JUDGMENT OF THE COURT (First Chamber)
27 June 1991 *

In Case T-120/89,

Stahlwerke Peine-Salzgitter AG, a company governed by German law, established at Salzgitter, Federal Republic of Germany, represented by Mr Sedemund, Rechtsanwalt Köln, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Rolf Wägenbaur, Legal Adviser, acting as Agent, assisted by Eberhard Grabitz, Professor at the Free University of Berlin, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for damages under Articles 34 and 40 of the ECSC Treaty,

THE COURT OF FIRST INSTANCE (First Chamber),

composed of: J. L. Cruz Vilaça, President, R. Schintgen, D. A. O. Edward, R. García-Valdecasas and K. Lenaerts, Judges,

Advocate General: J. Biancarelli,
Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 19 September 1990,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 30 January 1991,

gives the following

Judgment

The facts

1 Pursuant to Commission General Decision No 234/84/ECSC of 31 January 1984 (Official Journal 1984 L 29, p. 1, hereinafter referred to as 'General Decision No 234/84') on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry for the years 1984 and 1985, the Commission fixed each quarter and for each undertaking the production quotas and the part of such quotas which might be delivered in the Common Market ('delivery quota') on the basis of the production and reference quantities determined by that decision and after applying to those production and reference quantities certain abatement rates fixed quarterly.

2 Article 14 of General Decision No 234/84 provides:

'If, by virtue of the scale of the abatement rate for a certain category of products set for a quarter, the quota system creates exceptional difficulties for an undertaking which, during the twelve months preceding the quarter in question:

— did not receive aids authorized by the Commission with a view to covering operating losses,

— was not the subject of penalties in respect of the price rules or paid fines due,

the Commission shall, in respect of the quarter in question, make a suitable adjustment to the quotas and/or parts of quotas which may be delivered in the Common Market for the category or categories of products in question . . . '

3 Aware of the difficulties encountered by the applicant, a German steel undertaking, as a result of the unfavourable ratio between its delivery quota and its production quota (known as the I: P ratio) and in response to an application from that undertaking, the Commission adjusted the delivery quota for the second, third and fourth quarters of 1984 pursuant to Article 14 of General Decision No 234/84. However, by decision of 11 June 1985, the Commission refused to grant the applicant quota adjustments for the first two quarters of 1985 on the ground that the authorities of the Federal Republic of Germany had granted it in the fourth quarter of 1984 aid for structural improvements in respect of special depreciation, which was authorized by the Commission. In the Commission's view, that aid for structural improvements constituted aid with a view to covering operating losses which, under the said Article 14, precluded the grant of supplementary quotas pursuant to that article. In that decision, moreover, the Commission found that, since the applicant undertaking had on the whole shown a profit after the fourth quarter of 1984, there were no longer any 'exceptional difficulties' within the meaning of Article 14.

4 By judgment delivered on 14 July 1988 in Case 103/85 *Stahlwerke Peine-Salzgitter AG* v *Commission* [1988] ECR 4145, the Court of Justice annulled the Commission decision of 11 June 1985 inasmuch as the Commission refused to adjust pursuant to Article 14 of General Decision No 234/84 the applicant's delivery quotas for Category III products for the first quarter of 1985.

5 The Court of Justice found, in the first place, that the applicant, Stahlwerke Peine-Salzgitter, produces, inter alia, rolled steel in Category III, which then accounted for 16% of its total output and that, for that category of products, the I: P ratio was, at that time, exceptionally unfavourable for the applicant.

6 The Court of Justice went on to hold that, in determining whether exceptional difficulties existed, the Commission was not entitled to take account of the undertaking's situation as a whole but only of the situation obtaining in the categories of products to which a high abatement rate was applied and that, consequently, it was not entitled to base its refusal to adjust the quotas under Article 14 on the fact that the undertaking as a whole was profitable. The Court also held that the aid at issue, which had been granted to the applicant pursuant to a programme of restructuring of particular expedience and might have to be refunded if the undertaking decided to abandon the closure or reduction in capacity, could not be

regarded as aid intended to cover operating losses within the meaning of Article 14 of General Decision No 234/84.

7 Without reference to the proceedings before the Court of Justice, the Commission, aware of the exceptional financial difficulties experienced by the applicant and other steel undertakings, on several occasions expressed its willingness to review the question of the I: P ratio before extending the quota system for a further period of two years. After consulting the ECSC Consultative Committee, it asked the Council to give its assent for new provisions suggested for that purpose. But the Council refused to give its assent for the adjustment of the I: P ratio.

8 In those circumstances, on 27 November 1985 the Commission adopted General Decision No 3485/85/ECSC extending the system of monitoring of production quotas for certain products of undertakings in the steel industry for 1986 and 1987 (Official Journal 1985 L 340, p. 5, hereinafter referred to as 'General Decision No 3485/85'). That decision did not provide for any adjustment of the I: P ratio that the Commission itself had proposed to the Council. Pursuant to Article 5 of that decision, the Commission was to fix each quarter, for each undertaking, the production quotas and delivery quotas on the basis of the reference production and quantities fixed by that decision and after applying to such reference production and quantities certain abatement rates fixed each quarter.

9 Pursuant to that provision, on 30 December 1985 and 21 March 1986 the Commission addressed to the applicant individual decisions fixing, for the first and second quarters of 1986, the delivery quotas applicable to it for the products in Categories Ia, Ib, Ic and III.

10 By a judgment also delivered on 14 July 1988 in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 *Stahlwerke Peine-Salzgitter AG and Hoogovens Groep BV* v *Commission* [1988] ECR 4309, the Court of Justice annulled Article 5 of General Decision No 3485/85.

11 The Court of Justice found that the applicant Stahlwerke Peine-Salzgitter manufactures, inter alia, products in Categories Ia, Ib, Ic and III and that, for those categories, the I: P ratio was exceptionally unfavourable at that time.

12 In Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86, the issue before the Court of Justice was whether the Commission, in adjusting the I: P ratio, was obliged to seek the Council's assent or whether, on the contrary, the Commission should have acted alone and did not do so.

13 After analysing Article 58(1) and (2) of the ECSC Treaty and the case-law on it, the Court of Justice held that the powers conferred on the Commission by that Treaty would be diverted from their lawful purpose if it appeared that the Commission, by wrongly using the procedure laid down for the establishment of the quota system, failed to exercise its own powers to adopt the rules which it considered necessary to ensure that the quotas were equitable.

14 In that case, the Court of Justice held that, by failing to make, pursuant to Article 58(2) of the ECSC Treaty, the change to the I: P ratio that the Commission itself considered necessary in order to determine the quotas on an equitable basis, the Commission had pursued a purpose different from that laid down by that provision and thus committed a misuse of power with respect to the applicant. Consequently, the Court of Justice annulled Article 5 of General Decision No 3485/85 in so far as it did not enable delivery quotas to be fixed on a basis which the Commission considered fair for undertakings having ratios between their delivery quotas and production quotas which were significantly lower than the Community average.

15 The individual decisions addressed by the Commission to the applicant on 30 December 1985 and 21 March 1986, which were based in part on Article 5 of General Decision No 3485/85 and of which the annulment was also sought, were annulled by the same judgment.

16 It is thus apparent that, first, the Court of Justice (in Case 103/85, cited above) annulled the Commission decision of 11 June 1985 inasmuch as it refused to adjust pursuant to Article 14 of General Decision No 234/84 the applicant's quotas for the first quarter of 1985 and that, secondly, the Court of Justice (in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86, cited above) annulled

both Article 5 of General Decision No 3485/85 and the individual decisions addressed by the Commission to the applicant on 30 December 1985 and 21 March 1986 in so far as they fixed Peine-Salzgitter's delivery quotas for the first and second quarters of 1986 respectively.

17 On the other hand, the Commission's decision of 11 June 1985 was not annulled by any judgment of the Court of Justice as regards its refusal to adjust the applicant's quotas for the second quarter of 1985, nor were the implied decisions of the Commission refusing to adjust the applicant's quotas for the third and fourth quarters of 1985. Similarly, the individual decisions addressed by the Commission to the applicant on 5 August 1986, 28 November 1986, 5 March 1987, 9 June 1987, 12 August 1987, 3 December 1987, 11 March 1988 and 6 June 1988 were not annulled by any judgment of the Court of Justice as regards their determination of Peine-Salzgitter's delivery quotas for the last two quarters of 1986, all four quarters of 1987 and the first two quarters of 1988.

18 The Court of First Instance notes that, shortly after the two judgments delivered by the Court of Justice on 14 July 1988, the applicant endeavoured, pursuant to the first paragraph of Article 34 of the ECSC Treaty, to obtain compensation or equitable redress for the harm caused to it by the Commission's unlawful decisions. For that purpose, its chief executive made a direct approach to the Vice-President of the Commission, Mr Narjes, on 12 August 1988. A meeting between employees of the applicant and Commission officials was held on 21 September 1988. The Commission's representative, Mr Kutscher, stated on that occasion that the Commission could not pay compensation even for part of the harm suffered by the applicant since the quota system had come to an end on 30 June 1988 and the Commission no longer had the necessary means at its disposal to pay financial compensation. The chief executive of the applicant then wrote a further letter on 5 December 1988 to the Vice-President of the Commission, stating that the applicant, for reasons connected with the legal regime governing public limited companies and the applicable financial legislation, could not waive its right to compensation and might have to bring an action before the Court of Justice. A further meeting was held on 9 December 1988 between employees of the applicant and representatives of Directorate-General III of the Commission. At that meeting, Mr Kutscher emphasized that only a judgment of the Court of Justice could make the Commission pay compensation for the damage claimed by the applicant.

19 In a letter sent to the applicant on 28 December 1988, Mr Kutscher stated that, in view of the inferences to be drawn from the judgments of the Court of Justice of 14 July 1988, the applicant's I: P ratio as at 1 January 1986 was 65.8%. He stated that it was not possible to calculate the applicant's reference quantities and quotas for the following quarters taking account of those judgments. Finally, Mr Kutscher suggested that the Commission might waive any action in respect of alleged quota infringements by the applicant during the third and fourth quarters of 1986. As *quid pro quo*, the applicant should give an undertaking not to bring any further proceedings against the Commission in connection with the judgments given by the Court of Justice on 14 July 1988.

20 Further discussions between the parties proved fruitless and the applicant informed the Commission that, in its opinion, the 'reasonable time' mentioned in the second paragraph of Article 34 of the ECSC Treaty would come to an end at the beginning of April 1989 and that it proposed to bring an action for compensation before the Court of Justice if the Commission did not, before that date, submit to it a satisfactory proposal for compensation for the harm suffered by it.

21 The Commission did not accede to that request.

22 The Court of First Instance also notes that since, by judgment of 14 June 1989 in Joined Cases 218/87, 223/87, 72/88 and 92/88 *Hoogovens Groep BV and Others* v *Commission* [1989] ECR 1711, the Court of Justice annulled Article 5 of Commission General Decision No 194/88 ECSC of 6 January 1988 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry for the first half of 1988 (Official Journal 1988 L 25, p. 1, hereinafter referred to as 'General Decision No 194/88'), which repeated the terms of Article 5 of General Decision No 3485/85 and constituted the legal basis for the individual decisions taken by the Commission for the first and second quarters of 1988.

Procedure

23 By application lodged at the Registry of the Court of Justice on 3 July 1989, the applicant brought the present action against the Commission. It seeks compensation pursuant to Article 34 of the ECSC Treaty or, in the alternative, pursuant to

Article 40 of that Treaty, on the ground that the Commission failed to take within a reasonable time the measures necessary to comply with the judgments of the Court of Justice of 14 July 1988.

24 In support of its claim, the applicant submits that the unlawful decisions adopted by the Commission and annulled by the Court of Justice were vitiated by a fault of such a nature as to render the Community liable. It evaluates the special pecuniary damage suffered as a result of those unlawful decisions as amounting to a capital sum of DM 73 065 405. In the course of the proceedings, it raised its claim to a capital sum of DM 77 603 528. The damage, according to the applicant, constitutes the difference between the income which it would have been able to obtain if the Commission had properly granted it a higher delivery quota for the Community market, where prices were higher, and the income which it actually received as a result of having to sell at low prices in non-member countries.

25 By order of 15 November 1989, the Court of Justice referred the case to the Court of First Instance, pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

26 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure without any preparatory inquiry. At that stage of the procedure, the President of the Court designated an Advocate General.

27 The representatives of the party presented oral argument and their answers to the questions put to them by the Court at the hearing on 19 September 1990 and the Advocate General lodged his written opinion at the Registry of the Court of First Instance on 30 January 1991.

28 The applicant claims that the Court should:

(1) declare that the following Commission decisions are vitiated by a fault of such a nature as to render the Community liable:

(a) Article 5 of the general Commission Decision (ECSC) No 3485/85 of 27 November 1985, in so far as it does not allow the Commission to fix delivery quotas which it considers appropriate for those undertakings in which the ratio of delivery quota to production quota was appreciably lower than the Community average;

(b) the individual Commission decisions of 30 December 1985 and 21 March 1986, addressed to the applicant, in so far as they fix the applicant's delivery quotas for product categories Ia, Ib, Ic and III for the first and second quarters of 1986;

(c) the individual decisions addressed to the applicant fixing the applicant's delivery quotas for product categories Ia, Ib, Ic and III for the third quarter of 1986, and all the subsequent quarters until the second quarter of 1988 inclusive;

(d) the Commission's decision of 11 June 1985 refusing to adjust the applicant's quotas for products in category III for the first quarter of 1985, pursuant to Article 14 of general Decision No 234/84/ECSC;

(e) the subsequent decisions of the Commission refusing to adjust the applicant's quotas for category III products for the second, third and fourth quarters of 1985 pursuant to Article 14 of general Decision No 234/84/ECSC;

(2) order the Commission to pay the applicant DM 73 065 405 together with accumulated interest until the expiry of the quota system (on 30 June 1988), amounting to DM 8 079 885 and interest at 6% running from 1 July 1988;

(3) order the Commission to pay the costs.

29 The defendant contends that the Court should:

(1) dismiss the application;

(2) order the applicant to pay the costs.

Admissibility

30 The defendant contests the admissibility of the action based on Article 34 of the ECSC Treaty, on two grounds: first, there were no prior annulling decisions and, secondly, there was no prior decision of the Court of Justice finding a fault of such a nature as to render the Community liable.

The absence of prior annulling decisions

31 The defendant contends that the claim for redress based on Article 34 of the ECSC Treaty is inadmissible in so far as it relates to the individual decisions for the second, third and fourth quarters of 1985, the last two quarters of 1986, the four quarters of 1987 and the first two quarters of 1988, since those decisions have not been annulled by the Court of Justice.

32 In support of its contention, it states that an action under Article 34 of the ECSC Treaty is admissible only if a prior annulling decision has been obtained on the basis of Article 33 of the same Treaty (see judgment of the Court of Justice in Joined Cases 81/85 and 119/85 *Usinor* v *Commission* [1986] ECR 1777).

1. *The last three quarters of 1985*

33 The defendant contends that the requirement of prior annulment is not satisfied for the last three quarters of 1985 since no action for annulment was brought within the prescribed period of one month either against General Decision No 234/84 or against the individual decisions adopted it under it for those quarters.

34 The applicant, whilst conceding that in principle prior annulment is a precondition for an action based on Article 34 of the ECSC Treaty, claims that the absence of prior annulling decisions cannot in this case, having regard to the formal written assurances given to it by the Commission, prevent judgment from being given on the substance of the case.

35 It relies in that regard on correspondence between it and the defendant, including the following extract:

Letter dated 11 July 1985 from Mr Sedemund, Rechtsanwalt, to the Commission:

'...

Since the time-limit for the forthcoming action against the Commission's rejection decision of 11 June 1985 for the second quarter of 1985 is soon to expire, we should like to provide you with the following clarifications regarding the said proposal:

1. Our client undertakes not to bring an action against the rejection decision of 11 June 1985 for the second quarter of 1985 provided that the Commission gives it a firm assurance that, once judgment has been given by the Court of Justice in Case 103/84 (in fact 103/85) now pending before the Court, the Commission will give a fresh decision, within a short time and in conformity with the grounds of that judgment, on the application for adjustment of quotas under Article 14 of General Decision No 234/84 submitted by our client for the second quarter of 1985.

2. If the Commission reserves its decision on the applications made by our client under Article 14 of General Decision No 234/84/ECSC for the third and fourth quarters of 1985 until the Court of Justice has given judgment in Case 103/84 (in fact 103/85) and gives our client a firm assurance that it will then give a decision on those applications within a short time, in conformity with the grounds of the judgment, our client will refrain from bringing an action, within the period running from the date of lodgment of its applications, for failure to act as provided for in the third paragraph of Article 35.

...'

Letter of 12 July 1985 from Professor Wagenbaur replying to Mr Sedemund:

'...

1. As soon as judgment has been given in Case 103/84 (in fact 103/85), the Commission will without delay draw the appropriate inferences and will adopt a decision modifying, if necessary, the decisions previously taken by it. This is, moreover, merely a statement of the obvious.

2. At your express request, the Commission will reserve its formal decisions on the applications under Article 14 as from the third quarter of 1985 until judgment has been given in Case 103/85.'

36 The applicant states that it refrained from bringing further actions for annulment in reliance upon the undertakings which the Commission had thus given to it that it would, without delay, draw the inferences deriving from the judgment to be given by the Court of Justice in Case 103/85 (for the first quarter of 1985) and accordingly amend the individual decisions following that for the first quarter of 1985. It maintains that the agreement concluded between the parties was intended to avoid, in respect of those quarters, further actions for annulment which would be pointless in view of the fact that the subject matter of the disputes was the same. The applicant concedes, nevertheless, that, in their correspondence, the parties did not expressly refer to the possibility of compensation.

37 The applicant considers that the undertaking given by the defendant to conduct itself, with respect to the quarters subsequent to the first quarter of 1985, as if judgments of annulment had been delivered was perfectly clear, with regard both to redress under the quota system and to pecuniary compensation. The terms of the agreement do not, in its view, allow any other interpretation.

38 In that context, the applicant criticizes the defendant for frustrating its legitimate expectation by relying, despite the assurances given, on the absence of prior annulling decisions as a ground of inadmissibility.

39 It also considers that the exchange of letters between the parties reflects the conclusion between them of an agreement governed by public law whereby they agreed to extend the legal effects of Article 34 of the ECSC Treaty to the quarters for which the quota-fixing decisions had not been contested. Its right to compensation therefore derives, in its opinion, directly from that agreement in the event of its not arising directly from Article 34 of the ECSC Treaty.

40 For its part, the defendant replies that since the applicant did not apply for an adjustment of quotas based on the judgment to be given by the Court of Justice, the Commission confined itself to stating in its letter that the promised consequences would consist solely in the grant of a more favourable quota for the applicant. It envisaged, in mid-1985, maintaining the quota system for a period of three years as from 1 January 1986 and thereafter possibly adding to it an optional quota system under Article 46 of the ECSC Treaty. That is why the two parties implicitly envisaged the possibility of meeting any requests from the applicant by granting more favourable quotas. Since the quota system was still in force when the parties wrote to each other, both parties considered that the Court's decision would be given before the system came to an end on 30 June 1988. The defendant adds that compensation was not envisaged by the parties at any time.

41 It must be observed, in the first place, that, as the Court of Justice has held (see the judgment in Joined Cases 81/85 and 119/85 *Usinor*, cited above), an action to establish liability based on Article 34 of the ECSC Treaty is admissible only after the decision which allegedly caused the damage has been annulled and after it has been established that the Commission does not intend to take the steps necessary to redress the illegality found to exist.

42 The Court of First Instance finds in the present case, first, that no action for annulment under Article 33 of the ECSC Treaty was brought against the Commission's individual decision of 11 June 1985, in so far as it related to the second quarter of 1985, and, secondly, that no action for annulment under Article 35 of the ECSC Treaty was brought against the implied refusals in respect of the last two quarters of 1985, which are deemed to result from the absence of any decision taken in response to the requests from the applicant whose existence,

which is not contested by the Commission, is evidenced by the abovementioned exchange of letters. Those decisions are vitiated — as the Commission has conceded — by the same illegality as was the decision of 11 June 1985, which was annulled by the Court of Justice in its judgment of 14 July 1988 in Case 103/85 in so far as it related to the first quarter of 1985.

43 It must be remembered that in its judgment in Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris and Others and Greece* v *Commission* [1988] ECR 2181, paragraphs 29 and 30, the Court of Justice clarified the obligations deriving from a judgment of annulment for the institution from which the annulled measure emanated. It held that, upon the annulment of a decision whose effect is limited to a clearly defined period, 'the institution which adopted the measure is first of all under an obligation to ensure that new legislation adopted following the judgment annulling the previous measure . . . contains no provisions having the same effect as the provisions held to be illegal', and that 'by virtue of the retroactive effect of judgments by which measures are annulled, the finding of illegality takes effect from the date on which the annulled measure entered into force', concluding from this that 'the institution concerned is also under an obligation to eliminate from the regulations already adopted when the annulling judgment was delivered . . . any provisions with the same effect as the provision held to be illegal'.

44 The facts before the Court of First Instance in the present case, for the four quarters of 1985, are analogous to those in *Asteris.* Both cases involve legislative measures of general application, whose legality is not in question, serving as a legal basis for — explicit or implicit — implementing measures, whose effect is limited in time and of which only one has been annulled by a judgment of the Court of Justice.

45 *Asteris* involved Commission regulations relating to consecutive agricultural marketing years which were adopted on the basis of a Council regulation whose legality was not in issue. The Commission regulation relating to one of the agricultural marketing years concerned had been annulled by the Court of Justice in a first judgment and, in a second judgment, the Court held that the Commission was required to take, under Article 176 of the EEC Treaty, the measures necessary to comply with the annulling judgment not only with regard to the annulled regulation but also with regard to the regulation, of which the annulment had not been

sought, relating to the agricultural marketing year falling between that in respect of which the regulation had been annulled and the annulling judgment.

46 In the present case, the issue before the Court of First Instance is whether the Commission is required to take, under the first paragraph of Article 34 of the ECSC Treaty, the measures necessary to comply with the annulling judgment with respect to the second, third and fourth quarters of 1985. Those quarters have been the subject of an express refusal (the second quarter) and implied refusals (the third and fourth quarters) which essentially are the same as the decision annulled by the judgment of the Court of Justice of 14 July 1988 in Case 103/85, cited above, and were adopted after the date on which the annulled measure entered into force and before the annulling judgment.

47 It follows from the judgment of the Court of Justice in *Asteris*, cited above, that, for the application of Article 176 of the EEC Treaty, express or implied measures which are essentially the same as an annulled measure and were adopted between the date on which the annulled measure entered into force and the date of the judgment annulling them must be treated in the same way as the annulled measure. That approach must also be adopted in applying Article 34 of the ECSC Treaty, in so far as that provision is drafted in terms similar to those of Article 176 of the EEC Treaty as regards the obligation of the institution which adopted the annulled measure to take the measures necessary to comply with the annulling judgment.

48 The Court of First Instance notes that, in its letter of 12 July 1985, the defendant gave the applicant an undertaking that it would, without delay, draw the inferences from any annulling judgments of the Court of Justice and, if necessary, modify the decisions taken by it earlier. By describing the giving of that undertaking as a statement of the obvious, the defendant expressly recognized that it knew, as from 12 July 1985, that it was under an obligation to take, pursuant to the first paragraph of Article 34 of the ECSC Treaty, the measures necessary to comply with those annulling judgments not only in respect of the annulled measure but also in respect of subsequent measures having essentially the same content as the annulled measure.

49 It follows that, with respect to the claim based on Article 34 of the ECSC Treaty, the first objection of inadmissibility must be rejected in so far as it relates to the individual decisions for the last three quarters of 1985.

2. *The last two quarters of 1986, 1987 in its entirety and the first two quarters of 1988*

50 The defendant contends that the application is inadmissible in respect of the last two quarters of 1986, the four quarters of 1987 and, essentially, the first two quarters of 1988, in so far as the individual decisions fixing the quotas for those quarters were not the subject of any action for annulment.

51 It maintains that the subsequent annulment of Article 5 of General Decision No 3485/85, which constitutes the legal basis for the abovementioned individual decisions, was not capable of affecting those decisions. Since the latter became final after expiry of the period of one month specified in the third paragraph of Article 33 of the ECSC Treaty, their fate is independent from that of the general decision which provided the legal basis for them by reason of the requirements of the principle of legal certainty and of the principle of the authority of official measures, which preclude the possibility of overturning individual decisions by means of an action to establish liability brought after the expiry of the limitation period laid down in the third paragraph of Article 33 of the ECSC Treaty. It adds that, in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 *Stahlwerke Peine-Salzgitter AG and Hoogovens Groep BV* v *Commission*, cited above, the Court of Justice annulled not only General Decision No 3485/85 but also the individual decisions of 30 December 1985 and 21 March 1986 relating to the first two quarters of 1986.

52 The applicant, whilst conceding that a prior annulling decision is in principle a precondition for proceedings to be instituted under Article 34 of the ECSC Treaty, repeats that the absence of prior annulling decisions cannot in the present case, by reason of the formal written assurances given to it by the Commission, preclude a judgment on the substance of the case.

53 It relies in that respect on a second exchange of letters between it and the defendant, of which the following is an extract:

— Letter from Mr Sedemund to the Commission dated 23 April 1986:

'...

As you know, the Commission likewise did not change the I: P ratio in the individual decision of 21 March 1986 (SG(86) D/3433) fixing production and delivery quotas for the second quarter of 1986, notified on 3 April 1986. It would therefore be wise to bring, in respect of that quarter too, an action having the same substantive basis as that brought in Case 44/86, in order to ensure that the decision of 21 March 1986 does not become final.

In order to avoid an accumulation of actions having the same subject-matter — and the same problem arises for the following quarters throughout the period of validity of Decision No 3485/85/ECSC until such time as the Commission makes a lasting improvement to our client's I: P ratio — we propose the following arrangement, which, moreover, has already been entered into between the Commission and our client under Decision No 234/84/ECSC for the following quarters, which should be dealt with in Case 103/84 (in fact 103/85).

As soon as the Court of Justice has given judgment in Case 44/86, the Commission will without delay draw the necessary inferences, having regard to the grounds of that judgment, so as to modify not only the contested individual decision of 30 December 1985 concerning the first quarter of 1986 (SG(85) D/17043), but also all the subsequent decisions concerning our client's delivery quotas for the first quarter of 1986 and the following quarters throughout the period for which Decision No 3485/85/ECSC is applicable.

Once we have your confirmation that the Commission accepts this proposal, our client will refrain from instituting proceedings for failure to adjust its I: P ratio against the decision of 21 March 1986 and the subsequent decisions during the period for which Decision No 3485/85/ECSC is applicable. In view of the fact that time is now running, I should be obliged if you would kindly state your position by 1 May 1986 at the latest.'

— Letter of 16 May 1986 from Professor Wagenbaur replying to Mr Sedemund:

'...

As soon as the Court of Justice has given judgment in Case 44/86 (*Peine-Salzgitter* v *Commission*), the Commission will without delay draw the necessary inferences having regard to the grounds of that judgment and will, if necessary, modify the decisions taken by it previously. This applies to the first quarter of 1986 and to the following quarters.

I assume that these assurances — which, moreover, the Commission regards as a statement of the obvious — will enable you to refrain from bringing further actions for the subsequent quarters.'

54 The applicant states that it refrained from bringing further actions for annulment in reliance on the undertakings thus given to it by the Commission that it would without delay draw the inferences deriving from the judgment to be given by the Court in Cases 33/86, 44/86 and 110/86 (for the first two quarters of 1986), so as to modify the individual decisions following the first two quarters of 1986. It maintains that the purpose of the agreement concluded between the parties was to avoid, in respect of those quarters, further pointless actions for annulment which, having the same subject matter, would be pointless. The applicant concedes, nevertheless, that in their exchange of correspondence the parties did not expressly refer to the possibility of compensation.

55 It claims that the defendant cannot base any argument on the fact that the Court of Justice annulled not only General Decision No 3485/85 but also the individual decisions relating to the first two quarters of 1986, since, in so doing, the Court confined itself to upholding the claims brought before it by the parties, without thereby wishing to dissociate the fate of the individual decisions which were not contested from that of the general decision which constituted the legal basis for them. The applicant thus considers that the annulment of General Decision No 3485/85 entailed the annulment of the individual implementing decisions based on it.

56 In response to the argument as to non-observance of the limitation period laid down in the third paragraph of Article 33 of the ECSC Treaty, the applicant states that legal certainty is not affected in the present case since it was only for the purpose of keeping proceedings to a minimum that the applicant refrained from bringing further actions for annulment.

57 The defendant states in reply that procedural time-limits are mandatory and therefore the parties could not, by agreement, dispense with the limitation period laid down in the third paragraph of Article 33 of the ECSC Treaty. Even if the existence of such an agreement could be established it would be of no effect.

58 The Court of First Instance finds that, following the judgment of the Court of Justice in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86, annulling not only Article 5 of General Decision No 3485/85 but also the individual decisions of 30 December 1985 and 21 March 1986 in respect of the first two quarters of 1986, the Commission was under an obligation to eliminate from the measures already adopted when the annulling judgment was delivered any provisions with the same effect as the provisions held to be illegal, namely the individual decisions relating to the last two quarters of 1986, the four quarters of 1987 and the first two quarters of 1988. As regards the latter, it must be pointed out that those decisions have essentially the same effect as the annulled individual decisions, since they implement Article 5 of General Decision No 194/88, which is identical to Article 5 of General Decision No 3485/85 and, moreover, like the latter, has been annulled by the Court of Justice (judgment in *Hoogovens*, cited above).

59 The Court also notes that, in its letter of 16 May 1986, the defendant gave the applicant an undertaking that it would, without delay, draw the inferences from any annulling judgments of the Court of Justice and, if necessary, modify the decisions taken by it earlier. By describing that the giving of that undertaking as a statement of the obvious, the defendant expressly recognized that it knew, as from 16 May 1986, that it was under an obligation to take, pursuant to the first paragraph of Article 34 of the ECSC Treaty, the measures necessary to comply with those annulling judgments not only in respect of the annulled measures but also in respect of subsequent measures having essentially the same content as the annulled measures.

60 In that connection, the Court also observes that, if the Commission was under an obligation, by virtue of the first paragraph of Article 34 of the ECSC Treaty, to take the steps required to comply with an annulling judgment not only in respect of the annulled measure but also in respect of subsequent measures, covering successive periods and vitiated by the same illegality, it was, *a fortiori*, under an obligation to take those steps for all the measures implementing an annulled general measure.

61 In the present case, by annulling Article 5 of General Decision No 3485/85 and General Decision No 194/88 in its judgments in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 and Joined Cases 218/87, 223/87, 72/88 and 92/88, cited above, the Court of Justice deprived the individual decisions relating to the last two quarters of 1986, the four quarters of 1987 and the first two quarters of 1988 of any legal basis as from the date on which the annulled general provisions entered into force. Consequently, the Commission was required, in compliance with those annulling judgments, to take the same measures as those which it would have been under an obligation to take if those individual decisions had themselves been annulled.

62 It follows from the foregoing that, for the same reasons as those for which the Court rejected the first objection of inadmissibility, in so far as it related to the individual decisions for the last three quarters of 1985, it is also necessary to reject that objection in so far as it relates to the individual decisions relating to the third and fourth quarters of 1986, the four quarters of 1987 and the first two quarters of 1988.

The absence of a prior judgment of the Court of Justice finding the existence of a fault of such a nature as to render the Community liable

63 The defendant contends that the application for compensation is inadmissible on the ground that a finding of fault by the Court of Justice must precede the commencement of proceedings for damages on the basis of the second paragraph of Article 34 of the ECSC Treaty. It considers it to be imperative that, after a finding of fault, the Community be allowed an appropriate period in which to react to the threat of a pecuniary penalty. At the hearing, the defendant also stated, first, that it is not necessary for the application for a finding of fault to be

made in the same procedure as the application for annulment and, secondly, that the application for a finding of fault and the application for damages must be the subject of separate proceedings, since an application for damages is admissible only after the Court of Justice has found the existence of a fault of such a nature as to render the Community liable.

64 At the hearing, the applicant conceded that, pursuant to Article 34 of the ECSC Treaty, an appropriate period should in fact be allowed to the Commission after a finding of fault. But, in its view, that article does not preclude applications for a finding of fault and for damages in the same proceedings in cases where the period needed for the Commission to be able to react came to an end a considerable time earlier.

65 It must be pointed out that in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86, cited above, the Court of Justice confined itself to annulling Article 5 of General Decision No 3485/85 and the individual decisions adopted on 30 December 1985 and 21 March 1986, without thereby finding that the annulled provisions were vitiated by a fault of such a nature as to render the Community liable. Similarly, in its judgment in Case 103/85, cited above, the Court of Justice confined itself to annulling the individual decision of 11 June 1985 adopted under Article 14 of General Decision No 234/84, without thereby finding that that individual decision was vitiated by a fault of such a nature as to render the Community liable.

66 The Court of First Instance considers that where, following an annulling judgment, an undertaking exercises its right to bring an action seeking only a finding of fault on the part of the Community and of direct and special harm suffered by it, the consequential action for damages pursuant to the second paragraph of Article 34 of the ECSC Treaty may be brought only after the expiry of a reasonable period after the judgment establishing fault, so as to enable the Commission to take the appropriate steps to ensure equitable redress for the harm suffered and, to the extent necessary, to pay appropriate damages.

67 The claims in the present action are, first, for a finding by the Court, on the basis of the first paragraph of Article 34, of the existence of a fault of such a nature as to render the Community liable and for a finding that the applicant has suffered direct and special harm.

68 Consequently, the applicant's claim — at the same time — for an order, on the basis of the second paragraph of Article 34, that the defendant pay DM 77 603 528 is, at this stage, premature and must therefore be declared inadmissible.

69 It follows from the foregoing considerations that the applicant's claim, in so far as it is based on Article 34 of the ECSC Treaty, is admissible to the extent to which it seeks a declaration by the Court that the individual decisions relating to the four quarters of 1985, 1986 and 1987 and the first two quarters of 1988 are vitiated by a fault of such a nature as to render the Community liable and that they have given rise to the direct and special harm alleged by the applicant. On the other hand, the applicant's claim for pecuniary reparation in respect of those quarters is, at this stage, premature.

Substance

70 As regards the substance, it is necessary to consider, first, whether the unlawful decisions are vitiated by a fault of such a nature as to render the Community liable and, secondly, whether the applicant has suffered harm as a result of those decisions such as to justify redress.

The conditions as to liability under the ECSC Treaty

71 The applicant maintains that the decisions of the Court of Justice on the second paragraph of Article 215 of the ECSC Treaty cannot be extended to the present application, which is made on the basis of Article 34 of the ECSC Treaty, because of structural differences between those two provisions. It adds that it can, at most, merely glimpse the existence of a relationship between the second paragraph of Article 215 of the EEC Treaty and the first paragraph of Article 40 of the ECSC

Treaty. Finally, at the hearing, the applicant also maintained that the authors of the ECSC Treaty proceeded on the hypothesis that decisions of the Commission under the ECSC Treaty were essentially of merely administrative nature and that it was for that reason that, in that Treaty, powers were attributed almost exclusively to the Commission and not to the Council. Accordingly, the decisions of the Court of Justice on the second paragraph of Article 215 of the EEC Treaty which concern measures of a legislative nature, cannot be transposed as such for the purposes of applying Article 34 of the ECSC Treaty.

72 The defendant considers, on the other hand, that, for the purposes of the first paragraph of Article 34 of the ECSC Treaty, reference must be made to decisions of the Court of Justice on the second paragraph of Article 215 of the EEC Treaty for the meaning of the term 'fault of such a nature as to render the Community liable' in the case of an unlawful legislative measure. For that reason the defendant states that the Community's liability in respect of a legislative measure or of any measure involving choices of economic policy and the exercise of discretionary powers can be incurred only where there is a sufficiently serious breach of a superior rule of law for the protection of individuals or where the institution concerned manifestly and gravely disregarded the limits imposed on the exercise of its powers. It adds, referring to the judgment of the Court of Justice in Case 143/77 *Scholten-Honig* v *Council and Commission* [1979] ECR 3583, that the Community cannot incur liability except by 'conduct . . . verging on the arbitrary'.

73 The issue before the Court of First Instance is whether, in order to define the concept of fault of such a nature as to render the Community liable under the first paragraph of Article 34 of the ECSC Treaty, reference must be made to the criteria laid down by the Court of Justice in its decisions relating to the system of liability laid down in the second paragraph of Article 215 of the ECSC Treaty or whether the differing nature of the ECSC and EEC Treaties implies that different sets of conditions as to liability exist.

74 In the first place, it follows from decisions of the Court of Justice that there can be no fault of such a nature as to render the Community liable under the second

paragraph of Article 215 of the EEC Treaty unless the unlawful measure involves a sufficiently serious breach of a superior rule of law for the protection of the individual (see the judgments of the Court of Justice in Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975; Case 43/72 *Merkur Außenhandels GmbH* v *Commission* [1973] ECR 1055; Joined Cases 63/72 to 69/72 *Wilhelm Werhahn Hansamühle and Others* v *Council* [1973] ECR 1229; Case 153/73 *Holtz and Others* v *Council and Commission* [1974] ECR 675; Joined Cases 54/76 to 60/76 *Compagnie Industrielle et Agricole du Comté de Loheac and Others* v *Council and Commission* [1977] ECR 645; and Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH und Co. KG and Others* v *Council and Commission* [1978] ECR 1209) or where the institution, by adopting the unlawful measure, manifestly and gravely disregarded the limits composed on the exercise of its powers (see judgments of the Court in *Bayerische HNL*, above; Case 238/78 *Ireks-Arkady GmbH* v *Council and Commission* [1979] ECR 2955; Joined Cases 241/78, 242/78, 245/78 and 250/78 DGV, *Deutsche Getreideverwertung und Rheinische Kraftfutterwerke GmbH and Others* v *Council and Commission* [1979] ECR 3017; Joined Cases 116/77 and 124/77 *G. R. Amylum NV and Others* v *Council and Commission* [1979] ECR 3497; and Case C-152/88 *Sofrimport SARL* v *Commission* [1990] ECR I-2477).

75 It is also apparent from Articles 33 and 34 of the ECSC Treaty, read together, that the annulment of a Commission decision under Article 33 cannot result from the assessment of the situation deriving from economic fact or circumstances in relation to which that decision was adopted unless the Commission is accused of having misused its powers or having clearly disregarded the provisions of the Treaty or any rule of law for the application of the Treaty, and that the annulment of a Commission decision cannot render the Community liable under Article 34 unless direct and special harm has been suffered as a result and the competent court has recognized that the annulled decision was vitiated by a fault of such a nature as to render the Community liable.

76 It follows that the mere annulment by the Court of Justice of a legislative measure of the Commission is not sufficient to render the Community liable under the first paragraph of Article 34 of the ECSC Treaty.

77 In that connection, it must be observed that that conclusion, which is based on the very terms of the ECSC Treaty, is very close to what was decided by the Court of Justice, in relation to the EEC Treaty, regarding liability of the Community resulting from unlawful legislative measures.

78 In view of the need, within a single legal order, albeit one established by three different Treaties, to ensure as far as possible the uniform application of Community law relating to non-contractual liability of the Community resulting from unlawful legislative measures and the consistency of the system of judicial protection created by the various Treaties (see most recently the judgment in Case C-221/88 *Busseni* v *Commission* [1990] ECR I-519, paragraphs 13 to 16), it is appropriate, where a legislative measure is unlawful, to interpret the term 'fault of such a nature as to render the Community liable' in the first paragraph of Article 34 of the ECSC Treaty in the light of the criteria laid down by the Court of Justice in its decisions on the second paragraph of Article 215 of the EEC Treaty.

The consequences of the illegality found by the judgment of the Court of Justice of 14 July 1988 in Case 103/85

79 The applicant claims that the Commission decision of 11 June 1985 refusing to adjust, under Article 14 of General Decision No 234/84, the applicant's quotas for category III products for the first quarter of 1985, which the Court of Justice annulled by its judgment in Case 103/85, inasmuch as it was based on an erroneous interpretation of the said Article 14, is vitiated by a fault of such a nature as to render the Community liable. It considers that the Commission's incorrect interpretation of the terms 'exceptional difficulties' and 'aids . . . with a view to covering operating losses' contained in Article 14 of General Decision No 234/84 constitute a fault of such a nature as to render the Community liable.

80 The applicant also considers that the decisions whereby the Commission refused to adjust the applicant's quotas for the second, third and fourth quarters of 1985, which were not contested before the Court of Justice, are also vitiated by a fault of

such a nature as to render the Community liable, since they are vitiated by the same illegality as was the decision of 11 June 1985.

81 The applicant maintains, first, that it must have been clear to the defendant that it was not entitled, for the purposes of determining the existence of exceptional difficulties within the meaning of Article 14, to take account either of the situation of other categories of products or of the fact that the undertaking was profitable as a whole, since the Court of Justice had already held in Case 317/82 *Usine Gustave Boël and Fabrique de Fer de Maubeuge* v *Commission* [1983] ECR 2041 that the Commission might adjust quotas in exceptional circumstances where such an adjustment was necessary for categories subject to a high abatement rate.

82 It also states that, in several other cases, the Commission gave a correct interpretation of the concept at issue by granting additional quotas to undertakings which were achieving profits. This shows that the Commission must, in the present case, have been aware of its error.

83 The applicant also considers that it must have been clear to the Commission that the aid which had been granted to the applicant under the Directive of the Federal Minister for the Economy of 28 December 1983 on the grant of aid for structural improvement of steel undertakings, which was in fact capable of promoting restructuring and improving competitiveness, cannot be regarded as aid intended to cover operating losses within the meaning of Article 14 of General Decision No 234/84, since, according to the terms of the judgment of the Court of Justice in Case 250/83 *Finsider* v *Commission* [1985] ECR 131, such aid cannot constitute aid liable to delay the desired restructuring. By describing such aid as aid intended to cover operating losses, the Commission attributed a manifestly and overtly incorrect interpretation to the concept of aid granted with a view to covering operating losses within the meaning of Article 14.

84 For its part, the defendant contends that it made no manifest error in its interpretation of the term 'exceptional difficulties'. It states that, in its judgment in Case

317/82 *Usine Gustave Boel*, above, the Court of Justice merely held that only difficulties which are the direct consequence of the establishment and application of the quota system may be taken into account for the purposes of applying Article 14 and that, consequently, it is only for categories which are subject to a high abatement rate that an adjustment may, in exceptional circumstances, be rendered necessary and that the Court did not therefore explicitly define the new concepts of 'direct consequence' and 'exceptional circumstances'. According to the defendant, there was reliable evidence which led it to consider that the applicant's difficulties were attributable not to the quota system but to structural deficiencies of the undertaking, in particular, the excess capacity of its universal beam mill constructed in the 1970s.

85 The defendant contends, primarily, that it was not at all clear that the aid for structural improvement provided for in the abovementioned directive of the Federal Minister for Economy should not be regarded as aid granted with a view to covering operating losses. Whilst conceding that in its judgment in Case 250/83 *Finsider*, above, the Court of Justice enunciated the principle that all forms of aid which are in fact capable of promoting restructuring do not preclude the adjustment of quotas, the defendant contends that the Court did not thereby give a clear answer to the question whether the aid for structural improvement at issue in fact met that aim. It states that the extension of such aid to installations which were not operating at full capacity legitimately prompted the Commission to regard it as disguised aid intended to cover operating losses, since, according to its general decision number 2320/81/ECSC of 7 August 1981 establishing Community rules for aids to the steel industry (Official Journal 1981 No L 228, p. 14, commonly known as the 'ECSC Aid Code'), only definitive closures may be regarded as genuine restructuring measures.

86 The Court of First instance finds that the individual decision of 11 June 1985 refusing to adjust, under Article 14 of General Decision No 234/84, the applicant's quotas for the first quarter of 1985 was annulled by the Court of Justice pursuant to Article 33 of the ECSC Treaty for infringement of a rule of law relating to the application of the Treaty and that the Community cannot incur liability by reason of an individual decision annulled by the Court of Justice under

Article 34 unless that decision is also held to be vitiated by a fault of such a nature as to render the Community liable.

87 The Court observes that the individual decisions for the last three quarters of 1985 must be assimilated to that individual decision relating to the first quarter of 1985, since the Commission was under an obligation to draw the same inferences in relation to those decisions as in the case of the annulled decision.

88 The Community cannot incur liability by reason of its individual decisions refusing to adjust the quotas for the four quarters of 1985 unless the defendant manifestly and gravely disregarded the limits imposed on the exercise of its powers.

89 In that connection, it must be observed, in the first place, that, having regard to the judgment of the Court of Justice in Case 317/82 *Gustave Boël*, above, the defendant could not, when adopting the decisions refusing to adjust the quotas, have been unaware of the fact that it was not authorized to take into account, in determining the existence of exceptional difficulties, the position of other categories of products and consequently that it could not lawfully base its refusal on the fact that the undertaking was on the whole making a profit.

90 It follows that the interpretation adopted by the defendant was vitiated by a manifest error, regard being had to the wording of Article 14 of General Decision No 234/84 and the interpretation thereof by the Court of Justice.

91 Moreover, the seriousness of the error committed by the defendant is aggravated by two further circumstances, namely, first, that after interpreting the legislation in 1984 without taking account of the applicant's overall profitability, the defendant,

for no apparent reason, took the opposite approach as from 1985 and, secondly, that, as the Court of Justice stated in Case 103/85, above, it is apparent from the documents before the Court that, in several cases, the defendant granted additional quotas under Article 14 even though the undertakings concerned were achieving profits.

92 It must be concluded that the defendant has manifestly infringed the principle of equality of treatment as between economic agents.

93 It must be observed, in the second place, that in its judgment in Case 250/83 *Finsider*, above, the Court of Justice clearly laid down the principle that only undertakings which have received a form of aid which is likely to delay restructuring can be excluded from the benefit of additional quotas, the grant of which is likewise liable to reduce the incentive to undertake such restructuring.

94 Consequently, the defendant could not have been unaware, when adopting its decisions refusing to adjust the quotas for the four quarters of 1985, that the effect which an aid may have on the profit and loss account of an undertaking cannot be regarded as a valid criterion for the purpose of identifying aid granted with a view to covering operating losses within the meaning of Article 14, since the result of any aid may be to offset, wholly or in part, such operating losses as may arise.

95 It follows that the error committed by the defendant in interpreting the concept of operating losses must be described as inexcusable.

96 It follows from the foregoing that, by denying the applicant the benefit, for the four quarters of 1985, of the application of Article 14 of General Decision No 234/84, the defendant manifestly and gravely disregarded the limits to which

the exercise of its discretion is subject for the purpose of implementing the production quota system based on Article 58(2) of the ECSC Treaty and that, consequently, it committed a fault of such a nature as to render the Community liable under the first paragraph of Article 34 of the ECSC Treaty.

The consequences of the illegality found by the judgment of the Court of Justice in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 and the judgment of the Court of Justice in Joined Cases 218/87, 223/87, 72/88 and 92/88

97 The applicant considers that General Decision No 3485/85 and the individual decisions based on it are vitiated by a fault of such a nature as to render the Community liable, since the Court of Justice held in its judgment in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 that the defendant had pursued a purpose different from that laid down in Article 58(2) of the ECSC Treaty by failing to alter the I: P ratio, which it had considered necessary in order to establish quotas on an equitable basis, and that it had thus committed a manifest misuse of powers affecting the applicant. It was on the basis of that finding that the Court of Justice annulled Article 5 of General Decision No 3485/85 and the individual decisions based on it fixing the delivery quotas for the applicants for the first two quarters of 1986.

98 The applicant claims that, by not proceeding on its own initiative to change the applicant's I: P ratio, the Commission committed a particularly grave infringement of Article 58(2) of the ECSC Treaty since, in the first place, by acting in that way it acted in disregard of its own communication to the Council of 25 September 1985 in which it expressed the view that it was necessary to adjust the reference quantities adopted for the calculation of the delivery quotas and because, secondly, the Commission, by seeking the assent of the Council, failed to take account of the judgments of the Court of Justice in Case 244/81 *Klöckner-Werke AG* v *Commission* [1983] ECR 1451 and Joined Cases 140/82, 146/82, 221/82 and 226/82 *Walzstahl-Vereinigung and Thyssen AG* v *Commission* [1984] ECR 951.

99 The applicant also contests the defendant's contention that it was the victim of an error in law, arguing that, in the light of previous decisions of the Court of Justice and in particular of its judgment in Case 244/81 *Klöckner-Werke*, above, the legal situation was perfectly clear. It also observes that the Commission adopted its General Decision No 1433/87/ECSC of 20 May 1987 on the conversion of a proportion of the production quotas into quotas for delivery within the Common Market (Official Journal 1987 L 136, p. 37) without seeking the assent of the Council.

100 Referring to the judgment of the Court of Justice in Case 238/78 *Ireks-Arkady*, above, the applicant submits that the Commission manifestly and gravely disregarded the limits on the exercise of its powers, since there was insufficient justification for its conduct.

101 It also maintains that, even assuming that there can be a grave disregard, on the part of the Commission, of the limits on the exercise of its powers only to the extent to which its conduct is held to be verging on the arbitrary, it is established in the present case that the defendant placed it at a disadvantage and deliberately caused it harm for reasons of political expediency by sacrificing, under political pressure, rights which it had acknowledged to be vested in the applicant.

102 Finally, the applicant states that, in any event, mitigation of liability, which is liable to be invoked by the defendant in respect of decisions involving choices of economic policy made in exercise of the wide discretion conferred on it by the ECSC Treaty, cannot be relied on with respect to decisions deriving from an incorrect legal assessment since legal assessments do not fall within the area specific to the assessment of choices of economic policy.

103 At the hearing, Counsel for the applicant also claimed that such mitigation of the liability of the Community may be invoked only with respect to legislative measures characterized by the exercise of a discretionary power. Referring to the fact that, in its judgment in Joined Cases 33/86, 44/86, 110/86, 226/86 and

285/86, above, the Court of Justice described the adjustment of quotas as forming part of the details of the system, the applicant asserts that Article 5 of General Decision No 3485/85 cannot be described as a legislative measure characterized by the exercise of a discretionary power.

104 The defendant counters those complaints by arguing that its action was based on an error in law. Since the Court of Justice held in its judgment in Case 244/81 *Klöckner-Werke*, above, that the Commission is vested with its own powers for the purpose of determining the detailed arrangements of the quota system, but did not clearly lay down the limits of the powers conferred on the Commission, the defendant considers that it had due reason to treat adjustment of the I: P ratio not as a matter of detail but, rather, as a measure of an essential nature calling for the assent of the Council.

105 It adds that only the judgment of the Court of Justice in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 has classified adjustment of the I: P ratio as forming part of the details of the production quota system set up on the basis of Article 58 of the ECSC Treaty.

106 The defendant also contends that there can be no grave disregard by an institution of the limits on the exercise of its powers unless it has engaged in conduct verging on the arbitrary. In any event, there can be no question in the present case of the Commission's being accused of arbitrary conduct inspired by a deliberate intent to place the applicant at a disadvantage, since, by seeking the Council's assent for adjustment of the I: P ratio, the defendant specifically endeavoured to take account of the applicant's preoccupations.

107 The Court of First Instance observes that, pursuant to the first paragraph of Article 34 of the ECSC Treaty, the Community can be rendered liable by virtue of a decision annulled by the Court of Justice only where the latter has also held that

the decision was vitiated by a fault of such a nature as to render the Community liable, mere annulment not being sufficient to render the Community liable.

108 It is therefore necessary to decide whether the annulled Commission decision was the result of an erroneous, but excusable, approach to an unresolved legal question or whether, on the contrary, it was the result of manifest and grave, and therefore inexcusable, disregard by the Commission of the limits on the exercise of its powers.

109 In that regard, the Court observes that the Court of Justice held, in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86, above, that, by failing to adjust the I: P ratio which it itself considered necessary in order to place the quotas on an equitable basis, the defendant had committed a misuse of powers. By declaring that Article 5 of General Decision No 3485/85 was unlawful by reason of misuse of powers, the Court of Justice clearly criticized, under the second sentence of the first paragraph of Article 33 of the ECSC Treaty, a legislative measure characterized by the exercise of a discretionary power of appraisal. That observation applies also to Article 5 of General Decision No 194/88, which was annulled by the Court of Justice for the same reasons in its judgment in Joined Cases 218/87, 223/87, 72/88 and 92/88, since the said Article 5 reiterated the terms of Article 5 of General Decision No 3485/85.

110 The Court of Justice held that the individual decisions adopted each quarter to fix the applicant's production and delivery quotas on the basis both of Article 5 of General Decision No 3485/85 and on that of Article 5 of General Decision No 194/88 constituted decisions for the implementation of the said general decisions and should therefore be annulled. That means, therefore, that they were necessarily affected by the same misuse of powers as that which vitiated the general decisions which provided the legal basis for them.

111 The Court of First Instance considers that, in the circumstances of the present case, the misuse of powers found by the Court of Justice and the patent disregard

of both Article 58(2) of the ECSC Treaty and the principle of equal treatment constitute a fault of such a nature as to render the Community liable within the meaning of the first paragraph of Article 34 of the ECSC Treaty.

112 It must be pointed out, in the first place, that in its judgment in Case 244/81 *Klöckner*, above, the Court of Justice clearly established that the Council's assent was required only for the establishment of the production quota system based on Article 58 of the ECSC Treaty, so that the Commission did not in any way exceed the powers vested in it by Article 58 by fixing different production and reference quantities for the application of the abatement rates to apply to the determination of, respectively, the production quota and the part of production which might be delivered within the Common Market.

113 Secondly, the Commission itself considered in Case 119/81 *Klockner* v *Commission* [1982] ECR 2627 'that the requirement of assent laid down in Article 58 is therefore satisfied once the Council has approved in principle the introduction of a quota system' and that it is 'not necessary . . . for the Council to give its opinion on the details of the system'.

114 It must be observed, finally, that in its judgment in Joined Cases 140/82, 146/82, 221/82 and 226/82 *Walzstahl and Others* v *Commission* [1984] ECR 951, the Court of Justice clearly indicated that the powers conferred on the Commission by the ECSC Treaty would be diverted from their legal purpose if it appeared that the Commission had made use of them with the exclusive, or at any rate main, purpose of evading a procedure specifically prescribed for dealing with the circumstances with which it is required to cope.

115 The Court finds that, in the present case, the defendant, after examining the particular situation of Peine-Salzgitter and Hoogovens and concluding, in discussions with the undertakings concerned within the Advisory Committee and, in particular, in its communication to the Council of 25 September 1985, that the I: P ratios of those undertakings should be adjusted with a view to placing the quotas on an equitable basis, did not thereby adopt, on the basis of Article 58(2) of the ECSC Treaty, the provisions necessary in order to give effect to that

conclusion. Despite the fact that the Council had already given its assent to the principle of the establishment of a quota system, the defendant did no more than submit a draft to the Council on the basis of Article 58(1), even though it could not have been unaware that it was not necessary for the Council to express its view on the fixing of production and reference quantities for the purpose of applying the abatement rates for the determination of the production and delivery quotas for each undertaking.

116 The Court also finds that, not having obtained the assent of the Council, the defendant adopted General Decisions Nos 3485/85 and 194/88 without making any adjustment to them regarding the delivery quota system.

117 In view of the foregoing, the Court considers, first, that the defendant could not have been unaware that it was under an obligation to determine the delivery quotas on an equitable basis, under its own responsibility alone, ensuring that the principle of equality in the field of public charges is always most scrupulously observed (see the judgment in Joined Cases 14/60, 16/60, 17/60, 20/60, 24/60, 26/60, 27/60 and 1/61 *Meroni and Others* v *High Authority of the ECSC* [1961] ECR 161), and, secondly, that it could not have been unaware that, as a result of its failure to discharge that obligation, the principle of equitable allocation of delivery quotas had not been observed in the case of a limited number of undertakings for which the I: P ratio had become exceptionally unfavourable.

118 It follows that, by adopting Article 5 of General Decision No 3485/85 and the individual decisions adopted to implement that article and Article 5 of General Decision No 194/88 and the individual decisions adopted to implement that article, the Commission manifestly and gravely disregarded the limits on the exercise of its discretionary power in implementing the production quota system based on Article 58(2) of the ECSC Treaty, having thus committed a fault of such a nature as to render the Community liable within the meaning of the first paragraph of Article 34 of the ECSC Treaty.

The harm

119 It is also necessary to decide whether, as a result of the decisions held above to be vitiated by a fault of such a nature as to render the Community liable, the applicant suffered direct and special harm, represented by the difference between the income which it would have been able to achieve if the Commission had properly allowed it a higher delivery quota for the Community market where the prices were higher and the income which it actually achieved as a result of being obliged to sell at low prices in non-member countries.

The direct nature of the harm

120 The applicant claims that it is necessary to consider whether the same harm would have been caused in the absence of the unlawful act. In the present case, it considers that the Commission's unlawful decisions directly caused the harm suffered by it, by preventing it from charging higher selling prices for the additional quantities which it would have been able to dispose of in the Community if the unlawful decisions had not been adopted.

121 The defendant contends that the alleged harm stemmed from causes other than the unlawful decisions adopted by the Commission namely, in particular, the level of prices prevailing on the world market, which the defendant was unable to control. Moreover, the causal link is to be sought in the individual decisions which were not contested and not in the general decisions which were annulled. Finally, the applicant, which survived the crisis unscathed thanks to the quota system, can have no grounds, now that it is again achieving comfortable profits, for claiming, after the quota system has ceased to exist, that it suffered damage.

122 The Court takes the view that, whilst it is true, on the one hand, that undertakings cannot, in order to justify their right to compensation, base any argument on the fact of restrictive measures imposed under the quota system in the interests of restoring the health of the market and their longer-term profitability, it cannot be conceded, on the other hand, that the Commission is entitled to escape its responsibilities merely because, when the quota system came to an end, favourable economic conditions in the steel industry enabled the undertakings which had survived the crisis to achieve profits once more.

123 Furthermore, whilst it is true that the initial damage was caused by, inter alia, General Decisions Nos 3485/85 and 194/88, which were held to be unlawful, the fact nevertheless remains that certain individual decisions were also annulled by the Court of Justice as being vitiated by the same illegality as General Decision No 3485/85 and that all the other individual decisions — although not annulled — were similarly unlawful and would therefore have been dealt with in the same way if they had been the subject of proceedings for annulment before the Court of Justice. Moreover, with respect to 1985, the damage was caused by an individual decision which was annulled by the Court of Justice and by three other individual decisions which — although not annulled — were vitiated by the same illegality.

124 Moreover, the harm suffered by Peine-Salzgitter resulted not from the fall in steel prices on the markets of certain non-member countries but rather from the fact that it was compelled, as a result of successive unlawful Commission decisions, to dispose of its production on those markets under unprofitable conditions.

125 Finally, it must be pointed out that the applicant is not seeking to recover the relative market shares that it claims to have lost by comparison with its competitors which improperly benefited from the delivery quotas which were unlawfully withheld from it but is seeking pecuniary reparation for direct harm caused by unlawful decisions which were vitiated by a fault of such a nature as to render the Community liable.

126 It must therefore be held that it was the improper conduct of the Commission which caused the harm of which the applicant complains.

The special nature of the harm

127 The applicant maintains that in this case the harm suffered exceeded the 'common misery' which had to be borne uniformly by all the economic agents concerned. In fact, only the applicant and Hoogovens suffered loss of income as a result of the Commission's refusal to adjust their I: P ratio.

128 It also points out that the Court of Justice expressly found in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 that the applicant was subject to 'exceptional difficulties'.

129 Finally, the applicant claims that the issue is not whether or not it has been profitable since the quota system came to an end but rather whether it was subject to discrimination during the currency of that system. In its view, its competitors achieved on the Community market, as a result of the Commission's conduct, additional profits which should have accrued to the applicant. The loss of profit suffered by the applicant during the period from the first quarter of 1985 to the second quarter of 1988, resulting from the unlawful decisions of the Commission, definitively undermined the applicant's investments and the repayment of its debts. It has been placed at a disadvantage because, since the quota system came to an end, it has had to respond to a new competitive situation whilst at the same time bearing the burden of the losses which it suffered in the past.

130 The defendant contends that in this case there is no harm to be redressed under Article 34 of the ECSC Treaty which, as the Court of Justice has held (see the order of 2 May 1988 in Case 92/88 R *Assider* v *Commission* [1988] ECR 2425), requires an enduring 'loss of relative position'. Since the quota system has been abolished, that requirement of enduring harm is not met because the undertakings, exposed to competition once again, now have an opportunity to increase their market shares and can thereby offset the losses suffered when the quota system was in force. It adds that it was thanks to the quota system and the positive economic climate created by the Community that the applicant was enabled once again to achieve comfortable profits in a restored market.

131 It must be pointed out that the concept of special harm involves, on the one hand, harm of particular intensity and, on the other, an impact upon a limited and identifiable number of economic agents.

132 With regard to the special nature of the harm suffered as a result of the application of Article 5 of General Decision No 3485/85, it must be stated that

the finding of the Court of Justice in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 that 'it is an established and undisputed fact that these unfavourable I: P ratios entail exceptional economic difficulties for the applicants' justifies the conclusion that the harm suffered as a result of the illegality by which the Commission decisions were vitiated considerably exceeds what a private person may be required to bear, within reasonable limits, without being able to obtain compensation out of public funds by reason of his economic interests being adversely affected by an unlawful legislative measure.

133 Secondly, the requirement that a limited and identifiable number of economic agents be affected is also fulfilled, since nine steel undertakings, individually named, suffered considerable difficulties as a result of a particularly unfavourable I: P ratio.

134 As regards the special nature of the harm resulting from the annulled decision of 11 June 1985 and the decisions relating to the last three quarters of the same year, refusing to adjust the delivery quotas in accordance with Article 14 of General Decision No 234/84, it must be observed, first, that in a letter sent to the applicant in December 1988 the Commission itself assessed as 7 000 tonnes per quarter for 1985 the additional tonnage covered by Article 14, that estimate being confirmed by the estimate of additional tonnages furnished by the applicant itself. That loss considerably exceeds the limits of what may reasonably be required of a private person.

135 The requirement that a limited and identifiable number of economic agents be affected by the unlawful decisions is also met by virtue of the fact, which is not contested by the defendant, that only Peine-Salzgitter was denied by the Commission any adjustment of its I: P ratio for 1985, under Article 14 of General Decision No 234/84.

136 It has thus been proved that the Commission, without justification, failed to observe equality of treatment as between economic agents, thereby adversely affecting a limited and clearly defined group of economic agents and that the damage alleged goes beyond the bounds of the economic risks inherent in the

activities of the sector concerned (see the judgments in Case 238/78 *Ireks-Arkady*, above; Joined Cases 241/78, 242/78, 245/78 to 250/78, *DGV*, above; and Joined Cases 261/78 and 262/78 *Interquell and Diamalt* v *Council and Commission* [1979] ECR 3045).

137 It follows from the foregoing considerations that the individual decisions for the four quarters of 1985, 1986 and 1987 and the first two quarters of 1988 are vitiated, within the meaning of the first paragraph of Article 34 of the ECSC Treaty, by a fault of such a nature as to render the Community liable and that, as a result of those decisions, the applicant suffered direct and special harm.

138 It is therefore necessary to refer the matter back to the Commission, which must take the necessary steps to ensure equitable redress for the harm resulting directly from all the individual decisions listed above and, where necessary, to pay appropriate damages.

Costs

139 Pursuant to Article 69(2) of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to proceedings before the Court of First Instance, an unsuccessful party is to be ordered to pay the costs if they are asked for in the opposite party's pleadings. In the present case, the defendant has essentially failed in its pleas, except as regards the claim for payment of DM 77 603 528. It is therefore appropriate to order the defendant to pay its own costs and to pay 90% of the applicant's costs. The applicant shall bear 10% of its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber),

hereby:

(1) Declares that the following Commission decisions are vitiated by a defect of such a nature as to render the Community liable:

(a) the decisions of the Commission refusing to adjust pursuant to Art. 14 of General Decision No 234/84/ECSC, the applicant's delivery quotas for category III products for the four quarters of 1985;

(b) the Commission decisions adopted under Article 5 of General Decisions Nos 3485/85/EEC and 194/88/ECSC, fixing the applicant's delivery quotas for products in categories Ia, Ib, Ic and III with effect from the first quarter of 1986 until the second quarter of 1988 inclusive;

(2) Declares that applicant has suffered direct and special harm as a result of those decisions;

(3) Dismisses the claim for payment of the sum of DM 77 603 528, together with interest, on the ground that it is premature;

(4) Refers the case to the Commission, which is required to adopt appropriate measures in order to ensure equitable redress for the harm directly resulting from the decisions mentioned above, and to pay appropriate damages as far as may be necessary;

(5) Orders the Commission to bear its own costs and 90% of the applicant's costs. The applicant shall bear 10% of its own costs.

Cruz Vilaça Schintgen

Edward García-Valdecasas Lenaerts

Delivered in open court in Luxembourg on 27 June 1991.

H. Jung
Registrar

J. L. Cruz Vilaça
President