JUDGMENT OF THE COURT (Fifth Chamber)
12 November 1985 *

In Case 183/83

Krupp Stahl AG, 165 Alleestraße, Bochum, represented by Karl Pfeiffer, Kurt Biedenkopf and Peter Ossenbach, Rechtsanwälte, 72 Friedrich-Schmidt-Straße, D-5000 Cologne 41, with an address for service in Luxembourg at the Chambers of Jean-Claude Wolter, 2 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbaur, acting as Agent, with an address for service in Luxembourg at the office of Georges Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission decision of 13 July 1983 imposing a fine on the applicant under Article 47 of the ECSC Treaty is void,

THE COURT (Fifth Chamber)

composed of: U. Everling, President of Chamber, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 29 January 1985,

gives the following

* Language of the Case: German.

JUDGMENT

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

Decision

1 By application lodged at the Court Registry on 26 August 1983, Krupp Stahl AG, Bochum, brought an action under Article 33 and the second paragraph of Article 36 of the the ECSC Treaty primarily for a declaration that the Commission decision of 13 July 1983 imposing on it a fine of DM 3 505 414 is void and, in the alternative, for a reduction of the fine by an appropriate amount.

2 According to Article 1 of the operative part of the contested decision, 'the undisclosed accounting system maintained by Krupp Stahl AG in 1980 and during the first half of 1981, and the obstruction of the investigation into prices constitute infringements of Decision No 14/64'.

3 In support of that finding, the Commission sets out the following facts in the statement of the reasons on which the contested decision is based:

(a) During the first stage of an inspection carried out on 9 February 1981 at its offices, Krupp refused to give the Commission's inspectors access to the places in which the business books were kept and the Commission was obliged to adopt an individual decision in order to enable its inspectors to obtain the necessary information;

(b) In 1980 and during the first half of 1981, Krupp granted discounts which were neither published nor notified, contrary to the price rules contained in the ECSC Treaty;

(c) Krupp sought to evade inspections and checks by obstructing the investigations being carried out by the Commission's inspectors;

(d) During the same period, Krupp maintained an undisclosed accounting system for discounts by reducing to a minimum the number of persons aware of their existence, by keeping the relevant documents in places other than the company's business premises and by causing payments to be made by persons outside the undertaking.

4 In the present action, the applicant makes a general submission alleging infringement of essential procedural requirements and other submissions dealing with each of the abovementioned sets of facts.

Infringement of essential procedural requirements

5 The applicant complains that the Commission did not respect the rights of the defence by not drawing up definitive minutes of its hearing on 19 January 1983 although that was made necessary by the observations which the applicant had made on the draft minutes of 9 February 1983, transmitted to it by the Commission. The applicant claims that the errors and omissions which it observed in that draft are the most likely cause of or in any event one of the reasons for the error which it alleges is contained in the contested decision. It also considers that the Commission was required to grant it a hearing by virtue of an analogous application of Regulations Nos 17 and 99/63 dealing with competition law, which lay down procedural rules of general application.

6 The Commission contends that Article 36 of the ECSC Treaty merely requires it to send a letter to the persons concerned setting out the infringements which have been found to exist and inviting them to express their views thereon. A hearing is thus not provided for and, even if it is in practice granted to the undertakings concerned, it is merely an additional opportunity afforded to them which is not provided for in the Community rules. In any event, the obligation to draw up agreed minutes is not imposed by the Treaty. Moreover, Regulations Nos 17 and 99/63 cannot apply to the procedure to be followed in relation to the hearing in question.

7 It must be borne in mind that according to the first paragraph of Article 36 of the ECSC Treaty: 'Before imposing a pecuniary sanction or ordering a periodic penalty payment as provided for in this Treaty, [the Commission] must give the party concerned the opportunity to submit its comments'. According to the Court's interpretation of that provision in its judgment of 16 May 1984 (Case 9/83 *Eisen und Metall Aktiengesellschaft* v *Commission* [1984] ECR 2071): 'The rights of the defence are guaranteed by that article since it provides the party concerned with an opportunity to put forward its arguments. The Commission cannot be required to reply to those arguments . . . where it considers that the preliminary investigation of the case has been sufficient, for that would be likely to render the procedure for establishing an infringement too cumbersome and extend its duration unnecessarily'.

8 That rule also applies where, after a company has replied in writing to the complaint made against it in the Commission's letter, it is offered a further opportunity of explaining its point of view orally. Article 36 of the ECSC Treaty does not require the Commission to reply to the observations submitted by the company concerned on the draft minutes transmitted to it.

9 It must be added that the applicant's argument that such an obligation results from the application by analogy of the provisions of Regulations Nos 17 and 99/63 is without foundation since those provisions belong to a totally different branch of Community law.

10 The submission alleging an infringement of essential procedural requirements must therefore be rejected.

The facts set out at (a)

11 With regard to the facts at (a) above, Krupp claims that in expressing its views as to the extent of the inspectors' powers it was merely exercising its right to ask that contested legal questions first be clarified by a specific decision of the Commission. Such a request cannot be regarded as an obstruction rendering Krupp liable to a fine.

12 The Commission replies that it does not contest the right of undertakings to require an individual decision to be taken, like that adopted in this case on 22 June 1981, before an inspection is carried out. At the hearing, it has also contended that the events which occurred at the beginning of the inspection on 9 February 1981 are not the subject of the contested decision.

13 It must be observed first that the operative part of the contested decision refers to all the obstructions of the investigations without distinguishing between them and that the recitals in the preamble expressly include in the complaints against the applicant the events which took place on 9 February 1981.

14 It must also be borne in mind that, as the Court emphasized in its judgment of 14 April 1960 (Case 31/59 *Acciaieria e Tubificio di Brescia* v *High Authority* [1960] ECR 71), 'if the undertakings consider that the activities of the officials of the High Authority exceed either their terms of reference or the jurisdiction of the Community, they may request that no information be gathered or checks be made before a decision is adopted in favour of one of the differing points of view'.

15 It follows that the applicant is justified in claiming that the first set of facts cannot be relied upon in support of a finding that it has committed an infringement.

The facts set out at (b)

16 The applicant claims that the Commission cannot criticize it for granting discounts because those discounts were the subject of a formal agreement with the Commission and were approved by it.

17 It should be noted in this regard that it follows both from the recitals in the preamble and from the operative part of the contested measure that the facts set out at (b) were not relied on as constituting an infringement. This submission is therefore without purpose.

The facts set out at (c)

18 With regard to the facts set out at (c) above, namely obstruction during the second stage of the investigations, a preliminary claim by the applicant is that that allegation was first made by the Commission during the proceedings before the Court; no reference was made to it in the contested decision which in that respect, therefore, does not contain a sufficient statement of reasons.

19 The Commission denies that claim and contends that in the third recital in the preamble to the contested decision mention is clearly made of the fact that 'Krupp . . . tried to evade the checks and verifications regarding prices being carried out by servants or agents of the Commission'. According to the Commission, that was a reference, in particular, to attempts by the applicant's representatives to have the inspectors limit their investigation to certain pages of the files and and to the absence of a plan of the archives.

20 It should be noted that the recitals in the preamble to the contested decision do not contain sufficient information to enable the applicant to ascertain exactly which facts were regarded as constituting the infringement. The said decision contains neither a description of the events nor an indication of the dates on which those events took place with the result that the alleged complaint remains vague and imprecise. Consequently, the statement of the reasons on which the contested decision is based is insufficient.

21 That defective statement of reasons cannot be remedied by the explanations supplied at the hearing by the Commission according to which the applicant did not make available to the inspectors a detailed plan of the archives which would have facilitated the investigation and did not cooperate with them in order to make their task easier.

22 Consequently, the submission that the statement of reasons for the decision was inadequate in this respect must be accepted.

The facts set out at (d)

23 With regard to the facts set out at (d) above, Krupp claims that there was no need to conceal the discounts from the Commission because they were accorded with the latter's knowledge and consent.

24 It should be noted that even if Krupp had no reason to hide from the Commission certain discounts that it granted, that does not alter the fact that there existed an undisclosed accounting system as described in the contested decision which in this respect contains a sufficient statement of reasons.

25 Consequently, this submission must be rejected.

26 The applicant then claims that those facts cannot be regarded as constituting an infringement. It observes that the contested decision fails to specify which provisions of Decision No 14/64 had been infringed in this case and also claim that the facts in question do not come within the scope of Decision No 14/64.

27 The Commission contends that having regard to the applicant's conduct, a precise indication of which provisions of Decision No 14/64 had been infringed was not necessary. Decision No 14/64 was adopted in implementation of Article 47 of the Treaty. It particularizes undertakings' obligations under that article and specifies the 'minimum' business books and accounting documents which undertakings are obliged to keep and to make available to inspectors in order to permit adequate verification.

28 It should be observed that the first paragraph of Article 47 of the Treaty lays down, on the one hand, the duty of undertakings to provide information and, on the other hand, the extent of the investigations which may be carried out in order to obtain the information the Commission requires. To that end, Decision No 14/64, adopted in implementation of Article 47, specifies in terms the concrete obligations imposed on undertakings for the purpose stated in the fourth recital in the preamble, according to which 'undertakings must be able to produce for inspection to officials or agents of the High Authority business books and accounting documents which contain the information needed to check effectively that the rules relating to prices have been complied with'. In those circumstances, it was not necessary to mention in the contested decision the precise provisions on the basis of which it was adopted.

29 It follows that if the existence of an undisclosed accounting system makes it difficult for the Commission to carry out the necessary checks, it is contrary to the obligations imposed on undertakings by Article 47 and the provisions adopted in implementation thereof.

30 Consequently, this submission must be rejected.

31 The applicant further claims that Decision No 14/64 does not provide for the imposition of a fine on the basis of the facts in this case.

32 To rebut that submission, it is sufficient to note that according to Article 47 of the Treaty, the 'High Authority may impose fines or periodic penalty payments on undertakings which evade their obligations under decisions taken in pursuance of this Article .... The maximum amount of such fines shall be 1% of the annual turnover, and the maximum amount of such penalty payments shall be 5% of the

average daily turnover for each day's delay' and that Article 3 of Decision No 14/64, adopted in implementation of Article 47, 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'.

33 Consequently, this submission must also be rejected.

34 It follows from all the foregoing that the only facts on which the Commission could properly rely against the the applicant company are those set out at (d) above.

The amount of the fine

35 Krupp claims that the contested decision wrongly fixed the amount of the fine on the basis of its turnover in respect of all products coming within the scope of the ECSC Treaty and not its turnover in respect solely of the products which were the subject of the check. The decision also wrongly referred to the turnover for 1981 and not that for the year in which the contested decision was adopted.

36 The Commission observes that the third paragraph of Article 47 of the ECSC Treaty fixes the maximum amount of the fine on the basis of turnover. It contends that the period relied on is justified by the fact that it is the period during which the check was made and in respect of which the applicant's turnover was known to it. Moreover, it considers that it would be unjustified to restrict itself solely to the turnover in respect of the products which were the subject of the check.

37 It should be borne in mind that in determining the fine account may be taken both of the overall turnover of the undertaking, which gives some indication, however approximate and imperfect it may be, of the size and economic strength of that undertaking, and of the part of that turnover represented by the goods concerned in the infringement which therefore serves to provide an indication of the extent of that infringement. Consequently, neither one or the other of those figures should be given too much weight compared with the other factors relevant to an assessment and the determination of an appropriate fine cannot be the result of a

simple calculation on the basis of overall turnover. The Court must take account of those considerations in assessing, in the exercise of its unlimited jurisdiction, the seriousness of the infringements at issue.

38 With regard to the seriousness of the infringement, Krupp claims that the Commission's assessment of the seriousness of each offence was wrong and the apportionment of the amount of the fine between the various infringements was unjust. It also considers that a fine imposed under Article 47 of the ECSC Treaty should as a general rule be less than that imposed under Article 60 in respect of infringements of price rules.

39 The Commission replies that the actual seriousness of the infringement was taken into account. The applicant's policy of concealment effectively rendered the entire check illusory. It thus constituted an infringement of a greater degree of seriousness than a failure to provide information and consequently deserves an exemplary punishment. Moreover, the Commission considers that it was not obliged to impose separate fines since the infringements were so intertwined that the fixing of a single fine was necessary. Finally, it contends that a fair balance existed between the fine imposed and the fine laid down for infringements of the price rules.

40 It should be pointed out that the Commission has the right and even the duty to fix fines at levels that take account of the circumstances and the gravity of the infringement. After examining the facts in this case, the Court has considered that it is only the maintenance of an undisclosed accounting system that constituted an infringement and has not accepted the other facts relied on by the Commission. Consequently, having regard to the seriousness of that infringement, the imposition of a fine at the level fixed by the Commission cannot be regarded as justified.

41 However, the infringement which the Court has found to exist undoubtedly remains a serious one because it affects the exercise of the supervisory powers granted to the Commission by the Treaty.

42 In the light of the circumstances of the case and on the basis of the foregoing considerations, the Court considers that the amount of the fine should be reduced from DM 3 505 414 to DM 1 000 000.

Costs

43 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its main submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Declares that Article 1 of the Commission decision of 13 July 1983 is void in so far as it finds that the investigations were obstructed;

(2) Reduces the amount of the fine imposed on the applicant to DM 1 000 000;

(3) For the rest, dismisses the application;

(4) Orders the Commission to pay the costs.

Everling Joliet

Due Galmot Kakouris

Delivered in open court in Luxembourg on 12 November 1985.

P. Heim
Registrar

U. Everling
President of the Fifth Chamber