Hoogovens*.

35. In that case the Court of Justice held that

'Article 5 of Commission Decision No 3485/85/ECSC of 27 November 1985 [is declared void] *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'. [25]

36. Since the *sole* ground for the annulment of Article 5 of Decision No 194/88/ECSC upheld in the judgment of 14 June 1989 refers to the grounds of the judgment of 14 July 1988, the Court of First Instance could properly consider that the later annulment could not be more extensive than the earlier one [26] and that '(...) the Court of Justice has not annulled Article 5 in so far as it constitutes the legal basis for the Commission's power to fix the quotas of steel undertakings quarterly, but *solely in so far as* the reference levels which it employs in order to fix those quotas do not enable delivery quotas to be determined on a basis which the Commission regards as equitable for undertakings whose I: P ratios are significantly lower than the Community average'. [27]

21 — Appeal, see page 29 of the French translation.

22 — Paragraph 26, cited in the judgment of the Court of First Instance at paragraph 53.

23 — Paragraph 53 of the contested judgment.

24 — Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 *Peine-Salzgitter and Others* v *Commission* [1988] ECR 4309.

25 — Paragraph 1 of the operative part, my emphasis. See also paragraph 28 of the grounds.

26 — Paragraph 55 of the contested judgment.

27 — Paragraph 57 of the contested judgment, my emphasis.

37. That interpretation is, moreover, corroborated by the fact that Article 6 of Decision No 194/88/ECSC was not annulled. That article cannot be divorced from Article 5 for which it lays down the conditions for its application. It therefore necessarily continues to exist '(...) as the legal basis authorizing the Commission to fix quotas'. [28]

38. Since Finsider does not fall within the category of undertaking having I: P ratios significantly lower than the Community average, [29] it cannot rely on the annulment — the scope of which, as has been seen, is limited — of Article 5 and the Commission is not under a duty '(..) either to redefine in a general decision the parameters for fixing quotas or to adopt new individual decisions' [30] pursuant to Article 34 of the ECSC Treaty with regard to that undertaking.

39. The individual decisions fixing Finsider's quotas for the second quarter of 1988 thus remained valid and could '(...) be used as a reference for the calculations of the amounts by which the Commission has charged the applicant with exceeding its quotas'. [31]

40. In the second limb of its plea, Finsider argues that it has been the victim of the application of Article 17 and that the exceeding of quotas with which it is charged must be the subject of a set-off in order to take account of the decrease in delivery quotas caused by the application of that article during the period from 1 January 1987 to 30 June 1988. [32] It adds that all the consequences flowing from the annulment of Article 17 must be applied to steel products other than those referred to in the contested decision.

41. The effect of applying Article 17 was that the quantities which may be delivered on the Community market were increased to the detriment of undertakings whose production was essentially disposed of on that market, [33] and in particular, to the detriment of Finsider.

42. In the *Hoogovens* judgment the Court of Justice considered that the adjustment of the I: P ratio, as it appeared in Article 17 of Decision No 194/88/ECSC — which merely restates the provisions of Article 1 of Decision No 1433/87/ECSC — did not ensure the equitable allocation of quotas required by Article 58(2) of the ECSC Treaty and the Court of Justice annulled Article 17.

28 — Paragraph 56 of the contested judgment.
29 — Paragraph 58 of the contested judgment.
30 — Paragraph 59 of the contested judgment.
31 — Paragraph 62 of the contested judgment.
32 — See paragraph 46 of the contested judgment.
33 — See on this point paragraph 18 of the judgment of 14 June 1989 in *Hoogovens*, *supra*, footnote 8.

43. The fine was imposed on Finsider for exceeding quotas during the second quarter of 1988. It is common ground that for that period and for the category of products referred to in the decision '(...) the Commission acted on that annulment in favour of the applicant by decreasing the excesses initially calculated for the two categories of product concerned'. [34]

44. Did the Commission have to take into account the favourable consequences for the applicant of the annulment of Article 17 for the period form 1 January 1987 to 31 March 1988 and for categories other than categories Ia and Ib?

45. Let me make two preliminary points: first, the calculation of the quotas cannot be reopened before the Court of Justice as Finsider requests since the question is one of pure fact. [35] Secondly, Finsider's analysis to the effect that the Court of First Instance gave judgment *ultra petita* [36] on the ground that it based itself on 'completely new reasons', that is to say, reasons which had not been invoked by the parties, is wrong in law.

46. The appellant's argument may be reduced here to three points:

— the effects of the annulment of Article 17 must be offset against the excess over quotas noted in the second quarter of 1988; [37]

— the excess could be declared only by means of a global assessment of the quotas during the whole period of crisis; [38]

— the contested judgment notes, inaccurately, that the products affected by the exceeding of quotas are different to those in respect of which Article 17 was annulled. [39]

47. That last point presupposes a finding of fact which lies outside the jurisdiction of the Court of Justice. I will restrict myself to considering the other two.

34 — Paragraph 65 of the contested judgment.
35 — Appeal, pages 34 and 35 of the French translation.
36 — Ibid., page 36.
37 — Ibid., page 37.
38 — Ibid., page 38.
39 — Ibid., page 39.

48. As regards the first point, the two procedures which lie at the heart of the matter must not be confused.

49. The decision imposing a fine concerns an excess over quotas *during the second quarter of 1988*, [40] since it is stated that the effect of the annulment of Article 17 for that period (and therefore the re-establishment of certain quotas for Finsider) was taken into account by the Commission. [41]

50. Moreover, in application of the first paragraph of Article 34 of the ECSC Treaty, it was for the Commission *alone* to take the necessary steps to comply with the judgment annulling Article 17.

51. It follows from Article 34 that the Community judicature cannot dictate to the Commission, the source of the annulled act, what steps it must take.

52. Thus in its judgment in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, [42] after noting the wording of Article 34 of the ECSC Treaty, the Court of Justice held that

'If the Court entertains the application, it may not dictate to the High Authority the decisions which should be consequent upon the judgment annulling the decision but the Court must confine itself to referring the matter back to the High Authority.' [43]

53. It is clear that if the Court of First Instance had offset the exceeding of the quota of the second quarter, as Finsider had requested, against the quotas re-established from the previous quarters in Finsider's favour, following the judgment of the Court of Justice annulling Article 17 of Decision No 194/88/ECSC, it would have been exercising a power which Article 34 of the ECSC Treaty denies to it.

54. The Court of First Instance was therefore right to refuse to engage in that exercise. [44]

55. Finally, as regards the second point, Finsider is wrong in maintaining that the Commission should have taken into account the

40 — Article 1 of the decision.

41 — See above, paragraph 43, and paragraph 65, penultimate sentence, of the contested judgment, as well as the third recital of the decision of 21 March 1990.

42 — Case 30/59 [1961] ECR 1.

43 — Page 17. The case-law on Article 176 of the EEC Treaty — which is the counterpart of Article 34 of the ECSC Treaty — is consistent in this matter. See, for example, the judgment in Case 141/84 *De Compte* v *Parliament* [1985] ECR 1951, paragraph 22, and the judgment in *Hoogovens*, cited above, paragraph 21.

44 — Paragraph 65 of the contested judgment.

quotas 'during the whole of the crisis period' before finding that their quotas had been exceeded. The quota system requires that quotas be complied with *quarter by quarter*, [45] with the exception of carryovers, advances or exceptional allocation of additional quotas.

56. In the third limb of its plea (see paragraphs 104 to 111 of the judgment), Finsider pleads infringement of the first paragraph of Article 34 and the first paragraph of Article 36 of the ECSC Treaty and maintains that it was never given the opportunity to submit its comments on the accounts which the Commission drew up before deciding to impose a sanction on it for exceeding quotas.

57. The Court of Justice has consistently held that 'observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings'. [46]

58. In its judgment in *Belgium* v *Commission* of 10 July 1986, [47] the Court stated that 'in order to respect [that principle], the person against whom an administrative procedure has been initiated must have been afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the commission to support its claim that there has been an infringement of Community law'.

59. The Court of First Instance, in findings of fact which only it can make and which cannot be called into question before this Court, considered that (1) the Commission, by its letter of 23 February 1989, gave the applicant an opportunity to submit its comments on the alleged overshooting, (2)the applicant was able to put over its comments on several occasions. [48]

60. It is indeed common ground that the latter calculations taken into account in assessing the overshooting of quotas were raised during a meeting between the parties without being communicated formally to the appellant. [49]

61. The failure to do so would be such as to constitute an infringement of the right to be heard which might result in the annulment of the measure, if it were established that, had it not been for that irregularity, the out-

45 — Article 5(1) of Decision No 194/88/ECSC.

46 — Judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9, (especially paragraph 14). See also the judgment in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461.

47 — Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 27.

48 — Paragraph 108 of the contested judgment.

49 — Paragraph 109 of the contested decision.

come of the procedure might have been different. [50]

62. Finsider acknowledged at the hearing before the Court of First Instance that the calculations carried out by the Commission in order to determine the magnitude of the quotas of which the appellant was deprived as a result of Article 17 were accurate and did not put forward any reason for doubting the accuracy of the calculations which enabled its overshooting of quotas to be established. [51]

63. The Court of First Instance could therefore properly consider that the first paragraph of Article 36 of the ECSC Treaty had not been infringed '(...) even if it would have been preferable to communicate the latter calculations to the applicant formally (...)'. [52]

64. By a final plea (see paragraphs 112 to 116 of the judgment), Finsider claims that the judgment, in so far as it rejects the request that the amount of the fine be reduced, is insufficiently reasoned.

65. By judgment of 1 October 1991 in *Vidrányi* v *Commission*, [53] the Court of Justice accepted a ground of appeal based on the infringement by the Court of First Instance of the obligation to state the reasons on which its decisions are based. [54]

66. In refusing to reduce the amount of the fine, the Court of First Instance notes, first, that the appellant was unable to contest the Commission's statements to the effect that it obtained from the unlawfulness of Article 5 a benefit '[which] works against a fair sharing amongst the undertakings of the burden of the crisis', [55] and secondly, that the amount of the fine imposed was 'substantially lower' than the standard laid down in Article 12 of Decision No 194/88/ECSC. [56]

67. According to the appellant, the Court of First Instance should have taken account of the grounds of its decision, of the principle of the protection of legitimate expectations and the practice followed previously. [57]

68. Apart from the fact that the Court of First Instance sufficiently demonstrated [58] that there had been no breach of that principle, the appellant does not explain why there

50 — See on that point paragraph 48 of the judgment in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959.

51 — Paragraph 110 of the contested judgment.

52 — Paragraph 109 of the contested judgment.

53 — Case C-283/90 P *Vidrányi* v *Commission* [1990] ECR I-4339

54 — Paragraph 29

55 — Paragraph 114 of the contested judgment.

56 — Paragraph 115 of the contested judgment.

57 — See the third indent of paragraph 44 of the French translation of the Appeal.

58 — See *supra* paragraph 28.

should be a reference to that principle in the grounds given for refusing to reduce the amount of the fine.

69. It follows that the Court of First Instance had no duty to justify itself with regard to that principle. It provided Finsider with sufficient information to make it possible to ascertain whether its decision was well founded or whether it might be vitiated by a defect allowing its validity to be contested and enabling the Court of Justice to review its legality.

70. In the alternative, Finsider requests the Court of Justice to reduce the amount of the fine.

71. In the absence of an error in law committed in that respect at first instance, the Court of Justice may not substitute its decision for that of the Court of First Instance.

72. I am therefore of the opinion that the Court should dismiss the appeal and that it should order the appellant to pay the costs of the proceedings.