OPINION OF JUDGE BIANCARELLI OF THE COURT OF FIRST INSTANCE delivered on 30 January 1991 *

Contents

* Original language: French.

Mr President,
Members of the Court,

Before the Court is an application brought by Stahlwerke Peine-Salzgitter AG ('Peine-Salzgitter') based on both the first paragraph of Article 34 and the first paragraph of Article 40 of the ECSC Treaty for a declaration that the Community has incurred non-contractual liability as a result of a number of illegal acts committed by the Commission in applying the quota system for steel. The application seeks, first, declarations that several Commission decisions are vitiated by faults of such a nature as to render the Community liable and, secondly, an order that the Commission pay the applicant the principal sum of DM 77 603 528 plus interest. It follows on directly from two judgments of the Court of Justice of 14 July 1988: the first was given in Case 103/85 [(1988] ECR 4131) and the second in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86 ([1988] ECR 4309).

The application raises new and important legal issues, together with complex and delicate questions of fact. What is the relationship between Articles 34 and 40 of the ECSC Treaty? What is the system of non-contractual liability to be applied under the ECSC Treaty in respect of maladministration resulting from an unlawful measure? Having regard in particular to the illegal acts found by the Court of Justice in the judgments cited above, did the Commission commit any fault of such a nature as to render the Community liable? Is there any harm capable of redress and, if so, is it sufficiently direct and special? What is the scope of the right of redress in proceedings to establish liability under the ECSC Treaty?

It is appropriate to consider successively:

I — The factual and legal background;

II — The problems of admissibility arising in the present action in relation to both Article 34 and Article 40 of the ECSC Treaty;

III — The problems concerning the existence in this case of a fault of such a nature as to render the Community liable; and finally,

IV — The problems concerning the damage alleged by the applicant.

I — Factual and legal background

1. *The production and delivery quota system for steel*

From 1973 to 1988, the Community steel industry experienced considerable difficulties caused in particular by the recession which affected all economic activities and brought about a drop in demand for steel products both in the Community markets and in those of non-member countries.

Those difficulties, which are often described as short term, were exacerbated by other problems, in particular the arrival in the common market of very competitive products manufactured in non-member countries and by the structural difficulties experienced by the Community steel industry associated with the fact that much of its plant was extremely outdated. This combination of factors led to substantial excess capacity at a time of considerable fall-off in demand for steel, giving rise to a fall in prices which jeopardized the viability of a large number of the steel undertakings in the Community.

In order to remedy that situation, or at least mitigate its effects, the Commission adopted certain measures which initially involved the observance of certain minimum prices and affected the volume of imports from non-member countries. The Commission also took measures for the purpose of reorganizing the industry, one of which involved drawing up an aids code to coordinate at Community level the aid granted by the Member States which was liable to distort competition in a market that was already in turmoil.

But, what is more, in view of the constant worsening of the situation in the steel market, taking the form of a precipitous decline in demand and a collapse of prices in the third quarter of 1980, the Commission, having determined that there was a 'manifest crisis' within the meaning of Article 58 of the ECSC Treaty, introduced by General Decision No 2794/80/ECSC of 31 October 1980, which was adopted with the assent of the Council, a production quota system for the Community steel undertakings.[1] That system involved, for each of the categories of product covered by it, the application of a uniform abatement rate to the actual production of all the undertakings concerned in a given reference period, namely the years 1977 to 1980. The system also involved the application of abatement rates to that part of the undertakings' production which might be delivered in the common market. However, that general decision allowed certain exceptions to the system of uniform abatement: thus, reference production was increased for undertakings in certain clearly defined situations arising, in particular, from their having taken measures in conformity with the Community steel policy; moreover, Article 14 of that decision conferred on the Commission the power to adapt certain of its provisions, at the request of the undertaking concerned, where the restrictions on production or delivery imposed by the general decision or by its implementing measures created exceptional difficulties for that undertaking.

Thus, under that severely circumscribed and interventionist system, each quarter the Commission fixed the production quotas for each undertaking and the part of that quota that might be delivered within Community territory, that part being commonly known as the 'delivery quota'. The two types of quota were fixed according to the reference production and quantities determined when the system was introduced, after the application thereto of certain abatement rates which were fixed quarterly. They also differed according to the category of steel products concerned.

1 — OJ 1980 L 291, p. 1.

It is thus apparent from the outset that the ratio between the production quota (the 'P quota') and the delivery quota (the 'I quota') was of essential importance since the production that was not disposed of within Community territory, where the prices were attractive, necessarily had to be disposed of in non-member countries where the prices were substantially lower than the Community prices.

That complex system, described as 'verstaatlichte Marktordnung' (State regulation of the market),[2] was extended on several occasions with a view to improving and perfecting it, until it was abolished, that is to say until 30 June 1988, on which date free competition was re-established against a background of favourable prevailing market conditions, even though the process of reorganizing the European steel industry had not yet been completed. Thus the system of production and delivery quotas for steel, introduced by the abovementioned Commission Decision No 2794/80, itself modified on four occasions, was extended a first time by Commission Decision 1696/82/ECSC of 30 June 1982,[3] which was also modified on four occasions, then by Commission Decision No 1809/83/ECSC of 29 June 1983,[4] then by Commission Decision No 2117/83/ECSC of 28 July 1983,[5] which was also modified on three occasions, then by Commission Decision 234/84/ECSC of 31 January 1984,[6] then by Commission Decision 3485/85/ECSC of 27 November 1985,[7] which was modified on two occasions, in particular by Commission Decision No 1433/87/ECSC of 20 May 1987, on converting a proportion of the production quotas into quotas for delivery in the common market,[8] and finally by Commission Decision No 194/88/ECSC of 6 January 1988,[9] which was the last extension, lasting until the system was abolished on 30 June 1988. The damage which the applicant claims to have suffered relates to the conditions for the application of the last four decisions and covers the period from the first quarter of 1985 to the second quarter of 1988 inclusive.

2. *The annulling judgments delivered by the Court of Justice*

(a) *Generalities*

As has been seen, the establishment by each of the general decisions of the principles or exceptional procedures allowing determination of the I: P ratio, in other words the part of production which might be disposed of on the Community market at attractive prices and, consequently, the part of the production which had to be disposed of on the markets of non-member countries at considerably lower prices, was of essential importance. It was on precisely those points that the applicant company brought two actions before the Court of Justice.

The first action for annulment related to an individual decision implementing Article 14 of

2 — See Dr J. F. Meinhold, 'Nichtigkeitsurteil, Widergutmachungsmaßnahmen und Schadensersatz gemäß Artikel 34 EGKSV', *Recht der Internationalen Wirtschaft 1989*, No 6.

3 — OJ 1982 L 191, p. 1.

4 — OJ 1983 L 177, p. 5.

5 — OJ 1983 L 208, p. 1.

6 — OJ 1984 L 29, p. 1.

7 — OJ 1985 L 340, p. 5.

8 — OJ 1987 L 136, p. 37.

9 — OJ 1988 L 25, p. 1.

General Decision No 234/84, which empowered the Commission to adjust, for the quarter in question, the part of the quotas which might be delivered in the common market if the quota system had caused exceptional difficulties for an undertaking and if, moreover, the undertaking had received no aid to cover operating losses and had not been penalized under the price rules or had paid fines.

The second action for annulment was directed against both Article 5 of General Decision No 3485/85 and certain individual decisions adopted on the basis of the said Article 5.

In both cases, the Commission was accused of having committed a number of illegal acts and thereby having failed to implement a system under which the applicant would be allowed fair delivery quotas, having regard to its specific situation.

The applicant's action was successful in both cases. Referring to settled case-law and relying in particular on Articles 3, 4 and 5 of the ECSC Treaty which prohibit all discrimination as between the undertakings covered by the Treaty, the Court of Justice stressed the need, in a period of crisis, where, as a result of administrative control, quantitative competition between undertakings is de facto eliminated and where an artificial balance is created between supply of and demand for steel, to respect in full the principle of fairness laid down in Article 58 of the Treaty. As early as 1961 in its judgment in *Meroni*,[10] the Court held that 'the High Authority must take particular care to ensure that the principle of equality in the field of public charges is always most scrupulously observed' and from this it inferred that the High Authority had been right to give precedence to the principle of distributive justice rather than to that of legal certainty. Similarly, in its judgment of 3 March 1982,[11] the Court recognized the Commission's freedom of choice concerning determination of the reference period, whilst at the same time making it clear that such a choice must not lead to breach of the principle whereby total production must be shared on an equitable basis between the various Community undertakings. That finding was confirmed by the judgment of 19 September 1985[12] in which the Court laid particular emphasis on the criterion of equitable distribution of the production and delivery quotas between the various Community undertakings, by the judgment of the Court of 21 February 1984[13] and, finally, by the judgment of 6 July 1988[14] in which the Court held expressly that 'the purpose of the quota system . . . is . . . to spread in the most equitable manner possible amongst all undertakings the limitations on production required by the steel crisis'.

In such circumstances, when the economic crisis had thus brought about the emergence of two new general principles of law relating to the European Coal and Steel Community, first, that of solidarity as between the various undertakings and, secondly, that of equitable distribution of the sacrifices to be made, how were the two actions for annulment brought by the applicant presented?

10 — Joined Cases 14/60, 16/60, 17/60, 20/60, 24/60, 26/60, 27/60 and 1/61 *Meroni et Cie and Others* v *High Authority* [1961] ECR 161.

11 — Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749

12 — Joined Cases 63/84 and 147/84 *Finsider* v *Commission* [1985] ECR 2857

13 — Joined Cases 140/82, 146/82, 221/82 and 226/82 *Walzstahl-Vereinigung and Thyssen* v *Commission* [1984] ECR 951

14 — Case 236/86 *Dillinger Huttenwerke AG* v *Commission* [1988] ECR 3761

(b) *In Case 103/85, above, Peine-Salzgitter brought before the Court of Justice an action for the annulment of the individual decision by which the Commission refused to adjust its delivery quotas for category III products for the first quarter of 1985* under Article 14 of General Decision No 234/84. Although, aware of the difficulties experienced by the applicant because of its particularly unfavourable I: P ratio, the Commission agreed, for the second, third and fourth quarters of 1984, to proceed, on the basis of Article 14 of the same general decision, to make an appropriate adjustment of the part of the quota which might be delivered in the common market, it refused to do so for the first quarter of 1985. The Court first observed that, for the steel products in question, which represented a substantial proportion of the undertaking's total production, the ratio between the production quota and the part of that quota which might be delivered within the common market, namely the I: P ratio, was 'exceptionally unfavourable for the applicant both in absolute terms and in comparison with the Community average and was at the relevant period some 24% less than that of the Community average for the said category'.

The Court of Justice went on to examine the substance of the two grounds relied upon by the Commission, namely, first, that the applicant was not experiencing any exceptional difficulties and, second, that it had received aid intended to cover its operating losses.

On the first point, the Court of Justice had no difficulty in rejecting the Commission's view, referring to its earlier decision [15] according to which the Commission may not, in determining whether exceptional difficulties exist, take account of the position of other categories of products and may not base its reasoning on the fact that the undertaking is on the whole profitable. Moreover, the Court also pointed out that it was apparent from the documents before it that in several cases the Commission had granted additional delivery quotas under Article 14 even where the undertakings concerned were in fact profitable.

With respect to the classification of the contested aid paid by the German Government, the Court of Justice, again referring to its own case-law and in particular to its judgment of 15 January 1985, [16] considered that 'aid which in practice is likely to promote the desired restructuring and improvement in competitivity cannot be regarded as aid intended to cover operating losses within the meaning of Article 14 of the general decision now in force'.

That was indeed so, in that case, with the result that the Commission had committed a two-fold error of law and the Court of Justice proceeded to annul its decision of 11 June 1985 refusing to adjust, pursuant to Article 14 of General Decision No 234/84, the applicant's quotas for category III products for the first quarter of 1985.

(c) *The second action for annulment, brought both by Peine-Salzgitter and Hoogovens, was entirely different in scope.* In that case, the

15 — Case 317/82 *Usines Gustave Böel and Fabrique de Fer de Maubeuge* v *Commission* [1983] ECR 2041.

16 — Case 250/83 *Finsider* v *Commission* [1985] ECR 131.

applicant sought the annulment of Article 5 of General Decision No 3485/85, applicable to 1986 and 1987, since that article, by merely repeating the text of the corresponding article in the previous general decision, made no provision for the possibility of adjusting on an equitable basis the part of the production quotas which might be delivered within the common market (also known as delivery quotas), in the case of undertakings whose delivery quotas were substantially lower than the Community average. With regard to that issue, the documents before the Court of Justice included one which was of great significance, being the communication submitted by the Commission to the Council on 25 September 1985 concerning the introduction of a system of production quotas under Article 58 of the ECSC Treaty after 31 December 1985.[17]

In that document, the Commission, after observing that the most acute phase of the steel crisis was over and that it would therefore be possible to consider returning shortly to a market in which the Community undertakings competed freely, stated that, although the state of manifest crisis appeared to be entering its final phase, it was not yet entirely over. It therefore proposed that the Council extend the quota system once again but, first, should adopt a number of liberal measures with respect to certain products and, secondly, should make it its concern to remedy the most manifest inequalities which had been created by the quota system, affecting in particular the delivery quotas. Thus, in section VII of that document, the Commission considered that 'adjustments will have to be made to firms' references — the basis of these references has not been charged since the quota system was first introduced and these quotas are based on production figures which date back even further. Over the last few years there has been such a substantial structural evolution within firms and the market (both internal and external) that these references have become divorced from the reality of production despite the elements of flexibility which have been introduced and the exchanges which have been allowed under the present decision'.

In paragraph 2 of section VII, the Commission went on to say: 'Since there has been a far-reaching change in the pattern of steel trade between the Community and the rest of the market since the introduction of the quota system, a review would also have to be made of the situation of steel makers whose ratio between the part of production quotas which may be delivered in the Community and production quotas is, for all products covered by the system, much lower than the Community average. These historical situations are no longer in line with Community steel policy objectives and the Commission intends, in respect of each firm's production, to bring down this ratio to no more than 10% below the Community average, where this has not been the case so far.'

However, the Commission, fully aware of the difficulties of that kind experienced by a small number of undertakings and on several occasions expressing its willingness to reexamine the question of the I: P ratio for those undertakings before extending the quota system for a further period of two years, considered, despite the scheme of Article 58 of the ECSC Treaty, that it was appropriate to seek the assent of the Council. It did not in fact obtain the

17 — COM(85) 509 final

Council's assent on that point. It was against that background that, on 27 November 1985, it adopted General Decision No 3485/85, which merely repeats, in essence, the corresponding provisions of the previous general decision and makes no provision for any adjustment of the I: P ratio, as submitted by the Commission to the Council.

In those circumstances, the Court of Justice first found, in its abovementioned judgment of 14 July 1988, that, for all the categories of products manufactured by Peine-Salzgitter, 'the ratio between the production quota and the proportion of that quota which may be delivered in the Common Market (known as "the I: P ratio") is *exceptionally unfavourable in the applicant's case*, both in absolute terms and in comparison with the Community average and at times is nearly 25% lower than that average. *It is an established and undisputed fact that these unfavourable I: P ratios entail exceptional economic difficulties for the applicants*' (paragraph 7).

As to whether or not the Commission was required — as it did — to seek the assent of the Council in order to adopt measures which it itself considered necessary for the purpose of achieving an equitable distribution of quotas, the Court of Justice had no difficulty in giving an answer.

It did so, first, by reference to a literal analysis of the text of Article 58 of the ECSC Treaty, which provides as follows, in the first subparagraph of paragraph 1 and the first subparagraph of paragraph 2:

'1. In the event of a decline in demand, if the High Authority considers that the Community is confronted with a period of manifest crisis and that the means of action provided for in Article 57 are not sufficient to deal with this, it shall, after consulting the Consultative Committee and with the assent of the Council, establish a system of production quotas, accompanied to the necessary extent by the measures provided for in Article 74.

...

2. The High Authority shall, on the basis of studies made jointly with undertakings and associations of undertakings, determine the quotas on an equitable basis, taking account of the principles set out in Articles 2, 3 and 4. It may in particular regulate the level of activity of undertakings by appropriate levies on tonnages exceeding a reference level set by a general decision.'

It did so, secondly, by referring to its own decisions and, in particular, its judgment of 11 May 1983,[18] and to its judgment in *Walzstahl-Vereinigung and Thyssen AG*, cited above, from which it was clearly apparent that Article 58 should be interpreted as requiring the assent of the Council only for the establishment of the *essential features of the quota system* and that it was for the Commission, acting under its own powers, to lay down the *details of the system* in order to determine the quotas on an equitable basis.

18 — Case 244/81 *Klöckner Werke AG* v *Commission* [1983] ECR 1451.

The Court of Justice went on to observe that 'the powers conferred on the Commission by the ECSC Treaty would be diverted from their lawful purpose if it appeared that the Commission had made use of them for the exclusive, or at any rate the main, purpose of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances with which it is required to cope. The same is true if the Commission wrongly uses the procedure laid down for the establishment of the quota system and thereby fails to exercise its own powers to adopt the rules which it considers necessary *to ensure that the quotas are equitable*'. Finding, in that case, first, that the adjustment which the Commission itself considered necessary affected only the quotas of a small number of undertakings and not the quotas of an entire group of undertakings characterized by their structure and, secondly, that 'it was foreseeable, once the system had been introduced, that a particularly unfavourable development on the export market might require an adjustment of that ratio *in order to enable the Commission to comply with its obligation to determine the quotas on an equitable basis*', the Court considered that such an adjustment should therefore be regarded as forming part of the details of the system, for which the Council's assent was not necessary. It thus considered that *the applicant company had been the victim of a misuse of powers* and therefore it proceeded, first, to annul Article 5 of General Decision No 3485/85 'in so far as it does not enable delivery quotas to be fixed on a basis which the Commission considers fair for undertakings having ratios between their delivery quotas and production quotas which are significantly lower than the Community average' and, secondly, to annul the individual decisions addressed by the Commission to Peine-Salzgitter fixing delivery quotas for that undertaking for the first and second quarters of 1986 since those individual decisions, being based on Article 5 of the general decision, were necessarily vitiated in the same way.

(d) *Finally, reference must be made to a third judgment of the Court of Justice delivered on 14 June 1988 in proceedings brought by Hoogovens against the Commission.*[19]

In that case, Hoogovens and the Federation of Italian Steel Producers sought, on the one hand, the annulment of Decision No 1433/87 and, on the other, the annulment of Articles 5, 6 and 17 of Decision No 194/88, which extended the system of monitoring and production quotas for steel for the last time.

Decision No 1433/87, which was justified by the fall in exports to non-member countries for 1986, by a deterioration in export prices and by the fact that the distribution of reference figures between undertakings dating back several years could in some cases be regarded as outdated (see paragraph 12 of the judgment of the Court), had been taken without the assent of the Council being sought. By that decision, the Commission had endeavoured to establish a system which could be described as an 'averaging' system, authorizing undertakings, to a limited extent, to convert production quotas into delivery quotas each quarter within a clearly defined category of products, subject to a number of very precise reservations. The Court, noting that Article 5 of Decision No 194/88 had repeated the provisions of Article 5 of General Decision No 3485/85, referred to the Peine-Salzgitter case cited above, Joined

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

Cases 33/86, 44/86, 110/86, 226/86 and 285/86, before adding that it was the responsibility of the Commission, in compliance with that judgment, to adopt, on its own responsibility, provisions adjusting the I: P ratio to the extent required by the situation on the export markets with a view to ensuring an equitable distribution of quotas. In the absence of such a decision based on an assessment by the Commission of the situation on the export markets, the Court could only find that the adjustment of the I: P ratio made by Decision No 1433/87 did not reflect what the Commission itself had considered necessary in its 1985 communication to the Council to ensure the equitable distribution required by Article 58(2).

The Court of Justice annulled that decision on a second ground, namely that it had been unlawfully based on Article 18 of General Decision No 3485/85, which allowed adjustments to be made if radical changes occurred or unforeseen difficulties were encountered, observing that the deterioration of the situation on the export markets was known to the Commission before General Decision No 3485/85 was adopted and that it could not therefore constitute a new circumstance enabling the exceptional power conferred by Article 18 to be exercised.

Thus, for the same reasons as those set out in the Peine-Salzgitter judgment, the Court of Justice annulled, first, Article 1 of Decision No 1433/87 and, secondly, Article 5 of General Decision No 194/88, which merely repeated Article 5 of General Decision No 3485/85 which itself had been annulled, and Article 17 of Decision No 194/88 which merely, in turn, repeated Article 1 of Decision No 1433/87. It is apparent both from the scheme of those judgments and from perusal of the Opinion of Mr Advocate General Lenz that those articles were annulled only because they did not make it possible to establish delivery quotas on a basis which the Commission regarded as equitable for the undertakings for which the ratio between the production quota and the delivery quota was substantially lower than the Community average.

3. *It is appropriate at this stage to examine the relationship between the applicant and the Commission before and after the annulling judgments of 14 July 1988*

(a) *Before the annulling judgments delivered by the Court of Justice on 14 July 1988* in proceedings commenced respectively on 22 April 1985 and 7 February 1986 — by all indications the parties considered that the proceedings would be completed before the quota system came to an end — the applicant, concerned to keep proceedings to a minimum, had exchanged letters with the Commission with a view to limiting the differences between them.

Thus, with respect to the reference to Article 14 of General Decision No 234/84, the applicant, after lodging its application which related to the individual negative decision received by it with respect only to the first quarter of 1985, sent a letter to the Commission on 11 July 1985 suggesting, first, that it would refrain from bringing an action against the new decision refusing an adjustment which had just been notified to it (on 11 June 1985) for the second quarter of 1985 and, secondly, that the Commission

should reserve its decision on the applications for adjustments for the third and fourth quarters of 1985 until the Court of Justice had given judgment in Case 103/85. In its reply of 12 July 1985, the Commission confirmed that, once judgment had been given by the Court in Case 103/85, it would without delay draw the consequences and adopt a decision in order to modify, if necessary, the decisions previously taken by it. The Commission also confirmed that it would reserve formal decisions on the requests made under Article 14 as from the third quarter of 1985 until the Court had given judgment.

The applicant followed exactly the same approach regarding the failure to adjust its I: P ratio, relying upon the alleged illegality of Article 5 of General Decision No 3485/85. After bringing its action on 7 February 1986 against both General Decision No 3485/85 and the individual decisions adopted for its implementation, which fixed its delivery quotas for the first and second quarters of 1986, it wrote to the Commission on 23 April 1986 with a view to avoiding a build-up of cases dealing with identical disputes. The same problem arose for the following quarters, throughout the period of validity of General Decision No 3485/85, and the applicant considered that it would be appropriate for the Commission, once the Court of Justice had given judgment, to draw the consequences without delay, taking account of the grounds of that judgment, so as to modify not only the individual decisions which had been challenged but also all subsequent individual decisions on delivery quotas for the later quarters. The Commission reacted favourably to that request, stating that it would 'without delay draw the necessary consequences having regard to the grounds of the 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'.

(b) *The relationship between the parties deteriorated somewhat after the judgments of 14 July 1988.*

The applicant maintains that, shortly after those judgments were delivered, it expected to obtain, pursuant to the first paragraph of Article 34 of the ECSC Treaty, compensation or equitable redress for the harm which it considered that it had suffered as a result of the Commission's unlawful decisions. A number of meetings were therefore held in August and September 1988 between representatives of the applicant and Commission officials. The applicant was then told that since the quota system had ceased to exist on 30 June 1988, the Commission no longer had the necessary resources to pay financial compensation and could not provide compensation in kind either. There was then an exchange of letters in December 1988 between the management of Peine-Salzgitter and representatives of the Commission, which produced no positive results. Further discussions were then held but they too were unsuccessful.

Finally, on 7 March 1989 the chief executive of the applicant company sent a letter to the Vice-President of the Commission, Mr Bangemann, in which he referred, first, to the seriousness of the harm suffered, secondly, to the fact that the

Commission had so far responded to the applicant's claims only with political and financial arguments but not with legal reasoning and, thirdly, that if no amicable solution were arrived at in the form of substantial redress, the company could not in any circumstances waive its right to fair compensation. Finally, the applicant considered that the period laid down in Article 34 of the ECSC Treaty for the necessary steps to be taken to comply with judgments of the Court would expire after Easter, the implication being that after that date an action for compensation would be brought.

By letter of 14 June 1989, the Vice-President of the Commission refused that request, stating, first, that there was a series of technical obstacles to calculation of the I: P ratio for the various quarters in question; secondly, that the Court of Justice had not yet delivered all the relevant judgments and that therefore the calculations could not be made and finally, above all, that the Commission denied the existence of any direct harm caused to the undertaking by a fault of such a nature as to render the Community liable.

Under those circumstances, the applicant company lodged the application initiating the present proceedings, which was received on 3 July 1989 — with the result that there can be no problem, in any event, of the action being time barred.

I shall likewise not dwell on the problem of the jurisdiction of the Court of First Instance, since, pursuant to Article 14 of the Council decision of 24 October 1988 establishing a Court of First Instance of the European Communities, it was the Court of Justice itself which, by order of 15 November 1989, which is binding on the Court of First Instance in that respect, referred the case to the Court of First Instance.

4. *The forms of order sought*

(a) The *applicant* claims that the Court should:

1. declare that the following decisions of the Commission involve 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.

(b) The *Commission* contends that the application should be dismissed and the applicant be ordered to pay the costs.

5. *It is appropriate at this stage, having regard to the foregoing claims, to summarize the unlawful acts criticized by the Court of Justice in its three judgments of 14 July 1988 and 14 June 1989 with respect both to the general decisions and to the individual decisions.*

— For the year 1985, the Court of Justice held, in its judgment of 14 July 1988 in Case 103/85, that the individual decision refusing to adjust pursuant to Article 14 of General Decision No 234/84 the applicant's quotas for Category III products for the first quarter of 1985 was based on an unlawful misapplication of the said Article 14 and should therefore be annulled (that annulment corresponds to the applicant's claims under 1(d)).

— By contrast, for the second, third and fourth quarters of 1985, the applicant, having regard to the abovementioned exchange of letters with the Commission, did not bring an action. The Commission does not deny that its three individual decisions refusing to adjust the quotas for those quarters were vitiated in the same way as the annulled decision of 11 June 1985, but those decisions were not annulled (those decisions are referred to in paragraph 1(e) of the claims seeking a finding of liability).

— In its judgment of 14 July 1988 in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86, the Court of Justice annulled, first, Article 5 of General Decision No 3485/85 and the individual decisions addressed to the applicant by the Commission, in so far as they fixed its delivery quotas for Categories Ia, Ib, Ic and III for the first and second quarters of 1986 (those annulment decisions thus correspond,

as regards the matter of liability, to the applicant's claims under 1(a) and 1(b)).

— The problem is somewhat more complicated in the case of the applicant's claims under 1(c) which seek a declaration from this Court that several individual decisions of the Commission are vitiated by a fault of such a nature as to render the Community liable. They are, first, individual decisions addressed to the applicant, fixing its delivery quotas, again for Categories Ia, Ib, Ic and III, for the third quarter of 1986 and, secondly, similar individual decisions concerning the subsequent quarters, up to the second quarter of 1988 inclusive, that is to say the fourth quarter of 1986, all four quarters of 1987 and the first two quarters of 1988.

For those eight quarters, the applicant secured no annulment decision, once again because, as it stated, it was concerned to keep proceedings to a minimum. But the Commission does not deny that, for all those quarters, the individual decisions fixing the applicant's delivery quotas for the categories of products in question are vitiated by the same illegality as that to which the Court referred in its abovementioned judgment of 14 July 1988.

That clearly applies to the individual decisions for the third and fourth quarters of 1986, which are based directly on Article 5 of General Decision No 3485/85, which was itself annulled.

That also applies to the four quarters of 1987, for which the applicant's delivery quotas were fixed on the basis of Decision No 1433/87, which applied as from 1 January 1987. And, in its judgment of 14 June 1989, cited above, the Court of Justice annulled Decision No 1433/87 in so far as it did not allow the adjustment of the I: P ratio required to ensure an equitable distribution of the quotas, as required by Article 58(2).

Finally, that also applies to the individual decisions which fixed the applicant's delivery quotas for the first two quarters of 1988, in other words until the quota system came to an end, since in its judgment of 14 June 1989, cited above, the Court of Justice annulled Articles 5 and 17 of the last Commission decision extending the quota system, namely Decision No 194/88, on the grounds, first, that Article 5 of General Decision No 194/88 merely repeated the terms of Article 5 of General Decision No 3485/85, which itself had been annulled by the judgment of 14 July 1988 and, secondly, that Article 17 of General Decision No 194/88 itself merely repeated the provisions of Decision No 1433/87, which had itself been annulled.

The effect of those annulment decisions *erga omnes* having been established, this Court cannot disregard the new legal situation thus created by the judgment of the Court of Justice of 14 June 1989 particularly since, once again, the Commission has not even contended that its individual decisions adopted in 1987 and 1988 were not vitiated in the same way as the 1986 decisions which were annulled by the Court of Justice.

To summarize, the applicant asks the Court to find that, first, Article 5 of General Decision No 3485/85, which has been annulled, and, secondly, fourteen individual decisions fixing the applicant's delivery quotas from 1 January 1985 to 30 June 1988, are vitiated by a fault of such a nature as to render the Community liable; in the abovementioned decisions of the Court of Justice, the applicant secured the annulment of only three of those fourteen individual decisions.

Throughout the currency of the quota system, situations of that kind were resolved fairly simply by the Commission's granting additional quotas to companies which had successfully pleaded their cases before the Court of Justice. That restitution in kind, moreover, is in conformity with the concept of 'equitable redress' referred to in the first paragraph of Article 34 of the Treaty. But, in the circumstances of the present case, since the Court's judgments of 14 July 1988 and 14 June 1989 were delivered after the quota system came to an end, the parties can no longer contemplate reparation in kind (even though the Commission has, rather dubiously, claimed that it could revert to a voluntary system of quotas, based on Article 46 of the Treaty).

That is why the applicant has brought the present action, *based simultaneously — an essential point — on Article 34 and Article 40 of the ECSC Treaty*, in which it does not seek any annulment but, first, claims that the Court should find that all the abovementioned general and individual decisions of the Commission are vitiated by a fault of such a nature as to render the Community liable and, secondly, that the Commission be ordered to pay the applicant a sum of over DM 73 million. It is this specific situation which accounts for the difficulty of the present case, having regard in particular to the lack of any precedent and to the various objections of inadmissibility raised by the Commission.

II — The problems of admissibility arising in the present action in relation to both Article 34 and Article 40 of the ECSC Treaty

The applicant has based its action principally on Article 34 and, in the alternative, on Article 40 of the ECSC Treaty. It is appropriate to reproduce those articles.

The first paragraph of Article 34 provides:

'If the Court declares a decision or recommendation void, it shall refer the matter back to the High Authority. The High Authority shall take the necessary steps to comply with the judgment. If direct and special harm is suffered by an undertaking or group of undertakings by reason of a decision or recommendation held by the Court to involve a fault of such a nature as to render the Community liable, the High Authority shall, using the powers conferred upon it by this Treaty, take steps to ensure equitable redress for the harm resulting directly from the decision or recommendation declared void and, where necessary, pay appropriate damages.'

The second paragraph reads as follows:

'If the High Authority fails to take within a reasonable time the necessary steps to comply with the judgment, proceedings for damages may be instituted before the Court.'

The first paragraph of Article 40, only that paragraph being relevant here, provides:

'Without prejudice to the first paragraph of Article 34, the Court shall have jurisdiction to order pecuniary reparation from the Community, on application by the injured party, to make good any injury caused in carrying out this Treaty by a wrongful act or omission on the part of the Community in the performance of its functions.'

It is appropriate to consider successively the objections of inadmissibility raised by the Commission, under both Article 34 and Article 40 of the ECSC Treaty.

A — *The objections of inadmissibility concerning the applicability of Article 34 of the Treaty to the present case*

The Commission raises three objections of inadmissibility under this heading:

— the absence of an annulling decision for 11 of the 14 quarters in question;

— the impossibility of making simultaneous claims for annulment and compensation;

— the absence in the annulling judgments delivered by the Court on 14 July 1988 of any finding that the annulled decisions are vitiated by a fault of such a nature as to render the Community liable.

1. *The absence of an annulling decision*

The Commission contends that the claim for redress based on the second paragraph of Article 34 of the ECSC Treaty is inadmissible in so far as it concerns the individual decisions for the last three quarters of 1985, the third and fourth quarters of 1986, all four quarters of 1987 and the first two quarters of 1988, since those decisions were not the subject of a prior annulment decision.

The applicant, whilst recognizing that as a general rule the existence of an annulment decision is a precondition for the admissibility of an application based on the second paragraph of Article 34 of the ECSC Treaty, claims that in the present case that condition does not need to be satisfied. In the first place, because of the exchange of letters between the parties and the formal assurances given by the Commission in response to the letters which were sent by the applicant in its concern to keep proceedings to a minimum; secondly, by reason of the fact that the Commission frustrated the legitimate expectations of the applicant; and finally, because, simply by reason of the subsequent annulment of Article 5 of General Decision No 3485/85 on which they were based, the individual decisions fixing quotas for the period from July 1986 to June 1988 did not become final after the expiry of the period of one month provided for in Article 33 of

the Treaty. Accordingly, those individual decisions are themselves void.

It seems to me that the Commission's objection of inadmissibility is well founded on this point. It appears from the very terms of Article 34 that an action for compensation is not admissible in the absence of an annulment decision obtained previously on the basis of the second paragraph of Article 33, as far as the undertakings or associations referred to in Article 48 are concerned. Indeed, Article 34 begins with the words 'if the Court declares a decision ... void' and that condition is repeated, in case it should be necessary, at the end of the first paragraph, in the following phrase: '... steps to ensure equitable redress for the harm resulting directly from the decision or recommendation *declared void* ...'. And it is undisputed that, for 11 of the 14 quarters in question, the applicant secured no judgment declaring void the individual decisions fixing its quotas. The applicant's efforts to evade this objection of inadmissibility are entirely unconvincing.

It is appropriate to ask four questions in that regard: in the first place, was a contract governed by public law entered into, as the applicant maintains? Secondly, did the Commission formally commit itself to making pecuniary reparation? Thirdly, was there any breach of the principle of the protection of legitimate expectations? Finally, are the individual decisions which were not annulled void merely by virtue of the annulment of Article 5 of Decision No 3485/85?

(a) *It seems clear to me that the exchange of correspondence in question certainly does not constitute a contract governed by public law.* This idea of a contract governed by public law, concluded by or on behalf of the Community, is expressly referred to in Article 42 of the ECSC Treaty and has a very precise meaning: in particular, for a contract to exist, the parties must be *ad idem* and that fact must derive from a commitment contracted by persons empowered to take a decision on behalf of the Commission. Although in both cases, the applicant's lawyer was certainly empowered to bind the applicant, the Commission's replies, given by Professor Wagenbaur on 12 July 1985 and 16 May 1986, cannot rank as a commitment for the purposes of a contract governed by public law and binding on the Community, since they were not capable, by virtue either of their form or content, of giving rise to such effects. [20]

(b) *Secondly, did the Commission give formal assurances constituting a commitment to make any pecuniary reparation?* A reading of the exchange of correspondence in question shows that it did not.

With respect to the period from the second quarter to the fourth quarter of 1985, the letter from the applicant's lawyer to the Commission of 11 July 1985 merely suggests that the applicant would not bring an action in respect of the second, third and fourth quarters of 1985, provided that, once the Court had given judgment in Case 103/85, the Commission adopted a fresh decision within a short period, in conformity with the grounds and operative part of that judgment. As for Professor Wagenbaur's reply of 12 July 1985, it

20 — See in that connection the judgment in Joined Cases 42/59 and 49/59 *Société Nouvelle des Usines de Pontlieue, Aciéries du Temple (Snupat)* v *High Authority* [1961] ECR 53

merely confirms that 'as soon as judgment has been given in Case 103/85, the Commission will without delay draw the appropriate consequences and will adopt a decision modifying, if necessary, the decisions previously taken by it. This is, moreover, merely a statement of the obvious . . . '.

As regards the period from the third quarter of 1986 to the second quarter of 1988, similar considerations appear to apply. In the letter which he sent to the Commission on 23 April 1986, the applicant's lawyer made the following suggestion: 'as soon as the Court of Justice has given judgment in Case 44/86, the Commission will without delay draw the necessary consequences, having regard to the grounds of that judgment and accordingly amend not only the contested individual decision of 30 December 1985 concerning the first quarter of 1986 . . . 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 General Decision No 3485/85 is applicable'. Thus, the applicant itself sought a modification of the decisions and not any assurances as to the principle of, or the arrangements for, pecuniary reparation. The Commission's reply, dated 16 May 1986, is drafted in terms which correspond to those of that request, in other words, the Commission did not, expressly or by implication, give any commitment to make pecuniary reparation following the judgments to be delivered by the Court.

Furthermore, even if it were assumed — and once again, that is not the case — that we are dealing with a contract governed by public law and the Commission did give formal assurances regarding pecuniary reparation, would such circumstances be such as to release the applicant from the very strict time-limit of one month laid down in Article 33 for proceedings to be instituted for annulment under the ECSC Treaty? I certainly do not think so, having regard to the very strict case-law of the Court of Justice on that matter: the provisions governing time-limits for steps in proceedings are mandatory and cannot be changed by the parties or by the Court. Moreover, in relation to the ECSC, the Court gave a very clear ruling on this point in its judgment of 2 July 1984,[21] stating that 'the strict application of Community rules on procedural time-limits meets the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice. It is only if the party concerned proves the existence of unforeseeable circumstances or *force majeure*, as required by the third paragraph of Article 39 of the Statute on the Court of Justice of the ECSC, that its right of action is not prejudiced in consequence of the expiry of a time-limit'. In the present case it is clear that the applicant has not established, or indeed alleged, the existence of unforeseeable circumstances or *force majeure*, and the exchange of correspondence to which it refers does not satisfy any of the preconditions for those concepts to come into play.

(c) *It also appears to be entirely clear that the Commission certainly did not in any way infringe the principle of the protection of legitimate expectations.* In the first place, because it gave no formal assurance to the applicant regarding any pecuniary reparation; secondly, because it is apparent from the file on the case that, when the applications were lodged, both parties considered that the cases would be decided

21 — Case 209/83 *Ferreira Valsabbia* v *Commission* [1984] ECR 3089.

by the Court of Justice before the quota system came to an end and that it would thus be possible, in the event of annulment, for compensation to be awarded in the form of additional delivery quotas; finally, because, more generally, the principle of the protection of legitimate expectations, like the principle of legal certainty, 'important as it may be, cannot be applied in an absolute manner, but . . . its application must be combined with that of the principle of legality; the question which of these principles should prevail in each particular case depends upon a comparison of the public interest with the private interests in question . . . '.[22] In the present case, application of the principle of legality is of primary importance, since what is at issue is compliance with the rules on time-limits and the avoidance, as just stated, of any discrimination or arbitrary treatment in the administration of justice.

(d) *Finally, it is necessary to consider the last objection formulated by the applicant, which relates to the complex problem of the effect of the annulments at issue: is the subsequent annulment of a general decision which constitutes the basis for individual decisions previously adopted, which have entirely exhausted their effects, both legal and material (being decisions fixing quarterly quotas), of such a nature as, in its own right, to bring about the annulment or the nullity of all the individual decisions adopted on the basis of that general decision, even though such annulment was not sought within the prescribed time-limits?* In other words, for the eight quarters covering the period July 1986 to June 1988 under, first, General Decision No 3485/85 of which Article 5 was annulled, then Decision No 1433/87, which was also annulled, and General Decision No 194/88, of which the same Article 5 was also annulled, does this succession of annulments have the result, as the applicant maintains, that the individual decisions adopted to implement them have still not become final, despite the expiry of the period of one month provided for in Article 33?

On this point, legal writers appear somewhat divided. Thus, Messrs Vandersanden and Barav consider that 'although the measures adopted under an annulled measure do not automatically disappear with the annulled decision, they nevertheless lose their legal force'.[23] The authors considered themselves entitled to draw that conclusion from their analysis of the judgment of 26 May 1971,[24] in which the Court of Justice stated that 'under the provisions of the second sentence of the first paragraph of Article 34 of the ECSC Treaty, the first paragraph of Article 176 of the EEC Treaty and the first paragraph of Article 149 of the EAEC Treaty, where a measure of an institution has been declared void by the Court that institution shall be required to take the necessary measures to comply with the judgment declaring that the measure is void. It follows that, when the Court annuls a decision, the author of that decision is under an obligation to revoke or at least not to apply a subsequent decision which simply confirms the first one'. For my part, I am happier to associate myself with the analysis made by Michel Waelbroeck, who considers that 'if the annulled measure is general in scope, the implementing decisions adopted thereunder do not automatically lose their legal force. If the period within which their annulment should be sought has expired, they can be challenged only under the conditions laid down in Article 177(b) or Article 184'.[25] The author

22 — Joined Cases 42 and 49/59, cited in footnote 19, more particularly at p. 87

23 — *Contentieux Communautaire*, published by Bruylant, Brussels, 1977, p. 217

24 — Joined Cases 45/70 and 49/70 *Fritz-Auguste Bode* v *Commission* [1971] ECR 465

25 — *Le droit de la Communaute economique europeenne*, editions de l'universite de Bruxelles, Vol. 10 p. 175

adds, however, that 'where the contested decision has produced irreversible effects for both the applicant and third parties, the institution is required properly to restore the position of the applicant and, for the future, to make the appropriate changes to the rules held to be unlawful', relying on the judgment of 6 March 1979 in the *Simmenthal* case. [26]

For my part, I base my analysis on the judgment of the Court of Justice of 26 April 1988. [27] There the Court stated:

'In order to comply with the judgment [annulling a regulation] and to implement it fully, the institution is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure.

However, although a finding of illegality in the grounds of a judgment annulling a measure primarily requires the institution which adopted the measure to eliminate that illegality in the measure intended to replace the annulled measure, it may also, in so far as it relates to a provision with specific scope in a given area, give rise to other consequences for that institution.

In cases such as this one, where the effect of the annulled regulation is limited to a clearly defined period (namely the 1983/84 marketing year), 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 and governing the marketing years subsequent to that judgment contains no provisions having the same effect as the provisions held to be illegal.

However, 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. It follows that in the present case the institution concerned is also under an obligation to eliminate from the regulations already adopted when the annulling judgment was delivered and governing marketing years after 1983/84 any provisions with the same effect as the provision held to be illegal.

Consequently, the finding that the coefficients to be applied to the amount of aid . . . were illegally fixed is binding with respect not only to the 1983/84 marketing year, covered by the annulled regulation, but also to all subsequent marketing years. By contrast, that finding cannot apply to the marketing years covered by the regulations adopted before the 1983/84 marketing year.

By refusing to replace, with effect from the date of adoption of the annulled regulation, the provision contained in the regulations which entered into force after that date having the same effect as the one declared illegal in the [annulling] judgment, the Commission has failed to fulfil its obli-

26 — Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777. See also, on all these points, E. Paulis: 'Les effets des arrets d'annulation de la Cour de justice des Communautés européennes', *Cahiers de Droit Européen*, 1987, p. 243; M.-C. Bergeres: 'La théorie de l'inexistence en droit communautaire', *Revue Trimestrielle de Droit Européen*, No 4, October-December 1989, p. 647.

27 — Joined Cases 97/86, 99/86, 193/86 and 215/86 *Astéris A. E. and Others and Greece* v *Commission* [1988] ECR 2181.

gations under Article 176, which may be enforced under the procedure provided for in Article 175.'

That judgment is extremely interesting, because it shows clearly that, in the event of the annulment of a piece of legislation of general scope, the institution from which the measure emanates is required to draw all the consequences of the illegality thus determined and, in particular, to cancel all the implementing decisions based on the annulled legislative measure. That proves clearly, *a contrario*, that the implementing decisions of which the annulment has not been sought have not ceased to exist *ipso facto* because of the annulment of the legislative measure, since there is clearly a requirement of cancellation and those decisions are not 'void' or 'non-existent'. In the present case, such cancellation would be pointless, since the individual decisions fixing production or delivery quotas are adopted for one quarter and exhaust their legal and material effects on the expiry of that quarter. It is therefore only with respect to liability and any appropriate form of reparation that the institution is in a position to draw the consequences of the annulment of the general decision.

In any event, the second paragraph of Article 34 does not seem to me to be applicable in the present case for reasons of a primarily procedural nature, since, for the eight quarters in question, the individual decisions were not annulled. Even though the general decision providing the requisite support for them has been annulled, the individual decisions became final and are not subject to any nullity which could be assimilated to annulment. Moreover, cancellation of them would be pointless, since their legal and material effects have been exhausted. But, as we shall see in due course, the effects of upholding this objection of inadmissibility raised by the Commission seemed to me to be extremely limited (see II B 2, below).

2. *The second objection of inadmissibility raised by the Commission is, on the other hand, wholly unfounded*

The Commission contends that claims for annulment and claims for compensation cannot be the subject of the same proceedings under the ECSC Treaty, by contrast with the proceedings provided for in Articles 178 and the second paragraph of Article 215 of the EEC Treaty. This objection is based on an incorrect analysis of the claims set out in the application which do not in any instance seek annulment but solely, on the one hand, a finding that several Commission decisions are vitiated by a fault of such a nature as to render the Community liable and, on the other, an order that the Commission pay pecuniary compensation.

3. *Finally, the last objection of inadmissibility under Article 34 raised by the Commission raises further problems*

The objection relates to the fact that, in the annulling judgments of 14 July 1988, the Court of Justice merely annulled several general or individual Commission decisions without, however, finding that they were vitiated by any fault of such a nature as to render the Community liable.

The Commission contends that it is apparent from the very wording of the first

paragraph of Article 34 that that finding of a fault of such a nature as to render the Community liable must precede the lodgment of claims for compensation on the basis of the second paragraph of Article 34 since the Community must, after such a finding, be granted an appropriate period to react to the threat of an obligation to make pecuniary reparation.

On this matter, the applicant confines itself to maintaining that Article 34 of the ECSC Treaty, intended as it is to give the Commission an opportunity to eliminate the effects of its unlawful decisions and to ensure redress, merely serves the function of conferring powers; but that is not at issue in the present case, since the period of time necessary for the Commission to react expired long ago and a fresh period for the adoption of measures to remedy the damage suffered is unnecessary.

There are differing views on this problem among legal writers and the question has never been settled by any decision of the Court of Justice.

It seems to me that this objection of inadmissibility, in so far as it relates to Article 34, is well founded. The second sentence of that article reads: 'If direct and special harm is suffered by an undertaking or group of undertakings by reason of a decision or recommendation *held by the Court to involve a fault of such a nature as to render the Community liable*, the High Authority shall . . . take steps . . . .' The problem thus arises in all cases where, for whatever reason, the annulling judgment does not expressly find a fault of such a nature as to render the Community liable or, I think, the existence of direct and special harm, since those legal classifications are certainly a matter for the Court and not for the Commission.

This issue has been the subject of heated debate among academic legal writers. [28]

My views on this matter are inspired both by the wording of the provisions and by the fact that, as the Court of Justice held in its judgment of 16 December 1960, [29] even if it is conceded that there is some doubt, a provision providing guarantees of judicial protection for individuals cannot be interpreted restrictively to the detriment of such persons.

In the first place, I consider it incorrect to maintain that, if an applicant brings an action for annulment, he must necessarily think, at that stage, of possible future reparation for any damage which he may suffer and in all cases ask the Court to rule, forthwith, on the very principle of the Community's liability, with a view to preserving his rights. That argument is based on a confusion between an action for annulment and an action to establish liability, which totally disregards the principle whereby the action to establish liability is an autonomous form of action (to which I shall revert: see below, II B 2(a)(1)).

28 — See in particular Balentine, *The Court of Justice of the European Coal and Steel Community*, The Hague, 1955, p. 88; the report of Cesare Grassetti in *Les Actes Officiels du Congrès International d'Etudes sur la CECA, Milan, 31 May to 9 June 1957*, Milan, 1958, p. 55; J. Blanchet, 'La concurrence du recours en annulation avec l'action en réparation des dommages', *Dix Ans de la Jurisprudence de la CJCE*, Cologne, 1965, p. 343 et seq.

29 — Case 6/60 *Humblet* v *Belgian State* [1960] ECR 559.

Secondly, it likewise seems to me to be incorrect to contend that *it is for the Court to ascertain of its own motion* the existence of a fault of such a nature as to render the Community liable and the existence of direct and special harm, even if it has not been asked to make a finding in that regard. As Cesare Grassetti rightly emphasizes, 'from the legal point of view, to do so would be *ultra petita*; from the political point of view, to do so would be an open invitation to litigants to bring actions for compensation'.

Thirdly, it is clear, in my view, that an undertaking which brings an action for annulment is perfectly entitled also to seek, in support of its action, a finding of a fault of such a nature as to render the Community liable, and as to the existence of direct and special harm, for the purpose of allowing the procedure provided for in Article 34 to be initiated as soon as possible. However, as we have just seen, whilst an applicant is entitled to make subsidiary claims of that kind, it certainly is not required to do so at the stage of the action for annulment.

Fourthly, it seems clear to me that claims for a finding of liability on the part of the Community and the existence of direct and special harm certainly cannot be submitted simultaneously with claims for compensation under the second paragraph of Article 34. One of the purposes of the procedure under the first paragraph of Article 34 is precisely to set in train a procedure for amicable settlement, a 'pre-litigation' procedure before any action for compensation is brought under the second paragraph of Article 34. It enables the parties to enter into any appropriate discussions as to the nature and extent of the harm and allows the Commission to take the appropriate steps to ensure equitable redress for the harm, either by reparation in kind, where that is possible, or by granting, to the extent necessary, appropriate damages. In order to do so, the Commission is granted the reasonable time referred to in the second paragraph of Article 34. It is only where it has failed within that time to take the steps necessary to comply with an annulment decision that the way is opened for an action for compensation before the Community Court. Accordingly, to allow the simultaneous submission of claims for a finding of liability and claims for compensation would give rise to an impediment to the conduct of that procedure which, it must be observed, has no equivalent under the EEC Treaty.

Fifthly, I think that it is appropriate to recognize that an undertaking which has obtained the annulment of a decision or recommendation on the basis of the second paragraph of Article 33 of the Treaty *is entitled to bring an independent action before the competent Community Court solely to secure a finding of a fault of such a nature as to render the Community liable and also, I think, the existence of direct and special harm.* It is only on delivery of that judgment that the 'reasonable time' mentioned in the second paragraph of Article 34 begins to run. The Commission's argument, which seems to deny the existence of an independent remedy to establish liability, seems all the more baseless in view of the fact that an action to establish liability has been admitted, without difficulty, by the Court of Justice in the context of the EEC Treaty.

The Court of Justice has recognized the admissibility of an action to establish the Community's obligation to compensate for damage, without it being necessary, at that stage of the procedure, to ask the Court actually to order reparation of the damage and draw the specific consequences thereof, since that result can be obtained subsequently by means of an action for compensation.[30] The Court of Justice has also held that an action is admissible even where it merely raises the issue of the legal basis of the liability and that all matters relating to causality and to the nature and extent of the damage may be reserved for another action.[31]

4. *Provisional conclusions as to admissibility in relation to Article 34*

Having reached this stage of my reasoning, and having regard to the reply which I propose that the Court give concerning the three objections of inadmissibility raised by the Commission in relation only to Article 34 of the ECSC Treaty, I shall draw the following consequences:

— I propose that the Court recognize that, even if Article 5 of General Decision No 3485/85, which was annulled by the judgment of 14 July 1988, is indeed ultimately at the root of the harm caused to the applicant, *the actual and direct harm suffered by the applicant was provoked by each of the individual decisions fixing its delivery quotas for each of the quarters concerned.* In fact, those individual decisions are necessarily interposed between the annulled general decision and the harm suffered. In the case of the decisions which have not been annulled, and even though their illegality is clear and, moreover, not disputed by the Commission, compliance with the letter of Article 34 seems to me to require that restrictive interpretation and prohibit the importation, into the machinery thus provided for, of an 'inverted' theory of the objection of illegality;

— accordingly, the claims that the Court should declare the Commission decisions to be vitiated by a fault of such a nature as to render the Community liable are admissible as regards all the individual decisions covered by the annulling judgment of the Court of Justice, that is to say those mentioned in the applicant's claims under 1(b) and (d);

— on the other hand, the claims under 1(c) and (e) for a finding of liability on the part of the Community in respect of the eleven individual decisions addressed to the applicant, which have not been the subject of any judicial proceedings, can only be declared inadmissible under Article 34;

— furthermore, once again in relation only to Article 34, all the claims in paragraph 2, namely those seeking an order that the Commission pay the applicant a sum of over DM 70 million, are inadmissible. That inadmissibility is absolute as regards the eleven quarters which were not the subject of an annulment decision, since it was not possible for the procedure provided for in the first paragraph of Article 34, which is a precondition for commencement of the proceedings referred to in the second paragraph of Article 34, to be initiated.

30 — See in that regard the judgment of 2 June 1976 in Joined Cases 56 to 60/74 *Kampffmeyer* v *Commission* [1976] ECR 711.

31 — See in that regard the judgment of 28 March 1979 in Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1081.

It is merely 'relative' as regards the three individual decisions which were the subject of an annulling judgment, since the reasonable time referred to in the second paragraph of Article 34 has not yet started to run. In this last case, the claims for compensation based on Article 34 are inadmissible solely because they are premature.

B — *It is appropriate at this point to examine the objection of inadmissibility raised by the Commission in relation to Article 40 of the ECSC Treaty.*

The applicant based its application, in the alternative, on the first paragraph of Article 40 of the ECSC Treaty, maintaining that the unlawful decisions annulled by the Court of Justice and those which are vitiated in the same way but were not annulled derive from an instance of maladministration on the part of the Commission, which could perfectly well have acted lawfully and was indeed under an obligation to do so, as confirmed by its own communication to the Council of 25 September 1985, mentioned earlier.

The Commission, on the contrary, contends that Article 40 of the ECSC Treaty is inapplicable to the applicant since it must be regarded as an undertaking within the meaning of Article 80 of the ECSC Treaty and, accordingly, was perfectly entitled to bring actions for annulment on the basis of Article 33 of the Treaty against the individual decisions which it considers gave rise to the alleged harm. According to the Commission, Article 40 is, by virtue of its very form, subsidiary to Article 34, which constitutes a *lex specialis* that cannot be departed from by reason, inter alia, of the structure of that article and of the fact that Article 40 opens with the phrase 'Without prejudice to the first paragraph of Article 34 . . . '.

Thus, the Commission adds, the principle of subsidiarity applies not only to circumstances where an application based on Article 34 has been upheld but also in cases where the undertaking does not satisfy the particularly strict conditions laid down by that article. Any different view of the scope of Article 34 whereby, before an action is brought for compensation, a successful action for annulment must be brought within a period of one month, would lead to unacceptable consequences, in particular if, in the absence of the conditions laid down for the application of Article 34, it was permissible to bring an action for compensation directly on the basis of Article 40. Thus, in its view, Article 34 governs exhaustively and restrictively any liability for wrongful acts or omissions with regard to steel undertakings, provided that the cause of the alleged harm is to be found in a Commission decision. The Commission thus assimilates the concepts of annulment and annullability.

The question put to the Court is, therefore: is it open to an undertaking which has failed to use the procedure under Articles 33 and 34 to bring an action for compensation under the first paragraph of Article 40 of the ECSC Treaty for maladministration on the part of the Community? Does it not cover only injurious conduct on the part of the Commission and not the harm caused by illegal general or individual decisions which have not been annulled? In other words, must proceedings for reparation of damage, arising from unlawful conduct, necessarily be based on Article 34? Does Article 34 exclude recourse to proceedings under Article 40 if the

claim for reparation is based on an allegation of maladministration deriving from the illegality of a decision which has not been annulled?

This is one of the most delicate legal issues to be adjudicated on in these proceedings and one which, most authors insist, derives from one of the most 'obscure' chapters of the ECSC Treaty.

I propose considering successively the background to the problem, the considerations which prompt me to recognize that the Community may incur liability under Article 40 of the ECSC Treaty by reason of an unlawful decision which was not the subject of a prior annulling judgment and, finally, the practical consequences to be drawn as regards the admissibility of the action.

1. *The background to the problem*

The main features here, it seems to me, are the existence of somewhat ambiguous legislation, unsettled and uncertain case-law, divided views in legal literature and, finally, indecisive *travaux préparatoires.*

(a) *Somewhat ambiguous legislation*

The idea of laying down conditions governing the liability of the Communities, under the ECSC Treaty, was not taken for granted, since virtually no system of that kind existed for international organizations. However, it was justified by the finding that numerous powers, previously exercised by the administrations of the Member States, had been transferred to the Community administration and it was unacceptable for that transfer to have the effect of undermining the legal protection previously available to the economic agents concerned.

Thus, it is apparent from the *travaux préparatoires* for the ECSC Treaty,[32] that initially there was no provision for any action in liability. Thus, in a memorandum drawn up concerning the first draft of the Treaty, we read, under the heading 'Articles 26 to 28', which were the early antecedents of Article 34:

'The provisions concerning the jurisdiction of the Court are inspired by the need to reconcile the concern to keep action on the part of the Community organs within the legal limits and the no less imperious need not to limit the action of the High Authority in an area where economic, political and social considerations require constant assessment of circumstances of fact or expediency which normally fall outside the jurisdiction of a court. As a result of the latter consideration:

(1) no provision was made for infringement of the Treaty to be regarded as a ground for annulment, since a review of legality necessarily involves in most cases, because of the very subject-matter of the Treaty, an assessment of circumstances of fact;

32 — Which I have been able to consult by courtesy of the Ministry of Foreign Affairs of the Grand Duchy of Luxembourg.

(2) actions by undertakings were limited to individual decisions of concern to them;

(3) *in principle, the possibility of damages in the event of annulment was excluded.*

By treating as grounds of annulment, in addition to lack of powers and infringement of essential procedural requirements, misuse of law and misuse of powers, the Court is nevertheless provided with the means necessary to ensure, to the full extent of the law, the observance of the essential rights of the parties concerned.'

And under the heading 'Article 29', an even more remote ancestor of the present Article 40:

'This article is intended to govern proceedings concerning the civil life of the Community outside the application of the Treaty. In that regard, it is proposed:

(1) to entrust to the Court of Justice, the sole Community court, the task of determining actions to establish delictual or quasi-delictual liability which, in a State, would normally come within the jurisdiction of an administrative court in so far as the liability of public authorities is in issue;

(2) to leave other disputes to be governed by the ordinary law . . . .'

Then, when the matter had been considered further, the following appeared in a memorandum of 28 September 1950, under the heading 'Court of Justice':

'Its essential function is to guarantee the proper functioning of those institutions for everyone. Two conditions must be met for that purpose; it must be recognized that, for the purpose of applying the law, the powers of the Court must be defined fairly broadly so as to enable it, through its case-law, to contribute to the development and progress of the organization as a whole; on the other hand, it must be ensured that its judgments are not a means whereby the powers of the High Authority are actually transferred to the Court of Justice. This danger will be avoided by a rigorous separation of powers, which will prevent the Court from substituting itself for any of the organs provided for by the Treaty. It will be able to annul decisions or recommendations, deliver declaratory judgments and, *in the event of infringement of the Treaty, award damages, but it must in all cases refer to the organs created by the Treaty with respect to the decisions to be drawn up.*' [33]

As the *travaux préparatoires* proceeded, the need to establish a system of liability under the ECSC Treaty clearly emerged as the expression of a general principle of law common to all developed legal systems. On the other hand, as far as proceedings for annulment were concerned, there was agreement as to the need to provide for a system under which recourse to the Community Court would be available only in extremely limited circumstances to undertakings and associations of undertakings, hence the very strict conditions laid down in Article 33.

In the result, as far as liability is concerned, two systems co-exist, those provided for by

33 — Emphasis added.

Articles 34 and 40 respectively. All commentators, and that includes all Advocates General who have been called on to give an opinion on the matter, concur in the view that *the first paragraph of Article 40 constitutes the ordinary law governing the non-contractual liability of the Community under the ECSC Treaty.* That article enables any aggrieved party to seek pecuniary reparation in the event of damage caused in the implementation of the Treaty by maladministration on the part of the Community. But that article opens with a phrase of which the least that can be said is that it is not crystal clear: 'Without prejudice to the first paragraph of Article 34 . . . .' As a result, there are many who perceive in that Article 34 a veritable *lex specialis* regarding liability, limited to cases where the Community's liability derives from the illegality of a decision which was previously annulled, in so far as such illegality involves a fault of such a nature as to render the Community liable or has given rise to direct and special harm.

In reality, the position is not so simple. In the first place, the reservation in Article 40 applies only to the first paragraph of Article 34, so that the action for compensation available under the second paragraph of Article 34 is not covered by that reservation and therefore may perfectly well be assimilated to proceedings under Article 40. In the second place, no express provision is made regarding the possibility of the Community's incurring liability by reason of an unlawful decision which has not been annulled but is nevertheless vitiated by a fault of such a nature as to render the Community liable and has given rise to direct and special harm.

(b) *The case-law of the Court of Justice is unsettled and uncertain*

The Court of Justice examined the question of the relationship between Article 34 and Article 40 in two judgments delivered on 13 and 14 July 1961 which, although so close together in time, arrive at largely contradictory and irreconcilable conclusions: the judgment in *Meroni* and the judgment in *Vloeberghs.*[34]

(b) 1. *The Meroni case calls for a number of comments.* In that case, the regulatory decisions which had allegedly caused damage had not been annulled but declared unlawful following an objection to that effect in a first *Meroni* judgment.[35]

In his opinion, Mr Advocate General Lagrange first considered whether the conditions laid down by Article 34 were satisfied. His answer was that, as a matter of principle, they were: 'It is true that the general decisions of the High Authority have not been *declared void*: they have only been held to be unlawful following an objection to that effect, but the High Authority cancelled them, which it was entitled and undoubtedly under a duty to do, inasmuch as the Court had found that they were illegal and there appears to me to be no doubt that the rules of Article 34 also apply in such a case.'

That constituted a particularly extensive interpretation of Article 34 which, if applied

34 — *Meroni et Cie and Others* v *High Authority* (above, note 10), with an Opinion by Mr Lagrange; Joined Cases 9 and 12/60 *Vloeberghs, SA* v *High Authority* [1961] ECR 197, with an Opinion by Mr Roemer.

35 — Judgment of 13 June 1958 in Case 10/56 *Meroni* v *High Authority* [1958] ECR 157.

to the present case, would possibly bring most of the claims made by Peine-Salzgitter within the scope of Article 34. By virtue of the *Astéris* case, cited earlier, the annulment of Article 5 of General Decision No 3485/85 placed the Commission under an obligation to draw all the consequences of the annulling judgment: in other words, in the first place, to regard all the individual decisions adopted during the eight quarters in question as necessarily vitiated in the same way as the general decision and the two individual decisions which were annulled; in the second place, since the quota system had come to an end and reparation in kind was thus excluded, it was required to take all steps necessary to ensure equitable redress for the harm resulting directly from all those decisions and, where necessary, to *pay appropriate damages.*

In *Meroni*, it was because the Advocate General considered that the condition regarding the special nature of the harm was not satisfied that he went on to consider the possibility of the Community's liability being established on the basis of Article 40, which in his view did not itself lay down any particular requirement regarding the special nature of the harm. Here again I shall cite his views on this point: 'As far as I am concerned, after due consideration, I have come to the conclusion that it is unnecessary for the application of Article 40 to depend upon the condition that the injury must be special. In the first place, Article 40, unlike Article 34, is silent on this point, the words used being wholly general . . . The contrast between this wording and that of Article 34 is striking . . . Article 40 sets out the ordinary law on non-contractual liability under the Treaty; Article 34 is a *lex specialis* dealing with the specific case of harm resulting from a decision declared void to the extent to which the enforcement of the judgment which declared that decision to be void, in spite of the fact that such enforcement must necessarily have retroactive effect, is not sufficient to secure satisfactory compensation.'

And ultimately it was only because he reached the conclusion that no wrongful act or omission had been established that the Advocate General proposed that the application be dismissed.

The line of reasoning of the Court of Justice was entirely different. It started from the view that the applicants had necessarily based their actions on Article 40, since they had alleged maladministration on the part of the High Authority and their action sought pecuniary reparation for all the harm that they claimed to have suffered as a result of the alleged fault. Accordingly, in the Court's view, the issues had to be decided on the basis of that article alone; the Court added: 'Consequently the question whether the decisions whereby the system of equalization was created and modified are lawful or not must be excluded from the outset and the only question to be answered is whether there is evidence of a wrongful act or omission during the administration of the financial arrangements for which the defendant is responsible.'

Then, the Court of Justice took the view that only special harm, or at least specific harm, which had not been established in that case could give rise to entitlement to reparation under Article 40. Finally, concerned to do justice, it insisted on considering whether or not there had been any maladministration and concluded that, in the circumstances of the case, the

applicants had not specifically demonstrated 'that there have been inexcusable mistakes'.

The Court of Justice thus manifested its intention, in that judgment, to ensure at all costs that the legality of a measure which had not been annulled could be considered in the context of proceedings under Article 40 of the Treaty.

(b) 2. *But that intention did not last very long, since, the very day after the Meroni judgment, the Vloeberghs judgment was delivered, arriving at conclusions which it is hard to reconcile with those of the Meroni judgment.* In *Vloeberghs*, the High Authority contended that the applicant, which, not enjoying the status of an undertaking within the meaning of Article 80 of the Treaty, could not bring an action for failure to act under Article 35, was likewise not entitled to allege the illegality of such a failure to act in proceedings to establish liability under Article 40. The Commission took the view that such a claim, which involved a link between the review of legality and the assessment of any liability, could be pursued only under Article 34 of the Treaty. It contended that any decision to the contrary would allow a review of legality after the expiry of the period prescribed for that purpose and, moreover, at the instance of persons who had no standing in that regard.

My views come close to the arguments put forward in that case by the Commission. It must not be forgotten that, under the ECSC Treaty, actions for failure to act, under Article 35, are closer than under the EEC Treaty to the action for annulment, because they are brought against an implied refusal which is deemed to arise when the Commission remains silent for a period of two months. The problem therefore amounted to deciding very precisely a case of the kind with which we are concerned today, namely the question whether, in proceedings concerning legality and without any annulling judgment having been delivered, an action to establish liability could, nevertheless, be based directly on Article 40.

In that case, Mr Advocate General Roemer delivered an Opinion which may be described as exceptional and to which I shall refer on several occasions. In response to the objection of inadmissibility raised by the High Authority in that case, he analysed the principles involved in the following terms:

'The High Authority refers to the quite exceptional and unusual linking of the right to make an application for annulment and of the application for damages which Article 34 of the Treaty lays down for certain situations. We must ask ourselves whether the distinction which it makes between the spheres of application of Article 34 on the one hand and Article 40 on the other are justified under the system of the Treaty.

1) The first inference which the High Authority draws from Article 34 is certainly correct: after a successful application for annulment undertakings within the meaning of the Treaty cannot assert rights to damages except on the basis of Article 34 if they have suffered harm resulting from the decision.

2) On the contrary, all its *other inferences* and especially the following must be examined closely:

— Article 34 already requires the prior success of an application for annulment of the decisions of the High Authority which give rise to a claim to damages;

— the principle of Article 34 applies also to the omissions of the High Authority which must be contested in an application for failure to act;

— Article 34 allows only claims for damages from undertakings and groups of undertakings within the meaning of Article 80 of the Treaty.

These conclusions can be accepted only if it necessarily follows that any other interpretation, and above all that put forward by the applicant, would lead to serious disturbances in the system of the Treaty. In such an examination it is necessary to stipulate strict requirements, because the argument of the High Authority is directed towards placing narrow limits on legal protection.'

After developing a number of arguments to which I shall refer in due course (see II B 2, below), the Advocate General reverted to matters of principle, giving a consistent answer to the various questions which he had thus raised. Those questions of principle are closely related to the *travaux préparatoires* which I referred to earlier.

Thus, Mr Roemer stated that:

'In accordance with the general principles of law the Treaty draws a clear distinction between actions for annulment (of which actions for failure to act form part) and actions for damages. That difference is justifiable because of the legal consequences and of the conditions under which an action may be brought. In the first case the annulment of a decision or a declaration that the High Authority is required to adopt a decision amounts to a direct intrusion upon the executive's sphere of action, whilst in the second case only pecuniary reparation for harm is in question and the legal validity of the administrative measure is not called in question. The action for annulment is based on the four well known grounds; the action for damages on the other hand assumes a "wrong' committed by the administration. From a purely external point of view the difference in character between the two categories of action was given expression in their systematic classification in the Treaty. It is necessary to consider all questions relating to the reciprocal relationship between actions for annulment and actions for damages by starting from that elementary proposition.

It is evident that the Treaty intended to limit the number of persons and institutions entitled to bring directly an action for annulment. That intention is based on the fact that the Treaty was meant only to bring about partial integration.

On the other hand, the basic rule giving a right to damages is worded in quite general terms: ... The difference which has been outlined between actions for annulment and actions for compensation, taken together with the general wording of Article 40, in my opinion thus runs counter to the argument of the High Authority which claims that all the limits on the actions for

annulment apply to actions for damages when the cause of the injury is a defective decision. . . .

The conferring on Community organs of sovereign powers, the exercise or non-exercise of which may result in serious injury to the interests of persons outside the Community, is unthinkable without the corollary of compensation if the institutions of the Community are guilty of wrongful conduct.

The establishment of this right to compensation requires a corresponding right of action which is set out in Article 40 by way of a general rule. . . .

It follows from all these provisions that the Treaty gives to every injured party . . . the opportunity of having the Court examine whether the Treaty has been correctly applied. . . . Article 40 is not therefore limited to cases where the injury has been caused by "concrete acts of the Community" or by "defectiveness" or "negligence in the actual working of its departments", as the High Authority stated during the oral proceedings. But if persons outside the Community who are concerned can put in issue the correct application of the Treaty it is hard to see why that possibility should not include review of the conduct which gave rise or which should have given rise to a decision.'

Accordingly, having decided that an action for compensation based on Article 40 of the Treaty was admissible and after examining the conditions concerning the existence of maladministration and the characteristics of the harm necessary for entitlement to compensation, the Advocate General reached the conclusion that the Community's liability had been incurred in that case.

He was not followed on that point by the Court of Justice, but he was followed, at least partially — and this is the important detail — in his analysis of the relationship between Articles 30, 35 and 40 of the Treaty. The Court of Justice stated that,

'In the present case the Court is not asked to rule on the question whether it may be pleaded that the alleged illegality of a measure which has not been annulled constitutes in itself a wrong capable of giving rise to a right to reparation under Article 40.

On the other hand in the present case there was no decision of the High Authority creating rights or having legal effects. In these circumstances the infringement of the Treaty of which the High Authority is accused, on the ground that this is inherent in its inaction, may unquestionably be pleaded in support of an action based on Article 40 and there is no need, in considering the present case, to rule upon the question of the admissibility of an action for reparation based on the illegality of a positive act the annulment of which has not been sought.

The difference which exists between the jurisdiction conferred on the Court by Articles 33 and 35, and that which is conferred on it by Article 40, is confirmed by the reservation contained in the first paragraph of the latter article: "without prejudice to the first paragraph of Article 34". That phrase excludes any possibility of a reference to Article 34 and refers on the contrary to situations where Article 34 is not applicable, as in the present case.'

The Court of Justice did not follow its Advocate General, in so far as it considered that the conditions concerning the existence of harm of such a nature as to give rise to entitlement to reparation were not met in that case. But it must be observed that the clarity of Mr Advocate General Roemer's Opinion was matched by the relative ambiguity of the grounds of the Court's judgment cited above, in particular the last two.

The contradictory and irreconcilable aspects of the above two judgments have been clearly highlighted.[36]

(b) 3. *The third judgment delivered by the Court of Justice is more recent and much less pertinent.* It is the judgment of 10 June 1986 in *Usinor*,[37] upon which the Commission expressly relies. Admittedly, it is stated in the fourth paragraph of the summary of that judgment that 'it follows from Article 34 of the ECSC Treaty that an action for compensation for the damage arising from an individual decision may be brought by an undertaking only after the decision which allegedly caused the damage has been declared void and after it has been established that the Commission does not intend to take the steps needed to redress the illegality found to exist'.

However, the scope of that judgment appears to me in fact to be very limited. In that case, the applicant had simultaneously claimed annulment, under Article 33 of the Treaty, of general decisions extending the quota system and individual decisions fixing quarterly quotas and claimed compensation for the damage allegedly suffered. All the claims for annulment had been dismissed as inadmissible and it was in those circumstances that the claims for reparation, which could of course be based only on the second paragraph of Article 34 of the Treaty, were consequently themselves declared inadmissible in any event. This was in fact merely an application of the system established by Article 34 of the ECSC Treaty, whereby the implementation of the second paragraph of that article presupposes the existence of an annulling judgment, followed by completion of the procedure provided for in the first paragraph. The *Usinor* judgment, extensively referred to by the Commission in the present case, does not therefore in my opinion have the importance which the Commission attributes to it and does not appear in any way to rule out recourse to Article 40.

(c) *Legal writers are extremely divided as to the answer to the following question: is an undertaking which has not brought proceedings for annulment under Article 33, and then followed the procedure under Article 34, entitled to bring an action for compensation under Article 40 of the ECSC Treaty, seeking reparation for maladministration deriving from the illegality of a decision which has not been annulled?*

(c) 1. *A number of authors unhesitatingly say no to that question*, relying either on a purely literal analysis of the terms of Articles 34 and 40 or on the solution decided upon by the Court of Justice in *Meroni*, cited above. Thus, certain authors consider that the provisions of Article 34 form a single whole and constitute an autonomous form of action to establish liability under the ECSC Treaty. Consequently, the remedy provided for in the second paragraph of that article is available only to those who have previously secured the annulment of a general or individual decision under the conditions laid down in the first paragraph of Article 34 and who have secured a finding that that decision was both vitiated by a fault of such a nature as to render the Community liable and was

36 — See the doctoral thesis presented by Thierry Debard at the université Jean-Moulin, Lyon III, in 1984, *L'Action en Responsabilité Extracontractuelle devant la Cour de Justice des Communautés Europeennes*, p. 193 et seq. These matters were also taken up and commented on by Louis Cartou and Jean Blanchet in their work entitled *Dix Ans de la Jurisprudence de la Cour de Justice des Communautés Européennes*, Cologne, 1965, p 326 et seq. and p. 343 et seq.

37 — Joined Cases 81/85 and 119/85 *Usinor* v *Commission* [1986] ECR 1777

of such a nature as to give rise to direct and special harm. [38]

(c) 2. For other authors, the answer is undeniably yes. One of them, in particular, is Boulouis who states, in reliance upon the *Vloeberghs* judgment, that:

'In order to understand how the question could have arisen, regard must be had to the restrictions on the admissibility of actions for annulment brought by undertakings. On the basis of those restrictions, it has been contended that if the alleged damage originated from the supposed illegality of the measure giving rise to the damage, the action for reparation would be admissible only if such illegality had previously been ascertained by the Court. In other words, the action for reparation was necessarily subordinate to the action for annulment or, where appropriate, the action for failure to act, the result of which would have been to subject the admissibility of the former to the same restrictions as those affecting the admissibility of the latter. Acceptance of that view would have had serious consequences. Deprived of an action for annulment against the general decisions which they are entitled to bring only exceptionally, undertakings would also have been unable to take proceedings for reparation of the damage caused by such decisions. Reduced to raising objections of illegality or invalidity, they would then be liable to have their action for reparation time barred. If, on the contrary, the alleged damage resulted from a non-general decision against which the undertaking concerned did have an action for annulment, the consequence of the fact that the admissibility of that action was subject to the admissibility of the action for reparation would be that the short period for bringing actions of the first type would be substituted for the longer limitation period for actions of the second type. It was in order to avoid such consequences that the Court, rejecting that thesis, laid down in very clear terms the principle of the autonomy of the action for reparation under Article 40. The admissibility of that action is subject only to conditions specifically appropriate to it.' [39]

It was for analogous reasons that Joachim Friedrich Meinhold [40] subscribed to that thesis, adding to it a number of arguments to which I shall refer (see II B 2, below). Similarly, Messrs Cartou and Blanchet [41] expressed their approval of that thesis, relying on the one hand on the terms of the *Vloeberghs* judgment and Mr Advocate General Roemer's Opinion and, on the other, on the intention not to take the right to reparation away from the victim of any harm caused by the High Authority, for whom no remedy would otherwise be available.

Similarly, Jean Breban reaches the same conclusion, relying exclusively on an analysis of the *Vloeberghs* judgment, stating that 'it is apparent from the favourable

38 — See in that regard Goffin, JT 1963-2, p. 115. See also Much, *Die Amtshaftung im Recht der Europäischen Gemeinschaft fur Kohle und Stahl*, p. 56 et seq., p. 93 et seq., and p. 161, who essentially bases his analysis on the proviso concerning the first paragraph of Article 34 contained in the opening sentence of Article 40. See also Cesare Grassetti (above), who, like Much, considers that 'the status of *lex specialis* attaching to Article 34, which is moreover confirmed by the phrase "Without prejudice to the first paragraph of Article 34" at the beginning of Article 40 (justifies the) conclusion that whenever the conditions of Article 34 are met the application of Article 40 is excluded'. Finally, see also the abovementioned thesis of Thierry Debard who, after long hesitation, comes to the same conclusion, taking the view that the solution arrived at in the *Vloeberghs* judgment (above) is confined to the facts of that case, because the applicant undertaking did not enjoy the status of an undertaking within the meaning of Article 80 of the ECSC Treaty.

39 — 'Droit Institutionnel des Communautés Européennes', *Les Cours de Droit*, 1981-1982, p. 291. See also 2nd edition, 1990, p. 298.

40 — See footnote 2.

41 — See footnote 35.

solution (in that judgment) that, where an aggrieving measure is unlawful, compensation must be sought under Article 34, if two conditions are met:

(a) the time for bringing an action has not expired;

(b) the aggrieved undertaking may avail itself of a remedy under Article 33,

and where those two conditions are not met an action for damages is not excluded but must simply be brought on the basis of Article 40'.[42]

(c) 3. *Finally, several authors have displayed great caution in analysing this question.*

One of them, in particular, is Paul Reuter,[43] who, whilst considering that to adduce from Article 34 the principle that otherwise than in proceedings for annulment an illegal and unlawful administrative decision cannot give rise to liability is to add to the text of Article 34 something which is not there, appears to align himself with the views of the authors cited under (c)1, by reason of the fact that the procedure for establishing the Community's liability under the ECSC Treaty is an exceptional procedure.

A similarly cautious approach is also taken by Pierre Mathijsen,[44] who considers that Article 34 'thus constitutes a *lex specialis* by comparison with the general rule in Article 40. The question thus may be asked whether the phrase "Without prejudice to the first paragraph of Article 34" at the beginning of Article 40 refers to annulment as such or to annullability. In other words, is the application of Article 40 excluded solely where the harm has been caused by an annulled measure or also where the damage derives from an annullable measure'? The author does not give a precise reply to that question, since his study precedes the *Meroni* and *Vloeberghs* judgments. But, relying on an analysis of the judgment of the Court of Justice of 19 July 1955,[45] he is of the opinion that 'there is a fault of such a nature as to render the Community liable wherever an unlawful act has been committed . . . The breach of a legal obligation thus constitutes a wrongful act or omission within the meaning of Article 40 of the Treaty'.

Professor Guy Isaac[46] displays the same caution, whilst at the same time emphasizing the autonomy of the action for compensation; the Court of Justice, he says, 'after some hesitation (judgment of 15 July 1963 in Case 25/62 *Plaumann* [1963] ECR 95), extended to the sphere of the EEC Treaty the solution which it had already applied in relation to the ECSC (*Vloeberghs*, above)'. Finally, we may cite Robert Knöpfle,[47] who appears to recognize that the Community may incur liability under Article 40 by reason of an unlawful decision which has not been annulled and which is vitiated by a fault of such a nature as to give rise to such liability, suggesting at the same time that, in such circumstances, recourse may be had, for the purpose of detailed arrangements for

42 — J. Breban: *Revue de Droit Public*, 1962 'Revue de Jurisprudence de la CJCE', p. 872 et seq., particularly at pp. 1123 and 1124.

43 — *La Communauté Européenne du Charbon et de l'Acier*, Paris, 1953, LGDJ, p. 93 et seq

44 — *Le Droit de la Communaute Europeenne du Charbon et de l'Acier — une Etude des Sources*, Martinus Nijhoff, The Hague, 1958, p. 126 et seq.

45 — Case 1/55 *Kergall* v *Common Assembly* [1954 to 1956] ECR 151

46 — *Droit Communautaire Général*, in 'Droit, Sciences Economiques', Masson, 1983, p 252 et seq

47 — 'La Relation entre le Recours en Indemnité et le Recours en Annulation dans le Traite CECA', NJW 1961, Volume 50, p 2287.

reparation, to the procedure provided for in the first paragraph of Article 34 of the ECSC Treaty.

(d) *Inconclusive* travaux préparatoires

(d) 1. Admittedly, the 'Rapport de la Délégation Française sur le Traité et la Convention signés à Paris le 18 avril 1951, instituant la Communauté Européenne du Charbon et de l'Acier', [48] appears to support the thesis of those who have taken a restrictive view of the relationship between Articles 34 and 40 of the Treaty. It is there stated as follows (p. 39): 'Article 34, thus analysed, applies only where a decision or recommendation has been annulled. However, no argument can be inferred from a comparison of that article with the provisions of Article 40 to support the view that an interested party, an undertaking for example, might, by alleging "a wrongful act or omission" under Article 40, claim reparation for harm deriving from a decision or recommendation which had not been annulled, either because no action was brought in time or because such an action was dismissed: a clearly paradoxical consequence. In reality, Article 34 covers all liability of the Community by reason of wrongful conduct deriving from decisions or recommendations of the High Authority and it is apparent from that article, *a contrario*, that no fault on the part of the High Authority can be invoked and consequently no liability can be incurred by virtue of the illegality of a decision or recommendation which has not been annulled.'

48 — Imprimerie nationale, JU 101144.

There could be no clearer statement of the position and such an interpretation may be even more important in view of the fact that, as concluded by all the Advocates General of the Court of Justice, in particular Messrs Roemer and Lagrange in their abovementioned Opinions, the judicial system instituted by the ECSC Treaty was particularly influenced by the legal concepts of French administrative law.

(d) 2. *However, that conclusion is not wholly confirmed by an examination of the* travaux préparatoires *to which I have had access.*

In the draft dated 17 December 1950, in other words at a very advanced stage of the drafting of the Treaty, the future Article 34 still contained three paragraphs: the first included the first two sentences of the present Article 34, thus constituting the equivalent, in the ECSC Treaty, of the present Article 176 of the EEC Treaty; the second commenced as follows: 'In the event of direct and special harm suffered by an undertaking or a group of undertakings by reason of a decision or a recommendation *held by the Court to involve a serious fault*, the High Authority shall be required to take . . . '; and the third was the same as the present second paragraph of Article 34. At the same time, Article 40, in the same draft of 17 December 1950, opened with the phrase: 'Without prejudice to the *second paragraph* of Article 34, ...' In other words, at that very advanced stage of drafting, prior annulment did not appear to be a clear requirement for recourse to the procedure under Article 34 and the remedy under Article 40 did not appear to be unavailable in the absence of a prior annulment. It was only in the draft of 2 February 1951 that the first two paragraphs of the previous draft were merged

and the proviso in Article 40 referred to the first paragraph of Article 34. This fact appears to detract from the thesis of the *lex specialis* which the present Article 34 of the Treaty is said to constitute.

Moreover, an amendment was submitted on 14 April 1951, that is to say four days before signature of the Treaty, with a view to replacing the phrase in the first paragraph of Article 34 'recommendation held by the Court to involve a serious fault' by the phrase 'recommendation annulled by the Court'. It was rejected by the conference responsible for drawing up the Treaty. *It might perhaps be permissible to interpret that rejection as indicating the wish of the authors of the Treaty not to limit any remedies to the 'pre-litigation' administrative procedure provided for in the first paragraph of Article 34 only to situations where there has been a genuine prior annulment. That procedure could therefore be extended not only, as recognized by the Court of Justice, to cases where there was a declaration of illegality following an objection to that effect but also to cases where decisions or recommendations which have not been annulled are vitiated by illegality constituting a wrongful act or omission within the meaning of Article 40 of the Treaty.*

In any event, although the Court of Justice has on several occasions referred to the *travaux préparatoires* to interpret legislation,[49] it seems preferable, having regard to all the considerations just put forward and to the uncertainty which they reflect, to rely on the traditional methods of interpreting the Treaty, with a view to arriving at a constructive and teleological interpretation of the provisions, in order to ensure attainment of their purpose and consistency of the procedures and remedies available under the Community legal system as a whole.

2. *In view of the foregoing considerations, I propose that the Court accept the principle of the admissibility of an action to establish the liability of the Community on the basis of Article 40 of the ECSC Treaty arising from an illegal decision constituting maladministration, which has not been the subject of a prior annulling judgment.*

It seems to me that three categories of argument must be examined in support of that thesis: firstly, arguments based on the scope of the objections made by legal writers to that thesis; secondly, arguments concerning the need for appropriate judicial protection; and, finally, the arguments based on an analysis of the provisions and of the interpretation thereof by the Court.

(a) *Arguments concerning the limited scope of the objections to that thesis made, in particular, by legal writers*

(a) 1. *In the first place, the analyses made by some authors have disregarded the real scope of the principle of the autonomy of the action in liability.* According to some authors, Article 34 implies that if the supposed damage derives from the alleged illegality of a decision, an action for reparation can be admissible only if that illegality has previously been ascertained by the Court.

49 — See, in that connection, Case 6/54 *Government of the Kingdom of the Netherlands* v *High Authority of the ECSC* [1954 to 1956] ECR 103; Case 15/60 *Simon* v *Court of Justice* [1961] ECR 115; Case 39/72 *Commission* v *Italian Republic* [1973] ECR 101; Case 18/76 *Government of the Federal Republic of Germany* v *Commission* [1979] ECR 343 and Case 130/87 *Caisse de Pensions des Employes Prives* v *François Retter* [1989] ECR 865

Boulouis has clearly demonstrated the unacceptability of that thesis, which conduces to negation of the very principle of the autonomy of the action in liability which, in his view, was recognized and fully applied in the judgment in *Vloebergbs*. It is true that, in that judgment, the Court of Justice, following its Advocate General in that respect, emphasized the distinction between proceedings to establish liability and proceedings to establish illegality:

'The first paragraph of Article 40 deals with disputes concerning the liability of the Community for wrongful acts or omissions. The action for reparation referred to in Article 40 differs from an application for annulment both in its subject-matter and in the nature of the grounds which may be pleaded. As regards its subject-matter, an action for reparation is directed not to the abolition of a particular measure but only to reparation of damage caused by an act or failure to act amounting to a wrongful act or omission. As regards the grounds on which an action for reparation may be based, only the existence of a wrongful act or omission can lead to a finding against the High Authority, whereas an application for annulment enables the four grounds mentioned in Article 33 to be pleaded. Article 40 consequently confers on the Court a jurisdiction which is clearly different from that which it exercises in disputes concerning legality.'

But, in fact, even in relation to the EEC Treaty, the Court of Justice had not yet drawn the necessary consequences which, in my opinion, derive from affirmation of the principle of the autonomy of actions to establish liability. Thus, it was stated in the judgment of 15 July 1963,[50] that 'an administrative measure which has not been annulled cannot of itself constitute a wrongful act on the part of the administration inflicting damage upon those whom it affects. The latter cannot therefore claim damages by reason of that measure. The Court cannot by way of an action for compensation take steps which would nullify the legal effects of a decision which, as stated, has not been annulled'.

It was not until 1971 that the Court of Justice departed from that line, in its judgment in Case 4/69[51] and in particular in its judgment in Case 5/71;[52] Mr Advocate General Roemer 'welcomed . . . a certain change in the case-law' brought about by the *Lütticke* judgment. In the *Schöppenstedt* case, adopting an approach somewhat similar to that of the Commission today, the Council contested the admissibility of the action for damages, contending that what was sought was not reparation for harm attributable to it but the abolition of the legal effects of the contested measure. It also stated that to treat the action as admissible would frustrate the system of proceedings provided for in the Treaty, in particular in the second paragraph of Article 173, by virtue of which private individuals are not entitled to institute proceedings for the annulment of regulations. The Court answered very clearly that 'the action for damages provided for by Articles 178 and the second paragraph of Article 215 of the Treaty was introduced as an autonomous form of action, with a particular purpose to fulfil within the system of actions and subject to conditions on its use dictated by its specific nature. It differs from an application for annulment in that its end is not the abolition of a particular measure but compensation for damage caused by an institution in the performance of its duties. The Council further contends that the principal conclusions are inadmissible in that they involve the substitution of new rules, in

50 — Case 25/62 *Plaumann et Cie* v *Commission* [1963] ECR 95.

51 — Case 4/69 *Lütticke* v *Commission* [1971] ECR 325.

52 — Case 5/71 *Schöppenstedt* v *Council* [1971] ECR 975.

accordance with the criteria described by the applicant, for the rules in question, a substitution which the Court has not the power to order. The principal conclusions seek only an award of damages and, therefore, a benefit intended solely to produce effects in the case of the applicant'.

Subsequently, that case-law has always been confirmed and even taken further.[53] In particular, the judgment in *Krohn* v *Commission*[54] seems to me to be of essential importance since the Court of Justice held that 'the action provided for by Article 178 and the second paragraph of Article 215 of the Treaty was introduced as an autonomous form of action with a particular purpose to fulfil. It differs from an action for annulment in particular in that its purpose is not to set aside a specific measure but to repair the damage caused by an institution. *It follows that the existence of an individual decision which has become definitive cannot act as a bar to the admissibility of such an action.* The decision cited by the Commission relates solely to the exceptional case where an application for compensation is brought for the payment of an amount precisely equal to the duty which the applicant was required to pay under an individual decision, so that the applicant seeks in fact the withdrawal of that individual decision . . . '. That judgment appears to me to be particularly relevant to the present case where, in the first place, certain individual decisions became final and, in the second place, the action for compensation, by virtue of its very subject-matter, is certainly not intended to secure the withdrawal of those individual decisions.

(a) 2. *In the second place, the analyses by some legal writers are based on a distinction between 'illegality' and 'wrongful acts or omissions'.*

This enabled certain authors to place in hermetically sealed compartments on the one hand Article 34, which was regarded as a procedure for reparation for harm resulting from the illegality of an annulled decision and, on the other, Article 40, which was regarded as constituting a procedure facilitating the reparation of damage caused by ordinary conduct on the part of the administration, such as practical measures, incorrect information, negligence and so forth.

Subsequently, that distinction was found to be without any basis, as pointed out in particular by Guy Isaac[55] who emphasized that 'except in civil service matters, the essentially economic purpose of the activity of the EEC endows both the damage and the damaging events with their own particular features; since the Community, by contrast with a national administration, undertakes hardly any concrete activities, in essence it is necessary to develop a system of liability for damage caused by juridical, and more particularly legislative, activity'.

That had already been pointed out by Mr Advocate General Roemer in his

53 — See to that effect, the judgments in Case 43/72 *Merkur* v *Commission* [1973] ECR 1055; Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2965 — the 'Quellmehl' case, with a very explicit Opinion from Mr Capotorti on that point at p. 2981, Joined Cases 261/78 and 262/78 *Interquell* v *Council and Commission* [1979] ECR 3045; Case 76/79 *Karl Konecke* v *Commission* [1980] ECR 665; Case 543/79 *Anton Birke* v *Council* [1981] ECR 2169; and Case 281/82 *Societe Unifrex* v *Commission and Council* [1984] ECR 1969

54 — Case 175/84 *Krohn* v *Commission* [1986] ECR 753

55 — Above, p 252

Opinion in *Vloeberghs* when he stated that it followed from all the provisions of the ECSC Treaty to which he had referred that 'the Treaty gives to every injured party, and even to undertakings outside the Community, the opportunity of having the Court examine whether the Treaty has been correctly applied. In this respect it was quite proper for the applicant to rely upon the case-law of the Court in which *Article 40 was also applied when it had to be considered whether the conduct of a Community institution was in conformity with the Treaty and when the legality of a decision had to be examined. Article 40 is not therefore limited to cases where the injury has been caused by "concrete acts of the Community" or by "defectiveness" or "negligence in the actual working of its departments", as the High Authority stated during the oral proceedings*'. Mr Advocate General Roemer repeated that view in his opinion in *Schöppenstedt*: 'When the question is raised whether the Council ... was guilty of a wrongful act or omission ... it must first be considered whether the implementing regulation must be considered *illegal*. Illegality is, in general, the first prerequisite for a claim based on the liability of the administration.'

That assimilation of the concepts of illegality and fault emerges very clearly from the judgment of 17 December 1981,[56] in which the Court of Justice stated: 'It is appropriate to indicate the principles which, according to the case-law of the Court, govern the non-contractual liability of the Community. In its judgment of 28 April 1971 (Case 4/69 *Lütticke* [1971] ECR 325), which has since been confirmed on numerous occasions (see in particular the judgment of 2 July 1974, *Holtz & Willemsen* ...), the Court made clear that under the second paragraph of Article 215 and the general principles to which that provision refers, Community liability depends on the coincidence of a set of conditions as regards *the unlawfulness of the acts* alleged against the institutions, the fact of damage and the existence of a direct link in the chain of causality between the *wrongful act* and the damage complained of. The measures which, according to the applicants, gave rise to the alleged damage are legislative measures. With regard to such measures, according to a similarly consistent series of decisions of the Court, the Community does not incur liability unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (judgment of 2 December 1971 in Case 5/71 *Zückerfabrick Schoppenstedt* [1971] ECR 975). Regard must be had to these requirements when the actions are examined. Accordingly, it is appropriate to examine separately, on the one hand, the question whether the fixing, by measures adopted by the Council and the Commission, of the threshold price for durum wheat for the period in question is vitiated by illegality in the light of the criteria indicated above, and on the other hand whether the applicants are able to prove damage causally related to the contested measures.'

It follows that the illegality of conduct is assimilated, under the system of liability, to the illegality by which a measure is vitiated and that, therefore, no distinction is to be drawn between an instance of maladministration resulting from incorrect conduct and maladministration resulting from an unlawful decision. It seems to me that that is a general principle of law whose scope certainly cannot be limited to the field of application of the EEC Treaty, to the exclusion of that of the ECSC Treaty. The

56 — Joined Cases 197 to 200/80, 243/80, 245/80 and 247/80 *Walzmuhle and Others* v *Council and Commission* [1981] ECR 3211.

adoption of an unlawful measure constitutes, in principle, maladministration.

This general view of maladministration is, moreover, confirmed by legal writers.[57] Thus, Mr Schockweiler correctly emphasizes that 'the Court, after initially upholding the concept of fault, abandoned that concept at a later stage of development of its case-law in favour of the concept of illegality'.

(a) 3. *Thirdly, some legal writers have contended that a finding of illegality in proceedings to establish liability instituted on the basis of Article 40 places the High Authority under an obligation to annul the decisions at issue, contrary to the letter and the spirit of the ECSC Treaty*, as indicated, in particular, by the *travaux préparatoires* for that Treaty.

Once again, it was Mr Advocate General Roemer who disposed of that objection in his Opinion in *Vloeberghs*, when he stated that 'a finding in an action for damages that an administrative measure is illegal necessarily includes, according to the High Authority's argument, a requirement that the administrative measure be annulled, and this means that the purpose of the action for annulment is achieved. It is true that this consequence may follow in some cases. But it must not do so if, for example, the High Authority, in the interest of the Community and by compensating the injured party, believes it should adhere to its decision, or when an administrative measure has already been executed, because its effects become extinguished in a single act, or when the High Authority need no longer fear an action for annulment because of the expiration of the limitation period. This alone is enough to demonstrate an important difference as compared with the action for annulment, so that there can be no question of an unlawful extension of the right to apply for annulment'.

That is clearly applicable to the case before us, since all the individual decisions, which became final, in that they were not contested, also exhausted their legal and material effects immediately after the end of each quarter for which they fixed production and delivery quotas.

(a) 4. *Finally, it has often been stated, in support of the view that Article 34 constitutes a lex specialis, and derogates entirely from the action under Article 40, that the preconditions for the Community's liability to be incurred were different under each of those articles, as regards both the nature of the fault and the nature of the alleged harm.*

This thesis has been undermined by the Court of Justice itself. Bearing in mind that, even though those two articles are drafted in somewhat different terms, it would be inconceivable for two distinct systems of liability to be established under the ECSC Treaty, the Court required, for the application of Article 40, both a serious fault and sufficiently serious harm, in other words conditions virtually similar to those under which liability could be incurred on the basis of Article 34.[58] Accordingly, as

57 — See, on this point, H. W. Fuss, 'La Responsabilité des Communautés Européennes pour le Comportement Illégal de leurs Organes', *Revue Trimestrielle de Droit Européen*, 1981, p. 1; J.-F. Couzinet: 'La Faute dans le Régime de la Responsabilité non contractuelle des Communautés Européennes', *Revue Trimestrielle de Droit Européen*, 1986, p. 367; F. Schockweiler, with G. Wivenes and J. M. Godart: 'Le Regime de la Responsabilite Extracontractuelle du fait d'Actes Juridiques de la Communauté Européenne', *Revue Trimestrielle de Droit Européen*, 1990, p. 27.

58 — See, in that connection, the case-law of the Court of Justice referred to at III A 2 regarding the seriousness of the fault and at IV 1(b) regarding the nature of the harm.

regards the principles at issue and the general coherence of the system of the Treaty, there is nothing to prevent an action in liability, based on the illegality of a decision constituting a fault of such a nature as to cause such liability to be incurred and having given rise to direct and special damage, from being brought on the basis of Article 40 and not solely under Article 34.

(b) *Arguments as to the need for appropriate judicial protection of the individual*

Both in its judgment in Case 6/60 *Humblet* v *Belgian State*,[59] and in its judgment in Case 25/62 *Plaumann*,[60] the Court of Justice stated that *the principle should be applied whereby 'in case of doubt, a provision establishing guarantees for the protection of rights cannot be interpreted in a restrictive manner to the detriment of the individual concerned'*. However, that would indeed be the result of an excessively restrictive view of Articles 34 and 40 of the ECSC Treaty to the effect that, in the absence of prior annulment of a decision by the Court, it is impossible to seek to establish the Community's liability under Article 40 (no less impossible than on the basis of Article 34).

(b) 1. *First, the hypothesis is conceivable that harm may emerge only after the expiry of the very short period of one month, laid down by Article 33, for an action to be brought for the annulment of an individual or general decision.* As Mr Advocate General Roemer emphasized in his Opinion in *Vloeberghs*, 'the preliminary action, as a condition *sine qua non* of the application for damages based on defective decisions, is not in every case judicious. It is possible to imagine a case in which damage only became apparent after the expiry of the limitation period'. It would therefore be inconceivable, in such circumstances, to require steel undertakings to submit, as a protective measure, claims for annulment, possibly accompanied by claims for a finding as to the liability of the Community, solely for the purpose of providing the possibility of a guarantee for their rights. In numerous cases, it is a very delicate question for an undertaking to decide whether a general decision, on the one hand, is vitiated by a misuse of powers and, on the other, is liable to cause it direct and special harm. There is no apparent reason why, once the period of one month has expired and after the harm has actually become evident, an undertaking should not be entitled to seek to establish the Community's liability under Article 40. All things being equal, as we shall see below, it is appropriate here to draw a parallel with the mechanism of the objection of illegality against general decisions, which has been allowed both under the ECSC Treaty and under the EEC Treaty.

(b) 2. *Secondly, it is appropriate to refer to the hypothesis where an action for annulment would make little sense.* That was what Mr Advocate General Roemer had in mind in his abovementioned Opinion when he stated that 'One might think also of decisions which are implemented in full by a single act and in respect of which the

59 — Above.
60 — Above.

administration cannot after their annulment take "appropriate measures" instead of pecuniary reparation. In such cases even applicants entitled to institute annulment proceedings must be able to submit directly claims for damages.' This comes close to the circumstances of the present case where, on the one hand, the quarterly decisions fixing quotas immediately exhausted their legal and material effects and, on the other, owing to the abolition of the quota system, it was no longer possible for the Commission to think of taking appropriate steps in the form of compensation in kind.

(b) 3. *It is appropriate to consider all the circumstances in which an action for annulment would be inadmissible, for example because the contested measure was a general decision which was unlawful but was not vitiated by misuse of powers.* In such a case, the undertakings which had suffered direct and special harm as a result of that decision could not seek reparation if they were allowed to do so only on the basis of Article 40. The Court of Justice specifically took that point in relation to actions for failure to act which, in fact, are fully assimilated under the ECSC Treaty to actions for annulment. In the absence of a flexible interpretation of that kind in *Vloeberghs*, the applicant, which did not have the status of an undertaking within the meaning of Article 80 of the Treaty, would have been denied any legal remedy.

(b) 4. *Finally, if the Commission's view and that of certain legal authors who consider that the two remedies under Article 34 and Article 40 are separated by an impenetrable barrier were upheld*, it would seem that the result would be inconsistency and a system which would ultimately be disadvantageous for Community undertakings. If it is contended that the scope of *Vloeberghs* is limited only to undertakings that are not undertakings within the meaning of Article 80 of the Treaty, in other words often undertakings in non-member countries, that boils down to saying that, on the basis of *Vloeberghs*, the latter would be entitled, where a decision was illegal and involved fault, to act directly on the basis of Article 40. Conversely, Community undertakings within the meaning of Article 80 would, in the same circumstances, be required to obtain prior annulment of the decision in question by the Court within the very brief period laid down in Article 33 and then to observe the 'pre-litigation' procedure laid down in the first paragraph of Article 34. Such a solution would be truly unreasonable and would reflect an excessively restrictive interpretation of the judgment in *Vloeberghs*.

(c) *Arguments based on an analysis of the provisions themselves and of their interpretation by the Court of Justice*

(c) 1. *Article 40 lays down the ordinary law governing the non-contractual liability of the Community under the ECSC Treaty.* That was the view expressed by Mr Advocate General Lagrange in his Opinion in *Meroni*, above; the same conclusion was reached by Mr Advocate General Roemer in his Opinion in *Vloeberghs*, where, after reviewing all the applicable provisions, he stated that 'it follows from all these provisions that the Treaty gives to every injured party, and even to undertakings outside the Community, the opportunity of having the Court examine whether the Treaty has been correctly applied. In this respect it was quite proper for the applicant to rely upon the case-law of the Court in which Article 40 was also applied when it had to be considered whether the conduct of a Community institution was in

conformity with the Treaty and when *the legality of a decision had to be examined*'.[61]

Moreover, that finding follows from the very terms of Article 40 of the ECSC Treaty which grant every 'injured party' the right to seek 'pecuniary reparation' in the event of 'any injury caused in carrying out this Treaty by a wrongful act or omission on the part of the Community'. Those terms are extremely broad and, as emphasized by Paul Reuter,[62] 'to infer that, outside proceedings for annulment, an administrative decision cannot give rise to liability would be to add to the text something that was not there'.

As we have seen (II B 2 (a) 4, above), the fact that details of the concepts of harm and maladministration are not given in Article 40 is of no importance in that connection since the case-law developed by the Court has virtually harmonized the requirements of Article 34 and those of Article 40 in that regard. Moreover, a presentiment to that effect was expressed by Mr Roemer in his Opinion in *Vloeberghs*, where he said that 'in applying that rule of interpretation it does not appear therefore, from the point of view of the extent and the method of compensation, that there are differences between Articles 34 and 40 which are sufficiently great to bring about the exclusion of action under Article 40 in the case of defective administrative measures'.[63]

Under those circumstances, it does not seem to me that Article 34 constitutes a *lex specialis* in matters of liability, in other words, as maintained by many authors, an autonomous form of action to establish liability under the ECSC Treaty. *It is, in my opinion, merely a rule of procedure* which requires that, where an undertaking has previously secured the annulment of an individual or general decision on the basis of Article 33 and intends subsequently obtaining reparation for the harm which it considers itself to have suffered as a result of that annulled decision, it must, first, observe the 'pre-litigation' phase provided for in the third sentence of the first paragraph of Article 34 and, secondly, be in a position to take advantage of a decision from the Community court finding that the fault by which the decision was vitiated is of such a nature as to render the Community liable and that the harm suffered is indeed direct and special.

In fact, proceedings for damages, as provided for in the second paragraph of Article 34, do not in any way constitute a form of action independent from that provided for in Article 40 and, moreover, the proviso at the beginning of Article 40 relates only to the first paragraph of Article 34 and not to Article 34 in its entirety.

(c) 2. *Furthermore, it is permissible to ask exactly what meaning must be attributed to the first phrase of Article 40 'Without prejudice to the first paragraph of Article 34'.*

The expression 'without prejudice to . . .' may have either an 'inclusive' or 'exclusive' meaning. All legal writers, who have perceived a very clear separation between the so-called autonomous and special procedure under Article 34 and the

61 — Emphasis added.
62 — Above, p. 94.
63 — At p. 228.

procedure under ordinary law provided for in Article 40, seem to have failed to make this elementary finding. It seems to me that if that proviso had been intended to relate to an autonomous and special form of action available only where there was a prior annulment it would have referred to the whole of Article 34 and not only to its first paragraph, since it is the second paragraph of Article 34 which provides for entitlement to bring proceedings for damages.

It does not seem therefore, on a strict and literal analysis, that the abovementioned interpretation given by the French delegation in its records of the *travaux préparatoires* is necessarily well founded. Quite the contrary, in several provisions of the ECSC Treaty, the expression 'without prejudice to' is used for the purpose of clarifying the relationship between rules of procedure and, in this case, its purpose is to draw attention to the possible or compulsory application of another prior, simultaneous or subsequent procedure.[64] By contrast, where the expression 'without prejudice to . . .' is used in connection with substantive rules, its function is often to describe an exception to a principle which is generally set out in the same provision.[65]

As used at the beginning of Article 40, the expression 'Without prejudice to the first paragraph of Article 34' appears to me to constitute a procedural provision whose object or effect is certainly not to raise Article 34 to the status of a *lex specialis* or a basis for a special or autonomous form of action amongst remedies to establish liability, but on the contrary creates an additional procedural obligation under Article 40.

That, it seems to me, means that where proceedings to establish liability are brought under Article 40 and the alleged harm is attributable to maladministration deriving from the illegality of a decision not previously annulled by the Court, the first paragraph of Article 34 is nevertheless applicable.

This literal interpretation also seems to me to be confirmed by an analysis of the aim of the system intended by the authors of the ECSC Treaty. As was seen when the *travaux préparatoires* were examined, the Treaty was intended strictly to limit the number of persons and institutions entitled to bring proceedings for annulment, and even more strictly the pleas in law which might be put forward in support of such actions. The annulment of a decision constitutes a 'direct intrusion upon the executive's sphere of action', to borrow the expression used by Mr Advocate General Roemer, which does not come within the scope of proceedings for damages, where only financial compensation for the harm suffered is at issue.

That is the reason why Article 40, which is the expression of a general principle of law existing in all developed legal systems and constitutes the fundamental criterion for entitlement to compensation, is drafted in such general terms.

On the other hand, it is similarly clear, I think, that the authors of the Treaty intended to ensure that, even in the context of actions in liability, the Community court

64 — See the second subparagraph of Article 65(4) and Article 66(1). *Translator's note*: In fact, in the English version of the Treaty, the expression used in these cases is 'subject to ', not 'without prejudice to '.

65 — See, in this connection, the second paragraph of Article 47, Article 68(1), and Article 69(1) *Translator's note*: The English version uses the expression 'subject to ', not 'without prejudice to '

would not meddle overmuch in the decision-making of the High Authority; in other words, it seems to me that they intended, in cases where the illegality of a Commission decision constituted the basis of an action in liability and where that institution was under an obligation, by virtue of the first two sentences of Article 34, to draw all the consequences of the finding of illegality, to leave the widest margin of appreciation to the Commission and in some way to avoid what then appeared to be a risk of 'government by the courts'.

They also intended, as appears clearly from the third sentence of the first paragraph of Article 34, first, to limit attacks on the Community finances by imposing strict conditions regarding both the nature of the fault and the characteristics of the alleged harm and, secondly, to create a 'pre-litigation phase' necessarily preceding the commencement of proceedings for compensation. This phase must both promote the possibility of amicable settlement of disputes and limit any adverse effect on Community finances, to the extent to which reparation in kind is possible.

That, moreover, is what would have happened in the present case if the quota system had not ended on 30 June 1988. *It therefore seems to me that, in circumstances such as those of the present case where the action in liability based on Article 40 seeks reparation for harm caused by maladministration which itself derived from the illegality of an un-annulled decision, the pre-litigation machinery provided for in the third sentence of the first paragraph of Article 34 must be applicable by virtue of the theory of parallelism of remedies, and by virtue of the coherence which must necessarily characterize the relationship between the various forms of action, equality as between economic agents, depending on whether or not they are undertakings within the meaning of Article 80, and compliance with the wishes of the authors of the Treaty.*

(c) 3. *This entire thesis appears to me to be supported by the Court's very liberal interpretation of the provisions at issue of the ECSC Treaty*

— In the first place, a parallel must be drawn with the fact that the objection of illegality, under the ECSC Treaty, was upheld in the first *Meroni* judgment of 13 June 1958. By contrast with Article 184 of the EEC Treaty, the ECSC Treaty had made no provision whatsoever for raising, in an action against an individual decision, an objection of illegality against a general decision which had become final; it had done so only in the context of Article 36, namely where pecuniary penalties are imposed upon undertakings. However, the Court of Justice, concerned to ensure coherence and judicial protection for the persons concerned, transferred, in an exercise of purely judicial creativity, the concept of the objection of illegality to all proceedings for annulment under the ECSC Treaty, by holding as follows, in the *Meroni* judgment cited earlier:

'an illegal general decision ought not to be applied to an undertaking and no obligations affecting the said undertaking must be deemed to arise therefrom ... That provision of Article 36 should not be regarded as a special rule, applicable only in the case of pecuniary sanctions and periodic penalty payments, but as the application of a

general principle, applied by Article 36 to the particular case of an action in which the Court has unlimited jurisdiction. No argument can be based on the express statement in Article 36 to the effect that *a contrario* the application of the rule laid down is excluded in cases which it has not been expressly stated . . . Any other decision would render it difficult, if not impossible, for the undertakings and associations mentioned in Article 48 to exercise their right to bring actions, because it would oblige them to scrutinize every general decision upon publication thereof for provisions which might later adversely affect them or be considered as involving a misuse of powers affecting them. It would encourage them to let themselves be ordered to pay the pecuniary sanctions or periodic penalty payments for which the Treaty makes provision so as to be able, by virtue of Article 36, to plead the illegality of the general decisions and recommendations which they were alleged not to have observed. The Treaties establishing the European Economic Community and the European Atomic Energy Community adopt a similar point of view. The fact that the position adopted is the same does not constitute a decisive argument but confirms the reasoning set out above by showing that the authors of the new Treaties regarded it as compelling. The annulment of an individual decision based on the irregularity of the general decisions on which it is based only affects the effects of the general decision in so far as those effects take concrete shape in the annulled individual decision . . . In those circumstances, there is no reason why an applicant who is contesting an individual decision should not be entitled to put forward the four grounds of annulment set out in the first paragraph of Article 33 so as to question the legality of the general decisions and recommendations on which the individual decision is based.' [66]

66 — [1958] ECR at pp 162 and 163

In many respects, that reasoning is comparable to that which I propose the Court adopt regarding actions in liability, for the following reasons: if that thesis were rejected, the exercise of remedies available to undertakings would be singularly restrained; they would then be encouraged constantly to seek to identify a possible risk of damage and a possible misuse of powers which might affect all general decisions, leading to an accumulation of proceedings of a purely protective or 'precautionary' nature; the solution which I propose to the Court — although this is not a decisive argument — is the one adopted in the context of the EEC Treaty; to recognize the existence of liability on the basis of Article 40, by reason of the harm caused by an unlawful decision, would affect only the effects of that decision and only to the extent to which the Court considered that certain of its provisions gave rise to direct and special harm and constituted a fault of some seriousness, a matter to which I shall revert in due course (see below), III B 3.

In the context of the ECSC, those dicta whereby the exception of illegality was upheld were confirmed by the judgments of the Court of Justice of 21 February 1984 [67] and of 10 June 1986, [68] which shows that, until very recently, the Commission still appeared not to agree with those decisions of the Court of Justice. It is not surprising therefore that it should attempt to transpose those arguments to the problem of the admissibility of actions in liability, the two lines of reasoning ultimately being very close to each other.

67 — *Walzstahl and Thyssen*, above.

68 — *Usinor*, above

— Secondly, the judgment of 13 July 1961 in *Meroni*, above, despite a certain cautiousness of approach, nevertheless accepted the possibility of liability proceedings under Article 40, on the basis of certain findings in a judgment given on an objection of illegality.

Mr Advocate General Lagrange went much further, when he emphasized that 'It is true that the general decisions of the High Authority have not been declared void: they have only been held to be unlawful following an objection to that effect. But the High Authority cancelled them, which it was entitled and no doubt under a duty to do, inasmuch as the Court had found that they were illegal and there appears to me to be no doubt that the rules of Article 34 also apply in such a case.'

I wholly support that view, having regard to the development of the case-law of the Court of Justice regarding objections of illegality, definition of the concept of maladministration and the now full and wholehearted recognition of the principle that the action in liability is independent from the action for annulment, as well as the concrete consequences which are to be drawn from this.

— Thirdly, the contribution of the *Vloeberghs* judgment is similarly essential since, in that case, the assessment of liability was closely linked with the finding of illegality, made, it is true, in the context of an action for failure to act. But it must be pointed out, yet again, that proceedings for failure to act under Article 35 of the ECSC Treaty can be fully assimilated to an action for annulment.

In view of the alleged illegality, namely a failure to act, the Court of Justice recognized that an action for compensation based on the first paragraph of Article 40 was admissible, although, it is true, it stated 'in the present case the Court is not asked to rule on the question whether it may be pleaded that the alleged illegality of a measure which has not been annulled constitutes in itself a wrong capable of giving rise to a right of reparation under Article 40', which shows that the Court regarded this problem as more difficult to resolve than did some authors.

It is also true that, in that judgment, the Court of Justice held that the expression 'Without prejudice to the first paragraph of Article 34' 'excludes any possibility of a reference to Article 34 and refers on the contrary to situations where Article 34 is not applicable, as in the present case'. But the first grounds of the judgment showed that the principle of the autonomy of the action for compensation had not yet been fully accepted and it seems to me that that incidental issue would today no longer have the same importance, in view of the abovementioned developments in the case-law of the Court of Justice on the possibility of invoking, in support of an action in liability, the harm deriving from unlawful measures which have not been annulled and have become final.

3. *My conclusions, on the basis of the reasoning so far, as to the admissibility of all the claims made in the application and the relationship between the remedies and the procedural provisions of Articles 34 and 40*

(a) Where an undertaking seeks annulment on the basis of Article 33 of the Treaty, it is not entitled, in any circumstances, to make

claims for compensation at the same time since it must be possible for the first paragraph of Article 34 to be applied. That was the case in the *Usinor* judgment, cited above.

(b) Where an undertaking has obtained the annulment by the Court of a general or individual decision on the basis of Article 33, it is required to observe the entire procedure provided for in Article 34. Thus, if it has not obtained from the Court a declaration finding, first, that the illegality by which the decision is vitiated constitutes a fault of such a nature as to render the Community liable and, secondly, that the alleged damage is indeed of a direct and special nature, its claims for compensation are inadmissible since they are premature.

In the present case, that applies to the relief sought by the applicant in paragraph 2 of its claims.

(c) As regards the decisions referred to in paragraph 1(a), (b) and (d) of the applicant's claims, an undertaking which finds itself in such a situation has available to it an autonomous remedy for the purpose of obtaining a declaration as to the existence of a fault of such a nature as to render the Community liable and the existence of special and direct harm. Accordingly, the claims set out in paragraph 1(a), (b) and (d), seeking a declaration of the existence of a fault of such a nature as to render the Community liable, are admissible.

(d) Where an undertaking has brought no action for annulment against a general or individual decision, which has thus become final, it is entitled, on the basis of the first paragraph of Article 40 of the Treaty, to bring an action for reparation for the damage which it considers itself to have suffered as a result of the maladministration deriving from the illegality by which that decision is vitiated.

However, in such circumstances, and provided that the alleged harm derives from maladministration resulting from the illegality of a decision and not from a course of conduct, the entire 'pre-litigation' procedure under the first paragraph of Article 34 is applicable.

I consider that this construction which I propose that the Court adopt is in conformity with a constructive interpretation of the provisions, that it is conducive to appropriate judicial protection for the persons concerned and that it is not liable to give rise to 'serious disturbances in the system of the Treaty'.

(e) It follows that the claims set out in paragraphs 1(c) and (e), that is to say those seeking a declaration from the Court that the 11 unannulled decisions are vitiated by a fault of such a nature as to render the Community liable, are admissible. On the other hand, and for the same reasons as those set out above, the claims concerning those decisions, set out in paragraph 2, that is to say those intended to secure pecuniary reparation, are inadmissible on the ground that they are premature.

(f) To summarize, it seems to me that all the claims seeking to establish liability (in other words, all the claims in paragraph 1 are admissible) and that the claims for

compensation (set out in paragraph 2) are inadmissible on the ground that they are premature.

It remains to be considered, on the one hand, whether the illegality vitiating the decisions, whether annulled by the Court or not covered by any annulling judgment, constitute a fault of such a nature as to render the Communities liable and, on the other, whether the alleged harm is indeed direct and special in character. Since reparation of the damage must be made in accordance with the procedure under the first paragraph of Article 34, it is not necessary, in any case, to consider the problems relating to the assessment thereof.

III — The problems concerning the existence in this case of a fault such as to render the Community liable

It seems to me that in order to resolve this problem it is necessary to give answers, successively, to the following three questions: (A) In the first place, what system of liability is to be applied in the context of the ECSC Treaty? (B) In the second place, what are the specific conditions which must be met for liability to be incurred? (C) Thirdly, are those conditions satisfied in the present case with regard to the degree of seriousness of the fault?

A — *What system of liability is to be applied under the ECSC Treaty?*

This is a new and delicate issue, at least as far as Article 34 is concerned, since the Court has been called upon to expound its case-law further only in the context of proceedings for compensation under Article 40. But, as I said earlier, since those forms of action do not seem to me to be in any way separate, it would appear really inconsistent to provide for two distinct systems of liability under the same Treaty even though, quite clearly, the concept of maladministration includes, according to now settled case-law, the illegality by which a decision is vitiated.

It should be pointed out at this stage that, by way of precaution, the applicant maintained that, in the case of the decisions which had been the subject of an annulling judgment delivered by the Court, the illegalities found and criticized therein had constituted a fault of such a nature as to render the Community liable within the meaning of the first paragraph of Article 34 of the Treaty; as regards the other decisions, against which no proceedings were instituted in a concern to keep proceedings to a minimum, the applicant maintained, in the alternative, that, in any event, the Community must have incurred liability under Article 40 of the ECSC Treaty, because the very illegality by which those other decisions were vitiated constituted maladministration on the part of the Commission in the implementation of the Treaty, such as to give rise to a right to reparation on the basis of the latter article.

In general terms, the *applicant* states that the decisions annulled by the Court of Justice, and also the other decisions which were the same but were not annulled, are vitiated by a fault of such a nature as to render the Community liable. It relies on the findings of the Court of Justice in the two judgments of 14 July 1988, cited above. Conceding that any decision annulled as vitiated by illegality does not necessarily render the Community liable, the applicant contests that the conditions for the application of Article 34 of the ECSC Treaty could be the

same as those applicable to the second paragraph of Article 215 of the EEC Treaty. In its view, at most there is some similarity between the second paragraph of Article 215 of the EEC Treaty and Article 40 of the ECSC Treaty. The applicant also draws a distinction between the conditions for liability to be incurred by reason of the annulment of a general decision which was vitiated by illegality involving fault and for liability to be incurred by reason of a mere administrative measure which was vitiated by illegality involving fault. Finally, at the hearing, it was contended that the Community legislature started from the premise that the Commission decisions, in the context of the ECSC Treaty, were not essentially administrative in character and that it was for that reason that, in that Treaty, powers had been attributed almost exclusively to the Commission and not to the Council. Accordingly, the case-law of the Court of Justice on the second paragraph of Article 215, which relates to measures of a legislative nature, cannot be transposed as such for the purposes of applying Article 34 of the ECSC Treaty.

The *Commission, for its part,* considered, during the written procedure, that, as there is no judicial precedent concerning the application of Article 34 of the ECSC Treaty in the case of an illegal legislative measure, it is appropriate to refer to the judgments of the Court concerning the application of the second paragraph of Article 215 of the EEC Treaty. It is for that reason that the Commission asserts that the Community's liability in respect of a legislative measure or of any measure implying choices of economic policy and a wide margin of discretion can be incurred only where a sufficiently serious breach of a superior rule of law for the protection of individuals has occurred, and where the institution concerned has, manifestly and seriously, disregarded the limits imposed on the exercise of its powers; the Commission adds, relying on the judgment of the Court of Justice of 5 December 1979,[69] that there is a requirement of 'conduct verging on the arbitrary'. At the hearing, the Commission also expressed the view that, in the context of Article 34, conditions of a higher standard must be fulfilled for a finding of a fault of such a nature as to render the Community liable. The Commission infers that Article 34 lays down more rigorous conditions than those of the second paragraph of Article 215 for the Community to incur liability.

For my part, I consider that the case-law of the Court of Justice on questions of liability in the context of the EEC Treaty must be deemed to apply in its entirety to the basis for the liability of the Community to be incurred under the ECSC Treaty.

Whilst fully aware of the difference between the spirit and the letter of the Treaties, I rely, in reaching that conclusion, on the relevant provisions of the ECSC Treaty, on the case-law of the Court of Justice relating to Article 40 and on considerations of straightforward common sense.

1. *The textual arguments*

(a) *Article 33 of the ECSC Treaty, concerning annulment proceedings, shows clearly that the authors of the Treaty already*

69 — Case 143/77 *Scholten-Honig* v *Council and Commission* [1979] ECR 3583.

had in mind the need to moderate the review exercised by the Court of Justice in particularly complex economic situations. Thus, the second sentence of that article is worded as follows: 'The Court may not, however, examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the High Authority took its decisions or made its recommendations, save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application.'

(b) *Article 34, the second paragraph of which provides for proceedings for damages, which, in my opinion, are identical or at least similar to those under Article 40, lays down two preconditions in its first paragraph for entitlement to bring such an action: first direct and special harm and secondly, a fault of such a nature as to render the Community liable — in other words, quite clearly, not just any type of fault. It is for the Court to classify the fault.*

When it is known, moreover, having regard to the *travaux préparatoires*, that the expression 'fault of such a nature as to render the Community liable' was substituted at the last moment for the expression 'serious fault', it is clear that the authors of the Treaty intended to establish the principle of proceedings for reparation but, by means of very strict arrangements, to place a particular limit on the consequences thereof, particularly for the financial situation of the Communities.

In that regard, whilst the notion of direct and special harm is well known in all the legal systems of the Member States, the concept of fault of such a nature as to render the Community liable remains very uncertain and, as pointed out by the French delegation in its above-mentioned report, 'the Court will thus be left with the task of developing case-law on that point'. In the absence of any precedent, it is appropriate to refer, it seems to me, to the case-law which has developed in connection with Article 40.[70]

(c) *The very text of Article 40 confines itself to referring to 'any injury caused in carrying out this Treaty by a wrongful act or omission on the part of the Community'.* In his Opinion in *Meroni*, cited above (judgment of 13 July 1961), Mr Advocate General Lagrange considered that 'contrary to the view asserted by the High Authority in the written procedure, it is incorrect to say that under French law there must usually be a serious wrong to render the public authority liable: on the contrary, more often than not an ordinary wrong suffices. On the other hand it is true that the required degree of seriousness varies according to the nature of the service, the extent of the difficulty encountered in guaranteeing it, and, on the other hand, to the extent of the protection which the interests which have suffered damage deserve. In each case a balance must be struck between the public interest and private interests. In the case of the system of equalization of ferrous scrap I do not think that there are grounds for requiring that the wrong must be "serious" or "unusually serious" ... On the other hand the extremely complex nature of the system and the inevitable delays inherent in its proper functioning appear to me to be such as to require evidence of a wrong which is sufficiently serious without being "inexcusable" '.

70 — See 2, below.

We must now consider whether the Court of Justice followed that reasoning.

2. *The arguments based on the case-law of the Court of Justice in the context of Article 40*

In its judgment of 13 July 1961, *Meroni*, cited above, the Court of Justice said 'as a general observation, it must be said that, to the extent to which previous errors or defects ... may have called for certain corrections, those errors and defects do not amount *ipso facto* to a wrongful act or omission. They may just as well be for example the result of difficulty of solution of intricate legal problems or the carelessness of the undertakings themselves ... *In any case the applicants have not specifically demonstrated that there have been inexcusable mistakes*'.

In an early judgment of 17 December 1959,[71] the Court of Justice stressed that 'the fact that it was possible for the abuses complained of to continue for several years appears to indicate that the organization was defective and insufficient'; and, after noting the ambiguous nature of certain statements made by the representatives of the High Authority, the Court expressed the view that those circumstances 'cannot, moreover, transform a course of action by the defendant into a wrongful act or omission — a description which such a course of action does not in fact deserve'. The Court was even more specific in its judgment of 9 December 1965[72] in which, after analysing in detail the conduct of the High Authority, expressed the view that it showed a '*lack of care [which] became increasingly obvious ... [and that] the promises to grant transport parities ... are attributable to wrongful acts or omissions on the part of the High Authority of a nature such as to make it responsible for them*'. Finally, in its judgment of 14 December 1961,[73] the Court stated that the High Authority 'whatever the reasons for this failure ... *gravely neglected the duties of supervision required by a normal standard of care, and it is this shortcoming which gives rise to its liability*', before dismissing the application to establish liability on the ground that no damage had been suffered.

As is apparent, in all the foregoing cases, even though Article 40 confines itself to mentioning a wrongful act or omission as a condition for rendering the Community liable, without giving further details of acts of that kind, the Court of Justice has imposed the requirement of a sufficiently serious case of maladministration which comes astonishingly close to the serious and manifest breach which it has laid down as a requirement in its decisions on the application of the second paragraph of Article 215 of the EEC Treaty.

3. *Finally, pure common sense* prompts me to propose that the Court purely and simply transpose the case-law of the Court of Justice developed in the context of the EEC Treaty with respect to liability and apply it to the conditions for rights of action to arise under Articles 34 and 40 of the ECSC Treaty.

Of course, I am well aware that one is described as a 'traité-cadre' and the other as a 'traité-loi', but that does not seem to me to give rise to any decisive consequence regarding the conditions governing liability. What is important is that in both cases the Community administration operates in a delicate economic context, endeavours to reconcile several objectives which are often difficult to pursue simultaneously, and works against a background which is

71 — Case 23/59 *FERAM* v *High Authority* [1959] ECR 245.

72 — Joined Cases 29/63, 31/63, 36/63, 39/73 to 47/63, 50/63 and 51/63 *Société des Laminoirs, Hauts Fourneaux, Forges, Fonderies et Usines de la Providence and Others* v *High Authority* [1965] ECR 911.

73 — Joined Cases 19/60, 21/60, 2/61 and 3/61 *Societé Fives Lille Cail and Others* v *High Authority* [1961] ECR 281.

developing considerably and is extremely mobile, and it is for that reason, I think, that in both cases the authors of the Treaties wished to leave a considerable margin of discretion.

That does not mean, as was pointed out by Mr Advocate General Roemer in his Opinion in *Vloebergbs*, above, that there is 'an area of political discretion which is entirely outside judicial review. The Treaty expressly fixes the limits of that review. Within this framework there is no reason to accept that there exist sovereign measures not subject to the Court and which only come within the province of political responsibility. ... The only matter to be considered is whether the High Authority unduly extended its discretion ...'.[74]

The same concern for consistency has led me not to take the view that there are two different systems governing liability within the same Treaty (one based on Article 34 and the other relating to Article 40 of the ECSC Treaty) and I thus think it appropriate to propose that the Court should not establish two distinct systems of Community liability, depending on whether the Treaty involved is the ECSC Treaty or the EEC Treaty. The case-law which has developed concerning the non-contractual liability of the European Communities under the second paragraph of Article 215 of the EEC Treaty seems to me to be perfectly in conformity with the concerns of the authors of the ECSC Treaty. Moreover, numerous authors, as well as several Advocates General, have pointed out a number of 'comings and goings' between the ECSC case-law and the EEC case-law in the expounding of concepts and reasoning relating to the conditions under which the non-contractual liability of the Communities is incurred.

B — *What therefore are the specific conditions which must be satisfied for the Community's liability to be incurred in the present case?*

Those conditions were set out in the judgment of the Court of Justice of 2 December 1971 in *Schöppenstedt*, above, and confirmed by the judgment of 24 October 1973 in *Merkur*, above, and by the judgment of 14 May 1975,[75] and, were analysed in most detail in the Court's well-known judgment of 25 May 1978.[76]

I shall set them out here, as they appear in the summary of the judgment, which faithfully reflects its substance:

'The Commission does not incur non-contractual liability for damage caused to individuals through the effects of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a rule of law for the protection of the individual has occurred. Therefore the finding that a legislative measure is null and void is insufficient by itself for the Community to incur liability.'

74 — At p. 237.

75 — Case 74/74 *Comptoir National Technique Agricole* v *Commission* [1975] ECR 533.

76 — Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *Bayerische HNL and Others* v *Council and Commission* [1978] ECR 1209.

'Individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds, even if that measure has been declared null and void.'

'In a legislative field such as the one in question, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the common agricultural policy, the Community does not therefore incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.'

The foregoing decisions were confirmed by the judgments of the Court of Justice of 4 October 1979 in Case 238/78 and Joined Cases 261/78 and 262/78,[77] by the judgment of the Court of 6 December 1984,[78] and by the judgment of 19 September 1985[79] and have never been undermined since then. It is appropriate to consider successively whether each of those prescribed conditions has been satisfied in the present case, as far as matters of principle are concerned. The condition concerning the existence of a sufficiently serious breach, that is to say a manifest and grave disregard of the obligations incumbent upon the Commission, will be considered when the relevant principles are applied to the present case, in section C below.

77 — Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955 and Joined Cases 261/78 and 262/78 *Interquell* v *Council and Commission* [1979] ECR 3045 (known as the 'Quellmehl' cases).

78 — Case 59/83 *Biovilac* v *European Economic Community* [1984] ECR 4057

79 — Joined Cases 194/83 to 210/83 *Astéris* [1985] ECR 2815.

1. *Was the alleged harm suffered as a result of legislative measures involving choices of economic policy?*

It seems to me to be clear, in the first place, that General Decision No 3485/85, which extended the system of monitoring and production quotas for certain products for undertakings in the steel industry for 1986 and 1987, is *par excellence* a measure of that kind and that Article 5 thereof, the annulment of which is involved in these proceedings, is also, as is proved by the documents before the Court, the result of an economic policy choice made by the Commission in disregard, at the very least, of the limits of its own powers.

It seems to me to be well established, therefore, as has been pointed out, that all the decisions adopted each quarter to fix production and delivery quotas for the applicant undertaking on the basis of the said Article 5 are merely decisions for the application of that general decision, being necessarily affected by the same illegality as that which vitiated the general decision.

Once again, even if it can be said that the actual and direct harm suffered each quarter by the applicant was caused by the individual unlawful decision addressed to it for that quarter, which precludes reliance on Article 34 in respect of the decisions of which the annulment was not sought, the initial harm certainly derives from the general decision which was at the origin of all the illegal acts committed in the establishment of delivery quotas, on a basis which the Commission itself regarded as fair, for undertakings whose ratio between production quotas and delivery quotas was

considerably lower than the Community average.

As regards the individual quarters of 1985, it is the decisions by which the Commission refused to adjust the applicant's delivery quotas (for category III products) under Article 14 of General Decision No 234/84 extending the quota system for 1984 and 1985 which are under attack. Here again, General Decision No 234/84 is certainly a legislative measure involving choices of economic policy. Thus, where the Commission commits errors of law in the relatively complex application of that general decision, by means of individual decisions, and even in the absence of any illegality vitiating the general decision, it seems to me that the conditions to be applied are those laid down in the abovementioned case-law and not the more flexible conditions for administrative liability to arise which are found, in particular, in Community staff cases. What seems to me to be important is not merely the rank of the legislation allegedly infringed but also — and essentially — the margin of appreciation available to the Commission when it adopts its decision and the more or less complex economic context in which the decision is adopted.

It thus seems to me that the first condition is met.

2. *The second condition concerns the existence of a superior rule of law for the protection of individuals, of which a breach is alleged.*

According to the applicant, a finding of misuse of powers or a finding that decisions were applied in a manner contrary to the principle of equality would be sufficient, in principle, to establish a fault, to the extent to which the institution does not succeed in exonerating itself from liability, as in the present case, by invoking exceptional circumstances. The Commission's fault derives solely from the fact that it deliberately placed the applicant at a disadvantage for reasons of political expediency. Although it recognized the need for the measure to be taken, it in fact tried to have the responsibility for it borne by the Council, so as to escape its own political responsibility.

The Commission is of the opinion that the Court of Justice did not hold that any general principle of law had been infringed and merely criticized an infringement of material rules which, although important, are of a procedural nature, namely misinterpretation of the need to obtain the assent of the Council.

It seems to me that the superior rule of law at issue in the present case *is without doubt the principle of non-discrimination or of equality as between economic agents.* That principle is, in the first place, very clearly upheld by Articles 3, 4 and 5 of the ECSC Treaty, and then in Article 58(2) of the same Treaty, which states that 'the High Authority shall . . . *determine the quotas on an equitable basis*', and, finally, by Articles 60, 65 and 66 of the Treaty.

Moreover, that principle of equality, in the context of the ECSC Treaty, has been defined very precisely by the Court of Justice: first in the judgment of 16 July

1961 in *Meroni*, above, in which the Court of Justice held that 'the High Authority was entitled and under a duty, which was precisely in the interests of the undertakings subject to the equalization scheme, to ensure that this scheme functioned at all times on a basis of fairness, legality and accuracy as to the facts' and 'that the undertakings subject to the financial arrangements are in competition so that the High Authority must take particular care to ensure that the principle of equality in the field of public charges is always most scrupulously observed; . . . in such circumstances the High Authority cannot be blamed for having given precedence . . . to the principle of distributive justice rather than to that of legal certainty'.

That principle was defined even more precisely in the judgment of 15 January 1985 [80] which it stated 'as the Court has said, inter alia in its judgment of 13 July 1962 in Joined Cases 17 and 20/61 *Klöckner Werke* v *High Authority* [1962] ECR 325, for the Commission to be accused of discrimination, it must be shown to have treated like cases differently, thereby subjecting some to disadvantages as opposed to others, without such differentiation being justified by the existence of substantial objective differences. In order to determine whether the difference of treatment of which the applicant accuses the Commission may constitute a misuse of powers in its case, it is therefore necessary in the first place to consider whether the treatment is based on the existence of objective and substantial differences having regard to the aims which the Community may lawfully pursue as part of its industrial policy in the European steel industry'.

Finally, in its two judgments of 14 July 1988, cited earlier, the Court of Justice found an infringement of the principle of equality.

In the first case, concerning the annulment of Article 5 of General Decision No 3485/85, the Court of Justice held (paragraph 27) that 'by failing to alter the I: P ratio which it considered necessary in order to determine the quotas *on an equitable basis pursuant to Article 58(2)*, the Commission pursued a purpose different from that laid down by that provision and thus committed a misuse of power. Since the Commission had established that it was necessary to eliminate the imbalance in the I: P ratio which characterized the particular situation of undertakings such as the applicants, it must be considered that it committed a misuse of power affecting the applicants'. That breach of the principle of equality is also referred to in the operative part of the Court's judgment.

In the case of the second judgment, concerning the conditions for the application of Article 14 of General Decision No 234/84, the Court of Justice, whilst noting the two errors of law committed by the Commission, was concerned to point out (paragraph 19 of the judgment) that 'it is apparent from the documents produced at the Court's request that in several cases the Commission has granted additional quotas pursuant to Article 14 although the undertakings concerned were profitable', that is to say on a basis that was formally contrary to the thesis developed by the Commission. It therefore seems to me to be established in the present case, having regard in particular to the authority of *res judicata* attaching to the two abovementioned judgments of the Court of Justice, that there has indeed been an infringement of the principle of equality or of non-discrimination, that is to say of a

80 — Case 250/83 *Finsider* v *Commission* [1985] ECR 131.

superior rule of law intended for the protection of individuals.

3. *The exact significance of the condition concerning the existence of a 'sufficiently serious breach', that is to say, to use the terms used in Bayerische HNL, above, the requirement that the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.*

All that is necessary here is to define the exact meaning of that condition since the question whether it is satisfied in the present case will be considered in due course, in section C.

It must first be emphasized that the concept of manifest and grave disregard of the limits imposed on the exercise of the powers of an institution appears to me, with hindsight, to correspond perfectly with the concepts of 'inexcusable mistake', 'manifest lack of care' or 'serious negligence in the duties of supervision required by a normal standard of care', to which I referred earlier when considering the case-law of the Court of Justice concerning the conditions for the application of Article 40 of the ECSC Treaty.

The entire problem lies in whether, as contended by the Commission, it is also necessary for the conduct of the institution to have verged upon *the arbitrary* and even, as it appears to have argued at the hearing, to have disregarded in an even more manifest manner the rights available to individuals. In the sphere of the ECSC, it is worth citing a number of decisions which have referred to cases of arbitrariness, in particular the judgments of 21 June 1958[81] and those of 26 June 1958,[82] in which the Court of Justice held that 'pursuant to a principle generally accepted in the legal systems of the Member States, equality of treatment in the matter of economic rules does not prevent different prices being fixed in accordance with the particular situation of consumers or of categories of consumers provided that the differences in treatment correspond to a difference in the situations of such persons. If there is no objectively established basis distinctions in treatment are *arbitrary, discriminatory* and illegal. It cannot be alleged that economic rules are unfair, on the pretext that they involve direct consequences or disparate advantages for the persons concerned when this is clearly the result of the different operating conditions' (see also the judgment of 10 May 1960[83]).

It is against the background of that case-law that we must examine the Commission's claim that the non-contractual liability of the European Communities, with respect to the ECSC, can be incurred only where the institution has engaged in conduct 'verging on the arbitrary'.

In support of its contention, the Commission relies on the judgment of 5 December 1979[84] in which the Court of Justice, after referring to all the matters of principle discussed in the *Bayerische HNL* judgment, above, stated that in that case there 'were not errors of such gravity that it may be said that the conduct of the

81 — Case 8/57 *Aciéries Belges* v *High Authority* [1957 and 1958] ECR 245; Case 13/57 *Eisen-und Stahlindustrie* v *High Authority* [1957 and 1958] ECR 265.

82 — Case 9/57 *Chambre Syndicale de la Sidérurgie Française* v *High Authority* [1957 and 1958] ECR 319; Case 10/57 *Aubert and Duval* v *High Authority* [1957 and 1958] ECR 339; Case 11/57 *Sociétés Electriques d'Ugine* v *High Authority* [1957 and 1958] ECR 357; and Case 12/57 *Syndicat de la Sidérurgie du Centre-Midi* v *High Authority* [1957 and 1958] ECR 375.

83 — Joined Cases 3 to 18, 25 and 26/58 *Barbara Erzbergbau AG and Others* v *High Authority* [1960] ECR 173.

84 — Case 143/77 *Koninklijke Scholten-Honig* v *Council and Commission* [1979] ECR 3583 (the 'Isoglucose' case).

defendant institutions in this respect was verging on the arbitrary and was thus of such a kind as to involve the Community in non-contractual liability'.

It seems to me that that incidental issue in that judgment cannot be regarded as decisive here since, on the one hand, it is the only judgment referring to such conduct as a precondition for the European Communities to incur liability and, on the other, it is necessary to refer to the Opinion of Mr Advocate General Reischl in order to grasp its meaning. Essentially, Mr Reischl defined arbitrary conduct, in the form of disregard of the principle of equality, by reference to 'arbitrary disadvantage'. He added, however, that 'it must be shown, if there is to be any question of liability, that there has been a misuse of discretion verging on the arbitrary, in other words a decision which is totally unsupported by objective considerations or in which such considerations have had no influence'.

It seems to me, in fact, that that notion of arbitrariness which, moreover, has never been referred to again in the case-law of the Court of Justice and which appeared in that judgment for the first time, must be reduced to its proper proportions. It seems to me merely to have arisen by way of 'mishap', a fact which appears to be further confirmed by the statements of the Commission's agent himself, Mr Grabitz, at the hearing. Accordingly, it seems to me that this concept of 'arbitrariness' is to be seen as closely associated with the case-law developed in the German legal system, where it has a different meaning. It is, therefore, a form of extreme illegality, in other words, to use in essence the definition suggested by Mr Grabitz, where there is no equality of treatment there is arbitrariness. In those circumstances, it seems to me that that incidental issue in the abovementioned judgment referred more to the superior rule of law which had been infringed in that case than to the actual nature of the infringement committed. For it is true that 'arbitrariness' thus defined coincides, by its very nature, with every breach of the general principle of non-discrimination.

It is for that reason that, all things considered, I suggest that we adhere to the traditional conditions, as laid down in the considerable majority of the cases of the Court of Justice on the subject, namely manifest and serious breach of the duties incumbent upon the institution concerned.

C — *Has the condition concerning manifest and serious disregard of the duties incumbent, in this case, upon the Commission been satisfied?*

It is necessary to analyze closely and in detail the scope and context of each of the judgments delivered by the Court of Justice on 14 July 1988.

1. *The illegality criticized in the judgment of the Court of Justice of 14 July 1988 in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86* which derives, on the one hand, from the annulment of Article 5 of General Decision No 3485/85 'in so far as it does not enable delivery quotas to be fixed on a basis which the Commission considers fair for undertakings having ratios between their delivery quotas and production quotas which are significantly lower than the Community average' and, on the other, the

annulment of the individual decisions fixing the applicant's delivery quotas for the first two quarters of 1986.

The *applicant* maintains that the decisions annulled by that judgment of the Court of Justice are vitiated by a fault of such a nature as to render the Community liable, since the Commission acted in breach of its own communication to the Council of 25 September 1985, in which it considered adjustments to delivery quotas necessary and because it thus infringed the first subparagraph of Article 58(2) of the ECSC Treaty. Observing, in addition, that the Court held that the annulled decisions constituted a manifest misuse of powers in its regard, the applicant claims that it is clear that those decisions are vitiated by a fault of such a nature as to render the Community liable.

The *Commission*, for its part, contends that in the present case there was no sufficiently serious breach of a superior rule of law for the protection of individuals, that it did not manifestly and gravely, by conduct verging on the arbitrary, disregard the limits imposed on the exercise of its powers, that it certainly manifested no deliberate intent to place the applicant at a disadvantage and that it simply committed an error of law which, moreover, was not in its view entirely self-evident. The Commission also states that, towards the end of 1985, negotiations were conducted simultaneously on the new quota system and on a new agreement to restrict exports to the United States and that, for the latter agreement, the Council's assent would have been necessary under Article 95 of the ECSC Treaty. Finally, it states that the Court's views on the division of powers between the Council and the Commission were clarified for the first time by that judgment of 14 July 1988 and that the Court did not find any infringement of important material rules but only that of a procedural rule, namely misinterpretation of the necessity to obtain the assent of the Council.

I find it difficult to subscribe to the Commission's assessment of the gravity of the fault, which, although certainly a delicate matter, must in my view be based on the following matters of fact as a whole.

(a) *In the first place, the Commission was perfectly well aware that it was required, both under Article 58(2) of the ECSC Treaty and pursuant to the combined provisions of Articles 3, 4 and 5 of that Treaty, to determine delivery quotas on an equitable basis, that is to say in compliance with the principle of equality.* In a period of economic crisis, that principle calls for an equitable sharing of the sacrifices imposed on undertakings and means that, if the principle of solidarity which is apparent from the scheme of the ECSC Treaty necessarily presupposes that all the undertakings concerned should be subject to a production monitoring system and the introduction of production and delivery quotas, such a system, according to the case-law cited earlier, must be designed and implemented with 'particular care to ensure that the principle of equality in the field of public charges is always most scrupulously observed'.

(b) *The Commission was also perfectly well aware that, for a very limited number of undertakings, that principle of equitable sharing of the delivery quotas was not respected at all* and that it was necessary for it to intervene in order to restore equity on the eve of the adoption of a new general decision. For less than ten undertakings, which were well known to the Commission, and for certain production categories the ratio between the production quota and the part of that quota which might be delivered within the Common Market, otherwise known as the I: P ratio, had become exceptionally unfavourable, both in absolute terms and by comparison with the Community average, in some instances being around 25% lower than the latter.

(c) *In the third place, the Commission was very well aware both of the cause of that less favourable position, which derived from a collapse of steel prices on the markets of certain non-member countries, and the consequences thereof for the Community steel undertakings concerned,* which had delivery quotas for the internal market which were clearly inadequate and were, as a result, required to dispose of their production on the markets of non-member countries, thereby suffering losses or, at least, considerable decreases of profits.

(d) *The Commission, fully aware of all those difficulties, had on several occasions expressed its willingness to review the matter of the I: P ratio before extending the quota system for a further period of two years,* either in discussions with the undertakings concerned, when consulting the Consultative Committee, or in its communication to the Council of 25 September 1985 concerning the introduction of a system of production quotas after 31 December 1985.[85]

(e) *The Commission was also fully aware that the maintenance of an unchanged I: P ratio for a limited number of undertakings would place them in a particularly unfavourable and delicate competitive situation.* In fact, as the Court of Justice stated in its judgment (end of paragraph 7), 'it is an established and undisputed fact that these unfavourable I: P ratios entail *exceptional economic difficulties* for the applicants'.

(f) *The Commission must also have been fully aware of the fact that it had no need whatsoever to consult the Council and obtain the latter's assent in order to make such limited adjustments of delivery quotas in order to re-establish equality as between Community undertakings.*

That fact is apparent not only from a reasonably attentive reading of Article 58(1) and (2) of the ECSC Treaty but also from the case-law of the Court prior to the date on which the Commission adopted the decision and, in particular, the judgment of the Court of Justice of 11 May 1983.[86] The Court stated very clearly in that judgment that 'under the first subparagraph of Article 58(1), it is for the Commission to establish the existence of a manifest crisis. Should such a crisis become apparent and should the means of action provided for in Article 57 be insufficient to deal with it, Article 58 places the Commission under a duty to establish a system of production quotas. The power to take the appropriate measures lies, under Article 58, with the Commission, subject to the condition that it may not act except with the "assent" of the Council. In laying down that form of consultation between the Commission and the Council, Article 58 did not determine its detailed arrangements. In those circumstances, it is a

85 — Above.

86 — Case 244/81 *Klöckner* v *Commission* [1983] ECR 1451, paragraphs 10 and 11.

matter for the two institutions to provide, by common consent and in accordance with their respective powers, for the form which their cooperation shall take.' The requirements of Article 58 are thus satisfied if such cooperation culminates in the Council's assenting to the "quota system" which the Commission proposes to set up, without its being necessary to require the two institutions to examine a detailed draft decision'.

And indeed, the Commission itself stated, in the course of the proceedings leading to the judgment of the Court of Justice of 7 July 1982,[87] precisely what the Court held in its judgment of 14 July 1988. In its defence to a plea in law concerning the lack of any assent from the Council, the Commission had contended that 'it is to the Council that the Treaty grants the power to take the appropriate measures in cases of manifest crisis. The requirement of the assent envisaged in Article 58 is therefore satisfied provided that the Council has consented to the *principle* of establishing a quota system, being apprised of the material content of the system envisaged. On the other hand, it is not necessary for the Council to give a decision on the *detailed arrangements* for that system. The consultation which took place in this case satisfies those requirements and the existence of the Council's assent is duly attested in the preamble to Decision No 2794/80'.

Moreover, as Mr Advocate General Mischo pointed out in his Opinion: 'With regard to the amendment, by the High Authority only, of a decision made with the assent of the Council, the Court, in its judgment of 13 July 1965 in Case 111/63 *Lemmerz-Werke GmbH* v *High Authority* [1965] ECR 677, at page 699, and its judgment of 13 July 1965 in Case 37/64 *Mannesmann AG* v *High Authority* [1965] ECR 725, at page 741, made a distinction between "the very basis" or "essential structure" of the financial arrangements provided for in Article 53(b) of the ECSC Treaty and the other elements of those arrangements. It held that "there is no justification for the conclusion that the decisions of the High Authority taken with the unanimous assent of the Council could only be amended, even in the case of amendments not affecting the basis of such decisions, by a new decision also taken with the unanimous assent of the Council".

As regards the respective roles of the High Authority and the Council in the application of the first two paragraphs of Article 58, Mr Advocate General VerLoren van Themaat made a detailed examination of the different ways in which those provisions may be interpreted and of the opinions of academic writers on this matter (Opinion of 26 May 1982 in Case 119/81 [1982] ECR 2658, at pp. 2672-2677).'[88]

(g) *The Commission cannot therefore seriously claim to have been surprised or to have been confronted with an as yet unresolved legal problem and it is therefore strange that it should have considered it necessary to seek the assent of the Council* which, for reasons which have not been disclosed to the Court, the latter refused to grant it (on the specific point of the adjustment of delivery quotas).

Why adopt such an attitude? An inkling of an explanation is, without doubt, to be found on page 11 of the Commission's defence: 'When the defendant expressed its

87 — Case 119/81 *Klöckner* v *Commission* [1982] ECR 2627.

88 — [1988] ECR pp. 4324 and 4325.

intention to adjust the applicant's I: P ratio, it came up against fierce resistance from the vast majority of undertakings and associations, which considered that a correction was inappropriate. Having regard to the arguments put to it, the defendant could have changed its mind about the need to amend the I: P ratio. However, instead of abandoning the idea, it took the difficult option of negotiating with the Council in order to give effect to its intention. The defendant's intention thus sought precisely the opposite of an arbitrary disadvantage.'

A degree of surprise on reading this passage is permissible: in fact, the 'fierce resistance' of the vast majority of undertakings and associations was not in the least astonishing, since the delivery quota system is a system of apportionment and if the delivery quotas of nine undertakings are increased, in order to restore equity, and if this has a substantial effect, the delivery quotas of all the other steel undertakings are necessarily affected as a result.

It is similarly astonishing that the Commission should contend that, in the face of such resistance, it could have changed its mind about the need to amend the I: P ratios of the nine undertakings concerned. Although the Commission is required to consult undertakings, under Article 58(2), it is certainly under no obligation to adopt their suggestions. On the contrary, it is under a binding obligation to determine the quotas on an equitable basis, in accordance with the principles laid down in Articles 2, 3, 4 and 58 of the ECSC Treaty.

Finally, it is surprising that the Commission should congratulate itself on not abandoning its intent but to have 'taken the difficult option of negotiating with the Council in order to give effect to its intention'. The fact is that the Commission not only flagrantly disregarded the limits on its own powers but also, by approaching the Council in order to settle that modification of details of the delivery quota system for a very limited number of undertakings, set out along a path which, *ex hypothesi*, could lead practically nowhere other than the point actually arrived at.

Finally, the passage quoted earlier from the Commission's defence does not show, as the applicant appears to have claimed, that the Commission deliberately intended to place it at a disadvantage by comparison with its competitors or that it was moved by particular animosity against it. On the contrary, it provides very strong support for the idea that the Commission attempted to relieve itself of the obligation of examining a complex, delicate and contentious problem by preferring deliberately to disregard its own powers and leave the task of making a decision to an authority which manifestly lacked powers to deal with the matter.

The Court of Justice thus inferred that it was 'foreseeable, once the system had been introduced, that a particularly unfavourable development on the export market might require an adjustment of that ratio in order to enable the Commission to comply with its obligation to determine the quotas on an equitable basis. Such an adjustment must therefore be considered as forming part of the details of the system for which the Council's assent is not necessary . . . By failing to alter the I: P ratio which it considered necessary in order to determine the quotas on an equitable basis pursuant to

Article 58(2), the Commission pursued a purpose different from that laid down by that provision and thus committed a misuse of power. Since the Commission had established that it was necessary to eliminate the imbalance in the I: P ratio which characterized the particular situation of undertakings such as the applicants, it must be considered that it committed a misuse of power affecting the applicants' (paragraphs 26 and 27 of the judgment of 14 July 1988).

(h) *By virtue of the authority of res judicata attached to the judgments of the Court of Justice, we are bound by that legal classification adopted by the Court, namely misuse of powers, which constitutes one of the extreme forms of illegality, since, according to a well-established form of words, it involves pursuing a purpose other than that for which powers were conferred.*

It is true that the concept of misuse of powers has developed to some extent in Community law, as has been pointed out by Fernand Schockweiler.[89] He highlighted clearly the distinction between the French and German concepts of misuse of powers. According to the French concept, which is essentially subjective: 'The concept of misuse of powers is understood as relating to the defect by which an administrative measure is vitiated where an administrative authority has wilfully used its powers for a purpose other than that for which they were conferred upon it.'

89 — See F. A. Schockweiler: 'La Notion de Détournement de Pouvoir en Droit Communautaire', *Actualité Juridique de Droit Administratif*, 20 June 1990, p. 435.

On the other hand, the German concept is much more objective: 'The concept of misuse of powers, which in the German version of the Treaties was translated by the term "Ermessensmißbrauch", is a particular instance of exceeding or improperly exercising a discretion, a more general concept of which the application is appropriate only to decisions in respect of which the administrative authority is vested with a discretionary power or power of appraisal. Indeed, ... where an administrative authority is empowered to act in its own discretion, it must exercise that power of appraisal in accordance with the purpose for which it was granted and within the legally prescribed limits. That obligation is infringed where, on the one hand, the authority exceeds the limits of its power of appraisal or deviates from the purpose for which the power was granted to it ... and, on the other hand, where it declines to use its power ... even though it did so only because it was unaware of its existence.'

In the author's opinion, under the ECSC Treaty, there has been a progression from a subjective view towards an objective view of misuse of powers and, as a result, that impropriety 'is tending to merge with the concept of error of law, at least in so far as the latter relates to the scope of powers and the aims attributed to action on the part of the Commission'.

In any event, I consider, on the one hand, that the view of misuse of powers adopted in the judgment of 14 July 1988 remains essentially subjective in character (see paragraph 27) and, on the other, that the case-law of the Court of Justice concerning misuse of powers has always treated that impropriety as being of extreme gravity. Thus, on at least three occasions in connection with the ECSC Treaty, the

Court of Justice has described misuse of powers as a '*want of foresight or serious lack of care amounting to disregard for the purpose of the law . . . [pursuing] other objectives than those for which the powers provided by the Treaty were conferred*'.[90] This is in practice virtually a blend of the subjective and objective conceptions referred to earlier.

It is therefore undeniable, in my view, that the misuse of powers criticized by the Court of Justice in that case was a manifest and grave disregard of the limits on the exercise of the Commission's powers, as referred to in *Bayerische HNL*, above.

(i) *I shall consider only briefly the somewhat confused argument put forward by the Commission regarding the negotiations being conducted with the United States in 1985 with a view to establishing a new system for steel imports.*

It must be observed, on the one hand, that that fact, which, moreover, appears remote from the dispute, was referred to only incidentally in the communication submitted by the Commission to the Council on 25 September 1985 to which I referred earlier[91] and, on the other, that that argument was not referred to at any stage in the written or oral procedure before the Court of Justice prior to the judgment of 14 July 1988. In other words, that argument can in no way attenuate the gravity of the fault committed by the Commission.

(j) *Finally, the correctness of my approach is supported by an examination of the conditions surrounding the adoption of Commission Decision No 1433/87 of 20 May 1987* on converting a proportion of production quotas into quotas for delivery in the common market.

As we know, that decision too was intended to remedy, at least partially, the imbalance in the I: P ratio. Furthermore, that decision was annulled on the ground that, in view of the extremely modest scope of the system adopted, it was not capable of attaining the aim pursued. In fact, all the Community steel undertakings were authorized, subject to certain technical and complex reservations, each quarter to convert certain production quotas into quotas for delivery within the common market.

It is clear, as has moreover been emphasized by the Commission, that that draft decision did not cause any upset in the circles concerned since nearly all the steel undertakings benefited from that system. As a result, it was not capable of reducing the inequalities previously established and the decision was annulled.

But what is important is the fact that, in order to establish a system of that kind, which had a much greater impact and wider repercussions than would have resulted from a readjustment of delivery quotas on the

90 — See in that connection the judgments in Case 8/55 *Fédération Charbonnière de Belgique* v *High Authority* [1956] ECR 245; Case 2/57 *Compagnie des Hauts Fourneaux de Chasse* v *High Authority* [1957 and 1958] ECR 199; and Joined Cases 3/64 and 4/64 *Chambre Syndicale de la Sidérurgie Française and Others* v *High Authority* [1965] ECR 441

91 — See, under the heading 'Supplementary Remarks', Section XIII, last paragraph

basis of objective criteria such as those mentioned by the Commission in its communication to the Council of September 1985 for only nine steel undertakings for which the system was causing exceptional difficulties, the Commission did not consider it appropriate to consult the Consultative Committee or to obtain the assent of the Council.

In my view, the Commission should not regard the rules concerning its powers as mere procedural rules and think that it is entitled to use them according to the way in which it thinks the various undertakings in the Community steel industry might react.

That is why I propose that this Court hold that the illegality found by the Court of Justice in its judgment of 14 July 1988 constitutes both a fault of such a nature as to render the Community liable to the applicant, within the meaning of Article 34, and an instance of maladministration committed in the application of the ECSC Treaty, within the meaning of Article 40.

2. *Do the illegalities found by the Court of Justice in its abovementioned judgment of 14 July 1988 in Case 103/85 constitute a fault of such a nature as to render the Community liable?*

In that case, which covers, as far as the applicant's claims are concerned, all four quarters of 1985, the Court of Justice was called on to examine the conditions for the application of Article 15 of General Decision No 234/84, which provides that '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 ....'

For the second, third and fourth quarters of 1984, the Commission, aware of the difficulties experienced by the applicant owing to its particularly unfavourable I: P ratio, adjusted the part of the quota available for delivery in the common market. On the other hand, for the first quarter of 1985, the Commission, by an implied decision which was confirmed by an express decision of 11 June 1985, refused to make a further adjustment of that kind, relying on two arguments which have both been held by the Court of Justice to be vitiated by an error of law, namely, first, the absence of exceptional difficulties and, on the other, the allocation of aid intended to cover operating losses.

Admittedly, the Court of Justice has consistently held that a misinterpretation of the Treaty does not necessarily constitute a fault of such a nature as to render the Community liable. But, what appears to me to be decisive in the present case is the build-up of significant and grave faults which, in my view, certainly constitute a manifest and grave disregard of the duties incumbent upon the Commission and of the limits on the exercise of its powers, within the meaning of the judgment in *Bayerische HNL* of 25 May 1978, cited earlier.

(a) *The interpretation of 'exceptional difficulties'*

The Commission maintains that Article 14 does not apply to an undertaking which is profitable. In its view, the existence of exceptional difficulties depends upon the situation of the undertaking as a whole and not on the situation prevailing with regard to a specific category of products.

That interpretation was vitiated by a manifest error of law in the light of the very wording of Article 14 of General Decision No 234/84, from which it was clearly apparent, as the Court of Justice held in paragraph 17 of the judgment, 'only the difficulties which are the direct consequence of the establishment and application of the quota system may be considered by the Commission in applying Article 14'.

What is more, once again, that finding was not new as far as the Commission was concerned. As Mr Advocate General Mischo pointed out in his Opinion in that case, 'in the judgment in *Alpha Steel* it was held that Article 14 "was specifically designed to provide relief . . . it enables the effects of other provisions of the general decision to be adjusted as and when appropriate" (paragraph 24)'.[92] Moreover, the Court of Justice, adopting the views of its Advocate General in that respect, held, in paragraph 18 of the judgment, that 'it is clear from the judgment of the Court of 22 June 1983 in Case 317/82 *Usines Gustave Boël and Fabrique de Fer de Maubeuge* v *Commission* [1983] ECR 2041 that the Commission may adjust quotas only in exceptional circumstances where such adjustment is necessary for categories subject to a high abatement rate. It follows from the said judgment that in determining whether "exceptional difficulties" exist the Commission may not take account of the position of other categories of products. In the same way the Commission may not base its reasoning in relation to the existence of "exceptional difficulties" on the fact that the undertaking is on the whole profitable'.

It was thus clear that Article 14 was intended solely to compensate for the rigours of the quota system and that exceptional difficulties originating otherwise than from the introduction and application of the quota system could not be taken into consideration under that article. As was clearly shown by the Advocate General, that is precisely what would have happened if the Commission's reasoning had been followed. *It was therefore incumbent on the Commission to carry out a case-by-case review of the situation of each undertaking and of the nature and extent of the exceptional difficulties suffered by each as a result of the quota system alone, without asking*

92 — Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749.

whether on the whole it was making a loss or a profit.

In that connection, two considerations further indicate the gravity of the error committed by the Commission. In the first place, throughout 1984, the Commission had in fact adopted a lawful interpretation, without concerning itself with the applicant's overall profitable situation, before changing its position suddenly, despite very clear case-law of the Court of Justice. In the second place, as that Court pointed out in paragraph 19 of the judgment, 'indeed, it is apparent from the documents produced at the Court's request that in several cases the Commission has granted additional quotas pursuant to Article 14 although the undertakings concerned were profitable'. That observation appears to me to be of essential importance, proving the manifest and grave character of the fault committed by the Commission, a fault which, it seems to me, is even of such a nature as to establish not only a clear infringement of the principle of equality but also, possibly, a misuse of powers detrimental to the applicant company.

(b) *The classification of the aid received by Peine-Salzgitter*

At the material time, the applicant had received aid under the directive of the Federal Minister for the Economy concerning the grant of aid for structural improvement of steel undertakings, of 28 December 1983. The only aid at issue in this case was that intended to bring about structural improvements, facilitating special amortization arrangements for plant to be used for steel production, within the meaning of the ECSC Treaty, namely for the closure of such plant or, in exceptional cases, in respect of an enduring reduction of capacity used.

According to the Commission, whether or not Article 14 was applicable depended on whether the aid was, objectively, of such a nature as to contribute to the defrayal of operating losses. It added that since the aid for amortization arrangements at issue entailed a reduction of the undertaking's losses, the undertaking could not receive the additional benefit of an adjustment of its quotas under Article 14 since the aim of that article was specifically to avoid cumulative benefits of that kind.

Here again, that view discloses, without any doubt, a manifest error in the economic and financial reasoning of the Commission, which was criticized in the following terms by the Court of Justice (paragraphs 23 and 24):

'... it follows that the effect which aid may have on the profit and loss account of an undertaking cannot be regarded as a valid criterion for determining what constitutes aid intended to cover operating losses within the meaning of Article 14. Since the result of any aid may be to compensate wholly or in part for any operating losses, the Commission's argument with regard to the application of Article 14 would exclude almost all aid which is not aid for closure.

It is therefore the conditions of grant and the aim of aid which must be taken into

account in determining the question whether aid is aid intended to cover operating losses within the meaning of Article 14 of Decision No 234/84.'

That error was particularly inexcusable on the part of the Commission since Article 14 had been the subject of changes, which were successively examined in detail by Mr Advocate General Mischo, and from which it was possible to draw the following conclusions:

'It is thus undeniable that the Community legislature intended to widen appreciably the class of beneficiaries of this equity clause. Whereas under Decision No 2177/83 all traders who had received any aid, apart from aid for closure pursuant to Article 4 of the Aids Code, were barred from the benefit of Article 14, under Decision No 2748/83 all traders, even those who had received aid, were allowed to benefit from Article 14 with the sole exception of those who had received aid with a view to covering operating losses.'

As far as the definition of aids intended to cover operating losses was concerned, the Court of Justice had delivered on 15 January 1985, that is to say several weeks before the Commission's contested decision, an important judgment which shows that the fault committed by the Commission in the present case is truly inexcusable.[93] In paragraph 7 of that judgment, the Commission itself supported the reasoning finally adopted by the Court. Thus, it maintained that aid intended to cover operating losses 'produces the most damaging effect on competition and is the farthest from the true objective pursued by the Commission, namely to restructure undertakings'; and the Commission added 'to make it possible to grant additional quotas to undertakings which had received aid other than that intended for closure whilst still excluding undertakings which had received aid to cover operating losses', it had introduced 'a new criterion which was objective and general and thus not discriminatory vis-à-vis the applicant' and 'was merely exercising its discretion for the purpose of equitable management of the quota system'.

As the Court of Justice pointed out in paragraph 25 of the judgment of 14 July 1988, 'The Court held in its judgment of 15 January 1985 in Case 250/83 *Finsider* v *Commission* [1985] ECR 131 that the aim of the general decision extending the quota system was to promote the restructuring needed to adapt production and capacity to foreseeable demand and to re-establish the competitivity of the European steel industry. The Court observed that it was consistent with that aim that undertakings which had received a form of aid likely to delay the desired restructuring, namely aid intended to cover operating losses, should be excluded from the benefit of the additional quotas, the grant of which might likewise reduce their willingness to restructure. It follows from that judgment that aid which in practice is likely to promote the desired restructuring and improvement in competitivity cannot be regarded as aid intended to cover operating losses within the meaning of Article 14 of the general decision now in force.'

93 — Case 250/83 *Finsider* v *Commission* [1985] ECR 131

In the present case, as pointed out by the Court of Justice, it was clear that the contested aid had been granted with specific reference to a programme of restructuring of particular expedience from the point of view of economic policy and that in addition the aid might have to be refunded if the undertaking decided to abandon the closure or reduction in capacity previously decided upon by it. It was thus clear that the aid in question could not be regarded as aid liable to delay the desired restructuring, within the meaning of the *Finsider* judgment, that is to say aid intended purely and simply to cover operating losses within the meaning of Article 14 of General Decision No 234/84.

The various errors of law committed by the Commission, accompanied by inconsistent practice vis-à-vis the applicant and also practice which discriminated against the applicant and benefited competing undertakings in connection with the application of legislative provisions which were easy to interpret and for which the conditions of applicability had already been clarified by the Court of Justice on two occasions seems to me without any doubt to constitute a fault of such a nature as to render the Community liable vis-à-vis the applicant, within the meaning of Article 34, and an instance of maladministration in carrying out the Treaty, of the kind referred to in Article 40.

The Commission's defence will certainly not affect my views on this point, since it merely seeks to avoid the authority of *res judicata* of the abovementioned judgment of the Court of Justice of 14 July 1988 by contending that the term 'exceptional difficulties', within the meaning of Article 14, as previously clarified by the Court, remained excessively vague and that there were good grounds for believing the applicant's difficulties were attributable not to the quota system but to 'structural failings'; and, on the other, that it was not at all clear that the German structural aid should not be regarded as aid intended to cover operating losses.

In the first place, it is my view that a superior rule of law for the protection of individuals has indeed been infringed, in this case, by the Commission. The principle of equality of treatment has been infringed in two ways: on the one hand, by a manifestly incorrect interpretation of Article 14 of General Decision No 234/84 which, as a general equity clause, was specifically intended to ensure compliance with the fundamental principle of equitable distribution of production and delivery quotas; and, on the other hand, because it has been clearly shown, as expressly stated by the Court, that, in several cases, contrary to its own contention, the Commission granted additional quotas under Article 14 even though the undertakings concerned were profitable, that is to say in total contradiction with its own thesis.

Secondly, I consider that, having regard to the foregoing, the successive errors of law committed by the Commission in this case are indicative of a manifest and grave disregard of the limits on the exercise of its powers within the meaning of *Bayerische HNL*.

In those circumstances, I propose that the Court hold that, on the one hand, not only Commission General Decision No 3485/85

(Article 5) of 27 November 1985 but also all the individual decisions determining the applicant's delivery quotas for products in Categories Ia, Ib, Ic and III, from the first quarter of 1986 to the second quarter of 1988, and also the individual decisions determining the applicant's delivery quotas for Category III products, for the four quarters of 1985, are vitiated by a fault of such a nature as to render the Community liable, whether on the basis of Article 34 or that of Article 40 of the Treaty. In other words, I specifically propose that the Court accept that all the claims made by the applicant in paragraph I(a), (b), (c), (d) and (e) are not only admissible but are also well founded.

IV — Finally, the problems concerning the harm alleged by the applicant remain to be considered

I suggest that we consider successively: (1) the background to the problem, (2) the condition as to the direct nature of the harm, (3) the condition as to the special nature of the harm and, finally (4) the extent of the right to reparation.

1. *The background to the problem*

(a) Article 34 of the ECSC Treaty merely refers, as an essential precondition for the Community to incur liability, to the existence of direct and special harm. Those two concepts have never been interpreted by the Court.

(b) Article 40, for its part, makes clear that pecuniary reparation by the Community is to be made in the event of any injury caused in carrying out the Treaty by a wrongful act or omission on the part of the Community, but no details are given to describe the injury.

However, in the judgment of 13 July 1961 in *Meroni*, the Court of Justice expressed its views on the necessary characteristics of such injury. Differing in that respect from the views of its Advocate General, Mr Lagrange, who considered that there was no need to require special harm for the purposes of Article 40, the Court held that it could not 'accept that the normal disadvantages which are bound to be inherent in the system of equalization amount to an injury giving rise to a claim for reparation and is reinforced in its view because these disadvantages affect every Community undertaking and because equalization on the other hand gives substantial advantages to all consumers of ferrous scrap, especially by maintaining the price of Community scrap at a reasonable level and by preventing much larger fluctuations of this price. In the present cases it has not been shown that the disadvantage suffered by undertakings owing to the fact that they were for a time uncertain as to the final amount of their equalization contributions is greater than the disadvantage normally inherent in the system which was chosen'.

That appears to me to be a first outline of the concept of special harm, which, if such support were necessary, supports the view that the conditions for liability to be incurred under Article 34 and under Article 40 of the ECSC Treaty are ultimately very close, or indeed identical.

(c) Finally, the case-law of the Court of Justice in relation to the EEC Treaty makes it clear, on the one hand, that 'individuals

may be required . . . to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void' and, on the other, that the harm must affect limited and easily identifiable categories of economic agents (see the judgments in *Bayerische HNL* and *Biovilac* v *Commission*, above).

It may thus be inferred that, in addition to the requirement of the direct nature of the harm, which is to be found in all the legal systems of the Member States, the condition as to the special nature of the harm, within the Community legal order, actually embraces two ideas: the harm must be special, firstly by being of a certain gravity, a certain intensity; and it must be special, secondly, by affecting only a limited and easily identifiable category of economic agents. It is necessary to consider whether those various conditions are satisfied in the present case.

2. *The direct nature of the harm*

The *applicant* maintains that the harm suffered by it derives directly from the Commission decisions which were vitiated by a fault. Had the Commission acted legally, it would have raised the delivery quotas for the common market and the applicant would have been in a position to apply higher selling prices for the additional quantities that it would thus have been able to dispose of in the Community. It is thus necessary, in examining causation, to decide whether, by reference to the 'Adäquanztheorie' (reasonable foreseeability test), the same result would have been arrived at in the absence of the unlawful conduct. Such an examination clearly shows that in the present case it was the unlawful Commission decisions which directly caused the harm suffered by the applicant.

The *Commission*, for its part, denied both that there was any harm at all and that there was any causal link between the alleged harm and its decisions. The Commission put forward four arguments, which will be considered successively. In the first place, it was as a result of the quota system that the applicant was able to survive the crisis in the steel industry; secondly, the harm was not caused by the annulled general decision but by the individual decisions based on it, which have not been contested and therefore have become final; thirdly, the harm in this case, that is to say the failure to obtain the profit which would otherwise have been earned, was not caused by the contested general decision alone, since there were other causes, which were not attributable to the Commission; finally, the absence of a loss of any substantial duration and the emergence of new market shares in the future, on expiry of the quota system, negate the applicant's arguments.

(a) *The Commission contends, in the first place, that it was as a result of the quota system that the applicant survived the crisis in the steel industry; similarly, as a result of the positive economic climate created by the Community, giving rise to exceptionally favourable conjunctural conditions in the steel industry, the applicant was put in a position where it could again make comfortable profits.* Accordingly, there would seem to be no justification for recognizing any loss, since the applicant would thereby secure a double benefit from the quota system.

It seems to me that, as the Court of Justice held in respect of the equalization mechanism for the users of scrap in *Meroni*, and as it has also held on numerous occasions regarding the monitoring system and implementation of steel production quotas, an undertaking cannot, in relation to the ECSC Treaty and when particular difficulties are being experienced, complain of the normal disadvantages which are bound to be inherent in the system put into effect by the Commission, since that system was intended to uphold the general interest and is applied equitably. That, in particular, is what the Court of Justice stated with regard to steel quotas in its judgment in *Klöckner*, above: 'The goal of those restrictive measures is to improve market conditions so as to enable the profitability of undertakings to be maintained or restored in the long term and thereby enable the jobs which depend on it to be preserved as far as possible. However, contrary to the applicant's intention, Article 58 does not in any way require the Commission to guarantee each individual undertaking a minimum level of production determined in accordance with the undertaking's own criteria of profitability and development. The aim of Article 58 is to spread in the most equitable manner possible amongst all undertakings the reductions required by the economic situation and not to guarantee undertakings a minimum level of employment proportionate to their capacity.'

That being the case, the Commission's argument seems to me to be entirely untenable, since it involves simply accepting that, for the implementation of Article 58 of the ECSC Treaty, no unlawful or even arbitrary conduct on the part of the Commission would be of such a nature as to render the Community liable, even if its decisions were annulled, merely because when the system for the supervision of markets came to an end favourable economic conditions came into being in the steel industry, enabling steel undertakings to become profitable again. All the foregoing decisions of the Court of Justice, which require an equitable sharing of sacrifices and constant and scrupulous observance of the principle of equality — these being principles given effect by the adoption of an equitable production and delivery quota system — clearly run counter to such a contention.

(b) *The Commission contends, secondly, that under Article 34 of the ECSC Treaty an annulling decision is a necessary precondition for entitlement to compensation. In the present case, the loss of profit referred to by the applicant was caused only by the disadvantageous determinations of quotas in the individual decisions which were not contested, not by the general decision which was contested.*

I shall not dwell on the obvious fact that such an argument is without foundation in view of everything that I have just said concerning the relationship between Articles 34 and 40 of the ECSC Treaty and the principle whereby actions to establish liability are autonomous forms of action. Moreover, as I have already pointed out on several occasions, it is certain that the initial harm was caused by the annulled general decision which, in my view, was vitiated by a fault of such a nature as to render the Community liable. Moreover, certain individual decisions determining the applicant's delivery quotas each quarter have already been annulled as a result, on the ground that they are vitiated in the same way. Finally, all the other individual decisions, necessarily vitiated in the same way — a fact which is not in dispute — would have

suffered the same fate if brought before the Court.

But, once again, as I have endeavoured to demonstrate, the problem lies simply in determining whether the illegal acts in question, by which all those decisions are vitiated, constitute maladministration or a fault of such a nature as to render the Community liable, depending on whether reference is made to Article 40 or to Article 34 of the ECSC Treaty. That argument is, therefore, entirely irrelevant and, ultimately, merely reiterates reasoning which I rejected when considering the problems of admissibility.

(c) *Thirdly, the Commission states that there is no entitlement to compensation since the harm derived from other causes which are not attributable to it.*

In the view of the *Commission*, the applicant is not directly attacking the production and delivery quota system but is merely protesting against the fact that it had to sell part of its production on the world market. The harm allegedly suffered was thus not caused by Commission decisions but by the world market price which the defendant was not in a position to control.

This argument seems as baseless as the previous one since, on the one hand, it was precisely because the steel prices on all European and non-member-country markets had collapsed as a result of supply in excess of demand that the quota system was brought into operation and, on the other, it was also specifically because, since the beginning of 1985, the steel price on certain non-member-country markets had deteriorated considerably further that the Commission itself considered it necessary to adjust the I: P ratio of a limited number of steel undertakings which, as a result, suffered considerable harm.

Accordingly, the unlawful imposition of the requirement that an undertaking dispose of a substantial and excessive portion of its production on markets which at that time were structurally unprofitable, at prices significantly lower than those prevailing on other markets where it would otherwise have been entitled to dispose of its products, amounts, in my view, to causing direct harm to that undertaking. Moreover, that is precisely what the Court of Justice said in its judgment of 14 July 1967.[94]

It is quite clear, if the theory of causality is to be invoked, that the harm suffered by the applicant certainly did not derive from the fall in steel prices in certain non-member-country markets but arose from the obligation imposed on it by a series of unlawful Commission decisions to dispose of its products on those markets under circumstances which at that time were not profitable. In order to appraise the direct nature of the harm, the question must be asked what would have happened in the absence of any illegality constituting maladministration. That was the approach adopted by the Court of Justice in its judgment in *Société des Laminoirs, Hauts Fourneaux, Forges, Fonderies et Usines de la Providence and Others*, above, where it stated that 'when it is necessary to consider a situation as it would have been if there

94 — Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Firma Kampffmeyer and Others* v *Commission* [1967] ECR 245.

had been no wrongful act or omission, the Court must, while insisting that all available evidence be produced, accept realistic approximations, such as averages which have been established by means of comparisons'. Moreover, it has long been an established fact, as is the case in all developed legal systems, that the Court grants compensation not only for *lucrum cessans* but also for *damnum emergens*, provided that, as in the present case, direct causality is sufficiently established. [95]

(d) *Finally, the Commission contends that in the present case there is no damage for which reparation should be granted under Article 34 of the ECSC Treaty, which requires an enduring 'loss of relative position'.*

The Commission states that, since the quota system was abolished, enduring harm of that kind is necessary since undertakings, being once again subject to competition, have an opportunity to increase their market shares and could as a result make up for losses suffered when the quota system was in force. The existence of temporary damage cannot therefore be decisive if, all in all, the undertaking is ultimately able to make profits on a restored market.

It is true that the case-law of the Court of Justice has accorded a degree of importance to adverse effects on the relative position of steel undertakings in the market, or again to the concept of 'enduring losses in terms of relative position', but only to the extent to which the negative effect was regarded as serious. [96] The order made in response to the application for interim relief in the second *Assider* case is particularly illuminating. In paragraph 27 it states that 'the losses of relative position and the corresponding reductions of deliveries which Assider's members experienced as a result of the application of Article 17 were substantially under 1%. Those losses are therefore relatively slight and cannot be regarded as liable to give rise to serious damage for the undertakings in question. That conclusion is all the more inescapable inasmuch as it must be borne in mind that, as the Court has consistently held, measures adopted under Article 58 must make it possible for the whole Community steel industry to defend itself on a collective basis and by an effort of solidarity against the consequences of a crisis arising from a reduction in demand and that provision in no way requires the Commission to guarantee to a specific undertaking, to the detriment of other undertakings of the Community, a minimum production or the maintenance of its relative position in the market'.

But the Commission's argument on that point falls down upon examination of the real scope of the action, in which what is sought is not any restoration of a relative market share but merely reparation for the harm suffered as a result of a series of illegal decisions involving faults of such a nature as to render the Community liable.

Moreover, at the hearing, Counsel for the applicant took care to emphasize that the financial compensation sought related only to the direct harm and not the indirect harm resulting from all the unlawful decisions, which far exceeded the sum claimed. According to the applicant, as a result of cumulative losses of profit since 1985, it would have found itself, when the steel

95 — On this point, see the Opinion of Mr Advocate General Capotorti in *Ireks-Arkady*, above, at p 2998

96 — See in that regard the Order of the President of the Court of Justice of 10 August 1987 in Case 223/87 R *Assider* v *Commission* [1987] ECR 3473 and the Order of the President of the Court of Justice of 2 May 1988 in Case 92/88 R *Assider* v *Commission* [1988] ECR 2425

market was again opened up to free competition, that is to say in mid-1988, in a particularly good starting position by comparison with its competitors.

Those competitors had, for two and a half years, necessarily enjoyed higher income as a result of the delivery quotas which they had improperly received and they were thus able to use those additional profits in investment or rationalization measures, so that their relative competitive position appeared particularly favourable. Conversely, during those two and a half years, the applicant maintained that it not only suffered direct harm but also lost a substantial share since its competitors had at the same time improperly increased their market shares. The applicant stated specifically, at the hearing, that in its application it was not seeking compensation for this 'loss of relative position', in other words the reduction of its market share by comparison with that of its competitors who had unduly benefited from delivery quotas which had been unlawfully withheld from the applicant.

It seems to me that, by using this argument, the Commission is persisting in the same view, namely that, since Peine-Salzgitter achieved profits, it must not only tolerate all the unlawful acts of the Commission but also is to be deprived of any reparation in respect of those unlawful acts which amount to a fault of such a nature as to render the Community liable.

I cannot accept the Commission's view. Moreover, that approach was expressly condemned by Mr Capotorti in his Opinion in *Ireks-Arkady*, above, in which he stated as follows: 'As regards the past, the disparity in treatment in relation to starch is an established fact, *and the greater or lesser prosperity of the gritz and quellmehl industry cannot remove that disparity or its unlawful nature, which are the origin of the Community's obligation to make good the damage*'.[97] And the Court of Justice followed its Advocate General fully in its judgment of 4 October 1979 in that case.

In conclusion on this point, it seems to me that none of the arguments put forward by the Commission to deny the direct nature of the harm deserves to be accepted. It need merely be observed that if the Commission had acted lawfully, as it was required to do, it would have adjusted the applicant's delivery quotas for the common market, as the Court of Justice itself held, and the applicant would thus have been in a position to dispose of a large portion of its production — namely all the additional quantities disposed of in the Community — at much higher selling prices. Thus, if there had been no unlawful and improper act, the harm would never have been caused.

The applicant is therefore right, in my opinion, to claim that the issue is not whether it was able to achieve profits after the quota system came to an end but simply whether it suffered discrimination when the system was in force.

97 — See the Opinion of Mr Advocate General M. Capotorti of 12 September 1979 (at p. 3001).

3. *The special nature of the harm*

As stated earlier, the term 'special' as applied to harm has two meanings: first, the harm must be of an appreciable extent and a particular intensity and, on the other, it must affect a limited and sufficiently identifiable number of economic agents. Those two conditions appear to me to be fully satisfied in the present case and, moreover, the Commission has not actually disputed that fact.

(a) *The special nature of the harm suffered as a result of the application, by means of the various individual decisions in issue, of Article 5 of Commission General Decision No 3485/85* of 27 November 1985, which was annulled by the Court of Justice in its judgment of 14 July 1988 (in Joined Cases 33/86, 44/86, 110/86, 226/86 and 285/86).

— *As regards the intensity of the harm by reason of its extent*, it is sufficient to refer, on the one hand, to the Commission's communication to the Council of 25 September 1985 and, above all, *to the actual judgment of the Court of Justice, paragraph 7 of which states that 'it is an established and undisputed fact that these unfavourable I: P ratios entail exceptional economic difficulties for the applicants'*. That exceptional nature is also apparent from the arguments relied on by the applicant in calculating the damage suffered by it. Although, by all appearances, they require to be clarified and possibly rectified, they nevertheless show that the harm suffered as a result of the illegality by which the Commission decisions were vitiated *by far exceeds the harmful effects on their economic interests which private individuals may properly be expected to accept within reasonable limits* as a result of a legislative measure *without being able to obtain compensation from public funds*, even if that measure has been declared null and void (to repeat the precise terms of the judgment in *Bayerische HNL).*

— *The special nature of the harm, whereby only a limited and easily identifiable number of economic agents are affected.* This condition seems to me clearly to be satisfied in the case of Article 5 of General Decision No 3485/85 and the individual decisions implementing it. Moreover, the Commission expressly admitted this at the hearing in response to a question from a member of the Court. That fact is already apparent from the documents before the Court, in particular a table showing that nine Community steel undertakings, identified by name, experienced considerable difficulties as a result of a particularly unfavourable I: P ratio.

(b) *The special nature of the harm in relation to the unlawful acts condemned by the Court of Justice in its judgment of 14 July 1988 in Case 103/85, in other words the unlawful refusal to adjust the applicant's delivery quotas for category III products for the four quarters of 1985.*

— *The extent of the harm in question* is recognized by the Commission itself in the letter sent on 28 December 1988 by Mr Kutscher on its behalf to Peine-Salzgitter, conceding that 'as regards the Article 14 supplements, they amounted to about 7 000 tonnes per quarter for 1985'. That figure is perfectly consistent with the claims made in the application, since the applicant assesses as 28 289 tonnes for the whole year the additional quantity which it would have

been able to dispose of in the Community if the Commission had not unlawfully refused to allow it to do so. In view of the differences of income calculated for each of the four quarters of the year, it evaluates its loss for 1985 at over DM 5 million. It seems to me that such a loss, which is not disputed by the Commission, exceeds by far what may reasonably be required of a private individual.

— *As regards the special nature of the harm in relation to the number of economic agents* that had to suffer it, the Commission has made no comment; but it is apparent from the judgment of the Court of Justice that undertakings which were making a profit were granted additional quotas under Article 14 of General Decision No 234/84, resulting in manifest discrimination against the applicant. In this respect also, it cannot therefore be denied that the harm is special harm.

4. *The extent of the entitlement to reparation*

I think it is appropriate to make some observations on this point, since, if the Court has followed me to this point in my reasoning, it will refer the matter back to the Commission, either under the terms of the first paragraph of Article 34 or under the conditions of the ordinary law on liability, as is the frequent practice of the Court of Justice when the documents before it do not enable a precise decision to be given as to the amount of the alleged damage. That is clearly the case here, particularly since the oral procedure did not deal with the amount or the calculation of damages. Nevertheless, I think it is appropriate to give some guidance to the parties, in view of the difference between them concerning the extent of the entitlement to reparation.

— *The applicant maintains that it is entitled to full reparation for the harm which it considers itself to have suffered,* relying on the letter and spirit of Article 34 of the ECSC Treaty. Where equitable reparation in kind is no longer possible, as in the present case, since the quota system no longer exists, it is necessary to award it 'appropriate damages', that is to say compensation for its entire loss. Furthermore, that is the proper approach to the action for compensation envisaged in the second paragraph of Article 34 and the action for reparation provided for in Article 40.

— *Conversely, the Commission contends that Article 34 of the ECSC Treaty does not allow full reparation for the harm suffered but merely allows appropriate damages to be claimed, a term which necessarily means a predetermined sum.* In its view, the second paragraph of Article 34, which uses the word 'Schadensersatz' in the German version of the Treaty, that is to say 'damages', merely establishes the jurisdiction of the Court of Justice and contains no substantive provision. There was also a drafting error in the German translation, since in the French version, which is the only authentic version, both paragraphs of Article 34 refer only to the possibility of granting 'indemnité' and not to that of paying damages. Thus, in the Commission's view, a provision of that kind, being particularly flexible, leaves the Court a wide margin of discretion in order to strike a fair

balance between, on the one hand, the high risks to which the Commission is exposed when operating in a complex area in which harm is inflicted and, on the other, the interests of the undertakings concerned. Moreover, according to the Commission, that interpretation follows from the very principle of apportionment, a principle underlying the ECSC Treaty, by virtue of which the resources used to pay compensation must ultimately be provided by the undertakings which are subject to the ECSC Treaty.

In that connection, the Commission relies on two further considerations based, first, on 'necessity' and, secondly, on 'equity'. In the case of 'necessity', it contends that, as a result of the quota system, the applicant regained solvency and that no compensation is therefore necessary. As regards 'equity', it claims that an order for it to pay compensation would impose excessive financial difficulties upon it and require it to raise the ECSC levy substantially and commensurately to reduce its grants for research and its payments under Article 56 of the ECSC Treaty. Moreover, it might have to face claims from other companies.

I cannot accept any of the Commission's arguments on this point.

— As regards the argument put forward concerning supposed 'necessity', it is quite clear, as already stated, that the fact that the applicant has regained solvency in no way affects any right which it may have to reparation.

— Furthermore, as regards its reasoning purportedly based on 'equity', its views are in fact based on the 'horrific situation' which might result from an order to make payment. This seems to me to be untenable and contrary to the most elementary principles of a developed system of law. In no case would the courts of a Member State of the European Communities agree to dismiss an application for compensation on the ground that their judgment might be liable to burden the finances of the Member State in question. For the rest, I shall merely quote Mr Advocate General Lagrange: 'it would be most unsatisfactory if "the change of sovereignty" undergone by the undertakings referred to in Article 80 were accompanied by a diminution of the legal security from which they benefited when they were under the sovereignty of one of the Member States'.

— In those circumstances, the views advocated by the Commission regarding the interpretation of Article 34 seem to me to be unfounded. Article 34 speaks of 'equitable redress', 'appropriate damages' and 'proceedings for damages'. It seems to me that all those expressions clearly indicate that, where the Community has incurred liability as a result of unlawful acts or maladministration, the financial position of the victim of harm must be restored to what it would have been had there been no unlawful act or maladministration. *I see no reason, either in the legislation or in the case-law of the Court of Justice, to limit the reparation to a predetermined sum; on the contrary, it seems to me that it should precisely*

compensate for all the various components of the harm suffered. In that respect, I shall quote from the Opinion of Mr Advocate General Capotorti in *Ireks-Arkady* of 4 October 1979, cited earlier:

'It is well known that the legal concept of "damage" covers both a material loss *strictu senso*, that is to say, a reduction in a person's assets, and also the loss of an increase in those assets which would have occurred if the harmful act had not taken place (these two alternatives are known respectively as *damnum emergens* and *lucrum cessans*). In the case of damage resulting from an unlawful act not connected with a contract, the infringement of a rule of law causes injury to the interest which is protected by the provision . . . as well as adversely affecting the assets of the person. The object of compensation is to restore the assets of the victim to the condition in which they would have been apart from the unlawful act, or at least to the condition closest to that which would have been produced if the unlawful act had not taken place: the hypothetical nature of that restoration often entails a certain degree of approximation. I think it appropriate to emphasize that these general remarks are not limited to the field of private law but also apply to the liability of public authorities, and more especially to the non-contractual liability of the Community.' [98]

Moreover, the Court of Justice followed the Advocate General entirely on this point, having previously given judgment to that effect in *Kampffmeyer*, above, and in *Société des Laminoirs, Hauts Fourneaux, Forges, Fonderies et Usines de la Providence and Others*, above. In the latter judgment, it should be noted that the Court of Justice considered that, in evaluating the damage suffered by them, 'the applicants used the only method possible, consisting in imagining the position which would have arisen if the High Authority had not made the unlawful promises which represented the harmful act'. The same applies to interest, which is intended to restore the financial position of the person concerned to what it would have been in the absence of unlawful conduct. [99] Those seem to me to be general principles characteristic of a developed system of law and I see nothing in the wording of Article 34 or Article 40 of the ECSC Treaty to justify any departure from such principles, which, moreover, are the expression of straightforward common sense.

V — Final conclusions

For all the foregoing reasons, I propose:

(1) that it be declared that the following decisions of the Commission involve a fault of such a nature as to render the Community liable:

98 — At pp. 2998 and 2999.

99 — In that respect, see the judgment in Joined Cases 27/59 and 39/59 *Campolongo* v *High Authority* [1960] ECR 391.

(a) Article 5 of Commission Decision No 3485/85/ECSC of 27 November 1985 (recognized as admissible under Article 34);

(b) The individual decisions of 30 December 1985 and 21 March 1986, addressed by the Commission 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 (recognized as admissible under Article 34);

(c) The individual decisions addressed by the Commission to the applicant fixing the applicant's delivery quotas for product Categories Ia, Ib, Ic and III for the third and fourth quarters of 1986, the four quarters of 1987 and the first two quarters of 1988 (recognized as admissible under Article 40);

(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 (recognized as admissible under Article 34);

(e) The Commission decisions 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 (recognized as admissible under Article 40);

(2) That it be declared that, as regards all the foregoing decisions, illegality constituting a fault or maladministration of such a nature as to render the Community liable, has given rise to direct and special harm suffered by the applicant company;

(3) That the applicant's claim that the Commission be ordered to pay it the sum of DM 73 065 405 plus interest, be dismissed since that claim is premature and therefore inadmissible;

(4) That the matter be referred to the Commission so that it may take the steps required by the first paragraph of Article 34 of the ECSC Treaty;

(5) That the Commission be ordered to pay the costs.