

*The power to obtain information provided for in Article 47 of the Treaty can lawfully be used in order inter alia to supervise the observance of the rules on non-discrimination and on the publication of price-lists
(Treaty, Arts. 47 and 60 (2)).*

(g) *Publication — System of publication — Non-discrimination — High Authority's legislative powers — General objectives of the Treaty
When adopting the measures necessary for the implementation of Article 60, the High Authority has not merely a right but a duty to take into account all the aims laid down in Articles 2, 3 and 4, such as the fixing of prices at as low a level as possible and the attempt to prevent prohibited agreements. Consequently, in order to achieve the latter two aims, the High Authority is not bound to confine itself exclusively to the measures provided for in Articles 61 and 65
(Treaty, Arts. 60, 61, 65).*

3. *Misuse of powers*

*Where more than one aim is being pursued, even if the grounds for a decision include improper grounds in addition to the valid ones, this would not make the decision invalid for misuse of powers, provided that the decision does not sacrifice the main aim
(Treaty, Art. 33).*

In Case 1/54,

GOVERNMENT OF THE FRENCH REPUBLIC, represented by Paul Reuter, Professor at the Faculty of Law, Paris, Legal Adviser to the Ministry for Foreign Affairs, Paris, acting as Agent, with an address for service in Luxembourg at the French Legation,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser Michel Gaudet, acting as Agent, assisted by Jean Coutard, Advocate at the Conseil d'État and the Cour de Cassation, Paris, with an address for service in Luxembourg at its offices, 2 Place de Metz,

defendant,

APPLICATION for the annulment of Decisions Nos 1/54, 2/54 and 3/54 of the High Authority of 7 January 1954,

THE COURT

composed of: M. Pilotti, President, P. J. S. Serrarens and Ch. L. Hammes (Presidents of Chambers), O. Riese, L. Delvaux, J. Rueff and A. van Kleffens, Judges,

Advocate General: M. Lagrange
 Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

On 9 February 1954, the Government of the French Republic lodged at the Court Registry an application for the annulment of Decisions Nos 1/54, 2/54 and 3/54 of the High Authority of 7 January 1954, published as follows: No 1/54 in the Official Journal, English Special Edition 1952–1958, p. 14; No 2/54 in the Official Journal, English Special Edition 1952–1958, p. 15; and No 3/54 in the Journal Officiel de la Communauté Européenne du Charbon et de l'Acier, 13 January 1954, p. 219.

The application was submitted within the required period, in accordance with the third paragraph of Article 33 of the Treaty, and with Articles 84 and 85 of the Rules of Procedure of the Court, and the applicant has duly appointed an Agent.

It appears from the documents produced by the parties as well as from the decisions at issue that the facts of the case are as follows:

Under the terms of Article 60 of the Treaty, the High Authority on 2 May 1953 adopted Decisions Nos 30/53 and 31/53 which define the practices prohibited by Article 60 (1), and contain rules for the steel market relating to the publication of price-lists and conditions of sale; under the terms of these decisions, undertakings were under an obligation to publish their price-lists beforehand and keep strictly to the prices stated therein — any variation in relation to the aforementioned lists constituting, according to these texts, a prohibited discriminatory practice.

On 7 January 1954, the High Authority relaxed these rules by adopting Decisions Nos 1/54 and 2/54 against which the present proceedings are now brought.

Under this new system, a variation from published prices no longer amounts to a prohibited practice if the seller can show that the transaction in question does not fall within the categories of transactions covered by his price-list, or that the prices or conditions have been departed from uniformly in all comparable transactions (Decision No 1/54);—moreover, in the case of the steel market, and the steel market alone, an average margin of 2.5% was introduced, within which a variation from the lists was allowed in the case of all transactions concluded within the preceding sixty days, without the need for prior publication of new lists (Decision No 2/54);—lastly, for purposes of verification, undertakings must submit fortnightly reports on all variations made on the steel market (Decision No 3/54).

The aforementioned decisions and communications relating thereto were published in the Journal Officiel 1953, pp. 109 to 112, and 1954, pp. 217 to 224; Decisions Nos 30/53, 31/53, 1/54 and 2/54 were subsequently published in the Official Journal, English Special Edition 1952–1958, pp. 9 to 12 and 14 to 16.

By its application, the Government of the French Republic contested the aforementioned decisions and asked the Court to

'Annul Decisions Nos 1/54, 2/54 and 3/54 of the High Authority of 7 January 1954',

which, at the public hearing, was reduced to a claim for the annulment of Decisions Nos 1/54 and 3/54 as well as Articles 1 and 2 of Decision No 2/54.

The Government of the French Republic

bases its application upon the following grounds:

- A. Infringement of the Treaty;
- B. Misuse of powers.

The grounds put forward are supported by the following arguments which may be summarized as follows:

(a) Infringement of the Treaty by reason of Decision No 1/54: Article 60 (2) links the means (that is the duty to publish and adhere strictly to price-lists) so closely to the end (that is the prohibition of discriminatory practices) that any infringement of the rules as to publication must, at the same time, be deemed to be a discriminatory practice. Furthermore, the new ruling (Decision No 1/54) no longer amounts to prohibiting discriminatory practices: on the contrary, it makes these possible, for it makes the criterion meaningless, by basing itself on the completely abstruse notion of 'comparable transactions' and by allowing continual variations in prices; the result is that only strictly simultaneous transactions remain subject to the same conditions, which is practically meaningless. At the same time, the new ruling makes any form of supervision impossible.

(b) Infringement of the Treaty by reason of Decisions Nos 2/54 and 3/54: the easing of the duty of publication amounts to a breach of the Treaty, for the result of the use of the words 'prices charged' and 'must be made public' is that the Treaty categorically lays down a duty both to publish all new prices prior to transactions and to adhere strictly to price-lists; it entrusts the High Authority only with the duty of deciding how publications are to be effected but not with that of deciding their content and scope. The new ruling (Decision No 2/54) does not allow purchasers to ascertain the validity of the prices charged. Furthermore it makes the use of the right of alignment, laid down in Article 60, impossible, since the prices actually charged are not known. The High Authority fails to recognize the distinction made in the Treaty between the duty to publish price-lists and the right to demand information and statistics.

(c) Misuse of powers: in adopting the decisions which are now being contested, the High Authority's motive was its intention to lower the general price-level and prevent price agreements. However, the powers which have been vested in the High Authority under Article 60 were conferred on it only so as to prevent discriminatory practices; if it wished to pursue other objects, it could only do so within the framework of Articles 61 and 65.

The application was served on the High Authority on 9 February 1954, in accordance with Article 33 (2) of the Rules of Procedure of the Court.

The statement of defence was lodged at the Court Registry within the period laid down by Article 31 (1) of the Rules of Procedure, extended by order of the President of the Court dated 4 March 1954.

The High Authority's Agent and Counsel were duly appointed.

By its defence the High Authority requests the Court to:

'Dismiss the application by the Government of the French Republic filed on 9 February 1954, with all the legal consequences thereof, in particular as regards the settlement of fees, recoverable costs and any other expenses incurred'.

The High Authority counters the grounds on which the application is based with several arguments, which may be summarized as follows:

(a) The allegation of infringement of the Treaty by reason of Decision No 1/54 cannot be regarded as well founded: a clear distinction can be drawn between prohibiting discrimination and duty to publish, as a breach of the latter does not in itself necessarily amount to discrimination where published price-lists are departed from in a uniform manner in all comparable transactions. Moreover the only absolute rule is that discrimination is prohibited, whereas the duty to publish is not an end in itself but merely a means of maintaining this rule. The prohibition on discrimination has in no wise been negated by

the new rules, nor indeed has it been jeopardized by them. Objective criteria must be used in deciding whether transactions are comparable; this can be more effectively verified than formerly as a result of the measures provided for in Decision No 3/54.

(b) The allegation of infringement of the Treaty by reason of Decisions Nos 2/54 and 3/54 cannot be regarded as well founded: in fact, the decisions contested also rely upon the principle of prior publication, although Article 60, which speaks of prices 'applied' rather than 'to be applied', does not make this mandatory. What is decisive is that the provisions of the Treaty give the High Authority power to fix equitably to what extent and in what form publication shall take place. If prices were tending to come down, which was the case at the time when the decisions were adopted, purchasers could not be expected to exercise any effective supervision over prices, as the variations from price-lists were downward variations, that is, to the advantage of purchasers; nor could undertakings be expected to denounce themselves, so that under the old system, the High Authority had virtually no means of exercising supervision. This is only possible under the new system; the High Authority cannot be criticized for combining the duty of publication with the duty to give information.

As regards alignment, in a market which is as perfectly organized as the steel market, it is always possible to know a competitor's actual prices. The High Authority knows that undertakings are availing themselves of their right of alignment now as before. In accordance with the Treaty, alignment may be on the prices actually applied and not only on the price-lists published.

Finally, the new system has proved necessary in order to enable producers to adapt themselves to price fluctuations. In fact, the rigorous enforcement of a system of prior publication and a constant revision of price-lists, following any variation of prices, however slight, would have prevented prices from finding their own level; this could only have been achieved by agreements between producers which

would have been inconsistent with the provisions of the Treaty. The rigid system advocated by the Government of the French Republic would result in undertakings dominating the Common Market; moreover the High Authority would lose any effective influence on the market. Such a system would have such adverse consequences that it could only be asked for if the Treaty unequivocally laid it down, which it does not.

(c) The allegation that there has been a misuse of powers cannot be regarded as well founded: in fact, Article 60 — as can be seen from the use of the words 'in particular' — requires the High Authority in regulating publication, not merely to seek to prevent any discrimination, but also to seek to attain 'all' the objectives laid down in Articles 2 and 4 of the Treaty, so that it must campaign both against price agreements and in support of tendencies to lower prices. Article 57 requires the High Authority to give preference to indirect means of action; it is therefore surprising that the Government of the French Republic should be calling upon the High Authority to seek to attain these objectives by making use only of its powers of direct intervention, as laid down in Articles 61 and 65.

The main grounds on which the contested decisions were based, are not those stated by the Government of the French Republic. The High Authority merely found that the price of steel had fallen as a result of the state of the market, but it did not bring it about.

The defence was served on the Government of the French Republic, on 20 March 1954, in accordance with Article 33 (2) of the Rules of Procedure of the Court.

The reply was lodged at the Court Registry within the period laid down in the order of the President of the Court of Justice of 20 March 1954, and was served on the High Authority on 4 May 1954, in accordance with Article 33 (2) of the Rules of Procedure.

The rejoinder was lodged at the Court Registry within the period laid down in the President of the Court of 4 May 1954, as

extended by the order of 8 June 1954, and was served on the Government of the French Republic on 13 July 1954, in accordance with Article 33 (2) of the Rules of Procedure.

After the rejoinder had been lodged on 12 July 1954, the written procedure was terminated, in accordance with the first paragraph of Article 34 of the Rules of Procedure.

In accordance with the first paragraph of Article 34 of the Rules of Procedure of the Court, the President on 12 July 1954 appointed Judge O. Riese as Judge-Rapporteur.

In his preliminary report, the Judge-Rapporteur reported that in this case a preparatory inquiry was not necessary.

In accordance with the final paragraph of Article 34 of the Rules of Procedure, after hearing the views of the Advocate General, the Court decided to open the oral proce-

dure without any preparatory inquiry.

In accordance with Article 45 (2) of the Rules of Procedure of the Court, the President of the Court fixed the date of the oral procedure for 28 October 1954.

Hearings were held in open court on 28, 29 and 30 October and on 10 and 11 November 1954.

In the course of those hearings, the parties presented oral argument.

In the course of the hearing held on 10 November 1954, the Advocate General, in accordance with the procedure laid down in Article 11 and the final paragraph of Article 21 of the Protocol on the Statute of the Court of Justice, gave his opinion that the application should be dismissed.

At the hearing on 11 November 1954, the President in accordance with Article 50 (2) of the Rules of Procedure declared the oral procedure closed.

Law

The Court's judgment in the present case has taken the following points of the law into account:

1 — Admissibility

The parties raise no objection of inadmissibility. The Court is of opinion that there are no grounds for it to raise the point of its own motion.

The Court agrees with the Advocate General's view that the three decisions may be contested in a single action; in these circumstances, it will examine the arguments put forward inasmuch as, in the opinion of the Court, they cover each of the three decisions.

2 — The Substance of the Case

The applicant contests Decisions Nos 1/54, 2/54 and 3/54 on the grounds of infringement of the Treaty and misuse of powers.

A — The Submission of infringement of the Treaty

I — Decision No 1/54

(1) Decision No 1/54 introduces a clear distinction between publication and discrimination, thereby creating two kinds of infraction, namely the more serious

one of discrimination and the less serious one of infringing the rules as to price publication. However, whilst recognizing that the two paragraphs of Article 60 are linked as regards purpose, the Court does not consider that this distinction amounts to an infringement of the Treaty. In fact, nowhere does the Treaty prescribe that any infringement of the rules governing price publication amounts in itself to one of the practices prohibited under Article 60 (1). As regards the prohibition of discriminatory practices in particular, it cannot be disputed that the fact of departing, to whatever extent, from the prices or conditions laid down in the price-list of an undertaking does not amount to discrimination when it is a case of an exceptional transaction or when the same variation is made in the case of all comparable transactions. On this point, Decision No 1/54 is therefore consistent with the Treaty. On the other hand, it might be objected that Decision No 30/53 was open to criticism, since without expressly admitting evidence to the contrary it held certain transactions to be discriminatory which, in fact, were not.

The criticism that the absence of any precise definition of exceptional transactions opens the door to discriminatory practices and facilitates them instead of countering them, and so makes the concept of a discriminatory practice meaningless, is likewise unfounded. It is true that the old system of strict adherence to published prices seems to have been intended to prevent any kind of discrimination, save where an undertaking knowingly failed to fulfil its obligations; on the other hand, under the new system, it is theoretically possible for an undertaking to discriminate in good faith through being mistakenly of the opinion that it is dealing with a non-comparable or exceptional transaction; in fact, the new system leaves it to the undertaking itself to decide whether a transaction is of an exceptional or non-comparable kind. However, Decision No 1/54 places the burden of proof on the undertakings; if these cannot prove that the transaction is an exceptional or non-comparable one, they will be responsible for their mistake and liable to the penalties provided by Article 64. Finally, it must be admitted that the concept of an exceptional or non-comparable transaction does not lend itself to an abstract definition. Transactions entered into at one day's interval may, in fact, be non-comparable transactions, if, in the meantime, the market has completely changed; on the other hand two transactions may be comparable even though entered into within several weeks of each other, if the market has remained stable during this period. Comparability can therefore only be assessed in the light of the state of the market; moreover a transaction can only be held to be an exceptional one in the light of its particular circumstances. The two factors—comparability and exceptional nature— can be objectively assessed by the undertakings and by the High Authority, so that the system which is contested does not in fact make the concept of discrimination meaningless; on the contrary it helps to curb any discriminatory practice. It also follows from what has been said that there is nothing in the applicant's contention that the duty to charge identical prices and lay down identical conditions of sale would only apply to simultaneous transactions.

(2) Decision No 1/54 in no way does away with the duty to publish prices: on the contrary, it expressly retains it. There is therefore nothing in the objection that the decision is contrary to the rules governing price publication and that it sacrifices the principle of publication as a means of preventing prohibited practices. The Court, when it investigates Decision No 2/54, will consider whether the fact of permitting variations and, within certain limits, exempting undertakings from making a new publication is in accordance with the Treaty; in any case this is not a fact which can be relied on in contesting Decision No 1/54, which in no way affects the principle of publication.

(3) Decision No 1/54 in no way prevents the imposition of penalties if there is discrimination. If comparable transactions are entered into at different prices and under different conditions of sale, the penalties provided for by Article 64 still apply.

(4) Lastly, there is nothing in the applicant's argument that Decision No 1/54, instead of defining prohibited practices, in fact legalizes certain practices which were illegal under the old system. It has been shown above that Decision No 1/54 gives a new definition of prohibited practices by distinguishing between the rules as to non-discrimination and the provisions governing publication. If the new definition permits practices, which were previously prohibited, namely departures from published prices, it also lays it down that prices or conditions must be departed from uniformity in all comparable transactions, apart from any exceptional transaction which cannot give rise to discrimination. The principle of prohibiting any discriminatory practice is therefore strictly observed; Decision No 1/54, whilst doing away with the former automatic system, stays within the definition of prohibited practices.

The Court therefore holds that Decision No 1/54 does not amount to infringement of the Treaty. The application to annul that decision, inasmuch as it is based on an allegation of infringement of the Treaty, must therefore be dismissed.

II — Decision No 2/54

The Court holds that Article 1 of Decision No 2/54 is inconsistent with the Treaty in so far as it allows undertakings to make a mean variation upward or downward between actual market prices and published prices without prior publication of amendments to price-lists. The grounds for regarding this as amounting to an infringement of the Treaty are as follows:

(1) Before Article 60 (2) of the Treaty is interpreted in detail, it is proper to examine what the High Authority's objectives must be when it defines prohibited practices and regulates the publication of prices and conditions of sale.

(a) Articles 2, 3 and 4 of the Treaty, referred to at the beginning of Article 60 (1), constitute fundamental provisions establishing the Common Market and the common objectives of the Community. Their importance is clear from Article 95. In authorizing the High Authority to define prohibited practices, the Treaty obliges it to take into account all the aims laid down in Articles 2, 3 and 4. This follows clearly from the express reference to the said articles at the beginning of Article 60. The High Authority therefore has not merely a right, but a duty, when defining prohibited practices, to bear in mind the attempt to prevent agreements between producers and to be concerned to help prices to be fixed as low as possible, under the conditions referred to in Article 3 of the Treaty, as well as the attempt to prevent unfair competitive practices and discriminatory practices. For these reasons, the Court cannot accept the applicant's contention that Article 60 only refers to the attempt to prevent discriminatory practices, that the attempt to prevent agreements is solely governed by Article 65, and that the attempt to help prices to be fixed as low as possible is governed by Article 61. It is true that Articles 65 and 61 of the Treaty give the High Authority direct means of action to counter agreements and increases in prices, but the Treaty makes it clear (*inter alia* in Article 57 which deals with the field of production) that the High Authority, before using direct means of action, must give preference to 'the indirect means of action at its disposal'. Thus the High Authority may also exercise its right to define prohibited practices as regards prices, with a view to forestalling practices which are contrary to any one of the objectives referred to in Article 60.

Furthermore, the words 'in particular' (Article 60 (1)) show that Article 60 deals mainly with unfair competitive practices and discriminatory practices.

(b) With particular reference to the part which under the Treaty is to be played by the publication of price-lists, the Court accepts the Advocate General's view that compulsory publication is provided for in the Treaty in order to attain the three following objectives:

- (1) As far as possible to prevent prohibited practices;
- (2) To enable purchasers to learn exactly what prices will be charged and be able themselves to check whether any discrimination has taken place;
- (3) To enable undertakings to have an accurate knowledge of the prices of their competitors so as to enable them to align their prices.

Whilst publication is intended to meet the above-mentioned objectives, the Treaty does not consider that this alone will suffice to ensure the attainment of these objectives; publication is but one of the means provided for by the Treaty.

The publication of price-lists is a matter of public law, since the results under private law have not been dealt with by the Treaty. However, this public law

characteristic, which the Advocate General has rightly emphasized, is not inconsistent with the applicant Government's contention that the publication of price-lists must also produce legal consequences for third parties, in particular undertakings wishing to align their prices with those of their competitors. It is this result, which is inherent in the very publication of the price-lists, which distinguishes that publication both from the mere information collected by the High Authority under Article 47 as well as from the publication of statistical documents compiled by the High Authority in accordance with Article 46. If publication was not intended to keep the general public informed, it is difficult to understand why the Treaty did not merely declare 'that the price-lists must be communicated to the High Authority'.

(2) Article 60 (1) directly and categorically prohibits certain practices; the High Authority is authorized to define them but it may not derogate from the rule that they are prohibited.

Article 60 (2) provides for the compulsory publication of the price-lists 'for these purposes'. These words clearly show the instrumental nature of the subsequent provisions as to the publication of prices. This is categorically provided for; it is regarded as an appropriate means of attaining the objectives set out in the previous paragraph. It is thus only a means, but a means categorically laid down by the Treaty and not a means which may be replaced by any other means which might possibly achieve the same results.

The mandatory nature of the duty to publish the price-lists is also made clear by the words 'must be made public'. Thus the Court comes to the conclusion that the duty to make the price-lists and conditions of sale public must be interpreted as a strict rule of law, which allows of no exception; the duty is an absolute one and must be fulfilled in its entirety.

The Court does not agree with the defendant's view that the expression 'être rendus publics' ('be made public') is less strong than if the Treaty had said 'être publiés'). In fact, in the last two paragraphs of Article 46, the Treaty uses these two terms (both rendered by the word 'publish' in the English version of the Treaty) as having the same meaning. In any case, publication must be effected in such a way that all those who operate on the market (possible future purchasers and competitors) may know the prices; only such publicity meets the objectives to attain which the rule was made.

(3) Article 60 (2) (a) does not expressly state the time when price-lists and conditions of sale must be published. One only has to read subparagraph (2) (b) on the methods of quotation to understand that the price-lists must precede any sale effected in the Common Market.

In fact, Article 60 (2) (b) states that the methods of quotation used must not have the effect that prices charged result in increases over the price 'shown in the price-list'—which again confirms that the price-lists contain a list of the prices at which goods are offered for sale, which enables any lawful transaction to be

precisely calculated, and that these price-lists must be published before being applied.

Moreover, Article 30 (2) of the Convention on the Transitional Provisions states that the prices charged by undertakings for sales of steel on the Italian market may not be lower than the prices shown in the price-lists for comparable transactions. This provision confirms that the price-list is only a list of the prices at which goods are offered for sale prior to any contract of sale.

Moreover the Treaty is very precise in its wording when it refers to 'the price-lists' and not 'price-lists'. The price-lists in question are therefore not documents related to the Treaty alone and specially drawn up with a view to the Treaty's objectives, but documents of a type which has been established by previous commercial practice and which, according to such practice, always amount — albeit sometimes generally and sometimes provisionally — to an offer to do business on the basis of the price stated in them.

Price-lists do not cease to be offers to do business even though the Treaty ascribes to them objectives of public interest which are recognized by its provisions. There can therefore be no doubt that the expression 'price-lists' retains its usual meaning in the Treaty and means the prices on the basis of which undertakings state their willingness to sell their products.

This interpretation is moreover confirmed (and on this point the Court accepts the Advocate General's argument) by the fact that Article 60 (2) distinguishes between prices applied¹ and prices charged, inasmuch as this latter expression which appears in Article 60 (2) (b) means the prices at which transactions are in fact concluded. Consequently, it would seem that the expression 'prix appliqués' (prices applied) means the prices at which goods are offered by vendors, although it would have been clearer had the Treaty used the term 'prices to be applied' for this purpose.

Moreover, both in its previous decisions and in Decision No 2/54, this is the manner in which the High Authority always seems to have interpreted the Treaty, for Article 4 of Decision No 31/53 and Article 3 of Decision No 2/54 both contain the statement that the price-lists and conditions of sale shall apply not earlier than 'five clear days' (one day, according to Article 3 of Decision No 2/54) 'after they have been addressed in printed form to the High Authority'.

The preamble to Decision No 2/54 also shows that the High Authority itself assumes that the price-lists will have been published beforehand: after the second recital states that the price-lists must reflect the price-level existing on the market, the third recital refers to certain concessions granted to undertakings, and, to these concessions, the fourth recital adds yet another consisting of making the time-limits set for applying a new price-list as short as possible. It would be really difficult to regard this as a concession if the price-lists merely reflected price movements on the market after they had occurred. Only if there is previous publication can this be regarded as a concession, for this is the only circumstance under which undertakings will have an interest in not having to wait several days

1 — Translator's Note: The English version speaks in Article 60 (2) (a) of 'price-lists ... applied'.

before being in a position to conclude sales contracts based on new prices. It must therefore be concluded that the publication of price-lists must necessarily be effected before undertakings may apply new prices.

Moreover, it follows from the foregoing considerations that the word 'price-list' always means published price-lists. On this point also, the Court accepts the Advocate General's argument. The Court cannot accept the defendant's suggestion that the term 'price-list' does not necessarily bear this meaning.

(4) Now that it is established that the price-lists and conditions of sale be published before they are applied on the Common Market, it remains to be decided whether the Treaty requires the publication of exact prices or whether it is enough to publish average or approximate prices. There is no doubt that the Treaty requires the publication of exact prices in the form of price-lists. This follows from the objectives to which the principle of price publication is intended to lead: the information acquired by purchasers is only of value to them if it informs them of the exact prices at which they can buy. Likewise publication must make alignment possible and this must be based on a competitor's exact prices. Alignment is a right granted to undertakings by the Treaty, not a mere possibility to which effect could only be given if undertakings were in a position to gain information by other more or less fortuitous means as to prices charged by their competitors.

If therefore, for the above-mentioned reasons, the Treaty categorically requires the prior publication of exact prices, it follows that the power accorded to the High Authority to lay down the extent and the manner of publication does not allow it to weaken the principle of the compulsory publication of exact prices. Since Article 60(2)(a) is a strict rule of law and in the absence of any provision to the contrary, the powers conferred on the High Authority by the words 'to the extent and in the manner prescribed by the High Authority', cannot be read as authorizing the High Authority not to publish price-lists. The words just quoted must be understood to mean that the High Authority is entitled to determine the content of the price-lists. But this content must fulfil a public need, so that the High Authority is confined to laying down the minimum information to be included in the price-lists.

In other words, the phrase 'to the extent and in the manner prescribed by the High Authority' entitles the High Authority to prescribe the extent, that is to say, the scope, of publications, in so far as it is a question of settling their details; the High Authority may, for instance, as it has already done, decide the period after which a new price-list shall come into force, lay down that certain discounts (such as discounts for seconds, and so on) must be mentioned in the price-lists, and decide whether packing costs should or should not be published. On the other hand, in accordance with the system created by the Treaty every price-list must contain all information required to show the exact price. The fact that the Treaty requires the publication of price-lists to be made with due regard to the purposes which it is to serve makes it impossible to accept the High Authority's

argument that it has power to lay down what shall and what shall not be published, according to its own unfettered judgment. If this argument, which the Court rejects, were accepted there would be no limit to the information which might be exempted from the duty of publication. The High Authority would then be able to lay down far wider margins, and it is impossible to say where this would end; it might lay down mere publication in scales (for example 'price 80 to 120') or even the non-publication of prices of whole categories of products—in short, it might discard the principle of compulsory publication laid down in the Treaty.

Lastly whilst it is true that the High Authority's powers are to regulate the minimum requirements with which the price-lists must comply, its powers are also to regulate the scope of the publication itself. It is thus not enough to ensure that the price-lists are transmitted to the High Authority; if this were the case, the Treaty would merely have so provided. The price-lists must be made public and the High Authority's power to prescribe 'the extent and the manner' implies that it has a duty to see that the extent to which and manner in which the price-lists are published and made available to the public adequately meet the needs of the public interest.

The text of Decision No 31/53 was drafted with extreme care; Article 1 states that undertakings in the steel industries must publish their price-lists and conditions of sale, and any subsequent amendments must also be published in accordance with the provisions of the decision; Article 2 then states with great precision what information the price-lists must contain, putting a reasonable interpretation on the words 'extent' and 'manner' which appear in the Treaty; Article 4 provides that price-lists are to apply not earlier than five clear days after they have been addressed to the High Authority and that the seller must communicate them upon request to anyone interested.

On the other hand, what is laid down in Article 1 of Decision No 2/54 is not the extent to which the price-lists must be made public by undertakings, but rather the extent to which the High Authority authorizes the non-observance of the published price-lists. This is contrary to Article 60(2) of the Treaty.

It is to be added that the interpretation adopted by the Court is supported by the fact that the High Authority may determine the extent of publication after merely consulting the Consultative Committee whereas, before defining prohibited practices, it must also consult the Council of Ministers. This is understandable if the High Authority when determining the extent of publication must strictly adhere to the rule that the exact prices and conditions of sale must be published. Had the Treaty wished to give the High Authority greater freedom and the right to derogate from this rule, it would have been logical for such powers also to be subject to consultation with the Council.

(5) It now remains to consider whether the conclusion to which the Court has come as a result of its examination of the words used and the reasons underlying them is contrary to the Treaty's other objectives, or whether it may be invali-

dated by other considerations. This is not the case. It must first be repeated, that the method of prior publication of the exact prices is the mandatory rule laid down by Article 60 (2). It follows that this rule cannot be disregarded, even if this would facilitate some other method which might better attain the aims in view. It is not for the Court to express a view as to the desirability of the method laid down by the Treaty, or to suggest a revision of the Treaty, but it is bound, in accordance with Article 31, to ensure that in the interpretation and application of the Treaty as it stands the law is observed.

(a) The objection that purchasers cannot check on prices when these are coming down is irrelevant, as this is not the sole object of publication, which is also intended to enable purchasers to obtain information as to the exact prices and to enable undertakings to align their prices. This objection is therefore not sufficient to justify abandoning the rule as to publication which is laid down in the Treaty.

(b) The defendant stressed the danger of agreements between producers, a danger which is said to be inherent in the old system. However there is no evidence that the introduction of an average margin would obviate this danger. Even if the new system were to some extent instrumental in lessening this risk, this would not be any justification for neglecting the other objectives at which publication is aimed. Moreover, the Treaty enables the High Authority to intervene by other means, as soon as it learns that any agreements have been concluded.

(c) The state of the market, in particular the realization that there is a trend to lower prices, is likewise no ground for abolishing the rule that prices are to be published, since such publication is provided for by the Treaty. In the event of a crisis or disturbances on the market, the Treaty confers various powers on the High Authority— in particular under Article 60 (2) last line, Article 61, Article 63, Articles 58 and 59—but nowhere the power to dispense with the compulsory publication of price-lists. Moreover, the rule as to compulsory publication, laid down by the Treaty, is of a general nature and in no wise depends on current market trends.

(d) The Court has been particularly concerned that prices shall be allowed to find their own level; but this cannot justify its reaching another decision. The Treaty is based on the assumption that the freedom given to undertakings to fix their own prices and to publish new price-lists whenever they wish to amend them will ensure that prices find their own level. If current market trends change producers will have to amend their price-lists accordingly, and in this way 'the market makes the price'. But, notwithstanding the basic assumption that prices are to be allowed to find their own level, it must not be forgotten that the Treaty forbids any kind of discrimination and that it provides for the right to align prices. This is why the Treaty has laid down the rule that there should be com-

pulsory and prior publication of price-lists and conditions of sale. It is not for the Court to express a view as to the desirability of this system; it can only record that this rule is laid down by the Treaty which (whether rightly or wrongly) does not contain any words which might permit a certain flexibility in the price-lists in the event of minor or temporary fluctuations.

On all these grounds, the Court finds that Article 1 of Decision No 2/54 infringes the Treaty, and it must therefore be annulled.

Moreover, the Court of its own motion has examined the question whether Article 1 of Decision No 2/54 amounts to an infringement of an essential procedural requirement. The wording of this article states that it only lays down the fresh conditions under which new price-lists must be published. It may, nevertheless, be asked whether the said article, read in conjunction with Decision No 1/54, does not in actual fact constitute, in disguised form, an addition to the definition of prohibited practices. If this were the case, so that it amounted to an indirect and supplementary definition of prohibited practices, then the Council should have been consulted, under the terms of Article 60 (1). Yet such official consultation did not take place, and unofficial information supplied to the Council by the High Authority does not meet this requirement. However, the Court is of opinion that Article 1 of Decision No 2/54 does not contain a definition of prohibited practices, but merely lays down how price-lists are to be published.

The reference, in Article 2 of Decision No 2/54, to Article 1 thereof, does not justify the annulment of Article 2, as that reference becomes pointless as a result of the annulment of Article 1.

The applicant did not contest the remaining articles of Decision No 2/54, and the Court considers that there are no grounds for annulling them.

III — Decision No 3/54

Decision No 3/54 which is intended to introduce a method of collecting information and enabling supervision to take place, is based on Article 47 of the Treaty. That article empowers the High Authority to obtain the information it requires in order to carry out its tasks; Decision No 3/54 is therefore consistent with the Treaty. The fact that the High Authority combined this method of collecting information with the supervision of the system of publication provided for in Article 60 does not make it in any way objectionable.

Even though Decision No 3/54 is apparently intended to complete the system of variations introduced by Article 1 of Decision No 2/54 which has already been declared to be inconsistent with the Treaty, it is however not in itself contrary to the Treaty; there is therefore no reason to annul it, although it obviously becomes inoperative and pointless as a result of the annulment of Article 1 of Decision No 2/54.

B — The submission of misuse of powers

The Court shares the Advocate General's opinion that the allegation that by reason of the contested decisions the defendant has misused its powers has not been made out.

It has been stated above that the High Authority, in carrying out its duty to attempt primarily to prevent unfair competitive practices and discriminatory practices, is entitled to take account of the prohibitions resulting from Articles 2, 3 and 4, so that it cannot be criticized for having done so.

Even if the contested decisions were partly based on the idea of introducing a new system which undertakings would be more likely to respect than the old one, this cannot lead to the conclusion that such a system was intended to legalize offences previously committed. In any case, it is obvious that the decisions were above all intended to further the Treaty's aims. Even if the grounds for the High Authority's decisions included, in addition to proper grounds, the improper one of avoiding subjecting guilty undertakings to penalties, this would not make the decisions invalid for misuse of powers, in so far as they do not detract from the main aim, which is the prohibition of unfair competitive practices and discrimination. The Court considers that this is not the case, for the reasons set out under I above.

Costs and reference of the case back to the High Authority

(1) Under the terms of Article 60 of the Rules of Procedure of the Court, in any contentious matter the unsuccessful party shall be ordered to pay the costs. Nevertheless the Court may, in accordance with paragraph (2) of that article, order that the parties bear their own costs wholly or in part, where each party succeeds on some and fails on other heads.

In this case, the applicant has succeeded in part of the case and on an important point, namely the annulment of Article 1 of Decision No 2/54 which introduced the system of mean variations from the prices published in the price-lists. In these circumstances the Court considers that it would be right to order the defendant to pay half the applicant's costs. However, since the applicant expressly stated that it did not seek repayment of any of its expenses and did not ask for costs in its pleading, the Court takes formal note of that declaration and decides that each party shall bear its own costs.

(2) Under Article 34 of the Treaty, if the Court declares a decision void, it shall refer the matter back to the High Authority, which must take the necessary steps to comply with the judgment.

Upon reading the pleadings;

Upon hearing the parties;

Upon hearing the opinion of the Advocate General;

Having regard to Articles 31, 33, 34 and 60 of the Treaty;
 Having regard to the Protocol on the Statute of the Court of Justice;
 Having regard to the Rules of Procedure of the Court including those regarding costs;
 Taking formal note of the declaration by the Agent of the Government of the French Republic stating that 'the French Government has not asked for costs in its pleading';

THE COURT

hereby:

Annuls Article 1 of Decision No 2/54 and on that point refers the matter back to the High Authority;

Dismisses the application for the annulment of Decisions Nos 1/54 and 3/54 and Article 2 of Decision No 2/54;

Takes formal note that the applicant has not asked for costs in its pleading and orders each party to bear its own costs.

Decided by the Court in Luxembourg on 20 December 1954

Pilotti

Serrarens

Hammes

Riese

Delvaux

Rueff

Van Kleffens

Delivered in open court in Luxembourg on 21 December 1954.

M. Pilotti

O. Riese

President

Judge-Rapporteur

A. Van Houtte

Registrar

OPINION OF MR ADVOCATE GENERAL LAGRANGE

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