JUDGMENT OF THE COURT
19 September 1985 *

In Joined Cases 172 and 226/83

Hoogovens Groep BV, of IJmuiden, municipality of Velsen, the Netherlands, represented by B. H. ter Kuile and F. O. W. Vogelaar, of the Hague Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 2 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Bastiaan van der Esch, its Legal Adviser, and Marie-Josée Jonczy, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Manfred Beschel, a member of its Legal Department, Jean Monnet Building,

defendant,

APPLICATION requesting the Court to declare void:

Decision No C (83) 950/8 of 29 June 1983 concerning the aid that the Netherlands Government proposes to grant to the steel industry, published under No 83/398/ECSC (Official Journal 1983, L 227, p. 33);

Decision No C (83) 950/6 of 29 June 1983 concerning the aid that the Italian Government proposes to grant to certain steel undertakings, published under No 83/396/ECSC (Official Journal 1983, L 227, p. 24),

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco and O. Due (Presidents of Chambers), P. Pescatore, U. Everling, K. Bahlmann, Y. Galmot, R. Joliet and T. F. O'Higgins, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 5 June 1985,

gives the following

* Language of the Case: Dutch.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By two applications lodged at the Court Registry on 8 August and 5 October 1983, Hoogovens Groep BV requested the Court to declare void:

Commission Decision No 83/398/ECSC of 29 June 1983 concerning the aid that the Netherlands Government proposes to grant to the steel industry (Official Journal 1983, L 227, p. 33);

Commission Decision No 83/396/ECSC of 29 June 1983 concerning the aid that the Italian Government proposes to grant to certain steel undertakings (Official Journal 1983, L 227, p. 24).

2 The first application, registered under No 172/83, was lodged as soon as the applicant became aware of the contested decisions, 11 days before they were published in the *Official Journal.* It refers to the internal reference numbers of the decisions, No C (83) 950/8 for the decision concerning the Netherlands aid, and No C (83) 950/6 for the decision concerning the Italian aid. The second application, registered under No 226/83, was lodged after the decisions were published in the *Official Journal* and refers to the new numbers given to them on publication, as set out in paragraph 1, above.

3 In view of the increasing gravity of the crisis in the steel industry and the stricter rules which had to be applied to meet it, the Commission, at the request of the Council amended the first aids code introduced by Decision No 257/80/ECSC of 1 February 1980 (Official Journal 1980, L 29, p. 5), by means of Decision No 2320/81/ECSC of 7 August 1981 establishing Community rules for aids to the steel industry (Official Journal 1981, L 228, p. 14), which is known as the second aids code.

4 Article 2 of Decision No 2320/81/ECSC states that aids granted to the steel industry are compatible with the common market only if they are approved not later than 1 July 1983 and do not lead to aid payments after 31 December 1985, and if the accompanying restructuring programme results in an overall reduction in the production capacity of the recipient group of undertakings and does not make provision for an increase in production capacity for the various categories of products for which there is not a growth market. In addition to those general rules, the decision lays down rules applicable to each type of aid.

5 After reviewing all the aid which, according to Article 8 of Decision No 2320/81, had to be notified to it no later than 30 September 1982, the Commission adopted a number of decisions addressed to the Member States, known as Series 950, including the two contested decisions.

6 In the decision addressed to the Netherlands, the Commission states that the net capacity reduction for hot-rolled products suggested by the Netherlands government to justify the proposed investment aid and aid for continued operation may be estimated at 250 000 tonnes and is insufficient. The Commission points out that by virtue of the second indent of Article 3 (1) and the third indent of Article 5 (1) of Decision No 2320/81/ECSC, the amount and intensity of investment aid and aid for continued operation must be justified by the extent of the restructuring effort associated with them; moreover, it is necessary to ensure that the required overall reduction Community-wide of 30 to 35 million tonnes of capacity for hot-rolled products, in line with the General Objectives for Steel, is distributed fairly. On that basis, the Commission required the Netherlands steel industry to effect an additional reduction of 700 000 tonnes.

7 Hoogovens considers that the total reduction of 950 000 tonnes required is not sufficiently justified or explained and that the effort required of the Netherlands steel industry is considerably greater than that imposed, in particular, on the Italian steel industry.

Admissibility

8 Before the objection of inadmissibility raised by the Commission is considered, it should be noted that the third paragraph of Article 33 of the ECSC Treaty, which

prescribes notification and publication as the formalities from which the time-limit for bringing an action to have a decision declared void is to run, does not prevent an applicant from lodging an application with the Court as soon as the contested decision has been adopted, without waiting for it to be notified or published. Consequently, Case 172/83 is admissible notwithstanding the fact that it was lodged at the Court Registry before the contested decisions were published.

9 Accordingly, since the application in Case 226/83, which was lodged at a later date, involves the same parties and seeks the annulment of the same decisions on the same grounds as in Case 172/83, it must be dismissed as inadmissible.

10 The objection of inadmissibility put forward by the Commission should therefore be considered only as regards Case 172/83.

11 The Commission's first contention is that the action is inadmissible because it requests the Court to declare void the letters by which the Commission notified the contested decisions to the Netherlands and Italian Governments. The Commission claims that those letters do not constitute decisions.

12 It must be stated that the application challenges solely the decisions on aids and merely refers to the content of the letters by which those decisions were notified in order to clarify the grounds on which they were based. Consequently, the Commission's submission is unfounded.

13 Secondly, the Commission contends that the action is inadmissible because it challenges the decision concerning the aid that the Italian Government proposes to grant to its steel industry. Hoogovens, which is established in the Netherlands, is not individually concerned by that decision and has not shown that it is in a different situation from all the other steel undertakings in the Community.

14 It should be noted that the second paragraph of Article 33 of the ECSC Treaty, which is worded differently from the second paragraph of Article 173 of the ECSC Treaty, authorizes undertakings to institute proceedings for the annulment of 'decisions or recommendations concerning them which are individual in character'.

15 As the Court has acknowledged, in particular in its judgment of 15 July 1960 in Joined Cases 24 and 34/58 (*Chambre syndicale de la sidérurgie de l'est de la France* v *High Authority* [1960] ECR 281), an undertaking is concerned by a Commission decision which permits benefits to be granted to one or more undertakings which are in competition with it.

16 It should be noted that the applicant is in competition with certain Italian undertakings which benefit from the contested decision and which carry on the same business as the applicant within the common market and sell the same products. Consequently, it must be accepted that the contested decision may affect that competitive relationship and for that reason concerns the applicant.

17 The Commission's second submission must therefore be rejected.

18 Lastly, the Commission observes that since the contested decision was adopted the applicant has reduced its production capacity by more than the 950 000 tonnes which was required of the Netherlands steel industry. Although the Commission does not formally claim that the action is inadmissible on that ground, it doubts whether the applicant now has any interest in bringing it.

19 On that point it is sufficient to note that according to Article 39 of the ECSC Treaty an action brought before the Court does not have suspensory effect. By making the requisite capacity reductions, even if for technical reasons the capacity of the plant which the applicant closed was higher than was strictly necessary, the applicant has merely complied with the contested decision, as it was obliged to do. It cannot thereby be deprived of its interest in seeking a declaration that that decision is void.

Substance

20 In support of its application Hoogovens puts forward four submissions. In the first three it merely seeks a declaration that the decision addressed to the Netherlands is void, on the grounds that the reduction in production capacity required of the Netherlands industry is excessive, the Commission wrongly took account of aid of HFL 570 million and the Commission was not entitled to suspend aid payment if the relevant conditions were disregarded. In its last submission it seeks a

declaration that both that decision and the decision concerning the Italian aid are void, on the ground that they misinterpret the concepts of maximum possible production and reduction in production capacity.

The submission that the Commission wrongly, or without giving adequate reasons, required a reduction of 950 000 tonnes in the production capacity for hot-rolled products

21 In support of this submission, Hoogovens claims first that according to the judgments of the Court, in particular those of 28 October 1981 in Joined Cases 275/80 and 24/81 (*Krupp Stahl* v *Commission* [1981] ECR 2489) and 3 March 1982 in Case 14/81 (*Alpha Steel* v *Commission* [1982] ECR 766), the Commission may not confine itself to a brief statement of reasons unless the general decision on the basis of which the individual decisions were adopted contains the essential elements of the reasoning followed, in this case the factors governing the relationship between the proposed amount of aid and the volume of reductions required. That condition is not met by the relevant general decision (Decision No 2320/81), the General Objectives for Steel or the contested decision. The applicant also stresses that, according to the judgment of the Court of 26 November 1981 in Case 195/80 (*Michel* v *Parliament* [1981] ECR 2861), an inadequate statement of reasons in a contested decision cannot be remedied by explanations given by the Commission during the proceedings before the Court.

22 Secondly, Hoogovens claims that a comparison of the amounts, expressed in European Currency Units, of the different aids granted per tonne of production capacity to be reduced in each Member State reveals that the reduction imposed on the Netherlands steel industry is far too high. Thus by not stating the method by which it decided on that reduction, the Commission infringed not only Article 15 of the ECSC Treaty but also the principles of equal treatment and proportionality. By so doing, the Commission at the same time infringed the applicant's property rights, which are protected by Article 1 of Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

23 The Commission refers to paragraph 18 of the judgment in *Alpha Steel*, cited above, and states that, in spite of the short time available to it, it set out fairly concisely but sufficiently clearly and precisely the procedure which it had

followed; it underlines the considerations in the light of which it imposed the capacity reduction at issue, and contends that the applicant could not, in view of its frequent contacts with the Commission, have been unaware of the reasons for the contested decision.

24 As regards the reasons on which the contested decision is based, it must be acknowledged, first, that although the statement of the reasons on which a decision is based must enable the Court to review the decision's legality and provide the persons concerned with the information needed to determine whether or not the decision is well founded, the statement of reasons required by Articles 5 and 15 of the ECSC Treaty depends on the circumstances of the case, in particular the content of the measure, the nature of the reasons relied upon and the interest which the addressees or other persons concerned by the measure for purposes of the second paragraph of Article 33 of the ECSC Treaty may have in obtaining an explanation.

25 On that point, it should be noted that, in the case of a measure which is intended to be of general application, the Court has acknowledged, in particular in its judgment of 18 March 1980 in Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78 and 39, 31, 83 and 85/79 (*Valsabbia* v *Commission* [1980] ECR 907), that the requirements laid down in Articles 5 and 15 of the ECSC Treaty oblige the Commission to mention in the reasons on which its decision is based the situation as a whole which led to the adoption of the decision and the general objectives which it seeks to attain.

26 It is clear from recitals I, II, IV and V of the contested decision and from the explanatory letter by which that decision was notified that the Commission undertook a detailed assessment which involved, first, an examination of the relationship between the intensity of the proposed aid and the social and regional problems which it is intended to correct; next, the Commission assessed the compatibility of the proposed aid with the common market on the basis of Articles 2, 3 and 5 of Decision No 2320/81, which provide that the intensity of aid can be justified only by the extent of the restructuring effort associated with it, such effort being assessed by reference in particular to the financial position and production capacity of the undertakings concerned; lastly, the capacity reductions were imposed so as fairly to distribute among the Member States the reduction of 30 to 35 million tonnes of capacity for hot-rolled products sought by the Community.

27 It follows from the foregoing that the Commission fulfilled its obligation to state the reasons on which the decision was based. Furthermore, although the Commission applied a complicated set of rules, contained in several different documents, the applicant had taken part in the discussions which led up to the contested decision and was therefore aware of the main reasons on which it was based. Thus the submission that the contested decision contains an inadequate statement of reasons must be rejected.

28 Secondly, as regards the question whether the contested decision breaches the principles of equal treatment and proportionality, it should be pointed out that, on the basis of a detailed assessment taking account in particular of the economic and social realities, the Commission, in adopting the collection of decisions in Series 950, lowered the Community target for capacity reduction for hot-rolled products from the 30 to 35 million tonnes provisionally fixed by the Council to 27 million tonnes. It does not appear from the file or from the argument before the Court that the reduction required in the Netherlands, which represents about 13% of that common effort, was decided upon in breach of the principles of equal treatment and proportionality.

29 Lastly, as regards the alleged breach of the applicant's property rights, it should be remembered that, as the Court held in its judgment of 9 December 1982 in Case 258/81 (*Metallurgiki Halyps* v *Commission* [1982] ECR 4261), the fact that restrictions on production necessitated by the economic situation might affect the profitability and the very existence of certain undertakings cannot be considered to be an infringement of property rights.

30 It follows that that submission must be rejected.

The submission that the Commission wrongly took into consideration aid of HFL 570 million in fixing the capacity reduction to be imposed

31 In support of this submission, Hoogovens claims that the aid in question is used solely for the discharge of debts and obligations assumed since the split of the Estel group in 1982 into two undertakings which had been its shareholders, each having a 50% holding, from 1972 onwards. Those undertakings are the Koninklijke Nederlandsche Hoogovens en Staalfabrieken NV (KNHS), IJmuiden, and Hoesch AG, Dortmund, Federal Republic of Germany, which have since acquired all the shares in Hoogovens Groep BV and Hoesch respectively. Moreover, Hoogovens observes that it cannot obtain any benefit from the aid in

question since it is paid to its parent company, KNHS. According to Hoogovens, those very special characteristics of the aid in question ought to exclude it from the category of aid capable of justifying a reduction in capacity. Even if that were not the case, Hoogovens claims that that aid ought to have been regarded as compensated for by the capacity reductions resulting from the restructuring of Hoesch AG, which gave rise to the debt to Estel, paid in part by KHNS.

32 According to the Commission, there were no grounds for separating the aid in question from the other aid provided for and thus to grant Hoogovens an exemption from the obligation to reduce capacity. It contends that the aid was destined to meet obligations which were incurred by the applicant in the past and, regardless of the method by which such aid was paid, it indirectly facilitated the financing of investments or other restructuring measures.

33 It should be noted that, by virtue of Article 6 (2) of Decision No 2320/81, only emergency aid is exempt from the requirement that there should be a compensatory reduction of capacity. At the same time, Article 1 (1) of the decision provides that:

'All aids to the steel industry, whether specific or non-specific, financed by Member States or through State resources in any form whatsoever may be considered Community aids and therefore compatible with the orderly functioning of the common market only if they respect the general rules set out in Article 2 and satisfy the provisions of Articles 3 to 7. Such aids shall only be put into effect in accordance with the procedures established in this decision.'

34 Furthermore, it is clear from Article 2 of Decision No 2320/81 that only 'the recipient undertaking' is obliged to reduce its production capacity. However, the mere fact that aid is paid by the State to the applicant's parent company, which is a holding company without any independent activity, does not prevent the applicant from obtaining benefit from it.

35 Consequently, the aid in question had to be taken into consideration on the same basis as all the other aid proposed by the Netherlands Government.

36 Lastly, the Commission rightly observes that it could not credit Hoogovens with a capacity reduction effected by an undertaking situated in another Member State without obtaining the agreement of that undertaking.

37 This submission must therefore be rejected.

The submission that the Commission was not entitled to provide for aid *payments to be suspended if the relevant conditions were disregarded*

38 In support of this submission Hoogovens claims that by reserving, in Article 7 of the contested decision, the right to suspend aid payments if the relevant conditions were disregarded, the Commission exceeded its powers. According to the second paragraph of Article 95 of the ECSC Treaty, the penalties applicable should have been laid down by Decision No 2320/81, yet the only penalty for which that decision provides is an action against a Member State for failure to fulfil its obligations under Article 88 of the ECSC Treaty, to which Article 8 (3) of the decision expressly refers.

39 It is not necessary to decide whether the suspension of authorized aid in the event of failure to comply with the conditions laid down by the Commission constitutes a penalty within the meaning of the second paragraph of Article 95 of the Treaty, since it is sufficient to note that according to Article 8 (1) of Decision No 2320/81, 'the Member State concerned shall put its proposed measures into effect only with the approval of and subject to any conditions laid down by the Commission'. It must therefore be held that that provision, by stating that the authorization to grant aid may be subject to conditions, provides the legal foundation for the measure contained in Article 7 of the contested decision.

40 This submission must therefore also be rejected.

The submission that the concepts of maximum possible production and reduction in production capacity have been misinterpreted

41 By this submission the applicant seeks a declaration that the two contested decisions are void, on the ground that they were based on an incorrect interpretation of the legal concepts of maximum possible production and of reduction in production capacity and are therefore in breach both of Decision No 2320/81 and of the principle of equal treatment.

42 According to Hoogovens, the severity of the capacity reduction required of the Netherlands industry by the Commission was increased by the fact that, because it failed to apply correctly the legal concepts mentioned above, it failed to recognize the true reduction proposed by the Netherlands industry and at the same time overestimated the reduction proposed by the Italian industry.

43 It is clear from the file that the capacity reduction proposed by the Netherlands and by Italy are equal to the difference between the maximum possible production in 1980, which was the year in which the Community restructuring programme was instituted, and the maximum possible production for 1985, the final year for the capacity reductions provided for by the Council. The applicant alleges that the Commission erred in failing to apply the same considerations in assessing those two maximum possible productions.

The decision concerning the Netherlands aid

44 Hoogovens claims that, in breach of the relevant rules, the Commission included, in calculating the maximum possible production for 1980 for the purposes of the decision addressed to the Netherlands, bottle-necks in production which were described as reversible in so far as the resulting restriction of production was temporary, whereas it refused to take such bottle-necks into account in assessing the maximum possible production for 1985. It considers that the Commission ought to have adopted a consistent policy, either by applying the same rules in 1985 as those on which the maximum possible production for 1980 was based, or by revising the figures for the maximum possible production for 1980 to bring the rules applied in 1980 into line with those applied in 1985.

45 The Commission explains that because 1980 is a reference year, the figures for which were used as the basis for the Community restructuring plan drawn up by the Council, it wished to base its assessment on an uncontested picture of

production capacities and for that purpose relied on the information communicated to it by the undertakings themselves. In 1985, on the other hand, it was entitled to refuse to take into account reversible bottle-necks so as to ensure that the reduction in production capacity required by the Council would be achieved.

46 It should be stated that the reduction in capacity required of the Netherlands industry in addition to that proposed by it was determined by comparing the total capacity reduction required with the proposal made by the Netherlands Government. It is therefore important that no error should have been made in assessing that proposal.

47 The proposed capacity reduction was calculated by the Commission by deducting the maximum possible production proposed for 1985 from the maximum possible production for 1980. Whether that calculation was correct therefore depended upon whether the two figures were obtained by the same method.

48 It is not disputed that the maximum possible production for the Netherlands industry for 1980, assessed at 5 400 000 tonnes, took into account reversible bottle-necks. Although the Commission correctly observes that it merely accepted the figures communicated to it by the undertakings themselves, it is clear from the argument before the Court that those figures were provided by the undertakings on the basis of a questionnaire drawn up by Commission officials and that the Commission was fully aware of the method of calculation adopted. It is also agreed that, by contrast, the Commission excluded bottle-necks of that nature in assessing the maximum possible production for 1985, which was thus fixed at 5 300 000 tonnes. On that basis, the capacity reduction initially proposed by the Netherlands industry was assessed at only 100 000 tonnes. That figure was increased to 250 000 tonnes as a result of changes made in the Netherlands plan after it was notified to the Commission.

49 As the Commission has correctly contended, if reversible bottle-necks are taken into account, it is impossible to assess true capacities of production and thus to determine accurately the necessary capacity reductions. The Commission should therefore have increased the maximum possible production for the Netherlands steel industry for 1980 by excluding reversible bottle-necks.

50 The Commission has not succeeded in justifying its failure to correct the figure for the maximum possible production for the Netherlands industry for 1980. That error resulted in an artificial reduction of the estimate of the capacity reduction proposed by the Netherlands Government. The applicant is thus justified in claiming that the contested decision is in this respect vitiated by error and is entitled to a declaration that Article 2 (1) is void in so far as it contains an erroneous assessment of the reduction in production capacity proposed by the Netherlands Government.

The decisions concerning the Italian aid

51 Hoogovens claims that in the case of the Italian decision the Commission increased the figures provided by certain undertakings in relation to the maximum possible production for 1980 and took into consideration reversible bottle-necks for the maximum possible production for 1985.

52 The Commission states that, so far as the maximum possible production for 1980 was concerned, it amended the figures which had been provided by certain small undertakings because they had been based on confusion between actual production and maximum possible production; it did not, on the other hand, take into account any reversible bottle-necks as regards 1985 but only considered actual capacity reductions resulting from the definitive closure of plant.

53 There is nothing in the file or in the argument presented before the Court to show that the decision concerning the Italian aid is vitiated by the errors of assessment alleged by the applicant. This submission must therefore be rejected.

Costs

54 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs.

55 As the defendant has failed in its submissions in Case 172/83, it must be ordered to pay the costs of that action. As the applicant has failed in its submissions in Case 226/83, it must be ordered to pay the costs of that action.

On those grounds,

THE COURT

hereby:

(1) Declares void Article 2 (1) of Commission Decision No 83/398/ECSC of 29 June 1983 (Official Journal 1983, L 227, p. 33) concerning the aid that the Netherlands Government proposes to grant to the steel industry, on the assessment of the reduction in production capacity proposed by the Netherlands Government;

(2) Dismisses the remainder of the conclusions in Case 172/83 and Case 226/83;

(3) Orders the Commission to pay the costs in Case 172/83;

(4) Orders the applicant to pay the costs in Case 226/83.

Mackenzie Stuart Bosco Due Pescatore

Everling Bahlmann Galmot Joliet O'Higgins

Delivered in open court in Luxembourg on 19 September 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President