taking is charged may be clearly established from the statement of objections in conjunction with the decision and the undertaking had already clearly perceived, in the course of the administrative procedure, the scope of the objection communicated to it.

3. It is clear from the terms of Article 36 of the ECSC Treaty that the obligation on the part of the Commission to give the party concerned the opportunity to submit its comments before imposing a pecuniary sanction or ordering a periodic penalty payment cannot be understood as requiring the Commission to put forward its counter-arguments in relation to the arguments put forward in its defence by the party concerned. 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, to carry out further inquiries or to hear witnesses for the party concerned, where it considers that the preliminary investigation of the case has been sufficient.

In Case 9/83

EISEN UND METALL AKTIENGESELLSCHAFT, Gelsenkirchen, represented by Martha Grünning, Rechtsanwalt, Düsseldorf, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe-II,

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 Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission Decision of 9 December 1982 imposing a fine on the applicant under Article 15 of Decision No 1836/81/ECSC is void,

THE COURT (Fourth Chamber)

composed of: T. Koopmans, President of Chamber, K. Bahlmann, P. Pescatore, A. O'Keeffe and G. Bosco, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. Legal background

Commission Decision No 1836/81/ ECSC of 3 July 1981 on the obligation of distributive undertakings to publish price lists and conditions of sale and on practices prohibited for these undertakings (Official Journal 1981, L 184, 4. 7. 1981, p. 13) was adopted in order to ensure that undertakings engaged in distribution activities in the steel sector observed the same rules as those applicable to production undertakings pursuant to Article 60 of the ECSC Treaty and its implementing decisions.

Article 2 of Decision No 1836/81 provides that: "Steel dealers shall be obliged to publish price lists and conditions of sale for direct and ex-stock sales in accordance with the provisions set out below and to communicate them to the Commission."

Articles 3 to 6 contain detailed rules for the publication of price lists.

Article 7 provides that: "Steel dealers need not publish rebates for sub-standard products or seconds." They are then required to state on the invoice the reasons for classification as sub-standard products or seconds.

Article 8 forbids steel dealers "to apply in the common market dissimilar conditions . . . to comparable transactions . . .". Transactions are considered comparable, under Article 9 (1), where:

(a) they are concluded with purchasers:

Who compete with one another, or

Who produce the same or similar goods, or

Who carry out similar functions in distribution;

and

(b) they involve the same or similar products;

and

(c) their other relevant commercial characteristics do not differ to a material extent.

Article 11 provides that steel dealers who allege that transactions are not comparable are, at the request of the Commission, to set out the facts and circumstances justifying their contention.

Article 14 provides that: "Steel dealers shall be obliged to furnish all the necessary information to the Commission, which may carry out all the necessary checks to ensure that the abovementioned provisions are being complied with."

Article 15 (1) and (2) provides for the imposition of fines on steel dealers who infringe any of the provisions of Articles 2 to 13 or Article 14 respectively.

Finally, Article 16 provides that the decision is to enter into force on the date of its publication in the Official Journal of the European Communities and is to apply until 30 June 1982. The decision was subsequently renewed. Although the decision entered into force on 4 July 1981, the Commission granted the undertakings concerned a period which was to expire on 15 September 1981 for the publication of their price lists.

2. Facts

Eisen und Metall Aktiengesellschaft (hereinafter referred to as "Eisen AG"), a steel dealer, published on 12 October 1981 a price list "valid as from 14 October 1981".

From 25 to 29 January 1982 a Commission inspector carried out checks exclusively in relation to transactions effected after 14 October 1981 to ascertain whether Eisen AG had fulfilled its obligations under Decision No 1836/81. The inspector established that on several occasions during the period in question the applicant had sold sheet at a price lower that its published list price.

3. Procedure

In the light of the results of those checks, the Commission initiated a procedure under Article 36 of the ECSC Treaty.

By decision of 9 December 1982 it imposed on Eisen AG a fine of DM 133 736 pursuant to Article 15 of Decision No 1836/81.

On 13 January 1983 Eisen AG brought an action for a declaration that the decision imposing a fine was void or, in the alternative, for a reduction of the fine.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry, although it asked the parties to provide it with certain information and to submit certain documents. The Court also decided, by order of 9 November 1983, to assign the case to the Fourth Chamber.

II — Conclusions of the parties

Eisen AG claims that the Court should:

Declare the Commission decision of 9 December 1982 void and, consequently, annul the fine amounting to DM 133 736 imposed by Article 2 of that decision;

In the alternative, reduce the amount of the fine;

Order the defendant to pay the costs.

The *Commission* contends that the Court should:

Dismiss the application;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — Infringement of essential procedural requirements

(a) Failure to comply with the obligation to provide a statement of the reasons on which the decision was based

Eisen AG contends that the conditions laid down for the imposition of a fine were not satisfied in this case, with the result that the contested decision is at one and the same time unfounded and lacks a sufficient statement of the reasons on which it was based.

According to the applicant, all the contested deliveries were carried out in performance of "framework contracts" concluded with a number of undertakings before 15 September 1981, the date of expiry of the period set by the Commission for the publication of price lists. Those contracts were concluded on 7 September 1981 with Markmann, Düsseldorf, and with Claas, Saulgau, on an unspecified date but in any event prior to 24 June 1981 with Schlafhorst, Mönchengladbach, and on an unspecified date but in any event prior to 15 September 1981 with Bergbau, Westphalia.

Eisen AG points out that "framework contracts" are frequently used in the steel market and consist of a contract of sale with a fixed price for a given quantity of products in respect of which the buyer reserves the right to ask for "delivery upon request", that is to say to ask for partial deliveries on dates which are most suitable to him within a period agreed with the supplier.

The *Commission* does not deny that undertakings may conclude "framework contracts" but it takes the view that the reference to such contracts is not relevant in this case, in the light of several factors such as the discrepancy between the quantities specified in the contracts which Eisen AG refers to as "framework contracts" and the quantities actually delivered, the reference to approximate quantities and the delivery of certain products whose dimensions differed from those specified in the "framework contracts". It follows, in the Commission's view, that the agreements entered into by Eisen AG cannot be regarded as contracts governed by civil law which may be enforced by legal proceedings.

Moreover, as regards more particularly the delivery of products to Markmann, *Eisen AG* maintains that the Commission took no account of the fact that the transactions in question displayed commercial characteristics wholly different from those referred to in Decision No 1836/81 and were not therefore subject, by virtue of Article 9 (1) (c) of that decision, to a price list. The applicant is merely a dealer in products in Category II (a) (sub-standard products or seconds) in respect of which there is no obligation to publish a price list, but it is often obliged by the other contracting parties also to purchase products in Category I (a) (first grade products), whilst lacking a sales organization for products in that category. The specific feature of the relationship between Eisen AG and Markmann is precisely the fact that the latter renders the former an extremely important service by regularly purchasing from it the quantity of products in Category I (a) which the applicant is at

times required to buy together with the products in Category II (a) which are the main subject-matter of the applicant's commercial dealings.

The *Commission* states by way of reply that the transactions which took place betwen Eisen and Markmann concerning products in Category I (a) cannot be regarded as special transactions on the sole ground that Markmann was a particularly reliable and faithful customer of the applicant. That factor might have justified the grant of a fidelity rebate but cannot, according to the Commission, authorize the applicant to charge Markmann prices below its list prices. The Commission adds that if those transactions were to be regarded as special transactions, it would be obliged to challenge the applicant's factual contentions. In that regard, the Commission points out that, as far as it is aware, sales by the applicant from its stocks of products in Category I (a) amounted to 9 572 tonnes and therefore greatly exceeded sales of products in Category II (a) which in the same period amounted to 1 627 tonnes.

As regards its relationship with Bergbau, *Eisen AG* maintains that there was a tacit agreement between itself and that company whereby the latter, which used the products purchased for purposes in respect of which the difference of category was not decisive, was also prepared to accept delivery of products in Category II (a) instead of the delivery of products in Category I (a) as stipulated in the contract. A substitution of that kind took place precisely in the instances complained of by the Commission.

The *Commission* observes that the existence of such an agreement was relied upon by Eisen AG for the first time on 20 September 1982 in its reply to the Commission's statement of objections. It also points out that whenever products in Category II (a) were delivered to Bergbau, this was shown in the applicant's invoices, as is clear for instance from an invoice dated 14 January 1982 which is attached to the rejoinder.

As regards the "framework contract" entered into with Schlafhorst which was signed before 24 June 1981, *Eisen AG* points out that, if general Decision No 1836/81 is permitted to influence the terms of a contract concluded before its entry into force, a retroactive effect of that kind is contrary to the principle of legal certainty and amounts to interference with the fundamental principles of national civil law, an area that is to say which is entirely outside the Commission's jurisdiction. Moreover, if the decision were endowed with retroactive effect, it would lead to an absurd situation since after publishing its price list, a dealer could proceed to charge its list prices instead of the fixed prices stipulated in pre-existing contracts.

The *Commission* re-emphasizes that in its opinion none of the contested contracts is a "framework contract" in the true sense and adds that, in any event, it is not possible to rely on a "framework contract" in the case of deliveries effected after the date on which the applicant published its price list. Decision No 1836/81, which was initially intended to expire on 30 June 1982, was an emergency measure of limited duration and the possibility of its having a direct effect on the market could not be ruled out without at the same time rendering it wholly ineffective. According to the Commission, if steel dealers had been able to rely on the prices stipulated in medium or long-term

contracts (from 3 to 12 months) which were concluded prior to the adoption of the decision, they would have been able to escape the application thereof. Accordingly, the view must be taken that the provisions of Decision No 1836/81 indicate quite clearly that, in view of the crisis in the steel sector, the decision was necessarily applicable also to pre-existing contracts.

(b) Infringement of Article 15 of Decision No 1836/81

Eisen AG contends that the infringement of Article 15 of Decision No 1836/81 may be regarded both from the point of view of the failure to comply with the obligation to state the reasons on which the decision was based and from that of the infringement of a provision of substantive law. The obligation to provide a statement of reasons was not complied with, in the applicant's view, inasmuch as Article 15 provides for the imposition of fines for the infringement of Articles 2 to 14 of Decision No 1836/81 and the Commission referred to Article 15 in general terms without specifying which provisions the applicant was alleged to have infringed.

The infringement of Article 15 viewed as a provision of substantive law lies in the fact that the article in question does not refer as a separate infringement to the "undercutting of a dealer's own list prices", that is to say the practice which led the Commission to adopt a decision imposing a fine.

In reply the *Commission* states that in this case the applicant could not possibly have failed to perceive the nature of the infringements with which it was charged and that, moreover, the applicant evidently had no difficulty in understanding the meaning of the objections communicated to it. As regards, in particular, the "rebate on its own list prices" which is not referred to in any specific provision, such a rebate necessarily amounts, in certain cases, to a failure to observe those list prices and therefore constitutes an infringement under Article 8 of Decision No 1836/81, that is to say the application of dissimilar conditions to comparable transactions.

(c) Infringement of the rights of the defence and in particular of the right to a fair hearing

According to *Eisen AG*, the Commission infringed the right in question inasmuch as, before adopting its decision imposing a fine, it failed to draw the applicant's attention to the fact that it had no intention of carrying out an inquiry into the evidence in exoneration adduced by the latter.

In reply, the *Commission* states that by offering to organize a hearing for the applicant, it went beyond what is laid down by Article 36 which requires the Commission merely to "give the party concerned the opportunity to submit its comments". Since the applicant declined that offer on the sole ground that the Commission had considered it unnecessary to discuss certain matters in greater detail, it cannot after turning down that offer rely on the contention that its right to a fair hearing was infringed.

B — Infringement of the ECSC Treaty and of the rules of law relating to its application

(a) Infringement of Article 15 of the ECSC Treaty

Eisen AG maintains that by providing an insufficient statement of the reasons on which its decision was based, the Commission infringed Article 15 of the ECSC Treaty which provides that "decisions, recommendations and opinions of the High Authority shall state the reasons on which they are based . . . ."

The *Commission* observes that if — as it has already, in its opinion, established in connection with the other submissions relating to the failure to comply with the obligation to provide a statement of reasons — the decision did contain a sufficient statement of the reasons on which it was based, there can be no question of an infringement of Article 15 of the ECSC Treaty.

(b) Infringement of Articles 47 and 36 of the ECSC Treaty and of Articles 11 and 14 of Decision No 1836/81

In this submission *Eisen AG* maintains that the Commission infringed Articles 47 and 36 of the ECSC Treaty and Article 14 of Decision No 1836/81, in so far as it disregarded the fact that those articles, which authorize the Commission to gather information necessary for the accomplishment of its task and to carry out the necessary checks, thereby require it to verify every aspect of a situation, including those aspects which may lead to the conclusion that no infringement has been committed. The same applies to Article 11 of Decision No 1836/81 which authorizes the Commission to require steel dealers to provide information concerning the facts and circumstances justifying their conduct.

In reply, the *Commission* states that its officers examined all the exonerating circumstances and finally rejected them because they did not stand up to scrutiny. Accordingly, the Commission cannot be reproached with failing to verify the facts of the case.

Article 11 "does not require the Commission to request undertakings to provide it with information if it considers that such information is unnecessary.

(c) Breach of the general principle that a decision may not be based on obvious mistakes or be contradictory or illogical

According to *Eisen AG*, the contested decision is vitiated by obvious mistakes and contradictions since, first of all, it neither denies nor refutes the argument that the contested contracts were concluded before the price list became applicable or even before the entry into force of Decision No 1836/81 and, secondly, it alleges that those contracts constitute an infringement of the latter decision. Those obvious contradictions and mistakes show that the defendant's reasoning is illogical.

The *Commission* rejects that objection in its entirety and emphasizes that since it was not prepared to accept the reference to "framework contracts" or to the agreements allegedly concluded earlier which are mentioned by the applicant, it could take no other decision than that in question. It is therefore consistent in its attitude and its decision is not vitiated by any kind of contradiction of illogicality.

C — Misuse of powers

Eisen AG contends that the Commission exercised the power to impose a fine, conferred upon it by Article 15 of Decision No 1836/81, not in order to penalize certain infringements but exclusively in order to set an example, without taking the trouble to establish whether in the present case the imposition of a fine was really justified. The intention of frightening steel dealers as a whole into complying with Decision No 1836/81 also emerges from the public statements made by certain Commission officials. Moreover, the failure to comply with the obligation to

state the reasons on which the decision was based, the contradictions and illogicalities inherent in the decision the failure to consider the evidence in exoneration adduced by the applicant and the precipitation and haste with which the procedure was initiated and the decision drafted are all indications which support the view that there was a misuse of powers.

In reply, the *Commission* states that the concern to "set an example" is quite legitimate when an exemplary penalty is imposed in appropriate circumstances, and that if the imposition of a fine has at the same time a deterrent effect *erga omnes* such an effect can only be welcomed. As regards the indications of a misuse of powers which Eisen AG claims to have detected in its conduct, the Commission points out that they are entirely baseless since, as the Commission believes it has already pointed out in connection with the applicant's preceding submissions, this case is genuinely concerned with infringements of Decision No 1836/81.

IV — Oral procedure

Oral argument was presented by the parties at the sitting on 18 January 1984.

The Advocate General delivered his opinion at the sitting on 29 February 1984.

Decision

1 By application lodged at the Court Registry on 14 January 1983 Eisen und Metall Aktiengesellschaft, Gelsenkirchen, (hereinafter referred to as "Eisen AG"), brought an action pursuant to Article 33 and the second paragraph of Article 36 of the ECSC Treaty, in which it requested the Court to declare void the Commission decision of 9 December 1982 imposing a fine of DM 133 736 on the applicant under Article 15 of Decision No 1836/81/ ECSC of 3 July 1981 on the obligation of distributive undertakings to publish price lists and conditions of sale and on practices prohibited for these undertakings (Official Journal L 184, p. 13), or, in the alternative, to reduce the fine.

2 The contested decision states that during the period from 14 October 1981 to the end of January 1982 Eisen AG on several occasions sold rolled products at a price lower than the list price which it had published in accordance with the aforesaid decision, No 1836/81, and it established, in Article 1, that the price reductions in question constitute infringements of the latter decision.

3 In support of its application, Eisen AG advanced three categories of submissions relating to:

(a) infringement of essential procedural requirements;

(b) infringement of the ECSC Treaty and of the rules of law relating to its application;

(c) misuse of powers.

4 The applicant's first submission concerning the infringement of essential procedural requirements relates to the obligation to state the reasons on which the decision was based. According to Eisen AG, the Commission disregarded the fact that the conditions laid down for the imposition of a fine had not been fulfilled in this case, with the result that the contested decision was at one and the same time unfounded and lacked a sufficient statement of the reasons on which it was based.

5 In that regard Eisen AG contends in the first place that all the contested transactions were carried out in performance of "framework contracts" concluded with a number of undertakings, in particular Markmann, Schlafhorst, Claas and Bergbau, prior to 15 September 1981, the date of expiry of the period set by the Commission for the publication of price lists by steel dealers.

6 The Commission denies, in the first place, that the agreements referred to by Eisen AG are in the nature of "framework contracts". Moreover, it considers that, even on the assumption that in this case the agreements are genuine "framework contracts", the provisions of Decision No 1836/81, which was an emergency measure of limited duration, had to be directly applicable also to pre-existing contracts if that decision was not to be rendered wholly ineffective by the charging of prices stipulated in pre-existing medium or long-term contracts.

7 It must be pointed out in that regard that measures of economic policy adopted, as in this case, in a situation in which the market is seriously disturbed can achieve their objective only if they take effect immediately.

8 Moreover, that requirement was expressly referred to in the third recital in the preamble to Decision No 1836/81 where it is emphasized that the steel

market continues to be seriously affected by the deterioration of the economic situation and that, in order to create economic conditions favourable to the indispensable restructuring of the iron and steel industry, "immediate action with regard to the sales prices of steel is absolutely necessary; . . . urgent implementation of such action is becoming increasingly essential in this period of crisis".

9 It must be remembered in that regard that Decision No 1836/81 was based, as is also clear from the recitals in the preamble thereto, on the need "to implement a very short-term action for rationalization of the steel market in such a way as to bring about the rise in prices necessary to prevent financial disaster". Thus, the obligation incumbent on undertakings engaged in distribution activities to publish their price lists and to refrain from selling their products at a price lower than the list price constitutes the method selected by the Community legislature to terminate forthwith the grant of individual rebates and the dissimilar conditions of sale resulting therefrom and thus to contribute to a general increase in the level of prices.

10 It follows that the provisions of Decision No 1836/81 must apply to all transactions still in progress after its entry into force and must take precedence, where appropriate, over any obligations arising under pre-existing framework agreements.

11 Eisen AG subsequently contended that the transactions concluded with Markmann must not be regarded as comparable transactions since they exhibit special characteristics for the purposes of Article 9 (1) (c) of Decision No 1836/81. They are in fact transactions whose relevant commercial characteristics, other than those specified under subparagraphs (a) and (b) of the same paragraph, differ to a material extent from those peculiar to the remainder of the applicant's commercial transactions. In support of that contention, the applicant maintained that Markmann regularly purchases from it the quantities of products in category I (a) (first grade products) which the applicant, a scrap dealer, is at times required to buy in order to obtain products in Category II (a) (sub-standard products or seconds) which are the main subject-matter of its commercial dealings.

12 The Commission, whilst expressing its reservations with regard to Eisen AG's contention that it is primarily a dealer in products in Category II (a), pointed

out that the fact that Markmann is a particularly reliable and faithful customer of the applicant cannot endow the transactions concluded with that undertaking with special characteristics for the purposes of the above-mentioned provision.

13 In the first place, it must be stated, as regards the reference to the small proportion of first-grade steel sold by the applicant, that even if it were established that the transactions involving products in Category I (a) accounted for only a relatively small proportion of the transactions concluded by Eisen AG, the fact remains that it would be possible to ascertain the special characteristics of a transaction for the purposes of Article 9 solely from a comparison between transactions involving products in Category I (a), the only products in respect of which Decision No 1836/81 requires a price list to be published.

14 Next, it must be observed that the mere fact that Markmann purchases products in Category I (a) from Eisen AG more frequently than do other undertakings, such as Claas and Schlafhorst, to which the applicant itself admits having sold first-grade steel, cannot endow the contracts concluded with Markmann with commercial characteristics which are materially different from those of the contracts concluded with the other undertakings. Furthermore, it would have been possible to take account of the stability of the relationship with Markmann by the grant of a fidelity rebate which is by no means prohibited by Decision No 1836/81, provided that it is published in the price list.

15 Finally, Eisen AG contended that the transactions concluded with Bergbau were covered by Article 9 (1) (b), inasmuch as the products delivered in pursuance of those transactions consisted in practice of sub-standard rolled products, that is to say products which are not "the same [as] or similar" to those delivered in connection with other transactions. That was possible, it is claimed, because Bergbau used those products for purposes in respect of which certain characteristics distinguishing first-grade steel from sub-standard steel were of no importance.

16 It is clear from the "framework contract" of 3 April 1981 that the agreement entered into with Bergbau is for the delivery of "Steel 37 quality sheet corresponding to DIN 17100, grade one". That contract also expressly provides as follows:

"As regards all the R ST 37-2 quality sheet, please provide, on delivery, factory certificates in accordance with DIN 50049/2.1 or control slips in accordance with DIN 50049/2.2. Deliveries unaccompanied by control slips can no longer be accepted."

17 All the orders and confirmations of orders included in the file on the case by the applicant contain an express reference to quality standards of the steel industry in the Federal Republic of Germany (DIN standards). If the invoices themselves do not refer to DIN standards, they refer to confirmations of orders which expressly indicate those standards.

18 In those circumstances, therefore, it is impossible to deduce from the documents included in the file factors which support the contention that the transactions concluded between Eisen AG and Bergbau involved sub-standard products.

19 Moreover, is must be remembered that, according to Article 7 of Decison No 1836/81, steel dealers are required, when selling a sub-standard product, to state on the invoice the reasons for classification as sub-standard products or seconds.

20 Eisen AG has been unable to explain why it acted in a manner which, in the first place, was contrary to Article 7 and was punishable by the imposition of a fine and, secondly, prevented it from relying on its invoices in support of the contention that the material sold fell outside the scope of Decision No 1836/81. The reference to technical difficulties involved in computer invoicing cannot in any event justify a breach of the relevant Community rules.

21 As evidence that, although the invoices relate expressly to first-grade products there was a tacit agreement between itself and Bergbau to the effect that the latter was prepared to accept products in Category II (a) instead of products in Category I (a), Eisen AG contended that the material supplied to

Bergbau was always imported from the German Democratic Republic and was therefore sub-standard. According to Eisen AG, the material in question does not satisfy the conditions laid down by the rules on standardization (DIN standards) of the Federal Republic of Germany, although the commercial authorities of the exporting country always describe it in their invoices as a first-grade product.

22 In order to determine whether that argument is well founded, it is however unnecessary to examine the characteristics of the product imported from the German Democratic Republic. There are other factors on the basis of which the conclusion may be drawn that the material delivered by Eisen AG to Bergbau normally fell within Category I (a).

23 In that regard it must in the first place be stated that on several occasions during the period taken into account by the Commission's inspectors, Eisen AG supplied Bergbau with Category II (a) material and each time indicated expressly on the invoice that a "special consignment" was involved (see Invoices No 40/32749 of 10. 12. 1981, No 40/32808, No 40/32809 and No 40/32810 of 16. 12. 1981, No 40/32895 of 21. 12. 1981, No 40/30037 of 11. 1. 1982 and No 40/30076 of 14. 1. 1982). That indication would have been unnecessary if, as Eisen AG has stated, Bergbau had tacitly accepted deliveries of sub-standard material in place of first-grade material. It may therefore be concluded that in case in which no such indication was provided, first-grade material was supplied.

24 Furthermore, as regards more particularly the steel imported from the German Democratic Republic, it is possible to state, on the basis of the table of stocks submitted by the applicant at the Court's request, that the serial numbers assigned to those products are not given in any of the contested invoices, which seems to rule out the possibility that Eisen AG delivered to Bergbau material imported from the German Democratic Republic.

25 In the light of the considerations set out above, it must therefore be stated that the conditions laid down for the imposition of a fine are fulfilled and that the applicant's submission to the contrary must be rejected.

26 In its second submission which is also concerned with alleged defects in the statement of reasons, Eisen contended that the Commission failed to specify which provisions the applicant had allegedly infringed and that it merely referred in general terms to Article 15 of Decision No 1836/81, paragraph (1) of which provides that: "Steel dealers who infringe the provisions of articles 2 to 13 inclusive shall be liable to fines not exceeding twice the value of the sales effected in disregard thereof."

27 Although it is true that the statement of reasons on which the decisions was based is in fact relatively succinct, it must none the less be borne in mind that in its statement of objections of 16 August 1982, the Commission charges Eisen AG with "undercutting" its own list prices, which is tantamount to charging the applicant with applying dissimilar conditions to comparable transactions, that is to say carrying on a practice which is penalized by Article 8. The charging of a price lower than the published list price necessarily involves an element of unfairness in relation to transactions concluded on the basis of the list prices.

28 Moreover, it is clear that the applicant was not under a misapprehension as regards the nature of the Commission's objection, as is shown by its comments of 20 September 1982 in reply to the statement of objections, in which it relies on the contention that the contested transactions displayed different characteristics.

29 It must therefore be concluded that the infringement with which Eisen AG is charged may be clearly established from the statement of objections in conjunction with the decision and that the applicant had already clearly perceived, in the course of the administrative procedure, the scope of the objection communicated to it.

30 As regards the submissions concerning the infringement of essential procedural requirements, Eisen AG also contended that the Commission infringed the rights of the defence inasmuch as, in the course of the procedure which led to the adoption of the contested decision, it failed to draw the applicant's attention to the fact that it had no intention of making any inquiry into the evidence in exoneration adduced by the applicant.

31 In reply the Commission stated that Article 36 of the ECSC Treaty requires it, before imposing a pecuniary sanction or ordering a periodic penalty payment, to "give the party concerned the opportunity to submit its

comments". By giving the applicant an opportunity to submit written comments, the Comission complied with that obligation, it claims.

32 It is clear from the provisions of Article 36 that the abovementioned obligation cannot be understood as requiring the Commission to put forward its counter-arguments in relation to the arguments put forward in its defence by the party concerned. 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, to carry out further inquiries or to hear witnesses for the party concerned, 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. That submission must therefore be rejected.

33 In its submissions concerning the alleged infringement of the ECSC Treaty and of the provisions of Decision No 1836/81, Eisen AG claims that the Commission disregarded a number of rules of substantive law.

34 In the light of the considerations referred to earlier, the submission concerning the alleged infringement of Article 15 of the ECSC Treaty, according to which the decisions of the High Authority must state the reasons on which they are based, must be rejected at once. As has already been pointed out, there are no grounds for taking the view that the contested decision did not state the reasons on which it was based.

35 As regards the alleged infringement of Article 15 of Decision No 1836/81, it has already been observed that the infringement established by the Commission is not the "undercutting of list prices" as such, but the conclusion of transactions on dissimilar conditions which is the inevitable consequence of such undercutting. The argument that Article 15 makes no reference to undercutting as a separate infringement therefore seems to be devoid of substance.

36 As regards Articles 36 and 47 of the ECSC Treaty and Articles 11 and 14 of Decision No 1836/81, it must be pointed out that they confer on the Commission powers of inquiry and supervision which it may exercise, if it sees fit, in order to establish the existence of an infringement. It is required

to carry out further inquiries or to request additional information only if it considers that the information already at its disposal is not sufficient for that purpose. A breach of those provisions cannot therefore be established separately from the question whether the decision imposing the fine was justified. If that question is answered in the affirmative, as in this case, it follows that the arguments concerning the infringement of the aforementioned articles must automatically be rejected.

37 Finally, the submission concerning the alleged misuse of powers must be rejected in the light of the consideration set out above in so far as it is based on the contention that the Commission imposed a fine on the applicant for infringements which have not been established.

38 In so far as the submission in question is based on the contention that the amount of the fine was fixed at a very high level for the purpose of the general prevention of infringements, it is sufficient to point out that the decision itself expressly states that: "The amount of the fine must be sufficiently high to deter the undertaking from undercutting its list prices again."

39 The imposition of a fine in order to penalize an unlawful practice and to deter the undertaking concerned from repeating the infringement is in conformity with Community law, irrespective of the fact that the penalty may also act as a general deterrent.

40 In those circumstances, it follows that consideration of this submission has disclosed no factor of such a kind as to establish that the Commission was guilty of a misuse of powers. This submission must therefore be rejected.

41 In the alternative, Eisen AG has requested the Court to reduce the amount of the fine.

42 In that regard, it must be pointed out that the measures adopted for the rationalization of the steel market apply first and foremost to steel producers and that the role of steel dealers in the rationalization of that market, albeit important, is secondary to that of producers.

43 In the case of an infringement committed by a steel dealer, the more limited influence which the latter may exercise on the state of the market thus constitutes a factor mitigating the gravity of the infringement.

44 In those circumstances, the imposition of a very high fine can be justified only by the existence of circumstances demonstrating that an infringement committed by a steel dealer is particularly serious, which it is for the Commission to establish.

45 Regard being had to the fact that the Commission based the imposition on Eisen AG of a fine equal to 110% of the price reductions on the sole ground that: "The amount of the fine must be sufficiently high to deter the undertaking from undercutting its list prices again," the conclusion must be drawn that the rate applied in this case is unjustified.

46 Having regard to the circumstances of this case and to Eisen AG's conduct viewed in its entirety, the Court considers it appropriate to reduce the amount of the fine by one half to DM 66 868.

Costs

47 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has been largely unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. Fixes the amount of the fine imposed on the applicant at DM 66 868;

2. **Dismisses the remainder of the application;**

3. **Orders the applicant to pay the costs.**

Koopmans Bahlmann

Pescatore O'Keeffe Bosco

Delivered in open court in Luxembourg on 16 May 1984.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the Fourth Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 29 FEBRUARY 1984 [1]

Mr President,
Members of the Court,

1. Introduction

The application lodged by Eisen und Metall Aktiengesellschaft which I am to deal with today is directed against a Commission decision of 9 December 1982 imposing a fine. That decision is itself based on Article 15 of the general decision, No 1836/81/ECSC. The applicant claims that the Court should:

1. Annul the fine imposed amounting to DM 133 736, or, in the alternative, reduce the amount thereof;

2. Declare Articles 1 and 2 of the decision void.

In support of its application, the applicant relies on the following grounds:

I. Infringement of essential procedural requirements and, in particular, insufficient statement of the reasons on which the decision is based;

II. Infringement of the ECSC Treaty and of the rules of law relating to its application;

III. Misuse of powers.

Before I consider those submissions in detail, I have certain general remarks to make with regard to this case.

As is clear from Article 80 of the ECSC Treaty, the obligations arising from

1 — Translated from the Dutch.