OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 17 November 1987 *

Mr President,
Members of the Court,

1. This opinion concerns the action brought by Stahlwerke Peine-Salzgitter AG challenging the Commission's refusal to adjust its delivery quotas for the first quarter of 1985 for products in Category III (heavy sections) in accordance with Article 14 of Commission Decision No 234/84/ECSC of 31 January 1984 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (Official Journal 1984, L 29, p. 1).

2. In the absence of a reply from the Commission to its request Peine-Salzgitter AG originally brought an action for failure to act (Article 35 of the ECSC Treaty). Subsequently, on 11 June 1985, the Commission adopted a formal decision rejecting Peine-Salzgitter's request. The applicant then extended the scope of its action to cover that decision.

3. The Commission expressed doubts as to whether it was permissible to transform an action for failure to act into an action for a declaration that a decision was void, but did not formally contest it.

4. I think it would not be in the interest of the due administration of justice and the requirements of procedural economy to oblige the applicant to bring a fresh action challenging the formal decision rejecting its request. [1]

5. With regard to the substance the present case concerns the interpretation of Article 14 of Decision No 234/84/ECSC, which is worded as follows:

'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 12 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 . . .'

6. The Commission considers that the action is unfounded at least for one of the two following reasons, namely:

* Translated from the French.

1 — See, for example, the judgment of 29 September 1987 in Joined Cases 351 and 360/85 *Fabrique de fer de Charleroi SA and Dillinger Hüttenwerke AG* v *Commission* [1987] ECR 3639 at paragraph 11 or the judgment of 3 March 1982 in Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 8.

The quota system has no longer caused Peine-Salzgitter AG 'exceptional difficulties' since the first quarter of 1985;

During the 12 months prior to the first quarter of 1985 Peine-Salzgitter AG received aid authorized by the Commission to cover operating losses.

7. The case now hangs on the interpretation to be given to the terms 'exceptional difficulties' and 'aids authorized by the Commission with a view to covering operating losses'. I shall examine those two questions in turn.

I — Interpretation of the term 'exceptional difficulties'

8. The Commission considers that Article 14 applies only if the undertaking satisfies a fundamental condition: it must have suffered losses at least during the quarter to which its request relates. The Commission states that it relies in principle on that interpretation for it is scarcely possible to speak of 'exceptional difficulties' if an undertaking makes a profit.

9. Peine-Salzgitter AG, on the other hand, claims that Article 14 imposes no such condition. It states that it suffered losses in relation to its heavy sections production (the subject of the request for an additional quota) because of the extremely unfavourable relationship between the part of its quota which may be delivered on the common market and its total quota (the I:P ratio). It alleges that its overall results can be regarded as positive only if the losses carried over are deliberately left out of account. To do so would be unacceptable.

10. Perusal of Article 14 undoubtedly reveals a link from cause to effect between the quota scheme, or more precisely the abatement rate for a certain category of products, and the exceptional difficulties of the undertaking.

11. In the judgment in *Alpha Steel*[2] 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).

12. Further, according to the judgment in *Boël*[3]

'Article 14 of Decision 1696/82/ECSC, according to its wording, provides limited scope for adjusting the quotas solely when an undertaking experiences "exceptional difficulties" "by virtue of the scale of the abatement rates". In those circumstances the Commmission is required to take into consideration the special situation in *each case* in order to determine whether the undertaking in question is confronted with exceptional difficulties resulting from the reductions in production imposed on it.

Accordingly only difficulties which are the *direct consequence* of the establishment and

2 — Judgment of 3 March 1982 in Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749.

3 — Judgment of 22 June 1983 in Case 317/82 *Usines G. Boël* v *Commission* [1983] ECR 2041.

application of the quota system may be considered when Article 14 is applied.' (paragraph 7).

13. The sole object of Article 14 is to compensate for the harshness of the quota system. Exceptional difficulties having any other origin cannot be taken into account under that article. That, however, is precisely what might happen if the Commission's argument were accepted.

14. Let us imagine for example two undertakings, A and B, both with an identical and very unfavourable I:P ratio in relation to Category III products. Let us also imagine that undertaking A has made a sustained and systematic effort at reorganization and by reason of the profit which it succeeds in achieving on other categories of products subject or not to quotas no longer suffers a general loss on its activities as a whole. Undertaking B has not made the same effort: it has retained large surplus capacity in relation to other categories of products and it ends its year with a loss. If additional quotas are granted to undertaking B because it has made a loss and refused to undertaking A because it has not done so, a vital role would be attributed to exceptional difficulties which do not have their origin in the abatement rate applicable to Category III products. As we have seen, that is not allowed.

15. On the other hand the fact that an undertaking does not suffer a general loss does not necessarily mean that it does not have exceptional difficulties in one of its sections. Thus it may happen that a particular factory specialized in the manufacture of a product subject to a high abatement rate in relation to the part of the quotas which may be delivered on the common market incurs losses so great that a closure of the factory must be seriously contemplated because its losses would become too heavy to bear. It may also be that the profit is due to products which do not come under the ECSC Treaty or is even due to the fact that the undertaking has obtained additional quotas under Article 14. It is thus not sufficient to look superficially at the undertaking's record, to observe that it has made a slight profit and infer *ipso facto* that it is not faced with exceptional difficulties.

16. In his Opinion of 19 March 1985 in Case 27/84 (*Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* [1985] ECR 2385, at p. 2391) Mr Advocate General Darmon also came to the conclusion that it was wrong to say that the exceptional difficulties referred to by Articles 14 and 16 must *necessarily* result in a loss for undertakings.

17. The Commission must therefore consider the undertaking's situation in each case and the nature and scope of the exceptional difficulties caused by the quota system.

18. That is, moreover, the interpretation which the Commission itself followed in reaching the decisions in which it allocated Peine-Salzgitter AG additional quotas for the third and fourth quotas of 1984. After pointing out that the undertaking's I:P ratio had fallen from 52 to 44% and that that percentage was 20 points less than the Community average, the Commission concluded in its decisions:

'For those reasons your undertaking is experiencing exceptional difficulties in respect of the part of the Category III quota which may be delivered in the common market' (see point 2 of the Commission decisions of 24 December 1984 and 2 April 1985 annexed to the application).

19. The Commission added at point 7 of the decisions:

'Since in the present case the exceptional difficulties solely concern the quota shares, it is they and not the production quotas which must be adjusted.'

20. Finally, it transpired at the hearing and from documents lodged at the request of the Court that it was not only in one case, as the Commission stated during the written procedure, but in several cases that the Commission granted additional quotas under Article 14 although the undertaking in question was making a profit. The fact that in certain cases the profit was due to products which did not come under the ECSC Treaty or was even due to the grant of additional quotas under Article 14 is not capable of affecting that observation.

21. It may thus be concluded that the simple fact that an undertaking is making a profit is not in itself sufficient reason to refuse to apply Article 14.

22. In the decision of 11 June 1985 (annexed to the reply) in which the Commission refused Peine-Salzgitter AG additional quotas for the first and second quarters of 1985 there is the following statement:

'The prior condition for the application of Article 14 is that the undertaking should have exceptional difficulties. According to the Commission's information the results for your undertaking have been positive on the whole since the fourth quarter of 1984. There are thus no longer any "exceptional difficulties" within the meaning of Article 14.'

23. The Commission's individual decision of 11 June 1985 is thus based on a wrong interpretation of the term 'exceptional difficulties' in Article 14 of Decision No 234/84/ECSC. The Commission has failed to show that Peine-Salzgitter AG was not in a situation of exceptional difficulty. It remains to determine whether the application could be rejected because the undertaking had received aid intended to cover operating losses.

II — The nature of the aid received

24. The second reason for which Article 14 of Decision No 234/84/ECSC was stated to be inapplicable to the applicant was, according to the Commission, that 'in November 1984 the applicant received aid for depreciation in relation to the operation of the plant which must be regarded as aid to cover operating losses.'

25. It is not denied that at the said time Peine-Salzgitter AG received aid pursuant to the Directive of the Federal Minister for Economy on the grant of aid for structural improvement of steel undertakings of 28 December 1983 (Bundesanzeiger No 245 of 31 December 1983). Aid intended for structural improvements covers:

expenditure in respect of employees affected by the restructuring measures and leaving the undertaking because they are directly or indirectly affected thereby;

the special depreciation of plant intended for steel production within the meaning of the ECSC Treaty, that is to say for the closure of such plant or, in exceptional cases, for long-term reduction in utilized capacity.

Only aid received for special depreciation is at issue in the present case.

26. It must first of all be observed that even if such aid is granted for the definitive closure of plant or for long-term reduction in utilized capacity, it is not aid for closure within the meaning of Article 4 of Decision 2320/81, commonly referred to as the 'ECSC Aids Code'.[4] Article 4 exhaustively defines 'the normal costs resulting from the partial or total closure of steel plants'. Aid of the kind provided for by the German directive is not included in that list.

27. However, the aid received by Peine-Salzgitter AG must clearly be defined not under the provisions of the 'Aids Code' but in the light of the notion of 'Aids . . . with a view to covering operating losses' which appears in Article 14 of Decision 234/84 and not in the Aids Code.

28. In that respect the applicant rightly draws attention to the development which the provision at issue has undergone. Article 14 of Decision 2177/83[5] which included for the first time a restriction on account of aid received by the undertakings was worded as follows:

'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 12 months preceding the quarter in question:

did not receive aids pursuant to Commission Decision No 2320/81/ECSC, with the exception of aids for closures as provided for in Article 4 of that decision;

. . .

the Commission shall, in respect of the quarter in question, make a suitable adjustment to the quotas . . . which may be delivered in the common market . . .'

29. Already two months later, by *Decision 2748/83*,[6] the first indent of the first paragraph of Article 14 was amended to provide that the undertaking

'did not receive aids authorized by the Commission with a view to covering operating losses'.

4 — Commission Decision 2320/81/ECSC of 7 August 1981 establishing Community rules for aids to the steel industry (OJ L 228, 13. 8. 1981).

5 — Commission Decision No 2177/83/ECSC of 28 July 1983 on the extension of the system of monitoring and production quotas for certain products of undertakings in the steel industry (OJ L 208, 31. 7. 1983, p. 1).

6 — Commission Decision 2748/83/ECSC of 30 September 1983 amending for the second time Decision No 2177/83/ECSC (OJ L 269, 1. 10. 1983, p. 55).

30. That amendment was justified in the fifth recital by the fact that

'it would appear inequitable not to allow those which have received aids to benefit from adjustments under Articles 14 and 14a, with the exception, however, of those undertakings which have received aids authorized by the Commission with a view to covering operating losses'.

31. With regard to the latter it was observed in the fourth recital that

'it would be unjustifiable to grant supplementary quotas to an undertaking in order to retrieve a situation of exceptional difficulties whilst, on the other hand, it has received aids granted with a view to covering operating losses for the same reason'.

32. In the German version of Article 14 and the recital, however, the reference was to aid to cover running expenses ('keine von der Kommission genehmigte Betriebsbeihilfen').

33. Since all the other language versions were identical to the French it is permissible to conclude that the decision did not envisage aid to cover running expenses but only aid granted with a view to covering operating losses.

34. *Decision 234/84*, the decision at issue here, adopts, in the German version too, the wording of Article 14 which had already appeared in the other language versions of the previous decision ('keine von der Kommission genehmigten Beihilfen zur Deckung von Betriebsverlusten').

35. It is thus undeniable that the Community legislature intended to widen appreciably the class of beneficiaries of this equity clause. Whereas under Decision 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.

36. If the fact of having obtained aid of another kind no longer suffices to exclude an undertaking from the benefit of Article 14, it is obvious that the effect which aid may have on the profits and losses of an undertaking cannot be regarded as a valid criterion for determining aid intended to cover operating losses. The effect of any aid, even aid for closure within the meaning of Article 4 of the Aids Code, is to compensate all or part of the operating losses in so far as there are any.

37. The applicant is therefore right in submitting that it is the conditions of grant and the aim of the aid which must be considered.

38. With regard to the conditions for the grant of aid for structural improvement, the aid obtained by Peine-Salzgitter AG, it is apparent from the wording of the aforementioned directive of the Federal Minister of the Economy that their justification and their amount depended solely on the extent of the definitive or temporary measures of closure actually carried out and the amount of the resulting depreciation.

39. The aid was thus paid independently of the undertaking's financial situation. It could be granted even if there were no losses and if there were such losses their amount was irrelevant in fixing the amount of aid. The necessary condition for their grant was 'a programme of restructuring of particular expedience from the point of view of economic policy . . . the feasibility of which was checked and confirmed by an independent auditor or by an independent audit company' (point 4 of the directive).

40. In its judgment of 15 January 1985 (Case 250/83 *Finsider* v *Commission* [1985] ECR 131, 142, paragraph 9 at p. 152) the Court made the following statement on the subject of justification for the refusal of additional quotas where an undertaking had received aid intended to cover operating losses:

'it is consistent with that aim (namely to promote the restructuring needed to adapt production and capacity to foreseeable demand and to re-establish the competitivity of the European steel industry) that undertakings which have 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 may likewise reduce their willingness to restructure.'

41. It is thus because aid intended to cover operating losses has an anti-restructuring effect and thereby counteracts the efforts needed to overcome the obvious crisis in the steel industry that it cannot be aggregated with additional quotas.

42. It seems to me difficult to contend that Stahlwerke Peine-Salzgitter AG has received 'aid likely to delay the desired restructuring' since the aid was granted precisely on the basis of a restructuring programme.

43. The aid, which is granted in the form of subsidies refundable from 1986 in so far as the undertaking makes a profit, must be returned if the undertaking decides to abandon wholly or partly the closure or restriction of capacity before 31 December 1989 (point 12 of the directive).

44. In its rejoinder, however, the Commission however relies on the fact that the major part of the contested aid was not granted for the purpose of a reduction in capacity but solely for the purpose of reducing the utilization rate of plant which continues to function in order to contend that the object of the aid was to cover operating losses.

45. The Commission admits, however, that aid can be classified as 'aid intended to cover operating losses' only if the undertaking in question actually makes a loss, yet the Commission maintains that Peine-Salzgitter AG has not made a loss since the

fourth quarter of 1984. Peine-Salzgitter AG agrees that if the losses carried forward are disregarded the undertaking is making a profit. The Commission refuses to take account of the losses carried forward. In those circumstances even in the Commission's view there is no loss, so that the Commission's last objection cannot be accepted.

46. In brief, it is thus possible to conclude that Peine-Salzgitter AG has not received aid intended to cover operating losses. The Commission's negative decision of 11 June 1985 is based on an incorrect interpretation of that term and was thus adopted in breach of the first indent of the first paragraph of Article 14 of the aforementioned Decision No 234/84.

III — Conclusion

47. On the basis of the aforegoing considerations I propose that the Court should declare void the Commission Decision of 11 June 1985 by which it refused to apply Article 14 of Decision 234/84/ECSC to the applicant's undertaking for the first quarter of 1985, and order the defendant to pay the costs.