OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 11 FEBRUARY 1960[1]

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Mr President,
Members of the Court,

I have today to give my opinion in an action which concerns an application brought by the limited company Acciaieria e Tubificio di Brescia contesting an individual decision adopted against it by the High Authority on 15 April 1959 and notified to it by letter dated 30 April 1959.

A — Introduction

There are no observations to be made regarding the regularity of the procedure.

I can therefore begin to consider straight away the questions of fact and law contained in the arguments of the parties, the contested decision and the legal consideration of the subject-matter of the action.

In so far as it is of importance in this instance, it is necessary as regards the relationship between the applicant and the High Authority to make reference to certain facts and events which took place before the contested decision was adopted.

1. *The applicant's industrial activities*

In one of its divisions the applicant manufactures steel and in another engineering equipment, particularly for power stations, and machine components. The production of the two plants is separate. The manufacturing process in the steelworks ends with the sale of the products to third parties; the division which produces engineering equipment buys its primary products, in particular steel plates, from third parties. From a legal point of view each of these two works was previously run as an independent company. After they merged to form the applicant company *one* balance sheet and *one* profit and loss account was published for them both.

2. *The inspections made in 1958: the exchange of letters between the parties*

In pursuance of its powers under Article 47 of the Treaty, as it interprets them, the High Authority decided to have an inspection made of these undertakings. It therefore issued to one of its inspectors a written order dated 16 September 1958 giving him instructions and authority to act.

The inspections were carried out on the applicant's premises by three experts from 11 to 24 October 1958 and on three days in November. It appears that they were broken off when the inspectors asked to examine certain commercial documents and accounts which were common to both works of the undertaking. The management of the company did not comply with the request for reasons of principle of a legal and commercial nature. The explanations given to the inspectors led the High Authority to write the letter dated 5 February 1959, in which a member of the High Authority made, *inter alia,* the following statements:

The inspectors asked for certain information. The applicant replied that it was unable to produce certain documents concerning the management of the undertaking and the accounts (for example, bank statements and the sales account, carried forward to the profit and loss account). In this regard the High Authority points out that under Article 86 of the Treaty the inspectors have such rights and powers as are granted under the laws of the Member States to revenue officials. It also points out that under Article 47 of the Treaty it may obtain the information it requires to carry out its tasks.

The letter ends with a request that at their next visit the inspectors be given all the information and documents which they might require in order to perform their task, failing which the High Authority would adopt a decision against the company.

In a detailed letter to this member of the High Authority dated 12 February 1959 the company replied essentially as follows:

It has submitted to the inspectors for thorough examination all the documents which relate to the business operations and accounts of that part of its steel production which is subject to the High Authority. It lists these documents in detail. They in-

clude documents concerning bank transactions for which precise requests were made by the inspectors. The company considers that it has given the inspectors all the explanations and additional documents necessary to an understanding of these papers. In reply to the statement by the High Authority that it must still submit to the inspectors certain commercial and accounting documents, in particular bank statements and accounts which provide information as to the proceeds of sale, such as the profit and loss account, the company observes that those bank statements which were specifically requested were produced without reservation or exception. As regards the account showing the sales figure which has been carried forward to the profit and loss account the High Authority's indication is incomprehensible since the sales figure has already formed the subject of an inspection on the basis of the documents produced, without the inspectors finding any difference or making any complaint. However, as regards the production of the profit and loss account, it must be remembered that the company produces not only steel, but also plant and equipment which do not fall within the area of competence of the Community. As the profit and loss account covers both areas of production the company found it necessary to inform the inspectors of its objections to the extension of the inspection to production outside the area governed by the High Authority.

The company states that for these reasons this question is thus one of great general importance and that it is therefore submitting it to the High Authority with a request that it appraise the reasons which may cause any undertaking whose production is mixed to be concerned to keep free from inspection a minimum area of those sectors of its production which are not subject to the jurisdiction of the High Authority.

3. *The contested decision*

These statements concerning the course of the inspection and the commercial and legal reasons for the applicant's conduct, evidently made with the intention of arriving at an amicable arrangement, received no corresponding response from the High Authority. On the contrary, on 15 April 1959 the High Authority adopted the decision in question, the principal points of which are as follows:

In the statement of the reasons for the decision:

In order to ensure that the rules governing the functioning of the Common Market are observed, the High Authority must obtain all necessary information from the undertakings and must have checks made of them by its inspectors. In this way, that is, through the information obtained and checks made, it must establish the value of any sales effected in disregard of Article 64 and, in appropriate circumstances, the value of the annual turnover within the meaning of Articles 47 and 82 of the Treaty. The fact that certain accounts and records concern an activity of the undertaking which does not fall within the competence of the Community cannot restrict the right to request information and have inspections made. The accounts of an undertaking whose production is mixed are indivisible. Consequently, the High Authority would be incapable of carrying out the tasks conferred on it by the Treaty if it did not have the power to inspect all the accounts and documents.

In the operative part:

'The undertaking Acciaieria e Tubificio di Brescia, S.p.A., Via Zara 12, Brescia, shall be bound, during normal working hours, to provide the inspectors of the High Authority instructed by it to carry out the inspections referred to in the recitals to this decision with all the information necessary to enable them to perform their duties and, for that purpose, to make available to them all the books and accounts of the company and in particular invoices, records of bank transactions and the constituent elements of the profit and loss account, such as the sales account and the charges account.'

B — Legal consideration of the contested decision

The applicant contests this decision by means of a series of submissioms and arguments which concern both various aspects of the substantive legality of the decision and its formal validity. I shall consider these objections in detail when considering the points at issue but without following the order adopted by the applicant.

I — *The material requirements and the extent of the right to obtain information and to have checks made*

1. General observations

Authorities which are responsible for supervising, planning and controlling the economy must be able to keep themselves correctly informed of economic events, even in the private economic sector. This corresponds to the duty of the undertakings to provide information. As the Bundesverwaltungsgericht (German Federal Administrative Court) stated in a judgment of 19 December 1958, 'without a duty to provide information on the part of the parties concerned, it is impossible to take those measures which, in a modern State, are inevitable in order to control the economy even where such State is pursuing a socially-orientated market economy. Therefore, the introduction of a duty to provide information about economic conditions and events is entirely in line with reasonable considerations concerning the public interest'.

That these observations apply in particular to the Treaty and to the duties of the High Authority is quite clear and, in addition, follows from Article 46. For this reason Article 47 of the Treaty contains the general rule which forms the centre of the discussion, as well as a number of special provisions which serve the same purpose. These provisions have frequently been referred to during the proceedings and are, in particular, Articles 54, 65, 66 and 80.

Article 47 empowers the High Authority to obtain the information it *requires* to carry out its tasks and to have any *necessary* checks made. I have emphasized the terms 'requires' and 'necessary' checks since the parties disagree over the meaning to be given to them. Is it sufficient that there is a general need for the information requested, that is, the fact that the information *may* by its nature be necessary to enable the High Authority to carry out its tasks, or must a special need exist in a particular case (which of course must then be proved)? Further, may checks be made generally and at all times, for example, in order to obtain information and establish that the Treaty has been violated, or must a check be necessary in a particular case on the basis of particular facts and events? Above all, may the checks only be made after the information has been obtained, or is the right to make checks independent of the right to obtain information? Finally, do the terms of the Treaty also cover checks which go beyond the sector governed by the Treaty establishing the Coal and Steel Community and which thus concern documents relating to sectors of production not subject to the Treaty?

2. Conditions for the exercise and extent of the right to have checks made

The cause of the present proceedings is the problem concerning the extent of the High Authority's right to have checks made. It is also the most important point at issue in the proceedings. I shall therefore consider it first.

If we bear in mind the number and diversity of the tasks conferred upon the High Authority which result from all the provisions of the Treaty, it appears doubtful that the High Authority's right to make inspections may be exercised in the same manner in every conceivable case in which a check may be necessary. The High Authority has duties similar to those of a tax authority under national law in the imposition of the general levy. The High Authority is required to maintain normal conditions of competition (see Articles 67 and 68 and, in particular, the provisions concerning agreements and concentrations): it has powers as regards prices; it influences production and distribution in times of marketing difficul-

ties and shortage; it is active in the field of social security and in the spheres of transport, investment and research. Thus, it groups together powers which on a national level are divided between various authorities and are subject to special rules and distinct powers. In my explanations concerning the right to make checks I shall have to show haw in the interpretation of Article 47 a distinction made on the basis of the reason for the check and its subject and purpose may be held to be proper and appropriate.

(a) *Restrictive interpretation of Article 47*

The applicant's first argument that checks are only permissible if they prove necessary in the light of information which has been obtained or refused and, in addition, if the existence of certain facts makes a check necessary in relation to a particular undertaking and in view of particular events, cannot be deduced clearly from the wording of Article 47.

It cannot be concluded from the order in which the powers are laid down by the Treaty that the right to have checks made is subject to a request for information. Also, the meaning of the word 'check' ('vérification' in French) does not require the check to relate precisely to information which has been obtained.

It must, however, be borne in mind that one of the applicant's arguments is of such a nature as to suggest that the proposition which it puts forward may be accepted as a general rule for most cases in which a check is to be made. The applicant is in fact referring to the generally applicable administrative principle that, when taking action in the private sector, an administration must first employ the least stringent measures available (which clearly means obtaining information rather than making checks). This principle is also applicable in Community law. It is set out in Article 5 of the Treaty, which states that:

'The Community shall carry out its task . . . with a limited measure of intervention.'

The general result of this is that all the powers of the High Authority which enable it to intervene in the activities of undertakings must in principle be interpreted restrictively. There is no exception to this rule as regards the right to make checks.

In support of its argument the applicant rightly referred during the course of the proceedings to the German Law against restrictions on competition, Article 46 (1) of which provides that:

'In so far as it is necessary in order to carry out the tasks imposed upon it by this Law the cartel authority may:

(1) Require undertakings and associations of undertakings to provide information concerning their economic situation;

(2) Consult and examine the records of undertakings and associations of undertakings during normal working hours.'

As far as I am aware this provision, which concerns the questions at issue in this case, is unanimously given a restrictive interpretation.

On this point let me quote from Müller-Gries' commentary, p. 273:

'The principles of proportionality and of the least stringent measures also apply to the right of the cartel authority to request information. Of several measures which are equally appropriate that alone may be applied which obtains the best possible result with the least effort and imposes the least burden on the citizen (see Deutsches Verwaltungsblatt Bundesverwaltungsgericht, 1957, page 540). See also Krüger, Betrieb 1958, p. 72, who rightly emphasizes that certain economic considerations, such as, for example, a reduction in the amount of work to be done by the administration, must be regarded as less important.'

as well as from the commentary by Müller-Henneberg-Schwartz, p. 704, to which the applicant also refers:

'Article 46 (1) No 2 vests an additional right of consultation and inspection in the cartel authority.

It must be assumed that this is a means of ensuring that correct information is given and a safeguard when information is refused.

According to the general principle of administrative law that the means used must be in proportion to the end sought and the introductory sentence of Article 46 (1) which is also applicable here, consultation and inspection may only be requested if the information is insufficient and there is reason to believe that it is incorrect or incomplete. Thus, in the first place, the cartel authority must always make a request for information. A subsequent order for documents to be consulted and inspected must be based on a refusal to provide information or inadequate information (see Krüger, *ibid.*).'

I therefore consider that as a *general rule* the right of the High Authority to carry out checks, which represents far-reaching intervention in the activities of an undertaking, may only be exercised where a special need for it is shown in a specific case, that is, for example, if information has been refused or if there is good reason to suspect that the information obtained is incomplete or incorrect.

(b) *Article 86 of the Treaty*

At this point in my examination it is necessary to refer to Article 86 of the Treaty, that is, to the provision giving officials of the High Authority entrusted by it with tasks of inspection such rights and powers as are granted by the laws of a Member State to its own revenue officials.

(aa) What is the relationship between Articles 47 and 86 of the Treaty?

Article 47 empowers the High Authority to undertake the necessary checks but makes no provision for the manner in which they are to be carried out. In exercising its right to make such checks the High Authority must take action in the territory of the Member States. For this reason Article 86, which governs the obligation on the Member States to facilitate the performance of the Community's tasks contains provisions concerning the manner in which the checks are to be carried out within the territory of the Member States.

The High Authority concludes from Article 86 that, in carrying out its tasks of inspection, it has, in a quite general way and to the widest extent, the powers which in the territory of each State are enjoyed by its own revenue officials. The applicant, on the other hand, contests whether Article 86 must be regarded as an independent enabling provision.

I have already tried to show how the right of the High Authority to make checks must in principle be interpreted. If one considers the wording and position of Article 86, which comes under the title General Provisions, it appears that this provision only constitutes an implementing provision, or an 'instrumental provision' as the applicant calls it.

Where, in another part of the Treaty, inspections by the High Authority are declared to be permissible, and then only under the conditions laid down therein, inspectors have the powers of national revenue officials. On the other hand, it cannot be deduced from Article 86 that in every case in which inspections may be made under the Treaty the legal requirements laid down by the national tax laws are sufficient. However, if a judicious interpretation of Article 47 in conjunction with other provisions of the Treaty shows that in principle checks may only be made after information has been obtained and then provided that special justification exists in a particular case, it is necessary to examine whether these conditions are fulfilled before an inspection may be ordered in a specific case.

At the beginning of my discussion of the conditions governing the right to make checks and the extent of that right I indicated that I considered it appropriate for different treatment to be given according to the

particular cases in which the checks are necessary. However, it certainly cannot be my task to indicate, within the context of a particular dispute, a complete analysis of the right of the Community to order checks to be made. Nevertheless, Article 86 gives cause for considering whether the strict conditions governing the right to make checks should also apply to situations in which the High Authority takes action which is similar to that taken by a national tax authority, for example, in the assessment and imposition of the general levy.

This view is suggested by the fact that under national systems of taxation the strict requirements referred to in connexion with Article 47 do not apply to inspections carried out for tax purposes.

(bb) Comparison of the powers of inspection available under national systems of taxation.

The statement I have just made is justified by, for example, the German Abgabenordnung (German Code on Taxation). I hope you will allow me to quote from this Code in order to give an idea of the German system of inspection in tax matters.

In the context of the general inspection for tax purposes which is intended to establish whether the tax laws are being observed and to prevent possible infringements,[1] inspections may be made without any evidence of irregularities existing or any special justification.

Such a tax inspection enables the revenue authority to examine the books of account and records of the tax-payer to check that they have been fully and correctly kept.[2] Within the context of the aim of the inspection the director of an undertaking which is inspected must provide any necessary information. Furthermore, the general tax inspection enables the so-called inspection *in situ* to take place.[3] Consequently, apart from a tax ascertainment procedure, the revenue authority may inspect an undertaking belonging to any person who is required to keep records or who is liable to pay tax. In such a case the revenue authority may inspect any documents which seem appropriate for the purpose of checking the undertaking's liability for tax.[4] The revenue official may have access to the offices of the undertaking in order to check that account books and records have been kept.[5] Academic lawyers clearly emphasize that in the context of tax inspection the right to request the production of books and business documents does not depend on the insufficiency of the information provided by the tax-payer or even on doubts as to the accuracy of such information.[6]

I have also compared *French law* and believe that I have found that it contains similar principles. On this point let me refer to certain tenets concerning the 'verification' (inspection) procedure which are set out in 'Droit fiscal' in the 'Collection du chef d'entreprise' by Pierre Laroque on page 445.

'5. The inspector may carry out inspections on the premises and, in particular, may examine its accounts *in situ*.

11. ... The books and accounts of any private undertaking shall be subject to the inspector's right to disclosure (Code Général des Impôts, Article 1991).

12. ... The documents subject to the right of access are those books which must be kept under Title II of the Code de Commerce, as well as all related books and records, receipts and expense vouchers.

13. ... The right to disclosure also extends to documents concerning the current financial year.

42. ... The inspector is not bound to inform the undertaking in advance of his arrival. He may therefore arrive unexpectedly to make an inspection.'

As regards *Italian law*, I shall cite two rules

1 — See Kühn, Kommentar zur Abgabenordnung, p. 209.
2 — See Abgabenordnung, Para. 162.
3 — See Abgabenordnung, Para. 193.
4 — See Kühn, *ibid.*, on Para. 193.
5 — See Abgabenordnung, Para. 195.
6 — See Kühn, *ibid.*, on Para. 207.

recalling the provisions of the German Abgabenordnung which are based upon principles which are characteristic of a State governed by the rule of law. These are Articles 39 and 42 of Decree No 645 of 29 January 1958, on the imposition and collection of direct taxation:

Article 39

Powers of the tax authorities

In order to make its official assessment the administration may:

(d) Order that its officials holding a special authorization showing the purpose of their visit shall be granted access to all the premises set aside for the business operations, in order to take measurements and to make assessments, and to inspect the business books and accounts of the company as provided for in Article 42 and, in addition, that they shall be granted access to other premises in order to make assessments or take measurements of the size of the premises, their condition and the purpose for which they are used.

Article 42

Inspection of the business books and accounts of the company

The administration may inspect the records, account books, inventories and documents which must be kept or filed by the tax-payer.

For the purposes of my investigation I have also considered Article 35 of Law No 4 of 7 January 1929 (General provisions concerning measures to be taken in the case of infringement of the provisions of the tax laws) and Article 13 of Regulation No 1508 of 17 September 1931 concerning declarations of income and penalties in relation to direct taxation.

In the *Netherlands* under the Law of 23 April 1952 any person must provide the tax authorities with information and explanations and must permit them to examine books of account and other business records where this is relevant to the State as regards the collection of taxes.

I do not consider that it is my task to examine closely the opportunities for inspection by the tax authorities under the various systems of taxation, or to describe them in detail. As regards Italian law, the High Authority had occasion to go into such detail from its own viewpoint in the statements which it made during the proceedings, if not in the contested decision.

(cc) The powers of the High Authority with regard to the imposition of the general levy

I would like to restrict myself on this point to the statement that I consider it possible to draw conclusions for the interpretation of Article 47 from a consideration of national systems of taxation and the powers of inspection for which they provide, regardless of the fact that, in relation to Article 47, Article 86 is only instrumental in nature.

The express reference in Article 86 to the tax laws of the Member States may support the view that, when an inspection is being made, not only is it possible to refer to inspection procedures employed under national tax law, but it is possible to be guided by principles of national law when defining the conditions for such inspections, at least as regards the *powers* of the High Authority *which are similar to that of taxation* (for example, as regards the imposition of the general levy which, by the terms of the Italian tax system, resembles direct taxation). This would in turn lead to the argument that the strict interpretation of Article 47, which may be inferred from Article 5 of the Treaty and generally applicable principles of administrative law, cannot be applied to those duties of the High Authority which resemble those of a national tax authority, while as regards price control, the investigation of unlawful sales and observance of the rules on competition, to mention only the aims of the inspection referred to in the decision itself, the High Authority must abide by the strict principle that the least stringent measures must be applied and special justification must be given for a check in a specific case.

(dd) The extent of the right of inspection

Since, in the various cases in which inspections are made, different commercial documents are important, the High Authority's right to make such inspections only covers those documents which concern the question for which, in that particular case, the material requirements are satisfied, but does not always cover all the business documents of the undertaking. This fact is important not only as regards the need for the document ordering the inspection to be drafted in precise terms (I shall have to return to this question later) but also in relation to the basic definition of the right of inspection.

(c) *Does the contested decision infringe the principles governing the right of inspection?*

If the argument which I have just put forward concerning the material requirements for the right of inspection is applied to the contested decision, it appears that the decision is defective. The recitals to the decision indicate that the High Authority intended to verify that the rules on competition and the provisions governing prices and unlawful sales were being observed and to check the annual turnover of the undertaking. The latter may be important not only for the purpose of fixing the sanctions to be applied but also as regards the imposition of the general levy. In this connexion no special justification is required in certain cases as my previous comparative examination has shown.

As regards the other questions, however, any check remains subject to the strict interpretation of the conditions laid down in Article 47. It may only be made if special circumstances exist which appear to make it necessary but not 'in every case' or 'as a precaution' or a routine measure. No such conditions has been alleged to exist during the proceedings and it is stated nowhere in the decision itself. To this extent, therefore, the exercise of the right of inspection is basically not permissible and constitutes an infringement of the Treaty within the meaning of the first paragraph of Article 33.

Furthermore, I consider that a second ground of complaint is justified as regards the actual order to carry out the inspection, in so far as it is clear from both the correspondence which preceded the decision and the statements made during the proceedings that it was only important for the High Authority to check the documents which it was refused to produce for its inspectors. On the other hand, the decision requires the production of all the company's records and accounts and after the words 'in particular' it mentions, purely by way of example, certain documents of special importance. By using this extremely wide form of wording the High Authority therefore requests documents which have already been produced and which for the purpose of Article 47 need not be produced a second time. It is of no importance whether the High Authority wished the order to be implemented strictly as it in fact intended. For the purpose of the legal consideration of the question the decisive factor is the wording of the decision itself (that is, of the operative part of the decision, including its recitals). Thus, to the extent to which the production of the documents does not appear necessary from this point of view, the decision is vitiated by a defect which justifies its annulment by the Court on the grounds of misuse of powers.

3. Conditions for the exercise of and extent of the right to obtain information

I need not spend much time on the justification given in the decision for the request for information. In principle I consider that the material requirements for the exercise of this power need not be interpreted as strictly as in the case of the right to have checks made. I believe therefore that a general need for information, that is, the fact that it may be necessary in order to attain the objectives of the Treaty, is sufficient, and that for this reason special justification in a particular case seems to be unnecessary. The High Authority must always be informed of the economic factors and events concerning the individual undertakings, the nature of which are important as regards the performance of its tasks under the Treaty.

However, I consider that for the following

reasons it is unnecessary in the present case to spend more time on this question: the decision only ordered the information to be given as a supplement. According to the wording and sense of the decision the information is only intended to supplement the results of the check and thus has no separate significance. Thus, from the point of view of law it is treated in the same way as that part of the decision which it is intended to supplement. To the extent to which the decision must be annulled because it orders unlawful inspections to be made, the material requirement which must be satisfied in order to make the request for information permissible is absent. In so far as the decision ordering the checks to be made satisfies the material requirements and is legally valid (nothing has yet been said as to the complaints concerning the procedure) there would be no objection concerning the permissibility of the request for information. On this point the most that could be claimed would be a misuse of powers: in fact, supplementary information should only be requested to the extent to which production of the documents was ordered, that is, it should be limited to the documents hitherto refused and to related questions. The terms of the decision go well beyond this purpose, the scope of which is clearly limited, even as regards the information required.

4. Can the High Authority request information and order checks to be made in relation to areas of production which do not fall within its jurisdiction?

I shall now examine the main point of the questions referred to the Court of Justice, that is, the problem whether the High Authority's right to request information and to have checks made may extend to areas of production which do not fall within its jurisdiction. It is this question which is of greatest importance to both the parties in the present case.

(a) *The conditions necessary for such an 'encroachment'*

The Treaty, which has brought about partial integration, is careful to limit itself essentially to those areas which the Member States had envisaged combined in one Community. Let me refer here to Articles 80 and 82, as well as to the very detailed Annexes to the Treaty which clearly set out its limits. It is unnecessary to make special reference to the fact that the partial integration of the economy of various States may give rise to difficulties of demarcation, for example, because, as in the present case, these limits cut across an undertaking. It must not be forgotten that, in the case of an undertaking with mixed production, it is possible for certain commercial transactions which fall within the jurisdiction of the High Authority to be dealt with in the sector which is not covered by the Treaty, for example, to be included in the business accounts of that sector. An inspection by the High Authority which is intended to obtain a complete picture of all the operations falling within its jurisdiction can in certain specific circumstances only be successful if the High Authority is not refused access to documents not covered by the Treaty in order to establish for itself whether or not they are important.

Such encroachments are not foreign to the Treaty itself. Under Article 56 the High Authority may facilitate the conversion of undertakings to other areas of production and the financing of new activites in industries which are not subject to the Treaty. Under Article 66 (4) the High Authority may in certain cases take measures which affect purchasers of coal and steel undertakings. In addition, under Article 66 (4) the undertakings not covered by the ECSC Treaty have a duty to make information available to the High Authority (with the power to impose penalties) and, finally, the High Authority has jurisdiction in the field of transport. This extension of the jurisdiction of the Community is explained by the fact that if its powers were strictly limited to the area in which partial integration had been brought about, the attainment of the objectives of the Treaty would to a certain extent not be ensured. However, the cases to which I have referred make it clear that all such 'encroachments' must be restricted to what is absolutely necessary.

Only under these conditions is it possible to accept that the High Authority's right to request information and to have checks made in relation to undertakings with mixed production may be extended to areas of production which are not subject to the Treaty. Thus, in each individual case special circumstances must exist which appear to justify this intervention, for example, there must be good reason to believe that an error has been made or that intentional irregularities exist in the way in which the company records and accounts are kept. However, the undertaking must be permitted to prevent consultation of such accounts if no special grounds for doing so are put forward reasonably and appropriately.

(b) *The questions whether the accounts are inseparable*

It is true that in the recitals to the grounds for its decision of 15 April 1959 the High Authority stated that: 'The accounts of an undertaking whose production is mixed *are inseparable*', but this statement can in no way be regarded as generally applicable.

The applicant has maintained, without being contradicted, that the difference between the two products from the raw materials to the final product and their manufacture in two separate plants is recorded in separate accounts. During the proceedings the applicant company described its accounting system graphically and explained it.

The contrary argument put forward by the defendant, that is that these acounts are separable in theory but not in practice, is not convincing, especially in the light of the fact that the High Authority was not forced to act on the basis of considerations of a theoretical nature but had the results of the checks carried out by its inspectors available in the form of reports. Thus, with full knowledge of the applicant's accounts and balances it was in a position to explain in detail the extent to which the joint recording of the business operations of both undertakings made it necessary to consult those accounts which cover both sectors of production.

It seems hardly necessary to mention that the fact that the assets and the profits of both undertakings are consolidated in one balance-sheet and one profit and loss account is not an argument in favour of the defendant. The applicant is a joint-stock company and states, without contradiction, that it keeps its accounts in accordance with the rules of the Italian Civil Code (Article 2214 *et seq.*, Articles 2423–2435).

The balance–sheet is merely an annual

1. statement of, on the one hand, assets and capital, and on the other, liabilities, debts, own capital and borrowed capital;

2. statement of income and expenditure and the resulting profit or loss.

Information concerning the annual statement of accounts and the profit and loss account is generally not necessary in order to establish the turnover and total value of production (first sentence of Article 49 (1) and Article 50 (2)). The total value of production for the financial year may be calculated from the proceeds of sale and the stock in hand and may be elicited from the corresponding accounts which are regularly kept for each financial year whose final figure is incorporated at the end of the year in the annual statement of accounts (balance-sheet and profit and loss account). The defendant has put forward no conclusive answer to the detailed statement made by the applicant in its reply (p. 18) that it is possible and appropriate to carry out a separate inspection of the steel-producing works and the business documents and accounts relating thereto.

(c) *Conclusion*

As a result of all the foregoing, I have reached the conclusion on this point that in the present case the High Authority was not entitled to ask to consult documents which concern areas of production which are not subject to its jurisdiction. It has put forward nothing to justify such intervention, since it was clearly of the opinion that it should automatically be entitled to extend the inspection in this way. Therefore, to the extent to

which the operative part of the decision, together with the statement of reasons for it, order an 'encroachment', the decision suffers from a defect which justifies its annulment.

II — *The formal conditions which must be fulfilled when exercising the right to request information and to have checks made*

I must now say a few words about the applicant's submissions concerning the procedure, that is, on the question which formal conditions the decisions of the High Authority must fulfil. As you know, the applicant has raised objections to the decision both on the grounds of its uncertainty as regards the subject-matter of the order and of the absence of justification for the order made by the High Authority in this particular case. The High Authority contests the applicant's view of the meaning and purpose of a decision adopted under the third paragraph of Article 47: it is not a matter of establishing the applicant's obligation (this results directly from the Treaty), but the task of the decision is simply to establish the applicant's refusal and thereby to set in motion the procedure for imposing penalties under Article 47 (see statement of defence, pp. 8 and 9).

1. The need for a formal decision

If it is maintained that there are no material grounds for annulling the contested decision in its entirety, the complaints concerning the procedure cannot be overlooked. Neither of the parties has disputed that the contested order of the High Authority is a decision within the meaning of Article 14 of the Treaty. It is thus clear that Article 15 of the Treaty is also applicable, that is, that the decision must state the legal and factual grounds for the order made by the High Authority. This duty to state the reasons clearly corresponds to the purpose of the decision. This is also the reason for the dispute concerning the function of the contested decision. It is therefore necessary to consider first whether the High Authority's right under Article 47 to request information and to make checks may only be exercised with binding force by means of a formal decision, or whether the corresponding obligation on the part of the undertaking stems directly from the Treaty. A glance at the Treaty shows that the High Authority is quite correct to state that a number of obligations on undertakings arise directly out of the Treaty, and that no decision on its part is necessary. This applies, in the first place, to duties to refrain from taking action (compliance with rules laying down prohibitions) and also, in certain cases, to duties to take action. I am thinking here of Article 68 (4) (notification of wage reductions) and of the last sentence of Article 23 (5) of Convention on the Transitional Provisions.

It is also possible to maintain that Article 47 provides for a general obligation on the part of undertakings to provide information and to permit checks to be made. This is true in so far as Article 47 contains a general authorization enabling the High Authority to exercise the relevant powers. However, it cannot be said that this obligation on undertakings is set out in the Treaty in such detail that it may be implemented without further action by the High Authority. It must therefore be put into concrete form by means of measures adopted by the High Authority: the High Authority itself calls these measures a 'request' but the applicant refers to them as a decision within the meaning of Article 15.

On this point it must be observed that, according to the exhaustive list set out in Article 14 of the Treaty, the High Authority may use either a decision or a recommendation in drawing up compulsory orders in relation to undertakings. In addition, certain special provisions concerning the right to request information confirm the view that a request by the High Authority of the type referred to above must legally take the form of a decision. Mention was made in the course of the proceedings to articles of the Treaty which refer to a special request addressed to the undertaking concerned or a decision stating what kind and scale of programme must be communicated (Article 54). Other provisions refer to a special request made to the parties concerned or to regulations stating the kinds of agreement or other matters which must be communi-

cated to the High Authority (Article 65), and to regulations stating the kind of transaction to be communicated to the High Authority or to a special request under these regulations to the parties concerned (Article 66). It is clear from these provisions that requests for information to be provided are referred to at the same time as decisions or regulations (this term is used to mean general decisions), in other words, therefore, that from a legal point of view they must likewise be classified as decisions and, what is more, as individual decisions. To this extent the third paragraph of Article 47 is also quite clear, as the applicant is, in my opinion, quite right to emphasize; it refers to obligations under decisions taken in pursuance of this article. If the meaning of Article 47 were that attributed to it by the High Authority, other terms would have been used in drafting the text. We are all aware of the provisions of the Treaty under which the High Authority may find that an undertaking (or a State) has failed to fulfil an obligation under the Treaty and may set a time-limit for its fulfilment by the party in default (*vide* Article 88 and the second subparagraph of Article 66 (5)).

All these considerations lead me to accept as justified the applicant's argument that when in a specific case the High Authority exercises the general right to request information or to make checks under Article 47 it must first adopt a decision, whether it be individual or, as in the other provisions mentioned, general.

In support of this argument let me quote from a German author. In his 'Wirtschaftsverwaltungsrecht', p. 338, Huber states:

'A right to request information may either be exercised by means of a general order in the form of a public announcement addressed to a large number of persons who are under a duty to provide information or by an individual order addressed to one specific person;'

and on p. 339 he writes:

'General orders, individual inquiries and direct consultation . . . are national administrative measures which are directly binding on all those who are under a duty to provide information.'

In addition, I would like to reiterate the provisions of the German Law on Cartels to which the applicant has already referred. Article 46 of the Law on Cartels states that:

'(6) The Federal Minister for Economic Affairs or the highest regional authority shall request information by means of an individual written order; the Bundeskartellamt (Federal Cartel Office) shall request information by means of a decision. These shall contain the legal basis, the subject-matter and the purpose of the request for information and shall set an appropriate period within which it is to be provided.

(7) The Federal Minister for Economic Affairs or the highest regional authority shall order a check to be carried out by means of an individual written order; the Bundeskartellamt shall order it by means of a decision adopted with the approval of the President. The order shall set out the date, legal basis, subjectmatter and purpose of the check.'

This legal view that undertakings may only be compelled to provide information and allow checks to be made by means of a formal decision cannot be effectively opposed on the ground that the administration of the High Authority would thereby be made more difficult. There will be many cases in which undertakings or associations will most willingly provide information in answer to inquiries by the High Authority. In fact, the undertakings and their associations have an interest in providing the High Authority with information and thereby enabling it to take events and occurrences in the market into consideration.

However, under the scheme of the Treaty, in the absence of any general rules laid down by a general decision of the High Authority, a decision is necessary in cases in which the High Authority meets difficulties when attempting to obtain information, whether such difficulties are explained by divergent legal views or by justified or unjustified business interests. In these border-

line cases, which either raise problems of a legal nature or show an absence of goodwill on the part of undertakings, the rules of proper administration require a formal decision which sets out the essential questions in the particular case in a form open to review by the Court.

2. Which requirements must be satisfied by the decision?

The result of these considerations in connexion with the application of Article 15 to the present case is that, first, the decision must be given concrete form, so that the person to whom it is addressed knows exactly which types of documents and account books it must produce, and it must indicate the periods (the financial year) and the material content (for example, mouvements of goods and money in purchases and sales). In this connexion, details must be given of any additional information required. It is not enough to order the person to whom the decision is addressed to comply with the instructions of the inspectors, which amounts in fact to leaving the task of putting the decision into concrete form to the officials carrying out the inspection. Since the subject-matter of the check varies according to its purpose, the statement of its purpose may, in a specific case, be sufficient to show which documents are involved in the inspection. However, this is not so in every case. Where it is not clear that certain documents are necessary for a particular check, the documents to be examined must be indicated exactly. This also applies to additional oral information. In particular, however, as we have seen, a special justification is generally necessary before a check may be made, in particular where it must exceed the limits of the coal and steel sector.

A glance at the decision shows that it also fails to satisfy these formal conditions.

C — General conclusion

In conclusion, therefore, I am of the opinion that the application brought by the Acciaieria e Tubificio di Brescia is admissible and well founded.

I therefore suggest that the decision of the High Authority be annulled:

1. On the ground that it orders checks to be made in the field of competition, price law and unlawful sales without any special reason being given to justify such order, that it orders general checks to be carried out although, having made a partial inspection, the High Authority only requires to consult certain specific documents, and that the checks are ordered in an area which does not fall within the jurisdiction of the High Authority, without any special justification being given for them;

2. In addition, on the ground that the decision is vitiated by certain formal defects, in that it defines in detail neither the request for information nor the subject-matter of the check and does not justify the need for the inspections to be carried out in this case.

The High Authority must be ordered to bear the costs of the proceedings, including those resulting from the applicant's request for the suspension of operation of the decision.