Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 36, 60, 64, 80 and 92 of the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of the Court of Justice of the European Coal and Steel Community relating to costs,

THE COURT

hereby:

1. **Dismisses the application;**

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

Donner Delvaux Rossi
Riese Catalano

Delivered in open court in Luxembourg on 17 December 1959.

A. Van Houtte
Registrar

A. M. Donner,
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE[1]

Mr. President,
Members of the Court,

'Macchiorlatti Dalmas e Figli', a limited partnership with a capital of Lit 50 000 000, has its registered office at Corio Canavese and is managed from Turin; it is a mechanical engineering undertaking and – to a small extent, according to its own statements, (the Court will have to consider to what extent at a forthcoming hearing) but in any case to a certain extent – an iron and steel undertaking within the meaning of Article 80 of the Treaty. It manufactures *inter alia* steel ingots, rolled steel and steel sections included in the definitions in Annex I.
The partnership is challenging before the Court, on the basis of Article 36 of the

1 – Translated from the French.

Treaty, a decision of the High Authority of 14 November 1958 made under Article 64 imposing upon it a fine of Lit 2 500 000 for having effected sales at prices higher and subject to conditions more onerous than those shown in its price list, thus contravening Article 60 and the decisions taken in implementation thereof. According to the decision the total value of the 'irregular sales' was Lit 70 569 655 and the surcharges amounted in the aggregate to Lit 9 199 973. The applicant asks the Court to release it from payment of the fine and, alternatively, to reduce the amount thereof.

I shall exclude from my argument everything which has no relevance to the determination of this dispute, that is to say, on the one hand, everything which refers to the civil status of the members of the Macchiorlatti family and to the exact nature of the duties of the partnership staff and, on the other hand, everything concerning the irregularities connected with payment of the levy, which are the subject-matter of another action.

On the last point, however, there is an observation which I must make concerning the partnership's letter of 15 December 1958 which the High Authority puts forward as an actual 'extrajudicial admission' that there was an infringement. As the applicant correctly points out this letter was in reply to a formal demand from the High Authority for payment of the levy and cannot therefore be considered, as far as these proceedings are concerned, which have a very different subject-matter, as an admission or acknowledgement that an infringement has been committed: it is merely a document placed on the Court's file, which is nevertheless of interest in this case, because in it the signatory explains with a certain animation and considerable candour what might be described as his pricing policy.

Having made that observation it is appropriate to consider in the light of the legally applicable provisions whether the alleged infringements were committed or not and then, if they were, what is a reasonable amount at which to fix the fine.

The Court knows these provisions: they are, in addition to Article 60 of the Treaty, Decisions Nos 30 and 31/53 of 2 May 1953, supplemented and amended by Decisions Nos 1 and 2/54 of 7 January 1954, excluding of course Article 1 of Decision No 2/54 which has been annulled by the Court. This system distinguishes between the rules relating, on the one hand, to the practices prohibited by Article 60, that is to say, to the observance of the principle of non-discrimination and, on the other hand, to the publication of prices.

On the first point the principal provision is the following (Article 2, as amended, of Decision No 30/53):

> '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 either that the transaction in question does not fall within the categories of transactions covered by this price list, or that the prices or conditions have been departed from uniformly in all comparable transactions.'

The reason for the publication of prices is the undertakings' need to publish their price lists and sale conditions with due regard to certain conditions as to content and timing. According to the judgment of the Court of Justice of the ECSC of 21 December 1954, as you know, any disparity between the prices and conditions which are in fact applied and the prices and conditions shown in the published price lists infringes the Treaty. Consequently, as the High Authority was right to point out in the Official Journal of the European Coal and Steel Community of 11 January 1955, p. 543:

> 'Any departure from the prices shown in the price list – even if such price is departed from uniformly in all comparable transactions and does not for that reason constitute an infringement of the rules on non-discrimination – must always be an infringement of the rules regarding publication.'

This is very important. It is not in fact suf-

ficient for the applicant, in order to avoid an infringement of the rules regarding publication, to prove that the prices which depart from those shown in its price list are not discriminatory, because any such departure amounts to such an infringement. It would also have to establish that each of the transactions in respect of which descrepancies have been found to exist 'do not fall within the categories of transactions covered by [its] price list' pursuant to Decision No 1/54. On the other hand, if the list price has not been departed from uniformly in all comparable transactions, there are then two infringements: an infringement of the rules regarding publication and an infringement of the rule on non-discrimination. Does it then follow that there is no need to ascertain whether the rule on non-discrimination has been disregarded? In my view certainly not, because, although it is sufficient to find that there has been an infringement of the rules regarding publication in order to justify in law the *application* of a sanction, in my view it is, on the other hand, very important to know whether that noncompliance also includes an infringement of the rule on non-discrimination in order to determine the *gravity* of the infringement which has been committed and consequently the amount of the fine to be imposed. An infringement of the rule on non-discrimination, one of the fundamental principles of the common market, appears to me to be more serious, at least *a priori,* than a disregard for the rules regarding publication, the only object of which is to facilitate compliance with the first of these two rules; and this is especially true when, as in this case, the undertakings involved are small or medium-sized, not members of powerful associations, which are consequently much more affected by actual market fluctuations and in the nature of things under a greater constraint to expose themselves to effective competition and whose more or less restricted range of commercial activity makes official publication in the whole of the common market very much less necessary.

In my view therefore each of the twenty infringements which the High Authority's Inspector found had been committed and which the High Authority accepted in the contested decision should be considered from the point of view both of non-discrimination and also of infringement of the rules regarding publication.

In this connexion I do not believe that it is sufficient to dispose of the allegations made in the application merely by putting forward an alternative argument as the High Authority has done in its statement of defence. In fact the Court has unlimited jurisdiction to evaluate the facts of this case and has an unrestricted discretion in the matter of the amount of the fine.

I dare say that it would have been better, and even in its own interest, if the partnership had made use of the long period of time at its disposal between the inspection and the imposition of the fine to submit its explanation, instead of offering it for the first time in its application. However, that delay cannot absolve the Court from determining whether the explanation is well founded.

The two documents of fundamental importance to this examination, which have to be compared, are, on the one hand, the list of infringements which the High Authority's Inspector found had been committed and which was notified to the applicant by registered letter of 16 January 1958 (Annex 2 to the application, p.2) and, on the other hand, the detailed explanations set out at pages 3 to 10 of the application. The applicant has dealt one after the other with the 20 infringements recorded in the inspector's report, numbering them from 1 to 19 (it has in fact included under one heading (No 1) invoice No 2 of 5 January 1957 and invoices Nos 6, 7 and 8 of 4 January 1957).

Perusal of these documents shows that the explanations offered by the applicant are frequently the same for different invoices with the result that, for the purpose of allowing the Court to be better able to determine their significance, I thought it would be advisable to draw up a table of *categories of surcharges,* on which I have consolidated the various invoices under their respective categories: in this way it is easier to see

whether there are different prices for comparable transactions and whether they appear to be justified. I now produce this table, which has also been placed at the disposal of the parties. If the Court so wishes I suggest that we examine it together.

The first category of surcharges: *ingots for rolling*, Lit 1 per kilogramme. On page 8 of the undertaking's price list the basic price of 'ingots for rolling' is Lit 54, but on page 10 we see that this price, which is applied to squares of 95mm, is reduced to Lit 53 for squares of 120mm and to Lit 52.50 for those of 150mm. The applicant has not taken this into account and in each of these cases it has therefore not adhered to the prices in its price list. On the other hand, there has been no discrimination, since the surcharge was in each case the same (moreover the deliveries in question were all to the same undertaking).

Second category: *ingots of special sizes,* Lit 2 per kg. This surcharge does not appear in the price list, although *it should have done* according to Article 2 (b) of Decision No 31/53:

> *All* price lists and conditions of sale published shall contain the following *minimum* information:
>
> ..... any additional charge for size or length.'

So there is an *omission* from the price list, which is all the more unjustified because the 'Ilva' firm, which appears to be one of the applicant's most important customers, is always required to pay this surcharge for supplies of ingots of 1.20m, which exceed the normal length. On the other hand there has been no discrimination in these cases either: the surcharge is always the same: Lit 2 per kg.

Third category: *delivery dates.* The applicant maintains that it applies a surcharge of Lit 1.5 to 4.5 for special delivery dates. The general conditions of sale (first part of the price list) provide at Article 6 (2) that:

> 'Where periods for performance, despatch *and delivery* are stated (at the date when the order is accepted) they are only to be treated as a general indication and are never guaranteed, save in the case of specific agreements for delivery of particular supplies agreed before acceptance of the order.'

In such a case it is perfectly normal to ask for a price increase and it stands to reason that this may vary according to the nature of the particular requirement. Nevertheless, surcharges or price increases must appear in the price list (Article 2 (b), *in fine,* of Decision No 31/53):

> 'any surcharge or increase normally applied in connexion with delivery of the various products.'

In this connexion we find therefore that there is another *omission* from the price list. It does not seem possible to record a finding of discrimination (save in the case of infringement No 2, invoice No 4, where the actual amount of the surcharges is not shown). Thus it can be seen that the 'Vicenzo' firm was asked to pay a surcharge of Lit 2.50 for 'special delivery dates' (infringement No 4, invoice No 12) whereas the surcharge to each of the firms 'Comp. Siciliana' (infringement No 6, invoice No 53) and 'Menzio Pietro' (infringement No 7, invoice No 63) was Lit 3.50, the customers in the last two cases having asked to be given 'absolute priority over any other work in progress, work to be carried out if necessary at night and during public holidays': the higher price appears therefore to be justified.

Fourth category: *special conditions of delivery.* Here the position is the same as in the case of delivery dates. There is an omission from the price list. As for discrimination, the absence of discrimination has not been proved in the case of infringement No 2 (invoice No 4); on the other hand it appears to have been proved in the case of infringement No 4 (invoice No 12) and No 10 (invoices Nos 70 and 72): in the first case delivery was to be effected in small quantities, in the second case special conditions of carriage are mentioned.

Fifth category: *technical and chemical analyses, strength tests.* The general conditions of sale (Article 10, p. 3) provide that the costs of *tests* are to be borne entirely by

the purchaser, which is the usual practice. The same no doubt applies to the costs of technical and chemical analyses. But must surcharges imposed under these heads be shown in the price list? Decision No 31/53 does not say so. On this point it is therefore my view that a breach, by way of omission, of the rules for publication has not been proved. There does not appear to be any discrimination either, as there is little variation in the differences between the increases which were charged (between Lit 5 and 6.50).

Sixth category: *special binding,* surcharge: Lit 2.50 or 3. The price list shows Lit 1 on page 29. There is therefore a failure to adhere to the price list, either directly or by an omission if the undertaking were to claim that the service provided is not covered by the price mentioned in the price list. On the other hand, there does not appear to be any discrimination, or at all events very little: Lit 2.50 instead of the Lit 3 'Borini' was charged (infringements Nos 13 and 18, invoices Nos 441, 464 and 465), the binding consisting of 'small bundles.'

Seventh category: *participation of the staff in loading and unloading.* The price list makes no provision for this: Article 2 of Decision No 31/53 includes a subparagraph (e) which reads 'costs in connexion with method of shipment'. The price list therefore is once more guilty of a sin of omission. With regard to the differences in prices, they appear to be justified (except in the case of infringement No 2, invoice No 4, where the particulars are missing). Thus a surcharge of Lit 3.50 is imposed (infringement No 4, invoice No 12) for participation by the staff in *unloading* only, whereas in the case of infringements Nos 7 (invoice No 63) and 14 (invoice No 444) the surcharge is Lit 4 for participation by the staff in the costs of *loading* and *unloading.*

Eighth category: *elimination of cracks:* Lit 1 per kg. It may be asked whether this process should not automatically be included in the price (in this connexion I refer to a letter of the 'Ilva' company of 25 February 1957, annex 16 to the application). If not, this surcharge should be shown in the price list because it would then be an 'increase for certain grades and qualities' within the meaning of Article 2 (b) of Decision No 31/53. Therefore, either this charge exceeds the prices shown in the price list or there was an omission therefrom. As against that, there has been no discrimination as the surcharge was in every case the same.

Ninth category: *special qualities (very mild steel).* The price list specifies on page 32 a surcharge of 7 lire for mild steel *bands:* in this case they are ingots. There has therefore been a failure to abide by the price list (directly or by way of omission, since Article 2 (b) of Decision No 31/53 provides that the price list must contain 'any increase for certain grades and qualities'). There seems to have been discrimination since a different price has been charged in both cases without any explanation being given for this difference.

Tenth and eleventh categories: *swaging and shearing.* It appears that in these cases special work is involved for which Decision No 31/53 does not provide that publication in the price list is obligatory.

After this examination, and I apologize for the lack of interest, there are still two observations which I have to make.

First of all, I have asked myself whether some of the transactions at issue might not be regarded as 'not falling within the categories of transactions covered by the price list' of the applicant which would remove any taint of an infringement from the surcharges relating to them. This question could be asked especially in the case of infringement No 2 (invoice No 4), in respect of which a whole host of surcharges was imposed: special delivery dates, special conditions of delivery, participation by the undertaking's staff in loading and unloading, elimination of cracks, technical analyses and special binding. I do not, however, think that all these additional operations permit the transaction to be regarded as 'unusual' and not 'covered by the price list'. The product in question is manufactured in the normal course of events by the partnership and is specifically mentioned in the price list (page 8, No 5 (f), price Lit 72) and the many

surcharges in connexion with this transaction are those which we have come across, most of which could and should have been mentioned in the price list.

My second observation: there is another infringement which must be added to those which we have just considered and which relates to the *terms of payment* which, as the High Authority's formal notice of 16 January 1958 specifically states, vary according to the customer: payment in cash without any discount, payment within 10 days, 15 days, 30 days, 60 days, 90 days, one half within 30 days and one half within 60 days, payment in cash subject to a discount of 10%, one half in cash and one half within 30 days. These various methods of payment vary slightly from those set out in condition No 16 of the general conditions of sale, p. 5. It is this point which the applicant stressed in its letter of 15 December 1958 to the High Authority, which I mentioned at the beginning of my opinion, when it stated that it would be impossible and even unjust to treat both 'good' and 'bad' customers, which in this case means good and bad payers, on the same footing. However, the fact remains that, as far as this point is concerned, the breach of the conditions of sale set out at the head of the price list cannot be denied and moreover has not been disputed.

So what is my opinion to be?

If this case was concerned with the *determination of the amount of a debt,* I would not for one moment, in the absence of detailed argument from both sides, have contemplated giving my view on all these questions of such a technical nature and I would not hesitate to recommend that the Court obtain an expert's report.

But in this case the only purpose of the examination which I considered that I had to undertake was to provide the Court with some grounds for the possible reduction of the fine, which you alone can determine. Now I believe an opinion can be formed on this point, without laying the parties open to the delays and costs of a measure of investigation.

There appears to be no doubt that there has been an infringement: most of the matters raised have amounted to non-compliance with the rules for publication, either because there has been a failure to adhere to the price list or because certain particulars which should have been published in it have been omitted.

On the other hand, in the majority of cases it seems to be impossible to be able to find that the rule of non-discrimination has *also* been disregarded. With reference to my general observations on this aspect of the case, and taking into account the fact that the infringement is a first offence, the amount of the fine should, in my opinion, be substantially reduced and should be regarded as a token penalty. An amount of Lit 100 000 could be regarded as reasonable, though that sum is clearly only intended to indicate the appropriate order of magnitude.

I confidently hope that this lenient approach, if you adopt it, will bear fruit and that in future the applicant partnership will see to it that it completes its price list and amends it as often as it proves to be necessary to do so, which can be done very easily.

It is my opinion:

That the fine imposed upon the applicant partnership should be reduced to Lit 100 000;

And that the costs should be borne by the High Authority.

ANNEX

Description of surcharge	Amount per kg. in lire	No (pages 3 to 10 of application)	No of invoice and name of firm	Price list: Contravention or Omission	Discrimination
1. Ingots for rolling	1	1a	(2-6 to 8) 'Ilva'	Contravention	No
„	„	11a	(429-30-31) 'Ilva'	„	„
„	„	15a	(445 to 55) 'Ilva'	„	„
„	„	17a	(459 to 63) 'Ilva'	„	„
„	„	19a	(466 to 73) 'Ilva'	„	„
2. Special sizes (Ingots)	2	1b	(2-6 to 8) 'Ilva'	Omission (Decision No 31/53 article 2 (b))	„
„	„	11b	(429 to 31) 'Ilva'	„	„
„	„	15b	(445 to 55) 'Ilva'	„	„
„	„	17b	(459 to 63) 'Ilva'	„	„
„	„	19b	(466 to 73) 'Ilva'	„	„
3. Delivery dates	1.50 to 4.50	2a	(4) 'Martini Francesco'	Omission (Decision No 31/53 article 2 (b))	Yes (in the absence of proof)
„	2.50	4a	(12) 'Ferr. Vicenzo'	„	No
„	3.50	6a	(53) 'Comp. Siciliana'	„	„
„	3.50	7a	(63) 'Menzio Pietro'	„	„
4. Special Conditions of delivery	1 to 6	2b	(4) 'Martini Francesco'	Omission (absence of particulars)	Yes (in the absence of proof)
„	2.50	4b	(12) 'Ferr. Vicenzo'	Omission	No (small quantities)
„	2.50	10	(70-72) 'Borini subalpina'	„	No (circumstances described)
5. Technical and Chemical analysis; strength tests	4.50-25	2e	(4) 'Martini Francesco'	No	No
„	6	6b	(53) 'Comp. Siciliana'	„	„
„	6	9c	(67) 'Narbonne'	„	„
„	6.50	11d	(429-431) 'Ilva'	„	„
„	6.50	12c	(438) 'Genisio'	„	„
„	5	14c	(444) 'Befani'	„	„
„	6.50	15d	(445-455) 'Ilva'	„	„
„	5	16b	(457) 'Zava'	„	„
„	6	17d	(459-463) 'Ilva'	„	„
„	6.50	19d	(466-473) 'Ilva'	„	„

ANNEX *(continued)*

Description of surcharge	Amount per kg. in lire	No (pages 3 to 10 of application)	No of invoice and name of firm	Price list: Contravention or Omission	Discrimination
6. Special binding	3	2f	(4) 'Martini Francesco'	Contravention of price list, p. 29 (extra 11.)	No
,,	3	4d	(12) 'Ferro Vincenzo'	,,	,,
,,	3	7c	(63) 'Menzio Pietro'	,,	,,
,,	3	12b	(438) 'Genisio'	,,	,,
,,	2.50	13	(441) 'Borini'	,,	Small bundles
,,	2.50	18	(464, 465) 'Borini'	,,	,,
7. Participation of staff in loading and unloading	2.5-7.5	2c	(4) 'Martini Francesco'	Omission (Decision No 2-53 article 2e)	Yes in the absence of proof
,,	3.50	4c	(12) 'Ferro Vincenzo, (loading)	,,	No
,,	4	7b	(63) 'Menzio Pietro' (loading and unloading)	,,	,,
,,	4	14b	(444) 'Befani(-id-)'	,,	,,
,,	Increase for inconvenient location of site	8	(64) 'Ferro Vincenzo'	,,	,,
8. Elimination of cracks	1	2d	(4) 'Martini Francesco'	Omission	No
,,	1	4e	(12) 'Ferro Vincenzo'	,,	,,
,,	1	7d	(63) 'Menzio Pietro'	,,	,,
,,	1	11c	(429, 430, 431) 'Ilva'	,,	,,
,,	1	12a	(438) 'Genisio'	,,	,,
,,	1	15c	(445-455) 'Ilva'	,,	,,
,,	1	17c	(459-463) 'Ilva'	,,	,,
,,	1	19c	(466-473) 'Ilva'	,,	,,
9. Special qualities (very mild steel)	4	5	(15) 'Metall. di Sestri'	Contravention of price list, p. 32 (extra for bands= 71.)	Yes in the absence of proof
,,	3	16a	(457) 'Zava'	,,	,,
10. Swaging	4	9a	(67) 'Narbonne'	No	No
11. Shearing	3.50	9b	(67) 'Narbonne'	,,	,,