OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 5 February 1987 *

Mr President,
Members of the Court,

1. The applicant in these proceedings — Dillinger Hüttenwerke AG, a German steel undertaking — seeks a declaration as to the nullity of the decision addressed to it by the Commission on 12 June 1985, refusing to apply to it Article 14A of Commission Decision No 234/84/ECSC of 31 January 1984, [1] which extended the system of monitoring and production quotas for certain products of undertakings in the steel industry.

A — 2. Article 14A (1) and (2) of Decision No 234/84 provides that, in certain circumstances, adjustments of quotas may be granted to steel undertakings where, because of closures, the ratio in a category of products between the reference production on 1 October 1982 and the production potential has increased by at least 5% compared with what it was on 1 October 1982 or when the last quarterly adjustment was made.

3. Paragraph 4 of Article 14A lays down the conditions under which an undertaking may benefit from an increase in quotas pursuant to that article. It may so benefit only if:

(i) it has not increased its capacity since 1 July 1983;

(ii) it has not, since 1 October 1982, carried out plant closures giving rise to a significant increase in its utilization rate; and

(iii) its viability is assured without structural adjustment.

4. A further requirement is that, during the 12 months preceding the quarter in question:

(i) the undertaking did not receive aids authorized by the Commission with a view to covering operating losses; and

(ii) it was not the subject of penalties in respect of the price rules, or else paid any fines due.

B — 5. By letters of 23 March, 26 July and 16 October 1984 and 15 January and 16 April 1985, the applicant applied, pursuant to Article 14A of Decision No 234/84, for an adjustment of its quotas in category II for the quarters between the beginning of 1984 and the second quarter of 1985 inclusive.

6. In its reply of 12 June 1985, the Commission set out the following considerations to justify its refusal to accede to the applicant's requests:

Provided that the conditions laid down in Article 14A of Decision No 234/84 are satisfied, the Commission may grant certain additional quotas. However, a precondition therefor is that the undertaking in question must already have been restructured and, as a result, no longer be in need of aid.

* Translated from the Portuguese.
1 — OJ L 29, 1.2.1984, p. 1.

The Commission has taken note of the applicant undertaking's restructuring plan, on the basis of the communication from the Government of the Federal Republic of Germany of 30 January 1984. The plan provides for the closure of production plant in 1985 and the grant of aid; accordingly, the applicant undertaking cannot be regarded as having already been restructured.

7. The purpose of the communication from the German Government referred to by the Commission was, in particular, to obtain, under Commission Decision 83/392/ECSC of 29 June 1983[2] on aids to the steel industry proposed to be granted by the German Government, definitive authorization from the Commission for the grant of certain aids to the applicant, for the purpose of financing its restructuring plan. The Commission gave a favourable opinion thereon on 7 May 1984. The opinion took account of the fact that the plan simultaneously improved the products, and their surface quality, strength and dimensions, thus enabling the applicant to adjust to changes in demand, and that, moveover, the plan involved a decrease in production capacity for heavy plate of 360 000 tonnes a year. On 2 May 1985, the Commission gave authority for the aid to be granted to the applicant.

8. The applicant attacks the decision in question on the basis of two submissions: infringement of Article 14A of Decision No 234/84 and breach of the duty to state the reasons on which the decision was based, as required by Article 15 of the ECSC Treaty. In fact, the two arguments are closely interconnected, since they both relate to the reasons for the decision in the light of the conditions laid down by Article 14A.

2 — OJ L 227, 19.8.1983.

9. In essence, the applicant claims that, in adopting the contested decision refusing to adjust the quotas as requested, the Commission merely relied upon the fact that restructuring measures were planned and grants for that purpose had been applied for. In its view, that approach is improper in the light of the letter and the spirit of Article 14A (4) which specifically requires, as a precondition for the grant of additional quotas, that the *viability* of the undertaking *should be assured even without structural adjustment.* That provision is not therefore intended to exclude from its scope all undertakings which are being restructured, but only those for which restructuring is necessary to enable them subsequently, and particularly after the closure of plant, to regain viability without the need for aids.

10. Even if it were conceded that the Commission implicitly accepted, in its decision, that the applicant's viability could not be assured without structural adjustment, the decision would, in the applicant's view, have to be regarded as inadequate, as regards the statement of the reasons for it, in so far as it was not based on a rigorous assessment of the applicant's general financial situation.

11. Had it carried out such an assessment, the Commission would, according to the applicant, have decided that there was no doubt as to its viability, in view of its strong position in the steel market and the positive results recorded since 1978 (with the exception of 1983, a year in which the economic situation was particularly difficult).

12. The restructuring measures carried out by it — for the financing of which the Commission had authorized the grant of

government aid — were not therefore intended, in the applicant's view, to re-establish its viability but rather to consolidate it and to strengthen its competitiveness by means of concentration on quality products and modernization through investments in up-to-date technology.

13. Moreover, such investments would not give rise to plant closures, but rather to modernization or conversion of plant to facilitate the manufacture of products not subject to quotas. This is illustrated by the fact that the applicant engaged 500 new workers between 1980 and the end of 1985.

14. In short, the applicant considers that, as was admitted by Commission officials and even by a member of the Commission itself, its viability was assured without the need for structural adjustment, its plant being 'among the most competitive in the Community'.

C — 15. The Commission relies, in the first place, upon the purpose of Article 14A: in its view, in certain circumstances that article allows compensation in the form of additional quotas to be granted to undertakings which do not need restructuring, in other words, which do not need to carry out closures, in order to become competitive and which, therefore, receive no aid or additional quotas under Article 14B of Decision No 234/84.

16. It was that very fact that the Commission sought to emphasize when, in the statement of the reasons on which the contested decision was based, it used the same expression as that used in the preamble to Decision No 2177/83/ECSC (which preceded Decision No 234/84), in relation to Article 14A thereof ('undertakings which have already been restructured and hence no longer receive aid'). That form of words therefore has, in both cases, the same meaning as the reference to viability being assured without structural adjustment.

17. Moreover, in the same way, the Commission draws attention to the relationship between the quota system and the rules for aids to the steel industry laid down in Commission Decision No 2320/81/ECSC of 7 August 1981.

18. That decision applies only to those undertakings which, *inter alia*, are 'engaged in the implementation of a . . . restructuring programme . . . capable of restoring its competitiveness and of making it financially viable without aid under normal market conditions'.

19. It was by virtue of that provision that on 2 May 1985 the Commission authorized the applicant to receive aid from the German Government in connection with the restructuring programme which it had submitted. In granting its authorization, the Commission took the view that, having regard to the particulars furnished by the undertaking in its reply to the financial questionnaire, there was a 'strong possibility that, under normal market conditions, Dillinger Hüttenwerke AG could re-establish its financial viability by 1986 without the need for further aid'.

20. Although it acknowledged that the applicant is, by comparison with other steel undertakings, a modern undertaking achieving good results and that the investments made were intended to introduce technical innovations, the Commission went on to express the view that the applicant was an undertaking whose viability was not assured without structural adjustment, otherwise it would not have authorized the aid in question.

D — 21. Essentially, the position adopted by the Commission can only be said to be well founded if the question whether there

is a relationship between the quota system and the rules for aids is answered in the affirmative and if therefore it is established that it is lawful — the applicant says it is not — to interpret the legislation on quotas in the light of the rules for aids.

22. It is a matter which the Court has already dealt with in the *Finsider* and *Krupp Stahl AG and Thyssen Stahl AG* judgments, both of which were delivered in 1985.[3]

23. The first of those judgments[4] makes it clear that the quota system and the rules for aids 'pursue a common aim, namely to promote the restructuring needed to adapt production and capacity to foreseeable demand and to re-establish the competitiveness of the European steel industry'.

24. And the judgment in *Krupp Stahl AG and Thyssen Stahl AG* v *Commission* states[5] that 'despite the differences in their legal basis and the criteria for their application, the objective of those systems is restructuring. It is therefore neither arbitrary nor discriminatory if factors resulting from the application of one of the systems are used as a point of reference in the other'.

25. It is therefore, in principle, lawful for the Commission, in defining the criterion of viability without structural adjustment referred to in Article 14A of Decision No 234/84, to apply the same methods as those used by it to appraise the same concept in applying Article 2 (1) of the rules for aids.

26. In this case, the applicant submitted a restructuring programme and applied for State aids in order to finance it.

27. The Commission gave authority for such aids under Article 2 of the rules for aids because, as stated in the letter of authorization, the conditions laid down in that provision were fulfilled, namely:

(i) the undertaking had submitted a restructuring programme;

(ii) that programme entailed an 'irreversible reduction' of sheet production-capacity as a result of the dismantling of a furnace and the removal from service of a rolling mill for finished products;

(iii) it also involved various investments in research and development projects and in the introduction of technological innovations, which would enable production quality to be improved and innovations to be made regarding the type of products manufactured;

(iv) Implementation of the programme would contribute to creating 'a strong probability that, under normal market conditions, Dillinger Hüttenwerke AG could regain its financial viability by 1986 without additional aid'.

28. Nevertheless, the Commission requested that the half-yearly reports to be given to it should include 'information as to the progress achieved by Dillinger Hüttenwerke AG towards re-establishing financial viability', it being empowered to require payment of the aid to cease or to impose additional obligations regarding restructuring of the undertaking if the half-yearly reports were to raise 'doubts as to the restoration of the undertaking's viability by the end of 1985'.

29. In other words, the Commission regarded the applicant as an undertaking

3 — Judgment of 15 January 1985 in Case 250/83 *Finsider* v *Commission* [1985] ECR 131, at p. 152; judgment of 15 October 1985, Joined Cases 211 and 212/83, 77 and 78/84 *Krupp Stahl AG and Thyssen Stahl AG* v *Commission* [1985] ECR 3409.

4 — Case 250/83, *supra*, paragraph 9.

5 — Joined Cases 211 and 212/83, 77 and 78/84, *supra*, paragraph 34.

which required restructuring in order to become viable again, and it was exclusively for that reason that it had authorized the financial aid needed by the company to implement its restructuring programme.

30. In transposing those conclusions to the sphere of application of Article 14A of Decision No 234/84, and thus in verifying whether the conditions laid down therein were fulfilled, the Commission did no more than demonstrate the close logical relationship between the rules for aids and the quota system, already upheld by the Court.

31. In its rejoinder, the Commission further explains that it regards the word *'viability'*, used in relation to the rules for aids and to Article 14A, as a technical term, for the appraisal of which it used a quantitative method whose results, in the applicant's case, did not appear in the contested decision for reasons of convenience, but of which the criteria and basic assumptions are published in the 12th, 13th and 14th reports on competition policy, with the result that the applicant cannot be unaware of them.

32. Thus, in considering the restoration of viability, the Commission applies identical criteria to all undertakings, with a view to ensuring, in the context of the market prospects indicated by the 'General objectives', that they are capable of achieving the necessary margins to cover all their production costs, including depreciation, financial charges and a minimum return on capital and reserves.

33. In that regard, the Commission states that its appraisal is based not on past results obtained in a market regulated by the public authorities (quotas, price regulation, import restrictions) but rather on the results which undertakings will foreseeably be capable of achieving in a free market, and it was reasonable to expect that such a market might re-establish itself by 1986.

34. In that connection, it is interesting to note that the Commission fixed a threshold of 3.5% for the minimum return on capital and reserves in 1986 as an essential criterion for recognizing viability without the need for restructuring.

35. It was on the basis of those criteria that the Commission, relying upon the particulars furnished by the applicant in its restructuring programme and in the financial questionnaire, made the calculations necessary to assess the viability of Dillinger Hüttenwerke AG as from 1986, for the purpose of deciding whether or not to authorize the aid applied for.

36. The study carried out provided grounds for the view that, having regard to the investment plans and the envisaged aids, the applicant's viability for 1986 could be regarded as 'on the borderline', since its results were not sufficient to enable a return on capital and reserves of 3.5% to be paid (DM 21.8 million instead of DM 24 million).

37. Moreover, its results would show a deficit of DM 43.2 million if the applicant did not proceed with the restructuring measures, and a surplus of only DM 15.8 million if the measures were implemented without any aid.

38. It was the results of that calculation that the Commission transposed to the quota

system, refusing to apply Article 14A to the applicant.

E — 39. The Court has, as we have seen, already upheld the lawfulness of this combined interpretation of the provisions governing the two systems of rules, regard being had to their common objectives.

40. However, a number of specific difficulties arise in the present case.

41. Naturally, the terminology used in the relevant provisions of each of the two systems does not coincide entirely.

42. Article 14A (4) speaks of 'viability' without structural adjustment; and Articles 1 and 2 of the rules for aids refer to programmes capable of restoring 'competitiveness' and of making undertakings 'financially viable' without aids.

43. In the German version of those provisions, the terms used are 'Lebensfähigkeit' (for 'viability', or 'viabilité' in the French text) and 'Rentabilität' (for 'financially viable', or 'financièrement viables').

44. Similarly, the terms used in the Italian text are, respectively, 'possa continuare la sua attività' and 'rendere l'efficienza finanziaria dell'impresa'.

45. However, it is significant that the English version of Article 2 of the rules for aids does not speak of 'profitability' but instead uses the term 'making it financially viable'.

46. It is incumbent upon the institutions to interpret and apply the rules of Community law uniformly, without relying on individual language versions.

47. However, that is only possible if objective criteria of interpretation are applied.

48. If preference were given to the interpretation of Article 14A which seems closest to the Italian or even the German version, this would be tantamount to adopting a somewhat subjective approach, since the 'continuation of business' or the 'keeping alive' of an undertaking when it is not 'profitable', but is not insolvent, depends largely on the wishes of those who own its capital.

49. Furthermore, as the Court has stated, 'in the case of divergence between the language versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part'.[6]

50. There is no doubt as to the interpretation which the Commission gives to the concept of viability (or financial viability) in the context of the rules for aids.

51. In the light of the purpose of Article 14A, as determined by the Commission, whose interpretation I agree with, and of the common objectives of the rules for aids and the quota system, there is no substantive argument to prevent the Commission from applying the same criteria to the quota system as well. Moreover, they are general criteria which are applicable to all undertakings, and the definition thereof without any doubt falls within the margin of discretion enjoyed by the Commission as the institution responsible for managing both systems.

52. The legislature itself made clear that Article 14A is addressed to undertakings which have 'already been restructured and hence no longer receive aid', they being granted a compensatory adjustment by

6 — Judgment of 28 March 1985 in Case 100/84 *Commission* v *United Kingdom* [1985] ECR 1169, paragraph 17.

comparison with those that increased their operational level as a result of closures.

53. In the case of undertakings which are in the process of implementing a restructuring plan approved by the Commission, it is Article 14B which enables additional quotas to be granted for the purpose of encouraging them to proceed rapidly with all the envisaged closures.

54. Consequently, since the applicant was in the process of implementing a restructuring programme which, as is acknowledged, involved a reduction of capacity, and was in receipt of aids intended to make it financially viable under *normal market conditions*, it was not in a position to benefit from Article 14A.

55. That was the interpretation of Article 14A, which emerged clearly from Decision No 2177/83, according to the preamble thereof.

56. However, Decision No 234/84 made a number of amendments to the wording of Article 14A.

57. The Commission adheres to the same interpretation of that article.

58. The fact that — by contrast with what happened in the case of other provisions, in particular Article 14B — the legislature felt no need to give an explanation for those changes in the preamble to the decision points to the conclusion that it did not regard them as changing the previous meaning of the provision, which thus still has the same objectives.

59. In my opinion, therefore, it has not been shown that the Commission was wrong to interpret the concept of 'viability . . . without structural adjustment' in the same terms as it did in relation to Article 2 of the rules for aids.

60. That is, in my opinion, the best way of ensuring that the system operates in a totally consistent manner.

61. Only if there were weighty reasons for doing so would it be appropriate to attribute different meanings to identical concepts in the two systems; and a precondition for such an approach would be that the difference of meaning was unequivocally apparent from the literal wording of the provisions, which is not the case.

62. Moreover, it seems to me to be correct to relate the concept of 'structural adjustment' contained in Article 14A to the existence of a restructuring programme, without which an excessively broad meaning could be attributed to it, thus rendering the application of the provision in question entirely unworkable.

F — 63. The applicant claims, however, as we have seen, that the reasons on which the contested decision is based are not clearly apparent, as they should be, from the text thereof, with the result that it is not an adequately reasoned decision. The Commission only refers to the fact that restructuring measures are envisaged, without expressing a view as to the only truly decisive condition, namely viability without structural adjustment. In any event, the contested decision makes no reference to any calculations or criteria which might have prompted the Commission to consider that the applicant's viability was not assured without structural adjustment.

64. The Commission, on the other hand, considers that the meaning of the decision can be understood even without any indication of the calculations on which it was based.

65. In referring to the need for restructuring and to the grant of aids, using the same expressions as those used in the preamble to Decision No 2177/83, the Commission properly sought to indicate that the viability of the undertaking was not assured without such restructuring.

66. It must be acknowledged that the Commission could have accompanied its decision by a more complete statement of the reasons on which it was based, which would have been less likely to cause any misunderstandings.

67. But the references to the restructuring plan, to the closure of plants and to the grant of aids provided the applicant with the information necessary to apprehend the reasons for the refusal of the application, in the light of the conditions laid down by Article 14A of Decision No 234/84 (expressly referred to) and even in relation to the rules for aids.

68. It does not seem to me therefore that that statement of reasons is of such a nature as to deprive the applicant of the opportunity of checking the correct application in regard to itself of Article 14A of Decision No 234/84 or to prevent the Court from exercising its task of review.[7]

G — 69. Since both the submissions relied upon must be dismissed, I propose that the Court should dismiss the application by Dillinger Hüttenwerke AG and order the applicant to pay the costs, in accordance with Article 69 (2) of the Rules of Procedure.

7 — Cf. judgment of 28 October 1981, in Joined Cases 275/80 and 24/81 *Krupp* v *Commission* [1981] ECR 2489, at pp. 2512 and 2513.