OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 29 January 1985 *

Mr President,
Members of the Court

1. The subject of this case is the decision of 13 July 1983 in which the Commission of the European Communities, acting under Article 47 of the ECSC Treaty, imposed a fine of over three and a half million marks on Krupp Stahl AG. In its application, lodged on 26 August 1983, Krupp asks the Court, primarily, to declare the decision void and, in the alternative, to reduce the fine.

On 23 January 1981, the Commission, in order to verify that the rules of the ECSC regarding prices were being complied with, ordered an inspection of accounts to be carried out in Bochum, at the registered office of Krupp Stahl AG and at that of Krupp Stahl Vertriebsgesellschaft mbH, a sales company. The operation was carried out in two phases. During the first phase (9 to 11 February 1981), the managements of the two companies disputed the right of the Commission's officials to be present when documents containing the accounts were removed from the archives in which they were kept. The inspection was suspended, and after an exchange of letters, the Commission clarified the scope of its powers of inspection by adopting (on 22 June 1981) an appropriate decision. In it, the two companies were ordered to: (a) grant the Community inspectors access to their offices; (b) produce at their request, if necessary in the places in which they were kept, the accounts and documents concerning the transactions regarding the products listed in Annex I to the ECSC Treaty; (c) provide the written and oral explanations requested by them during their inspection.

During the second phase of the inspection (24 June to 30 July 1981) those instructions were carried out, though with much difficulty. Since it thereby became aware of some interesting facts, the Commission, by a memorandum of 30 September 1982, charged Krupp Stahl AG with an infringement of Articles 47 and 60 of the ECSC Treaty as well as the implementing measures adopted under them. It therefore invited the applicant to submit its own conclusions within 14 days and that period was later tacitly extended to 30 November 1982. On that date, the applicant stated its position on each of the accusations and, at its own request, was also heard in Brussels on 19 January 1983. In accordance with the usual practice, the Commission's officials prepared draft minutes of that hearing. Krupp was also able to hear a tape-recording of it and communicated its comments to the Commission in a letter of 16 April 1983.

Finally, on 13 July 1983, the Commission adopted the decision on the validity of which the Court has been asked to decide. It is therein stated that it emerged from the inspections and the hearing in Brussels that Krupp granted discounts in 1980 and in the first six months of 1981 which were not published and not notified in accordance with the rules governing such matters (Articles 2 and 5 of Decision No 31/53 of

* Translated from the Italian.

2 May 1953 on the publication of price-lists and conditions of sale applied by undertakings in the steel industry, Official Journal, English Special Edition, 1952-1958, p. 11; provisions of Decision No 14/64 of 8 July 1964 on business books and accounting documents which undertakings must produce for inspection by officials or agents of the High Authority carrying out checks or verifications as regards prices, Official Journal, English Special Edition, 1963-1964, p. 162). It also emerged, *inter alia*, that Krupp: (a) had refused to grant the inspectors access to the places in which the business books were kept, thus obliging the Commission to adopt a special decision; (b) had set up an undisclosed accounting system designed to camouflage confidential discounts; (c) had sought to evade the checks being carried out by the Community inspectors.

Those were stated to be the reasons on which the decision was based. Its operative part imposed a fine of DM 3 505 414 on the applicant, equal to 0.1% of its turnover in 1981. The penalty was said to be in respect of the setting-up of an 'undisclosed accounting system' and 'obstruction of the investigation'.

2. Krupp makes three submissions in the application initiating these proceedings: infringement of essential procedural requirements; infringement of the Treaty and of rules of law relating to its application; and misuse of powers in fixing the fine. Let me say first of all that, in my opinion, the first complaint is without foundation whilst the other two are partly well founded. Here, in order, are the reasons for the argument that I submit to the Court.

The defect in the decision of which the first submission complains is that the applicant did not approve the minutes of the hearing on 19 January 1983, from which the Commission derived important information on the basis of which it acted as it did. According to Krupp, an oral hearing before the sanction is imposed is an 'indispensable part of the rights of the defence'. A hearing is therefore necessary, and it therefore follows that the minutes in which are collected the statements made by the persons heard during it must be formally approved by those persons. That, moreover is required by Article 9 (4) of Regulation No 99/63, adopted by the Commission on 25 July 1963 to regulate the hearings provided for in Article 19 of Regulation No 17 adopted by the Council on 6 February 1962 for the purpose of implementing Articles 85 and 86 of the EEC Treaty. Furthermore, it cannot be argued that this case comes within the scope of the ECSC Treaty: the provision cited above lays down principles of general application and therefore applies to this case either directly or at least by analogy.

The defendant's argument is exactly the opposite. It contends that the rules of the ECSC do not oblige it, when it considers that it must impose a pecuniary sanction, to provide the undertaking concerned with a forum in which it can put forward its point of view orally. In practice, such an opportunity is granted, but that certainly does not transform the hearing into an 'indispensable part of the rights of the defence'. Consequently, the failure to draw up a definitive version of the minutes of the hearing at which the applicant gives its views (and therefore the applicant's failure to approve it) cannot have any effect on the validity of the measure.

As I have already said, that submission need not be taken into consideration. I note first of all that the applicant itself did not feel obliged to develop it during the oral

procedure. In any event, its weakness is obvious. According to Article 36 of the ECSC Treaty, the principle that the accused must be heard during the administrative procedure preceding imposition of the fine or penalty payment requires only that the party concerned must be given 'the opportunity to submit its comments'. It seems to me however that the Commission has fully satisifed that requirement both by the memorandum of 30 September 1982 and by the period of two months granted to Krupp in which to put forward its comments on the findings therein contained. The steps taken subsequently (hearing, opportunity given to Krupp to listen to the recording, draft minutes and so on) were indeed in line with established practice, but the essential point is that they were in no way mandatory. In fact, that practice is only a *quid pluris* which the Commission spontaneously developed over the years to provide better guarantees of the rights of undertakings against whom it is bringing charges.

Finally, I do not believe that the applicant's reference to Article 9 (4) of Regulation No 99/63 is relevant. The Commission's obligations in the context of the administrative procedure are exhaustively set out in Article 36 of the ECSC Treaty. It is thus clear that provisions belonging to another system such as that of the EEC Treaty cannot apply to that procedure otherwise than by way of analogy. Moreover, the provision to which Krupp refers is contained in a tertiary source, that is to say, in a source too minor to allow 'principles of general application' to be drawn from it, as is done by the applicant.

3. In its second submission — infringement of the Treaty and of rules of law relating to its application — the applicant makes a series of complaints which, for the sake of clarity, may be grouped under three headings: (1) errors with regard to the legal basis of the decision; (2) errors with regard to the charge of setting up an undisclosed accounting system intended to camouflage discounts; (3) errors concerning the charge of obstructing the Commission's inspection.

Let me begin with the first group. The errors complained of are as follows: (a) the fact that the measure does not specifically indicate which provisions of Decision No 14/64 Krupp is alleged to have infringed, whilst Article 1 of that decision contains a full and detailed list of the documents failure to produce which constitutes an infringement of the rules; (b) the fact that, in contrast to what is provided for in Article 47 of the ECSC Treaty, infringements of the provisions of the said decision do not entail imposition of a pecuniary penalty.

In my opinion, both of those complaints are without foundation. With regard to the first one, I would observe that the Commission is not obliged to indicate precisely the specific provision which has been infringed. The documents listed in subparagraphs (a) to (g) of Article 1 of Decision No 14/64 are in fact merely examples of the materials to be placed at the disposal of the inspectors. The legislature is interested in only one thing: that the documents shown to the Commission's officers should include 'all supporting documents' (eighth recital in the preamble) and contain 'the information needed to check effectively' that the rules relating to prices have been complied with (fourth recital in the preamble); in other words, that they are exhaustive and genuine. The second complaint is expressly contradicted by Article 3 of the decision which provides that: 'Undertakings which

evade their obligations under this decision shall be liable to the penalties provided for in the third paragraph of Article 47 of the Treaty'.

As I have said, the errors in the second group concern the charge that the applicant maintained an undisclosed accounting system for the purpose of hiding confidential discounts. According to Krupp, the Commission knew about those discounts. It had in fact approved them in a specific agreement. It was not therefore correct to say that the undertaking had hidden them from it by maintaining a parallel accounting system.

I believe that Krupp is to a large extent right. In reply to a question from the Court, the Commission admitted that in the period from 1 January 1980 to 30 June 1981 it authorized undertakings in the steel industry which had been affected by the crisis to offer discounts of identical amount for each group of comparable consumers. The agreement provided, by way of derogation from the provisions of Article 60 of the Treaty, that the discounts should be neither published nor notified. However, the undertakings were to inform the Commission's inspectors of them so that the latter could verify that the rules prohibiting discriminatory practices had been complied with.

At the time when the inspection took place therefore, the discounts were lawful. Moreover, it cannot be said that they were of a discriminatory character, as is proved by the fact that the Commission did not see fit to adopt an *ad hoc* decision addressed to Krupp. Why then does it accuse the applicant of maintaining an undisclosed accounting system? The oral procedure threw some light on that aspect of the case. It emerged in fact that, perhaps because of an excess of compartmentalization in the Commission, the inspectors were unaware of the agreement regarding discounts. Consequently, they regarded them as unlawful and concluded that the accounting system used by Krupp was intended to hide them. That being the case, the reasons for which Krupp adopted that system might well arouse the interest of the German authorities. For the purposes of Community law however the argument which it advances is fully relevant.

Finally, let me turn my attention to the errors in the third group. According to the applicant, those errors are as follows: (a) the Commission regarded as an 'obstacle' put in the way of its officials something that, during the first phase of the inspection, was no more than a difference of opinion as to the scope of its powers of inspection. The refusal to allow the inspectors into the place where the archives were kept was based on precise provisions of German law; Krupp was therefore entitled to ask the Commission for a decision clarifying that point and the exercise of a right cannot be regarded as an 'obstacle'; (b) Krupp in no way obstructed the carrying out of checks during the second phase of the inspection. This is proved by the fact that the inspectors were able to examine all the documents, even though only after a 'closely contested argument'.

The complaint made at (a) is well founded. I shall not go any further into the question of the right of the inspectors to have access to the place in which the archives were kept. That was in fact resolved by the decision of 22 June 1981 which Krupp has complied with, even though reluctantly. On the other hand, let me underline the admissions made by the defendant during the proceedings. It recognizes that undertakings have a right to ask for a decision defining the contents and limits of its powers of inspection (a right,

moreover, the existence of which has been recognized by the Court in its judgment of 14 April 1960 in Case 31/59 *Acciaierie e Tubificio di Brescia* v *High Authority* [1960] ECR 71). It also declares that the events which led it to adopt the decision of 22 June 1981 are not the subject of the decision of 13 July 1983. It seems to me that is sufficient to conclude that the latter measure should be declared void in so far as it alleges that Krupp obstructed the investigations (Article 1) by refusing to grant the inspectors 'access to the places in which the documents were kept' and by forcing the Commission to 'adopt an individual decision'.

On the other hand, the complaint made at (b) is without foundation. According to Krupp, the second phase of the inspection went smoothly, so smoothly in fact that the Commission was able to establish the existence of a parallel accounting system. However, that statement does not correspond to the facts. As we learned during the hearing, the inspectors who wanted to take possession of documents relating to the discounts had considerable difficulty, not least because they were kept in special places and, in the case of certain documents, in places other than the company's registered office. However, it is a general principle that agreements are to be carried out in good faith. It follows that the obligation to produce the accounts relating to the discounts may be regarded as fulfilled only by immediately and spontaneously putting the documents into the hands of the inspectors. Since that did not happen in this case, Krupp must be regarded as having broken the agreement in which that obligation was laid down. Moreover, the applicant itself has stated that the inspectors obtained possession of the documents only after 'a closely contested argument'. Such an admission gives further credence to the allegation that the applicant obstructed the inspection contrary to Article 47 of the ECSC Treaty and to Decision No 14/64.

4. In its final submission (misuse of power in fixing the fine), the applicant complains of four defects: (1) the erroneous nature of the criterion chosen for the purpose of fixing the sanction; (2) the failure to assess or the wrongful assessment of the gravity of the infringements; (3) the failure to indicate the criterion on the basis of which the fine was apportioned among the infringements alleged; (4) the disproportionate size of the fine. In this paragraph, I shall concern myself with the first and third alleged defects, whilst the other two will be dealt with in relation to the application to reduce the fine.

The first complaint is directed against the method which the defendant employed in determining the fine. I note that the measure fixed that fine at 0.1% of Krupp's turnover in 1981 in respect of products subject to the ECSC Treaty. In the applicant's view, that method is wrong because: (a) in general, turnover is not a suitable criterion for determining the financial situation of an undertaking; (b) in particular, taking account of the fluctuations to which the steel market is subject, the figure for 1981 does not correctly represent Krupp's situation; (c) even if the Commission's method is correct, the calculation should be made on the basis of the figure representing the value of the transactions which were the subject of the inspection; (d) the figure of 0.1% is arbitrary.

None of those observations stands up to any but the most cursory examination. With regard to (a), I note that the criterion of annual turnover is laid down in Article 47 of the Treaty itself. With regard to (b), my

view is that the reference to the 1981 turnover in order to assess Krupp's financial situation for the purpose of the fine seems correct. It was in that year that the inspection took place and the first half of that year forms part of the period which the inspectors checked. With regard to (c), I note that when speaking of 'annual turnover', Article 47 is referring to all products to which the Treaty applies. As the Court is aware, when it is intended that another method of calculation be adopted in determining a fine, the Treaty says so expressly (see the sixth paragraph of Article 54, Article 58 (4), Article 59 (7), Article 64 and Article 65 (5)). Finally, with regard to (d), I would limit myself to observing that the choice of a percentage value is not completely arbitrary. Article 47 itself makes use of such a criterion to indicate the maximum size of the sanction.

The third complaint is that the contested measure did not take sufficient account of the different infringements which Krupp is alleged to have committed. In other words, the Commission ought to have indicated for each infringement the amount of the fine imposed in respect of it and, since it did not do so, it has prevented the Court from exercising the discretionary power of review granted to it by the Treaty. That complaint does not stand up either. Article 47 does not impose any obligation on the Commission to relate a specific punishment to each offence. It thus makes no sense to say that it has sought to avoid review by the Court. As we all know, the Court enjoys unlimited jurisdiction with regard to pecuniary sanctions.

5. I noted at the outset that the applicant is seeking, in the alternative, a reduction in the fine imposed on it. It puts forward two arguments in support of that application. The first one contends that the decision does not specify the seriousness of the allegations, in particular with regard to their economic consequences. The second argument complains of the disproportionate character of the fine compared to the infringements it is alleged to have committed. The Commission replies that: (a) it is not necessary to assess the economic consequences of the infringements in order to impose the fines provided for in Article 47 of the Treaty; (b) the fine is proportionate to the infringements. To the extent to which it makes auditing of accounts illusory, maintaining an undisclosed accounting system is a very serious offence. It therefore merits an exemplary reproof, which is also justified by the dissuasive effect which it would have on undertakings in the steel industry in the present period of crisis in that sector.

In the light of the considerations set out in paragraph 3, that line of argument does not seem to me to be acceptable. Of the two allegations made by the Commission against Krupp — maintaining an undisclosed accounting system intended to hide confidential discounts and obstructing the inspection during both periods in which it took place — I have stated the first to be without foundation and the second to have no basis as regards the initial phase of the inspection. In those circumstances, a reduction of the fine would appear to be justified. I am nevertheless of the opinion that it should remain substantial. The failure to present the accounts immediately and spontaneously to the inspectors is a serious infringement, particularly if account is taken of the fact that the duty to do so is part of an agreement the principal effects of which are largely favourable to the undertakings concerned, since it provides for a noteworthy (even if only temporary) derogation from the rules on prices laid down in the Treaty.

6. For all the aforementioned reasons, I suggest that the Court grant in part the application lodged on 26 August 1983 by Krupp Stahl AG against the Commission of the European Communities by: (a) declaring the decision of 13 July 1983 void in so far as it alleges that the applicant maintained an undisclosed accounting system for the purpose of concealing confidential discounts and that it obstructed the investigations during the first phase of the inspection; and (b) reduce the fine to half its present amount.

With regard to costs, I suggest that the parties bear their own, as provided for in Article 69 (3) of the Rules of Procedure.