OFFICIAL GAZETTE

OF THE

EUROPEAN COAL & STEEL COMMUNITY

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THE HIGH AUTHORITY

DECISIONS

Decision No. 42/54, December 22, 1954, authorizing the joint selling of iron and steel products by the Union Commerciale Belge de Métallurgie, Brussels, (UCOMETAL)

THE HIGH AUTHORITY,

HAVING regard to Articles 65 and 80 of the Treaty and to Section 12 of the Convention,

HAVING regard to Decision No. 37/53, of July 11, 1953, concerning the date of entry into force of the prohibitions upon agreements (cartels) set forth in Article 65 of the Treaty (*Official Gazette*, July 21, 1953, p. 153);

WHEREAS the following iron and steel enterprises coming under Article 80 of the Treaty :

—Société Anonyme John Cockerill, Seraing,

—Société Anonyme des Forges de la Providence, Marchienne-au-Pont,

—Société Anonyme Métallurgique de Sambre et Moselle, Montignies-sur-Sambre,

have concluded, by two conventions entered into on August 7, 1953, with the Union Commerciale Belge de Métallurgie (UCOMETAL), agreements whereby UCOMETAL shall have the exclusive right and obligation to sell the iron and steel products of these three enterprises ;

WHEREAS the three aforementioned enterprises, on August 24, 1953, requested, in conformity with Decision No. 37/53, that such joint selling be authorized ;

WHEREAS the total production for 1953 of the three enterprises concerned was:

Crude steel		Finished rolled products
1,762,000	metric tons	1,132,000
4·45%	percentage of Community's production	4·20%

WHEREAS, on the one hand, a joint selling organization of this kind can help appreciably to improve distribution, both for producers and for purchasers and consumers ;

WHEREAS, on the other hand, the amounts of products thus sold jointly are not so large as to give the enterprises concerned the power to determine prices, or to control or limit the production or selling of a substantial part of the products in question within the Common Market, or to protect them from effective competition by other enterprises within the Common Market ;

WHEREAS, consequently, the agreement among the three enterprises to sell their iron and steel products jointly satisfies the conditions listed in Article 65, paragraph 2 of the Treaty ,

DECIDES :

Article 1

The agreement concerning the joint selling by the Union Commerciale Belge de Métallurgie (UCOMETAL) of the iron and steel products of the Société John Cockerill, the Société Forges de la Providence and the Société Métallurgique de Sambre et Moselle, and, specifically, the two conventions signed on August 7, 1953, between these three enterprises and the Union Commerciale Belge de Métallurgie, are hereby authorized.

Article 2

This Decision shall come into force as from the day upon which it is communicated to the Société John Cockerill, the Société Forges de la Providence and the Société Métallurgique de Sambre et Moselle.

This Decision was deliberated and adopted by the High Authority at its session on December 22, 1954.

For the High Authority,

(Signed) A. COPPE,

Vice-President.

DECISION No. 1/55, January 4, 1955, rescinding Decision No. 3/54, of January 7, 1954, concerning information to be furnished by enterprises in the steel industry with regard to the application of their price-schedules.

THE HIGH AUTHORITY,

HAVING regard to Article 47 of the Treaty ;

HAVING regard to the judgment delivered by the Court of Justice on December 21, 1954, in Case No. 1/54 ;

WHEREAS the Court of Justice by the aforementioned judgment rescinded Article 1 of Decision No. 2/54, of January 7, 1954 ;

WHEREAS upon the rescission of Article 1 of Decision No. 2/54 there is no longer any object in assembling the information required under Decision No. 3/54, of January 7 ;

DECIDES :

Article 1

Decision No. 3/54, of January 7, 1954, is hereby rescinded.

Article 2

This decision shall come into force within the Community as from the day of its publication in the Official Gazette of the Community.

This decision was deliberated and adopted by the High Authority at its session on January 4, 1955.

For the High Authority,

(Signed) ETZEL,

Vice-President.

OFFICIAL NOTICES

NOTICE issued by the High Authority concerning Decisions Nos. 1/54, 2/54, and 3/54

1. Following the appeals lodged by the Government of the French Republic and the Government of the Italian Republic against the High Authority's Decisions Nos. 1/54, 2/54, and 3/54, of January 7, 1954 (*Official Gazette,* January 13, 1954, pp. 217–220) the Court of Justice, by a judgment delivered on December 21, 1954, rescinded Article 1 of Decision No. 2/54, but rejected the petitions regarding the other points, thus upholding the legal validity of Decision No. 1/54, of Article 2 and following articles of Decision No. 2/54, and of Decision No. 3/54. *Accordingly, Article* 1 *of Decision No.* 2/54, *inserting an Article* 1*a in Decision No.* 31/53, *is hereby automatically deleted, and no longer figures among the provisions in force.*

2. Decision No. 1/54 therefore remains in force. It draws a distinction, the legal cogency of which is expressly recognized in the judgment of the Court of Justice, between violations of the rules on publicity and violations of the rules on non-discrimination. Thus a deviation from the scheduled price does not, *ipso facto,* constitute a violation of the rules on non-discrimination where the seller is able to prove that the transaction in question does not fall under the types of transaction set forth in his schedule, or alternatively where such deviations apply equally to all intercomparable transactions.

3. On the other hand, the Court of Justice declared any discrepancy between actual prices and conditions and the prices and conditions set forth in the price-schedules to be incompatible with the provisions of the Treaty concerning the publication of price-schedules. Accordingly, any deviation whatsoever from the prices quoted in the schedule (even where such a deviation applies equally to all intercomparable transactions, and hence does not constitute a violation of the rules on non-discrimination) is at all times a violation of the rules on publicity.

4. The recission of Article 1 of Decision No. 2/54 by the Court of Justice carries with it the deletion of the Article 1*a* which it was its object to insert in Decision No. 31/53. On the other hand, the judgment allows to stand the rules on publicity set forth in the other provisions of Decision No. 31/53, as amended by Articles 2 and 3 of Decision No. 2/54.

Accordingly, enterprises in the steel industry are no longer authorized to apply any deviation whatsoever, either upward or downward, from the prices published in their schedules. Any enterprise wishing in future to apply prices deviating from those in its current schedules must therefore publish a new schedule in advance.

The Court of Justice having upheld the validity of Article 3 of Decision No. 2/54, the term of publication remains one day.

As regards the publication of new schedules, it will be sufficient to inform the High Authority that the printed schedules lodged with the High Authority are applicable either as they stand, or with a stated reduction or increase per cent, as the case may be. This information must also be furnished by the sellers, on request, to any person or persons interested.

In order to ascertain whether the rules on publicity are being duly respected in accordance with the principles sanctioned by the Court of Justice, the High Authority will make use of its supervisory power in regard to transactions entered into on or after January 25, 1955.

5. By the terms of the Court's judgment, the rescission of Article 1 of Decision No. 2/54 renders nugatory:

(*a*) the reference in Article 2 of Decision No. 2/54 to the article thus rescinded ;

(*b*) Decision No. 3/54, although the Court recognized that decision as compatible with the provisions of the Treaty.

The Official Notice issued by the High Authority on January 7, 1954, concerning the application of Article 60, as published in the *Official Gazette* of January 13, 1954, p. 221, is likewise of no further relevance.

Subject to these conditions, the High Authority, by its Decision No. 1/55, of January 4, 1955, rescinded Decision No. 3/54. It proposes to examine, in consultation with the Consultative Committee, such amendments as might appropriately be made to Article 2 of Decision No. 2/54, in order to specify what rules should be applicable in regard to publicity, compatible with the principles established by the Court of Justice and taking into account the requirements of the steel market.

INFORMATION

Letter sent on December 22, 1954, by the High Authority to the Government of the French Republic, concerning a special domestic tariff measure for the benefit of the Centre-Midi collieries

YOUR EXCELLENCY,

In his letter of October, 21, 1954, the Minister of Works, Housing and Reconstruction passed to the High Authority a proposal submitted on September 29, 1954, by the French State Railways for the introduction, under Tariff No. 7, heading 14, of a tariff scale for coal, briquetted or non-briquetted, from any colliery in Aquitaine, Auvergne, the Cévennes, Dauphiné, Hérault or Provence, consigned either by full train-load or by sixty-ton portion, to departments on the French Atlantic seaboard.

This tariff measure, as the Minister's letter itself points out, comes under the provisions of Article 70, paragraph 4 of the Treaty establishing the Community, and can therefore be put into force only if the prior consent of the High Authority has been obtained.

In order to proceed to the study of this question, the High Authority on November 13 last heard representatives of the French Government, assisted by representatives of the Charbonnages de France and the French State Railways. These delegates stressed that the Centre-Midi collieries were faced with serious difficulties in regard to the marketing of their production, which were leading to a good deal of unemployment in the various coalfields involved ; they mentioned that these difficulties were largely due to competition by solid and liquid fuels from outside the Community.

The High Authority's information is that the Centre-Midi collieries have already, by zonal reductions, sought to ensure selling by every means compatible with their financial position and the assistance afforded them by inter-coalfield compensation ; that they have also tried hard to keep down their production costs, and have, in particular, secured an appreciable increase in output from their workers ; and, finally, that they have started a scheme for adapting their means of production, and more particularly their manpower, to the development of the overall volume of their markets. Despite this concentration of operations, however, their position is still difficult.

Although the tariff provisions proposed constitute an exception to the provisions of Article 4,*b* and of Article 70, Paragraph 1 of the Treaty, the High Authority considers that, in the above circumstances, the principles which, under Articles 2 and 3 of the Treaty must govern the development of the Common Market, and in particular that of safeguarding the continuity of employment, justify it in granting to the tariff measure proposed the consent required under Article 70, paragraph 4 of the Treaty.

Notwithstanding, inasmuch as the High Authority is so justified only in consequence of the particular circumstances at present confronting the Centre-Midi collieries, it can only consent to the measure in question, provided due account is taken of the temporary nature of the proposed tariff, and within the limits of the period involved, namely, up to December 31, 1955.

Furthermore, should any important change take place in the general conditions of competition in the Common Market, the High Authority reserves the right to take up the matter again with the French Government.

Finally, since inclusion on the tariff does not seem likely to provide the Dauphiné and Provence collieries with extra markets of any note, the High Authority considers that, in the circumstances, there is no reason to include these two coalfields among those covered by the tariff provisions in question.

I have, &c.

Letter sent on December 30, 1954, by the High Authority to the Government of the French Republic, concerning subsidies on the sale of coal from Lorraine and the Saar

YOUR EXCELLENCY,

In its letter of October 4, 1954, the High Authority authorized the French Government to continue after September 30, 1954, its subsidies on deliveries of coal from Lorraine and the Saar to Southern Germany, subject to reconsideration not later than March 31, 1955.

The question has been raised whether the increase, as from April 1, 1954, in the price of certain grades of coal from Lorraine and the Saar should entail a corresponding increase in the figure per metric ton of the subsidy on these grades.

No increase in the subsidy on those grades whose price has risen could be authorized by the High Authority, except where such an increase offsets a reduction in the subsidy resulting from a lowering of the price for other grades: the average amount of the subsidy per metric ton would thus remain unchanged.

I have, &c.

Communication from the High Authority of the European Coal and Steel Community to Associations of Enterprises coming under the Community's jurisdiction

(Article 48 of the Treaty)

In a letter sent on December 16, 1954, to the President of the Consultative Committee, the High Authority requested the Committee :

—to proceed to the consultations prescribed in Article 55, paragraph 2 of the Treaty, regarding the desirability of earmarking funds derived from the levies for the purpose of helping to finance the international production of a journal seeking to familiarize its readers with modern technical processes and to publish the results achieved or likely to be achieved by such technical or economic research as is facilitating or will facilitate a more satisfactory and extensive consumption of steel.

Associations of Enterprises coming under the jurisdiction of the Community have, under Article 48, paragraph 2 of the Treaty, the right to submit to the High Authority the observations of their members on the above consultation.

Any such observations should reach the High Authority not later than January 31, 1955.

(Sgd.) M. KOHNSTAMM,

Secretary, High Authority.

Luxembourg, December 18, 1954.

THE COURT OF JUSTICE

JUDGMENT OF THE COURT

IN THE CASE No. 1–54: THE GOVERNMENT OF THE FRENCH REPUBLIC *vs* THE HIGH AUTHORITY

(TRANSLATION, the French text being authoritative.)

In the case

the GOVERNMENT OF THE FRENCH REPUBLIC

which has chosen as its address for service the seat of its Legation in Luxemburg,

Plaintiff

represented by Mr. Paul REUTER, Professor at the Faculty of Law of Paris, Legal Adviser to the Ministry of Foreign Affairs, in Paris,

as Agent,

vs

the HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY

which has chosen as its address for service its offices, 2 Place de Metz, in Luxemburg,

Defendant

represented by its Legal Adviser Mr. Michel GAUDET,

as Agent,

assisted by Mr. Jean COUTARD, Barrister at the Conseil d'Etat and at the Cour de Cassation, in Paris,

concerning the Appeal for annulment of the Decisions of the High Authority No. 1–54, 2–54 and 3–54, of January 7th, 1954.

THE COURT

composed of

President PILOTTI,

Presidents of the Chambers SERRARENS and HAMMES,

Judges RIESE, DELVAUX, RUEFF and van KLEFFENS,

Advocate General: LAGRANGE,

Registrar: VAN HOUTTE,

delivers the following

JUDGMENT

As regards the facts:

Whereas the Government of the French Republic has filed on February 9th, 1954, in the Registry of the Court, an Application for annulment of the Decisions of the High Authority No. 1–54, 2–54 and 3–54 of January 7th, 1954, published in the Official Gazette of the Community on January 13th, 1954;

Whereas the Application has been filed within the time-limit, in accordance with Article 33, paragraph 3, of the Treaty, in conjunction with Articles 84 and 85 of the Rules of the Court, and whereas the appointment of the Agent of the Plaintiff has been made in accordance with the Regulations;

Whereas it results from the documents produced by the parties and the Decisions in question that the facts are as follows:

By virtue of Article 60 of the Treaty, the High Authority has issued, on May 2nd, 1953, the Decisions 30–53 and 31–53 which give a definition of the practices prohibited by Article 60, paragraph 1, and which contain for the steel market regulations on the publication of price-lists and conditions of sale; on the ground of these Decisions, the enterprises were to publish their price-lists previous to any transaction and to keep strictly to the prices stated therein—while every deviation from those price-lists constituted, according to these Decisions, a prohibited discriminatory practice;

on January 7th, 1954, the High Authority modified these regulations by issuing the Decisions 1–54 and 2–54 which form the subject of the present dispute;

under this new system, a deviation from the published prices no longer constitutes a prohibited practice if the seller can prove that the transaction in question does not fall within the categories of transactions provided for in his price-list or that the deviation was applied in an equal measure to all comparable transactions (Decision 1–54);—furthermore, for the steel market, and for the steel market alone, an average margin of 2.5% was introduced, within which a deviation from the price-lists is permitted for transactions concluded during the last sixty days, without previous publication of new price-lists being required (Decision 2–54);—finally, for purposes of control, the enterprises are to submit bi-weekly reports on the applied deviations (Decision 3–54);

Whereas the above-mentioned Decisions and communications pertaining thereto have been published in the Official Gazette of the Community, 1953, pages 109 to 112, and 1954, pages 217 to 224;

Whereas the Government of the French Republic opposes in its Application the above-mentioned Decisions and asks the Court to

"annul the Decisions 1–54, 2–54 and 3–54 of the High Authority of January 7th, 1954",

which claim was reduced, at the public hearings, to annulment of Decisions 1–54 and 3–54, and likewise of Articles 1 and 2 of Decision 2–54;

Whereas the Government of the French Republic bases its Appeal on the following grounds:

A.—Violation of the Treaty;

B.—Détournement de Pouvoir;

Whereas the grounds on which the Appeal is based are supported by the arguments summarized below:

(*a*) Violation of the Treaty by Decision 1–54: Article 60, paragraph 2, relates the means (i.e. the obligation to publish and to keep strictly to the price-lists) so closely to the end (i.e. the prohibition of discriminations)

that every infraction of the rules on publication must be considered, at the same time, to be a discriminatory practice. Furthermore, the new regulations (Decision 1–54) no longer constitute a prohibition of discriminations on the contrary, by being based on the completely obscure notion of "comparable transactions" and allowing continuous price variations, they make discrimination possible because they rob this notion of its contents ; as a result, only strictly simultaneous transactions remain submitted to identical conditions, a case of practically no significance. At the same time, the new regulations make every control impossible.

(*b*) Violation of the Treaty by Decisions 2–54 and 3–54 : the more flexible application of the obligation to publish constitutes an infraction of the Treaty because, as it ensues from the words "prices applied" and "shall be published", the Treaty imperatively prescribes the obligation to publish all new prices previous to transactions and to keep strictly to the price-lists : the Treaty entrusts the High Authority only with the regulation of the modalities but not of the contents and the extent of the publications. The new regulations (Decision 2–54) do not enable buyers to ascertain the lawful character of the applied prices. Furthermore, they render impossible the use of the right of alignment provided for in Article 60, because the prices actually applied, are not known. The High Authority has failed to appreciate the distinction established by the Treaty between the obligation to publish price-lists and the possibility to require information and statistics.

(*c*) Détournement de pouvoir: when it issued the Decisions in question, the High Authority was governed by the intention to bring about a lowering of the general price level and to prevent price agreements. But the powers which Article 60 confers to the High Authority were only given in order to prevent discriminatory practices ; if the High Authority wanted to pursue other objectives, it could only do so within the framework of Article 61 and 65.

Whereas the Application has been notified to the High Authority on February 9th, 1954, in accordance with Article 33, paragraph 2, of the Rules of the Court ;

Whereas the Counter-Memorial has been filed in the Registry of the Court within the time-limit provided for in Article 31, paragraph 1, of the Rules of the Court, as extended by Order of the President of the Court, of March 4th, 1954 ;

Whereas the appointment of the Agent and the Advocate of the High Authority has been made according to regulations ;

Whereas, in its Counter-Memorial, the High Authority asks the Court to:

> "reject the Appeal of the Government of the French Republic submitted on February 9th, 1954, with all the legal consequences, in particular for the reimbursement of fees, costs and all other eventual expenses" ;

Whereas the High Authority opposes the grounds of the Application with several arguments which can be summarized as follows :

(*a*) the ground of Violation of the Treaty by Decision 1–54 can not be considered as well-founded ; indeed, a complete distinction between the prohibition of discriminations and the obligation to publish is

admissible, because an infraction of this obligation does not necessarily constitute in itself a discrimination, when the deviation from the price-list is uniformly applied to all the comparable transactions. Furthermore, only the prohibition of discriminations constitutes an absolute principle, whereas the obligation for publication is but a simple means to insure observance of the principle, but is not a principle in itself. The prohibition of discriminations has by no means been put aside by the new regulations, neither was it affected by it. It is on the ground of objective criteria that one has to determine which transactions are comparable ; a control, more efficient than before, has resulted from the regulations of Decision 3–54.

(*b*) The ground of Violation of the Treaty by the Decisions 2–54 and 3–54 can not be considered as well-founded : indeed, the Decisions in question imply also the principle of previous publication although Article 60, which speaks of " applied prices ", and not of " prices to be applied ", does not prescribe this imperatively. Decisive is the fact that the Treaty gives to the High Authority the power to establish, in all equity, the extent and the forms of the publication. When the prices show a tendency to fall, tendency which existed at the moment when the Decisions were issued, one cannot expect any useful control from the buyers, because the deviations from the prices in the price-lists were at that moment downward deviations, i.e. to the benefit of the buyers ; one could no more expect the enterprises to denounce themselves, so that the High Authority had practically no possibility for control under the previous system. Only the new system ensures this control ; one cannot criticize this system for combining the obligation to publish with the obligation to send information.

As for the alignment, in a perfectly organized market such as the steel market, it is always possible to know the real prices of the competitor. The High Authority knows that the enterprises use their right to align their prices in the present time as well as in the past. According to the Treaty, alignment is possible with the price actually applied and not only with the published price-lists. Finally the new regulations appeared necessary in order to enable the producers, to adapt to the price-fluctuations. Indeed, the rigorous application of a system of previous publication and a continuous adjustment of the price-lists following every price-fluctuation, however small, would have prevented the free price-formation and resulted in agreements among the producers, which are incompatible with the provisions of the Treaty. This rigid system advocated by the Government of the French Republic would result in domination of the common market by the enterprises ; on the other side, the High Authority would be deprived of all effective influence on the market. This system would have such unfavourable consequences that one could only require its application if the Treaty prescribed it without ambiguity ; but this is not the case.

(*c*) The ground of " Détournement de pouvoir " cannot be considered as well-founded : indeed, Article 60—as it results from the use of the words " in particular "—requires the High Authority to pursue, in the regulation of the publication, not only the objective to prevent discriminations but also " all " the objectives set forth in the Articles 2

and 4 of the Treaty and consequently to pursue as well the actions against price-agreements as the promoting of the tendencies towards a fall in prices. Article 57 requires the High Authority to give preference to the indirect means of action ; it is therefore surprising that the Government of the French Republic asks the High Authority to pursue those objectives by using only the " means of authority " provided for in Articles 61 and 65.

The Decisions in question were not inspired, in the first place, by the considerations enumerated by the Government of the French Republic. The High Authority has simply ascertained the fall of the steel-prices—a consequence of the market situation—but it did not bring it about ;

Whereas the Counter-Memorial has been notified to the Government of the French Republic on March 20th, 1954, in accordance with Article 33, paragraph 2, of the Rules of the Court ;

Whereas the Reply has been filed in the Registry of the Court within the time-limit fixed by Order of the President of the Court, of March 20th, 1954, and whereas it has been notified to the High Authority on May 4th, 1954, in accordance with Article 33, paragraph 2, of the Rules of the Court ;

Whereas the Rejoinder has been filed in the Registry of the Court within the time-limit fixed by Order of the President of the Court, of May 4th, 1954, as extended by Order of June 8th, 1954, and whereas it has been notified to the Government of the French Republic on July 13th, 1954, in accordance with Article 33, paragraph 2, of the Rules of the Court ;

Whereas after the submission of the Rejoinder on July 12th, 1954, the written procedure was closed in accordance with Article 34, paragraph 1, of the Rules of the Court ;

Whereas the President has, in accordance with Article 34, paragraph 1, of the Rules of the Court, designated on July 12th, 1954, the Judge RIESE as Judge Rapporteur ;

Whereas, in accordance with Article 34, last paragraph, of the Rules of the Court, the Court has, after consultation of the Advocate-General, decided to open the oral proceedings without instruction ;

Whereas, in accordance with Article 45, paragraph 2, of the Rules of the Court, the President of the Court has fixed the date of the session for the oral proceedings on October 28th, 1954 ;

Whereas public hearings were held on October 28th, 29th and 30th, November 10th and 11th, 1954 ;

Whereas, in the course of these hearings, the Court heard the parties ;

Whereas at the public hearing of November 10th, 1954, the Advocate General has, in accordance with the procedure provided for in the Articles 11 and 21, last paragraph, of the Protocol on the Statute of the Court of Justice, concluded that the Appeal should be rejected ;

Whereas the President has, in accordance with Article 50, paragraph 2, of the Rules of the Court, declared, at the public hearing of November 11th, 1954, the oral proceedings closed ;

* * * * * * *

As regards the law :

Whereas the Court bases its judgment on the following considerations :

(1°) *Concerning the Admissibility*

The parties do not raise any estoppel for non-admissibility. In the present case, the Court is of the opinion that this question does not have to be examined ex officio.

The Court, in accordance on this question with the Advocate General, admits the possibility of a single Appeal against the three Decisions ; under these conditions it will examine the grounds of the Appeal in so far as they, in the opinion of the Court, concern each of the three Decisions ;

(2°) *As for the merits*

The Plaintiff opposes the Decisions 1–54, 2–54 and 3–54 on the grounds of Violation of the Treaty and Détournement de Pouvoir.

A.—THE GROUND OF VIOLATION OF THE TREATY

I. *As for Decision* 1–54

(1°) Decision 1–54 introduces a clear distinction between publication and discrimination, creating thus two kinds of infractions, namely the offense of discrimination, on one side, and the infraction of the regulations on the publication of prices on the other side. Yet, while the Court admits that there exists a connection of finality between the two paragraphs of Article 60, the Court sees no Violation of the Treaty in this distinction. Indeed, the Treaty does nowhere provide that every infraction of the regulations on the publication of prices constitutes at the same time one of the practices prohibited by Article 60, paragraph 1. Especially where the prohibition of discriminatory practices is concerned it is undeniable that the fact of deviating, to whatever extent, from the prices or conditions provided for by the price-list of an enterprise does not constitute a discrimination when it concerns a singular transaction or when the same deviation is applied to all comparable transactions. Decision 1–54 is thus consistent with the Treaty on this point. One could, on the other hand, observe that Decision 30–53 was objectionable because, without expressly admitting proof to the contrary, it declared discriminatory certain transactions which in fact were not vitiated by this defect.

Also ill-founded is the reproach that the absence of any precise definition of singular transactions and of comparable transactions opens the way to discriminations, facilitates them instead of acting against them, and robs of its contents the notion of discriminatory practices. It is true that the old system of keeping strictly to the published prices seems to have aimed at the exclusion of every discrimination, except of course in the case of an enterprise deliberately violating its obligations ; on the other hand, under the new system it is theoretically possible that an enterprise commits, in good faith, a discrimination when it erroneously supposes that a transaction is non-comparable or singular ; indeed, the new system leaves it to the enterprise itself to appreciate the singular or non-comparable character of the transaction. However, Decision 1–54 lays the burden of proof upon the

enterprises ; if they can not prove the singular or non-comparable character of the transaction they will be held responsible for their error and be subject to the sanctions provided for in Article 64. Finally, it must be admitted that the notion of singular or non-comparable transactions does not easily lend itself to abstract definition. It is indeed possible that transactions concluded with an interval of only one day constitute non-comparable transactions, if in the meantime the market has undergone a complete change ; on the other hand, it is possible that two transactions are comparable although concluded several weeks apart, if the market has remained stable during this time. Comparability can therefore only be appreciated in relation to the market situation ; likewise, the singularity of a transaction can only be admitted on the ground of the circumstances which characterize the transaction. The two characters—comparability and singularity—can be objectively ascertained by the enterprises and by the High Authority, and therefore the system in question does not rob the notion of discrimination of its contents ; on the contrary, it makes it possible to act against any discriminatory practice. From the above-mentioned it also follows that Plaintiff's argument that only simultaneous transactions are still submitted to the obligation of identical prices and conditions of sale does not rest on any ground.

(2°) Decision 1–54 does not abolish the obligation to publish the prices ; on the contrary it expressly maintains it. The objection that the Decision violates the regulations on the publication of prices and eliminates the principle of publicity as a means of preventing prohibited practices, is therefore without ground. When considering Decision 2–54, the Court will examine whether the fact of allowing deviations and of exempting the enterprises from a new publication within certain limits is consistent with the Treaty ; in any case, this fact can not be used as an argument against Decision 1–54 which leaves the principle of publication unimpaired.

(3°) Decision 1–54 does by no means abolish the sanctions in case of discrimination. If comparable transactions are concluded at different prices and conditions of sale, the sanctions provided for in Article 64 are still applicable.

(4°) Finally, Plaintiff's argument that Decision 1–54 instead of giving a definition of prohibited practices legalizes certain practices that were illegal under the old system is ill-founded. It has been explained above that Decision 1–54 gives a new definition of prohibited practices by separating the regulations on non-discrimination from the regulations governing the publicity. If, under the new definition, practices that were prohibited before, namely the deviations from the published prices, are now admitted, it nevertheless prescribes that these deviations have to be uniformly applied to all comparable transactions, while an exception is made for singular transactions which can not yield a discrimination. The principle of the prohibition of all discriminatory practices is therefore strictly respected. Decision 1–54, while it abandons the previous automatic system, remains within the framework of defining prohibited practices.

For these reasons, Decision 1–54 does not violate the Treaty ; consequently the Appeal for annulment submitted against this Decision, inasmuch as it is based on the ground of Violation of the Treaty, must be rejected.

II. *As for Decision* 2-54

The Court is of the opinion that Article 1 of Decision 2-54 is not consistent with the Treaty in so far as it permits the enterprises to apply an average upward or downward deviation between the published prices and the prices actually applied, without previous publication of the modifications to the price-lists. This Violation of the Treaty results from what follows:

(1°) Before interpreting in detail paragraph 2 of Article 60 of the Treaty, it is necessary to examine the objectives which the High Authority has to pursue when it defines the discriminatory practices and when it regulates the publication of prices and conditions of sale.

(*a*) The Articles 2, 3 and 4 of the Treaty, referred to at the beginning of paragraph 1 of Article 60, constitute fundamental dispositions establishing the common market and the common objectives of the community. Their importance results clearly from Article 95. When giving the High Authority competence to define prohibited practices the Treaty compels it to take into account all the objectives prescribed by the Articles 2, 3 and 4. This results from the explicit reference to these Articles made at the beginning of Article 60. When defining prohibited practices the High Authority has therefore not only the right but also the obligation to bear in mind the action against agreements among producers and the preoccupation to promote the establishment of the lowest possible prices under the conditions mentioned in Article 3 of the Treaty, and also the action against unfair competitive practices and discriminatory practices. For these reasons the Court can not except Plaintiff's proposition that Article 60 refers only to actions against discriminations, whereas the action against agreements is only of the resort of Article 65 and the promotion of the lowest possible prices of the resort of Article 61. It is true that Articles 65 and 61 of the Treaty empower the High Authority to act directly against agreements and against an increase of prices, but it follows from the Treaty (among others from Article 57 regarding production) that the High Authority before making use of the direct means of action must preferably employ " the indirect means of action at its disposal ". In this way the High Authority can also use its right to define prohibited practices, with respect to prices, in order to prevent practices which are contrary to one of the objectives provided for in Article 60.

On the other hand, it follows from the words " in particular " (in the first paragraph of Article 60) that Article 60 chiefly refers to unfair competitive practices and discriminatory practices.

(*b*) Especially where the role is concerned which the Treaty assigns to the publication of the price-lists, the Court ascertains, in agreement with the Advocate General, that the compulsory publication is provided for in the Treaty in order to achieve the following three aims:

(1°) prevent as much as possible the prohibited practices ;

(2°) give to the buyers the opportunity to acquaint themselves with the exact prices, and also to participate in the control of discriminations ;

(3°) give the enterprise the opportunity to know exactly the prices of competitors in order to give them the possibility to align their prices.

Although publicity is required for the above-mentioned purposes, the Treaty does not consider it, however, sufficient to guarantee the actual achievement of these aims ; publicity is but one of the means provided for in the Treaty.

The publication of price-lists is under the jurisdiction of Public Law, since the consequences with regard to Private Law have not been regulated by the Treaty. However, this character of Public Law, justly pointed out by the Advocate General, is not in opposition with Plaintiff's proposition that the publication of price-lists must also have legal consequences with regard to third persons, namely with regard to the enterprises that want to align their prices with those of their competitors. It is this result, inherent in the publication of price-lists that distinguishes this publication from the simple information gathered by the High Authority according to Article 47, and likewise from the publication of statistical documents gathered by the High Authority according to Article 46. If the publication were not intended to inform the general public, one could not explain why the Treaty does not simply state " that the price-lists have to be communicated to the High Authority ".

(2°) In its first paragraph, Article 60 prohibits directly and imperatively certain practices ; the High Authority is empowered to define them, but it can not infringe upon the principle of their prohibition.

Paragraph 2 of Article 60 provides for the compulsory publication of price-lists " for the above purposes ". These words clearly indicate the instrumental character of the following provisions concerning the publication of prices. This publication is imperatively provided for ; it is considered as an appropriate means to achieve the ends enumerated in the first paragraph. Hence it is only a means that is concerned, but a means imperatively prescribed in the Treaty and not a means which could be replaced by any other means eventually susceptible to achieve the same results.

This obligatory character of the publication of the price-lists follows also from the words " shall be published ". The Court is therefore bound to interpret the obligation to publish the price-lists and conditions of sale in the sense of a strict legal rule upon which no infringement is permitted : the obligation is absolute and has to be obeyed integrally.

The Court does not accept Defendant's opinion that the expression " être rendu public " is less strong than the expression " être publié ". Indeed, in the last two paragraphs of Article 46, the Treaty uses those two expressions as equivalent. In any case, publication has to be made in such a way that all the participants in the market (eventual future buyers and competitors) are in a position to know the prices ; such a publication alone is consistent with the objectives for which it was provided.

(3°) Paragraph (2*a*) does not expressly say at what moment the price-lists and conditions of sale are to be published. One has only to read paragraph (2*b*) concerning the methods of quotation to understand that the price-lists are previous to all sales taking place on the common market.

Indeed, letter (*b*) of paragraph 2 of Article 60 specifies that the methods of quotation applied must not have the effect of introducing into the practised prices increases over the prices " indicated by the price-list "—which confirms again that the price-lists contain a list of prices at which the products are offered, which permits the exact calculation of all legal transactions; it confirms furthermore that those price-lists have to be published previous to their application.

Moreover, paragraph 30 No. 2 of the Convention containing the Transitional Provisions stipulates that the prices charged by the enterprises for the sales of steel on the Italian market may not be lower than the prices indicated in the price-lists for comparable transactions. This provision confirms that the price-list constitutes only a list of prices at which the products are offered for sale, price-list which is previous to any sales contract.

The Treaty is, for that matter, very specific in its use of terms where it mentions " the price-lists " and not " price-lists ". The mentioned price-lists do not constitute documents that are proper to the Treaty alone and especially established in view of the objectives of the Treaty, but they constitute documents of a type universally accepted by trade practice and which, in accordance with this practice, have always, although in a general or provisory way depending upon the case, the character of an offer to contract on the basis of the price mentioned therein.

The price-lists do not lose this character of an offer to contract although the Treaty assigns to them objectives of public interest recognized by its provisions. There is therefore no doubt that the expression " price-list " retains in the Treaty its usual meaning and refers to the prices on the basis of which the enterprises declare themselves ready to sell their products.

This interpretation is furthermore confirmed, and on this point the Court agrees with the opinion of the Advocate General, by the fact that the text of Article 60, paragraph 2, distinguishes between applied prices and practised prices, as this last expression, used under letter (*b*) of the second paragraph of Article 60, designates the prices at which the transactions are actually concluded. It appears therefore that the expression " prices applied " designates the prices of the offer of the sellers, although it would have been clearer if the Treaty had used for this the words " prices to be applied ".

The High Authority, for that matter, seems to have always interpreted the Treaty in this sense in the previous Decisions as well as in Decision 2–54, because it is stated in Article 4 of Decision 31–53, as well as in Article 3 of Decision 2–54, that the price-lists and conditions of sale enter into force " at the soonest five full days (one day, according to Article 3 of Decision 2–54) after having been addressed, in print, to the High Authority ".

It follows also from the preambles of Decision 2–54 that the High Authority's starting point is the idea of a previous publication of the price-lists; after stating in the second preamble that the price-lists must express the price-level clearly established by the market, the third preamble refers to certain facilities that one intends to accord to the enterprises, and to those facilities the fourth preamble adds a new one which consists in a

reduction to the minimum of the time-limit for the entering into force of the new price-lists. But it would be difficult to consider this as a facility if the price-lists were only to reflect "ex post" the market-evolution. One can only speak of a facility if one accepts the thesis of previous publication, because only then will the enterprises benefit by not having to wait several days before being able to conclude sales-contracts on the basis of the new prices.

It must therefore be admitted that the publication of the price-lists must by all means be made before the enterprises can apply the new prices.

Furthermore, it results from the foregoing considerations that the words "price-list" always designate published price-lists. On this point also the Court agrees with the opinion of the Advocate General. Defendant's suggestion to understand the word "price-list" in a sense irrelevant on this point, is not accepted by the Court.

(4°) After having ascertained that the price-lists and conditions of sale have to be published previous to their application on the common market, it remains to be decided whether the Treaty requires the publication of the exact prices or whether it is sufficient to publish average or approximate prices. There is no doubt that the Treaty prescribes a publication of exact prices in the form of price-lists. This follows from the objective which the publication of prices should achieve: information given to buyers has only value for them if it informs them at what prices they can buy. Likewise publication must make alignment possible and this alignment should be done with the exact prices of the competitor. The alignment is a right granted to the enterprises by the Treaty, and not only a facility which can only be exercised if the enterprises are able through other less or more fortuitous means to acquaint themselves with the prices practised by their competitors.

Since the Treaty imperatively prescribes, for the above-mentioned reasons, the previous publication of the exact prices, it follows that the competence granted to the High Authority to establish the extent and the form of the publication does not empower it to impair the principle of the compulsory publication of the exact prices.

Having regard to the imperative character of paragraph 2 (*a*) of Article 60, and in the absence of any text to the contrary, the power granted to the High Authority by the parenthesis ", to the extent and in the form prescribed by the High Authority,", can not be interpreted in a sense which would permit the High Authority not to publish the price-lists. The parenthesis should be understood to mean that the High Authority is empowered to determine the content of the price-lists. But this content should answer the public interest, so that the High Authority is only competent to prescribe minimum requirements for the outline of the price-lists.

In other words, the expression " , to the extent and in the form prescribed by the High Authority," does indeed empower the High Authority to prescribe the extent, that is to say the scope, of the publication in so far as it concerns the regulation of its modalities; the High Authority shall be allowed, for example, to prescribe, like it has done, the time-limit for the entering into force of the new price-lists, to establish that certain rebates—such as the rebate for second choice, etc.—have to be mentioned in the

price-lists, to decide if the leading-costs have to be published or not. On the other hand, under the system imposed by the Treaty all that is indispensable for the knowledge of the exact price must necessarily be mentioned in the price-list. The fact that publication of price-lists has to take into account the objectives, which according to the Treaty this publication should pursue, does not allow the acceptance of the thesis of the High Authority that it has the competence to prescribe, at its own discretion, what is to be published and what not. According to this thesis, which the Court rejects, there would be no limit as for the indications that can be exempted from the obligation to publish. The High Authority could then allow margins much more important, and one does not see where this would end; it could prescribe a simple publication by degrees (e.g.: prices 80 to 120) or even no publication at all for prices of whole categories of products—in one word, it could put aside the principle of the compulsory publication, principle provided for in the Treaty.

Finally, if it is true that the power of the High Authority in this matter is a regulating one for what concerns the minimum requirements to be fulfilled by the price-lists, this is true also with regard to the scope of the publication itself. It is not enough, therefore, to make sure that the price-lists are communicated to the High Authority; if it were so, the Treaty would simply have mentioned this obligation. The price-lists have to be published and the power of the High Authority to prescribe "the extent and the form" implies for it the obligation to watch that the extent and form in which the price-lists are published and placed at the disposal of the public in general answer sufficiently the needs of the public interest.

The text of Decision No. 31–53 had been drafted with extreme care; its first Article declares that the enterprises of the steel industries have to publish their price-lists and conditions of sale, and also every subsequent modification, in accordance with the provisions of the Decision; Article 2 then enumerates the very precise indications which the price-list should contain, thus interpreting in a reasonable way the words "extent" and "form" used in the Treaty; Article 4 prescribes that the price-lists enter into force at the soonest five full days after having been addressed to the High Authority and that they have to be communicated by the seller, on demand, to all persons interested.

On the other hand, Article 1 of Decision 2–54 establishes not the extent to which the price-lists have to be published by the enterprises, but the extent to which the High Authority authorizes the non-observance of the published price-lists. This is in opposition with Article 60, paragraph 2 of the Treaty.

It should be mentioned furthermore that the interpretation adopted by the Court is supported by the fact that the High Authority may determine the extent of the publication after consultation of the Consultative Committee only, whereas, for the definition of the prohibited practices, it has to consult also the Special Council of Ministers. This is understandable if the High Authority, when it determines the extent of the publication, has to abstain from impairing the principle of the exact compulsory publication of the prices and conditions of sale. If the Treaty had wanted to grant it more freedom and accord to the High Authority the right to depart from this

principle, it would have been logical to subordinate this power also to the consultation of the Council.

(5°) It remains to be examined whether the result to which the study of the text and of the ratio legis have brought the Court is not in opposition with other objectives of the Treaty or if it is susceptible to be invalidated by other considerations. This is not the case. It should in the first place be repeated that the system of previous publication of exact prices constitutes the imperative principle prescribed by paragraph 2 of Article 60. It follows that this principle can not be eluded, not even for the benefit of a system better adapted to the objectives in view. It is not the task of the Court to give its opinion about the opportuneness of the system imposed by the Treaty nor to suggest a revision of the Treaty, but according to Article 31, the Court is bound to ensure the rule of Law in the interpretation and application of the Treaty.

(*a*) The objection that the control by the buyers does not operate when prices go down is not pertinent, because the publicity is not only intended to permit this control but also to place the buyers in a position to acquaint themselves with the exact prices and to permit alignment by the enterprises. This objection, therefore, does not suffice to justify abandonment of the principle of publication prescribed by the Treaty.

(*b*) The Defendant has insisted on the danger of agreements among producers, danger reputed to be inherent in the previous system. But it has not been proved that this danger is removed by the introduction of the average margin. Even if the new regime could have a certain usefulness for diminishing this risk, this would not justify neglect of the other objectives which the publicity should pursue. The Treaty, for that matter, permits the High Authority to intervene with other means, when it learns that agreements have been made.

(*c*) The market situation, namely the ascertainment of a tendency to a fall in prices, can not justify either the abolition of the principle of price-publication, since this publication is prescribed by the Treaty. In case of crisis or perturbation of the market, the Treaty confers different powers upon the High Authority—namely in Article 60, paragraph 2 (*b*) in fine, Article 61, Article 63, Articles 58 and 59—but nowhere does the Treaty provide for the abolition of the compulsory publication of the price-lists. For that matter the principle of the compulsory publication prescribed by the Treaty has a general character and does in no way depend on the economical situation.

(*d*) The Court has been especially preoccupied by the principle of free price-formation. It can not, however, justify another Decision. The Treaty starts from the idea that the free price-formation is guaranteed by the freedom given the enterprises to fix their prices themselves and to publish new price-lists when they want to modify them. If the economic situation changes, the producers are forced to adapt their price-lists, and it is in this way that " the market makes the price ". But, although the Treaty starts from the idea of a free price-formation, it should not be forgotten that the Treaty forbids all discriminations and that it provides for the right of alignment. For these reasons the Treaty has established the principle of the compulsory and previous publication of the price-lists and conditions of sale. The Court

has to abstain from giving its opinion about the opportuneness of this system, it can only ascertain that it has been prescribed by the Treaty which—rightly or wrongly—does not contain a text which permits a certain flexibility of the price-lists in the case of minor or passing fluctuations.

On all those grounds the Court ascertains that Article 1 of Decision 2–54 violates the Treaty ; this Article must therefore be annulled.

Finally the Court has examined ex officio the question whether Article 1 of Decision 2–54 constitutes a major violation of procedure. According to this text, this article defines only the new conditions under which the new price-lists have to be published. It can be asked, however, whether the said Article, in connection with Decision 1–54, does not in fact give, in a hidden way an addition to the definition of prohibited practices. If this were the case, if this were an indirect and complementary definition of prohibited practices, the Council should have been consulted, according to Article 60, paragraph 1. Such official consultation has not taken place, and the unofficial information of the Council by the High Authority, could not be considered as an observance of this requirement. However, it is the opinion of the Court that Article 1 of Decision 2–54 does not contain a definition of prohibited practices but is limited to regulating the system of price-publication.

The reference, made in Article 2 of Decision 2–54 to Article 1 thereof, does not justify annulment of Article 2, as this reference loses its object following the annulment of Article 1.

The other Articles of Decision 2–54 have not been opposed by the Plaintiff and the Court is of the opinion that there are no grounds for their annulment.

III. *As for Decision* 3-54

Decision 3–54, whose purpose it is to introduce a system of information and control, is based on Article 47 of the Treaty. This Article permits the High Authority to gather the information necessary for the accomplishment of its mission ; Decision 3–54 is therefore consistent with the Treaty. The fact that the High Authority has combined this system of information with the control of the publicity system, provided for in Article 60, does not justify any objection.

Although Decision 3–54 is apparently intended to complete the system of deviations, introduced by Article 1 of Decision 2–54 and declared above inconsistent with the Treaty, it is not, however, by itself in opposition with the Treaty ; consequently, there are no grounds for its annulment, although it evidently becomes inoperative and without object, following the annulment of the first Article of Decision 2–54.

B.—THE GROUND OF DETOURNEMENT DE POUVOIR

In agreement with the findings of the Advocate General, the Court is of the opinion that the ground détournement de pouvoir can not be used against the Defendant on account of the Decisions in question.

It has been said above that the High Authority, when performing its duty to act principally against the unfair competitive practices and against discriminatory practices, has the right to take into account the prohibitions resulting from the Articles 2, 3 and 4 so that one can not blame it for having considered them.

Even if the Decisions in question have been partially inspired by the intention to introduce a new system better suited than the previous one to be observed by the enterprises, one cannot conclude from this that the purpose of the Decision was to legitimate the infractions previously committed. At any rate, it is evident that the Decisions were especially destined to pursue the objectives referred to in the Treaty. Even if among the motives which do justify the action of the High Authority, there had been an unjustified one, namely the preoccupation to avoid sanctioning the guilty enterprises, the Decisions would not, because of that, be vitiated by détournement de pouvoir, inasmuch as they do not infringe upon the essential objective which is the prohibition of the unfair competitive practices and of discriminations. The Court is of the opinion that this is not the case for the reasons mentioned under I.

C.—COSTS AND REMANDING OF THE MATTER TO THE HIGH AUTHORITY

(1°) On the ground of Article 60 of the Rules of the Court, a party which is proved wrong, shall be condemned in the costs. The Court can, however, according to paragraph 2 of this Article, totally or partially compensate the costs if the parties are both proved wrong on one or more grounds.

In the present dispute the Plaintiff has partly won its case and on an important ground, namely the annulment of Article 1 of Decision 2–54, which introduced the system of the average deviation from the prices published in the price-lists. Under these conditions the Court is of the opinion that it would be just to give the Plaintiff the right to have half of its costs reimbursed by the Defendant. However, as the Plaintiff has expressly relinquished the right to reimbursement of its costs and has presented no submissions concerning the costs, the Court gives judicial notice of this declaration and decides that each party shall support its own costs.

(2°) According to Article 34 of the Treaty, in as far as the Court annuls, the matter is remanded to the High Authority which must take the necessary measures in order to give effect to the decision of annulment.

Having considered the Pleadings ;

Having heard the Parties ;

Having heard the findings of the Advocate General ;

Having regard to Articles 31, 33, 34 and 60 of the Treaty ;

Having regard to the Protocol on the Statute of the Court of Justice ;

Having regard to the Rules of the Court and to the Rules of the Court concerning the costs ;

Taking judicial notice of the declaration of the Agent of the Government of the French Republic that " the French Government has presented no submissions concerning the costs " ;

THE COURT

rejecting all further submissions or submissions to the contrary,

finds and decides:

Article one of Decision 2–54 is annulled and, in this respect, the matter is remanded to the High Authority ;

the Appeal for annulment of the Decisions 1–54 and 3–54 and of Article 2 of Decision 2–54 is rejected ;

As the Plaintiff has renounced to present submissions concerning the costs, the Court takes judicial notice thereof ; each party shall support its own costs.

Thus done and judged by the Court in Luxemburg, on December 20th, 1954.

PILOTTI, SERRARENS, HAMMES, RIESE, DELVAUX, RUEFF, VAN KLEFFENS.

Read in public session in Luxemburg, on December 21st, 1954.

The President,
PILOTTI.

The Judge Rapporteur,
RIESE.

The Registrar,
VAN HOUTTE.

JUDGMENT OF THE COURT

IN THE CASE No. 2–54 : THE GOVERNMENT OF THE ITALIAN REPUBLIC *vs* THE HIGH AUTHORITY

(TRANSLATION, the Italian text being authoritative)

In the case

the GOVERNMENT OF THE ITALIAN REPUBLIC

which has chosen as its address for service the seat of its Legation in Luxemburg,

Plaintiff

represented by Professor Riccardo MONACO of Rome, Legal Adviser to the Italian Ministry of Foreign Affairs, as Agent,

assisted by Mr. Cesare ARIAS, Assistant of the Advocate General of the State in Rome,

vs

the HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY

which has chosen as its address for service its office, 2 Place de Metz, Luxemburg,

Defendant

represented by its Legal Adviser, Mr. Nicola CATALANO,

as Agent,

assisted by Mr. Jean COUTARD, Barrister at the Conseil d'Etat and at the Cour de Cassation, in Paris,

concerning the Appeal for annulment of the Decisions of the High Authority No. 1–54, 2–54 and 3–54 of January 7th, 1954,

THE COURT,

composed of :

President PILOTTI,

Presidents of the Chambers SERRARENS and HAMMES,

Judges RIESE, DELVAUX, RUEFF and van KLEFFENS,

Advocate General: LAGRANGE,

Registrar: van HOUTTE,

delivers the following

JUDGMENT

As regards the Facts:

Whereas the Government of the Italian Republic has filed on February 18th, 1954, in the Registry of the Court, an Application for annulment of the Decisions of the High Authority No. 1–54, 2–54 and 3–54 of January 7th, 1954, published in the Official Gazette of the Community on January 13th, 1954;

Whereas the Application has been filed within the time-limit in accordance with Article 33, paragraph 3, of the Treaty, in conjunction with Articles 84 and 85 of the Rules of the Court, and whereas the appointment of the Agent and of the Advocate has been made in accordance with the regulations;

Whereas it results from the documents produced by the parties and the above mentioned Decisions that the facts are as follows:

by virtue of Article 60 of the Treaty, the High Authority has issued on May 2nd, 1953, the Decisions No. 30–53 and 31–53 which give a definition of the practices prohibited by Article 60, paragraph 1, and which contain for the steel market regulations on the publication of price-lists and conditions of sale; on the ground of these Decisions the enterprises were to publish their price-lists previous to any transaction and to keep strictly to the prices stated therein—while every deviation from these price-lists constituted, according to these Decisions, a prohibited discriminatory practice;

on January 7th, 1954, the High Authority modified these regulations by issuing the Decisions 1–54 and 2–54 which form the subject of the present dispute;

under this new system, a deviation from the published prices no longer constitute a prohibited practice if the seller can prove that the transaction in question does not fall within the categories of transactions provided for in his price-list or that the deviation was applied in an equal measure to all comparable transactions (Decision 1–54);—furthermore, for the steel market, and for the steel market alone, an average margin of 2,5% was introduced, within which a deviation from the price-lists is permitted for transactions concluded during the last sixty days, without previous publication of new price-lists being required (Decision 2–54);—finally, for purposes of control the enterprises are to submit bi-weekly reports on the deviations applied on the steel market (Decision 3–54);

Whereas the above mentioned Decisions and communications pertaining thereto have been published in the Official Gazette of the Community, 1953, pages 109 to 112, and 1954, pages 217 to 224;

Whereas the Government of the Italian Republic opposes in the Application the above mentioned Decisions and asks the Court to

"annul the Decisions No. 1–54, 2–54 and 3–54 of the High Authority of January 7th, 1954",

which claim was reduced at the public hearings to annulment of Article 1 of Decision 2–54 and of Decision No. 3–54 ;

Whereas the Government of the Italian Republic, in its written statements, bases its Appeal on the following grounds:

A.—Violation of the Treaty ;

B.—Détournement de pouvoir ;

Whereas the grounds on which the Appeal is based can be summarized as follows:

(*a*) Violation by Decision 1–54 of Article 60, paragraph 1, in connection with Article 4 (*b*) of the Treaty: The Treaty has established between the principle of publicity and the principle of non-discrimination an indissoluble bond, so that only the preceding regulations can be considered legal. Every deviation granted from the price-lists replaces the system of fixed prices provided for in the Treaty by a system of mobile prices, and opens the way to illegal advantages granted to a few buyers because they have no longer the opportunity to ascertain if the prices charged are legal. In its Reply the Plaintiff has added that the new regulations do not take into account the reservations made in the Consultative Committee and in the Special Council of Ministers. To these considerations can be added the fact that the Treaty does not give a definition of "comparable transactions"; consequently, the enterprises have the opportunity to make every transaction a "non-comparable transaction" and to avoid the sanctions provided for in case of infraction of the prohibition of discriminations. Finally, a rebate, even if it is granted in an equal measure to several buyers, harms the weakest competitors, i.e. the Italian steel market;

(*b*) Violation of Article 60, paragraph 2 of the Treaty by the Decisions 2–54 and 3–54: the admission of deviations from the published price-lists infringes upon the system prescribed by the Treaty: from the words at the beginning of paragraph 2 of Article 60 "for the above purposes" it results that the obligation to publish has been prescribed in order to guarantee the observance of the prohibition of discriminations. The new regulations do not take into account the close tie which thus exists between the paragraphs 1 and 2 of Article 60; they permit discriminations which in special cases can go far beyond the margin of 2,5%.

On the other hand—a ground put forward for the first time in the Reply—the new regulations do not take into account the reservations made in the Consultative Committee and in the Special Council of Ministers. According to the Treaty, publicity is an indispensable means to prevent discriminations ; only a complete publication ensures an equal regime for all the buyers. On that account the High Authority generally has not the right to admit deviations from the price-lists. The words "to the extent and in the form prescribed by the High Authority" which appear in Article 60, paragraph 2 (*a*) only give the High Authority the right to regulate the modalities of the publication,

but not the right to determine its contents. Furthermore, Decision 2–54 permits the enterprises to keep the applied deviations secret during sixty days. The exception for transactions which do not fall within the categories of transactions provided for in the price-lists permits avoidance of the obligation to publish and of the prohibition of discriminations and makes all control impossible. The new regulations permit to leave unpublished the applied prices. For these reasons also, they are inconsistent with the letter and the spirit of the Treaty.

(*c*) Violation of paragraph 30, No. 2 of the Convention containing the Transitional Provisions : the Decisions in question permit the non-Italian steel producers to grant on the Italian market rebates which, owing to the average margin of 2,5%, can be rather high in special cases. As it follows from the mentioned provision, the High Authority should never have authorized deviations from the published price-lists without the agreement of the Italian Government. All the price-reductions granted by non-Italian enterprises to the profit of Italian buyers constitute a menace for the Italian steel industry. Even if the rebates on the prices were legal in the other countries of the Community, they should not be applied in Italy.

(*d*) Détournement de pouvoir: there is always Détournement de pouvoir when the High Authority infringes upon the Treaty while exercising the powers granted by the Treaty. The High Authority has used this power for objectives different from those which it is bound to pursue on the ground of the Treaty. The High Authority is bound:

(1°) to use the power which it has on the ground of Article 60, paragraph 1, only with the objective of defining the discriminatory practices ; in reality its objective was to admit discriminations and to legitimate infractions against the previous Decisions ;

(2°) to use the power which it has on the ground of Article 60, paragraph 2, to determine the modalities and the form of the publications ; in reality its objective was to legalize the deviations from the price-lists.

In short, Decision 3–54 is vitiated by Détournement de pouvoir because, if on the ground of the text of its statement of motives the Decision is intended to prevent discriminations, it does in reality serve to legalize the deviations ;

Whereas the Application has been notified to the High Authority on February 19th, 1954, in accordance with Article 33, paragraph 2 of the Rules of the Court ;

Whereas the Counter-Memorial has been filed in the Registry within the time-limit prescribed by Article 31, paragraph 1 of the Rules of the Court ;

Whereas the appointment of the Agent and Advocate has been made in accordance with the regulations ;

Whereas the High Authority, in its Counter-Memorial, asks the Court to:

" reject the Appeal of the Government of the Italian Republic submitted on February 10th, 1954, and notified on February 19th, 1954 and to condemn the Plaintiff in the payment of the fees, costs and other eventual expenses " ;

Whereas in its Rejoinder the High Authority completes its submissions by asking the Court to:

"declare inadmissible, if necessary, in accordance with Article 29, paragraph 3, of the Rules of the Court, the new grounds put forward in the Reply";

Whereas the High Authority opposes the grounds of the Application with the following argumentation:

(*a*) as for Violation of Article 60, paragraph 1, in relation with Article 4 (*b*) of the Treaty by Decision 1–54:

This ground is ill-founded. Indeed, the regulation is more logical than the previous one. It is clear that a seller who applies equal deviations from his price-lists to all the comparable transactions does not commit a discrimination. Furthermore, the obligation to publish does only constitute a means with regard to the prohibition of discriminations; it is not an objective in itself. A rigid system like the previous one only offers the advantage of an effective control of the price-policy by the buyers, when the prices are stable or rise; on the other hand, when the prices show a tendency to fall—tendency which existed at the moment the Decisions in question were issued—there is no reason to expect an effective control by the buyers; the deviations are then downward deviations and constitute for them an advantage about which they will not complain. It is not exact to maintain that the Treaty provides for a system of fixed prices. In accordance with Article 29, paragraph 3 of the Rules of the Court, the new grounds put forward for the first time in the Reply have to be declared non-admissible. Furthermore, these grounds are ill-founded; the High Authority is indeed bound to ask for the opinion of the Consultative Committee and the Special Council of Ministers, but it is not bound by this opinion; furthermore, these institutions have admitted in principle that the High Authority has the power to consent a margin.

The notion of non-comparability of a transaction is an objective element which can not be arbitrarily appreciated by the enterprises, although the verification of the comparable character may sometimes be difficult in practice. The objection based on a damage inflicted upon the Italian steel market is ill-founded, because Italy also is submitted to the laws of competition of the common market and is not entitled to a protection superior to the one which is granted by paragraph 30 of the Convention containing the Transitional Provisions.

(*b*) As for Violation of Article 60, paragraph 2 of the Treaty by the Decisions 2–54 and 3–54:

The Court is asked to reject as non-admissible, in accordance with Article 29, paragraph 3 of its Rules, the grounds put forward for the first time in the Reply. Furthermore, these grounds are ill-founded. Although the rules concerning the compulsory publication constitute an auxiliary means to attain the objectives mentioned in Article 60, paragraph 2, they are not the only means. Paragraph 2 gives the High Authority a large power of appreciation; from the word

" extent " follows the right to limit quantitatively the contents of the publications and consequently the power to determine which are the constituent elements of the prices that have to be published and those that do not have to be published. When doing this the High Authority must, as it follows from the word " in particular ", respect all the objectives mentioned in Article 60, paragraph 1 and in the Articles 2 to 4 of the Treaty ; besides actions against discriminations and against unfair competition, the High Authority must promote, among others, the establishment of the lowest possible prices and prevent price-agreements for the repartition and the exploitation of the market. The new Regulation takes into account all these view-points and simultaneously permits a more efficacious control owing to the bi-weekly reports required by Decision 3–54.

The new regulation appeared necessary in order to permit the producers to adapt to price-fluctuations. Indeed the rigorous application of a system of previous publication and a continuous adjustment of the price-lists following every price-fluctuation, however small, would have prevented the free-price-formation ; the price-determination could only have resulted from agreements among producers, which are inconsistent with the Treaty.

The objection that the High Authority has not respected the dissenting opinions expressed in the Consultative Committee and the Special Council of Ministers is also unjustified for the reasons mentioned under (*a*).

Plaintiff's statement that the enterprises could keep the deviations secret during sixty days is not exact, because they are revealed by the bi-weekly reports required by Decision 3–54.

The fact of exempting from the obligation to publish the transactions that do not fall within the categories of transactions provided for in the price-lists is justified because there are transactions that deviate from the normal and therefore can never be discriminatory. But it is practically impossible to determine in advance, in the rules on publicity, which are the transactions that have a unique character, the so-called singular transactions which on these grounds do not fall within the categories of transactions provided for in the price-lists.

It is also erroneous to state that the enterprises can, in a special case, apply large deviations from the price-lists because this is forbidden by the prohibition of discriminations. Furthermore, they can practically never wait until an average margin of 2,5% is attained, but they have to adjust their price-lists in advance if they want to avoid exposing themselves to a temporary standstill of their business or committing infractions to the rules on publicity.

Decision 2–54 does not affect the obligation to publish, it only authorizes small deviations from the price-lists : the latter remain, as in the past, determinant.

(*c*) As for Violation of paragraph 30, No. 2 of the Convention containing the Transitional Provisions:

The ground is ill-founded. Indeed, paragraph 30, No. 2 only contains a prohibition for the non-Italian enterprises to align their prices, for the sales of steel on the Italian market, with the offers of the Italian producing enterprises. This prohibition remains as in the past; the Italian steel producers are effectively protected because the non-Italian enterprises, owing to the protective rights which still temporarily subsist and owing to the necessity to add the transportation costs, have to sell at a higher price in Italy than in the other countries of the Community. If by way of exception this were not the case, they would have to accept it as a consequence of the free competition. This would also have been possible under the regime of the previous regulation.

(*d*) As for the Détournement de pouvoir:

The ground is ill-founded. Indeed, Détournement de pouvoir can only be accepted when, from a formal point of view, the High Authority has not infringed upon the prescriptions of the Treaty. The ground of Détournement de pouvoir and Violation of the Treaty are mutually exclusive. In particular for Decision 1–54 the idea of a détournement de pouvoir is unconceivable because the High Authority has on this point no power of appreciation; it has simply fulfilled the obligation imposed by the Treaty to give a definition (of prohibited practices). If the definition were incorrect, there would at the most be Violation of Article 60, paragraph 1, but certainly no Détournement de pouvoir. It is not possible to state that provisions, which were intended to improve old unprecise definitions, are vitiated by Détournement de pouvoir.

On the other hand, the objective of the High Authority has been to prevent practices which are contrary to the Treaty and to issue within the framework of the Treaty a regulation the observance of which can be reasonably required from the producers. Because of the instability of the prices which characterize the real situation of the steel market, a continuous adaptation of the price-lists for every price-variation, however small, is practically inexecutable. Furthermore, the more efficacious control system, introduced by Decision 3–54, permits immediate action whenever discriminatory practices are suspected.

Whereas the Counter-Memorial has been notified to the Government of the Italian Republic on March 20, 1954, in accordance with Article 33, paragraph 2, of the Rules of the Court;

Whereas the Reply has been filed in the Registry of the Court within the time-limit prescribed by Order of the President of the Court of March 20, 1954, and whereas it has been notified to the High Authority on May 3, 1954, in accordance with Article 33, paragraph 2 of the Rules of the Court;

Whereas the Rejoinder of the High Authority has been filed in the Registry of the Court within the time-limit prescribed by Order of the President of the Court of May 4, 1954, as prolonged by Order of June 2, 1954 and whereas it has been notified to the Government of the Italian Republic on July 13, 1954, in accordance with Article 33, paragraph 2 of the Rules of the Court;

Whereas after the submission of the Rejoinder on July 12, 1954, the written procedure was closed in accordance with Article 34, paragraph 1, of the Rules of the Court;

Whereas the President of the Court has, in accordance with Article 34, paragraph 1 of the Rules of the Court, designated, on July 12, 1954, the Judge Riese as Judge Rapporteur;

Whereas the Judge Rapporteur has, in his preliminary report, concluded that the case did not necessitate instructions;

Whereas the Court has, in accordance with Article 34, last paragraph, of the Rules of the Court, after consultation of the Advocate General, decided to open the oral proceedings without instruction of the case;

Whereas the President of the Court has, in accordance with Article 45, paragraph 2 of the Rules of the Court, fixed the date of the session for the oral proceedings on November 3, 1954;

Whereas public hearings were held on November 3, 4, 5, 8, 10 and 11, 1954;

Whereas in the course of these hearings the Court heard the parties;

Whereas at the request of the Government of the Italian Republic formulated at the hearings of November 3 the Court of Justice has by Order of November 6, 1954

> "requested the High Authority to transmit to the Court within 24 hours the minutes and the opinions of the Consultative Committee concerning this case, and authorized the High Authority, by way of exception, to suppress therein the names of the participants and all the references which would make possible the identification of the proponents of the different opinions";

Whereas the High Authority has complied with this Order within the prescribed time-limit;

Whereas at the public session of November 11, 1954, the Advocate General has, according to the procedure provided for in the Articles 11 and 21, last paragraph of the Protocol on the Statute of the Court, concluded that the Appeal should be rejected;

Whereas the President of the Court has, in accordance with Article 50, paragraph 2, of the Rules of the Court, declared the oral proceedings closed, at the session of November 11;

As regards the Law

Whereas the Court bases its judgment on the following considerations:

(1°) *Concerning the Admissibility*

The parties do not raise any estoppel for non-admissibility. In the present case, the Court is of the opinion that this question does not have to be examined ex officio.

The Court, in accordance on this question with the Advocate General, admits the possibility of a single Appeal against the three Decisions; under

these conditions it will examine the grounds of the Appeal in so far as they, in the opinion of the Court, concern each of the three Decisions ;

(2°) *As for the Merits*

The Plaintiff opposes the Decisions 1–54, 2–54 and 3–54 on the grounds of Violation of the Treaty and Détournement de pouvoir.

A.—THE GROUND OF VIOLATION OF THE TREATY

I. *As for Decision* 1–54

(1°) Decision 1–54 introduces a clear distinction between publication and discrimination, creating thus two kinds of infractions, namely the offense of discrimination, on one side, and the infraction of the regulations on the publication of prices on the other side. Yet, while the Court admits that there exists a connection of finality between the two paragraphs of Article 60, the Court sees no Violation of the Treaty in this distinction. Indeed, the Treaty does nowhere provide that every infraction of the regulations on the publication of prices constitutes at the same time one of the practices prohibited by Article 60, paragraph 1. Especially where the prohibition of discriminatory practices is concerned it is undeniable that the fact of deviating, to whatever extent, from the prices or conditions provided for by the price-list of an enterprise does not constitute a discrimination when it concerns a singular transaction or when the same deviation is applied to all comparable transactions. Decision 1–54 is thus consistent with the Treaty on this point. One could, on the other hand, observe that Decision 30–53 was objectionable because, without expressly admitting proof to the contrary, it declared discriminatory certain transactions which in fact were not vitiated by this defect.

Also ill-founded is the reproach that the absence of any precise definition of singular transactions and of comparable transactions opens the way to discriminations, facilitates them instead of acting against them, and robs of its contents the notion of discriminatory practices. It is true that the old system of keeping strictly to the published prices seems to have aimed at the exclusion of every discrimination, except of course in the case of an enterprise deliberately violating its obligations ; on the other hand, under the new system it is theoretically possible that an enterprise commits, in good faith, a discrimination when it erroneously supposes that a transaction is non-comparable or singular ; indeed, the new system leaves it to the enterprise itself to appreciate the singular or non-comparable character of the transaction. However, Decision 1–54 lays the burden of proof upon the enterprises ; if they can not prove the singular or non-comparable character of the transaction they will be held responsible for their error and be subject to the sanctions provided for in Article 64. Finally, it must be admitted that the notion of singular or non-comparable transactions does not easily lend itself to abstract definition. It is indeed possible that transactions concluded with an interval of only one day constitute non-comparable transactions, if in the meantime the market has undergone a complete change ; on the other hand, it is possible that two transactions are comparable although concluded several weeks apart, if the market has remained stable during

this time. Comparability can therefore only be appreciated in relation to the market situation ; likewise, the singularity of a transaction can only be admitted on the ground of the circumstances which characterize the transaction. The two characters—comparability and singularity—can be objectively ascertained by the enterprises and by the High Authority, and therefore the system in question does not rob the notion of discrimination of its contents ; on the contrary, it makes it possible to act against any discriminatory practice. From the above-mentioned it also follows that Plaintiff's argument that only simultaneous transactions are still submitted to the obligation of identical prices and conditions of sale does not rest on any ground.

(2°) Decision 1–54 does not abolish the obligation to publish the prices ; on the contrary it expressly maintains it. The objection that the Decision violates the regulations on the publication of prices and eliminates the principle of publicity as a means of preventing prohibited practices, is therefore without ground. When considering Decision 2–54, the Court will examine whether the fact of allowing deviations and of exempting the enterprises from a new publication within certain limits is consistent with the Treaty in any case, this fact can not be used as an argument against Decision 1–54 which leaves the principle of publication unimpaired.

(3°) Decision 1–54 does by no means abolish the sanctions in case of discrimination. If comparable transactions are concluded at different prices and conditions of sale, the sanctions provided for in Article 64 are still applicable.

(4°) Finally, Plaintiff's argument that Decision 1–54 instead of giving a definition of prohibited practices legalizes certain practices that were illegal under the old system is ill-founded. It has been explained above that Decision 1–54 gives a new definition of prohibited practices by separating the regulations on non-discrimination from the regulations governing the publicity. If, under the new definition, practices that were prohibited before, namely the deviations from the published prices, are now admitted, it nevertheless prescribes that these deviations have to be uniformly applied to all comparable transactions, while an exception is made for singular transactions which can not yield a discrimination. The principle of the prohibition of all discriminatory practices is therefore strictly respected. Decision 1–54, while it abandons the previous automatic system, remains within the framework of defining prohibited practices.

For these reasons, Decision 1–54 does not violate the Treaty ; consequently the Appeal for annulment submitted against this Decision, inasmuch as it is based on the ground of Violation of the Treaty, must be rejected.

II. *As for Decision* 2–54

The Court is of the opinion that Article 1 of Decision 2–54 is not consistent with the Treaty in so far as it permits the enterprises to apply an average upward or downward deviation between the published prices and the prices actually applied, without previous publication of the modifications to the price-lists. This Violation of the Treaty results from what follows:

(1°) Before interpreting in detail paragraph 2 of Article 60 of the Treaty, it is necessary to examine the objectives which the High Authority has to

pursue when it defines the discriminatory practices and when it regulates the publication of prices and conditions of sale.

(*a*) The Articles 2, 3 and 4 of the Treaty, referred to at the beginning of paragraph 1 of Article 60, constitute fundamental dispositions establishing the common market and the common objectives of the community. Their importance results clearly from Article 95. When giving the High Authority competence to define prohibited practices, the Treaty compels it to take into account all the objectives prescribed by the Articles 2, 3 and 4. This results from the explicit reference to these Articles made at the beginning of Article 60. When defining prohibited practices the High Authority has therefore not only the right but also the obligation to bear in mind the action against agreements among producers and the preoccupation to promote the establishment of the lowest possible prices under the conditions mentioned in Article 3 of the Treaty, and also the action against unfair competitive practices and discriminatory practices. For these reasons the Court can not except Plaintiff's proposition that Article 60 refers only to actions against discriminations, whereas the action against agreements is only of the resort of Article 65 and the promotion of the lowest possible prices of the resort of Article 61. It is true that Articles 65 and 61 of the Treaty empower the High Authority to act directly against agreements and against an increase of prices, but it follows from the Treaty (among others from Article 57 regarding production) that the High Authority before making use of the direct means of action must preferably employ " the indirect means of action at its disposal ". In this way, the High Authority can also use its right to define prohibited practices, with respect to prices, in order to prevent practices which are contrary to one of the objectives provided for in Article 60.

On the other hand, it follows from the words " in particular " (in the first paragraph of Article 60) that Article 60 chiefly refers to unfair competitive practices and discriminatory practices.

(*b*) Especially where the role is concerned which the Treaty assigns to the publication of the price-lists, the Court ascertains, in agreement with the Advocate General, that the compulsory publication is provided for in the Treaty in order to achieve the following three aims :

(1°) prevent as much as possible the prohibited practices ;

(2°) give to the buyers the opportunity to acquaint themselves with the exact prices, and also to participate in the control of discriminations ;

(3°) give the enterprise the opportunity to know exactly the prices of their competitors in order to give them the possibility to align their prices.

Although publicity is required for the abovc-mentioned purposes, the Treaty does not consider it, however, sufficient to guarantee the actual achievement of these aims ; publicity is but one of the means provided for in the Treaty.

The publication of price-lists is under the jurisdiction of Public Law, since the consequences with regard to Private Law have not been regulated by the Treaty. However, this character of Public Law,

justly pointed out by the Advocate General, is not in opposition with Plaintiff's proposition that the publication of price-lists must also have legal consequences with regard to third persons, namely with regard to the enterprises that want to align their prices with those of their competitors. It is this result, inherent in the publication of price-lists, that distinguishes this publication from the simple information gathered by the High Authority according to Article 47, and likewise from the publication of statistical documents gathered by the High Authority according to Article 46. If the publication were not intended to inform the general public, one could not explain why the Treaty does not simply state " that the price-lists have to be communicated to the High Authority ".

(2°) In its first paragraph, Article 60 prohibits directly and imperatively certain practices; the High Authority is empowered to define them, but it can not infringe upon the principle of their prohibition.

Paragraph 2 of Article 60 provides for the compulsory publication of price-lists " for the above purposes ". These words clearly indicate the instrumental character of the following provisions concerning the publication of prices. This publication is imperatively provided for; it is considered as an appropriate means to achieve the ends enumerated in the first paragraph. Hence it is only a means that is concerned, but a means imperatively prescribed in the Treaty and not a means which could be replaced by any other means eventually susceptible to achieve the same results.

This obligatory character of the publication of the price-lists follows also from the words " shall be published ". The Court is therefore bound to interpret the obligation to publish the price-lists and conditions of sale in the sense of a strict legal rule upon which no infringement is permitted; the obligation is absolute and has to be obeyed integrally.

The Court does not accept Defendant's opinion that the expression " être rendu public " is less strong than the expression " être publié ". Indeed, in the last two paragraphs of Article 46, the Treaty uses those two expressions as equivalent. In any case, publication has to be made in such a way that all the participants in the market (eventual future buyers and competitors) are in a position to know the prices; such a publication alone is consistent with the objectives for which it was provided.

(3°) Paragraph 2 (*a*) does not expressly say at what moment the price-lists and conditions of sale are to be published. One has only to read paragraph 2 (*b*) concerning the methods of quotation to understand that the price-lists are previous to all sales taking place on the common market.

Indeed, letter (*b*) of paragraph 2 of Article 60 specifies that the methods of quotation applied must not have the effect of introducing into the practiced prices increases over the prices " indicated by the price-list "— which confirms again that the price-lists contain a list of prices at which the products are offered which permits the exact calculation of all legal transactions; it confirms furthermore that those price-lists have to be published previous to their application.

Moreover, paragraph 30 No. 2 of the Convention containing the Transitional Provisions stipulates that the prices charged by the enterprises for the sales of steel on the Italian market may not be lower than the prices

indicated in the price-lists for comparable transactions. This provision confirms that the price-list constitutes only a list of prices at which the products are offered for sale, price-list which is previous to any sales contract.

The Treaty is, for that matter, very specific in its use of terms where it mentions " the price-lists " and not " price-lists ". The mentioned price-lists do not constitute documents that are proper to the Treaty alone and especially established in view of the objectives of the Treaty, but they constitute documents of a type universally accepted by trade practice and which, in accordance with this practice, have always, although in a general or provisory way depending upon the case, the character of an offer to contract on the basis of the price mentioned therein.

The price-lists do not lose this character of an offer to contract although the Treaty assigns to them objectives of public interest recognised by its provisions. There is therefore no doubt that the expression " price-list " retains in the Treaty its usual meaning and refers to the prices on the basis of which the enterprises declare themselves ready to sell their products.

This interpretation is furthermore confirmed, and on this point the Court agrees with the opinion of the Advocate General, by the fact that the text of Article 60, paragraph 2, distinguishes between applied prices and practised prices, as this last expression, used under letter (*b*) of the second paragraph of Article 60, designates the prices at which the transactions are actually concluded. It appears therefore that the expression " prices applied " designates the prices of the offer of the sellers, although it would have been clearer if the Treaty had used for this the words " prices to be applied ".

The High Authority, for that matter, seems to have always interpreted the Treaty in this sense in the previous Decisions as well as in Decision 2–54, because it is stated in Article 4 of Decision 31–53, as well as in Article 3 of Decision 2–54, that the price-lists and conditions of sale enter into force " at the soonest five full days (one day, according to Article 3 of Decision 2–54) after having been addressed, in print, to the High Authority ".

It follows also from the preambles of Decision 2–54 that the High Authority's starting point is the idea of a previous publication of the price-lists ; after stating in the second preamble that the price-lists must express the price-level clearly established by the market, the third preamble refers to certain facilities that one intends to accord to the enterprises, and to those facilities the fourth preamble adds a new one which consists in a reduction to the minimum of the time-limit for the entering into force of the new price-lists. But it would be difficult to consider this as a facility if the price-lists were only to reflect " ex post " the market-evolution. One can only speak of a facility if one accepts the thesis of previous publication, because only then will the enterprises benefit by not having to wait several days before being able to conclude sales-contracts on the basis of the new prices.

It must therefore be admitted that the publication of the price-lists must by all means be made before the enterprises can apply the new prices.

Furthermore, it results from the foregoing considerations that the words " price-list " always designate published price-lists. On this point also

the Court agrees with the opinion of the Advocate General. Defendant's suggestion to understand the word " price-list " in a sense irrelevant on this point, is not accepted by the Court.

(4°) After having ascertained that the price-lists and conditions of sale have to be published previous to their application on the common market, it remains to be decided whether the Treaty requires the publication of the exact prices or whether it is sufficient to publish average or approximate prices. There is no doubt that the Treaty prescribes a publication of exact prices in the form of price-lists. This follows from the objective which the publication of prices should achieve : information given to buyers has only value for them if it informs them at what prices they can buy. Likewise publication must make alignment possible and this alignment should be done with the exact prices of the competitor. The alignment is a right granted to the enterprises by the Treaty, and not only a facility which can only be exercised if the enterprises are able through other less or more fortuitous means to acquaint themselves with the prices practised by their competitors.

Since the Treaty imperatively prescribes, for the above-mentioned reasons, the previous publication of the exact prices, it follows that the competence granted to the High Authority to establish the extent and the form of the publication does not empower it to impair the principle of the compulsory publication of the exact prices.

Having regard to the imperative character of paragraph 2 (*a*) of Article 60, and in the absence of any text to the contrary, the power granted to the High Authority by the parenthesis " , to the extent and in the form prescribed by the High Authority,", can not be interpreted in a sense which would permit the High Authority not to publish the price-lists. The parenthesis should be understood to mean that the High Authority is empowered to determine the content of the price-lists. But this content should answer the public interest, so that the High Authority is only competent to prescribe minimum requirements for the outline of the price-lists.

In other words, the expression " , to the extent and in the form prescribed by the High Authority," does indeed empower the High Authority to prescribe the extent that is to say the scope of the publication insofar as it concerns the regulation of its modalities ; the High Authority shall be allowed, for example, to prescribe, like it has done, the time-limit for the entering into force of the new price-lists, to establish that certain rebates—such as the rebate for second choice, etc.—have to be mentioned in the price-lists, to decide if the leading-costs have to be published or not. On the other hand, under the system imposed by the Treaty all that is indispensable for the knowledge of the exact price must necessarily be mentioned in the price-list. The fact that publication of price-lists has to take into account the objectives, which according to the Treaty this publication should pursue, does not allow the acceptance of the thesis of the High Authority that it has the competence to prescribe, at its own discretion, what is to be published and what not. According to this thesis, which the Court rejects, there would be no limit as for the indications that can be exempted from the obligation to publish. The High Authority could then allow margins much more important, and one does not see

where this would end ; it could prescribe a simple publication by degrees (e.g.: prices 80 to 120) or even no publication at all for prices of whole categories of products—in one word, it could put aside the principle of the compulsory publication, principle provided for in the Treaty.

Finally, if it is true that the power of the High Authority in this matter is a regulating one for what concerns the minimum requirements to be fufilled by the price-lists, this is true also with regard to the scope of the publication itself. It is not enough, therefore, to make sure that the price-lists are communicated to the High Authority ; if it were so, the Treaty would simply have mentioned this obligation. The price-lists have to be published and the power of the High Authority to prescribe " the extent and the form " implies for it the obligation to watch that the extent and form in which the price-lists are published and placed at the disposal of the public in general answer sufficiently the needs of the public interest.

The text of Decision No. 31–53 had been drafted with extreme care ; its first Article declares that the enterprises of the steel industries have to publish their price-lists and conditions of sale, and also every subsequent modification, in accordance with the provisions of the Decision ; Article 2 then enumerates the very precise indications which the price-list should contain, thus interpreting in a reasonable way the words " extent " and " form " used in the Treaty ; Article 4 prescribes that the price-lists enter into force at the soonest five full days after having been addressed to the High Authority and that they have to be communicated by the seller, on demand, to all persons interested.

On the other hand, Article 1 of Decision 2–54 establishes not the extent to which the price-lists have to be published by the enterprises, but the extent to which the High Authority authorizes the non-observance of the published price-lists. This is in opposition with Article 60, paragraph 2 of the Treaty.

It should be mentioned furthermore that the interpretation adopted by the Court is supported by the fact that the High Authority may determine the extent of the publication after consultation of the Consultative Committee only, whereas, for the definition of the prohibited practices, it has to consult also the Special Council of Ministers. This is understandable if the High Authority, when it determines the extent of the publication, has to abstain from impairing the principle of the exact compulsory publication of the prices and conditions of sale. If the Treaty had wanted to grant it more freedom and accord to the High Authority the right to depart from this principle, it would have been logical to subordinate this power also to the consultation of the Council.

(5°) It remains to be examined whether the result to which the study of the text and of the ratio legis have brought the Court is not in opposition with other objectives of the Treaty or if it is susceptible to be invalidated by other considerations. This is not the case. It should in the first place be repeated that the system of previous publication of exact prices constitutes the imperative principle prescribed by paragraph 2 of Article 60. It follows that this principle can not be eluded, not even for the benefit of a system better adapted to the objectives in view. It is not the task of the Court to give its opinion about the opportuneness of the system imposed by the

Treaty nor to suggest a revision of the Treaty, but according to Article 31, the Court is bound to ensure the rule of Law in the interpretation and application of the Treaty.

(*a*) The objection that the control by the buyers does not operate when prices go down is not pertinent, because the publicity is not only intended to permit this control but also to place the buyers in a position to acquaint themselves with the exact prices and to permit alignment by the enterprises. This objection, therefore, does not suffice to justify abandonment of the principle of publication prescribed by the Treaty.

(*b*) The Defendant has insisted on the danger of agreements among producers, danger reputed to be inherent in the previous system. But it has not been proved that this danger is removed by the introduction of the average margin. Even if the new regime could have a certain usefulness for diminishing this risk, this would not justify neglect of the other objectives which the publicity should pursue. The Treaty, for that matter, permits the High Authority to intervene with other means, when it learns that agreements have been made.

(*c*) The market situation, namely the ascertainment of a tendency to a fall in prices, can not justify either the abolition of the principle of price-publication, since this publication is prescribed by the Treaty. In case of crisis or perturbation of the market, the Treaty confers different powers upon the High Authority—namely in Article 60, paragraph 2 (*b*) in fine, Article 61, Article 63, Articles 58 and 59—but nowhere does the Treaty provide for the abolition of the compulsory publication of the price-lists. For that matter the principle of the compulsory publication prescribed by the Treaty has a general character and does in no way depend on the economical situation.

(*d*) The Court has been especially preoccupied by the principle of free price-formation. It can not, however, justify another Decision. The Treaty starts from the idea that the free price-formation is guaranteed by the freedom given the enterprises to fix their prices themselves and to publish new price-lists when they want to modify them. If the economic situation changes, the producers are forced to adapt their price-lists, and it is in this way that " the market makes the price ". But, although the Treaty starts from the idea of a free price-formation, it should not be forgotten that the Treaty forbids all discriminations and that it provides for the right of alignment. For these reasons the Treaty has established the principle of the compulsory and previous publication of the price-lists and conditions of sale. The Court has to abstain from giving its opinion about the opportuneness of this system, it can only ascertain that it has been prescribed by the Treaty which—rightly or wrongly—does not contain a text which permits a certain flexibility of the price-lists in the case of minor or passing fluctuations.

(6°) The Plaintiff has, for the first time in its Reply, put forward that the new system permits the enterprises to keep secret during sixty days the discriminatory transactions. The Defendant considers this to be a new ground which should not be admissible according to Article 29, paragraph 3 of the Rules of the Court.

The Court is of the opinion that this argument sustains the ground of Violation of the Treaty, which ground has already been put forward in the Application and which can not be declared non-admissible. Furthermore,

the above-mentioned argument is ill-founded, considering the obligation provided for in Decision 3–54 which prescribes the communication of bi-weekly reports.

Furthermore, the Plantiff has put forward the following grounds:

(7°) The ground that the Consultative Committee has not been consulted in accordance with the legal prescriptions:

The Defendant asks the Court to declare this ground non-admissible because it is not listed in the Application. The Court is of the opinion that this ground has to be examined ex officio, because if it were well-founded an annulment ex officio for Violation of the Treaty and major violation of procedure would be justified.

The minutes of the Consultative Committee which were handed to the Court following its Order of November 6, 1954, prove that the Consultative Committee has been regularly consulted, that it has given an opinion concerning certain modifications to the Decisions 30–53 and 31–53, proposed by the High Authority and that the only point on which the consultation did not reach a conclusion, namely the definition and the exclusion from the price-lists of long-term contracts and public allocations, does not enter into account for the examination of the legality of the Decisions in question.

The minutes contain a series of views which the High Authority, in accordance with the Consultative Committee, could rightly consider as an opinion.

On this point the Court agrees with the findings of the Advocate General.

(8°) The ground of insufficient motivation of the Decisions in question resulting from the omission of dissenting opinions.

This ground based on a violation of procedure has only been put forward in the Reply. For this reason, as the Public Order does not necessitate an examination ex officio, the Court, in agreement with the Advocate General, declares this ground non-admissible, in accordance with Article 29, paragraph 3 of the Rules of the Court.

(9°) Furthermore, the Court has examined ex officio the question whether Article 1 of Decision 2–54 constitutes a major violation of procedure. According to its text this Article defines only the conditions under which the new price-lists have to be published. However, when this Article is brought into connection with Decision 1–54, it can be asked if it does not indirectly complete the definition of prohibited practices. If this were the case, the Council should have been consulted in accordance with Article 60, paragraph 1. As such an official consultation has not taken place and can not be replaced by a simple information of the Council by the High Authority, Article 60, paragraph 1, might have been violated. However, the Court is of the opinion that Article 1 of Decision 2–54 does not contain a complement to the definition of discriminatory practices, nor an indirect definition, but is limited to regulating the system of publication of price-lists.

(10°) The reference made in Article 2 of Decision 2–54 to its Article 1 does not justify the annulment of Article 2, as this reference loses its object following annulment of Article 1.

Plaintiff demands annulment of Article 3 of Decision 2–54. For the above-mentioned reasons the Court is of the opinion that this Article is consistent with the Treaty.

As the other Articles of Decision 2–54 have not been opposed by Plaintiff, there is no reason for the Court to rule on their behalf.

(11°) Plaintiff demands annulment of Articles 1, 2 and 3 of Decision 2–54 for violation of paragraph 30 of the Convention containing the Transitional Provisions. As for Articles 2 and 3 of Decision 2–54, this demand must be rejected on the above-mentioned grounds. If Article 3 of Decision 2–54 which reduces the time-limit set for the entering into force of the new price-lists, forces the Italian enterprises to react more rapidly to eventual modifications of their competitors' price-lists, it does not, however, seriously infringe upon the special protection provided for their benefit.

On the other hand, where Article 1 of Decision 2–54 is concerned, Plaintiff's demand is justified on the following grounds:

Even if one is of the opinion that paragraph 30 of the Transitional Provisions especially aims at prohibiting the alignment with the prices of the Italian enterprises, it does not necessarily follow that this article excluded a protection under different forms. To sustain the opposite would be a real petitio principii because in the absence of a clear and precise text it is also legitimate to admit that the Convention wanted to make the Italian enterprises benefit integrally, exceptionally and temporarily, of the protection which the Treaty provided for them. Its real purpose therefore is to prevent the non-Italian enterprises to compete with the Italian enterprises on the Italian market by applying prices inferior to their own price-lists.

In the opinion of the Court, paragraph 30 of the Transitional Provisions prohibits all sales in Italy below the prices provided for in the price-lists. This prohibition has meaning only if in the other countries of the Community, sales below the prices of the price-lists are exceptionally allowed on the ground of special provisions. Such is the case for the right of alignment provided for in Article 60, paragraph 2 (*b*). On the other hand, the Decisions in question create a new regime—which can be applied to the entire common market—on which grounds sales below the prices of the price-lists are lawful. It must be admitted that this regime remains submitted to the prohibition of paragraph 30 and the more so now this paragraph does not expressly mention the alignment, but uses very general terms. Paragraph 30 must therefore be interpreted in the following sense; even if sales below the prices of the price-lists were by exception lawful, this could not be legal on the Italian market. In the present case, paragraph 30 prohibits to extend to the Italian market the system of deviations from the price-lists. Since Decision 2–54 has not taken this prohibition into account, it violates a legal rule concerning the application of the Treaty.

III. *As for Decision* 3–54

Decision 3–54, whose purpose it is to introduce a system of information and control, is based on Article 47 of the Treaty. This Article permits the High Authority to gather the necessary information for the accomplishment of its mission; Decision 3–54 is therefore consistent with the Treaty. The

fact that the High Authority has combined this system of information with the control of the publicity-system, provided for in Article 60, does not justify any objection.

If Decision 3–54 is apparently intended to complete the system of deviations, introduced by Article 1 of Decision 2–54 and declared above inconsistent with the Treaty, it is not, however, by itself in opposition with the Treaty ; consequently, there are no grounds for its annulment, although it evidently becomes inoperative and without object, because of the annulment of the first Article of Decision 2–54.

B. THE GROUND OF DETOURNEMENT DE POUVOIR

In agreement with the findings of the Advocate General, to which it refers, the Court is of the opinion that the ground of détournement de pouvoir cannot be admitted against the Defendant on account of the Decisions in question.

It has been said above that the High Authority, when it fulfills its duty to act primarily against the unfair competitive practices and against discriminatory practices, has the right and the obligation to take into account also the prohibitions resulting from the Articles 2, 3 and 4 ; one cannot blame it for having acted in that manner.

Even if the Decisions in question have been partly inspired by the idea of introducing a regime that had greater chance to be respected by the enterprises than the previous one, one cannot conclude from this that the new regime was intended to legalize the previously committed infractions. In any case it is evident that the Decisions were especially directed towards the achievement of the objectives laid down by the Treaty. Even if an unjustified motive, such as the avoidance of the penalization of the guilty enterprises, had been among the motives justifying the action of the High Authority, these Decisions would not therefore be vitiated by Détournement de pouvoir, when they do not sacrifice the essential objective i.e. prohibition of unfair competitive practices and discriminatory practices. The Court is of the opinion, for the above-mentioned reasons that the Decisions do not sacrifice these objections.

C. EXHIBITION OF DOCUMENTS ON THE GROUND OF ARTICLE 23 OF THE STATUTES OF THE COURT

The Plaintiff has asked at the hearing of November 3 that the Defendant be requested to exhibit all the documents pertaining to the case, in accordance with Article 23 of the Protocol on the Statute of the Court. By Order of November 6, 1954, the Court has required the High Authority to hand to the Court the minutes and opinions of the Consultative Committee concerning the case, reserving itself the right to decide later on the eventual prohibition of the minutes of the Special Council of Ministers and of the High Authority. If the exhibition of the latter has not been expressly required, it was nevertheless implicitly included in the demand for exhibition of all documents concerning the case. The Court judges this demand admissible ; indeed the Plaintiff was entitled to expect that the execution

of the obligations resulting from Article 23 of the Statutes had been assured; furthermore, it was only at the beginning of the oral proceedings that the Plaintiff was able to determine that the High Authority had not transmitted all the documents to the Court.

The Court ascertains that the Defendant was under obligation to transmit to the Court the minutes of the High Authority in accordance with Article 23 of the Statute of the Court of Justice. At its demand the Court would have authorized the suppression of all the names of the speakers; and eventually would have ordered a session in camera for the discussion of these documents.

However, the Court does not judge it necessary to order the production of these minutes, nor of the minutes of the Special Council of Ministers; indeed, the documents exhibited by the Defendant are sufficient, in this case, to inform the Court about the objectives pursued by the High Authority.

D. COSTS AND REMANDING OF THE MATTER TO THE HIGH AUTHORITY

(1°) On the ground of Article 60 of the Rules of the Court a party which is proved wrong shall be condemned in the costs. The Court can, however, according to paragraph 2 of this Article, totally or partially compensate the costs if the parties are both proved wrong on one or more grounds.

In the present dispute the Plaintiff has partly won its case and on an important ground, namely the annulment of Article one of Decision 2–54 which introduced the system of the average deviation from the prices published in the price-lists. Under these conditions, the Court is of the opinion that it would be just to give the Plaintiff the right to have half of its costs reimbursed by the defendant.

(2) According to Article 34 of the Treaty, in case of annulment, the matter is remanded to the High Authority, which must take the necessary measures in order to give effect to the judgment of annulment.

In as far as the Appeal is declared well-founded and considering the interest represented for Plaintiff by a Decision on the grounds put forward, this provision remains applicable, notwithstanding the fact that Article 1 of Decision 2–54 cannot be formally annulled, now that this Article has been previously annulled, although that annulment was pronounced on the same date as this judgment.

Having considered the Pleadings;

Having heard the Parties;

Having heard the findings of the Advocate General;

Having regard to Articles 31, 33, 34 and 60 of the Treaty;

Having regard to the Protocol on the Statute of the Court of Justice;

Having regard to the Rules of the Court and to the Rules of the Court concerning the Costs;

THE COURT

rejecting all further submissions and all submissions to the contrary, finds and decides:

The Appeal for annulment of the first Article of Decision 2–54 is declared well-founded where Violation of the Treaty and of the Convention containing Transitional Provisions is concerned ; the matter is remanded to the High Authority for all necessary measures.

The Appeal for annulment of the Decisions 1–54 and 3–54 and of the Articles 2 and 3 of Decision 2–54 is rejected.

The Plaintiff is entitled to have its costs reimbursed by the Defendant, while the latter supports its own costs.

Thus done and judged by the Court, in Luxemburg, on December 20, 1954.

PILOTTI, SERRARENS, HAMMES, RIESE, DELVAUX, RUEFF, van KLEFFENS.

Read in public session in Luxemburg, on December 21, 1954.

The President,
PILOTTI.

The Judge Rapporteur,
RIESE.

The Registrar :
VAN HOUTTE.

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