On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicants to bear the costs jointly and severally.**

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 27 November 1984.

For the Registrar

H. A. Rühl

Principal Administrator

O. Due

President of the Fifth Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 23 OCTOBER 1984 [1]

Mr President,
Members of the Court,

1. By order of 20 June 1984 the Court assigned Case 50/84, *Bensider and Others* v *Commission,* to the Fifth Chamber for preliminary consideration of the admissibility of the originating application.

The background to that development can be described in a few words. By application lodged at the Court Registry

1 — Translated from the Italian.

on 25 February 1984, the Italian undertaking Bensider and six Belgian undertakings sought, pursuant to the second paragraph of Article 33 of the ECSC Treaty, a declaration that Decision No 3717/83 of 23 December 1983 was void. That decision had introduced for steel undertakings and steel dealers a production certificate and an accompanying document for deliveries of certain steel products in the Member States and elsewhere.

By application lodged at the Court Registry on 8 March 1984, the applicants also applied for suspension of the operation of the decision; but that application was dismissed by the President of the Court by order of 23 May 1984. In the meantime, by an application on a procedural issue received at the Registry on 30 March, the Commission objected that the originating application was inadmissible and asked the Court to give a decision thereon under Article 91 of the Rules of Procedure, without considering the substance of the case.

That is why the matter was assigned to this Chamber.

2. Before I set out the facts giving rise to the question to be dealt with, some clarification may be useful. In their application, the applicants describe themselves as dealers in second steel products: they therefore fall within the category of "steel dealers" covered, in addition to steel undertakings, by Decision No 3717/83. Article 2 of that decision defines dealers as "distributive undertakings ... which effect ... sales ... within the common market, of the steel products listed in Annex I".

The reason for this wording is simple. By describing dealers as "distributive undertakings", the dealers are brought, *ratione personae*, within the scope of the ECSC Treaty; Article 80 thereof provides that, for the purposes of the Treaty, "undertaking" means any undertaking "regularly engaged in distribution other than sale to domestic consumers or small craft industries".

The important consequences which flow from that definition from the procedural point of view will become apparent in due course.

3. The facts of this case are essentially marked by two dates: 31 December 1983, when Decision No 3717/83 was published in the Official Journal (L 373), and 25 February 1984, when the applicants lodged an application for a declaration that that decision was void.

It was on the basis of those dates that the Commission lodged the objection to which I have referred. It is based on two distinct "charges". The first, which was addressed to the six Belgian undertakings, is to the effect that the application was lodged out of time. The second relates only to the Italian undertaking: it is conceded that Bensider's application is in time, by virtue of the extension of the time-limit on account of the distance between its registered office and the seat of the Court; but that application too is inadmissible because the applicant had no capacity to be a party to legal proceedings when the application was lodged.

I shall consider the two charges in the order in which they are given.

4. There is no doubt, as in indeed stated in the order of the President of 23 May 1984, that the application by the six undertakings whose registered offices are in Belgium reached the Court Registry after the prescribed period had expired. In order to comply with the time-limits laid down by the Community rules applicable in this case (third paragraph of Article 33 of the ECSC Treaty, Article 81 of the Rules of Procedure and Article 1 of Annex II thereto), the Belgian undertakings should have lodged their application by 17 February 1984 at the latest. In the event, the application was registered on 25 Febraury 1984.

In his submissions in reply to the objection, the lawyer representing the applicants does not appear to dispute that fact but asserts that, by reason of the indivisibility of the application, which follows from the identical title and purpose of the action brought jointly by the Italian undertaking and the Belgian undertakings, the latter are entitled to the longer period available to Bensider. Because there is no doubt that Bensider's application was lodged in time, and is therefore admissible, the indivisible nature thereof — it is argued — extends that admissibility to the other applicants. Moreover there is no legislation or case-law to the contrary.

The argument is attractive, but without foundation. There is no doubt that the multiple claims made in this case are characterized by the same *petitum* and *causa petendi,* and therefore by indivisibility, or to put it better, connexity. However, that does not justify aligning the various periods prescribed for the lodgment of applications by the various parties with the longest such period.

There is no doubt that, where several applications are connected, there is procedural unity, in other words the applications are dealt with and discussed jointly. But that does not affect their independent nature: there is evidence that, *inter alia,* the procedural positions of the various applicants are wholly independent. Thus, no ground for discontinuance of the proceedings which arises with respect to one of the applicants (for example death or better still mere abandonment of the proceedings) affects the position of the others.

The same applies regarding the time-limits for applications under Community law and any extension thereof under Article 1 of Annex II to the Rules of Procedure. That article provides: "time-limits for all parties save those habitually resident in the Grand Duchy of Luxembourg shall be extended as follows: for the Kingdom of Belgium: 2 days; . . . for the Italian Republic . . .: 10 days". It is easy to see that the extension is provided for and calculated *solely* on the basis of the distance between the residence of the party and the seat of the Court. Since that calculation relates exclusively to the residence of each applicant, it is not apparent why it should cease to apply in a case of connexity or a collective application. For these reasons, the application by the Belgian undertakings is irretrievably out of time and should be declared inadmissible.

5. It remains to be considered whether the application can be declared admissible as far as the Italian undertaking is concerned.

As regards the observance of the time-limit, the Commission acknowledges that in this case the action against Decision No 3713/83 was brought in due time and is therefore in order. Being granted a longer period within which to lodge its application, Bensider had to do so by 25 February 1984 at the latest, and that is what it in fact did.

The application is, however, vitiated in another respect. Bensider describes itself as a "società a responsabilità limitata" [private limited company] governed by Italian law. However, on 25 February 1984 it was not yet entered in the commercial register in the city in which its principal office is located. Since, under Italian law and in particular pursuant to Article 2331 and 2475 of the Civil Code, it is "by entry in the commercial register [that] a company acquires legal personality" (Article 2331), it seems obvious — the Commission claims — that on the date of lodgment of the application Bensider had no entitlement to institute proceedings before this Court. "Pas d'action sans personnalité" is the premise upon which the defendant relies; and in the result the application must be declared inadmissible by reason of the applicant's lack of capacity to be a party to legal proceedings.

I do not believe that it is necessary here, because the facts are clearly set out in the Report for the Hearing, to describe in detail the complications attending the birth of the applicant, or to recall how it entered the world of the law. I would note however that the first argument upon which Bensider relies is based on the practice, which is widespread both in Italy and elsewhere, whereby a general meeting of a company may ratify, with retroactive effect, the steps taken by the sole director before entry of the company in the commercial register. In the present case, thanks to this *fictio iuris,* Bensider is said to have had capacity to be a party in legal proceedings as from 9 February, the date of the instrument constituting it, and therefore it also had that capacity on 25 February 1984, when the application in these proceedings was lodged at the Registry.

The applicant contests the Commission's objection from a second viewpoint. The Commission relies on an Italian provision — by virtue of which the capacity to be a party to legal proceedings is conditional upon entry in the commercial register — which is unknown to the Community system. That provision — it is argued — cannot therefore be relied upon in the proceedings before this court.

Like the Commission, I consider the application inadmissible; but, in my opinion, in order to reach that conclusion it is unnecessary to follow the path suggested by the lawyer representing the Commission. Admittedly, in principle, anyone wishing to check whether a natural or legal person is entitled to be a party to legal proceedings will ask whether that person has capacity to act under his national law. However, it is not always necessary to carry out such a check as a preliminary measure.

Let me take an example as close as possible to the presente case: the legal personality acquired by an undertaking (for example, a steel dealer) under the law of the State in which it operates does not in itself mean that it is also entitled to act under the second paragraph of Article 33 of the ECSC Treaty. Naturally, the converse is also true: thus, the fact that an undertaking has no legal

personality does not automatically prevent it from relying upon that article.

What is suggested by this example? It seems to me to be possible to derive from it a rule of conduct: in the Community context the admissibility of an application for a declaration that a measure is void may certainly be considered on the basis of the conditions specifically imposed by the Community procedural system; there is, however, no inescapable obligation to establish, as a matter of priority, whether the conditions laid down by national law for such actions have been satisfied.

There are many decisions of this Court to that effect. I would add that, where it is necessary to decide as to the capacity of a person to be a party to proceedings before this Court, the Court has always adopted a realistic approach and dealt with the specific aspects of each case so as not to attach excessive importance to the formal requirements of the laws of the various Member States (cf. recent judgment of 28 October 1982 in Case 135/81, *Groupement des Agences de Voyages, Asbl* v *Commission*, [1982] ECR 3799). In the last analysis, it seems to me that for *locus standi* to be validly established for the purposes of Community procedure, the Court attaches particular importance to one requirement: that the party should be capable from the outset of *lawfully* exercising its rights as a party to proceedings. In other words, it must have the *locus standi* appropriate to the right which it intends exercising in the specific proceedings in question.

I shall now consider the present case. It too concerns *locus standi* to be a party to Community proceedings: as I have just observed, therefore, the solution is to be sought in the relevant law. The question which then arises is whether, upon expiry of the period for an action to be brought (25 February 1984), Bensider was lawfully empowered to exercise its right of action, as provided for in the second paragraph of Article 33 of the ECSC Treaty. I do not think so.

I shall first mention the conditions laid down in that provision. It provides that "Undertakings ... may ... institute proceedings ... against general decisions or recommendations which they consider to involve a misuse of powers affecting them. In the first place, therefore, the action must be taken by an undertaking. The undertaking therefore may challenge the general decisions or recommendations, but only on one ground: the misuse of powers affecting them directly. I shall analyse these two conditions one after the other.

Fulfilment of the first condition cannot, it seems to me, be ascertained otherwise than by reference to the definition of undertaking given in Article 80 of the ECSC Treaty. I have already stated in Section 2 of this Opinion that, with the clear intention of subjecting steel dealers to Community rules in the iron and steel market, Article 2 of Decision No 3717/83 identifies those dealers as "distributive undertakings ... which effect ... sales ... within the common market". That provision therefore requires that the undertakings upon which it imposes certain obligations should fulfil the requirements laid down in the more general definition contained in Article 80: that is to say they must be undertakings which regularly engage in distribution.

In that phrase the emphasis clearly falls upon the adverb. What does "regularly"

mean? I can say unhesitatingly that nowhere in the abundant case-law of the Court have I found any precedent to clarify the meaning and scope of the word. It is a fact, however, that in at least two of the three cases in which it was referred to the undertakings in question had engaged in trade and sales frequently and for a long time (judgment of 20. 3. 1957 in Case 2/56 *Mining Undertakings of the Ruhr Basin* v *High Authority of the European Coal and Steel Community* [1957] and [1958], ECR 3; order of 4. 12. 1957 in Case 18/57 *Nold* v *High Authority of the European Coal and Steel Community* [1957] and [1958], ECR 121; judgment of 19. 3. 1964 in Case 67/63 *Société Rhénane d'Exploitation et de Manutention "SOREMA"* v *High Authority of the European Coal and Steel Community*, [1964] ECR 151).

Are those decisions a sufficient basis for the view that regularity involves repeated and prolonged distribution activity? I doubt it because such an interpretation leaves too many questions unanswered (how many instances of distribution are necessary before it can be discribed as "repeated"? And how much time must pass before it can be described as "prolonged"?). I think, rather, that the correct solution is to be arrived at by reference to a dictionary of the French language *(Petit Robert,* Paris, 1981) in which the word "habituel" is stated to describe conduct "qui tient de l'habitude par sa régularité, sa constance". Those are two concepts which can be examined by a court without any difficulty. On the basis of Article 80, therefore, distribution activity must be other than occasional: that is to say normal, ordinary or, if you prefer, effective activity.

Does Bensider fulfil that requirement? Article 4 of the instrument constituting it does in fact state that its object is to act as an intermediary and to trade in iron and steel products. But nobody who goes through its *curriculum vitae* can reasonably assert that, at the end of the period prescribed for the bringing of an action, that object had been pursued by the management of the company in a normal or effective manner. At least, the documents relating to the case provide no indication to that effect: and I think that that is a sufficient basis for the conclusion that on 25 February 1984 Bensider did not have the *locus standi* contemplated in the second paragraph of Article 33 of the ECSC Treaty to institute proceedings against Decision No 3717/83.

6. I shall now go on to the second of the two requirements laid down in Article 33: the existence with respect to the applicant of "a misuse of powers affecting [it]". I shall begin by considering the question raised for the first time by the Commission during the oral phase of the proceedings. At that time, reiterating to the letter an argument put forward in the order of the President of 23 May 1984 (paragraph 25), the representative of the defendant maintained that, regardless of Bensider's legal circumstances when the application was lodged, it had no interest in bringing an action against Decision No 3717/83. That measure entered into force on 1 January 1984 and, even if the argument as to retroactive ratification is upheld, that date preceded by a long period the constitution of Bensider: therefore, unless it is acknowledged that the Commission misused its powers to the detriment of a non-existent under-

taking, the application must be declared inadmissible.

The lawyer representing Bensider reacted to that argument by asserting that, in this case, the application is directed not against an individual decision but against a general decision, and therefore one which is capable of affecting the Italian undertaking to the same extent as the other applicant companies and the whole iron and steel industry in general.

Once more i concur with the objective pursued by the Commission, but not with the argument which the Commission puts forward to achieve that objective. In fact, to maintain that at a time within the period allowed for challenging a general decision one of the persons to whom that decision is addressed cannot challenge it since it did not exist when the decision was issued is (a) to confuse the legal position of the addressee of a rule (which is a matter of substantive law) with its interest in bringing an action concerning the illegality of the measure containing that rule (which, by contrast, is pre-eminently a matter of procedure), (b) to confuse misuse of powers, which is a defect in the Community measure, with the effect of the measure thus vitiated, that is to say with the injury which the measure produces in the sphere of interest of the addressee.

It is recognized that misuse of powers relates only to the measure itself: I would almost go as far as to say that that is an intrinsic — albeit abnormal — feature of it, in so far as it consists in the objective failure of the measure to correspond to the stated purpose of the rule. But, if that is the case, it cannot be said that, like any other legal defect, it can directly injure a particular person. It is only the measure, and can only be the measure, which is injurious; the measure is obviously capable of adversely affecting the interests of a person who came into existence after the measure was adopted and of which that person is in any event an addressee.

I do not intend to dwell any longer on the concept of misuse of powers. But on the other hand it is necessary to clarify, needless to say only with respect to the question of admissibility, the meaning of the expression "à leur égard". In fact there is a judgment of the Court on this point (9 June 1964 in Joined Cases 55 to 59/63 and 61 to 63/63, *Acciaierie Fonderie Ferriere di Modena and Others* v *High Authority* [1964] ECR 211) which appears to me to be decisive. At page 448 in the French version, which I prefer because it is more precise, the Court held that the ground of misuse of powers "n'est recevable, dans le cas d'un recours contre une décision générale, que si le requérant . . . [expose] de façon pertiente les raisons pour lesquelles l'adoption de la décision attaquée cause un préjudice direct à ses intérêts". And the Court concluded: "puisque l'acte attaquée affecte toutes les requérantes dans la même mesure, on ne saurait prétendre qu'il porte une atteinte directe aux intérêts individuels de chacune et qu'il est donc entaché de détournement de pouvoir 'à leur égard'".

In short, collective interests are not to be taken into account; undertakings may bring actions against general decisions of the ECSC only to defend their individual interests: *uti singuli* therefore, not *uti cives.* Is that so in Bensider's case? I

think it is possible to say that it is not. In so far as such an examination is permissible here, I should point out that Decision No 3717/83 is addressed to all steel dealers as a category, requiring from all of them a production certificate for deliveries intended for the other Member States. I do not therefore see how it can directly injure the individual interests of Bensider, particularly when Bensider had only just come into being. Moreover, this has been acknowledged both in the application and in the oral phase of the proceedings by the lawyer representing the applicant, who stated that the latter "paraît concernée par [la] décision au même titre que les autres sociétés requérantes et ... que le négoce privé dans son ensemble".

Those considerations lead me to the conclusion that, seen separately from those of the other applicants, Bensider's application is inadmisible since it does not fulfil the requirements laid down in the second paragraph of Article 33 of the ECSC Treaty. When the application was lodged, the applicant did not in fact regularly carry on the activity of distribution and therefore did not have the requisite *locus standi*. It then failed to demonstrate, *in limine litis*, the existence of any misuse of powers affecting it.

In view of that analysis, it seems superfluous to consider the objection that Bensider's application is inadmissible by virtue of the applicant's lack of *locus standi* according to the rules and practices obtaining in Italy. What is more, such an examination could not be decisive because, as I observed above, under Community law a lack of capacity to be a party to proceedings under national law does not prevent an applicant from being recognized as having a right of action before this Court.

7. In view of all the foregoing considerations, I propose that the Court declare inadmissible the application lodged at the Registry on 25 February 1984: as regards Bensider società a responsabilità limitata, because of failure to fulfil the procedural requirements laid down in the second paragraph of Article 33 of the ECSC Treaty; as regards the six Belgian undertakings, because of their failure to comply with the procedural time-limits.

In view of the fact that they have failed in their submissions, the applicants should be ordered to pay the costs — including the costs which were reserved in the proceedings relating to the application for interim measures.