JUDGMENT OF THE COURT
21 DECEMBER 1954[1]

Government of the Italian Republic v High Authority of the European Coal and Steel Community

Case 2/54

1. *Procedure. Cf. Summary of Judgment in Case 1/54, para. 1*

2. *Prices. Cf. Summary of Judgment in Case 1/54, para. 2*

3. *Misuse of powers. Cf. Summary of Judgment in Case 1/54, para. 3*

4. *Prices — Steel products — Italian market — Prohibition on variations in relation to price-lists*
The objective of Article 30 (2) of the Convention on the Transitional Provisions is to prevent non-Italian undertakings from competing with Italian undertakings on the Italian steel market by undercutting their own price-lists. A decision of the High Authority, without the agreement of the Italian Government, authorizing variations from the price-lists of non-Italian undertakings is consequently contrary to Article 30
(Convention on the Transitional Provisions, Art. 30 (2)).

5. *Procedure — Defendant institution — Documents relating to the case — Production*
When a decision of the High Authority is contested, the High Authority must transmit to the Court its minutes relating to the decision; the Court may authorize the omission of the names of speakers. The Court may, nevertheless, waive production of such documents if it considers that they are not indispensable for deciding the issue
(Statute, Art. 23).

In Case 2/54

GOVERNMENT OF THE ITALIAN REPUBLIC,

represented by Professor Riccardo Monaco, Legal Adviser to the Italian Ministry for Foreign Affairs, acting as Agent, assisted by Cesare Arias, Sostituto Avvocato Generale dello Stato, Rome, with an address for service in Luxembourg at the Italian Legation,

applicant,

v

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

defendant,

1 — Language of the Case: Italian.

APPLICATION for the annulment of Decisions No 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 18 February 1954 the Government of the Italian 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.

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 Agent and Advocate have been duly appointed.

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 prior to any transactions 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 amended 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 equally 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 the purposes of verification, undertakings must submit fortnightly reports on 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 Italian 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 the first article of Decision No 2/54 and Decision No 3/54.
The Government of the Italian Republic bases its application in its pleadings upon the following grounds:

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

The grounds put forward may be summarized as follows:

(a) Infringement by Decision No 1/54 of Article 60 (1) in conjunction with Article 4 (b) of the Treaty: the latter has created an insoluble link between the principle of publicity and that of non-discrimination such that only the previous rules can be regarded as lawful. The grant of any variations in relation to the price-lists substitutes a system of flexible prices for the system of fixed prices provided for by the Treaty and opens the door to unlawful advantages granted to certain buyers for none of them has any longer the means of ascertaining whether the price required of him is lawful.

In its reply the applicant government has added that the new rules do not take into account the reservations made within the Consultative Committee and the Council of Ministers. In addition to these considerations there is the fact that the Treaty does not define 'comparable transactions'; as a result undertakings have the opportunity of making each case 'unique' and escaping the sanctions provided for in the event of a disregard of the prohibition on discrimination. Finally a reduction, even granted equally to several buyers, adversely affects the weakest competitors, that is to say the Italian steel market.

(b) Infringement by Decisions Nos 2/54 and 3/54 of Article 60 (2) of the Treaty: the admission of differences in relation to the published price-lists derogates from the system prescribed by the Treaty: it follows from the words at the beginning of Article 60 (2): 'For these purposes', that the obligation to publish has been prescribed to ensure that the prohibition on discrimination is observed. The new rules take no account of the close link existing between paragraphs (1) and (2) of Article 60; they allow discrimination which in certain cases may greatly exceed the margin of 2.5%. Further (a submission raised for the first time in the reply) the new rules do not take into account the reservations expressed within the Consultative Committee and the Council of Ministers. According to the Treaty publication is an indispensable means of preventing discrimination; only full publication ensures equal treatment for all buyers. For this reason the High Authority is not generally entitled to allow differences in relation to the price-lists. The words 'to the extent and in the manner prescribed by the High Authority' contained in Article 60 (2) (a) give the High Authority the right only to regulate the conditions of publication but not the right to determine its content. Further, Decision No 2/54 allows undertakings to keep the differences applied secret for sixty days. The exemption provided for transactions which do not come within the categories of transactions provided for by the price-lists allows both the obligation to publish and the prohibition on discrimination to be evaded and to escape from any control. The new rules allow the prices charged to remain unpublished. For these reasons also they are contrary to the letter and spirit of the Treaty.

(c) Infringement of Article 30 (2) of the Convention on the Transitional Provisions: the decisions in question allow non-Italian steel producers to agree to reductions on the Italian market which by reason of the introduction of the average difference of 2.5% may be quite high in particular cases. As appears from the said provision the High Authority ought never without the agreement of the Italian Gov-

ernment to have authorized the reductions in relation to the published price-lists. Any reduction in prices agreed by foreign undertakings in favour of Italian buyers threatens the Italian steel industry. Even if price reductions were lawful in other countries of the Community they ought not to be applied in Italy.

(d) Misuse of powers: there is always a misuse of powers where the High Authority contravenes the Treaty in exercising the power which is granted to it by the Treaty. The High Authority has used this power for objectives other than those which it is required to pursue according to the Treaty. It is required:

1. To use the power which it has under Article 60 (1) only for the purpose of defining discriminatory practices; in fact its objective has been to allow discrimination and to authorize infractions of its previous decisions;
2. To use the power which it has under Article 60 (2) to determine the conditions and form of publication; in fact its objective has been to authorize variations in relation to the price-lists.

Finally, Decision No 3/54 is vitiated for misuse of powers for although according to the statement of the reasons on which it is based it is intended to prevent discrimination, in fact it must serve to authorize variations.
The application was served on the High Authority on 19 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. The Agent and Counsel were duly appointed. In its defence the High Authority requests the Court to:

'Dismiss the application by the Government of the Italian Republic filed on 10 February 1954, served on 19 February 1954 and order the applicant to pay the costs and disbursements'.

In its rejoinder the High Authority supplements its submissions by asking:

'That the new submissions contained in the reply be declared, if appropriate, inadmissible in accordance with Article 29 (3) of the Rules of Procedure of the Court.'

In its pleadings the High Authority counters the applicant's submissions as follows:

(a) As regards the infringement of Article 60 (1) in conjunction with Article 4 (b) of the Treaty by Decision No 1/54:

This submission is unfounded. The new rules are more logical than the old. It is clear that a seller who varies his price-lists equally for all comparable transactions is not making any discrimination. Further, the obligation to publish is only a means in relation to the prohibition on discrimination and is not an objective in itself. A rigid system like the former system can offer the benefit of an effective control of the price policy of buyers only if the prices are stable or tending to rise; on the other hand where there is a tendency to fall, which was the case when the contested decisions were taken, effective control by buyers cannot be expected. The variations then are reductions and constitute for the buyers an advantage of which they are not going to complain. It is not correct to say that the Treaty provides for a system of fixed prices. The new submissions made for the first time in the reply must be declared inadmissible under Article 29 (3) of the Rules of Procedure. In addition the submissions are unfounded; it is true that the High Authority must consult the Consultative Committee and the Council of Ministers but it is not required to follow their advice. In addition these bodies have recognized that the High Authority had the power to agree a margin.
The criterion of non-comparability of a transaction is an objective factor which cannot be arbitrarily assessed by undertakings although the ascertainment of comparability may in practice sometimes be difficult. The objection based on the damage caused to the Italian steel market is unfounded, for Italy also is subject to the competition of the Common Market and is

not entitled to greater protection than that given to it by Article 30 of the Convention on the Transitional Provisions.

(b) As regards the infringement of Article 60 (2) of the Treaty by Decisions Nos 2/54 and 3/54:

The Court is asked to dismiss the submissions made for the first time in the reply as inadmissible under Article 29 (3) of the Rules of Procedure. In any event the submissions are unfounded. Although the rules on compulsory publication are an additional procedure to attain the objectives mentioned in Article 60 (1), they are not the only one. Article 60 (2) gives the High Authority a wide discretion; the word 'extent' implies the right to limit quantitatively the content of the publication and as a result the power to determine what are the factors making up the prices which must be published and those which do not have to be so published. In doing this it must, as appears from the words 'in particular', have regard to all the objectives referred to in Article 60 (1) and Articles 2 to 4 of the Treaty. Besides counteracting discrimination and unfair competition it must, *inter alia*, encourage the fixing of the lowest prices and prevent price agreements for the sharing and exploitation of the market. The new rules take account of all these points of view and at the same time allow more effective checking by reason of the fortnightly reports required by Decision No 3/54.

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. The fixing of prices could have arisen only from agreements between producers which would have been inconsistent with the provisions of the Treaty.

The complaint of not having followed the dissenting opinions given in the Consultative Committee and the Council of Ministers is also unjustified for the reasons given under (a).

The applicant's allegation that undertakings could keep price variations secret for 60 days is not correct since the fortnightly reports required by Decision No 3/54 reveals them.

The exemption from the duty to publish allowed for transactions which do not come within the categories of transactions provided for by the price-lists is justified for there are transactions which are quite outside the normal framework and which can therefore never be discriminatory. But it is practically impossible to determine in advance in the rules on publication which transactions have a unique character, so-called exceptional transactions, which for this reason do not come within categories of transactions provided for by the price-lists.

It is also not correct to say that undertakings in any particular case can allow large variations in relation to the price-lists for the prohibition on discrimination prevents this. Further, in practice they can never wait until an average difference of 2.5% is reached, but they must adjust their price-lists beforehand if they wish to avoid their business being temporarily stopped or to avoid infringing the rules on publication.

Decision No 2/54 in no way infringes the duty to publish: it is restricted to authorizing small variations in relations to the price-lists: the latter, as heretofore, remain decisive.

(c) As regards the infringement of Article 30 (2) of the Convention on the Transitional Provisions:

This submission is unfounded. Article 30 (2) simply prohibits non-Italian undertakings from aligning their quotations for the sale of steel on the Italian market on those of Italian producers. This prohibition continues as heretofore; Italian steel producers are effectively protected for foreign undertakings must sell at higher prices in Italy than in the other countries of the Community as a result of the protective duties which still temporarily exist and the necessity of adding transport costs. If exceptionally that is not the case they have to face it as a consequence of free competition. This would likewise have been possible under the system of the old rules.

(d) Misuse of powers.
The submission is unfounded. Misuse of powers assumes that the High Authority has kept, from the formal point of view, within the terms of the Treaty. The submissions of infringement of the Treaty and misuse of powers are mutually exclusive. The idea of misuse of powers is inconceivable in respect of Decision No 1/54 for the High Authority has no discretion in this respect; it has simply fulfilled a duty under the Treaty to provide a definition. If the definition should prove incorrect there would at most be an infringement of Article 60 (1), but in any event no misuse of powers. It cannot be said that provisions intended to improve former inaccurate definitions are vitiated as being a misuse of powers.
The objective, moreover, of the High Authority has been to prevent practices contrary to the Treaty and in the context of the Treaty to lay down rules which producers could reasonably be expected to respect. Because of the price instability characterizing the actual situation of the steel market a continual adjustment of the price-lists for every price variation, however negligible, is impracticable. Further, the more effective system of checking introduced by Decision No 3/54 enables immediate action to be taken taken where discriminatory practices are suspected.
The defence was served on the Government of the Italian 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 20 March 1954 and was served on the High Authority on 3 May 1954 in accordance with Article 33 (2) of the Rules of Procedure.
The rejoinder of the High Authority was lodged at the Registry within the period laid down in the order of the President of the Court of 4 May 1954, as extended by the order of 2 June 1954, and was served on the Government of the Italian 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 on 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 procedure 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 3 November 1954.
Hearings were held in open court on 3, 4, 5, 8, 10 and 11 November 1954.
In the course of those hearings the parties presented oral argument.
Upon application by the Government of the Italian Republic at the hearing on 3 November 1954 the Court of Justice made an order dated 6 November 1954 in which it:

'Requires the High Authority to transmit to the Court within 24 hours the minutes and opinions of the Consultative Committee relating to this case and authorizes it, as an exceptional measure, to erase the names of those taking part and any references which would allow the authors of the various opinions to be identified'.

The High Authority complied with this order within the period laid down.
In the course of the hearing held on 11 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 of the Court, 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 considerations into account:

1. Admissibility

The parties raise no objection of inadmissibility. The Court is of the 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 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 exeptional transactions and comparable 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 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' ('be published'). 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-lists'—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-list' 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 applied[1] 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 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 must 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 aquired 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.

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

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 the 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 ac-

cordance 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 invalidated 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 pub-

lication 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) (b) 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 compulsory 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.

6. The applicant has claimed for the first time in its reply that the new system allows undertakings to conceal discriminatory transactions for 60 days. The defendant considers this to be a new submission which is inadmissible under Article 29 (3) of the Rules of Procedure.
The Court considers that this is an argument in support of the submission of infringement of the Treaty already made in the application and that it should not be declared inadmissible. On the other hand this argument is unfounded in view of the obligation contained in Decision No 3/54 to send fortnightly reports.

The applicant has further made the following submissions:

7. Submission that the Consultative Committee has not been consulted in accordance with legal requirements:
The defendant asks the Court to declare this submission inadmissible on the

ground that it is not contained in the application. The Court considers that it is right to consider this submission of its own motion in view of the fact that if it were well-founded the Court would be justified in annulling the decision of its own motion on the ground of infringement of the Treaty or of an essential procedural requirement.
The minutes of the Consultative Committee, forwarded to the Court in pursuance of the order of 6 November 1954, show that the Consultative Committee has been duly consulted, that it has given an opinion on certain amendments which were to be made to Decisions Nos 30/53 and 31/53 and that the only issues on which the consultation has not been concluded, namely the definition and the exemption from publication in price-lists of long-term contracts and open tenders do not come into question in examining the legality of the contested decisions.
The minutes reflect a collection of opinions which the High Authority, together with the Consultative Committee, could rightly consider as an opinion.
On this issue the Court concurs with the opinion of the Advocate General.

8. Submission that the contested decisions contained an insufficient statement of the reasons on which they were based in view of the omission of contrary opinions:
This submission, alleging a defect of form, has been made only in the reply. For this reason since public policy does not require the Court to consider it of its own motion, the Court, *ad idem* with the Advocate General, declares the submission inadmissible under Article 29 (3) of the Rules of Procedure.

9. 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. According to its wording this article only defines the 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 indirectly supplement the definition of prohibited practices. If this were the case, then the Council should have been consulted, under the terms of Article 60 (1). Yet such consultation did not take place officially, and could not be replaced by a mere notification to the Council by the High Authority so that Article 60 (1) would be infringed. However, the Court is of opinion that Article 1 of Decision No 2/54 does not supplement the definition of prohibited practices and does not even contain an indirect definition, but merely lays down how price-lists are to be published.

10. 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 claims the annulment of Article 3 of Decision No 2/54. For the reasons stated above the Court takes the view that that article is consistent with the Treaty.

The applicant did not contest the remaining articles of Decision No 2/54, and there is therefore no reason for considering this point.

11. The applicant seeks the annulment of Articles 1, 2 and 3 of Decision No 2/54 on the grounds of infringement of Article 30 of the Convention on the Transitional Provisions. As regards Articles 2 and 3 of Decision No 2/54 this application must be rejected on the above-mentioned grounds. Although the provision of Article 3 of Decision No 2/54 reducing the period provided for the application of the new price-lists forces the Italian undertakings to react more quickly to any alterations in the price-lists of their competitors, it does not, however, seriously affect the special protection given to them.
On the other hand, as regards Article 1 of the decision the applicant's claim is justified for the following reasons:

Even if it is thought that Article 30 of the Transitional Provisions is particularly intended to prevent prices from being aligned on those of Italian undertakings it does not necessarily follow that this provision does not give other protection as well. To claim the contrary would really be begging the question, for in the absence of any clear and precise provision it is quite legitimate to accept that the Convention intended to give the Italian undertakings temporarily and by way of exeption the unlimited advantage of the protection which it provides for these undertakings. The actual objective of this provision is therefore to prevent the non-Italian undertakings from competing with the Italian undertakings on the Italian market by undercutting their own price-lists.
The Court sees in Article 30 of the Transitional Provisions a prohibition on any sale in Italy below the prices provided for by the price-lists. This prohibition can have a meaning only if in the other countries of the Community sales below the prices in the price-lists are allowed by way of exception under special provisions. This is the case with the right to align provided for by Article 60 (2) (b). The contested decisions create a new system applicable to the whole of the Common Market under which sale below the prices contained in the price-lists is lawful. This system remains subject to the prohibition provided for in Article 30, especially as that article does not expressly mention alignment but uses very general terms. Article 30 must therefore be interpreted as follows: even if sale below the prices shown in the price-lists were by way of exception lawful, it would not be so on the Italian market. In the present case Article 30 prohibits variations from the price-lists from being extended to the Italian market. Since Decision No 2/54 disregards this prohibition it infringes a legal rule on the application of the Treaty.

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 Trea-

ty. 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 the annulment of Article 1 of Decision No 2/54 makes it inoperative and deprives it of any point.

B. The submission of misuse of powers

The Court shares the Advocate General's opinion, to which it refers, 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 and required to take account also of the prohibitions resulting from Articles 2, 3 and 4; it cannot be criticized for having done so.
Even if the contested decisions were partly based on the idea of introducing a system which undertakings would be more likely to respect than the old one, this cannot lead to the conclusion that the new system was intended to legalize infractions previously committed. In any case, it is obvious that the decisions were specially intended to attain the Treaty's aims. Even if the grounds for the High Authority's decisions included, in addition to proper grounds, an improper one such as avoiding the imposition of penalties on guilty undertakings, this would not make those decisions invalid for misuse of powers, since they do not sacrifice the main aim, which is the prohibition of unfair competitive practices and discrimination. The Court considers, for the reasons explained above, that they do not so sacrifice them.

C. Production of documents under Article 23 of the Statute of the Court

The applicant applied at the hearing on 3 November for the defendant to be invited to produce all the documents relating to the case in accordance with Article 23 of the Protocol on the Statute of the Court. By order dated 6 November 1954 the Court ordered the High Authority to forward to the Court the minutes and opinions of the Consultative Committee relating to the case and reserved the right to decide subsequently on the possible production of the minutes of the Council of Ministers and the High Authority. Although the production of these minutes was not expressly required it was nevertheless included by implication in the application for the production of all the documents relating to the case.

The Court considers this application admissible; the applicant was entitled to think that compliance with the obligations under Article 23 of the Statute would be ensured; moreover it was not until the oral procedure was opened that it was able to see that the High Authority had not forwarded all the documents to the Court.
The Court finds that the defendant was bound to forward the minutes of the High Authority in accordance with Article 23 of the Statute of the Court of Justice. The Court, had application been made, would have authorized the names of the speakers to be omitted and if necessary would have ordered these documents to be examined in camera. However, the Court does not consider it necessary to order the production of these minutes, or those of the Council of Ministers: the documents produced by the defendant are sufficient for the Court in the present case to clarify the objectives pursued by the High Authority

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 grant the applicant the right to the reimbursement by the defendant of half its 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.
In so far as the action is recognized to be well-founded and because of the interest which the applicant has in a decision on the submissions made, this provision remains applicable notwithstanding the fact that Article 1 of Decision No 2/54 cannot be formally annulled since it has already been annulled prior to the present judgment, albeit on the same date.

On those grounds,
Upon reading the pleadings;
Upon hearing the parties;
Upon hearing the opinion of the Advocate General;
Having regard to Article 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;

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

Summary

Submission of infringement of Article 60 57
Submission of misuse of powers 59
Submission of infringement of Article 30 (2) of the Convention . 61
Conclusions 62

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;