

# OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 5 DECEMBER 1979 <sup>1</sup>

## Summary

|                                                                                                                                             |      |
|---------------------------------------------------------------------------------------------------------------------------------------------|------|
| 1. The nature of the applications and the arguments relied upon . . . . .                                                                   | 1036 |
| 2. The factual context of Commission General Decision No 962/77/ECSC . . . . .                                                              | 1036 |
| 3. The decision and the subsequent measures . . . . .                                                                                       | 1038 |
| 4. The limitations upon the review of the legality of the decision . . . . .                                                                | 1039 |
| 5. The condition concerning the existence or imminence of the crisis (Article 61 (b) of the ECSC Treaty) . . . . .                          | 1042 |
| 6. The relationship between Article 58 and Article 61 . . . . .                                                                             | 1044 |
| 7. The condition concerning the necessity of the decision in order to attain the objectives set out in Article 3 (Article 61 (b)) . . . . . | 1044 |
| 8. Article 61 and the level of the minimum prices . . . . .                                                                                 | 1047 |
| 9. The decision in the light of Article 2 . . . . .                                                                                         | 1049 |
| 10. The decision in the light of Articles 4 and 5 . . . . .                                                                                 | 1051 |
| 11. The alleged breach of fundamental rights . . . . .                                                                                      | 1054 |
| 12. The alleged infringement of the principle of proportionality — The gaps in the system . . . . .                                         | 1054 |
| 13. The submission of misuse of powers . . . . .                                                                                            | 1059 |
| 14. The submission of infringement of essential procedural requirements . . . . .                                                           | 1060 |
| 15. The theory of the implied repeal of the decision as regards the undertakings belonging to the UCRO . . . . .                            | 1063 |
| 16. The question of alignment on the prices of foreign producers . . . . .                                                                  | 1064 |
| 17. The question of mitigation on account of <i>force majeure</i> , legitimate defence, state of necessity . . . . .                        | 1067 |
| 18. Particular problems raised by individual applicants . . . . .                                                                           | 1072 |
| 19. The amount of the pecuniary sanctions . . . . .                                                                                         | 1079 |
| 20. Conclusions . . . . .                                                                                                                   | 1081 |

<sup>1</sup> — Translated from the Italian.

*Mr President,  
Members of the Court,*

1. The present cases arise from applications submitted under Article 36 of the ECSC Treaty by iron and steel undertakings from various Member States, which produce concrete reinforcement bars. The purpose of the applications is to obtain the annulment of individual decisions whereby the Commission imposed pecuniary sanctions on the applicants for infringement of the rules on compulsory minimum prices. Those rules were introduced under Article 61 of that Treaty by General Decision No 962/77 of 4 May 1977. Almost all of the applicants admit to having charged prices lower than those fixed by the Commission for sales during 1977 (however, the sales made by the applicants Rumi and Feralpi took place during the first months of 1978); the disputes as to whether the individual decisions impugned are factually well-founded concern only the scale of the underpricing, or the quantities of products in relation to which the fines were calculated proportionately. Thus the case raises mainly questions of law, and in that regard the principal submissions and arguments relied on by the majority of the applicants seek to prove that the aforesaid general decision setting up the system of minimum prices was "illegal". The illegality is alleged for the purposes referred to in the last paragraph of the said Article 36, that is to say "in support of" the applications made against the individual decisions imposing fines.

According to the undertakings concerned, Decision No 962/77 manifestly contravened the Treaty and the general principles of Community law and was,

moreover, vitiated by misuse of powers and by infringement of essential procedural requirements. In the alternative (or, in a few cases, as a principal claim) some applicants plead specific defects in the individual decisions impugned, or maintain that their conduct was lawful, because the prices charged were the result of a *de facto* alignment on prices in non-member countries, or because the failure to comply with Decision No 962/77 was justified by the existence of a state of necessity, or on grounds of legitimate defence or *force majeure*. Finally, in most cases, the undertakings concerned have added a further claim in the alternative to the effect that the decisions concerning them should be amended by way of a reduction in the amount of the fines.

2. Before going on to consider the numerous matters raised in the applications, it will be convenient to reconstruct briefly the context in which the Commission adopted the general decision fixing minimum prices, and the function assigned to that decision.

There is no doubt that Decision No 962/77 came at a time when the Community iron and steel industry, taken as a whole, was (as it still is) in serious difficulties. As from 1975 a fall in production took place which became progressively more serious in the course of the year, and which was calculated at around 20% in relation to the previous year. After a slight recovery in 1976 production fell again in 1977. According to the information supplied by the Commission, which is not disputed by the applicants, the rate of utilization of productive potential throughout the Community did not exceed 65% in that year. The quantitative recession was

accompanied by a fall in the level of prices, whilst production costs continued to rise; the result was that for many undertakings prices were no longer able even to cover the manufacturing costs. After the introduction of short-time working in the first half of 1975, a reduction in the labour force was subsequently undertaken between July 1975 and July 1976, which reached a total of 25 000 workers (I am still referring to the figures given by the Commission) throughout the Community iron and steel industry. A further reduction on the same scale took place in 1977.

In the course of 1975 the Commission had begun to consider the advisability of introducing a system of minimum prices for all iron and steel products and had requested the opinion of the Council and of the Consultative Committee on the matter. It had also informed the undertakings that the development of prices would be monitored (Communication of 2 May 1975 in Official Journal C 100) and had introduced an obligation to provide certain information about production and employment (Decisions No 1272 of 16 May 1975 and No 1870 of 17 July 1975). The brief economic improvement which took place at the beginning of 1976 persuaded the Commission that satisfactory results could be attained by non-coercive measures, that is to say by attempting to guide the production and pricing policy of the producers, on the basis of voluntary undertakings entered into by those producers in the context of preventive programmes of a non-compulsory nature. Thus on 23 and 24 December 1976 the Commission published two further communications

(Official Journal C 303 and C 304). The first (entitled "common steel policy") described the lines of action to which it intended to adhere in relation to the analysis and monitoring of the market, investments, specific crisis measures concerning production and prices, relations between the Community and non-member countries on the steel market, and social and regional problems. In particular, as regards the question of prices, that communication stated that "If the Commission finds that its quantitative policy is not yielding the results hoped for, and ... the Commission can see that it is necessary to bring in further measures, the Commission could publish minimum reference prices before any later recourse to minimum prices as referred to in Article 61 of the Treaty". In the second communication, which expressly referred to Article 46 of the ECSC Treaty and which dealt with the "application of the crisis measures on the steel market", the Commission announced its intention of making detailed forecasts for deliveries on the Community market of certain steel products (beams, wire rod, reinforcing bars, other merchant bars, heavy and medium plate and cold-rolled sheet), subdividing those forecasts by enterprises or groups of enterprises, and inviting each enterprise or group of enterprises to enter into a confidential undertaking to limit voluntarily such deliveries "to the level which will be communicated to it individually".

This programme of non-coercive guidance, designed to bring about a better balance between supply and demand, was reasonably successful for five of the products which I mentioned

above. In the corresponding sectors the commitments entered into by the undertakings to respect the delivery targets laid down by the Commission were able to cover approximately 90% of Community production. As regards concrete reinforcement bars, however, those commitments did not cover more than 50% of production. It should be noted that in that sector the reduction in prices had been greater than for the other rolled products, partly because of the installation of more advanced and more economic manufacturing processes by a number of small and medium-sized manufacturers, particularly Italian and German ones. Moreover, in almost all the countries of the Community activity in the construction industry, for which concrete reinforcement bars are made, started to decline in 1974. To that was added the fact that exports of that product to non-member countries decreased appreciably, whilst imports from such countries into the Community increased considerably. All that explains how, in May 1977, the average rate of plant utilization in the sector concerned had fallen to 55% and production had been reduced by 13% between 1974 and 1976, and by a further 8% between 1976 and 1977, with the serious consequence that the industry began to be threatened with lay-offs and short-time working.

However, this picture of crisis was not uniform. Community production of steel bars was in particular difficulty in the large amalgamated undertakings in the north, for which that product constituted only a modest part of a wide range of production. The situation was better for small and medium-sized undertakings, which had devoted themselves exclusively or mainly to the manufacture of steel bars, and which for the technical and organizational reason already indicated succeeded in producing at considerably lower cost than large-scale

undertakings, thus increasing their share of the market. In this regard it must be borne in mind that, of the total Italian production of steel bars (which represents approximately half of the Community's production), over 70% is the work of small and medium-sized undertakings, which are concentrated largely in the region of Brescia. It may therefore be said that at least a third of the Community's concrete reinforcement bar industry succeeded in avoiding the adverse effects of the crisis, but that that took place to a certain extent at the cost of aggravating the sales difficulties encountered by the other undertakings.

3. In that situation the Commission considered that the conditions laid down by Article 61 (b) of the ECSC Treaty for the introduction of compulsory minimum prices within the Common Market were satisfied. By Decision No 962 of 4 May 1977 it therefore imposed such prices upon the Community producers for their sales of concrete reinforcement bars to buyers both within the territory of the Community and within the territory of certain non-member countries (the members of EFTA), which are specifically mentioned in Article 5 of the measure and with which the Community has concluded particular commercial agreements.

The decision, which came into force on 5 May 1977, was to expire on 31 December of the same year. However, at the end of that period, the Commission considered it necessary to extend its validity until 31 December 1978, applying the system of minimum prices to two further iron and steel products: that was done by Decision No 3000/77 of 28 December 1977. At the same time, Decision No 3002/77,

adopted under Article 95 of the ECSC Treaty, required dealers in iron and steel products also to comply with the rules on minimum prices, and Decision No 3001/77 laid down that undertakings should notify their deliveries so as to facilitate an adequate monitoring of the patterns of trade.

Also on 28 December 1977, by Decision No 3003/77, the Commission required producers of iron and steel to issue certificates of conformity in respect of the products covered by Decision No 962/77; and by Recommendation No 3004/77 it supplemented the system of anti-dumping measures, already provided for by Recommendation No 77/329. In this regard, the Commission published on 31 December a communication in which, recognizing that in respect of certain iron and steel products the main cause of the difficulties seemed to lie in importations which amounted to dumping, it announced that as from 1 January 1978 the anti-dumping provisions laid down in the two recommendations (which in the ECSC system, of course, are acts binding as to the objective) would be applied.

Two further measures designed to reinforce the system of minimum prices followed in 1978. Decision No 527/78 of 14 March 1978 prohibited alignment on offers of iron and steel products originating in certain third countries with which the Community has undertaken to co-operate. Decision No 1525/78 of 30 June 1978 required undertakings to lodge deposits in cases in which the Commission established provisionally an infringement of the rules on minimum prices. In addition, the adjustment of

the price levels fixed by Decision No 3000/77 was carried out by Decision No 656/78 of 1 April 1978, followed on 14 June by Decision No 1483/78. It should also be noted that, in the field of measures encouraging voluntary planning, by Decision No 78/711 of 28 July 1978 the Commission authorized 31 undertakings situated in various parts of central-northern Italy (including several of the applicant undertakings to set up an organization ("UCRO") with the principal task of co-ordinating their export sales of concrete reinforcement bars and merchant bars, products which are both subject to the compulsory scheme with which we are dealing. As is stated in the preamble to the said decision, the essential object of that "co-ordination" was to "fairly distribute any orders" originating from other States.

Finally, I would point out that, as Decision No 3000/77 was due to expire on 31 December 1978, the scheme of minimum prices was extended by another year, with certain amendments, by Decision No 3139/78 of 29 December 1978.

4. What are the limitations upon the review which the Court is asked to undertake concerning the legality of General Decision No 962/77? I pointed out at the beginning that the applicants' criticisms are based on the last paragraph of Article 36, which provides: "In support of its appeal (that is to say, the appeal in which the Court has unlimited jurisdiction against pecuniary sanctions imposed upon undertakings pursuant to the Treaty), a party may, *under the same conditions as in the first paragraph of Article 33 of this Treaty*, contest the legality of the decision or recom-

mentation which that party is alleged not to have observed”.

The first paragraph of Article 33 provides that decisions and recommendations of the High Authority may be declared void on grounds of lack of competence, infringement of essential procedural requirements, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers, and adds: “The Court may not, however, examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the High Authority took its decisions or made its recommendations, save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rules of law relating to its application”.

The reference to this provision, contained in the last paragraph of Article 36, undoubtedly means in the first place that the legality of a general decision may be contested by anyone who appeals against a pecuniary sanction, on account of any of the vitiating factors referred to in the first paragraph of Article 33. This is confirmed by the case-law of the Court (see judgments of 12 June 1958 in Case 15/57 *Compagnie des Hauts Fourneaux de Chasse* [1958] ECR 211 and 13 June 1958 in Cases 9 & 10/56 *Meroni* [1958] ECR 133 and 157). It follows *inter alia* that a misuse of powers may be alleged without its being necessary to have recourse to the condition laid down in the second paragraph of Article 33 (namely that the misuse should *affect the applicant*). That is sufficient justification for rejecting the objection of inadmissibility raised by the

Commission against the claim in question, in the context of the applications lodged by the Italian undertakings, and based on the argument that the applicants have not proved that their interests were specifically and directly injured as a result of Decision No 962/77. I would add that, in my opinion, contrary to the Commission’s argument, there exists a current and direct interest on the part of the applicants in obtaining the annulment and the amendment of the individual decisions imposing pecuniary sanctions by establishing the illegality of the aforesaid general decision.

The second consequence that may be inferred from the reference which Article 36 makes to the first paragraph of Article 33 is the restriction imposed upon the Court’s examination of the “evaluation of the situation, resulting from economic facts or circumstances” in the light of which a general decision was taken. The effect of that restriction is that the situation resulting from economic facts or circumstances may be examined, for the purpose of establishing whether there has been an infringement of the Treaty or of other Community provisions, in so far as the Commission is charged with having “manifestly failed to observe” one or the other.

The purpose of that provision is clearly to limit the Court’s power to review choices of economic policy made by the Commission. However, as it is a question of establishing the legality of measures concerning economic policy on the basis of legal criteria which often employ economic concepts, it is not easy to distinguish clearly between review of the legality of a measure and assessment of its merits. The difficulty is reflected in

the unfortunate wording of the provision, which, by using the expression "situation resulting from economic facts or circumstances", has led to a dividing line being drawn between the finding of facts and the evaluation of the economic situation as a whole. In this regard, there is an important precedent in the case-law of the Court, namely the judgment of 21 March 1955 in Case 6/54 *Government of the Kingdom of the Netherlands v High Authority* [1954 to 1956] ECR 103.

It is worth recalling the most significant points of that decision. In the first place, the Court held that in order to examine whether the fixing of maximum prices was necessary a distinction should be made between the ascertainment of the economic circumstances by the High Authority and conclusions drawn by it on the basis of those findings, and that the latter could be subjected to judicial review only in the event of a charge of manifest failure to observe the provisions of the Treaty. Having said that, the Court declared that a manifest failure must have reached a certain degree of gravity "so that the failure to observe the Treaty appears to derive from an obvious error in the evaluation, having regard to the provisions of the Treaty, of the situation in respect of which the decision was taken"; consequently, the Court restricted its inquiry to ascertaining whether there existed an economic situation "which *prima facie* reveals no necessity for the contested measure in the pursuit of the objectives set out in Article 3 of the Treaty".

In conclusion, I think that from the wording of Article 33 (referred to by Article 36) and from the judgment cited the following criteria may be inferred for guidance in this case: (i) The Court may in no case review the mere expediency of a measure concerning economic policy when it is called upon to establish whether the measure was contrary to Community law; that applies particularly where the measure is based on economic forecasts (for example the concept of "imminence of a crisis" referred to in Article 61 (b)); (ii) In order to be able to review the Commission's evaluation of an economic situation which gave rise to the decision impugned, as regards compliance with the ECSC Treaty, the Court must see adequate evidence of a manifest failure to comply with the Treaty; (iii) In such a case, the objective of the judicial review is to ascertain whether the measure taken was manifestly unjustified, taking account of the conditions laid down by the Treaty and of an evaluation of the economic situation as a whole.

It is hardly necessary to add that if the Court were to uphold the charges levelled against the general decision whose legality is contested, the only consequence would be the inapplicability of that decision to the individual decisions impugned, which would thus lose their legal basis. But the annulment of the general decision would not ensue; in this regard both the Treaty and the case-law of the Court leave no room for doubt.

5. Amongst the numerous arguments relied on by the applicants in support of their claim that the Treaty was infringed, I shall begin by examining the criticisms concerning the existence of the legal conditions prescribed by Article 61 for introducing the system of minimum prices. Under that article, the Commission may fix for one or more products subject to the jurisdiction of the ECSC "minimum prices within the Common Market, if it finds that a manifest crisis exists or is imminent and that such a decision is necessary to attain the objectives set out in Article 3".

It should be noted that both the conditions stated are expressly subject to the discretionary appraisal of the Commission: that is shown by the use of the words "*if it finds ...*". Thus there is no doubt, for the reasons which I explained above, that the Court's powers of review as regard the existence or imminence of the crisis and as regards the necessity of the decision impugned for the objectives set out in Article 3 apply only if there has been *prima facie* a manifest failure to comply with the Treaty, and such review must in any case be restricted to establishing whether the Commission's evaluation was manifestly erroneous, so as to be clearly contrary to Community law.

Argument on the subject of the existence or imminence of the crisis was developed by the Italian applicants, and more particularly by the Feralpi undertaking, the applicant in Case 264/78. That applicant denies that the concept of "crisis" or

"threat of crisis" includes a difficult situation affecting only part of a particular sector of production and not applying to the other undertakings in the sector because of their more advanced technology, or because of their better combination of resources and resulting higher productivity. The advent of new techniques and the existence of better-organized producers lead in fact, it is argued, to new stability in the long run through the closure or replacement of old and unproductive plant, with obvious advantages for the industry as a whole.

In this case it is not disputed that at the time of the adoption of Decision No 962/77 Community production of reinforcement bars had fallen off. But the applicants claim that the difficulties facing the large steel-producing concerns in the North, in the sector of production concerned, derived not so much from the reduction in domestic demand as from the outdated organization of their production system. Thus the threat of crisis connected with that situation did not concern the market, which in that respect retained a remarkable capacity of absorption at prices which were still profitable for approximately half of the Community producers. It was the less productive undertakings which were experiencing difficulties (essentially of a financial nature), and the main reason, it is said, lay in their lack of competitiveness on the Community market and *a fortiori* on the international market.

With regard to the concept of crisis adopted in Article 61, I would point out

that it seems that the concept must be associated with the functioning of the market. According to one of the commentators on Article 61 of the ECSC Treaty, "the purpose of minimum prices is to stem a possible fall in prices due either to the structure of the market or to the conjunctural situation, because productive capacity would otherwise be lost which in the long term would prove to be essential for market requirements, and further an appreciable fall in prices could lead subsequently to a sharp increase in the same prices" (see Zimmermann in the ECSC Commentary edited by Quadri, Monaco, Trabucchi, Vol II, pp. 832 and 833). It is clear that the author was referring to a concept of crisis as a *market phenomenon*, which is either conjunctural in nature (a temporary fall in the normal level of demand), or structural (surplus of productive capacity in relation to the normal level of demand). Such a phenomenon necessarily concerns all producers, especially if it is considered from the structural viewpoint, since surplus productive capacity cannot be other than a result of the situation of the Community industry as a whole.

In this case, even though the minimum prices serve directly to protect a proportion of the Community producers of reinforcement bars against the (lawful) competition of the other, more efficient part, it is also true that, by affording the former room for manoeuvre as they attempt to restructure their undertakings and become more competitive, they seek to avoid an excessive reduction in the productive capacity of the Community in that industry and the ensuing repercussions at the level of employment in the Community.

The argument put forward by the applicant Feralpi, to the effect that the introduction of more advanced techniques and the related improvements in productivity result in the long term in the re-establishment of a balanced industry is certainly true; but it is also undeniable that in the short term the less dynamic undertakings may find themselves in serious difficulties. When these difficulties assume or threaten to assume vast proportions, in terms of the number of undertakings affected and of the consequences on their activities and on the level of employment, it is in accordance with the spirit and the system of the ECSC Treaty that consideration should be given to the possibilities of public intervention on the market provided for in exceptional situations, in order to moderate the severity of the effects which the free play of market forces might have in the economic and social spheres.

I would point out further that, in the presence of a situation characterized not only by a surplus of supply over demand, but also and above all by very considerable differences in the level of productivity (and therefore in production costs) between the undertakings in the industry, it is not necessary, in order to recognize the existence or imminence of a crisis within the meaning of Article 61 (b), that the level of prices charged by the more productive undertakings should be so low as to appear abnormal. Nor can such a finding be invalidated in my opinion by the fact that possible errors of forecasting, lack of foresight, negligence or incompetence have had a decisive influence in putting the less productive undertakings in difficulties.

All these considerations lead me to consider that in this case the factors indicative of a manifest failure to comply with the first condition laid down by Article 61 (b) are absolutely lacking. On the contrary, the Commission's conclusion concerning the existence or imminence of a manifest crisis in the factual circumstances which were established appears correct. Therefore, as regards that aspect, the introduction of the intervention measures provided for by Article 61 (b) is justified.

6. Another criticism based on the notion of crisis has been put forward by the applicant Rumi. It maintains that Article 61 permits the introduction of minimum prices only as a preventive measure, whilst in the presence of a manifest crisis recourse should have been had to Article 58 which provides for the adoption of a system of production quotas.

That argument is in my view unfounded. We have already seen that Article 61 (b) confers on the Commission the power to fix minimum prices within the Common Market not only if a manifest crisis is imminent, but also when it is already in existence. Article 58 makes the establishment of a system of production quotas conditional upon the finding that the means of action provided for in Article 57 are not sufficient to deal with the crisis; those indirect means of action encompass the interventions in the sphere of prices provided for by the Treaty, therefore including in particular the establishment of a system of minimum prices under the said Article 61 (b). Thus it is clear that the obligation upon the Commission to establish a system of production quotas arises only in the event of a finding that it is impossible to

remedy the crisis by means, *inter alia*, of intervention in the sphere of prices.

It should be added that in a situation of manifest crisis the adoption of the measures envisaged by Article 58 presupposes in any case that the Commission has undertaken the complex economic analyses necessary in order to conclude that the indirect means of action were insufficient and that it was therefore necessary to have recourse to further measures. Taking into account the wide margin of discretion enjoyed by the Commission, which is inherent in the very nature of such assessments, the assertion that the system of production quotas would operate more efficiently than a measure imposing minimum prices is not sufficient to justify a conclusion that the choice made by the Commission in favour of the latter device was unlawful.

7. I shall go on now to consider whether the second of the two conditions to which Article 61 (b) subjects the introduction of a system of minimum prices was satisfied, namely whether it was possible in this case to say that that type of measure was necessary "to attain the objectives set out in Article 3". Many applicants, in particular the Italian undertakings, deny that Decision No 963/77 complied with that condition. But let me emphasize that, in discussing the question, it is necessary to avoid confusing the requirement concerning the *necessity* of the introduction of minimum prices, in relation to Article 3, in the market situation of the product in question, with the separate aspects of the *functionality*, the *practicability* and the *suitability* of the system of intervention which in fact took place.

According to the applicants, the general decision in question is contrary to the majority of the objectives envisaged by Article 3, and in particular those referred to under letters (a), (c), (d), (f) and (g).

In this regard it must be said in the first place that in order to be able to speak of a manifest infringement of the second condition laid down by Article 61 (b), it is not sufficient to allege (or even to establish) the incompatibility of the decision on minimum prices with any of the objectives laid down by the said Article 3.

The Court has already had occasion to state that "In practice it will always be necessary to reconcile to a certain degree the various objectives of Article 3 since it is clearly impossible to attain them all fully and simultaneously as those objectives constitute general principles which must be observed and harmonized *as far as possible*" (judgment of 21 June 1958 in Case 8/57 *Groupeement des Hauts Fourneaux et Aciéries Belges v High Authority* [1957 and 1958] ECR 245, at p. 253; see also the said judgment of 13 June 1958 in Case 9/56, *Meroni*).

If the need to "reconcile" the various objectives arises in a normal market situation, *a fortiori* it must be accepted in a crisis situation which justifies the adoption of exceptional measures. As such cases involve action of limited duration, it is still more understandable that the Commission should give priority to certain objectives even at the cost of sacrificing others temporarily. Such a choice clearly falls within the scope of the Commission's discretionary power

and can only be made as the occasion arises on the basis of its assessment of economic reality at the time when the exceptional measures are introduced.

It is evident that a measure derogating from the normal rules governing the working of the common market in coal and steel, such as the fixing of minimum prices, will almost inevitably conflict with some of the objectives of Article 3. Thus, for example, the objective referred to under letter (c), namely the establishment of the lowest prices throughout the common market, is without doubt contradicted by the fixing of minimum prices at a level higher than those which might be charged by a section of producers in the industry. But if one wished to avoid that contradiction, it would be necessary to hold the Commission bound to fix the level of the compulsory minimum prices at that of the lowest levels in force on the market. That would constitute an excessive limitation upon the Commission's discretionary power to fix prices under Article 61.

The objection concerning the alleged infringement of the objective referred to in Article 3 (a) (ensuring an orderly supply to the common market) appears to me to be extremely weak. The applicants submit that they could have ensured such a supply at better prices than those fixed by the Commission. I think it is going too far to claim that all the problems relating to the supply of concrete reinforcement bars for the entire Community area could have been resolved by relying on the enterprise of the producers in Brescia. On the contrary, I think that the fixing of minimum prices was consistent with the objective referred to in Article 3 (a),

since the temporary protection granted to the less productive undertakings in order to enable them to modernize and re-organize their plant was intended to guarantee the Community an orderly supply to the market, avoiding the risk of massive closures of producer undertakings which could have led to a shortage of the product.

The applicants are also wrong to plead an infringement of the objective referred to under letter (d), which requires the Community to "ensure the maintenance of conditions which will encourage undertakings to expand and improve their production potential". It is true that the fixing of minimum prices at a level higher than that of the market is not likely to attain that objective as regards the more productive undertakings, but a different assessment must be made regarding the situation of undertakings below the margin. The temporary protection granted to them enables them to obtain the financial resources and time necessary to improve their production capacity and bring them up to the level of their more efficient competitors.

The applicants also claim that the price-fixing measure is in conflict with the objective of promoting the growth of international trade laid down by Article 3 (f). That relates to the fact that through Article 5 of Decision No 962/77 Community producers are required to comply with the minimum prices even when they effect sales to the non-member countries listed in that provision. However, it should be noted that that provision is based on the particular ties between the Community and certain member States of the European Free

Trade Area, and that the growth of international trade does not seem to be jeopardized by a measure affecting only a small group of foreign countries.

It also appears that up to a certain point the fixing of minimum prices is in accordance with the objectives stated in Article 3 (g) which requires the institutions to "promote the orderly expansion and modernization of production, and the improvement of quality", whilst avoiding protective measures against competing industries that are not justified by improper action on their part. In this case it is true that the Commission intended, by fixing compulsory minimum prices, to help the undertakings in crisis to improve their production and to recover their capacity for expansion; but the decision had a protective effect, although no charge of unfair commercial practices had been laid against the undertakings from Brescia as regards their conduct before the adoption of the scheme of minimum prices. It may only be observed that it was extremely difficult to promote the expansion and modernization of the undertakings bearing the brunt of the crisis, once recourse had been had to the device of minimum prices, without those prices assuming the function of protective measures as against the undertakings which had been most successful in a situation of free competition.

The applicant in Case 83/79, *Maximilianshütte*, declares for its part that Decision No 962/77 is contrary to Article 3 (e), which requires the institutions to "promote improved working conditions and an improved standard of living for the workers in

each of the industries for which it is responsible, so as to make possible their harmonization while the improvement is being maintained". The alleged conflict results from the fact that the decision would have obliged the applicant to dismiss part of its work force, if it had complied with it strictly. That argument has also been advanced by other applicants, especially with regard to the more limited question of the state of necessity, for the purpose of justifying the inapplicability of the sanction in the individual case. In fact the particular situation of an individual undertaking cannot be of direct relevance in judging the legality of a general decision. Further, taking into account the repercussions which the aforesaid phenomenon of swift and numerous closures of undertakings would have had upon the workers employed by them, it is clear that the introduction of a scheme of minimum prices is, at least in principle, consistent with the social aim stated under letter (e). Although it is true that the decision does not contribute to an improvement in the working conditions and standard of living of the workers, it did at least attempt to prevent those conditions from deteriorating. That objective must be considered to be in accordance with the spirit, if not the letter, of the aforesaid provision.

Thus an analytical examination of the arguments advanced by the applicants leads to the conclusion that, when it decided on the need for Decision No 962/77 in order to attain the objectives laid down by Article 3 — and in particular, as we have seen, the objectives stated under letters (a), (d) and (e) — the Commission was not guilty of a manifest failure to observe the Treaty.

That may be considered sufficient to justify dismissing as unfounded the objection of an infringement of the provisions of Article 61 on the ground of failure to comply with the second condition laid down under letter (b) of that article.

8. That Decision No 962/77 was necessary in order to attain the objectives laid down by Article 3 has been challenged by the Italian applicants in two other respects: on one hand the level of the compulsory minimum prices (which in their opinion was too high) and on the other the inadequacy of the intervention measure adopted. The first of these objections may be discussed in the light of Article 61 and Article 3, since it amounts to an argument that it was not necessary, in order to attain the objectives laid down by Article 3, to fix the prices at the level determined by the said decision (in other words, it would have been sufficient to fix lower prices). But I think that the other objection raises the problem of the appropriateness of the measure adopted in relation to its purpose, with which I shall deal later in relation to the principle of proportionality.

I would point out in the first place that Article 61 does not contain restrictive criteria with regard to the level of the prices (maximum or minimum) which the Commission may impose: it merely provides, by way of formal requirements, for the Consultative Committee and the Council to express their opinion on that point also. I have already had occasion to say that the reference to Article 3, made by Article 61 (b), might lead to the conclusion that the Commission is

obliged to keep to the lowest level (Article 3 (c)), but that with regard to minimum prices that argument would lead to the illogical result that the price fixed would always coincide with the lowest market price, when it is clear that intervention involving the device of fixing prices must possess an adequate margin of flexibility. So I believe that the determination of the level of minimum prices is highly technical and discretionary in nature. In this regard, therefore, it is necessary to bear in mind that the Court may review choices made by the Commission, under the last paragraph of Article 36, only when the economic evaluation reveals a manifest failure to observe the rule of law in question: that is, in this case, the rule which impliedly prohibits the fixing of prices so high as to prevent the attainment of the objectives laid down by Article 3 or prices which are excessive with regard to such aims.

Having said that, I consider it appropriate to consider the questions more closely. The principal charge levelled against the Commission by the applicants is that it fixed the prices at a median level, higher than those which had been charged until that time by the competitive undertakings, lower than those charged by the undertakings in crisis. That "political" judgment is said to have ignored the fact that undertakings' costs differ in accordance with management and organizational factors as well as in accordance with the raw material used. But the Commission took into account only the costs inherent in the material used, "averaging out" the costs of the undertakings which produce reinforcement bars using ferrous scrap and the costs of those which use iron ore. The only solution consistent with

Articles 3 and 61, it is argued, would have been to fix the prices at the "lowest profitable level". Only in that way would the position of the more productive undertakings not have been sacrificed.

The factors which I have summarized neglect to take into consideration the characteristic aims of a scheme of minimum price, applied in a market which displays imbalance between more dynamic undertakings and undertakings in a less advantageous position in a situation of free competition. It seems clear to me that in such a situation compulsory minimum prices tend to increase the sales potential of the less fortunate undertakings and at the same time cannot fail to reduce the sales potential of the more dynamic undertakings, in so far as they restrict their capacity to offer their products at reasonable prices. Therefore it was necessary in this case to fix prices at a level which would enable the more viable extra-marginal undertakings to remain in business and carry out their re-organization and modernization. And it is not possible to accept the applicants' argument that, in fixing the minimum prices at a level higher than the prices which could be charged by the more competitive undertakings, the Commission failed to comply with the provisions of Article 61 (b).

In my opinion, the criterion of the "median" (though not in the arithmetical sense) which the Commission followed cannot be considered unjustifiable. In fact, since the level of costs differed considerably within the Community, the

level of the minimum prices could not be adapted to the costs of the less productive undertakings, because that would have meant interfering excessively with the true market situation, entailing a considerable increase in prices which would have been economically unacceptable to consumers. Nor, on the other hand, would it have been possible to take into account solely the costs of the more productive undertakings, since that would have made the fixing of minimum prices pointless in view of the function assigned to them in the context of the scheme established by Decision No 962/77. Thus it was necessary to reconcile the situations and the interests of the various groups of producers concerned, and the Commission acted in accordance with that necessity.

Finally, it is worth giving some consideration to the provision contained in the penultimate paragraph of Article 61, according to which "In fixing prices, the High Authority shall take into account the need to ensure that the coal and steel industries and the consumer industries remain competitive, in accordance with the principles laid down in Article 3 (c)". The main purpose of the reference to Article 3 (c) seems to be to emphasize the importance of the criterion according to which it is necessary to ensure that price variations do not result in general increases, or in increases in the prices charged in other transactions, and of the criterion according to which it is necessary to ensure amortization and a normal return on capital.

In fact, the main function of the provisions contained in the penultimate

paragraph of Article 61 seems to be to reconcile the interests of the producer undertakings and those of the undertakings which use the products in question. However, it is not possible to ignore the fact that the need to ensure the competitive capacity of the producer undertakings was expressly recognized. The consequence which may be inferred from that, in the present case, is that if the level of prices had been fixed in such a way as manifestly to render uncompetitive the undertakings to which the general decision was addressed, it would have been necessary to consider that decision unlawful. The applicants have declared that their competitive capacity was seriously threatened by Decision No 962/77, because in the field of concrete reinforcement bars competitiveness is largely determined by prices, differences in quality being practically irrelevant. But in a situation of the type under consideration the mechanism of minimum prices necessarily worsens the position of the more dynamic and more competitive undertakings. In my opinion, the important factor is that the minimum price, having been fixed at a level below the prices of the undertakings most severely affected by the crisis, leaves a competitive margin for the other undertakings. In any case, I do not think that evidence has been put before the Court of factors capable of proving that the undertakings concerned have completely lost their competitive capacity as result of the decision with which we are concerned.

9. As well as alleging that Decision No 962/77 is contrary to Article 61 of the ECSC Treaty — and Article 3, to which Article 61 (b) refers — the applicants also rely on certain other provisions of Title I of the Treaty, namely Articles 2,

4 and 5, arguing that they, too, were infringed by the adoption of that measure. Thus it is now necessary to consider those complaints.

The second paragraph of Article 2 provides that the Community "shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States". That provision, it is claimed, was disregarded, since the minimum prices for concrete reinforcement bars were fixed at a level which nullifies the competitive advantage of the more productive undertakings, making it impossible for them to offer the product at a lower price, whereas their level of productivity would have permitted them to do so. Consequently, the fixing of the minimum prices is also said to have contravened the part of the provision quoted which refers to safeguarding continuity of employment, since, if the applicant undertakings had complied with the decision impugned, employment would have been seriously threatened in a considerable part of the Community industry in that sector.

The applicant in Case 83/79, *Maximilianshütte*, also claims that there was an infringement of the first paragraph of Article 2, which provides that the Community "shall have as its task to contribute, in harmony with the general economy of the Member States ... to economic expansion, growth of employment and a rising standard of living in the Member States". Contrary to that provision, the minimum prices scheme, it is said, placed an unjustifiable burden in particular on the economy of

Southern Germany and on the smaller steel producers.

I would point out that the article in question lays down in very broad terms the "task" which the Community is called upon to perform. The text of the provision — and in particular the reference to "*progressively*" bringing about the conditions described — shows that it is essentially programmatic in nature. The accomplishment of the general aims which all the Community's activity must seek to pursue, necessarily constitutes a long-term task, which is bound to undergo the impact of unforeseen circumstances. These sometimes make it necessary, in the short term, to adopt action which, taken in isolation, may appear to deviate from the objectives stated in Article 2, but which, viewed in a broader perspective, helps to ensure their attainment with the least possible sacrifice on the part of the persons concerned taken as a whole.

In fact, by providing for binding intervention in certain circumstances, the Treaty introduced derogations from the normal working rules of the Common Market, which are imbued with the principles of the market economy (as the provisions of Articles 2, 3 and 4 show). Thus there is a combination in the Treaty of rules absolutely faithful to those principles, and rules which depart from them — under well-defined conditions — conferring wide powers upon the Community institutions. But in the final analysis, even the rules of the second type are consistent with the general aims, in so far as the exercise of the powers of intervention, permitted by such rules, is intended to overcome conjunctural circumstances hostile to the maintenance of a free market.

In this case, it must be recognized that without Decision No 962/77 almost two thirds of the producer undertakings in the Community would have found themselves in a very difficult situation, not being able to withstand competition from the more productive undertakings; that would probably have had harmful consequences as regards employment, whereas the second paragraph of Article 2 of the Treaty seeks to safeguard continuity of employment. Moreover, the decision also complied with the requirement to avoid provoking fundamental and persistent disturbances in the economies of Member States, which would have been the consequence of any cessation of production by numerous undertakings producing reinforcement bars more seriously affected by the crisis. Therefore, although it is true that with regard to "the most rational distribution of production at the highest possible level of productivity" it would have been preferable to leave the economically and technically more advanced undertakings completely free to fix their selling prices and thus exploit their competitive advantage over the other Community producers, the dangers arising from that for the safeguarding of continuity of employment and of the productive apparatus itself as regards the majority of their competitors justify the measures impugned in the light of the general provisions of Article 2 also.

problem of having to choose between the divergent interests of the two groups of producers, and moreover, between two different interests of the Community at large: on the one hand, to encourage and reward those who have distinguished themselves on the battlefield of free competition, in the name of productivity and efficiency or, on the other, to attempt to protect throughout the Community continuity of employment and the survival of a larger and more diverse productive apparatus. In the abstract, both those interests are worthy of protection, but in the particular circumstances in which the decision impugned was adopted they were in conflict. Here it is sufficient to note that it was the task of the Commission (at least in the short term) to make the choice. In principle the merits of that choice are not subject to review by this Court, which — as I have said — may not substitute its own evaluation of the situation for the decisions on matters of economic policy taken by the competent body. It remains for me to add, of course: except in the case of a serious failure to comply with Community provisions; but I really do not think that it is possible to speak of a manifest infringement of Article 2 in this case.

The pattern assumed by the Community market in concrete reinforcement bars, as a result of the emergence of a hardy group of small-scale producers from amongst less modern and more ponderous undertakings, created the

10. With reference to Article 4 of the Treaty — which lays down the main prohibitions relating to the establishment and maintenance of the common market for coal and steel — the applicants complain above all of discrimination between producers, basing their argument on the fact that measures and practices which so discriminate are prohibited by Article 4 (b). In this case, it is alleged that such discrimination

between producers took place essentially because the system of minimum prices favoured some of them (the less competitive) to the detriment of the others. Clearly it is not the formal aspect of the measures criticized that has been taken into consideration, since the minimum prices laid down by Decision No 962/77 are identical for all Community producers. The discrimination is said to exist *de facto*, in the sense that two different situations — that of the more competitive producers and that of the undertakings in a state of crisis — were treated in the same way, by the imposition of the uniform system of minimum prices. And, since the level of those prices is below the list prices previously quoted by all the Community undertakings, with the exception of the producers in Brescia, the latter submit that in adopting the general measure contested the Commission took into account the situation of the other undertakings, and not the position and the market share of the small and medium-sized Italian undertakings, thus infringing the prohibition on discrimination in that respect also.

In this connexion, it must be borne in mind that an essential feature of discrimination is the unjustified, not to say arbitrary, nature of the equal treatment applied to different cases or of the unequal treatment applied to similar cases. But the equality complained of in the treatment of undertakings which were in different situations cannot be considered unjustified. In fact, the introduction of binding minimum prices at a level above the market price, which is permitted by the Treaty if a crisis exists or is imminent and is designed to protect the weaker undertakings, can effectively

achieve its legal objective only if it is binding upon all those who operate in the sector. If one then looks at the effects which the decision was intended to have, and which it actually had, upon undertakings which as regards competition and productivity are in different situations, it is hardly surprising to find that those effects were favourable for certain of the undertakings and unfavourable for others. That is a logical consequence of the measures with which we are dealing. Therefore, I find the argument based on discrimination to the detriment of the applicants unfounded.

Another provision contained in Article 4 (b) was relied upon in support of the claim that the general decision on minimum prices was illegal: namely, the prohibition on “measures or practices which interfere with the purchaser’s free choice of supplier”. It was said that the decision prevents that free choice and also constitutes a restriction on the free movement of products, contrary to Article 4 (a). That is because the consumer, having only a choice between products sold at the same price, displays a natural tendency to buy on the home market; that leads to a *de facto* restriction on potential sales to customers in other Member States, and thus to a restriction on intra-Community trade.

In fact, I think that the effect of the scheme of minimum prices on trade

patterns and on the purchaser's free choice of supplier is too indirect a consequence of the decision for it to be possible to argue that the decision infringed Article 4 (a) (the wording of which prohibits *quantitative* restrictions on the movement of products) or the last part of Article 4 (b). I would point out in particular that the choice of supplier is often influenced by factors other than the price. I would add that the state of affairs complained of presupposes that certain producers from one Member State have established a position on the markets of other Member States by virtue of their low prices; if it is accepted that a binding minimum price may be fixed by the Commission above the level of those particularly low prices, and that it is equally lawful to fix minimum prices in order to pursue the aim of increasing the productivity and competitive capacity of other producers in a state of crisis, the state of affairs in question will rightly be regarded as an economic disadvantage related to the intervention of the Commission, not as an indication of an infringement of the Treaty on the part of that institution. In conclusion, if it were considered that a measure introducing minimum prices at the same level throughout the Community necessarily constituted an obstacle to the free choice of supplier and to the free movement of goods, the reply would have to be that by providing for the possibility of such a measure, the Community legislature clearly accepted also the possibility of derogating temporarily from the provisions of Article 4 (a) and (b) through the introduction of such a measure.

restrictive measure which tends towards the sharing or exploiting of markets, contrary to Article 4 (d), and as distorting normal competitive conditions, contrary to the penultimate indent of Article 5. Those complaints are based on the same arguments advanced in relation to the alleged infringements of Article 4 (a) and (b), and they follow the same reasoning, with which I have already dealt critically. I must therefore repeat that any decision fixing minimum prices appreciably restrict undertakings' potential for competition on the basis of prices and so risks encouraging the partitioning of the Common Market, through the preference which consumers tend to show for local suppliers; but that is a disadvantage related to the scheme of minimum prices, and surely does not invalidate it. Moreover, we know that the measures in question were adopted for a relatively short period and that they are legitimate only in a time of crisis: if they were maintained after the disappearance of the circumstances which justify them, they would eventually accentuate their protective nature and favour also those undertakings which within a reasonable period of time had not succeeded in becoming competitive. Such a development — of which there is at this stage no evidence — would be contrary to the spirit of the Treaty and to the fundamental principles of the common market for coal and steel. But on the facts as established at present the complaints based on the provisions of Articles 4 (d) and 5 must also be considered unfounded.

The applicants also attack the general decision in question as representing a

11. Apart from those provisions of the Treaty which I have mentioned and discussed so far, two unwritten principles of Community law have been invoked in support of the applications. I refer to the fundamental right of respect for private property, and the principle of proportionality.

I do not believe it necessary to dwell at length on the first point. According to the applicants, the scheme for minimum prices created conditions such that entrepreneurs risked being divested of the businesses which belong to them, contrary to the protection given to the right to property by the European Convention on Human Rights (strictly speaking, by the First Protocol to that Convention). I have already had occasion to state in the opinion delivered on 8 November 1979 in Case 44/79 *Hauer* that the right to property is fully recognized and protected in the Community legal order, both on the basis of the constitutional principles common to the Member States and in accordance with the system of the European Convention; and that that guarantees protection for the individual, particularly in the event of expropriation and restrictions upon the use of property in the public interest. But it seems clear to me that a decision introducing a scheme of compulsory minimum prices has nothing to do with deprivation or limitation of property; it is a question solely of regulating the economic activity of undertakings. It seems that by such general references to the fundamental rights of the individual, the applicants wished to rely also upon the freedom of economic initiative. But a measure concerning prices does not jeopardize even that freedom, because the latter confers upon the individual the oppor-

tunity to choose any professional or trade activity, and to set up and manage undertakings, but does not limit the power of the authorities to intervene in the economic sphere, for example by imposing restrictions upon price trends, in the public interest.

Moreover, the complaint which I am considering rests on a confusion between the measure introducing minimum prices and the consequences which, according to the applicants, its application could have had. Thus it must be emphasized that the legality or otherwise of the measure in the light of fundamental principles concerning human rights cannot depend on the harmful repercussions which it is supposed (or alleged) that it might have upon some of the persons to whom it was addressed. At most, since the applicants speak of the very serious consequences which their compliance with Decision No 962/77 could have had on their activities, threatening their very existence, the relevance in law on the likelihood of such serious damage will fall to be discussed under the question of necessity, with which I shall deal later.

12. The argument that the measure fixing minimum prices infringed the principle of proportionality has been put forward on the basis of the claim that the burden imposed by that measure on a section of the persons to whom it was addressed (the more competitive undertakings) was excessive. The applicants maintain that in order to comply with

Decision No 962/77 they had to reduce appreciably the scale of their activities, at considerable financial and commercial risk, leading to a negative effect on the level of employment. The burden of such consequences was even greater for small steel producers specializing in the manufacture of concrete reinforcement bars, in that only the full utilization of their productive capacity enables them to remain in business in spite of high fixed management costs; in other words, they lack the compensating element which in larger undertakings is represented by the manufacture of other products. Besides, the burden imposed upon the more competitive undertakings is said to have been a pointless sacrifice, because of the inadequacy of Decision No 962/77 in relation to the aim pursued.

The applicants dwelt at length on this point, laying special emphasis on two gaps in the scheme of minimum prices set up by the decision in question: the fact that the scheme did not at first extend to dealers (I have already mentioned that provision was made for that only from the end of December 1977, by Decision No 3002/77, adopted pursuant to Article 95 of the ECSC Treaty) and the related question of freedom of prices in sales of bars directly imported from non-member countries. These initial defects in the system made it impossible, in the applicants' submission, to attain the objectives pursued by Decision No 962/77; therefore, the undertakings obliged to charge minimum prices saw their freedom of action sacrificed fruitlessly, contrary to the principle of proportionality.

In my opinion, the question of the gaps in the scheme of minimum prices in the

initial period of its application is of undoubted importance. The gravity of the situation caused by leaving the way open for trade at unregulated prices during a considerable period calls for careful examination and must be borne in mind when assessing the conduct of the applicant undertakings. However, that does not mean that an infringement of the principle of proportionality may be held to have occurred, without careful reflection on the scope of that principle and on the importance which the facts given assume in its light.

For producers who were in a position to sell at prices below the minimum prices fixed by the Commission, and for their customers, Decision No 962/77 represented the imposition by the authorities of an appreciable price increase. In the face of that increase, which can certainly not have been favourably received by the purchasers, the fact that dealers remained free to dispose of their stocks and of goods imported from non-member countries at lower prices created a situation which was bound to cause disturbances on the market. The customers of the more efficient producers, who had previously charged more favourable prices, were induced to place their orders elsewhere, or at least to delay them in the hope of being able to obtain the terms offered by the dealers from their usual suppliers also.

The real danger that the freedom retained by dealers might set off a chain of reaction amongst producers, which is economically and psychologically quite understandable, was a consequence of the fact, mentioned by the Commission in the second recital of the preamble to

its Decision No 3002/77, that a considerable number of sales of reinforcement bars within the Common Market is effected through dealers. The applicant Maximilianshütte declared, without being contradicted by the defendant, that on the German market at least 85 % of reinforcement bars passed through the hands of the dealers. The quantity of stocks held by them at the time of the entry into force of Decision No 962/77, which was sufficient to cover all the internal needs of the Community for two months, and the possibility which they had of continuing to augment their reserves at prices below the minimum prices by means of the purchase of products from non-member countries, constituted a grave threat for the Community producers and provided their customers with a means of bringing pressure on them to charge competitive prices. The very fact that seven months after the entry into force of the scheme in question the Commission resolved to extend it to dealers shows that the gap referred to had seriously disturbed the working of the system of minimum prices.

With regard to the freedom retained by the dealers, another aspect, pointed out by the applicant Maximilianshütte, deserves to be mentioned. It is well-known that the large steel-marking groups control distribution companies which are technically autonomous and are not covered by the term "their selling agencies" within the meaning of Decisions Nos 30 and 31/53 (that is to say undertakings which, as well as the products of the parent company, also deal in those of other producers). Through such distribution companies the large-scale producers were in a position to compete, on prices, with the small and medium-sized producers. In fact,

although formally complying with the minimum prices in the invoicing of sales to the distribution companies controlled by them, the large-scale producers could require such subsidiaries to re-sell at lower prices, whilst the small and medium-sized producers did not have a similar possibility.

To that were added the distorting effects, on the working of the system under consideration, of imports from non-member countries at uncontrolled prices, lower than the minimum prices imposed upon the Community producers. Those effects were magnified by the fact that the Commission had in 1977 not yet concluded with the main exporting countries those arrangements which in more recent times have made it possible to bring supplies from non-member countries down to levels closer to the minimum Community price.

According to the information given at the hearing by the Commission's agent, sales in the Community of reinforcement bars from non-member countries were equivalent to 3.5 % of Community production in 1977, rising to 4.2 % in 1978. In spite of the apparent insignificance of those percentages, it must be admitted that the phenomenon of imports at uncontrolled prices was a factor of considerable importance contributing to the confused state of the market and to the reluctance of purchasers to pay the minimum prices fixed by the Commission, at least in the case of the traditional customers of the more efficient producers, who had previously charged lower market prices.

Another factor creating confusion was the exercise by Community undertakings of the option of alignment on the terms offered by undertakings outside the Community. Decision No 527/78 of 14 March 1978, prohibiting any such alignment in the future (after Article 6 (2) of Decision No 962/77 had already attempted to subject alignment on external offers of concrete reinforcement bars to certain restrictive conditions), confirms the gravity of the consequences which that aspect of the option of alignment had had on the working of the system of minimum prices. In the second recital of the preamble to that decision, the Commission admitted in fact that experience had shown that compliance with those prices could not be secured if offers at lower prices could be used as a base for alignments; thus the abolition of the option of alignment on low-priced offers from non-member countries was necessary in order to avoid increasing downward pressures in Community prices. That declaration constitutes a further and eloquent recognition of the seriously defective nature of the system set up by Decision No 962/77. To all that it is necessary to add finally that the delay in bringing under control imports from non-member countries made it possible for bars produced in one Member State to be sold at uncontrolled prices in other Member States, after passing through Switzerland or Austria.

which are fundamental to the Community legal order (in this regard, see the judgment of the Court of 17 December 1970 in Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster* [1970] ECR 1162, and the later judgments of 24 October 1973 in Case 5/73 *Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof* [1973] ECR 1092 and of 13 November 1973 in Joined Cases 63 to 69/72 *Werhahn v Council* [1973] ECR 1230). That principle requires that "the aims pursued may be attained... with the smallest possible sacrifices by the undertakings affected" (thus the Court declared in the judgment of 13 July 1962 in Case 19/61 *Mannesmann v High Authority* [1962] ECR at p. 371) and more precisely that the burdens imposed upon traders must be no greater than is required to achieve the aim which the authorities are to pursue (see the judgment of 24 October 1973 in the *Balkan-Import-Export* case). Did the Commission take account of that restrictive criterion in the present case?

It remains to be seen whether the circumstances referred to gave rise to an infringement of the principle of proportionality. As is well known, that principle is included amongst those

In this regard, the first consideration which I think it necessary to state concerns the nature of the measure with which we are dealing; it is not a measure which in itself imposes burdens on all the persons to whom it is addressed, but on the contrary, a measure which, by reason of the price level laid down, benefits some of them and requires sacrifices of others, effectively limiting their competitive capacity and thus affecting the marketing of their products. I have already said, and I think it unnecessary to repeat, that that difference in treatment is lawful, being the logical

consequence of the measures adopted in a situation of crisis marked by a considerable difference in productivity. Thus the criterion of proportionality must be applied to the sacrifice required of some of the persons to whom the measure was addressed; but the extent of that sacrifice depends essentially on the level of the minimum prices, and in that regard I have already expressed the conviction that the solution chosen — a median level in relation to market prices — cannot be considered unjustifiable.

In fact, as we have seen, the applicants place the emphasis rather on the futility of the sacrifice, in view of the inadequacy of Decision No 962/77, that is to say its inability to attain the desired ends in the absence of additional measures (which were adopted later). That is a different aspect of the situation, and I have recognized its importance; but I do not think that it may be regarded as an infringement of the principle of proportionality. On the one hand, and on a formal level, it may be objected that the question whether that principle was observed must be answered having regard to the content of the measure under consideration, the weight of the burden which that measure imposes directly, and not the relationship between the measure in question and other measures intended to strengthen its practical effectiveness. In fact, acting under Article 61, the Commission could not do more than control the prices charged by the producing undertakings (Article 80 of the Treaty ensures that); in order to extend the minimum prices scheme to dealers, it had to have recourse to Article 95. That means that under the Treaty system the action of controlling prices, as imposed upon producers alone, is autonomous in nature.

Therefore I doubt whether that measure may be considered contrary to the principle of proportionality on the basis of the fact that other measures, necessary to set up an economically effective system, were not adopted. Besides, a finding that the sacrifice was disproportionate would require proof that it cast an excessive burden on the persons affected; but it is extremely difficult for such proof to be given by those who avoided the sacrifice, that is to say who infringed Decision No 962/77, considering it too onerous. In other words, if the allegation of an infringement of the principle of proportionality is based on the inadequacy of that decision, it is not sufficient to declare that the system required to be supplemented by other measures; it would be necessary to prove that the system did not function as long as such measures were not adopted. However, it is impossible to establish at this stage whether the system worked badly because of its incompleteness or because of the infringements committed.

These considerations lead me finally to the view that the infringement of the principle of proportionality complained of by some applicants did not take place in this case. Nonetheless, it remains clear that the consolidation of the system of minimum prices by means of the other measures adopted as from the end of 1977 should have taken place sooner. In fixing those prices at a level which exceeded the prices charged by the more competitive undertakings, the Commission should have realized that the system must not remain incomplete if it

was to avoid increasing the difficulties faced by those undertakings by exposing them to ruinous competition from dealers and importers of reinforcement bars from non-member countries. The Commission itself should in any event have taken that into account when imposing the pecuniary sanctions laid down for failure to comply with the general decision.

those in the Brescia area, which had not complied with the Commission's request to restrict their production. It is also argued that this second aspect of the misuse of powers may be inferred from the fact that the decision in question, having regard to the level of the minimum prices imposed, was bound to prejudice directly almost exclusively the undertakings in Brescia, a fact of which the Commission must have been well aware when it adopted the measure.

13. In the context of the complaints directed against that decision, the Italian applicants also plead misuse of powers, arguing that by adopting the measure fixing minimum prices the Commission pursued objectives different from those stated. Two main arguments have been adopted in support of that claim. In the first place, it is stated that the said decision served essentially to protect the large-scale iron and steel producing concerns which were not able to withstand the competition in the concrete reinforcement bar sector and which were able to retain a share of the market only as a result of the level fixed for the binding minimum prices. Instead, it is argued, the aim of restructuring the sector should have been pursued by respecting the law of the market, which would have forced the large-scale, unproductive undertakings to cease manufacturing reinforcement bars.

In this regard, I would point out that the aims of Decision No 962/77 are stated in the preamble thereto, in particular in the first five recitals. From that it may be seen that the Commission wished to remedy the market situation of the product in question, attempting in particular to establish a better balance between supply and demand (clearly by restraining supply) and between prices and production costs (arresting the fall in the former) so as to raise the *average* rate of utilization of productive capacity. The protection of the large iron and steel producing undertakings, which were producing at costs in excess of those prices, constituted a necessary effect of that choice of economic policy, not the exercise of power for a purpose different from the lawful one. The claim that the restructuring of the sector should have been achieved without intervention by the authorities in respect of prices is tantamount to proposing an alternative line of economic policy in place of the exercise of the power conferred by Article 61, but it does not in any way tend to show that that power was exercised for a purpose different from the lawful one. Moreover, the lawful purpose of the measures permitted by Article 61 (b) cannot be identified solely with the restructuring of a particular

Secondly, it is claimed that the measure adopted contained an element of retaliation against the small and medium-sized undertakings, and especially against

sector of production (even if in this case that indirect objective is particularly prominent); in fact, there may also be purely conjunctural crisis situations, and what matters is that a decision fixing minimum prices should really aim to restore balance between prices and production costs and revive a healthy relationship between supply and demand, as in my opinion occurred in this case.

The negative effect which Decision No 962/77 had on the small and medium-sized undertakings, even if it was perfectly known in advance to the Commission, cannot therefore be regarded as evidence of misuse of powers. I will repeat once again that that is simply a repercussion of the measure adopted, in a crisis situation marked by a difference in productivity between large undertakings and smaller-scale producers.

In its basic conception and in the objective function which it is required to fulfil that measure appears to be in accordance with the objectives of the Treaty. In my opinion, the applicants have not adduced the "objective evidence" which constitutes the minimum necessary to prove misuse of powers; and that strict proof is indispensable has been declared by the Court on numerous occasions (see *inter alia* the judgments of 21 March 1955 in Case 6/54 *Government of the Netherlands v High Authority*, already cited; 5 May 1966 in Joined Cases 18 and 35/65 *Gutmann* [1966] ECR 103; 7 December 1976 in Case 23/76 *Pellegrini v Commission* [1976] ECR 1807, in particular paragraph 30 of the Decision). Therefore, the plea in question should not be upheld.

14. The applicants also plead infringement of essential procedural requirements, in relation to Decision No 962/77, on the basis of criticisms concerning both the statement of reasons accompanying the measure and the procedure followed before its adoption. In their opinion, the statement of reasons contains incomplete and unsubstantiated affirmations which do not take into account the reality of the situation in Italy. As regards the procedure, it is denied that the preliminary studies were "made jointly with undertakings and associations of undertakings", as is required by the first paragraph of Article 61, or that the consultation with the Consultative Committee specifically concerned the measure based on Article 61.

I would point out first that in some of these actions the Commission has objected that this claim is inadmissible "because the applicant has not proved that the general decision harms individual interests specifically and directly". It is not clear on what legal basis the defendant has raised this objection, which was made in identical terms, as I have already had occasion to recall, also in relation to the allegation of misuse of powers. In fact, one might have expected the second paragraph of Article 33 of the Treaty to be relied on in support of the objection raised against that latter claim — which, however, we have seen to be without foundation in the context of the present actions — but neither Article 33 nor any other provision lends support to the view that the claim alleging an infringement of essential procedural requirements is inadmissible. Thus the objection in question must be rejected.

In dealing with the question of misuse of powers I referred to the statement of reasons accompanying Decision No 962/77, and I came to the conclusion that it clearly identifies the aims pursued. That statement of reasons starts from the finding of a crisis in the iron and steel industry and its effects on prices, it mentions the failure of voluntary planning of deliveries in the sector of concrete reinforcement bars, it dwells at length on the particular difficulties on the market for that product — deducing that “attainment of the objectives set out in Article 3 of the Treaty is jeopardized in the concrete reinforcement bars sector” — and on that premise goes on to declare that “the Commission therefore considers that the conditions for the application of Article 61 to the concrete reinforcement bar market are fulfilled”. In my opinion, those five recitals make it possible to reconstruct without difficulty the chain of logic followed by the Commission before adopting the measure provided for in Article 61 (b) of the Treaty. That is the basic requirement; indeed, according to the case-law of the Court, for a legislative measure to be sufficiently reasoned it is not necessary to provide such detailed information as may be necessary in the case of a measure addressed to individuals.

that, although Articles 5 and 15 of the ECSC Treaty require the High Authority to give reasons for its decision and to publish those reasons, no details are given as to the form or extent of that obligation; thus the Court considered that, “reasonably understood”, those provisions oblige the High Authority to mention in the reasons for its decision “the essential elements of the findings of fact on which the legal justification for the measure depends”. That case also concerned a decision on prices; and in the judgment it was considered sufficient that the decision should affirm the necessity of the measure in view of the aims stated in Article 3 and should expressly refer to a situation which is detrimental “to the achievement of the objectives of Article 3”. In the second of the judgments cited, the Court gave further clarification: “The extent of the requirement . . . to state the reasons on which measures are based, depends on the nature of the measure in question. It is a question in the present case of a regulation, that is to say, a measure intended to have general application, the preamble to which may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other; Consequently, it is not possible to require that it should set out the various facts, which are often very numerous and complex, on the basis of which the regulation was adopted, or *a fortiori* that it should provide a more or less complete evaluation of those facts”.

In this regard, I will cite only two judgments: that of 21 March 1955, already cited on several occasions, in Case 6/54 *Government of the Netherlands v High Authority*, and that of 13 March 1968 in Case 5/67 *Beus v Hauptzollamt München* [1968] ECR 83. In the first judgment, the Court started by observing

In the light of those precedents, I do not see how the statement of reasons accompanying Decision No 962/77 can be considered insufficient. I will add

that, as regards in particular the complaint concerning the lack of proof of the affirmations contained in the statement of reasons in question, it may be objected that, although the veracity of those declarations may have to be considered in order to decide upon the substance of the case (and indeed I have already dealt with the question of the existence or imminence of a manifest crisis in order to ascertain whether the conditions laid down by Article 61 (b) were fulfilled), that issue is not relevant in the context of the submission of infringement of essential procedural requirements. The charge that the statement of reasons did not take into account the reality of the Italian situation ignores the fact that the Commission had to consider the situation from the point of view of the Community iron and steel industry as a whole. Finally, I would point out that the choice of a particular level for the minimum prices laid down is not accompanied by any statement of reasons, whereas the Commission should have been aware of the importance of that point and of the undoubted advisability of making clear what criteria had been adopted; but it is true that the last recital of the preamble mentions the consultation with the Consultative Committee and with the Council concerning also the level of the prices and that the fulfilment of that procedural requirement, laid down by Article 61, seems to exonerate the Commission from any theoretical duty to give specific reasons for that aspect of the measure.

Consultative Committee and the Council; to be precise, that recital declares that the decision was adopted "having regard to studies carried out in conjunction with the undertakings and associations of undertakings, and after consulting the Consultative Committee and the Council". The wording follows the language of the first paragraph of Article 61; however, it must be noted that with regard to the "studies" that provision also recalls the first paragraph of Article 46, whereby the High Authority may *at any time* consult undertakings and their associations, as well as governments and other parties concerned, and the third paragraph of Article 48, which provides that the High Authority shall *normally* call upon producers' associations in order to obtain information, provided that the interest of workers and consumers are also represented or voiced in such associations. That means that the studies referred to in Article 61 do not necessarily have to be occasioned by an intention to exercise the powers granted by that article, and that the contacts with the producers' associations are a normal channel of consultation for the Commission. Doubtless the Commission enjoys a wide margin of discretion in the conduct of the necessary inquiries and consultations, but it must offer the undertakings directly concerned, through the normal intermediary of their associations, an opportunity to learn of the measures which it proposes to adopt and to express their point of view in that regard.

It remains to be seen whether the procedure laid down in the first paragraph of Article 61 was followed. In this regard, I have just noted that the last recital of the preamble to Decision No 962/77 records the consultation with the

The applicants do not in fact deny that the preparatory studies for Decision No 962/77 took place; but they maintain that the Commission did not call upon them to collaborate. That claim ignores

the fact that on 25 May 1977 the Commission gave a hearing to Mr Meriggi and Mr Sorelli, the representatives of two associations of small and medium-sized Italian undertakings in the sector. Further, according to the evidence given at the hearing by the defendant's agent, undertakings not belonging to those associations were also offered an opportunity to take part individually in the meeting on 27 March 1979. Therefore it cannot be said that the required collaboration with the undertakings and associations of undertakings did not take place.

As for the participation of the Consultative Committee in the decision-making procedure, some of the applicants see a formal defect in the fact that the consultation took place in the context of Article 54, concerning the financing by the Community of undertakings' investment programmes, instead of in the context of Article 61 of the Treaty. However, I must take the view that that criticism is based on incomplete information. It is true that in its resolution of 17 March 1977 on the situation on the iron and steel market the Consultative Committee referred specifically to the measures provided for in Article 54, and not to those under Article 61; but that resolution concerned the situation on the iron and steel market in general. On the other hand, the Consultative Committee expressed an opinion on the specific question of fixing minimum prices for reinforcement bars at the subsequent session on 19 April 1977, declaring itself in favour of the measures which the Commission proposed to adopt. Thus the procedure for consulting that body was properly carried out.

15. The Feralpi company submits that, as regards Italy, the measure prolonging

the period of application of the minimum prices for the whole of 1978 was repealed by implication as a result of the decision of 28 July 1978, already referred to, by which the Commission authorized the setting-up of the UCRO, that is to say the office designed to facilitate the "channelling" of export sales of concrete reinforcement bars, by co-ordinating such sales through a voluntary allocation of the quantities. The applicant infers an intention on the part of the Commission to repeal the previous measure from one of the recitals in the preamble to the aforesaid decision, which states that there is to be no interference with the undertakings' sales on the Italian market.

That argument cannot be accepted, above all for reasons of principle. A decision of the Commission addressed to a limited number of undertakings (those which had requested authorization to enter into the agreement setting up the UCRO) could never have the effect of repealing a general decision which was legislative in nature and as such binding on all producers of reinforcement bars in the Community. If it had been a question of restricting the area of that decision's applicability, the amendment — quite apart from doubts as to its lawfulness — would have required at least an express provision with a sufficient statement of reasons.

As a matter of fact, it is clear from the context of the recital mentioned by the applicant that in declaring that there was to be no interference with the undertakings' sales on the domestic market, the Commission merely intended to refer

to the fact that the agreement for co-ordinating sales did not concern the Italian market. Thus it is not possible to infer therefrom any demonstration of the Commission's presumed intention to free the Italian undertakings from the obligation to observe minimum prices for their sales in Italy.

Finally, I would point out that, as the undertakings to which the Commission refers in the aforesaid decision are only those which joined the UCRO, that is to say approximately half of the Italian producers of reinforcement bars, the applicant's argument would lead to the absurd result that only a proportion of the Italian producers concerned would be freed from the obligation to observe minimum prices for sales in Italy.

With regard to the decision authorizing the setting-up of the UCRO, I think it more important to note that it referred in the statement of reasons to the difficulties allegedly experienced by the applicants in maintaining their traditional patterns of trade with purchasers in other Member States of the Community whilst complying with the system of minimum prices. It is therefore possible to consider that, by conceding the authorization requested on that basis, the Commission recognized the gravity of the difficulties caused for the Italian undertakings by the application of the system of minimum prices and found that there was justification for the implementation of measures designed to help those undertakings to maintain their commercial relationships in spite of the retention in force of the aforesaid system.

16. Thus far I have examined the arguments whereby the applicants have sought to sustain the submission that General Decision No 962/77 was illegal, within the meaning of and pursuant to the last paragraph of Article 36 (or even, as we have just seen, that it has been repealed). The inquiry undertaken has not made it possible to identify any element demonstrating the illegality of that decision. Therefore it is necessary now to go on to discuss the criticisms which seek to obtain the annulment thereof. In this sphere, it will be convenient to deal first of all with the claim made by the applicant Feralpi that it behaved lawfully, selling at prices which were determined by alignments in accordance with Community provisions.

According to Feralpi, each undertaking in the Community was entitled to align its prices on those actually charged by other Community undertakings, even if they were below the minimum prices laid down by the authorities. In support of that argument, the applicant relies on Article 6 of Decision No 30/53 of 2 May 1953 (which was amended by Decisions Nos 1/54, 19/63 and 72/440) since that provision accepts that a seller may align his quotation on the actual prices of a competitor. But the argument falls down in the face of the defendant's pertinent objection that the possibility of alignment on market prices, rather than on list prices, is provided by the said Article 6 only for those products for which "there exists no obligation or there exists only a limited obligation to publish prices", that is to say for the products referred to in

Article 8 of Decision No 31/53 of the High Authority of the ECSC, which do not include concrete reinforcement bars. In relation to the latter, therefore, the alignment may take place only on the list prices of a competitor. The Commission adds that even if alignment on prices actually charged were permitted in principle, it would in any case be acceptable only with regard to prices charged legitimately, that is to say in accordance with the legislation in force. That observation also strikes me as correct.

The situation is different as regards alignment on the market prices of products from non-member countries. The applicant claims that until 15 March 1978, that is to say until the entry into force of Commission Decision No 527/78, sales at prices below the minimum prices could be the legitimate consequence of an alignment carried out by the undertaking on a quotation from a country outside the Community, or on the price charged by another Community undertaking which had in turn aligned its prices on quotations from non-member countries. But in reply the Commission observed that in order to be able to justify sales at prices below the minimum prices on the ground indicated in this submission, the undertaking concerned was obliged to notify its alignment to the Commission in each case. That obligation arises not only under the last part of Article 60 (2) of the ECSC Treaty, but also under Article 1 (1) of Decision No 23/63 of 11 December 1963.

As regards the exact scope of the said Article 60, the parties have differing points of view, for the applicant maintains that it imposes the obligation to notify only in particular cases, that is to say when the Commission has placed

restrictions on alignment in respect of a certain class of products. However, there is no doubt that under Article 1 of Decision No 23/63: "Iron and steel undertakings shall within three days of entering into any transaction in which they align their quotations on those of undertakings outside the Community make returns thereof to the High Authority". I think that the clear wording of that provision makes discussion of the interpretation of Article 60 superfluous.

It might also be asked whether compliance with the requirement to notify is a condition for the validity of each alignment, or whether it is not merely a condition affecting the formal propriety of that operation. But in this case the Commission is criticizing the applicant not only for having committed the infringement of failing to notify, but also and above all for not having produced any proof of the alleged alignments.

This indeed strikes me as the decisive argument against the view advanced by Feralpi. There is no doubt that in the absence of proper notification the burden is on the undertaking which relies on an alignment to adduce evidence capable of proving that at the time when it charged prices below the minimum prices its intention was to effect an alignment on particular quotations from non-member countries. The proof must specifically concern each sale in respect of which alignment is invoked. But in this case such proof has not been given for any of the sales below the minimum price carried out in Italy.

There remains the fact that Feralpi had also carried out sales transactions in Germany, taking advantage of the option

of alignment on the price lists of local competitors, and deducting the higher transport costs. The disputed decision imposing a fine accuses the undertaking of having carried out that alignment incorrectly, in particular because it applied the basic prices in Italian lire, although starting from German basing points, for the purpose of deducting the transport costs between Lonato and the place of destination. According to the Commission, that means that the sales took place "below the prescribed minimum prices". In the course of the procedure the Commission stated that the sales in question were in its opinion contrary to Decision No 3000/77/ECSC (which governed the system of minimum prices for 1978) because — taking into account the fluctuations in the Italian and the German currencies in the period between the adoption of Decision No 3000/77 (December 1977) and the adjustment of the rate of exchange laid down by Decision (ECSC) No 656/78 of 1 April 1978 — the application of prices aligned on German lists but expressed in Italian currency infringed in this case the general principle whereby the aligned price may not be lower than the price applied by the competitor with reference to whom the alignment takes place (pursuant to Article 6 of Decision No 30/53).

In reply the applicant states that the position adopted by the Commission presupposes that every variation in the exchange rates must immediately be reflected in the prices of the undertaking which applies the alignment, which is not required by any provision of Community law or by any of the decisions of the

Commission concerning alignment. In the event of fluctuations in the exchange rates being such as to endanger the objective of attaining a uniform minimum price within the Common Market, Article 1 (3) of Decision No 3000/77 empowers the Commission to adjust the minimum prices fixed initially. Feralpi considers that a readjustment of exchange rates may take place only as a result of such an intervention, and that there is no justification for requiring the individual undertakings to raise their minimum price whenever they have aligned their prices on the list of a country with a stronger currency which increases in value in the period between the sale and payment. According to the applicant, the alignment is carried out in the currency of the seller's country, and therefore it is the minimum price expressed in that currency which must be respected. The Commission, however, takes the opposite view, maintaining that all aspects of the list of the undertaking on which another undertaking has aligned its prices must be applied, including the currency in which it is expressed.

I would point out that the parties agree on the point that for the sales in question the alignment on German price-lists was actually carried out, but that the price was determined in the national currency of the seller. The dispute concerns the compatibility of the use of that currency with the rules governing alignment. But that means that any irregularity in the manner in which the applicant proceeded to calculate the prices would entail an infringement of the rules on alignment laid down by Article 60 of the ECSC

Treaty and covered by the more detailed provisions of the General Decisions of the High Authority Nos 30/53, 19/63 and 72/440, and would be punishable on that count, but would not constitute an infringement of the minimum prices system. Therefore, in my opinion, the complaint examined should be upheld and the decision concerning Feralpi should be annulled in so far as it relates to the sales operations carried out in Germany.

17. Another submission put forward by various undertakings, in support of their applications against the individual decisions imposing fines, amounts to an affirmation of the legality of the sales at prices below the compulsory minimum prices because they took place in circumstances of necessity or *force majeure*, or because they were justified by "legitimate self-protection". Those three types of exonerating circumstances have been intermingled in some applications without sufficient clarification of their value in Community law and of the limits of their applicability. However, I think that an attempt at clarification is necessary prior to an investigation of the facts.

In my recent opinion in Case 42/79, *Milch-, Fett- und Eier-Kontor*, delivered on 15 November 1979 before the First

Chamber of this Court, I had occasion to deal at length with the concept of *force majeure* which has been elaborated in the case-law of the Court with reference to the agricultural regulations. I emphasized that that concept contains two elements: above all an objective element, namely the occurrence of an extraordinary event *beyond the influence of the person concerned*, and secondly a subjective element, consisting in everything possible having been done by the person concerned, acting with care, prudence and diligence, in order to avoid the occurrence of that event. But the case-law of the Court concerned specific provisions of secondary Community law, which it has applied sometimes directly, and on other occasions by analogy. The existence of a general principle, begetting a uniform concept of *force majeure* applicable to all sectors of Community law, has not been shown and I believe that it would be difficult to show (as I observed in my opinion of 18 January 1978 in Case 68/77, *IFG* [1978] ECR 371). In fact the judgment of this Court of 11 July 1968 in Case 4/68, *Schwarzwalddmilk* [1968] ECR 377 at p. 385, recognized that "as the concept of *force majeure* is not identical in the different branches of law and the various fields of application, the significance of this concept must be determined on the basis of the legal framework within which it is intended to take effect". The judgment of 30 January 1974 in Case 158/73, *Kampffmeyer* [1974] ECR 101, reaffirmed the variable scope of the concept of *force majeure*, declaring that the precise meaning of that concept "has to be decided by reference to the legal context in which it is intended to operate". Finally, the judgment of 14 February 1978 in Case 68/77, *IFG* [1978] ECR 353, recalled that the legal systems of the Member States provide for exemption from legal obligations on account of *force majeure*, but only "in certain contexts and legal relationships".

In my opinion, all this could lead to the adoption of a radical view to the effect that in the absence of an express provision, *force majeure* cannot be relied upon in Community law. But let us suppose that the notion to which I referred is understood to be generally applicable; it would in any case be clear that the event relied on as constituting circumstances of *force majeure* must occur beyond the area of influence of the person concerned and so must of itself be the cause of the conduct which, considered objectively, is contrary to the legal provision. In other words, that conduct must have been determined by an external force which left the person concerned no alternative course of action (classic examples: the non-delivery of a particular consignment of goods because the ship which was carrying it sank, or because it was destroyed by lightning). But in this case the persons concerned claim to have been compelled to sell at prices prohibited by Decision No 962/77 by a combination of circumstances, comprising the state of the market in the light of the conduct of other traders (in particular, dealers who were selling at uncontrolled prices, and even competing producers who had already infringed that decision), the consequent risk of a sharp decline in sales, and the foreseeability of the damage which would have resulted in respect of finance, production and employment. None of those circumstances may be described as an external force such as to determine of itself the conduct of the person concerned; the undertakings themselves knowingly chose to sell at lower prices, which other undertakings in a similar situation did not do (I refer to the small and medium-sized Italian undertakings which complied with the minimum prices scheme), albeit they did so considering themselves justified by grave considerations and obliged to act in that way in order to avoid disaster.

Therefore I believe that the facts referred to by the applicants are not such as may

be regarded as constituting *force majeure*; rather it is necessary to ascertain whether a state of necessity occurred, or whether the infringement of the minimum prices amounted to an act of legitimate self-protection. In this regard also, it is necessary to ask whether Community law recognizes the two exonerating circumstances mentioned. The Commission has expressed a negative view (in the actions brought by the undertakings from Brescia; not in Cases 83 and 85/79, observing that the national legal systems accept legitimate self-protection and necessity for the purpose of safeguarding the essentials of life and of personal welfare, whilst in the Community legal order it is a question of protecting interests which are not comparable to those basic needs, because they are by nature proprietary interests. However, that argument neglects an interesting precedent in the case-law of the Court; the judgment of 12 July 1962 in Case 16/61, *Acciaierie, Ferriere e Fonderie di Modena v High Authority* [1962] ECR 289, in which the Court did not exclude the possibility of reliance upon legitimate self-protection in Community law, stating: "Legitimate self-protection presupposes an action taken by a person which is essential to ward off a danger threatening him. The threat must be immediate, the danger imminent, and there must be no other lawful means of avoiding it". On the basis of that consideration, the Court rejected the submission of the applicant company, which claimed to have acted in legitimate self-protection, charging prices lower than the list prices, because it had been confronted with the unfair conduct of certain competitors who succeeded in evading the control of the High Authority.

In the cases with which the present opinion is concerned, although the undertakings in question also charged prices lower than the compulsory prices, and have pleaded that they were induced to do so by the conduct of other traders,

none the less I do not think that it is appropriate to speak of legitimate self-protection, for at least two reasons: in the first place, because the danger caused by the *lawful* conduct of some traders (dealers, and undertakings in non-member countries) was an important factor and therefore it was not just a question of reacting to the unlawful conduct of others, and secondly because the undertakings concerned have also referred to additional circumstances (for example, the applicant Stefana has insisted on the difficulty of obtaining essential finance, the applicant Maximilianshütte has referred to the inadequacy of the supervision exercised by the Commission). Consequently, in my opinion, the only type of exonerating factor which is capable — in the abstract — of justifying the line of conduct followed by the applicants, in view of the reasons which they state, is necessity.

to threaten the *existence* of the person concerned, and that the conduct of the person under obligation must not have contributed to the creation of the dangerous situation. Moreover, it seems to me indisputable that extreme caution must be exercised in interpreting the concept, as recognition of the existence of a state of necessity is tantamount to exempting a person from compliance with particular obligations, which may be done only in exceptional cases.

On the subject of necessity, the fundamental conditions which must exist are very similar to those referred to in the judgment, already cited, of 12 July 1962 with regard to legitimate self-protection: a grave and imminent danger which it is impossible to avoid otherwise than by acting in a manner which, objectively considered, is unlawful. A feature common to international law and to the laws of the Member States is that the gravity of the danger must be such as

The applicant undertakings claim to have been forced to resist applying the minimum prices in order to avoid jeopardizing their existence; but I do not think that they have succeeded generally in proving either the imminence or the extreme gravity of the danger, or the absence of lawful means of avoiding it, at least in part. Rather, the information supplied by the applicants reveals a situation of considerable hardship and objective difficulty occasioned by Decision No 962/77. All the undertakings complain that they risked losing customers, and that they suffered heavy reductions in their sales owing to the reluctance of purchasers to pay higher prices and because the gaps in the system enabled those purchasers to continue to buy at advantageous prices from dealers and from producers in non-member countries. The Italian undertakings have

also pointed out that it was practically impossible to reduce their fixed costs by laying off a part of their labour force, in view of the employment crisis in Italy and the likelihood of strikes and social agitation in the event of redundancies. The German undertakings have stressed the competition faced by them from the Italian producers who had resolved to sell without complying with the minimum prices, and what they regard as the ineffectiveness of the control exercised by the Commission. Those circumstances confirm that Decision No 962/77 required considerable sacrifices of the more competitive undertakings; but they cannot be interpreted as a situation of imminent and unavoidable danger threatening the very existence of those undertakings.

The arguments which may be relied on in support of my point of view fall into three main groups. In the first place, a certain reduction in the competitiveness of the undertakings able to produce at lower costs, and thus a reduction in the volume of their sales, were logical consequences of Decision No 962/77, since it sought — as I have noted several times — to bring about a redistribution of the market, in the sense of facilitating sales of the products of the less efficient undertakings. The risk of loss of certain customers was therefore foreseeable, the more so as the need to introduce a scheme of minimum prices had been under discussion for some time. The gaps in that system would have had to cause not only a reduction in sales but an imminent danger of extinction for the undertakings for it to be possible to speak of a state of necessity; but a danger of that type did not arise, and the applicants themselves have not claimed that such an acute crisis was reached.

Secondly, I would point out that, even if the existence of the more competitive undertakings had been jeopardized by Decision No 962/77, there was no shortage of lawful means of attempting to remove the danger. The main difficulty for the Italian undertakings took the form of a reduction in their sales possibilities on the markets of other Community countries, but they retained the possibility of disposing of goods on the Italian market (since for local sales the producers were not placed at a disadvantage by the scheme of minimum prices), and on the markets of non-member countries (where it seems that some undertakings did indeed make up for the contraction in sales within the Community). Further, alignment on the prices of producers from non-member countries remained possible until March 1978, that is to say until the entry into force of Decision No 527/78. Therefore the existence of the applicant undertakings could not be said to have been threatened by a danger from which there was no escape.

Thirdly, the case for a state of necessity would have required specific proof, relating to the situation of each undertaking; but the majority of those concerned have referred to arguments of a general nature. Even the information on the fall in production or in sales in 1977 supplied by some applicants (for example, Ferriera Valsabbia and Officine Laminatoi Sebino) cannot be interpreted as proof of a dangerous situation precipitated by Decision No 962/77, because there is no question of a reduction such as to jeopardize the survival of those undertakings. Besides, the causal link between the prices scheme

and the fall in production or sales has not been proved in every case. In this regard, I will recall in particular the case of the Korf undertaking, the applicant in Case 85/79, which has claimed — without being challenged by the Commission — that its market share fell in the third quarter of 1977 from the 12.3% attained in the previous quarter to 10.2%; the Commission sees in that phenomenon only the continuation of a previous tendency to lose ground against more competitive undertakings, and notes that it was precisely in the third quarter that Korf began to sell at prices below the minimum prices.

In conclusion, I believe that it is not possible to accept that the conduct of the applicant undertakings was justified by an alleged state of necessity. An exception might be found in the case of the undertaking Antonio Stefana, the applicant in Case 226/78. At the time of the introduction of the rules on minimum prices that undertaking was in a particularly delicate financial situation, having contracted debts as a result of investment in industrial re-organization and being obliged to face the general credit difficulties which had arisen in Italy while the work was in progress. One month after the adoption of Decision No 962/77 it informed the Commission (by telex of 6 June 1977) that the actual market prices for reinforcement bars continued to be lower than the compulsory minimum prices and that observance of those minimum prices was causing it an appreciable reduction in sales. Indeed, from a monthly average of 6 570 tonnes in the first four months of 1977, its sales had fallen to 3 866 tonnes in May and to 2 474 in June. By the end of June, Stefana's liabilities had

risen from 1 700 million Italian lire to almost 2 000 million. Therefore, by a telex of 1 July 1977, it informed the Commission that in the face of the conduct of its competitors it considered itself obliged to sell at prices lower than those laid down; and in fact such sales, according to the information supplied by the Commission, commenced on 13 July 1977 and lasted until 5 September of the same year. Thus there are in that case factors which might persuade one to accept the defence of necessity in favour of the Stefana company: the danger took the form of a genuine risk of insolvency, given the size of the company's liabilities. However, I think that even in that case the imminence of that danger has not been proved, that moreover there remains doubt regarding the degree to which the financial situation of the company was a result of its lack of caution in investing, and that in any case there remained the possibility (which does not seem to have been explored) of seeking a solution to the difficulties experienced in one of the lawful ways referred to above.

Similar considerations are valid as regards the undertaking Maximilianshütte, the applicant in Case 83/79. There is no doubt that that undertaking also suffered a severe fall in sales after the introduction of the minimum prices scheme. In the first quarter of 1977 it had held 29% of the market in Bavaria, whereas in the second quarter of the year its share fell to less than 20%. The Commission has observed that the market share in the first quarter of 1977 may not be taken as a point of reference, since it was abnormally high; that would seem to be confirmed by the fact that the percentage in the second half of the year

remained more or less unchanged in 1978, although the company, according to the evidence of the defendant, had started to charge prices below the compulsory lower limit from 14 June 1977.

A further objection raised by the Commission is that the reduction in sales was largely determined by factors other than the minimum prices scheme, amongst them the seasonal pattern of the market, which tends to be slack in the summer months. On the other hand, it is true that imports from Switzerland into the Federal Republic of concrete reinforcement bars sold at prices lower than those laid down increased considerably in the second half of 1977 (from 12 000 tonnes in the April - June quarter, to 19 000 in the following quarter); Maximilianshütte sees that as proof of insufficient control on the part of the Commission, of which the producers in Brescia had taken advantage in order to sell bars via Switzerland. In my opinion, although it is true that the gaps in the system aggravated the burden thereof to the detriment of undertakings capable of producing at low prices, it cannot be said that the Commission failed to exercise control; that is proved by the sanctions imposed upon numerous undertakings, of which only a section have challenged the decisions inflicting fines on them. Finally, I do not think that Maximilianshütte has proved that it had to face the imminent risk of insolvency or closure, or that it sought in vain for solutions other than the infringement of the provision on minimum prices in order to ensure its survival.

Thus the negative conclusions reached with regard to the state of necessity apply generally to the applicants which have pleaded that exonerating ground in

their defence. Rather, the arguments to which some undertakings have referred in order to justify their conduct will have to be borne in mind when I come to consider the question of varying the decisions imposing fines.

18. Thus far I have dealt with questions common to all the applicants, or to a large number of them. I shall now have to consider specific problems raised in the context of individual applications which it is not appropriate to discuss generally.

(a) The undertaking Acciaieria di Darfo, the applicant in Case 227/78, considers that the individual decision impugned is vitiated by the fact that the Commission did not give it an opportunity to supplement its observations orally. Summoned to Brussels on 29 June 1978, at only six days notice, it had requested a postponement of two weeks and was informed of the Commission's refusal by means of a telegram which it received on 29 June, the day fixed for the hearing. It claims to have been thus denied its procedural right, contrary to the principle *audi alteram partem* laid down by Article 36 of the ECSC Treaty. The infringement of that principle, it is alleged, is now aggravated by the fact that the Commission denies the applicant's right to rely on documents which should have led at least to a reduction in the amount of the fine. All the foregoing is said to affect the individual decision impugned, vitiating it.

From the information supplied by both parties it is clear that the applicant did indeed receive the Commission's letter summoning it to appear six days before the date fixed for the hearing. However,

the Commission has observed that in the context of the procedure for applying pecuniary sanctions for an infringement of ECSC provisions a meeting subsequent to the submission of written observations by the undertaking concerned is a purely optional step for which no period of notice is laid down. Indeed, Article 36 of the ECSC Treaty, to which Acciaieria di Darfo referred, merely requires that before imposing a pecuniary sanction or ordering a periodic penalty payment, the High Authority must give the party concerned the opportunity to submit its comments; thus the requirement *audi alteram partem* may be deemed to have been satisfied by the opportunity given to the undertaking to submit written observations.

It remains to be considered whether the failure to present certain documents, at the time of the investigation or by way of annex to the written comments, precludes the undertaking from producing those documents in the course of the Court proceedings which may follow the decision imposing a fine. Contrary to the view taken by the Commission, I believe that there is no such rule excluding evidence. The judgment of 12 July 1962 in Case 16/61, already cited, stressed "the purely preliminary nature of the procedure laid down by Article 36" of the Treaty, and recognized that a ground of appeal could not be dismissed for the sole reason that it was not presented at the time of that procedure. Therefore documents which the undertaking concerned failed to rely on when presenting its comments to the Commission should be taken into consideration by this Court.

According to Acciaieria di Darfo, the Commission included amongst the transactions penalized by the fine certain

sales of products not subject to the minimum prices scheme.

However, in reply the Commission argued that the disputed invoices bore a stamp with the legend "partial alignment on the AFIM list" and that the AFIM list deals exclusively with prices relating to concrete reinforcement bars. The applicant did not challenge that statement during the oral procedure. Thus the defendant's argument must be upheld.

Acciaieria di Darfo claimed further that the sales in respect of which the fine was imposed included deliveries made pursuant to contracts entered into before Decision No 962/77 came into force. In this regard, the applicant referred specifically to two groups of invoices: a group relating to supplies to Maretto Blein, in execution of orders confirmed on 27 and 28 April 1977 through the agency of Darma of Milan; and a second group relating to deliveries to the Baracit company, in execution of confirmations of orders given on 28 April 1977 through the agency of Albani. The Commission objected that the orders in question were not put in evidence in the course of the investigation of the company concerned; but for the reasons which I have explained above that objection is irrelevant. Therefore, in the absence of any challenge by the defendant regarding the veracity of the documents presented by the applicant, I consider that the Court should take into account Invoices Nos 1315, 1316, 1416, 1454, 1514, 1691, 1705, 1713 and 1714 for supplies to Blein (Annexes 4 to 9 to the reply) and Invoices Nos 1660, 1661 and 1662 which relate to the deliveries to Baracit, for the purpose of excluding the corresponding sales from those subject to the imposition of penalties.

(b) The undertaking Rumi, the applicant in Case 263/78, submits that the individual decision addressed to it did not contain a sufficient statement of reasons as regards the criterion used for the calculation of the fine. For its part, the Commission declares that, in this case as in the others, it abided by an objective criterion whereby a particular percentage, the level of which varies according to the gravity of the offence, is applied to the amount of the underpricing. In the decision impugned the Commission did indeed indicate the amount of the underpricing and that of the unlawful sales, and went on to refer to Article 64 of the ECSC Treaty, which permits it to impose fines "not exceeding twice the value of the sales effected in disregard [of the provisions in question]".

It is true that it is not expressly stated which of the two figures was used as the basis for the calculation of the fine (we know that it was the figure representing the amount of the underpricing because the Commission made that clear in the course of the proceedings) and that it was therefore impossible to know what percentage was applied. However, it seems to me that the measure impugned at least indicates the essential premises, of fact and law, on which it is based, and I do not believe that the alleged incompleteness of the statement of reasons adversely affected the possibility for the undertaking of obtaining judicial protection or review before this Court (which judicial review was subsequently facilitated by the further details supplied by the defendant).

In the alternative, the same applicant submits that in calculating the amount of the underpricing imputed to it, the defendant was in error since its inspector compared the prices stated in the

invoices with the general Davignon price, whilst the German buyers calculated actual prices with reference to the basing points of Saarbrücken or Oberhausen, taking into account transport costs, thus reducing the Davignon price from DM 540 to DM 451.87 per tonne. If such actual prices resulting from the alignment method were applied, the applicant's underpricing would be reduced to half the figure stated in the disputed decision (that is from 200 to approximately 100 million lire).

By way of proof of the alleged alignment, the applicant submitted a telex of 23 June 1978 from the Walzstahl-Vereinigung (Annex 16 to the application). However, as the defendant rightly points out, that document refers to sales subsequent to those taken into consideration for the calculation of the underpricing. Further, in its defence the Commission claimed, without being challenged by the applicant, that the final destination of the goods in question was the Netherlands. In those circumstances, an alignment on German basing points would have been contrary to Article 60 (2) (b), fourth indent, of the Treaty.

Therefore the submission put forward in the alternative by Rumi should not be upheld.

(c) In Case 264/78, initiated by the undertaking Feralpi, there is disagreement concerning a group of invoices, with reference to which the decision impugned asserts that Feralpi "charged prices below the minimum, written by

hand on certain dispatch notes". According to the applicant, that suggestion, which was not raised in the communication of the charges against it, is unfounded. No probative value should be ascribed to annotations on such notes, as they are documents designed to accompany the goods in accordance with tax provisions, but are extraneous to the contractual relationship. Further, the applicant claims that the price appearing on the invoices could not have been different from the actual price, since the provisions in force require the invoices to be submitted to the currency authorities and the indication of a fictitious price constitutes a currency offence subject to heavy penalties in Italy.

However, it should be noted that in an annex to the rejoinder the defendant presented copies of certain telexes concerning the sales in question, in which a clear distinction is made between the selling price, expressed in Deutschmarks, and the amount intended to be included on the invoice, expressed in lire. Apart from being expressed in different currencies, the two amounts differ in value, as pointed out by the Commission.

That tends to substantiate the underpricing punished by a fine in the decision unpugned, in relation to the group of invoices in question.

In the alternative, the applicant Feralpi challenges the accuracy of the calculations on the basis of which the Commission fixed the amount of the pecuniary sanction imposed upon it. In particular, in calculating the amount of the alleged unlawful sales, the

Commission is said to have taken into account not only the basic price but also the extras, whereas the latter were left out of account when calculating the amount by which the minimum price had been undercut. That, it is claimed, is contrary to Article 2 of Decision No 3000/77, which includes in the minimum prices extras for quality. According to the applicant, for the purpose of the minimum price, any extra relating to a particular quality of the goods should be taken into consideration and, therefore, not only the supplement corresponding to particularly stringent specifications, but also the supplement in respect of the length or diameter of the product.

The Commission recalls that Article 1 of Decision No 3000/77 specifies the quality to which the minimum prices refer; in each case it is a question of a basic quality for a particular product. For any superior quality the price is higher, whether the so-called extra for quality is applied or the invoices are made out at the basic price fixed for the specific quality. As a result of Article 4 of the same decision extras (supplements and surcharges) may not be reduced or cancelled. Consequently, the lists are not subject to alteration (except as regards the basic prices, should they be lower than the minimum prices) and all the particular conditions of those lists, including the extras, must be applied.

In reply the applicant points out that it is not a question of seeing whether the list prices are subject to alterations, but rather of bearing in mind that the minimum price includes the extra for quality and that for that purpose the extra for diameter must also be considered an extra for quality. The Commission's rejoinder does not give

any further consideration to that point. During the hearing the defendant's agent expressed the view that if the Commission had failed to apply the rules strictly, that would have worked to the advantage of Feralpi and therefore the applicant would have no cause to complain on that count.

It cannot be said that the terms of the problem are sufficiently clear, or that the Commission's defence has helped to clarify them. The applicant had the impression that to a certain extent the defendant shared its interpretation, and the defendant suggested that it had made a mistake to the advantage of the applicant. As far as can be understood, the essence of the criticism in question is that whilst the extras were added to the basic price invoiced by the undertaking for the calculation of the amount of the unlawful sales carried out by it, reference was made only to the basic price, without the extras, for the calculation of the difference between the actual price and the minimum price (so that that difference was enlarged, affecting the fine proportionately). Under Article 2 of Decision No 3000/77 — the importance of which is recognized by both parties — the minimum price is a basic price which includes extras for quality; therefore, the point of reference for calculating the difference between that price and the actual price is not in dispute. As for the actual price, if extras for quality were invoiced by the undertaking separately from its basic price, it seems fair that they should be added to that price so that the total figure for the actual price includes the extras and thus becomes comparable with the legal point of reference (the minimum price). Therefore, if the Commission calculated the difference between the actual price and the legal price in any other way, that

calculation should be corrected and any variations which that may produce in the amount of the fine in favour of the applicant should be made.

Finally, the applicant Feralpi also contests the accuracy of the calculations on which the Commission based the decision impugned in relation to Invoice No 2738. Indeed, the telex informing that undertaking of the charges against it states that the invoice bearing that number concerns a consignment of 550 000 tonnes dispatched to Ferrari, whereas the goods covered by Invoice No 2738 were actually dispatched to the company Acciaierie di Calvisano and concerned a consignment of 20 920 tonnes.

The Commission denies having made a mistake which might have affected the calculation of the fine, merely pointing out that the number of the disputed invoice was illegible and may have been referred to erroneously, but that all the other details of the same invoice were correctly reproduced (and thus the sale of 550 000 tonnes to Ferrari actually took place). That claim was not specifically denied by the applicant. In that case the complaint in question must be considered unfounded.

(d) The undertaking Forges de Thy-Marcinelle et Monceau has brought two actions, registered as Cases 26/79 and 86/79 respectively; the first seeks the annulment of the individual decision of 10 January 1979, whilst the second seeks

to impugn the decision of 2 May 1979 whereby the Commission, taking into account new factual evidence, reduced the fine imposed upon the applicant by the previous decision.

In Case 86/79 the defendant, without raising a formal objection, casts doubts upon the admissibility of the second application, observing that its object and the submissions raised already formed part of the application in Case 26/79.

I do not deny that the decision of 2 May is of an ancillary nature in relation to the previous decision, in so far as it merely amends the parts relating to the scale of the transactions carried out in breach of the rules on minimum prices, those transactions being fixed at a lower level, thus reducing the size of the fine previously imposed. None the less, in its application in Case 86/79 the applicant adduces a new submission, concerning the criterion followed by the Commission in reducing the fine, and without doubt that ground of impugnement relates specifically to the decision of 2 May.

In my opinion, that fact is sufficient reason for considering the reservations expressed by the defendant with regard to the admissibility of the application to be unfounded.

As regards the substance of Joined Cases 26 and 86/79, I would point out that they differ from the other applications with which I have dealt hitherto in that they raise a special problem, namely, whether Decision No 962/77 is applicable to sales of bars carried out after its entry into force but in pursuance

of earlier contracts which did not, however, specify the price of the goods.

In the first place, I will recall that Article 2 (2) of the said decision provides that the minimum prices referred to in Article 1 "shall be compulsory for transactions effected on or after the third day following the entry into force of this Decision and as from that time they shall replace lower list prices until such prices have been changed by undertakings in accordance with Article 3".

In reliance on that provision, the applicant argues that the minimum prices scheme did not apply to the consignments of goods in relation to which the fine was imposed on it, maintaining that, although those consignments were dispatched after 8 May 1977, they were supplied in performance of contracts made prior to the entry into force of the decision. Indeed, the "transactions effected" subsequent to that date should be interpreted as the contracts and not as the deliveries in performance of contracts; that is demonstrated even more clearly by the French text of the decision, which speaks of "transactions effectuées". Therefore it must be assumed that consignments dispatched in performance of contracts made before Decision No 962/77 came into force are not subject to the minimum prices. At all events, that seems to be common ground and is in accordance with the practice followed by the Commission.

However, it is necessary to bear in mind that, in order to constitute a "transaction effected" prior to the entry into force of Decision No 962/77, the contract of sale must contain all its essential elements. In Belgian law, as in many other legal systems, a sale may be considered to be concluded even though the determination of the price is deferred to a later

date, provided that the determination is to take place on the basis of objective factors and so does not involve any manifestation of a new intention on the part of the contracting parties. The copies of the orders produced by the applicant refer, under the heading "price", to the prices agreed between buyer and seller. According to the applicant, it was a question of firm prices, already precisely determined at the time of the contracts. However, that claim is not supported by any evidence, and is indeed contrary to the practice of the applicant, which is apparent from the documentation produced by the defendant (see Annexes 1, 8, 17 and 22 to the defence). Those documents are confirmations of orders in which Forges de Thy-Marcinelle referred constantly, for the determination of the price, to the list in force *at the time of dispatch*. Moreover, that procedure seems to accord with the general conditions of sale set out in that applicant's lists, which stipulate as regards concrete reinforcement bars that "our sales are made on the basis of the prices, supplements and terms contained in our price-lists in force on the date of dispatch (or that of the ex-works invoice). The prices, supplements and terms stated in our offers or acknowledgments of receipt are therefore given for guidance only" (Annex 2 to the defence).

Taking account of those factors, it seems clear that a general reference to the price agreed with the purchaser, contained in a contract for the sale of bars drawn up by the applicant, and not accompanied by any other indication, must be interpreted as referring to the list prices

in accordance with the general conditions of sale and the commercial practice of the applicant. The invoices relating to the sales about which there is still dispute (after the decision adopted by the Commission in the course of the proceedings, which reduced the number of charges and thus the amount of the fine initially imposed upon the applicant) are all subsequent to the date on which Decision No 962/77 came into force and refer to dispatch notes which are also subsequent to that date. It necessarily follows from that that the contracts of sale in issue were completed after the minimum prices scheme had become applicable. That is in accordance with the principle whereby there is no contract of sale until the price has been ascertained, and it is not sufficient that it should be ascertainable, where the parties have referred to the prices in force at the date of dispatch and the seller is responsible for fixing the price unilaterally, without the intervention of the public authorities (which is the principle accepted both in Belgian and in French case-law; see, for example, Tribunal de Commerce, Tournai, 9 February 1947, Pasicrisie 1949, III, p. 31; Cass. civ. I, 1973, Brell. I, n. 96, p. 89).

On the other hand, this aspect of the question could also be settled in this case on the ground that there exists a simpler reason for rejecting the application. Indeed, as it is clear that the ascertainment of the price was carried out by reference to the list prices in force at the date of dispatch, the need to observe the minimum prices with regard to the sales in question exists in any case on the ground that after the entry into force of Decision No 962/77 no undertaking could fix list prices lower than the

minimum prices. Consequently, the sale price agreed *per relationem* prior to the entry into force of the said decision had to be in accordance with the obligations imposed by the minimum prices scheme.

With regard to the reduction in the fine imposed in January 1979, carried out by the Commission four months later in proportion to the reduction in the amount of the underpricing (approximately 10%), Thy-Marcinelle maintains that it would have been more logical to grant it a reduction in proportion to the reduction in the value of the unlawful transactions (20%).

I do not share that point of view. The criterion used by the Commission in reducing the fine seems to me to be in accordance with the criterion on which it based the calculation of the fine itself. For that purpose, the coefficient of 10% of the amount of the underpricing was applied; therefore it is logical that the reduction should be carried out by subtracting the 10% not from the total value of the unlawful sales, but only from the amount of the estimated underpricing related to those transactions. It should also be noted that in Case 26/79 the applicant does not contest the validity of the criterion used in calculating the fine; and that, moreover, the same method was used by the Commission in relation to all the other applicants also. The complaint in question should thus be rejected.

19. I recalled at the outset that, purely as an alternative remedy, the majority of the applicants are seeking an amendment to the individual decision impugned, in the form of a reduction in the fines imposed by the Commission. There is no doubt that, as the Court is invested with *unlimited jurisdiction* in these cases, it has the power to grant such requests, altering the amount of the pecuniary sanctions if it finds it just and appropriate to do so.

The special nature of the crisis in the concrete reinforcement bars sector — which led the Commission to introduce the minimum prices scheme —, the appreciable adverse effects which the level of the prices imposed had on the activity of the more competitive undertakings, the serious gaps in the system which was introduced by Decision No 962/77 and which remained until the beginning of 1978, all constitute in my opinion valid grounds for a substantial reduction in the fines. I have already spoken of all those circumstances, and I think it superfluous to dwell further on that aspect. Therefore I shall merely emphasize, as regards the first point, that the characteristic feature of the crisis in the said sector was the imbalance between the strong productive and competitive capacity of certain small-scale undertakings (approximately one-third of the total) and the difficulties encountered by many larger undertakings, so that a measure fixing minimum prices was bound to penalize the one group in order to protect the other. In fixing a compulsory minimum level for prices, the Commission must have known that that penalization would actually take place, and should have sought to reduce the burden thereof, at least adopting as from the beginning all the supplementary measures required in

order to ensure that the gaps in the system set up did not render compliance therewith still more onerous. I have taken the view that Decision No 962/77 did not contain legal defects such as to render it unlawful, but I cannot fail to confirm that there were, even on a strictly formal level, certain reasons for doubt (in particular as regards observance of the penultimate paragraph of Article 61, compliance with the principle of proportionality and the adequacy of the statement of reasons in relation to the level of the compulsory prices). It seemed to me that such doubts could be overcome, the more so as, in exercising its supervisory activity, the Court must adopt caution as its guiding criterion when decisions of economic policy, which are not manifestly unlawful, are under review; none the less, I believe that the hesitancy and uncertainty of the action taken by the Community executive cannot be overlooked when assessing the fairness of the pecuniary sanctions imposed.

Of course, in reducing the amount of those sanctions greater leniency should be shown towards those undertakings which suffered most from the introduction of the minimum prices scheme and which have furnished more convincing evidence of the dangers encountered and the sacrifices endured. I refer above all to the undertaking Antonio Stefana, and to a lesser extent to the undertaking Maximilianshütte, whose vicissitudes I have already related. I also believe that it is just, in the case of the undertaking Rumi, to take into account the fact that its sales in the Common Market fell sharply in July and August 1977, in spite of which fact it initially complied with the rules on minimum prices, being persuaded to infringe them after suffering a further

sudden and appreciable fall in January 1978, and after discovering that, on the German market where its products had previously enjoyed high sales, undercutting of the minimum prices had become frequent and dangerous (the undertaking Walzstahl-Vereinigung declared in a telex sent to Rumi on 23 March 1978: "no sales can be obtained by the Italian undertakings if this situation continues").

Finally, I would point out that the undertaking Sider Camuna has put in evidence documents which show that at the time of the facts under consideration it was already operating under very difficult conditions, utilizing not more than 25% of its capacity; under such conditions, it would have been impossible, so it says, for it to face the danger of a sharp contraction in sales as a result of observing the minimum prices.

On the other hand, there is at least one case in which I see no justification for reducing the fine. I refer to the case of Aciéries de Montereau, the applicant in Case 31/79. That undertaking declares that after the introduction of the minimum prices scheme it sought in vain to obtain orders at those prices, but learnt from its customers that they had been able to conclude contracts for the purchase of concrete reinforcement bars at lower prices from other producers, which had issued documents bearing dates earlier than the date on which Decision No 962/77 came into force. In that situation, and after suffering a loss of approximately 2 million francs as a

result of declining sales, the applicant claims to have been compelled to adjust to market conditions.

In reply, the Commission pointed out that the minimum prices fixed by Decision No 962/77 were lower than the applicant's list prices in force immediately prior to the entry into force of that decision. As for the financial losses which the applicant claims to have suffered in 1977, the Commission says that they were due essentially to the fact that the prices charged by the undertaking were too low in relation to production costs. It is interesting to note that the average sales achieved by the applicant in the period from September to December 1977 clearly exceed the average sales prior to the entry into force of Decision No 962/77. Thus one has the impression that that undertaking practised a policy of dumping, and that by offering its products at prices far below the minimum prices it was able to conquer new markets. All that is confirmed by the enormous quantity of the cut-price sales made by that undertaking, amounting to almost 50 000

tonnes, a level which greatly exceeds that of the other applicants.

In the light of those considerations, the conduct of *Aciéries de Montereau* seems to have contravened the objectives of Decision No 962/77 more seriously than did the infringements committed by more competitive producers. Moreover, that undertaking's sales below the minimum prices began scarcely a week after the entry into force of Decision No 962/77 and continued until the end of 1977, that is to say for a considerably longer period than in the case of the infringements committed by the other applicants.

Taking into account those factors, and in view of the extremely low coefficient applied by the Commission in imposing the fine on that applicant (5.7% of the amount of the underpricing as against 25% in the case of the undertakings from *Brescia*, and 10% in the case of *Korf*, *Maximilianshütte* and *Thy-Marcinelle*), I do not consider that there exists any ground for reducing the amount of the fine in question.

20. I would conclude by suggesting that, in its judgment on the applications in Joined Cases 154/78, 205 and 206/78, 226 to 228/78, 263 and 264/78 and 39/79, as well as in Joined Cases 26/79 and 86/79, and Cases 31/79, 83/79 and 85/79, the Court should:

- I. Dismiss the applications for the annulment of the individual decisions impugned, with the exception of those concerning the undertakings *Feralpi* and *Acciaieria di Darfo*.
- II. Annul the decision concerning the undertaking *Feralpi*, as regards only that part which concerns the sales transactions effected by it in the Federal Republic of Germany, and further, declare, in relation to the same decision, that in calculating the difference between the minimum prices and the prices charged for the purpose of determining the fine it is

necessary to take into account not only the actual basic price, but also the extras invoiced by the undertaking.

- III. Annul the decision concerning Acciaieria di Darfo, as regards only the deliveries to Maretto Blein and Baraclit under orders of 27 and 28 April 1977.
- IV. Reduce the coefficient used in calculating the fines imposed on the following applicants:
  - (a) By 50% in favour of the applicants Ferriera Valsabbia, OLS, Acciaierie e Ferriere Industria Metallurgica, Fratelli Stefana, Acciaieria di Darfo, Feralpi and Korf (having corrected the basis for the calculation of the fine in the case of the undertakings Acciaieria di Darfo and Feralpi);
  - (b) By 60 % in favour of the applicants Sider Camuna and Rumi;
  - (c) By 70 % in favour of the applicant Maximilianshütte;
  - (d) By 80 % in favour of the applicant Antonio Stefana.
- V. Order the Commission to pay half of the costs in the case of the applicants mentioned in groups (a) and (b) above, and two thirds of the costs in the case of the applicants Maximilianshütte and Antonio Stefana.
- VI. Order the applicants in Joined Cases 26 and 86/79 (Thy-Marcinelle et Monceau) and 31/79 (Montereau) to bear all the costs connected with those cases.