time of despatch", the transaction cannot be regarded as having been effected within the meaning of Article 2 of that decision.

3. Under a system of minimum prices such as that laid down by General Decision No 962/77/ECSC, transactions which are still to be concluded or completed must all comply with the requirement inherent in the imposition of such prices, so that any practice entailing rebates and credit notes devoid of any real substance cannot be relied on to justify sales at prices lower than the minimum prices imposed. Whatever method of calculation is used, the actual price, calculated after the entry into force of the decision, may not therefore be lower than the minimum prices.

In Joined Cases 26 and 86/79

FORGES DE THY-MARCINELLE ET MONCEAU S.A., of Marcinelle (Belgium), represented and assisted by George van Hecke, of the Cour de Cassation [Court of Cassation], Belgium, and Patrick Derom, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B, Rue Philippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by A. Prozzillo, acting as Agent, assisted by G. Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATIONS for the annulment of successive decisions of the Commission of 10 January 1979 and of 2 May 1979 ordering the applicant to pay a fine under Articles 61 and 64 of the ECSC Treaty for selling concrete reinforcement bars below the minimum prices fixed by General Decision No 962/77/ECSC of 4 May 1977 (Official Journal L 114 of 5 May 1977, p. 1).

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait, Presidents of Chambers, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

Forges de Thy-Marcinelle et Monceau manufacture concrete reinforcement bars and after an investigation were ordered by an individual decision of 10 January 1979 to pay a fine of 35 794 units of account or Bfr 1 425 000 for unlawful sales below the minimum prices fixed by General Decision No 962/77/ECSC adopted under Article 61 of the ECSC Treaty which amounted to Bfr 127 614 446. The amount of the underpricing had been assessed at Bfr 14 241 366 in respect of 11 977.48 tonnes and the fine was fixed at 10% of the amount of the underpricing.

By Application No 26/79, which was received at the Court Registry on 15 February 1979, the applicant undertaking challenged that decision on the basis of Article 36 of the ECSC Treaty. Those initial proceedings followed the normal course and ended with the lodging of a rejoinder on 17 May 1979.

However, pursuant to observations made by the applicant in the said proceedings, the Commission amended its decision of 10 January 1979 by a new decision of 2 May 1979, which was notified to the applicant on 4 May and which reduced the fine to 32 471 units of account or Bfr 1 305 000 on account of new factors which made it clear that the underpricing amounted to Bfr 13 052 510 in respect of 9 424.85 tonnes and that the amount of unlawful sales was Bfr 103 477 579.

By Application No 86/79, which was lodged on 31 May 1979, the applicant challenged that new decision. The procedure followed the normal course, with the parties simply exchanging their statements of case and the applicant deciding not to submit a reply.

By an Order of 13 June 1979 the Court, upon hearing the report of the Judge-Rapporteur and the view of the Advocate General, joined the two cases for the purposes of the oral procedure and the judgment. There was no preparatory inquiry.

II — Conclusions of the parties

In Case 26/79 the *applicant* claimed that the Court should:

"1. Annul the individual decision of the Commission of 10 January 1979 concerning the applicant company, with or without a prior declaration that Decision No 962/77/ECSC of 4 May 1977 (Official Journal L 114 of 5 May 1977, p. 1) is illegal;

2. Order the Commission to pay the costs."

In its statement of defence the *defendant* contended that the Court should:

"1. Dismiss the application as unfounded;

2. Order the applicant to pay the costs."

In its rejoinder the *defendant* enlarged upon the first head of its conclusions as follows:

"— Declare the application admissible and unfounded in regard to the first submission in so far as it seeks a declaration that there has been no breach of Decision No 962/77/ ECSC fixing minimum prices;

— Declare the application inadmissible and in any event unfounded in regard to the second submission in so far as it seeks the annulment of Decision No 962/77/ECSC".

In Case 86/79 the *applicant* claimed that the Court should:

"1. Annul the individual decision of the Commission of 2 May 1979 regarding the applicant company, with or without a prior declaration of the illegality of Decision No 962/77/ECSC of 4 May 1977 (Official Journal L 114 of 5 May 1977, p. 1);

2. In the alternative, reduce the fine imposed by the Commission on the applicant by the decision of 10 January 1979 in proportion to the reduced amount of any sales which may be found to be irregular;

3. Order the Commission to pay the costs."

The *defendant* contended that the Court should:

"1. Declare the application unfounded to the extent to which it seeks the annulment of the decision of 2 May 1979;

2. Declare the application inadmissible and in any event unfounded to the extent to which it claims that Decision No 962/77/ECSC of the Commission is illegal;

3. Declare the application unfounded to the extent to which it seeks a

reduction of the fine in proportion to the amount of the irregular sales;

4. Order the applicant to pay the costs".

III — Summary of the submissions and arguments of the parties

A — As to the infringement of Decision No 962/77/ECSC fixing minimum prices

In regard to the first disputed decision of 10 January 1979, the *applicant* points out that it is charged with a number of offences relating to sales from May to October 1977 of concrete reinforcement bars in Belgium and France amounting in total to 11 977.48 tonnes. With one exception, all the deliveries which took place related to transactions effect before 8 May 1977 and were not therefore covered by General Decision No 962/77/ECSC, as the applicant endeavours to prove with the aid of order forms, confirmation notes or invoices by considering in turn the transactions for which it is criticized.

(a) Concerning the sales in Belgium

1. The transaction with Etablissements Jouret

According to the *applicant,* this transaction was effected on 22 April 1977, as is proved by the copy of the order sent by Jouret to Socothy, the marketing company of Thy-Marcinelle et Monceau.

The *defendant* points out that the agreed price was that of the "Soco price-list in force at the time of despatch", in accordance with the applicant's practice. Since the invoices were drawn up and delivery took place after the entry into force of the minimum prices the latter should therefore have been observed; in fact they were not, as they were undercut by the use of market discounts given by means of credit notes.

The *applicant* replies that a "transaction" may be "effected" before delivery and the issue of an invoice, which are distinct from the transaction itself, the latter being an agreement by which the parties decide on the subject-matter of the sale and on the price, even if the latter is only ascertainable subsequently. In fact the price was determined at the time of the conclusion of the contract and this is evidenced by the fact that "it is quite clear that if, when issuing invoices, Thy-Marcinelle et Monceau gave discounts by means of credit notes it was not because it felt a sudden wave of generosity towards the buyer but solely because it was acting upon a firm agreement to which it had given its word".

Even if certain conditions to be applied are those of the price-list in force at the time of despatch, the fact remains that the final prices, that is to say the prices and any discounts, are thus fixed at the time when the contracts are concluded "despite the impression given by the documents which contemplate application of the price on the day of despatch". That contradictory situation is explained by the special circumstances prevailing on the steel market and by the obligation to publish and apply price-lists. It was in fact the alignment of

prices on those of competitors which led to the general undercutting of prices and the practice of using credit notes to bridge the difference between list prices and the prices agreed at the time when contracts were concluded.

Moreover, it is difficult to see why the applicant should have observed the minimum prices for transactions subsequent to 9 May 1977, when it had given discounts during the same delivery period on earlier transactions, if it was not to honour its word. The applicant could produce evidence to prove the propriety of its conduct.

Finally, the application of the disputed general decision to earlier contracts means giving it retroactive effect.

The *defendant* replies, first, that witness evidence cannot be adduced against a written document whose text is clear and unequivocal and, secondly, that it is legitimate to apply a general decision to an element of the contract (the prices to be charged) which was to be fixed on the day of despatch, that is to say subsequent to the entry into force of the decision. In effect, the minimum prices replace the company's own list prices.

The defendant points out in passing that the applicant admits to having undercut the prices on its own price-list but that it deliberately decided not to take action against it for that offence — although not admitting as much — and that it chose to impose fines only in regard to conduct constituting a breach of Article 61 of the ECSC Treaty.

2. The transaction with Dema S.A.

The *applicant* states that this transaction was effected on 21 April and it produces confirmation from Dema which on 22 April 1977 spoke of the "price agreed between us".

The *defendant*, with an argument parallel to that relating to the previous transaction, replies that the invoice was issued and the goods delivered after the entry into force of the minimum prices system, and at prices lower than those prices due to the discounts accorded in the credit notes.

(b) Concerning the sales in France

1. The transactions with Etablissements Champion

The *applicant* stated in Case 26/79 that the transactions with Etablissements J. Champion were effected under a consignment contract. "In such a case, on the last day of each month a provisional invoice based on a theoretical estimate of deliveries is drawn up. Of course, such invoices cover earlier withdrawals from the stock maintained at the customer's premises. The customer then sends off as soon as possible a statement summarizing the actual withdrawals shown in its inventory on the last day of the month and a corrective invoice or a credit note for the difference is issued".

The *parties* put forward arguments on this subject which do not now need to be stated since the amending decision of 2 May 1979 impugned by Application No 86/79 no longer takes into account the transactions with Etablissements Champion.

2. The transactions with Etablissements Davum

The *applicant* states that the Commission focused on three transactions with Etablissements Davum in its first decision.

The first two — which are still in suit after the second decision — are alleged to have been effected on 5 and 6 May 1977 respectively, that is to say when the application of the minimum price system was not yet compulsory. This is evidenced by two telex messages sent by Davum to the Paris office of the applicant.

The *defendant* points to invoices and despatch dates and replies that the invoiced prices are in accordance with the price-lists in force at the time of delivery but that they have been discounted by credit notes, which amounts to an undercutting of the minimum prices in force at the time of the performance of the transactions.

The *parties* then refer to the general arguments set out above regarding the sales to Jouret.

The *parties* also dealt with the third transaction with Davum but, since the amending decision of 2 May no longer takes it into account, there is no need to summarize their arguments on this subject.

B — As to the validity of Decision No 962/77/ECSC fixing minimum prices

1. Admissibility

In its Application No 26/79 the *applicant* reserved the right to raise the invalidity of the general decision at a later stage of the procedure and the *defendant* challenged the admissibility of that reservation on the ground that the legal extent of the submission was not in its opinion set out in even a summary form contrary to the minimum requirement of Article 38 (1) of the Rules of Procedure.

The *applicant* replies that academic writings and case-law (judgment in Case 74/74 [1975] ECR 544) do not give that rule such a narrow content and in the alternative puts forward the arguments in support of that submission relating to the general decision. In that regard it relies on the breach of two legal principles.

2. Breach of the principle of proportionality

The *applicant* cites the case-law on this principle, according to which "the means applied by the administration must be proportionate to the objective sought". It thinks that an examination of Decision No 962/77/ECSC, of its economic context and of its results proves that in spite of its commendable aim, the inappropriate nature of the means and in particular the lack of any "simultaneous introduction of measures to impose minimum prices on the same products imported by undertakings in non-member countries and sold within the Common Market" could only result in consequences contrary to the objective sought and lead to a breakdown of the market in concrete reinforcement bars, in which the average figure for production capacity was lower than for other types of product, and worsen the financial

position of undertakings. Thus from May to December 1977 — when Decision No 3000/77/ECSC of 28 December 1977 (Official Journal L 352 of 31 December 1977) comprising the introduction of "basic prices" applicable to imports from non-member countries was finally adopted — the measures adopted were unavailing and even damaging. In its concern to ensure observance of the principle of proportionality the Court may take such economic circumstances into consideration (judgment in Joined Cases 63 to 69/72 of 13 November 1973, [1973] ECR 1230).

The *defendant* states that the argument as to the absence of rules regarding prices of concrete reinforcement bars imported from non-member countries is extraneous to the objective of the general decision impugned. In fact Decision No 962/77/ECSC relates only to the fixing of minimum prices for "undertakings in the iron and steel industry of the European Coal and Steel Community and ... their selling agencies and middlemen as referred to in Decisions No 30/53 and No 31/53" (Article 1 (1)). Decision No 3000/77/ECSC of 22 December 1977 (Official Journal L 352 of 31 December 1977) changed nothing in that respect. It is identical in its terms and objectives to Decision No 962/77/ECSC save for the products covered. Imports from non-member countries were regulated in a different legal context on the basis of "arrangements" essentially aimed at obtaining from those importers a quantitative restriction on their sales and an undertaking not to charge excessively low prices. Those imports were not therefore to be taken into consideration, having regard to the exact objective of the decision impugned and the fact that the problem which they create has been resolved in another context and by other means.

3. Breach of the principle of non-discrimination

According to the *applicant* Decision No 962/77/ECSC constitutes clear discrimination against undertakings in the Common Market bound by the minimum prices system whereas undertakings of non-member countries could act in complete freedom. Up to 31 December 1977 there was therefore a breach of the principle of non-discrimination which constitutes a fundamental right (judgment in Joined Cases 124/76 and 20/77 of 19 October 1977, ECR 1795).

The *defendant* replies that Decision No 962/77/ECSC was not intended to achieve equal treatment as between undertakings established in the Community and undertakings in non-member countries. Since the principle of non-discrimination involves an evaluation of the relationships between the various groups of individuals it cannot have application in this case — Decision No 962/77/ECSC does not cover the system of prices chargeable by undertakings in non-member countries when imports are brought into the Community.

C — The amount of the fine

In the alternative, the *applicant,* in Case 86/79, seeks to point out that the reduction in the fine made by the amending decision of 2 May 1979 should be in proportion not to the reduction in the amount of underpricing taken into consideration, but to the reduction in

(any) irregular transactions. In fact the maximum fine provided for by Article 64 of the ECSC Treaty is fixed on the basis of irregular transactions.

The *defendant* replies that that criterion is not exclusive. In the case in point the Commission used its discretionary power in the very interests of the applicant and applied the same criterion to calculate the reduction in the fine as when determining it.

D — The necessity for Application No 86/79

The *parties* exchanged their views on the necessity or usefulness of further proceedings after the amending decision of 2 May 1979 was taken and on the possibility of lodging corrective conclusions. They did not submit any detailed conclusions in connexion with those views on reducing procedural steps.

IV — Oral procedure

Oral observations were presented on behalf of the parties at the sitting held on 17 and 18 October 1979. The parties replied to the questions asked by the Court and supplied all the information which they thought useful.

The Advocate General delivered his opinion at the sitting held on 5 December 1979.

Decision

1 By a first application received at the Court Registry on 15 February 1979 the applicant company, Forges de Thy-Marcinelle et Monceau S.A., challenged on the basis of Article 36 of the ECSC Treaty an individual decision of the Commission of 10 January 1979 ordering it to pay a fine of 35 794 European units of account, that is Bfr 1 425 000, for irregular sales of concrete reinforcement bars at prices lower than the minimum prices fixed by General Decision No 962/77/ECSC of 4 May 1977 (Official Journal L 114, p. 1) adopted pursuant to subparagraph (b) of the first paragraph of Article 61 of the ECSC Treaty. In that decision of 10 January 1979 the Commission assessed the value of the disputed sales at Bfr 127 614 446 and the extent of the underpricing in relation to the minimum prices at Bfr 14 241 366 in respect of the sale of 11 977.48 tonnes of concrete reinforcement bars. The fine was thus fixed at 10% of the extent of the underpricing estimated by the Commission at that time.

2 The decision of 10 January 1979 was amended by the Commission by a new decision of 2 May 1979 which reduced the fine to 32 471 European units of account, that is Bfr 1 305 000, pursuant to observations by the applicant which showed that the extent of the underpricing was only Bfr 13 052 510 in respect of 9 424.85 tonnes, the value of the irregular sales being reduced to Bfr 103 477 579.

3 By a second application received at the Court Registry on 31 May 1979 the applicant company challenged the amending decision of 2 May 1979. The two cases were joined by order of 13 June 1979 for the purposes of the procedure and of judgment.

A — The objection of unlawfulness raised against General Decision No 962/77/ECSC

(a) Admissibility

4 In its first application, to challenge the lawfulness of Decision No 962/77/ECSC of 4 May 1977 fixing the minimum prices for concrete reinforcement bars, the applicant confined itself to alluding to "various reasons" without mentioning them. Such a statement of reasons does not satisfy Article 38 (1) (c) of the Rules of Procedure of the Court which requires that the application should state "the grounds on which the application is based". On the other hand, the second application meets that requirement, clarifying the same submission by reliance on an infringement of the principles of non-discrimination and of proportionality. As the two cases are joined, the admissibility of the second application covers any inadmissibility of the first and the arguments put forward in support of the submission in the reply in Case 26/79 must therefore be taken into consideration in deciding the joined cases.

(b) The objection of lack of proportionality

5 The applicant argues that to the extent to which Decision No 962/77 was not replaced by Decision No 3000/77 of 28 December 1977 (Official Journal L 352, p. 1) which was accompanied by the introduction of "basic prices" applicable to imports from non-member countries (Commission statement published in Official Journal L 353 of 31 December 1977), it was "unavailing, not to say damaging, and was an extreme case of violation of the principle of proportionality". Whilst, according to the applicant, Decision No 962/77 was intended to remedy the collapse of the market for concrete reinforcement bars and the deteriorating financial position of undertakings, "the means used were wholly inadequate".

6 In its judgment of 24 October 1973 (Case 5/73 *Balkan* [1973] ECR at p. 1111) the Court has already acknowledged that although in exercising their powers the Institutions must ensure that the burdens which commercial operators are required to bear are no greater than is required to achieve the aim which the authorities are to accomplish, it does not necessarily follow that that obligation must be measured in relation to the individual situation of any one particular group of operators. Even if it may be admitted that General Decision No 962/77 was defective and insufficient in regard to the matter of imports from non-member countries, there is no evidence in the applicant's arguments to show that those rules imposed restrictions which were out of keeping with the common interest and that they constituted a disproportionate measure in relation to the aim which they sought to achieve. In those circumstances that objection can only be dismissed.

(c) The objection of discrimination

7 Relying on the facts described above, the applicant argues that the Community undertakings bound by Decision No 962/77 suffered discrimination in relation to undertakings in non-member countries which were able to act in complete freedom up to 31 December 1977. It believes that it has thus been a victim of that form of discrimination consisting of treating similar situations unequally.

8 There is however no similarity of situation here; Decision No 962/77 of itself covers only the prices to be charged by Community undertakings, which are the only ones referred to by the said decision, in regard to sales to be effected within the Community.

9 The applicant also referred to the temporary lacuna in the rules in that they did not apply to producers in non-member countries.

10 It has not however proved that those producers actually took advantage of that lacuna in order to influence the market to the point of appreciably worsening its financial situation. Consequently, even if the measure in dispute did require sacrifices of certain undertakings for the sake of Community solidarity, it did not cause them undue hardship. That objection must therefore be dismissed also.

B — The annulment of the individual decisions imposing fines on the applicant

11 There are no grounds for distinguishing the decision of 10 January 1979 from the amending decision of 2 May 1979. The position of the applicant should be considered in the light of those two decisions after the amendment was made.

12 The objection made by the applicant against the individual decisions in suit is that it is not possible to apply General Decision No 962/77 to "transactions effected" before the date of application of the said decision, which states that the minimum prices are compulsory for transactions "effected on or after the third day following (its) entry into force". According to the applicant, it was only the delivery of the concrete reinforcement bars which was subsequent to that date since the transactions themselves, that is to say the contracts, had been concluded prior to the entry into force of the general decision. That argument, the applicant says, applies equally to the transactions concluded with the Belgian firms Jouret and Dema and to those concluded with the French firm Davum, which the applicant says it effected on 21 April 1977, 22 April 1977 and 5 and 6 May 1977 respectively, those dates being the ones on the order forms. Those four transactions, in which the agreed price was the list price "in force at the time of despatch", were therefore effected, it argues, before 8 May 1977, the date on which Decision No 962/77 entered into force, and the actual price was therefore determined in advance by reference to a price list in force.

13 That line of argument just be rejected. A transaction is not "effected" within the meaning of Article 2 of Decision No 962/77, which is intended to prohibit all transactions below a minimum price from 8 May 1977 throughout the Community, until the exact price actually charged is fixed. If the price remains uncertain, as is the case here, because there is no price indicated in the contract or because reference is made to list prices "in force at the time of despatch", the transaction cannot be regarded as having been effected within the meaning of Article 2 of Decision No 962/77.

14 To that first finding must be added the fact that the price actually paid by the buyers further involved a rebate as against the list price in force at the time of despatch.

15 It should be noted that under a system of minimum prices transactions which are still to be concluded or completed must all comply with the requirement inherent in the imposition of such prices, so that any practice, such as in this case, entailing rebates and credit notes devoid of any real substance cannot be relied on to justify sales at prices lower than the minimum prices imposed. Whatever method of calculation is used, the actual price, calculated after the entry into force of Decision No 962/77, may not therefore be lower than the minimum prices.

16 The applications for annulment should consequently be dismissed.

C — The amount of the fine

17 After establishing that the applicant was experiencing difficulties of an economic and social nature, and in view of its financial position, the Commission imposed upon it only a fine equivalent to 10% of the underpricing practised. Equitable account was therefore taken of the position in which the applicant found itself.

18 In Case 86/79 the applicant challenged the calculation of the fine reduced by the amending decision of 2 May 1979; it argues that instead of being proportional to the amount of the underpricing that reduction of the fine should

be proportional to the amount of the irregular transactions. It should be noted in regard to this matter that the criticized method of calculation was used by the Commission in connexion with all the infringements of General Decision No 962/77 committed by average-sized undertakings operating at a loss and that it was approved by the Court.

Costs

19 Having substantially failed in its submissions the applicant must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications;**

2. **Orders the applicant to pay the costs.**

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 18 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President