THE COURT

hereby:

Declares the action for annulment of Article 1 of Decision No 2/54 well-founded as regards the infringement of the Treaty and the Convention on the Transitional Provisions and refers the matter back to the High Authority for the necessary action;

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

Orders the defendant to bear its own costs and half the costs of the applicant.

Pilotti Serrarens Hammes

Riese Delvaux Rueff van Kleffens

Delivered in open court in Luxembourg on 21 December 1954.

M. Pilotti
President

O. Riese
Judge-Rapporteur

A. Van Houtte
Registrar

OPINION OF MR ADVOCATE GENERAL LAGRANGE

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Mr President,
Members of the Court,

Like the Judge-Rapporteur, I regret not being able to address the Court in the language of the case. I have now to give my opinion in Case 2/54 brought by the Italian Government.
The application makes four formal submissions as follows:

1. Infringement of Article 60 (1) in conjunction with Article 4 (b) of the Treaty: this submission contests in particular Decision No 1/54 on the definition of prohibited practices;

2. Infringement of Article 60 (2) by Decision No 2/54 which makes the system of publishing more flexible;

3. Misuse of powers in the exercise of the power granted to the High Authority by Article 60 (1) and (2) of the Treaty;

4. Infringement of Article 30 (2) of the Convention on the Transitional Provisions, which, as the Court knows, relates to Italy.

The first three submissions repeat in a slightly different way the same arguments as those put forward in the application by the French Government. My opinion on this matter will therefore necessarily be brief and I apologize to the Italian Government. It goes without saying that this does not imply that I have studied the questions raised only on the occasion of the first action. I have read with the same attention all the statements submitted in the two cases as well as in the last two brought by the associations, and I have listened with the same interest to all oral observations. If so far I have given my opinion only on the single action brought by the French Government it is simply because it was brought first and so clearly presented. No-one I trust will regard this procedure as a prohibited 'discrimination' or lack of courtesy.

Submission of infringement of Article 60

The first submission, as I have said, is against Decision No 1/54 which it accuses of having authorized certain practices contrary to the rule of non-discrimination and thereby infringed Article 60 (1) which prohibits them absolutely. According to the applicant respect for the rule of non-discrimination is associated inseparably with the principle of publication and any straining of this latter necessarily involves an infringement of the former.

This, as the Court will see, is precisely the argument of the first action, namely that although the two concepts are 'separable in theory', they cannot be separated in practice. I can therefore only refer to my previous observations and say that in my opinion on the contrary Decision No 1/54 is itself perfectly regular whatever opinion may be held on the regularity of the system of publishing.

The second submission is based on the same notion, namely that publication is a means *imposed* by the Treaty to ensure observance of the rule of non-discrimination and that, in so far as certain transactions may be concluded at prices other than the published prices, discrimination becomes possible. Therefore the system which allows such results is necessarily contrary to Article 60 (2) in conjunction with Article 60 (1).

I can again only refer to my previous observations. Let me observe only that the application of the Italian Government takes express exception as regards Decision No 2/54 to the provisions of the third paragraph of the new Article 1a which, as the Court knows, concern a transaction having 'exceptional characteristics by virtue of which it is excluded from the categories set out in the price-lists' whereas, as has been seen, the French Government expressly declined to criticize the decision on this issue. The Italian Government, on the other hand, dealt with this question at length at the hearing. It seems to me, however, that this is one of the most justified exceptions since rigidity in such a case would be likely to be an obstacle in particular to the natural price formation and moreover checking discrimination in a case of this nature can only lie in a special check taking into account all the circumstances of the case. In any event it is not possible to bring the sometimes considerable differences relating to these special transactions into the calculation of the average variation of 2.5%. This calculation must reflect the market price, that is to say, essentially the price of transactions which are comparable *inter se*. It may be considered that the definition given of these special transactions is too vague; it may be thought that it would have been preferable to require these special transactions to be declared: these are only criticisms relating to expediency.

There is a special issue which the application of the Italian Government urges: that is the argument based on the fact that the system of publication which allows an apparently moderate average variation of 2.5% more or less may involve in fact in an isolated transaction a very much larger

variation extending to 15 or 20% or theoretically even more while the average is nevertheless maintained, which may involve considerable discrimination.

In answer the High Authority goes into long explanations accompanied by learned tables.

I confess that the argument does not move me. Not only would the practice of such variations make the maintenance of the average within the authorized limits very quickly impossible but it would by itself give rise to very strong presumptions of discrimination. Since the undertakings are required to state the minimum and maximum variation charged during the period which has elapsed and not only the average difference, such differences would not fail to be noticed by the officers of the High Authority and the greater the variation the more difficult it would be for the undertaking to show, as it must under Decision No 1/54, that this variation is applied to all comparable transactions. Or the undertaking has in fact refrained from declaring this transaction regarding it as exceptional and non-comparable and in that event, as I have just said, there can only be a special check; as I have also said, the High Authority would no doubt be well advised to require a special declaration before this check in order to facilitate the operation.

With regard to the infringement of Article 60 (1) in conjunction with Article 4 (b) the Italian Government, especially at the hearing, has expounded a point of view which I think deserves to be carefully considered. It is said that it should not be left to undertakings to decide whether a transaction is non-comparable. It is for the High Authority itself to define *objectively* the criteria of comparability making use of the power which it has been given for this purpose by Article 60 (1); Decision No 1/54 in fact leaves it to the seller to judge whether a given transaction is or is not comparable with another. The simple and automatic criterion, so to speak, which was that of Decision No 30/53 (namely: any infringement of the price-list is a prohibited practice) has thus been abandoned without replacing it by any other.

To this I say first of all that it is quite true that with Decision No 1/54 the High Authority has not really used the legislative power which it had under the last subparagraph of Article 60 (1) to attempt to define what is to be understood by 'comparable transactions', but it was not obliged to do so: the article states: 'The High Authority *may* define the practices covered by this prohibition', that is to say 'discriminatory practices involving, within the Common Market, the application by a seller of dissimilar conditions to comparable transactions'. The High Authority has defined the discriminatory practices but it has not specified the criteria of comparability of transactions: perhaps because there are none. In any event it was not obliged to do so.

Further, and this does not appear to me to have been sufficiently stressed, the High Authority has maintained in its second decision the principle adopted by the first, namely that *every variation means discrimination.* All it has done is to *permit this to be rebutted.* Let us bear in mind the wording of the article: 'It shall be a prohibited practice within the meaning of Article 60 (1) for a seller to apply prices or conditions departing from those shown in his price-list unless he can show ...' and so forth.

Finally, and this has not been specially stressed either, Article 2 of Decision No 2/54 supplements Article 2 (f) of Decision No 31/53 by adding new provisions relating to the *content* of price-lists: quantity discounts, loyalty discounts and discounts for seconds. These details are extremely useful to enable it more easily to be determined whether a transaction is comparable to another. Here again, rather than seeking legal or economic criteria more or less open to challenge, the High Authority has endeavoured to have regard to experience: in particular the so-called discount for seconds is one of the easiest and most widely practised means of according some advantage over the normal price or *vice versa* while maintaining the appearance of equality of treatment between buyers. It is more useful to discover that in fact seemingly comparable transactions were not actually so rather than to give a more or less scientific definition of comparability.

Submission of misuse of powers

As regards the submission of misuse of powers the application of the Italian Government to some extent takes up again, albeit in a different guise, the argument already developed and intended in fact to show that the decisions infringe the Treaty.
I have already given my observations on the misuse of powers in respect of action against restrictive agreements on the occasion of the action by the French Government.
Other aspects of misuse of powers have been stressed at the hearing and in particular the following three about which I must say something:

1. First of all the High Authority has sought to avoid impossing penalties which on account of the patent and widespread infringement of its earlier decisions would no doubt have had to be imposed against all the undertakings in the Community.
I shall not spend long on this allegation. Perhaps the High Authority ought to have intervened immediately. Perhaps on the contrary it was wise to hold back: the Court does not have to judge this. The fact is that it did not do so and that after some months, as the High Authority admitted very openly to the Court, the attempt failed in so far as the steel market was concerned. Thereupon it sought a more satisfactory system: the objective which it pursued was to achieve a better application of the Treaty and not to avoid imposing penalties.

2. It is also alleged that there has been a misuse of powers in the fact the new decisions are concerned with taking action against discrimination whereas the powers which the High Authority has under Article 60 have been given it to *prevent* discrimination occurring rather than to take action when it does occur. This objection applies above all to Decision No 3/54 on information.
I confess openly that I have not understood this any more than I did in the case by the French Government. The demand for information under Article 47 in so far as it appears necessary to enable effective checking appears to me quite normal in the present case and I cannot see in it any infringement of the Treaty or misuse of powers.

3. Finally it has been alleged that the 'defect in the decision-making process' of the High Authority appears in the way it has consulted the Consultative Committee in not having refuted in the recitals to its decisions the opinions which became apparent within the Committee and which differed from the final decision taken.
I have considered the documents produced by the High Authority on the consultation with the Consultative Committee. It appears to me in the light of these documents and the account of the long discussions which took place before the Committee or before its sub-committee that the real and, may I say, *crucial* objective pursued by the High Authority was, as I said on the occasion of the action by the French Government, to achieve some flexibility in the rules on publication compatible both with regard to non-discrimination and the necessity to ensure that the market freely determined prices which, in short, and as I have also said, came precisely within the scope of Article 60.
In my opinion there is no misuse of powers in this.

Perhaps on the other hand there may be here a *defect of form.*
This would, however, be a *new submission* which has not been made in time. The provisions of Article 22 of the Protocol on the Statute of the Court of Justice are formal in this respect: the application, which is strictly required to be lodged within a month in accordance with Article 33 of the Treaty, must contain at least a brief statement of the grounds on which the application is based. Moreover, I am of the opinion that it is not a question of public policy such as lack of competence, which could be raised at any time and even by the Court of its own motion.
In addition, apart from the fact that the submission appears inadmissible, it also appears to be unfounded.
The defect of form may be regarded from a double point of view: 1. At least partial

lack of consultation with the Consultative Committee; 2. Absence or at least inadequacy of the statement of reasons on which the contested decisions are based.

With regard to the first point, namely lack of or insufficient consultation, it is generally necessary to compare the request for an opinion by which the matter was brought before the Committee with the decisions ultimately taken.

The matter was brought before the Consultative Committee by a letter from the High Authority dated 20 November 1953, which we were fortunate in seeing at the very last stages of this case. The following are the relevant factors:

1. *'Under Article 60 (1) of the Treaty*: Consultation on a possible amendment to Decision No 30/53 of 2 May 1953 on practices prohibited by Article 60 (1) of the Treaty in the common market for coal and steel (published in the Journal Officiel, No 6, p. 109).'

2. *'Under Article 60 (2)(a) of the Treaty*: Consultation on a possible amendment to Decision No 31/53 of 2 May 1953 on the publication of price-lists and conditions of sale applied by undertakings in the steel industry (published in the Journal Officiel, No 6, p. 111).'

3. *'Under Article 60 (2)(a) of the Treaty*: in the sphere of special steels, consultation on a possible amendment to Decisions Nos 31 and 32/53 of 2 and 20 May 1953 on the conditions of sale applied by undertakings in the steel industry (published in the Journal Officiel, No 6, p. 111, and No 7, p. 130).'

I think that if there were only this letter the consultation no doubt could not be regarded as sufficient for, as drafted, it does not provide sufficiently precise details about the *subject-matter* of the amendments proposed by the High Authority.

But there are then more documents. First:

1. A note dated 28 November mentioning general considerations on the problem and accompanied by a draft decision;

2. Above all a note dated 30 November, much more detailed, in which the High Authority sets out the whole system which was finally adopted in the contested decisions. In particular there is to be found there, expressly mentioned, the concept of *the average variation by product* (page 2 at the end).

The Consultative Committee requested an extension of the time-limit which had been given to it and by letter dated 3 December the High Authority set 14 December as the new time-limit. It even arranged for an adjournment of the date which had been appointed for the consultation with the Council of Ministers. The opinion was forwarded to the High Authority on 14 December and as you know the decisions were signed on 7 January.

It therefore cannot be doubted in my opinion that the consultation was complete. Let us not forget the special character of the Consultative Committee which is not a Conseil d'État with the task of giving opinions on texts but a technical institution required to clarify problems for the High Authority. What is necessary is that it should be informed of all the aspects of the problem. This was the case.

The second aspect of the alleged defect of form, namely the lack or inadequacy of the statement of reasons, is no more valid than the first. Article 15 of the Treaty states that 'decisions, recommendations and opinions of the High Authority shall state the reasons on which they are based and shall refer to any opinions which were required to be obtained.' As the Court was reminded by defence counsel this *reference* in decisions consists in the obligation to *mention* at the beginning of the decision the fact that the opinion has been obtained. This may be done in the phrase: 'Having regard to the opinion of the Consultative Committee'. The High Authority prefers to say: 'After consulting the Consultative Committee' which comes to the same thing. Further, decisions must state the reasons on which they are based; it goes without saying that the reasons are to be judged in relation to the decision itself and not in relation to the opinions which may have preceded it. In other words, the High Au-

thority must state the reasons for its own decision as it stands and is in no way bound to *refute* contrary or different opinions which may have become apparent the opinions previously obtained.
The procedure therefore seems to me to have been completely regular. I may even add, if I am allowed, that I have rarely had the occasion in my own national experience to see cases of such full consultation and collaboration carried so far between the representatives of the administration and the members of the body consulted.
I think there I have said sufficient about the submission or the submissions of misuse of powers to which the applicant has sought to attach, as it were, this submission of defect of form which I have just considered.

Submission of infringement of Article 30 (2) of the Convention

There remains *the submission of infringement of Article 30 (2) of the Convention.* The wording is as follows:

'The prices charged by undertakings for sales of steel on the Italian market,when reduced to their equivalents at the point chosen for their price-lists, may not be lower than the prices shown in the lists in question for comparable transactions, save where authorized by the High Authority in agreement with the Italian Government, without prejudice to the last subparagraph of Article 60 (2) (b).'

The applicant's argument, based on this article, is obviously very forceful since Article 30 (2) states expressly that the parity prices charged by undertakings for sales on the Italian market may not be lower than *the prices shown in the lists in question,* which would prohibit the application of any variation from the price shown in the price-list, at least in the sense of a reduction.
I think, however, that if the Court agrees with my views on the interpretation of Article 60 it can only reject this submission of infringement of Article 30 of the Convention.
The latter, and this is not open to question, has only one objective which is quite clear: not to apply the system of alignment established by Article 60 (2) (b) of the Treaty to sales made on the Italian market during the transitional period (except in the event of a special authorization which can only be given by the High Authority in agreement with the Italian Government). It is clear that it would mean completely falsifying the scope of this article to interpret it as exempting the Italian market from the application of the other rules laid down by the Treaty and in particular the rules on competition established by Article 60 (1) and (2) (a). Let us not forget the provisions of Article 1 (5) of the Convention: 'Upon the entry into force of the Treaty ... the provisions thereof shall apply subject to the derogations allowed by this Convention and without prejudice to the supplementary provisions contained in this Convention for the ends set out above. Save where this Convention expressly provides otherwise, these derogations and supplementary provisions shall cease to apply ... at the end of the transitional period.' All the provisions of the Convention thus by their very nature constitute exceptions and are to be interpreted strictly.
All that may be said in my opinion is that the provision of Article 30, in view of the words used, constitutes an *argument* in favour of interpreting the expression price-list' strictly and of not recognizing any prices other than those listed in the price-lists published. This would be an *additional* argument in support of the submission of infringement of Article 60 (2) (a) on which the contested decisions are based and an argument which could have been used by the French Government or by any other non-Italian applicant.
There are only two possibilities and here I ask for the Court's indulgence in having recourse to logic which I have belittled in other circumstances, but here logic appears to be called for: either it is impossible in interpreting Article 30 to understand the expression 'prices shown in the lists' otherwise than as meaning the prices listed in a properly published price-list— and this impossibility is just as absolute in its application to Article 60 (2) as a whole and in that case the argument of the High Authority must be rejected as a whole and the

contested decisions completely annulled; or else the flexible argument which I have advocated must be accepted and then in interpreting Article 30 the same effort must be made as in the interpretation of Article 60 (2) (b)—an effort which is no greater in one case than in the other. But to accept the flexible argument, which would allow prices to vary within certain limits in relation to the published prices, and to accept this argument only for the whole of the Community with the exception of the Italian market would mean giving the Italian market during the transitional period *additional protection which the Convention has not provided for.* This would mean recognizing that the Italian market is not in a state to support the competition resulting from prices freely determined by the market even having regard to the complete geographical protection which the Convention intended to give it by Article 30 (2) and the customs protection also partially retained in force by Article 30 (1). I would ask the Court what would then remain of the very concept of the Common Market for Italy?

My opinion has not changed: I think the effort can and must be made. This means that the reference made by Article 30 to 'the prices shown in the lists in question' (the price-lists of the undertaking which wishes to sell on the Italian market) '*for comparable transactions*' must be understood as referring to the prices (and also the conditions of sale although this is not mentioned) *actually applied* in accordance with the price-list established on the basis of the undertaking's own parity and having regard to any authorized variations which the application of this price-list and conditions of sale may perhaps entail. This is exactly the same interpretation which I have proposed for Article 60 (2) (b) which also related to the methods of quotation and which the Convention had as objective to make inapplicable in principle to the Italian market during the transitional period. That is all I wish to say and, no matter what the Court's judgment is, in finishing I welcome once again the fact that the Italian Government considered that it ought also to bring an action against the decisions implementing Article 60 for it is this action which has allowed attention to be directed to an important argument based on the Convention which otherwise might have escaped the Court's consideration.

My opinion is that the application should be dismissed.