interests of undertakings and providing a *quid pro quo* for the duty to supply information to the Commission. As a result, it is necessary to balance the need for transparency of the common market in steel products against the need to protect the business secrecy of individual undertakings. The only way of striking such a balance is to examine the specific situation of the undertakings concerned.

3. Whilst the Commission is not entitled to refuse to disclose the quota adjustments granted pursuant to Articles 10 and 14c of general Decisions Nos 2177/83 and 234/84 solely on the ground that to do so would constitute *per se* a breach of business secrecy, that is not the case as regards the quota adjustments granted pursuant to Articles 14 and 16 of the two general decisions, which may be granted only in the event of 'exceptional difficulties' suffered by the undertaking concerned. Since the Commission's practice is to grant such adjustments only where the exceptional difficulties are of a financial nature, publication of the identification of the undertaking, of the quota adjustment granted to it and of the legal basis for that adjustment might seriously affect the operation of the undertaking or even its continued existence.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 19 March 1985 *

Mr President,
Members of the Court,

1. The action brought by the Wirtschaftsvereinigung Eisen- und Stahlindustrie [Iron and Steel Industry Association] (hereinafter referred to as 'the Wirtschaftsvereinigung') involves the reconciliation of two conflicting requirements:

(a) The transparency which should, in the applicant's view, characterize the application of the quota system as provided for in Commission Decision No 2177/83/ECSC of 28 July 1983 (Official Journal 1983, L 208, p. 1) in view of the obligation laid down in the last sentence of the second paragraph of Article 47 of the ECSC Treaty, which provides that the Commission 'shall publish such data as could be useful to Governments or to any other parties concerned';

(b) The discretion which the Commission is bound to exercise in fulfilling that obligation, in view of the first sentence of the second paragraph of Article 47 of the ECSC Treaty:

'The High Authority must not disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.'

* Translated from the French.

Those are the opposing views before the Court. But, before proceeding any further I shall briefly review the background to the dispute.

2. Since 1980 the steel market has been under the supervision of the Commission and subject to a system of production quotas. As stated in its preamble, general Decision No 2177/83/ECSC reflects the 'persistence of the manifest crisis'. As a result, the operation of the economic laws of the market are to a very large extent controlled and restricted by Commission decisions of a general or individual character which either unilaterally fix quotas for steel production in the Community or adjust them in the light of special circumstances peculiar to certain products or undertakings. In that respect, the Commission is empowered to grant supplementary quotas, in particular to encourage undertakings to undertake rapid restructuring (eleventh recital in the preamble to Decision No 2177/83/ECSC and Article 14b of that decision).

The applicant contends that such a directed market system should be utterly transparent so as to facilitate verification of compliance by the Commission with the conditions laid down in Article 58 of the ECSC Treaty, which provides that quotas are to be determined 'on an equitable basis, taking account of the principles set out in Articles 2, 3 and 4' of that treaty.

3. Consequently, by a letter dated 10 November 1983, the Wirtschaftsvereinigung, relying upon the provisions of Article 35 of the ECSC Treaty, asked the Commission to publish in the *Official Journal* the following data for each undertaking subject to the quota system:

(a) reference production figures and reference quantities,

(b) production and delivery quotas,

(c) adjustment of quotas (or additional quotas), resulting from the application of Decision No 2177/83/ECSC.

In its reply dated 13 January 1984 the Commission drew a distinction between two classes of undertaking, namely:

(i) undertakings belonging to Eurofer, for which it provided the applicant with a table summarizing, undertaking by undertaking, the data of which publication was requested;

(ii) other undertakings, for which only aggregate figures were notified to the applicant. The applicant was informed that disclosure of data for individual undertakings, although technically feasible, was subject to the agreement of the undertakings concerned in view of the provisions of the fourth paragraph of Article 47 of the ECSC Treaty, which makes the Commission liable to an action for damages, provided for in Article 40, in the event of its breaching professional secrecy. In that connection the defendant produced in the course of the proceedings a document from the European Independent Steelworks Association (EISA) in which the latter, also referring to Article 47, stated its opposition to the disclosure of the data in question.

4. The applicant has brought an action before the Court against the Commission's reply, which it views as a decision of refusal of an individual character. The action, which is based principally on the second paragraph of Article 33 of the ECSC Treaty and in the alternative on paragraph 3 of Article 35 of that treaty, seeks to have the Commission's decision declared void inasmuch as the Commission refuses

'(a) to communicate the production and delivery quotas fixed pursuant to Commission Decision No 2177/83/

ECSC, including reference production figures, reference quantities and "adjustments', in respect of each undertaking subject to the quota system which does not belong to the Eurofer confederation, and

(b) to communicate, in respect of all undertakings subject to the quota system, the adjustments permitted by the defendant under Articles 7 (3), 8 (2) and (3), 10 (2), 11 (5), 13 (indent 2), 14, 14a, 14b, 14c, 14d, 14e, 15, 15a, 16 and 17 of Decision No 2177/83/ECSC.'

5. Before considering the arguments submitted by the Wirtschaftsvereinigung in support of its application to have the decision declared void, the question of admissiblity must be considered, this having been contested by the Commission.

The Commission argues that the action is admissible

(a) neither on the basis of the second paragraph of Article 33 (the principal claim), since the letter of 13 January 1984 cannot be classified as a decision, being merely the answer to a request which is subject to the restrictions imposed as regards professional secrecy by the second paragraph of Article 47 of the ECSC Treaty;

(b) nor, as is claimed in the alternative, on the basis of Article 35, in so far as Article 35 provides that an action for failure to act can be brought only where the Commission is 'required by this Treaty ... to take a decision . . . '. That is not so in this case since Article 47 merely requires the Commission to publish certain information, not to take a decision.

That objection of inadmissibility cannot be upheld.

The aim of the applicant's request was to have certain data relating to the application of the quota system published in the Official Journal for all the undertakings subject to that system. That request was based explicitly on Article 35 of the ECSC Treaty, in so far as the applicant considered the Commission to be bound to publish the data requested pursuant to Articles 4 (b), 5 (fourth indent), 47 (second paragraph) and 58 of the ECSC Treaty.

In its reply, the Commission stated that disclosure of the data relating to non-Eurofer members required their authorization in writing, that is to say a condition not provided for in Article 47. As a result, the Commission's position must be taken to be a *decision* of refusal, which, although only a partial refusal, is nonetheless explicit and as such is open to an action pursuant to the second paragraph of Article 33 of the ECSC Treaty.

In any event, even if the Court were not to agree with me on this point, the fact would still remain that the Commission failed to act within two months on the applicant's request for publication: therefore the applicant was entitled, in accordance with Article 35 of the ECSC Treaty, to infer an implied decision of refusal from the Commission's silence.

The Commission could not claim that it was not required by the Treaty to take a decision to publish: the second paragraph of Article 47 clearly indicates that it 'shall publish such data as could be useful to Governments or to any other parties concerned'. That obligation necessarily implies a choice since, as the Commission acknowledged in its letter of 13 January

1984, it must be reconciled with the reservation concerning professional secrecy which is also laid down in Article 47 — as a result, the Commission is obliged to take a decision.

Consequently, in my view, the action brought by the Commission ought to be declared admissible by virtue either of the second paragraph of Article 33 or of the third paragraph of Article 35 of the ECSC Treaty.

6. As far as the substance of the case is concerned it should first be observed that the scope of the dispute has evolved considerably in the course of the proceedings.

In the first place, the applicant has extended its application so as to cover publication of the data ensuing from general Commission Decision No 234/84/ECSC of 31 January 1984 (Official Journal 1984, L 29, p. 1), which, replacing Decision No 2177/83, extended the quota system for a year. That change is acceptable, as the Commission acknowledges, since Decision No 234/84/ECSC was adopted after this action was brought. It is to be noted in passing that the extension of the scope of the application does not alter the nature of the information requested since the relevant provisions of Decision No 234/84/ECSC can for the most part be regarded as equivalent to the provisions of the previous general decision.

Secondly, the Commission considers, concurring in that respect with the Wirtschaftsvereinigung, that 'the utmost transparency of the market is in fact desirable' in the context of the quota system. Accordingly in the course of the written procedure it has disclosed most of the data requested.

Consequently the scope of the dispute is now limited to the Commission's refusal to disclose the *adjustments made to quotas* allocated to undertakings *not belonging to Eurofer* on the basis of four provisions which are almost identically worded in Decisions Nos 2177/83 and 234/84, namely Articles 10, 14, 14c and 16. The Commission considers that the provisions of Article 47 of the ECSC Treaty justify that refusal on two grounds. Those are, first, that the data requested cannot be viewed as useful within the meaning of that article and, secondly, that, in any event, they should be protected by professional secrecy. Those two arguments will be considered *seriatim.*

7. The argument that the data requested are not 'useful' prompts the following comments.

By contrast with the applicant's contention, the Commission's view is that sufficient information to establish whether or not discrimination has taken place between undertakings cannot be inferred from the allocation of additional quotas to a particular undertaking on the basis of a particular article of the general decisions. The allocation of additional quotas is based, the Commission maintains, on internal data of a confidential nature specific to each undertaking, and hence knowledge of the quotas alone would not enable the individual situations of the various undertakings to be compared on the basis of whether or not they have been granted additional quotas.

That argument is unconvincing. Knowledge of the distribution among undertakings of the additional quotas allocated pursuant to a given provision might reveal that some undertakings had received special treatment, and the applicant might be concerned to check that that treatment did not reflect discrimination. Moreover, it is hard to see how that information would be less useful than the data about reference production figures and reference quantities which the

Commission agreed during the proceedings to provide after initially refusing to do so.

In fact it would be impossible seriously to contest the usefulness for all the steel undertakings concerned — namely the undertakings subject to the quota system — of being kept regularly informed of the measures implementing that system and hence of the distribution as between undertakings not only of the constraints inherent in the quota system but also of the derogations which may be authorized under the system. As a matter of sound administrative practice the Commission must put the interested parties in a position to establish what basic and additional quotas have been allocated to undertakings subject to the quota system.

It is precisely because the usefulness of those data is undeniable that it is necessary to consider whether their disclosure and the ramifications thereof ought not to be subject to professional secrecy.

8. According to the second paragraph of Article 47 of the ECSC Treaty the only information which the Commission is required not to disclose is

'information of the kind covered by the obligation of professional secrecy . . . '.

The applicant argued in that connection that professional secrecy cannot stand in the way of disclosure of the additional quotas, in so far as their publication would provide the necessary counterweight to the unqualified powers vested in the Commission in that connection.

The step taken by the Commission during the proceedings testifies to its desire for transparency and has altered the scope of dispute to such an extent that it appears in the final analysis that the question of professional secrecy no longer concerns the additional quotas *as such*, but rather the data internal to the undertakings which the disclosure of those quotas, in view of their legal basis (Articles 10, 14, 14c and 16 of the decisions mentioned earlier) is likely to reveal.

The Commission argues as follows:

(a) As far as Article 10 is concerned, which deals with additional quotas for products used in the manufacture of tubes, more than 85% of the relevant quotas concern Eurofer undertakings, and their disclosure would enable the Eurofer undertakings to determine the share allocated to non-Eurofer members and enable them to formulate a joint strategy against the latter.

(b) The additional quotas provided for in Articles 14 and 16 are intended to offset the 'exceptional difficulties' suffered by an undertaking as a result of the actual application of the quota system. In the Commission's view, the publication of those quotas would reveal the major financial difficulties of the undertaking concerned, which could be detrimental to its credit standing.

(c) As regards Article 14c, that provision deals with the additional quotas allocated for the purpose of meeting orders from non-member countries. The Commission considers that disclosure of those quotas would enable other undertakings approached to find out what company had obtained the contract, which would enable them to eliminate it when the next contract came up for tender.

9. I cannot fully agree with that assessment.

Admittedly there are data which, in view of their confidential character, the Commission

must treat as subject to professional secrecy without carrying out any further examination. That category includes information about undertakings' business relations and their cost components, which is expressly covered by Article 47 of the ECSC Treaty. But in this case the situation is not so clear-cut.

In itself the publication of the additional quotas allocated pursuant to Article 10 does not necessarily disclose information *specific to the undertaking* concerned which is likely to damage it: the causal connection referred to by the Commission seems to be uncertain and, what is more, the damage invoked hypothetical. Besides the Commission's assessment does not appear to take account of the extensive supervisory powers which are vested in the Commission itself under Article 65 of the ECSC Treaty with regard to anti-competitive practices on the part of steel undertakings.

I consider that the same interpretation should be applied to the additional quotas provided for in Article 14c: here again the Commission invokes the 'possibility' that the undertakings eliminated will adopt a joint strategy towards the undertaking to which the quota has been allocated.

As regards Articles 14 and 16, it is incorrect to say that the exceptional difficulties referred to therein *necessarily* mean that the undertakings to which additional quotas are granted pursuant thereto are in deficit. The Commission states that generally it does not effect adjustments on the basis of those articles unless the undertakings concerned are making losses and that hence it can be concluded 'in virtually every case' that the undertakings are facing 'considerable financial difficulties'. Whatever the criteria employed by the Commission they do, on its own admission, not always include undertakings which are in deficit. Furthermore, such an approach is not required by Articles 14 and 16, which are designed to relax the rigidities caused by the quota system itself. I would add that the adjustments granted pursuant to those articles may, on the contrary, reflect the fact that supplementary funds have been given to the undertakings in question in order to overcome their 'exceptional difficulties' and hence in order to help restore or strengthen their creditworthiness.

In conclusion it appears to me that the causal connexion between publication of the additional quotas granted pursuant to Articles 10, 14, 14c and 16 of the Commission's decisions and any other information thereby published which, in view of its character, should be subject to professional secrecy is too uncertain to be accepted *on a systematic basis.*

However, that does not mean that the cases covered by those articles are never to be subject to professional secrecy by virtue of the second paragraph of Article 47 of the ECSC Treaty. Indeed it is possible that the disclosure of the additional quotas obtained by an undertaking by virtue of the said articles of the Commission decisions might have the effect of revealing information about the undertaking concerned of such a kind as to damage it in view of its special circumstances or of the economic context.

In such a case the Commission would be *obliged* to plead professional secrecy. Moreover its rôle in that area is particularly delicate since, as it is responsible for ensuring transparency, it may as a result incur liability.

Therefore I am not saying that the Commission should in this case have provided the applicant with the information which it continues to withold from it. I am simply saying that it was not entitled to

refuse the applicant's request on purely formal grounds by referring *in abstracto* to four provisions.

A decision of refusal on the ground of professional secrecy presupposed in this case a *specific* examination of the circumstances on the part of the Commission.

In view of the fact that such an examination, which would be the sole means of revealing whether or not certain information which should be kept secret, did not take place it appears that the Commission's continuing refusal to comply with the Wirtschaftsvereinigung's request should incur the Court's censure.

10. In view of all the foregoing considerations, it is my opinion that:

(a) The decision by which the Commission rejected the applicant's request for information about the additional quotas granted to certain undertakings *on the sole ground* that the quotas were allocated on the basis of Articles 10, 14, 14c and 16 of Decisions Nos 2177/83/ECSC and 234/83/ECSC should be declared void;

(b) The Commission should be ordered to pay the costs.