OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 12 NOVEMBER 1963[1]

Mr President,
Members of the Court,

These cases, which were joined by order of the Court of 14 March 1963, for the purposes both of procedure and judgment, form the sequel to Cases 5 to 11/62 and 13 and 14/62 which the same applicants brought against the High Authority something over eighteen months ago. They relate to the efforts of the High Authority to obtain reliable figures on the consumption of ferrous scrap so as to establish a final statement of account for the ferrous scrap equalization scheme.

To these ends, the Directorate General of Steel of the High Authority sent letters on 27 November 1961 to the applicant undertakings which use electric furnaces for the purposes of their production, calling upon them to forward the originals or copies of the electricity invoices relating to their production from April 1954 to November 1958, to certify that the documents submitted covered the total consumption of electricity, and, if all accounting documents were not available to them, to ask the electricity companies for copies.

As the undertakings did not comply with this request, even after an exchange of correspondence with the High Authority, the latter adopted formal Decisions on 23 February 1962 requesting the undertakings to send the documents specified in the letters of 27 November 1961 within a given time limit. The Decisions were contested before the Court and were the issue in Cases 5 to 11/62 and 13 and 14/62.

While these proceedings were taking place, the High Authority sent registered letters to the applicant undertakings on 27 August 1962. It gave them a time limit for implementing the contested Decisions, and invited them to submit any comments in accordance with Article 36 of the Treaty. The undertakings submitted their comments in letters of September 1962; further correspondence with the High Authority followed.

The proceedings ended with the judgment of the Court of 14 December 1962 dismissing the applications.

As the electricity accounts called for had not reached the High Authority it adopted new Decisions on 18 December 1962, this time imposing fines on the undertakings together with periodic penalty payments for each day's delay in complying with the obligation to produce the electricity invoices, to run from the eighth day following notification of the Decisions. These pecuniary sanctions are the issue in the present cases.

All the applicants seek the annulment of the Decisions of the High Authority, or alternatively the reduction of the fines by four fifths, five sixths or nine tenths and exoneration from the payment of the periodic penalty payments with which they are threatened.

The High Authority considers that these applications are inadmissible and in any case unfounded and its conclusions are to this effect.

Legal Consideration

A — Admissibility

In considering the legal issues we find that several objections of the High Authority call for comment on certain questions of admissibility.

1. The High Authority has expressed the view that the applications do not meet the formal requirements of the Statute of the Court of Justice and its Rules of Procedure in that they do not set out sufficiently clearly what are the grounds on which they are based.

1 — Translated from the German.

One does indeed seek in vain in the applications for the heads set out in the Treaty (infringement of the Treaty, infringement of procedural requirements, misuse of powers). The applicants are content to describe the factual situation and to criticize the conduct of the High Authority in certain respects as being illegal, for example, when they invoke previous checks carried out, Italian fiscal law under which undertakings are bound to keep accounting documents only for a certain time, and the fact that some of them were not engaged over the whole of the period of the operation of the equalization scheme in any production of the kind with which we are concerned. Without any doubt, it is very far from satisfactory that applications should be drafted in this way, even if it is certain that an explicit statement of the grounds in the terms used in the Treaty is not required for the formal validity of the application.

But, as the arguments and submissions put forward are easily recognizable and defined, and as they allow the Court to review the contested Decisions and even to some extent to classify the submissions according to the heads set out in the Treaty, the applications should not be held inadmissible simply by reason of the formal requirements of Article 22 of the Statute and Article 38 (1) of the Rules of Procedure.

2. There follows the problem of the definition of the subject matter of this application as distinct from the issue in those applications which ended in the judgment of 14 December 1962, since all the matters which were in dispute between the same parties in those proceedings cannot be the subject of a fresh judicial examination before the same court.

In substance, the Court then decided that the requirement of the High Authority to have certain electricity invoices produced to it and to be given the assurance that they actually covered the total consumption of electricity by the undertakings was legal. Likewise, it decided that the requirement that the invoices should be sent to Luxembourg was not 'excessive'. As to the objection, which the applicants raised during the oral procedure, that it might be impossible to send the invoices because under Italian law the undertakings were only required to keep invoices for five years, the Court held that this fact had no bearing on the legality of the Decisions. By way of amplification, however, the Court observed: 'It is for the High Authority to consider whether the non-production of certain invoices is justified, taking account of the provisions of the relevant legislation and drawing the appropriate conclusions from it.'

It follows that in the present case all the arguments relating to the legality of the requirement to produce documents are precluded and indeed it is immaterial whether they were actually put forward or could have been put forward in the previous proceedings.

We must therefore now reject the argument that instead of requiring the production of invoices the High Authority could have examined the accounts of the applicants and established its facts on the basis of this examination. The same applies to the argument that the previous inspections of the High Authority deprived it of the right to require the production of certain accounting documents and to the argument that the High Authority was required to observe certain time limits for making corrections of earlier assessments in conformity with the requirements of national fiscal laws and if it could no longer make a correction after expiry of these time limits it had no legal interest which gave it the right to require the production of certain accounting documents for use in the correction of the assessment.

The wording of the judgment of 14 December 1962 now only leaves open certain questions relating to the justifi-

cation of or to excuses for the failure to implement the Decisions of 23 February 1962, and naturally to the problems relating to the calculation of the fines and the fixing of the periodic penalty payments.

But as the allegations of the applicants are certainly not limited to the above-mentioned arguments which are precluded, but also contain other admissible arguments, the applications remain admissible.

3. Finally, we have still to consider how to judge the admissibility of the alternative conclusions, taking account of the fact that the applications contain only a reference to Article 33 of the Treaty and no explicit reference to Article 36, for a variation of the pecuniary sanctions can be ordered by the Court only under Article 36.

I think that there is no cause, on this point either, for excessive formalism. The submissions are drafted clearly enough for one to be reasonably able to read in them a reference to Article 36. Further, the applications contain arguments which are clearly intended to justify the conclusions seeking a reduction of the fines and cancellation of the periodic penalty payments (for example when they refer to the economic capacity of the applicants or to a lack of clarity in the legal situation which should excuse the applicants' conduct). On the other hand, the omission of an express reference to Article 36 cannot be decisive, the less so since it is established by the decided cases that an applicant is not obliged to refer expressly to specific Articles of the Treaty in the grounds of his application.

Thus it is that the alternative conclusions cannot be dismissed as inadmissible either.

B — Substance

After these brief observations on problems of admissibility I turn now to the arguments on the substance.

I — Is the imposition of fines and periodic penalty payments justified on the merits?

1. The fines

The contested Decisions are based on Article 47 of the Treaty under which the High Authority may obtain information and have any necessary checks made. According to the third paragraph the High Authority may impose fines 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.

In the present case the individual Decisions of 23 February 1962 were taken in pursuance of the first paragraph of Article 47. They required the applicants to produce certain documents within fifteen days. The time limit laid down expired without the documents' reaching the High Authority and without the undertakings' having begun to make any efforts to procure from their electricity suppliers duplicates of the invoices demanded.

We can thus say that, from the point of view of the external sequence of events and of the result sought, the conditions of Article 47 are fulfilled, because the third paragraph of Article 47 is not based on the concept that there can be no wrongful omission until the Court declares to be legal a decision of the High Authority imposing an obligation with a penal sanction for failure to carry it out. On the contrary the Decisions of the High Authority are directly binding and even applications to the Court have no suspensory effect.

But this first statement is not enough for the purposes of the application of a penal provision which Article 47 undoubtedly is. Other objective and subjective circumstances must be considered.

This applies first to the objection that it was impossible to perform the task

set. This is surely important, for no-one may be punished for failing to do the impossible.

This objection presents two aspects which must be distinguished.

(a) On the one hand, four undertakings argue that during specific periods between April 1954 and November 1958 they carried on no activity affected by the scrap equalization scheme. It was thus impossible for them to produce electricity invoices for these periods.

This could first be answered by saying that the objection concerns the legality of the demand for production of the documents and thus relates to the proceedings which were concluded by the judgment of 14 December 1962, for it was precisely in those Decisions which were then before the Court that the obligation to produce the documents affected equally all the applicant undertakings in relation to the period from April 1952 to November 1958.

The High Authority further explained, however, that the general formula contained in the Decisions of 23 February 1962 was simply intended to indicate that the undertakings were to produce those electricity invoices which related to their production requiring the use of ferrous scrap during the period mentioned. Its penal Decision was based on the fact that no documents whatever were submitted, even for the limited period of production requiring the use of ferrous scrap. But if this is so and if, therefore, the particular situation, known to the High Authority, of four of the applicant undertakings did not even play a part in the assessment of the amount of the penalty, let alone in considering whether their misconduct was of a punishable nature, then it should not be taken into account in the judicial appraisal of the penal Decisions.

(b) The second aspect of the objection based on impossibility is more important; the argument is that the documents required were destroyed by the undertakings when they considered that it was no longer necessary to keep them; and this was done for different reasons, either after the carrying out of numerous inspections by the High Authority which they thought were ended or in view of the regulations and practices of the Italian fiscal system.

In fact, on this point, the replies of the applicants to the questions put by the Court on 2 October 1963 brought us some additional clarification. We learn from them that several cases must be distinguished as regards the date of destruction of the accounting documents.

— On behalf of the applicant in Case 7/63 it was submitted that as a small undertaking it was in no way obliged to keep the accounting documents, with the clear implications that its electricity invoices had ceased to exist before the High Authority made its request.

— On behalf of the undertakings in Cases 3 to 6/63 and 8 to 10/63 it was stated that the invoices in question had been destroyed in the second half of December 1961 (Case 8/63), in January 1962 (Cases 3, 4, 6, 9 and 10/63) and in the first days of February 1962 (Case 5/63).

— Finally the undertaking in Case 2/63, we have learned, destroyed the invoices for the years 1957 and 1958 in October 1962; it did not give any date for the destruction of the invoices for the period before that.

Consequently it is necessary to make certain distinctions for the purposes of the legal consideration.

(i) Let us first take Case 2/63. The argument with regard to the impossibility of producing the documents is there clearly without importance, for it is undisputed that some of the invoices called for still existed at the time of the adoption and notification of the Decision of 23 February 1962 and while the period which it fixed was still running. It was therefore possible to comply with the Decision. Only some months later did it become impossible to do so.

(ii) It is somewhat different for the undertakings which allegedly destroyed their invoices in December 1961 and January and February 1962. If we disregard doubts as to the accuracy of the information supplied by the applicants, in view of the fact that in Cases 5 to 11 and 13 and 14/62 only in the course of the oral procedure was mention first made, and then only very vaguely, of the fact that the national law limits to five years the obligation to keep documents, whereas the non-existence of the documents called for would have been a very effective argument in just these cases, the following assessment of the situation emerges:

In fact, at the moment of the adoption and notification of the Decisions of 23 February 1962, it was impossible to produce the accounting documents which were originally in the hands of the applicants. If the Decisions of 23 February 1962 are regarded as creating only an obligation to produce the invoices transmitted to the applicants by the electricity companies, then, since failure to do the impossible cannot be penalized, culpability could only be established if the destruction previous to the adoption of these Decisions were enough to attract the application of the first and third paragraphs of Article 47. On the other hand, doubts are possible, for conduct is only punishable under the third paragraph of Article 47 if it constitutes failure to comply with a decision adopted on the basis of Article 47. But, clearly, such a decision, directed to the production or retention of the documents, did not exist at the time of the destruction of the accounting documents; there was only one letter of 27 November 1961 from the Directorate-General for Steel, Marketing Section. But this letter is so clearly the forerunner of the later formal Decisions that it could be maintained that the destruction of the accountancy documents carried out with knowledge of the letter should be regarded as a culpable act designed to make performance impossible, to be equated with a wilful failure to implement the Decisions of February 1962.

But even if such a construction is rejected as incompatible with the principles of penal law, the immunity of the applicants from sanctions is still not proven. The proposition that the Decisions of 23 February 1962 related solely to the documents in the possession of the applicants does not in fact seem convincing. In my opinion, the Decisions should be considered as the formal communication of what the Directorate-General for Steel said in its letter of 27 November 1961. This letter expressly imposes on the undertakings the obligation, if all the documents are not in their possession, to ask their electricity suppliers in writing, within a given time, to produce the invoices to the High Authority. It follows that the Decisions of 23 February 1962 lay down an alternative obligation to take effective action to obtain copies of the electricity invoices. But if they are understood in this sense, the objection of impossibility of performance falls to the ground in the case of all the applicant undertakings alike.

As regards now this further obligation to obtain copies of the electricity invoices, we know from the schedules to the pleadings that the applicants only made their first efforts in this direction after the judgment of 14 December 1962 was given. The time-limit fixed in the Decisions of February 1962 was then long expired. Consequently it is certain that in fact the undertakings did not comply with the obligation imposed on them by decisions of the High Authority.

But we have not yet arrived at a final verdict upon the fundamental legality of the penal decisions. We must still consider certain viewpoints which may enter into account as grounds for justifying or exculpating the applicants.

— When the applications fully and forcefully invoked the Italian rules on the obligation to keep accounting documents they did so *inter alia* in order to justify their failure to make enquiries of the electricity companies. These companies too, so they say, are required to keep documents only for a limited period. It might therefore have been hopeless to ask for copies of the accounts for a period situated a long time in the past. However, the failure to do something which has no hope of success cannot be punished, they say.

This argument in my opinion is not valid, for we must assume from the documents themselves produced by the applicants that the electricity companies' replies to the requests of December 1962 and January 1963 were not entirely negative. During the proceedings there were even three cases in which at least some information or even copies of invoices for a limited period were made available to the High Authority by the electricity companies.

— As another ground for justification there is the consideration that the applicants might have had doubts about the legal scope of the Decisions of February 1962 and especially whether they should be the basis of an obligation to obtain copies of the invoices from the electricity companies. But I should not wish to espouse this view, for indications as to the true scope of the later formal Decisions of 23 February 1962 were to be gleaned from the letter of November 1961 from the High Authority.

— Finally, we must also dismiss as a ground of justification the fact that the applicants might have been in some doubt as to the legality of the Decisions of February 1962 which, in fact, assume an exceptionally extensive obligation on the part of the undertakings to give information and produce documents. If in the firm conviction that these Decisions were illegal, they omitted to comply with them, they must accept the risk, and the risk of a penalty, at that, which arises from the fact that the Court may take a different view on the question of legality. In any event the two last-mentioned considerations might play some part in assessing the measure of the penalty.

To sum up, we thus find that all the arguments advanced with regard to the view to be taken of the fundamental legality of the decisions to impose a fine are not sufficient to annul them.

2. The periodic penalty payments

The function of periodic penalty payments is not to punish an offence which has been committed; they serve on the contrary as a coercive measure to ensure future conduct.

In the present cases the High Authority decided that the undertakings would have to make periodic penalty payments as from the eighth day after the notification of the Decisions for each day's delay in fulfilling the obligation to supply the High Authority with the electricity invoices mentioned and to vouch for their completeness.

In assessing the legality of the periodic penalty payments the first important fact is also that the applicants have destroyed the accounting documents in their possession and that they allegedly did so, without exception, before the adoption of the Decisions imposing the periodic penalty payments. If the Decisions were aimed solely at compelling the production of the documents from the applicants' records we should need to establish that the result sought was impossible of achievement and consequently that the fixing of periodic penalty payments is illegal.

But in the wording of the contested Decisions fixing the periodic penalty payments, just as in the interpretation of the Decisions of 23 February 1962 on obligations to be complied with, nothing compels us to suppose that the High Authority was concerned only with

the originals of the electricity invoices and not with copies, to be obtained if the need arose. Thus, so long as it is not shown that copies can no longer be obtained, the Decisions fixing the periodic penalty payments cannot be cancelled on the ground they are aimed at the implementation of a Decision which is directed to an impossible end.

But another consideration deserves examination. After the destruction of the accounting documents at the applicants' premises, a change necessarily took place, as we have already mentioned, in the content of their obligation towards the High Authority. The obligation to produce documents is transformed into an obligation to procure copies from the electricity companies. This obligation is extinguished in an urgent request to the suppliers of electricity, and so does not include a responsibility for achieving the result sought by the High Authority, the realization of which depends upon the conduct of third parties, namely the electricity companies. From the wording of the coercive Decisions the conclusion must however be drawn that only the production of the required documents to the High Authority is considered, as constituting compliance with the obligation imposed on the applicants, sufficient to prevent new periodic penalty payments from accruing. The applicants are therefore to suffer the disadvantages of the failure to attain a result which depends also upon the will of third parties. In this respect, in my opinion, the Decisions exceed the admissible limits of a means of compulsion, which would not be so if they were limited to imposing penalties for each day in which the applicants did not endeavour to obtain the documents from the electricity companies. For this reason, they should be considered as illegal and should be annulled, since their amendment by the Court under Article 36 of the Treaty could only be contemplated in the case of errors in the extent of the sanctions fixed, and not in the wrongful fixing of the requirements as to the time when they fall due.

II — The amount of the penalty

Finally, the applicants have also raised objections with regard to the amount of the penalties and the assessment of the periodic penalty payments; in view of the conclusions to which I have just come, these objections call for comment only in so far as they relate to the fines.

Essentially, the applicants plead their weak economic situation and the vagueness of the legal position as regards the obligation to preserve accounting documents. In my opinion, the first of these arguments does not warrant examination for it was put forward in a quite general manner and was not substantiated. But the second argument does give rise to some reflections, although not exactly in the sense intended by the applicants, for in my view they are not being penalized for having infringed the obligation to keep accounting documents but for not having procured copies.

In so far as it is necessary to begin with the fact that the accounting documents were no longer in the hands of the applicants when the Decisions of February 1962 were adopted (this applies to Cases 3 to 10/63), it might be thought that the faulty interpretation by the applicants of the mandatory Decisions of 23 February 1962 and their incorrect assessment of their legality, which, looked at as factors for establishing innocence, failed to exonerate them from punishment, might nevertheless be regarded at least as errors mitigating the offence. There is in fact no doubt that the request of the High Authority of February 1962 concerned primarily the production, directly from the applicants, of the documents in their possession, while the applicants might have had certain doubts whether they were

being called upon to procure copies from the electricity companies. Further, it is possible to take the view that there might be some reason for doubt about the assessment of the legality of an obligation with such wide scope.

For these cases then, in assessing the amount of the penalties, it may be material to consider that the impropriety of the applicants' conduct, for which they have in fact been punished, consisting solely of the failure to procure duplicate invoices, is to be rated less seriously than would have been the case had it been possible to accuse the applicants of continued failure to produce documents in their possession. From the point of view of legal consequences a distinction must be noted here, since there was greater certainty that the High Authority would obtain the information it required through the production, directly by the applicants, of documents in their possession than as the result of efforts to procure copies.

As already mentioned these observations admittedly do not apply in Case 2/63, a case in which the undertaking still possessed at least part of the documents called for after the notification of the Decision of February 1962 and only destroyed them in October 1962; here the offence consists in the non-production of documents which were available to the applicants.

I would not admit in mitigation the other circumstances indicated by the applicants (repeated inspections by the Société fiduciaire suisse or by the High Authority's inspectors or any instructions to the High Authority's inspectors not to extend the inspections beyond the three previous years). They were put forward in order to provide some justification for the destruction of the accounting documents. But since this destruction occurred after the delivery of the High Authority's letter of November 1961, the applicants could not have had any doubt of the intention of the High Authority to carry out new and comprehensive checks.

In its penal decisions, the High Authority fixed the fines at $\frac{1}{2}\%$ of the annual turnover. In doing so it kept very much below the maximum limit of 1% of the annual turnover permitted by the Treaty (third paragraph of Article 47). But as we cannot see whether it has taken sufficient account, in the sense just indicated, of the destruction of the vouchers of which it was informed by the undertakings in September 1962, I consider that a corresponding amendment and reduction of the fines in Cases 3 to 10/63 may be advocated.

C — Summary

At the end of my deliberations I arrive at the following conclusion: the principal conclusions seeking the annulment of the Decisions imposing fines are admissible but unfounded. On the other hand the applicants are successful in their conclusions seeking the annulment of the periodic penalty payments fixed and, as regards Cases 3 to 10/63, also in their conclusions seeking the reduction of the said fines.

As to the annulment of the periodic penalty payments I see no grounds for ordering the applicants to pay the costs, for they informed the High Authority in September 1962 of the destruction of the accounting documents, that is to

say, before the adoption of the contested Decision. Further, for the purposes of the decision on costs, the fact that the High Authority failed on several questions of admissibility should be taken into account. In Case 2/63 I propose that costs should be shared; in the other cases a decision on costs might be recommended under which the applicants would bear a somewhat smaller share of the total costs of the proceedings than the High Authority.