OPINION OF MR ADVOCATE GENERAL GULMANN
delivered on 15 July 1993 *

Mr President,
Members of the Court,

1. This Opinion covers two cases in which the Consiglio di Stato has referred questions to the Court for a preliminary ruling. It is practical to deal with the cases in one and the same Opinion because they have a common background even though the legal issues raised in the cases are different.

2. Both concern the interpretation of Commission Decision No 83/396/ECSC of 29 June 1983 in which the Commission, under certain conditions, authorized specific Italian aid to steel-makers [1] and they both relate to the same authorized aid, namely a reduction of electricity prices for electric steel-makers.

3. The cases arise from the exacerbation at the beginning of the 1980s of the crisis within the steel sector. Restructuring was necessary and the need for aid was thus accepted. Such aid could, however, only be granted within the framework of and under the conditions laid down in Commission Decision No 2320/81/ECSC establishing Community rules for aids to the steel industry. [2] That decision provided *inter alia* that aid which the Member States proposed to grant to the steel industry should be notified to the Commission and that the proposed aid could only be implemented with the Commission's authorization.

4. In October 1981 the Italian Government notified to the Commission its plans to grant aid to the Finsider Group and Sisma (which are subsidiaries of the Istituto per la Ricostruzione Industriale) and to all steel producers over 50% of whose total annual consumption of electricity was accounted for by the use of electric arc furnaces — so-called electric steel-makers. After lengthy negotiations, in which the Commission in particular required changes with regard to the aid to Finsider, the Commission adopted the above-mentioned 1983 decision.

5. In Article 1 the Commission authorized *inter alia* the said aid for reduction

* Original language: Danish.

1 — Decision 83/396/ECSC concerning the aids that the Italian Government proposes to grant to certain steel undertakings, OJ 1983 L 227, p. 24.
The Court has jurisdiction to give preliminary rulings on the interpretation of ECSC measures, see judgment in Case C-221/88 *Busseni* [1990] ECR I-495.

2 — OJ 1981 L 228, p. 14.

of electricity prices for electric steel-makers.

6. The aid consisted in the State defraying part of the costs incurred by electric steel-makers in paying a special surcharge on the basic electricity price — the *sovrapprezzo termico* — which was introduced to encourage energy savings and the efficient use of energy and decided periodically by the Interministerial Price Committee.

7. The aid was implemented by Decree-law No 495 of 4 September 1981 on urgent measures in favour of the steel industry, Article 1 of which, after amendment by Law No 617 of 4 November 1981, provided that under certain conditions aid to steel-makers could be granted, the aid consisting in the fact that the exchequer would renounce the increases in the electricity surcharge decided by the Interministerial Price Committee after 31 March 1981.

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8. The two Italian undertakings, Società Terni SpA and Italsider SpA, had, for a preliminary period, obtained a share of the aid, but the aid was later required to be repaid by the authorities, who pointed out that it appeared from the Commission's 1983 authorization that the aid could be granted only to private producers and the two companies did not satisfy that condition. That interpretation of the Commission's decision is disputed by the two companies.

The Consiglio di Stato requested the Court to interpret the Commission's decision in order to resolve that dispute.

9. Article 1 of the decision provides:

'The following aids which the Italian Government plans to grant to the Finsider Group, Sisma and steel producers over 50% of whose annual consumption of electricity is accounted for by the use of electric arc furnaces are compatible with the orderly functioning of the common market to the extent that the conditions and requirements set out in Articles 2 to 5 are satisfied:

1. Aids to Finsider:

— Investment aid: ... [interest subsidies etc.]

— Aid for continued operation: [interest subsidies etc.]

— Aid for research and development up to LIT 57 000 million; ...

2. Aids to Sisma:

— endowment of a fund: ...

3. Aids to private steel producers:

— defrayal by the exchequer of increases in the electricity surcharge (sovrapprezzo termico) decided by the Interministerial Price Committee between 31 March 1981 and 31 December 1982 ...'

10. The first question referred to the Court is whether the undertakings Terni SpA and Italsider SpA are treated in the Commission decision as private or public producers in the light of their legal structure or the public holding of their capital and, thus, whether authority was granted in their case for the exchequer to defray the increases in the electricity surcharge.

11. It is clear that the separation in Article 1 of aid recipients into three categories — respectively the Finsider Group, Sisma and private producers — was intended precisely to show which aid could be granted to undertakings within each of those categories and it must also be assumed that the separation also meant that the undertakings in question could not be granted aid other than that authorized for undertakings in the category in question. That conclusion is supported by Point III in the preamble, which first sets out the aid to Finsider, then the aid to Sisma and lastly the aid for 'the private sector'. The Commission emphasized the particular circumstances which applied to each of the three groups of undertakings and authorized the specific aid mentioned for each of them. Undertakings belonging to the Finsider Group — even if from the company law point of view they were set up as private law companies — can thus not lay claim to 'defrayal by the exchequer of increases in the electricity surcharge' which was only authorized for the third group of undertakings (producers in the private sector) . Moreover in the preamble the Commission indicated the significance to be ascribed to the fact that Finsider and Sisma were 'controlled' by the State, see Point IV in the preamble.

It is apparent that Terni SpA and Italsider SpA, at least at the time relevant to the main proceedings, were undertakings in the Finsider Group and the companies confirmed, moreover, that they obtained a share of the aid which the Commission authorized for Finsider; I therefore consider there to be no doubt but that Article 1 of the decision must be interpreted as meaning that the two companies cannot be treated as 'private producers' within the meaning of the provision.

12. Since it can be deduced from the actual terms of the decision how the disputed provision is to be interpreted, there is no reason to seek assistance from other provisions in Community law where the distinction between private and public undertakings is significant.

13. The Consiglio di Stato posed a further question, asking the Court to rule whether Italsider SpA and Terni SpA 'were ..., being regarded by the said decision as public producers but not taking any share of the various aids authorized for Finsider and Sisma, exposed to unequal treatment by comparison with private producers regarding the defrayal by the State Treasury of the increases in the electricity surcharge'.

14. The question assumes that Terni SpA and Italsider SpA are companies which benefit neither from the aid authorized for Finsider and Sisma nor from the aid authorized for private producers.

It follows from what has just been stated that that assumption is not correct. The two companies have obtained a share of the aid granted to the Finsider Group.

Moreover, no evidence has been produced to indicate that in its authorization of the Italian aid the Commission infringed the prohibition in Article 4 (b) of the ECSC Treaty by adopting measures or practices which discriminate between producers. [3] On the contrary, it appears from the preamble to the decision that the Commission had assessed the aid requirements for each individual category of undertakings on the basis of the capacity reductions which were necessary in the light of restructuring.

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15. The undertaking Fonderia A. has, as a private producer, an indisputable right to the State aid authorized by the Commission which consisted in the State's defrayal of increases in the electricity surcharge.

16. The undertaking's dispute with the Italian authorities relates solely to its entitlement to that aid in the first half of 1983. It considers that it is so entitled on the basis of the clear wording of the Italian Law. The authorities refused to grant the aid for that period on the ground that in its decision the Commission authorized grant of the aid solely to the end of 1982.

3 — In its judgment in Case 304/85 *Falck* v *Commission* [1987] ECR 871, the Court held that the Commission cannot 'approve aid the grant of which may result in manifest discrimination between the public and private sectors' (paragraph 27).

17. The question referred to the Court concerns the interpretation of the Commission's decision for the purpose of resolving that dispute.

18. The provision which formed the basis for the grant of aid is worded as follows:

'In the light of the special significance of energy costs for the Italian steel industry the exchequer shall, with effect from the date of entry into force of that decree until 30 June 1983, defray the increases in the "sovrapprezzo termico" decided by the Interministerial Price Committee after 31 March 1981.'

The provision thus lays down:

(1) that the aid consists in the fact that the State will defray the *increases in the electricity surcharge* which the Interministerial Committee decided *after 31 March 1981;* and

(2) that *the aid is granted with regard to the undertakings' energy consumption in the period from 6 September 1981* (the date on which the aid commenced) *until 30 June 1983.*

That is borne out by the fact that Article 2 of the Ministerial Decree of 26 January 1982 laid down that the subsidy referred to in Article 1 of the Law '... is a subsidy ... in respect of the increases in the "sovrapprezzo termico" which [the Interministerial Committee] decided after 31 March 1981, which relate to energy consumption in the period from 6 September 1981 to 30 June 1983 ...'.

19. In its decision the Commission authorized the 'defrayal by the exchequer of increases in the electricity surcharge (sovrapprezzo termico) decided by the Interministerial Price Committee between 31 March 1981 and 31 December 1982'.

In the Italian version, which is the only authentic text, the provision is worded:

'Azzunzione a carico del Tesoro degli aumenti del sovrapprezzo termico fissati dal comitato interministeriale dei prezzi, dal 31 marzo 1981 sino al 31 dicembre 1982'.

20. The Commission and the Italian Government contend that that authorization means that the aid can only be granted until 31 December 1982, and the Commission states that it reflected a conscious position on the scope of the permissible aid.

21. It naturally makes an impression when the author of the disputed provision and its addressee are in agreement over its interpretation.

22. Against that, however, there is the fact that that interpretation implies a considerable limitation on the aid granted by the Italian legislature for the benefit of private undertakings — a limitation of six months in respect of an aid which is only to apply for approximately 22 months — and that in such a situation it is at least reasonable to require such a limitation to be expressed with clarity.

23. It is also important for interpretation purposes that in the decision's comprehensive statement of reasons there is no suggestion of a limitation on the Italian aid's temporal application.

24. However, I find it most significant that, in my view, the provision can be naturally understood only as containing *no* limitation of the period within which the aid, according to the clear wording of the Italian Law, can be granted. [4]

As stated, the Law specifically sets out the scope of application of the aid, first as regards its material content and secondly as regards its temporal application.

On the first point it was laid down that the aid consisted only in the defrayal by the State of *increases* in the electricity surcharge which the Price Committee had decided after a certain date, *in casu* 31 March 1981, whereby it was made clear that the aid did not consist in a full defrayal of the surcharge.

Secondly, it was laid down that the aid was to be granted only for a *limited period, in casu* from the entry into force of the rule in September 1981 until 30 June 1983.

4 — The Commission and the Italian Government have referred to the fact that in the disputed provision there is a comma before 'dal marzo 1981 sino al 31 dicembre 1982' and contended that that comma shows that the said period is linked to the words 'increases in the electricity surcharge' and not to the words 'decided by the Interministerial Committee'. That argument cannot, in my opinion, be accorded great significance. On the one hand it seems dubious to me whether the position of a comma can support the interpretation claimed and, on the other hand, arguments supported by the placing of a comma can generally be accorded relatively limited significance. Moreover, that the argument is dubious would seem to be borne out by the fact that the Consiglio di Stato, in its order for reference, found the said period, regardless of the comma, to be referred to incidentally in the provision, with no logical link to any of the foregoing phrases.

The reference in the Commission decision to the period between 31 March 1981 and 31 December 1982 can reasonably relate only to the period which is relevant as far as the particular aid being granted is concerned — namely the price increases adopted in the period in question — not to the period within which the aid thus decided is granted.

The reference to the date of 31 March 1981 only makes sense if that interpretation is adopted. It was, moreover, explained in the course of the proceedings that price increases were not adopted for the first half of 1983, so it is rational that the Commission, which adopted its decision on 29 June 1983, referred to the aid as consisting in the State's defrayal of the price increase decided by the Price Committee in the period between 31 March 1981 and 31 December 1982.

25. In the light of the foregoing it must be right to interpret the provision to the effect that the Commission authorized aid to be paid until 30 June 1983, in accordance with the Italian legislation.

Conclusion

26. In view of the above considerations I suggest that the Court should reply as follows:

in Case C-99/92:

(1) Article 1 of Commission Decision No 83/396/ECSC should be interpreted as meaning that undertakings belonging to the Finsider Group may not be treated as 'private producers' covered by Article 1 (3).

(2) There is no evidence before the Court to suggest that the Commission decision involved unlawful discrimination between private and public undertakings.

In Case C-100/92:

Article 1 (3) of Commission Decision No 83/396/ECSC should be interpreted as meaning that the defrayal by the exchequer of increases in the electricity surcharge (sovrapprezzo termico) was also authorized with regard to the period from 1 January to 30 June 1983.