REPORT FOR THE HEARING
delivered in Case 69/87 *

I — Facts and written procedure

1. Article 1 of Commission Decision No 3715/83/ECSC of 23 December 1983, in which the Commission recognized the existence of a manifest crisis in the Community steel industry and established a system of minimum prices, provides that the Commission is to fix minimum selling prices for certain steel products, including cold-rolled sheet.

Article 2 of the decision defines minimum prices as basis prices for the basic quality of the product, from the points on which the price-lists are based (basing points), to which apply the extras for quality, size, etc., and the terms of payment provided for in the price-list of the leading producer in terms of volume for the product in question in the country in which the product is delivered. Those minimum prices must be net of all rebates, with the exception of rebates to dealers which are published in the price-lists. Article 2 (4) further provides that undertakings whose published price-lists and conditions notified to the Commission give rise to prices lower than the minimum prices must publish or notify new conditions to bring them into line with the decision within 15 days of its entry into force.

Article 3 (2) of the decision allows undertakings to obtain a derogation from the minimum prices as regards long-term contracts concluded between steel undertakings and users before 9 November 1983 in respect of deliveries to be effected after 30 June 1984, if contracts including industrial cooperation clauses are involved or if the contracts fix the prices precisely. To that end, undertakings are required to submit a duly substantiated application to the Commission by 31 January 1984. The application must in particular contain the contracts in question. The minimum prices must apply pending a decision by the Commission on the applications.

Pursuant to the provision under Article 60 (1) of the ECSC Treaty which prohibits discriminatory practices involving, within the common market, the application by a seller of dissimilar conditions to comparable transactions, Article 3 (1) of High Authority Decision No 30/53 of 2 May 1953, as amended by Commission Decision No 72/440/ECSC of 2 December 1972 (Official Journal, English Special Edition 1972 (30 and 31 December), p. 19) provides that transactions are to be considered comparable within the meaning of the aforesaid Article 60 (1) if:

'(a) they are concluded with purchasers:

who compete with one another, or

who produce the same or similar goods, or

* Language of the Case: Italian.

who carry out similar functions in distribution,

(b) they involve the same or similar products,

(c) in addition, their other relevant commercial features do not essentially differ'.

2. Further to inspections carried out between 9 September and 1 October 1985 at the premises of the steel undertaking known as Società Laminazione a Freddo pA, the applicant (hereinafter referred to as 'LAF'), the Commission sent a letter dated 21 March 1986 to LAF alleging that it had failed to comply with Decision No 3715/83/ECSC because in sales of uncoated, cold-rolled sheet and wide strip to companies controlled by FIAT SpA of Turin during the first quarter of 1985, LAF had applied basis prices lower than the minimum prices published by the Commission and had granted unpublished quantity rebates. The Commission's letter stated that the transactions in question accounted for a total of LIT 1 868 394 000 of undercutting, in respect of 84 927 tonnes delivered, representing illegal sales to the value of LIT 55 942 923 623, in contravention of Article 1 of Decision No 3715/83/ECSC.

The Commission further complained that LAF had infringed Article 60 of the ECSC Treaty (by failing to observe Decisions Nos 30/53, 31/53 [1] and 73/152/ECSC [2]) and also Article 47 of the ECSC Treaty (by failing to observe Decisions Nos 9/67 [3] and 2030/82/ECSC [4]).

Having been called upon to submit its comments in accordance with Article 36 of the ECSC Treaty, LAF, in a letter of 10 April 1986 and subsequently at a hearing attended by its representatives on 16 June 1986 before the competent officers of the Commission, maintained that the failure to apply the minimum prices to the sales at issue was lawful because the products supplied in connection with its relationship with FIAT were not comparable.

By a letter of 21 July 1986, LAF sent the Commission a copy of certain details regarding the manufacture of the materials produced exclusively and specifically for FIAT in accordance with FIAT's designs, in order to prove the special character of the materials supplied.

By a decision of 9 January 1987 the Commission informed the applicant of its infringements of the minimum price system and imposed on it, by virtue of Article 64 of the ECSC Treaty, a fine fixed at ECU 50 000.

By an application lodged at the Court Registry on 5 March 1987, LAF, considering that the individual decision adopted by the Commission was contrary to its interests and its rights, brought the present action.

1 — Decision of 2 May 1953 on the publication of price-lists and conditions of sale applied by undertakings in the steel industry, as amended by Commission Decision 72/441/ECSC of 22 December 1972 (OJ, English Special Edition 1972 (30 and 31 December), p. 22).

2 — Commission Decision of 23 May 1973 obliging undertakings of the steel industry to publish schedules of transport charges for routes involving intra-Community sea links (OJ 1973, L 172, p. 21).

3 — High Authority Decision of 1 June 1967 supplementing and amending Decision No 21/66 requiring undertakings in the steel industry to make returns of invoiced prices for deliveries of steel products (OJ, English Special Edition 1967, p. 26).

4 — Commission Decision of 26 July 1982 on the returns to be made by undertakings in the iron and steel industry in respect of their sub-standard products and seconds (OJ 1982, L 218, p. 13).

The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

(i) in any event, find that, owing to their nature, the contracts referred to in the application are not comparable;

(ii) annul the individual decision of 9 January 1987 concerning the applicant;

(iii) in the alternative, reduce the fine to a purely nominal amount if it holds the applicant responsible for failing to comply with Article 3 of Decision No 3715/83/ECSC;

(iv) order the defendant to pay the costs.

The *Commission* claims that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicant to pay the costs.

III — Submissions and arguments of the parties

1. LAF maintains that the 13 contracts for the supply of goods, concluded between itself and the companies within the FIAT group which use sheet and wide cold-rolled strip, are concerned with 'non-comparable transactions' for the purposes of Article 3 of High Authority Decision No 30/53 of 2 May 1953, and that they are therefore not subject to the minimum price system introduced by Decision No 3715/83/ECSC.

LAF explains that the origins and fundamental purpose of those contracts are to be found in the agreement on the division of steel-making functions, signed on 21 July 1982, between Teksid SpA, a company controlled by FIAT, and certain companies belonging to the Finsider Group, including Nuova Italsider which now controls LAF. That agreement, which was submitted to the Commission and authorized by a decision of 22 September 1982, provides for the rationalization and reorganization of output, the FIAT group having decided to concentrate entirely on its main activity whilst abandoning the production of certain qualities of special and ordinary steel, including the sheet and wide cold-rolled strip previously produced by Teksid SpA, and to obtain supplies of steel products under 10-year supply contracts to be concluded with certain companies created *ad hoc*, including LAF. As a further part of the reorganization the Finsider group, or rather certain companies belonging to it, including Nuova Italsider, acquired the entire share capital of the *ad hoc* companies. Accordingly, the FIAT group proceeded *inter alia* to set up LAF, by handing over to it Teksid's cold-rolling plant, and on 1 October 1982 Nuova Italsider acquired

50% of the shares comprised in the share capital of LAF, the remaining 50% being purchased in December 1985.

The applicant observes that the 13 contracts which were signed with Italian companies within the FIAT group recite in their entirety the clauses contained in the agreement of 21 July 1982 on the supply of sheet and wide cold-rolled strip. On examination, those clauses show that the contracts concluded with the FIAT group are in no way comparable with ordinary sales transactions or with even the medium-term supply of steel products pursuant to the usual contracts under which steel undertakings supply car manufacturers.

In that connection the applicant notes that all the contracts run for 10 years; this distinguishes them from other contracts generally, whose duration — usually of six months or a year — is directly linked to the price agreements which are concluded on a half-yearly or annual basis. The selling price is equal to the average price charged by German and French steel-makers to car manufacturers in their respective countries. Any disagreement over prices does not permit the parties either to suspend supplies or to refuse them, but is referred to a panel of arbitrators against whose ruling there is no appeal; that clause is not to be found in the usual supply contracts, in which the duration is linked to agreement on prices, with the result that if no agreement is forthcoming the contract expires as well.

The applicant points out that the FIAT group is required to obtain its supplies from LAF to the extent of 80% of its demand for cold-rolled products, and it argues that the very high percentage involved would never be encountered in an ordinary agreement for the supply of steel products.

The applicant further notes that the agreement of 21 July 1982 provides that the companies in the FIAT group must, periodically and in good time, inform the steel producers, including the applicant, of changes in their product requirements and product specifications so as to enable the producers to cater more easily for FIAT's requirements. The steel-producers also undertake to keep their technology up to the level required for compliance with the appropriate European standards of quality and service. That commitment is an essential term of the contract, breach of which entitles FIAT to withdraw from its obligation to accept the products supplied. The agreement further provides that, should the supply policies of the German and French car industry change in such a way as to involve major differences in the degree to which local steel-works depend on the steel-works of other countries, the FIAT group is not to be economically penalized but may call for appropriate adjustments to the pricing policy and a reduction of the extent of its commercial commitment while those changes continue.

The applicant emphasizes the exceptional nature, in the sales activities of a steel undertaking, of an agreement which provides for a continuous and reciprocal exchange of information and know-how, together with technological innovation and the organization of output in accordance with the particular requirements of a given client, and it concludes that the commercial aspect of the supply contracts concluded with the FIAT group is, in a sense, of secondary importance when compared with their industrial aspect.

It submits that, in the period during which it is supposed to have committed the infringements complained of, it was still 50% owned by Nouva Italsider and Teksid and was therefore still controlled by FIAT; according to a consistent practice acknowledged by the Commission, contracts between companies belonging to the same group may not be regarded as 'comparable'.

Furthermore, the fact that since its creation in 1982 the applicant has been supplying the FIAT companies, pursuant to the contracts in question, with 65% of its output of cold-rolled products demonstrates conclusively that it was set up, and has operated, for the purpose of supplying those companies.

The applicant points out that, in reply to the letter of 21 March 1986 in which the Commission had also alleged that it had infringed Decision No 30/53 of 2 May 1953 by failing to apply to those sales the conditions published in the price-list regarding periods allowed for payment and transport costs, it had put forward the defence that those sales were not comparable and hence that the conditions in the price-list were inapplicable; by not imposing any fine on that occasion the Commission had conceded that transactions with FIAT should be termed 'non-comparable'.

On those grounds the applicant takes the view that the decision imposing the fine infringes Article 61 of the ECSC Treaty and Decision No 3715/83/ECSC and also, in a sense, Article 60 of the ECSC Treaty. The applicant maintains that the minimum price system cannot be supposed to apply without distinction to all sales of steel products. To argue otherwise would be to vest the provisions on minimum prices with a scope beyond that which they need in order to produce their effects, and this would needlessly jeopardize restructuring operations and the attainment of trade and productivity targets among European producers, and would unfairly penalize producers engaged in non-comparable operations. Indeed, the paradoxical result would be that the Commission itself would, by applying minimum prices without distinction to comparable and non-comparable operations, give rise to discriminatory practices which Article 60 of the Treaty seeks to prevent by prohibiting undertakings from charging different prices for comparable sales. Thus, if undertakings in the FIAT group had been obliged to buy steel products at prices laid down by the Commission they would have been the victims of discrimination in favour of their competitors.

The applicant maintains that, since minimum prices are necessarily shown as standard, fixed amounts for any given product category they are bound to be regarded as universally applicable to sales transacted by producers in normal circumstances. That is further borne out by the point that the minimum price system is put into effect by means of checks on the price lists which undertakings are required to publish; in cases where the consideration given by the undertaking cannot, precisely because it is not comparable, be defined solely by reference to the standard price for the products sold, the comparison of that price with the figures shown on the price-list becomes pointless.

According to the applicant, Commission Decision No 3715/83/ECSC is not intended to apply to transactions which are

not comparable, as Article 2 (4) thereof demonstrates by confining itself to listed prices — that is, prices generally applied by undertakings to sales of their products, such sales being therefore comparable *inter se* — without including prices charged in non-comparable transactions. Such prices have never appeared in the lists published by undertakings, either before or since the introduction of minimum prices. It follows that the applicant cannot agree with the defendant that any sale at prices which differ from the minimum prices, even if concluded in the context of a non-comparable transaction, must be authorized by the Commission in conformity with Article 3 of the abovementioned decision.

On those grounds, the applicant is obliged to reject the argument which the Commission bases on the independence of Article 61 of the ECSC Treaty from Article 60, according to which Article 61 constitutes the legal basis for the minimum price system, which applies indiscriminately to all sales, whereas the notion of 'non-comparable transactions', contained in Article 60, is quite irrelevant for the purpose of applying that system. Furthermore, Article 3 of Decision No 3715/83/ECSC makes specific provision for the possibility of exemptions, whereby a different treatment may be given to transactions which genuinely differ from the majority of sales subject to minimum prices — transactions which display only some points of similarity (their long duration, for example) with non-comparable transactions.

It also disputes the Commission's contention that FIAT's 50% shareholding in the capital of LAF is not such as to give LAF the status of a member of the FIAT group. It maintains that a shareholding of 50% is more than adequate to substantiate common economic interests and a common administration, which demonstrate that sales transacted between the two companies are not comparable.

According to the applicant the Commission does not attach the right weight to the clauses on the fixing of the selling prices when it claims that the possibility of appealing to a third party if there is disagreement over prices makes termination of the contract following a dispute between the two parties over prices a highly unlikely eventuality. The applicant observes that, in the type of contract normally concluded in the steel sector, agreement between the parties is determined solely by their immediate and unconstrained interest in fixing a price; in this case, on the other hand, the interests at stake are different inasmuch as the parties, being unable to terminate the contract in the event of disagreement over prices, invariably reach agreement out of anxiety that any ruling on the matter by a third party would be more unfavourable than the price which they might otherwise conclude if they were free to terminate the contract.

Although the Commission is right in maintaining that all car manufacturers buy a high percentage of their steel from producers in their respective countries, it is none the less inconceivable that a straightforward agreement for the supply of such products would entail obtaining those stocks from a single producer who is bound by a 10-year contract to supply them.

The applicant concludes that, by failing to have regard to the complex relationship underlying the supply of goods by LAF to undertakings in the FIAT group, the Commission treated it unfairly and misrepresented the facts.

Furthermore, by showing on another occasion that it agreed with LAF's claim that the contracts in question were not comparable, the Commission seems now to be contradicting itself, yet without adducing any new criteria or new figures.

Lastly, the decision imposing the fine is also vitiated by a misuse of powers inasmuch as no reasons are given for the supposed 'comparability' of the sales transacted by LAF.

2. The Commission contends, in the first place, that the concept of 'non-comparable transactions' has nothing to do with Article 61 of the ECSC Treaty and in no way constitutes a general exception from the system of minimum prices.

It observes that the preamble to Decision No 3715/83/ECSC states that, in view of the scale of the difficulties facing the steel industry, the Commission has recognized the existence of a manifest crisis. Given the need to introduce measures to accompany the quota system so as to deal with the slump in prices, and in order to ensure that steel undertakings have a stable income, the Commission chose to adopt a system of minimum prices. As the system entails powers to impose sanctions, as is indicated by the reference to Article 64 of the ECSC Treaty, the Commission penalized the applicant, in the same way as it penalized comparable dealings by 16 other undertakings which had infringed the minimum price system when selling products — and in particular steel sheet — to the car-making industry, by fining it an identical sum of ECU 50 000.

It takes the view that, under the Treaty, undertakings are subject both to the minimum price system as adopted by the Commission and to the prohibition on discrimination laid down by the High Authority, and later by the Commission in its general decision, Commission Decision 72/440/ECSC. It follows that, although undertakings may, when transactions are not comparable, depart from the prohibition on discriminatory practices, they must none the less do so subject to compliance with the minimum prices. 'Non-comparable transactions' are therefore a concept peculiar to Article 60 of the Treaty which has no relevance to the application of Decision No 3715/83/ECSC, the legal basis for which is Article 61.

The Commission contends that the applicant is wrong to infer from Article 2 (4) of that decision that its scope is confined to transactions which comply with the listed prices — that is, transactions which are comparable — whilst those which are not comparable are, by definition, concluded on a different basis. It explains that Article 2 (1) is designed to define the meaning of 'minimum prices', since in practice the price invoiced by every steel producer for its own sales does not consist of a single, invariable figure but is derived from a variable combination of different components in the price-list. For that reason the provision in question seeks to eliminate any misunderstanding which might arise in determining the price, for example over the calculation of discounts, rebates or partially effective prices. It further emphasizes that, by allowing the undertaking a period of 15 days to bring its price-lists into line with the provisions on minimum prices, Article 2 (4) does not provide any exemptions whereby sales may disregard the listed prices. Moreover, the reference in Article 2 (4) to

conditions which are 'notified' to the Commission in accordance with Article 5 of Decision No 31/53 in respect of certain categories of consumer demonstrates that the entire system applies equally to conditions which do not appear in the price-lists, which is precisely the case with transactions which are not comparable.

The Commission observes that, in fixing the minimum prices, it took into consideration the market as a whole and its particular structure, as is shown by the specific exception under Article 3 (2) of Decision No 3715/83/ECSC in respect of long-term contracts containing fixed prices or industrial cooperation clauses. It is consequently incorrect to speak of an abuse of powers in the adoption of that decision; in any case, the submission in question is a new one, put forward by the applicant for the first time in its statement of reply, and is thus inadmissible.

The Commission points out that in its decision of 9 January 1987 imposing the fine, it limited itself to notifying the applicant of the infringements of the minimum price system, which cannot on any account be construed as an acknowledgement on its part of the merits of the arguments put forward by the applicant during the administrative proceeding, concerning the supposed non-comparability of the contracts concluded with the FIAT group.

The Commission contends that the goods supplied as part of the special relationship with FIAT cannot, in any event, be considered to have a 'non-comparable' character, and it is only in the alternative that it proposes to prove the point. Thus, if the criteria regarding 'comparability' are considered in the sequence followed by Article 3 of Decision No 30/53, the applicant cannot, in the first place, deny that FIAT, as a car manufacturer, buys steel sheet in competition with other manufacturers whose products are similar to its own. Similarly, it cannot seriously be doubted that the European competitors of FIAT are equally concerned with quality and that they require cold-rolled sheet which, if not identical, is at least similar to the sheet bought by FIAT. The passage in the application to the Court which refers to the quality of the products normally supplied by French and German steel producers is, indeed, revealing: the quality of the products sold by LAF to FIAT must match the quality of the products supplied by the applicant's European competitors, and this is unequivocal proof that the goods are 'the same or similar' in character.

The Commission argues that the fact that a standard contract has a duration of 10 years does not justify the applicant's assertions, because it is the mode of determining the price which constitutes the crucial component of a supply contract. It points out that in this case the prices are agreed on a half-yearly basis, and contends that this brings the contract, in effect, within the scope of the Community rules. In that connection the Commission recalls the observation rightly made by the applicant, that contracts for the supply of goods to the European car industry generally have a duration of half a year or a year and are renewed by the contracting parties with the prices suitably adjusted.

Whilst admitting that a clause referring any dispute over the fixing of the prices to an arbitration panel against whose ruling there is no appeal is unusual in contracts

concluded in the European steel sector, the Commission notes that the contract clauses in question, governing the determination of the selling prices, are so tightly worded as to make it improbable that any dispute would arise between the two parties, and hence that the matter would be referred to the arbitration panel.

Turning to the applicant's claim that the high percentage of supplies obtained by FIAT from LAF is inconceivable in the normal context of supplies of steel products, the Commission observes that such a claim overlooks the fact that in France, Germany and Great Britain — to cite only the main European car-making countries — the car industry obtains a comparable percentage of its cold-rolled sheet from domestic steel undertakings.

As for the argument put forward by the applicant to show that contracts between companies belonging to the same group should not be regarded as comparable and that, at the time when the contested sales were transacted, LAF was still controlled by FIAT, the Commission observes that if such were the case any relationship of parent company and subsidiary would fall outside the scope of the rules safeguarding competition under Article 60 of the ECSC Treaty. In any case, a shareholding of 50% is insufficient in itself to give control.

Lastly, the Commission disputes the applicant's assertion that non-comparable transactions constitute an absolutely minimal proportion of sales on the steel market. It explains that sales to the car industry represent about 25% of total sales of cold-rolled products within the Community. As far as the Italian market is concerned, FIAT obtains from LAF 80% of its requirements in sheet and wide strip. By attempting to withhold a market share such as that from the minimum price system, the applicant overlooks the requirement stated in the preamble to Decision No 3715/83/ECSC, that the minimum price system must 'be applied as widely as possible', with the result that 'it is . . . essential that it should apply in principle to long-term contracts as well'.

J. C. Moitinho de Almeida
Judge-Rapporteur