Having regard to Articles 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;
Taking formal note of the declaration by the Agent of the Government of the French Republic stating that 'the French Government has not asked for costs in its pleading';

THE COURT

hereby:

Annuls Article 1 of Decision No 2/54 and on that point refers the matter back to the High Authority;

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

Takes formal note that the applicant has not asked for costs in its pleading and orders each party to bear its own costs.

Decided by the Court in Luxembourg on 20 December 1954

Pilotti Serrarens Hammes

Riese Delvaux Rueff Van Kleffens

Delivered in open court in Luxembourg on 21 December 1954.

M. Pilotti
President

O. Riese
Judge-Rapporteur

A. Van Houtte
Registrar

OPINION OF MR ADVOCATE GENERAL LAGRANGE

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Mr President,
Members of the Court,

According to Article 11 of the Protocol on the Statute of the Court of Justice, 'it shall be the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, oral and reasoned submissions on cases brought before the Court, in order to assist the Court in the performance of the task assigned to it in Article 31 of this Treaty', which, in the words of that article, is to ensure that in the interpretation and application of the Treaty, and of rules laid down for the implementation thereof, the law is observed.

I have the honour of presenting an opinion on the first action to come before the Court of the first European Community, and I shall strive to carry out that task to the best of my ability, in the spirit in which it has been defined by the Statute of the Court.

Although the Court is aware of the facts of the case, I venture to set them out again briefly by way of introduction.

Facts

The opening of the common market both in coal and in steel involved, among other things, the need for the High Authority to implement Article 60 of the Treaty on prices. In the field of legislation, the High Authority had to direct its attention in particular to two sets of provisions:

First, those of the last subparagraph of paragraph (1), which states 'the High Authority *may* define the practices covered by this prohibition by decisions taken after consulting the Consultative Committee and the Council', that is, in particular by the prohibition of discriminatory practices;

Secondly, those of paragraph (2) (a), according to which 'the price-lists and conditions of sale applied by undertakings within the Common Market *must* be made public to the extent and in the manner prescribed by the High Authority after consulting the Consultative Committee'.

Thus, on the first point (prohibited practices) action by the High Authority was not mandatory, whereas on the second (publication of price-lists) it was stipulated by the Treaty.

In point of fact, a decision, dated 12 February 1953, concerning the publication of price-lists was adopted immediately after the opening of the common market in coal, iron ore and ferrous scrap on 10 February 1953, whereas Decision No 30/53, directed towards defining certain prohibited practices, was not adopted until 2 May 1953; moreover the latter decision is common to coal and to steel. The common market in steel opened on 1 May and the detailed rules for the publication of price-lists for steel were laid down by Decision No 31/53 of 2 May 1953.

The Court is familiar with those decisions. Let me mention only those parts of them which are essential with regard to the actions before the Court:

(1) *With regard to the definition of prohibited practices* (Decision No 30/53), Article 2 (1) provides that: 'It shall be a prohibited practice within the meaning 60 (1) of the Treaty for a seller to apply increases or reductions on the terms calculable, for the transaction concerned, for his published price-list and conditions of sale'. Thus adherence to the price-lists was linked absolutely to the concept of prohibited prac-

tices within the meaning of Article 60 (1); and although the latter provision condemns both unfair competitive practices and discriminatory practices, in reality the High Authority was essentially, if not solely, concerned with discriminatory practices, as is clearly shown by the first recital which precedes the decision:

'Whereas compliance with the obligations of non-discrimination involves uniform application by undertakings of the conditions shown in their price-lists with no other increases or reductions ...'

(2) *With regard to the publication of price-lists* (Decision No 31/53), the purpose pursued is clearly defined in the first two recitals which precede the decision; they are worded as follows:

'Whereas the price-lists and conditions of sale applied by undertakings must be such as to make it possible to verify that the rules of competition laid down in the Treaty, in particular in Articles 4 and 60 thereof, are being observed;

'Whereas they must ensure that users are able to ascertain the quality and calculate precisely the cost of the products they are considering buying, and to compare offers from various suppliers;'.

Thus the purpose here is not limited to observance of the rule of non-discrimination, but extends to all the rules of competition defined in the Treaty. The Court is already familiar with the content of the decision: it stipulates the publication, in addition to the basic price, of such principal details as will make possible a valid comparison between offers and between transactions: extras, place of delivery, discounts to dealers, terms of payment, revision clauses, and so on... Finally, it states that price-lists shall apply not earlier than five days after they have been addressed to the High Authority. Thus free competition must be ensured in favour of buyers, and at the same time the High Authority may carry out almost automatic supervision of the rules laid down by the Treaty and in particular the rule of non-discrimination.

Such was the system under which the Common Market began to function.

However, whereas for coal and iron ore that system did not give rise to major difficulties, at least on the point before the Court, the same was not true of the market in steel.

In fact, it very soon became apparent that the prices actually charged in that market were becoming considerably lower than the published prices, without the undertakings publishing fresh price-lists, as they should have done.

That state of affairs can be easily explained. On the one hand, it was quite clear that the prices in each country had been fixed not by a free, unilateral decision on the part of each undertaking, but after agreement: it could hardly be expected to be otherwise, in view of the long-standing system hitherto in force in that industry, which was a system of more or less extensive State intervention, in particular as regards prices, with the functioning of which the industry was more or less closely and even organically associated.

On the other hand, it was at that time a period, if not of crisis, at least of economic recession, bringing about a market downward trend in prices, which the producers doubtless did not wish to become too apparent, for fear of accelerating the trend.

These and doubtless still other reasons may explain why some of the prices published were shown above what would appear to have been the normal price, and at times even, as in France, above the prices in force at the time, and also why fresh price-lists with lower prices were not published subsequently.

Be that as it may, the High Authority refrained from reacting to that situation. It did not pronounce any sanction for failure to adhere to the price-lists. It did not seek to take action against any agreement under Article 65.

It preferred to watch and wait. Then, eight months later, after carrying out consultations prescribed by the Treaty, it adopted three decisions, No 1/54, 2/54 and 3/54, all three dated 7 January 1954 published in the Journal Officiel on 13 January 1954 (Nos 1/54 and 2/54 may be found in the Official Journal, English Special Edition

1952-1958, pp. 14 and 15 respectively).

The Court is familiar with those decisions:

The first one, Decision No 1/54, amends Decision No 30/53 on prohibited practices. Its main purpose is to *dissociate* the concept of non-discrimination from the publication of price-lists by no longer regarding as a prohibited practice the application of prices and conditions which depart from the price-list, as long as the seller is able to show 'either that the transaction in question does not fall within the categories of transactions covered by this price-list' (which appears self-evident), 'or *that the prices or conditions have been departed from uniformly in all comparable transactions*'.

The grounds for this very clearly given in the recitals in the preamble to the decision:

'Whereas the rules on publication of prices afford scope *inter alia* for checking that the rules on non-discrimination are complied with *although they do not mutually coincide;*

'Whereas, therefore, breaches of the price publication rules *are not necessarily in themselves breaches of the non-discrimination rules;*'.

Decision No 2/54 amends Decision No 31/53 on the publication of price-lists: it is the king-pin of the new system. The *content* of the price-lists published is the same, except for a supplement, which is moreover an important one, concerning quantity discounts, loyalty discounts, and discounts for seconds. However it is decided that amendments to price-lists already published will have to be published only if 'there is a mean variation ... between effective market prices and published prices' of more than 2.5%, the variation being calculated, in each category of products, by reference to the whole of the transactions that have taken place during the preceding 60 days. Moreover, it is decided that 'where a transaction in the course of an undertakings's activities has exceptional characteristics by virtue of which it is excluded from the categories set out in the price-list, the special conditions applied thereto shall be disregarded in calculating the mean price variation'. Finally, a time-limit of one day is substituted for the time-limit of five days for the application of newly published price-lists.

The first three recitals should be quoted, because in fact they reveal the substance of the High Authority's position in this matter:

'Whereas the publication of prices and conditions of sale, which is necessary for purposes of the application of the rules of competition laid down by the Treaty, must be effected in a manner compatible with freedom to determine steel prices in the light of market trends and of the needs of commercial relations;

'Whereas, therefore, the published price-lists must reflect the price-level existing on the market;

'Whereas, however, undertakings should not be obliged to adjust forthwith their price-lists on account of minor or temporary fluctuations in the steel market;'.

Finally, a new decision, Decision No 3/54, completes the scheme with a system of collecting information, which undertakings must provide twice a month, on the mean variation which they have applied during the period which has elapsed, as well as on the minimum and maximum variations both in relation to their own price-list and, if appropriate, in relation to the price-lists of competing undertakings upon which they have have had reason to align their prices under the conditions laid down in Article 60 (2)(b). It is necessary to know those details in order to be able both to supervise compliance with the rule of non-discrimination, which henceforward no longer result merely from adherence to the published price-lists, and also to supervise the new publication system itself.

These are the three decisions which are contested before the Court, by means of an application for annulment under Article 33, by the French Government, the Italian

Government, the Associazione Industrie Siderurgiche Italiane (Association of Italian Coal and Steel Industries) and the Industrie Siderurgiche Associate (another Italian association). Each of the applicants has submitted to the Court a separate application against the three decisions.

I shall examine the four applications in turn, avoiding repeating myself, of course, in the latter three in regard to any point which I have already covered in a preceding application.
As regards the application by the French Government, with which I am dealing at present, the Court is well acquainted with the arguments in the application; I shall not attempt either to repeat it or to summarize it, and the same applies to the arguments in defence.

Conclusions and submissions

To begin with, I wish only to set out clearly the conclusions and submissions in the application, and to that end I can only refer to the application itself, since as the Court is aware, that document, presented *in limine litis* within a compulsory time-limit, must set out both the conclusions and the submissions even though, as regards the submissions, only in summary form (this follows from Article 22 of the Protocol on the Statute of the Court).

As regards the conclusions, there is no difficulty: since it is an application for annulment, the conclusions are and can only be for the annulment of the contested decisions. Such conclusions are indeed formulated. The only question which might be asked is whether it is possible for a party to bring proceedings against more than one decision by a single application. No provision of the Statute or of the Rules of Procedure states that it is possible, but no provision forbids it either. In view of the obvious connexion between the three contested decisions, and in view of the fact that they were issued by the same institution, I am of the view that there is no valid reason to demand as many separate applications as there are decisions, in particular since, fortunately, no fiscal considerations are involved here. Furthermore, the defendant has raised no objection of inadmissibility in this connexion.

As regards the submissions, the Court is aware that Article 33 of the Treaty provides for submissions on four grounds: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application and misuse of powers.

The application does not expressly formulate submissions, at least it does not use that term; but it is very clear and very precise, and it is easy to extrapolate in that regard.

The action, as set out in the application, raises two questions: one concerns 'the relationship between discriminations and publication'; the other concerns 'the actual content of the concept of discrimination'.

On the first point (relationship between discrimination and publication), the application attacks the contested decisions on the grounds, first, that the way in which they govern publication does not allow any serious supervision to be exercised over the rule of non-discrimination, and that thereby they have failed to respect the connexion which Article 60 has established between the two concepts; furthermore that the system is incompatible with the proper operation of the provisions of Article 60 (2)(b) on alignment, which is made impossible in practice; and on the grounds, secondly, that they were aimed in practice at causing the general level of the price-lists to vary instead of at their observance, thus committing a misuse of powers by 'sacrificing the specific purposes of Article 60 to the achievement of a particular economic objective'.

On the second point (the actual content of the concept of discrimination), it is argued in the application that (I quote): 'Since variation in the prices actually charged may be continuous under the system instituted by the decisions put before the Court for its examination, it follows that discri-

mination can only operate in respect of strictly simultaneous transactions. Since such a case is purely hypothetical, the concept of discrimination is rendered meaningless'. Like the first point, this point was developed in the reply.

I am of the opinion that the second ground for complaint—that the contested decisions have rendered the concept of discrimination meaningless—is closely related to the ground for complaint concerning the failure to respect the connexion between the rule of non-discrimination and the system governing publication of price-lists. They are two aspects of a single line of argument directly based upon infringement of Article 60.
In fact, I can discern two submissions in the application of the French Government: a submission of infringement of the Treaty, in this case Article 60 thereof, and a submission of misuse of powers. I shall examine them in turn.

Submission of infringement of Article 60 of the Treaty

First of all the submission based on *infringement of Article 60.*

1. *As regards Decisions Nos 1/54 and 3/54*

First of all, I think that the real—and even the only—dispute concerns the second decision, No 2/54, which purports to relax the rules on publication.
If reference is made to the first decision, Decision No 1/54, the following provisions are found therein:

(1) In principle it shall be considered 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.

(2) However, in two cases the position is different:
First, where the seller can show that the transaction in question does not fall within the categories of transactions covered by his price-list; when read together with the preceding sentence, that is a statement of the obvious worthy of Monsieur de La Palice himself. Doubtless, it was intended to refer to the case of those 'transactions having exceptional characteristics' which cannot be reduced to expression in a price-list, and which are excluded by the third paragraph of Article 1 (a) of Decision No 2/54. And the position is also different, where the seller can show that 'the prices or conditions have been departed from uniformly in all comparable transactions'. Such a formula is perfectly orthodox, and it does not manifest any features which are contrary to the rule of non-discrimination, which on the contrary it respects to the letter.
It can doubtless be argued that, since the High Authority has not defined what must be understood by the expression 'comparable transactions', the only *means of supervision*, both in fact and in law, would be absolute adherence to the published price-lists; but then, that leads back to the question of the legality of the flexible system of publication instituted by Decision No 2/54; if that system did not exist and the argument of the French Government were correct, the result would be simply that the proof required by Decision No 1/54 would never be accepted and that that decision would be a dead letter, but not that it would be illegal.
The last decision, Decision No 3/54, on information, is also not open to criticism in itself, and moreover is not criticized from that point of view. No-one can deny that Article 47, which provides that 'the High Authority may obtain the information it requires to carry out its tasks', provided that it respects professional secrecy, is most general in its scope. What the applicant claims is that the system of publication provided for by Article 60 (2) is the only one which, always accompanied by the checks which it requires, was intended to ensure observance of non-discrimination in pricing, which it can only do if it is absolute and unqualified, and that Article 47, concerning information intended for the High Authority, cannot be used in a publication system directed at third parties.
Thus from all points of view I am brought back to Decision No 2/54: in the light of the submissions put forward, the other two

do not appear to me to contain any vitiating factor of their own and could be annulled only as a consequence of the annulment of Decision No 2/54 by virtue of their connexion with that decision.

(2) *As regards Decision No 2/54*

The question of the legality of Decision No 2/54—I use the term 'legality' by reference to Article 33 (infringement of the Treaty or of any rule of law relating to its application) and although the Treaty is not a 'law' in the formal sence—as I was saying, the question of its legality arises first and foremost in relation to the provisions of Article 60 (2) (a), upon which it is based. The High Authority exercised the power which is conferred on it by that paragraph. Did it exeed that power or not? That is the whole problem.

Despite the light shed upon it in the past few days, for my part I consider that that problem is extremely difficult. In fact, everything depends on the meaning which is to be given wording of paragraph (2) (a), and as has been seen a literal interpretation leaves room for debate. Therefore it is necessary to put it back in its context, which is first of all Article 60 itself in its entirety, and then the Treaty as a whole.

(a) Literal interpretation of Article 60 (2)

Therefore, with the permission of the Court, I shall begin by seeing what can be drawn from a literal interpretation, and I apologize in advance for the dryness of my treatment of that point; then, I shall put the paragraph back in the general context of Article 60, and finally Article 60 itself in the general context of the Treaty.

The first argument—which seems to me clearly to favour the High Authority—is based on the expression 'to the extent' which immediately precedes the expression 'and in the manner': 'the price-lists and conditions of sale... must be made public *to the extent* and in the manner prescribed by the High Authority ....'. It is clear that the term 'to the extent' implies by itself both a possible *limitation* on publication, which the term 'in the manner' would not constitute on its own, and a *discretionary power* conferred on the High Authority in that connexion.

A second textual argument—which seems to me to favour the applicant—comes from the subject of the sentence: 'the *price-lists* and conditions of sale ... must be made public to the extent and in the manner' ... so on. Surely the very concept of a price-list involves of itself a certain publication. There are prices, which it is possible not to publish, but if those prices have appeared in a 'price-list', that is a list drawn up by items or categories of products, surely they are then already published. Obviously this publication is merely commercial, and is not necessarily or even usually comparable to the publication of laws or regulations, but it exists none the less. Therefore the High Authority's rôle must consist in making that publication sufficient to satisfy the requirements of Article 60 (1), in particular to ensure compliance with the rule of non-discrimination; in this argument, the word 'extent' indicates merely that the High Authority must set the limits of the details to be published, which concerns above all the 'conditions of sale', as it had done in Decision No 31/53, but it does not authorize it to exempt certain price-lists from any publication whatever, because once again the concept of a price-list implies of itself of certain publication.

The third textual argument—going the other way, that is to say this time favouring the High Authority,—is the expression 'made public'. The price-lists must be made public to the extent ... and so on. This implies that documents are involved which were not hitherto public, but are liable to become such, to an extent to be determined. That would tend to prove, contrary to what I have just said, that price-lists can exist without being 'public'. If the article used the expression 'may be published', there would be room for doubt, because such an expression is currently used (although wrongly so) with reference to provision which are *drawn up* and published at the same time, in particular when they only become valid by being publish-

ed. For example, it is said that an authority has *published* a regulation; that is a current expression to signify that that authority has *adopted* a regulation which has been published forthwith. However, the choice of the much less common expression 'made public' precludes any uncertainty in this connexion.

Moreover, this is the High Authority's argument in its written defences to the French Government's application; the High Authority expressly admits that there can be 'unpublished price-lists' which record *inter alia* the graph of those 'minor or temporary fluctuations' which are allowed to go by within the limits of the authorized variations. However, let me point out that, in its defence to the application by the Italian Government, the High Authority does not go far, and adopts a somewhat different argument or at least terminology.

I fail to see the cogency of the argument relating to the word 'applied' which appears at the beginning of the paragraph ('the price-lists and conditions of sale *applied* by undertakings within the Common Market must be made public ...'). In its reply, the applicant alleges that if the High Authority's argument were correct, the words 'prices charged' ought rather to have been used. In fact, this textual argument can be used to favour either side. If, like the applicant, one accepts that the only 'lawful' or 'valid' price which an undertaking is authorized to ask is that which appears in its previously published price-list, then one can maintain that the word 'applied' which is used in the paragraph is nearer to that concept of lawful or valid prices. If, however, one adopts the High Authority's argument accepting that true price-lists and conditions of sale can exist without any publication since publication is only prescribed 'to the extent' necessary, then the term 'applied' tends rather to support the latter idea by indicating that there are, independently of any publication, perfectly lawful prices in price-lists and not only prices 'charged'. For its part, the High Authority maintains that if the applicant's argument were correct, the paragraph would use the expression 'prices to be applied' and not 'prices applied'. It is possible, but it is not the case, and the text must be taken as it is. In fact, only limited importance must be attached to the discussion on this point: it is merely a slight difference of wording, which does not have any decisive effect, and in my view does not even have any indicative effect.

To sum up, the textual arguments based on Article 60 (2)(a) itself appear quite inconclusive.

(b) Interpretation in the context of Article 60

I shall now examine subparagraph (2)(a) in the context of Article 60 as a whole.

If one reads paragraph (1) of that article first of all and then immediately afterwards paragraph (2) thereof, as is proper, one is immediately struck by the difference in *kind* between the two paragraphs: the first states the *purposes to be pursued*, which are the same as those defined as fundamental objectives of the Community in Articles 2, 3 and 4 of the Treaty. In applying those principles to the field of prices, Article 60 (1) prohibits pricing practices contrary to those articles, in particular unfair competitive practices and discriminatory practices. The second paragraph concerns the *practical rules* laid down to ensure that the prohibitions laid down in paragraph (1) are observed. The expression 'for these purposes' governs the whole of the remainder of the article relating to publication and methods of quotation. Article 60 (2), and in particular Article 60 (2)(a), is only a *means* to attain the ends which have been defined in Article 60 (1).

That analysis is correct, and both parties agree that it is.

The High Authority immediately draws the following inference therefrom: it argues that the application of subparagraph (2)(a) is entirely subject to the purposes set out in paragraph (1), which moreover do not exclusively concern compliance with the rule of non-discrimination. Therefore, when the said subparagraph (2)(a) empowers, and even obliges, the High Authority to establish a system for the publication of price-lists and conditions of sale, it does so only *to the extent* to which such system is deemed necessary in order best to attain the ends laid down in paragraph (1), *one of which*, but only one,

is the supervision of the prohibition on discrimination. When read together with the expression 'for these purposes', the expression 'to the extent' thus takes on its full meaning.

However, that line of reasoning comes into conflict with the line of argument which is the foundation of the applicant's case: for, although the applicant acknowledges that the two concepts of non-discrimination and publication are 'intellectually separable', to use an expression which appears in the application, and that the publication system is only a means to an end, its maintains that that means was imposed by the Treaty as having to ensure by itself supervision of the rule of non-discrimination and that by its essence and as defined by the Treaty the publication system cannot allow of the 'flexibility' which the High Authority has introduced into it.

Here again the two arguments conflict and the wording of Article 60 (1) is not enough in itself to decide between them. However, it seems to me distinctly to favour the High Authority.

However, if after reading what goes before (subparagraph (2)(a)), we now read what comes after, that is, subparagraph (2)(b), we receive the opposite impression. In fact, the latter subparagraph, which authorizes alignments, speaks only of 'price-lists', and makes no distinction between 'published' price-lists and 'unpublished' price-lists. Surely that is because the authors of the subparagraph did not for one instant envisage such a distinction, which *a priori* is somewhat surprising when it is a question of 'aligning' oneself on the prices of a competing undertaking. How could those prices be known otherwise than by the publication of the price-list which contains them? Surely lack of publication and the uncertainty resulting therefrom are contrary both to proper implementation of the alignment system by the seller and to supervision by the High Authority. Thus the reading of subparagraph (2)(b) proves that the price-lists and conditions of sale referred to in Article 60 must always mean only published price-lists, because the concept of a price-list cannot be given a different meaning in the various parts of a single provision.

As the Court is aware, the High Authority does not leave that argument unanswered. It maintains that alignment must be effected on the 'list of the prices actually charged' by the competitor, as it pointed out moreover in the penultimate paragraph of its communication of 7 January 1954, published in the Journal Officiel, following the contested decisions. According to that communication, 'proof of the conditions resulting for the buyer from the prices actually charged by the undertaking on which he is aligning himself may *inter alia* be based upon a confirmed offer by that undertaking'. The High Authority might have pointed out that a price-list is not a tariff. If adds that, in fact, sellers make extensive use of the possibility of alignment on the actual prices of their competitors, which they are quite capable of finding out both through the offers communicated to them by their customers and through the information which they themselves have on market conditions.

This factual explanation seems correct. The details provided at the hearing by the High Authority's Agent seemed cogent to me in this connexion. I think it must be taken as proved that the possibility of alignment on actual prices not only can be exercised, but in fact is exercised and even extensively so.

If it had been otherwise, I think that the objection would have been decisive, because it would have seemed impossible to me to give legal approval to an argument resulting in preventing the operation of a provision as important as the rules on alignment. However, merely because there is evidence that a contrary situation exists, namely that it is possible for the system of alignment on actual prices to *function in practice,* it does not follow therefrom that the High Authority is right in law. The difficulty is still the same: can the concept of unpublished price-lists alongside published price-lists be accepted?

To bring the direct analysis of the provisions to a close, I shall dismiss and not return to the applicant's argument regarding Article 64 on fines which, as the Court is aware, provides penalties for an infringement of the provisions 'of this Chapter' (and consequently *inter alia* of Article 60)

or of 'decisions taken thereunder', by the imposition of fines calculated on the basis of *'the value of the sales effected in disregard thereof'*. That concept of 'sales effected in disregard thereof' is not accepted by the High Authority, which makes Article 64 inapplicable.

The High Authority's answer on this point appears cogent to me: sales which are concluded in contravention of the decisions adopted by the High Authority under Article 60 constitute 'sales effected in disregard thereof' within the meaning of Article 64. They will include both those which infringe the rule of non-discrimination (for example, a sale under the terms of which prices or conditions have not been departed from uniformly in comparable transactions—infringement of Decision No 1/54), and those which fail to comply with Decision No 2/54 (for example, a sale where the authorized mean variation is exceeded and which was not preceded by the publication of an appropriate amendment to the price-list). Therefore in my opinion there is no infringement of Article 64 concerning fines, which still applies under the new system.

(c) Interpretation in the context of the Treaty as a whole

What conclusions can be drawn from this discussion of the provisions? In my view, the fact is that it does not provide any decisive argument one way or the other. Even putting subparagraph (2) (a) back in the context of Article 60 as a whole, as I have tried to do, does not indicate any certain interpretation of that subparagraph. Therefore it is necessary to go further; the question in dispute must be examined *in relation to the Treaty in its entirety.* Such an approach is always legitimate; it is particularly necessary in the case of this Treaty of 18 April 1951 because all its parts are interconnected. In particular, all the provisions of Title III represent only the implementation of the principles laid down in Title I, from which Title III must never be dissociated. The High Authority has not failed to point out that Article 60 refers expressly to Articles 2, 3 and 4, and that the prohibitions expressly imposed (unfair competitive practices, discriminatory practices) are preceded by the words 'in particular'. However, even if Article 60 had not contained that express reference, which moreover mentions only the provisions containing prohibitions, to the preliminary provisions of the Treaty, it would nevertheless be the duty of the High Authority and the duty of the Court to be constantly aware of them, as well as of the other implementing provisions of Title III which are liable to affect the problem under consideration.

What then is the Treaty's immediate purpose (I am not speaking of its ultimate aim, which is to begin to unite Europe)? To create a common market in coal and steel, to define the rules for the functioning of that market, and finally to organize an institutional system suitable to ensure that functioning.

It is possible to discuss indefinitely the meaning of the expressions 'Common Market' or simply 'market' or 'market economy'. Of course I have no intention, and make no claim, to enter into theoretical discussions on those subjects, which moreover would seem to me quite futile. On the contrary, faced with the duty of applying this Treaty, I consider that I have quite simply to look at what it contains.

In view of the concerns raised by this dispute, I am of the opinion that the most interesting idea is expressed in Article 5, where it is stated that the Community shall *'ensure the establishment, maintenance and observance of normal competitive conditions* and exert direct influence upon production or upon the market only when circumstances so require'. Thus it is clearly a market based on competition, which means a system of freedom, accompanied however by rules considered necessary to ensure that very freedom, and it is for the public authority to ensure the maintenance of that freedom. Competition is a game, but a game which has its rules. At this moment I cannot but think precisely of those 'rules of the game' about which a few months ago a speaker as brilliant as he was well qualified came here to speak to an audience of Luxembourg lawyers.

It may be said that the whole Treaty is based on the idea that the task of the Com-

munity and the rôle of the High Authority, which is responsible for carrying out that task, consist essentially of creating and maintaining certain conditions, namely those conditions which are necessary for the desired objectives to be attained by the free operation—or more precisely the normal operation—of productive activity, with direct intervention being confined to those cases in which that normal operation breaks down.

Let me merely quote from the Treaty:

Article 2:

'*The Community shall progressively bring about conditions which will of themselves ensure* the most rational distribution of production', and so on;

Article 3 (d):

'... *ensure the maintenance of conditions which will encourage undertakings* to expand and improve their production potential', and so on;

Article 3 again, in which the words '*ensure*' and '*promote*' are used throughout (one finds here the formula: '... ensure the establishment of the lowest prices');

Article 5, which has already been quoted: 'The Community shall carry out its task in accordance with this Treaty, *with a limited measure of intervention';*

and *Article 57,* which is particularly concerned with the sphere of production and in which it is stated that, in that sphere, 'the High Authority shall give preference to the indirect means of action at its disposal, such as ... intervention in regard to prices ...' (which, in parenthesis, clearly proves the interpenetration of the different provisions of the Treaty).

Doubtless, there are also in the Treaty provisions laying down prohibitions and there are penalties, often very severe ones. However, even in the most extreme cases (I am thinking for example of Articles 65 and 66 on agreements and concentrations), the only purpose of those prohibitions, rules and penalties is also to ensure that 'the rules of the game' are observed, but in particularly sensitive cases in which those rules are especially in danger of being ignored: that is the only justification for a greater degree of intervention or more vigilant supervision: far from violating freedom, their purpose is on the contrary to ensure the exercise of it.

What lesson is to be drawn from what may be described as the philosophy of the Treaty, as it emerges from the wording of the Treaty itself?

In my opinion, it is the following: that when the High Authority is called upon to exercise a power, such as the one conferred upon it by Article 60 (2) to lay down the conditions for the publication of price-lists, it must not lose sight of any of the objectives of the Treaty and, in seeking to attain the one or the ones at which the provision to be applied is more particularly directed, it must avoid sacrificing others, perhaps more important. In the event of incompatibility, a compromise may be acknowledged to be necessary. In so far as there is no clear, mandatory provision to the contrary, the Court for its part must interpret the provisions in such a way as to make such compromise possible whilst observing the principles laid down in Title I, in particular the one concerning the maintenance of normal conditions of competition, without which there is no market.

In this connexion, account must obviously be taken of the particular conditions prevailing in the market under consideration, both those which are inherent to it and those resulting from the immediate economic situation.

I have no wish to expound political economy here. However, I have to mention some basic concepts drawn from distant memories and recorded in the most elementary text-books as well as in highly erudite works: in this way, I hope—but I am not sure—that I shall not be accused of heresy: at all events, no-one will be able to accuse me of modernism ...

For example, the following appears in the 'Précis d'Economie Politique' ('Summary of Political Economy') by P. Reboud, published by Dalloz, Paris 1939, at page 436:

'(a) *Theory of free competition.*

The theory of perfectly free competition in the market requires the following three conditions to be fulfilled:[1] sellers and buyers must be able *to negotiate their prices freely*;—there must not have been any *prior agreement* between sellers or between buyers by which sellers undertook not to sell below a minimum price or buyers undertook not to buy above a maximum price;—and finally, at all times while the market is in operation, sellers and buyers must be kept completely informed by *perfect publicity* regarding the quantities of goods which are offered and demanded, so that both sellers and buyers can use the market conditions to the best advantage possible'. And the author adds: 'These conditions are not completely satisfied in any actual market'.

It is clear that a market such as the one in steel is not one of the closest to the 'ideal market' described by the economists. Not that it is particularly unamenable to the effects of economic trends; on the contrary, it is very sensitive to them. But that very sensitivity makes it vulnerable, and undertakings have a quite natural tendency to guard against those effects by means of agreements; which is understandable, if one thinks of the enormous size of the fixed charges, in particular wages and investments, and of the financial, social and other difficulties which may be brought about by excessively sudden shocks. It might even be said that such fluctuations might prove to be contrary to the general interest both of employees and of consumers, and that such effects of so-called 'normal' competition should be kept to some extent *in proportion*. Moreover, such is the intention of the Treaty, if one is to judge, for example, by the words of Article 3 (c): '... ensure the establishment of the lowest prices *under such conditions* that these prices do not result in higher prices charged by the same undertakings in other transactions or in a higher general price level at another time, while allowing necessary amortization and normal return on invested capital'.

Thus agreements in this field are particularly difficult to avoid, at least completely, and it is also particularly difficult to take steps against them, by reason both of the small number of the undertakings and of their power, which is inherent in the operating conditions of that heavy industry and which is further reinforced by the concentrations made necessary by the very enlargement of the market and the technical advances made necessary by rationalization and the development of production.

If prices are not free to find their own level, publication totally fails in its purpose, which is precisely to help them to do so. It even has the opposite effect, in that it crystallizes the positions taken up by the sellers. This is what may have prompted a member of the High Authority to say, in a statement which has been mentioned several times, that if the system set up by Decision No 31/53 had been maintained, the High Authority would have become the 'cartel police', and that is profoundly true, because the High Authority was facing just such a situation when the common market in steel began to operate.

Was the High Authority then to use the redoubtable weapons put into its hands by Article 65? Perhaps. That is a problem which I shall come back to when I examine the submission of misuse of powers.

However, it is clear that Article 65 alone is not enough to provide an answer to the question. Even if there is no agreement as such, when undertakings publish their price-lists they cannot be prevented from seeking to find out through contacts, for example through information given to them by their trade-union organizations, the 'market price', the apparent 'normal price' at the time for the product under consideration, and the simultaneous publication of identical or nearly identical prices must be accepted at least within each country. There was all the more reason for this to be so at the opening of the Common Market, since, as publication was being made for the first time, it had

1 — Stanley Jevons, 'La Théorie de l'économie politique' ('Theory of Political Economy'), French translation, page 102.

necessarily to be simultaneous and to deal with all of the products at once.

The result was—and could only be—the rigidity of the price-lists. It is a fact that the prices in the price-lists were fixed above what they ought to have been; it is a fact that the undertakings preferred giving more or less large discounts, in view of the downward trend which was appearing in prices, to issuing new price-lists, doubtless fearing that by being in a sense confirmed in this way, the downward trend would thereby be accelerated. However, since the price-lists were not being observed, publication was then failing in its purpose.

The High Authority has told the Court that in this situation, a check on non-discrimination became very difficult, since it was not in the interest of buyers to denounce sellers who had given them more advantageous prices than those listed. Doubtless, it can be replied that there was nothing to prevent the setting up of a system of supervision to detect discrimination. However such supervision would clearly have proved much more difficult, for want of information from the undertakings, whereas under the new system the declarations supplied concerning the variations which have actually taken place constitute a valuable source of information capable of being used as the basis of effective supervision. Such information obviously could not be sought under the old system, because all variations were prohibited under that system, and a public authority cannot require a declaration of infringements committed! On all these points, the additional explanations supplied to the Court in answer to a question asked seemed cogent to me.

Thus a solution had to be found, not one which would perfectly fulfil for that is impossible, but which would *tend* to fulfil the two conditions essential for the existence of a market (even an imperfect one): *freedom of prices to find their own level* and *publication*. In the event, having regard to the state of the market, a certain degree of flexibility was necessary concerning publication: it had to be sufficient to enable the rules on non-discrimination to be complied with but it had to avoid the excessive rigidity which would have made it hard for prices to find their own level and would have stood in the way of normal competition. This was done by Decision No 2/54, which clearly states its purport in this connexion in its first recital, which I have already quoted but which I take the liberty of quoting again:

'Whereas the publication of prices and conditions of sale, which is necessary for the purposes of the application of the rules of competition laid down by the Treaty, must be effected in a manner compatible with freedom to determine steel prices in the light of market trends and of the needs of commercial relations'.

Indeed, it must not be forgotten that, as the High Authority states in its written defence (page 6), 'the Common Market determines the prices and not *vice versa*', and, as it also says (rejoinder page 24): 'Whereas automatic publication facilitated the operation of agreements and favoured a uniform attitude on the part of undertakings against downward trends in the market, the mean variation system enables undertakings to react freely and facilitates a greater fluidity of the market'.

Thus it seems to me that the decision adopted by the High Authority is compatible with the purposes which the High Authority had to pursue in order to ensure the progressive establishment of the Common Market. In my opinion, the decision was congruent with the general objectives of the Treaty and the principles laid down by the Treaty.

(d) General discussion

Now I must return to Article 60 (2) and consider whether, in the light of the foregoing explanations, that paragraph can be interpreted in a way which is compatible with the content of the contested decisions. First of all, I think that if, as I have just done, one puts Article 60 back in the general context of the Treaty, the concept of publication appears in a palpably different light from that in which it was presented to the Court by the French Government. According to the French Government, publication is directed towards third parties

(which is clearly the case), and it adds that publication *must produce legal consequences with regard to them.* What is that legal effect with regard to third parties? It has been stated that there can be only one in the field of prices: in the case of a buyer, the *right* to claim the benefit of the same price; or in the case of a competitor, the *right* to align his prices. It is alleged that publication within the framework of Article 60 is meaningful only if it is *publication of an offer to do business.*

I think that that line of argument involves a misunderstanding which springs from a false conception of the Treaty. As I believe that I have shown merely by reading it, the Treaty establishes a common market based on a system of free competition, defines the rules for it, and makes institutions responsible for seeing that those rules are complied with. For those purposes and for those purposes only it confers *powers* on the institutions, particularly the High Authority, and strictly fixes their limits and the conditions for exercising those powers. Thus it is a question of economic legislation preceded by institutional legislation, since it was necessary to set up the institutions before defining their powers. Quite clearly all of that body of legislation is by its nature *public law* legislation which has taken the greatest care not to interfere with private law, particularly commercial law, apart from very precise exceptions (there are scarcely any except in Article 66 on concentrations). Thus the principle is that, once again, except as otherwise provided, private law relations as normally established in the different countries, particularly commercial relations, are not affected by the Treaty.

The application of those powers is conceived in relation to producer undertakings, carefully defined for that purpose by an article of the Treaty, and with only a few exceptions both the duties and the penalties concern only those undertakings. Thus, the only legal relations which are established within the framework of the Treaty are established between the High Authority and undertakings, not between the High Authority and third parties.

If reference is made more particularly to the field of prices, what I have just said is strikingly illustrated. All the duties contained in Articles 60 to 63 apply only to undertakings and all the powers of the High Authority are exercised only in relation to them. Even in the exceptional case in which it was desired to create duties on the part of a purchaser or a commission agent, that is a third party, care was taken to do so only by indirect means: this is Article 63 (2), and in that case any penalties which may be necessary are also indirect, taking the form of prohibiting the undertaking from dealing with a purchaser who has failed to comply with his duties, not duties prescribed by the Treaty or by the High Authority but the duties to which he is bound by his contract with the undertaking; and, finally, only the undertaking is liable to a penalty by the High Authority under Article 64.

The same is true as regards Article 61 which confers the power of fixing maximum prices or minimum prices. It is obvious that in such a case, there would also be publication resulting quite simply from the publication of the decision itself. It is obvious also that in such a case, the decision could be taken in the interest of third parties. However, the private law relations remain subject to national law; any sales concluded in breach of the decisions adopted are not void. Only the administrative sanctions of the Treaty will be applicable, and only in relation to the undertaking.

A fortiori, decisions taken under Article 60 concerning the rules on publication cannot be allowed to interfere in any way with private law, since here it is a question of the normal free system.

Therefore, when it is argued that since publication is carried out in the interest of third parties it must produce legal effects *with regard to them* and that the publication referred to in Article 60 can only be 'publication of an offer to do business', I take the view that two quite separate concepts, one from private law and the other from public law, are being mixed up. If it is a question of the legal effects *of the decision* providing for publication, those effects prevail only in the relations between the undertakings and the High Authority, which are public law relations. As to the le-

gal effects of publication itself, that is purely a question of private law. In private law, a price-list may be regarded as an offer to do business, in the same way as a catalogue or the affixing of a price ticket in a shop; it is purely a question of fact whether, by reason *inter alia* of the nature and of the greater or lesser extent of the publicity given to the price, that price amounts to an offer the mere acceptance of which constitutes the conclusion of a contract.

It can doubtless be accepted that, under the conditions in which the High Authority requires them to be published, the price-lists for steel amount to an offer. However, it is clear that agreement can be reached on another price. Perhaps in such a case economic legislation will be infringed and offences may be committed, but unless the law expressly provides otherwise the application of that legislation will not affect the contract.

This clearly shows that rigid prices, that is to say prices which are always preceded by the publication of a price-list, are only really of use to purchasers when prices are rising: in such a case the published price is a guarantee for him: he has only to accept for the contract to be concluded, and the seller can only raise his price by previously publishing a new price-list. When prices are falling, or even when they are merely stable, the situation is reversed: the buyer will seek to obtain a lower price and it is obviously in his interest for the seller to be able to agree without committing an offence; if an agreement is reached, whether or not it complies with the rules in force, it is perfect from the point of view of private law.

Thus it appears that although *the publication* of a price-list can amount to an offer to do business on the terms stated in that price-list, the *rules* on publication laid down by the public authority do not of themselves create *any right* in favour of the buyer: the buyer only has an *interest* therein, and then only if the arrangements suit him.

Such is the first conclusion to which I am led by the general analysis of the Treaty which I have felt it my duty to undertake. Moreover, in my view, that analysis particularly strengthens the argument which gives the fullest meaning to the expression 'to the extent', which is in fact the key to the matter. The High Authority has to define not only the manner of publication, but also the limits and the conditions thereof. In that connexion it does not have 'pouvoir discrétionnaire' (unlimited discretion) in the sense in which that expression is understood in French law; I should say rather that it has 'pouvoir d'appréciation' (restricted discretion) which is certainly not without its limits: those limits are found in the purpose which the High Authority has to pursue, namely the organization of a system which makes it possible to ensure as much publicity as is compatible with freedom of prices to find their own level and with the establishment of conditions of competition which are as normal as possible; and it is for the Court to exercise its power of review in this connexion, if it is necessary, under the conditions laid down in Article 33 of the Treaty, either by way of an action for misuse of powers or by way of an objective review of a 'manifest infringement'.

The word 'extent' was certainly not put in the Treaty without due consideration; it relates to the concern for flexibility the introduction of which was acknowledged to be necessary—to a certain extent—into the provisions on prices and which appears so clearly in the complex rules which follow concerning the difficult problem of methods of quotation.

None the less, that flexibility in the rules on publication must not however reach the point, as the application alleges that it does, of depriving the rules enacted of any mandatory effect, thus making the published prices into no more than a sort of indicative price-list, a mere approximation, a source of statistical information. If such were the case, it is clear that Article 60 (2) would be infringed.

However, in reality, that is not the case. In fact, within the limits which it lays down, the system operates in a mandatory way. First of all, '*at the time when a price-list is published, it must correspond to prices as they really are*'—this is of capital importance. The High Authority points this out, and underlines it, in its communication published in the Journal Officiel de la

Communauté of 13 January 1954, p. 223. Immediately afterwards, it adds: 'By acting otherwise, undertakings would from the outset accumulate variations which they could offset only by successively publishing new price-lists'. That is a counsel of prudence. But what I for my part derive from it in the legal sphere is that it cannot be said, as the applicant argues, that the new system has detached the method of publication from prices as they really are. On the contrary, prices as they really are govern publication, since, at least on the day of publication, the price-lists published must express those prices as they really are: they are indeed 'the price-lists and conditions of sale *applied* by undertakings within the Common Market', according to the very wording of Article 60 (2).

Subsequent alterations are simply *exempted from publication* so long as the mean variations authorized are not exceeded. This is very clearly expressed in the next part of the High Authority's communication: 'the latitude which is given to undertakings is designed to enable them to overcome purely temporary fluctuations in the market *without any fresh publication* and to test by experience the greater or lesser durability of the movements occurring in that market'. Here again, there is the same piece of advice: 'They would be depriving themselves of the benefit of that *room to manoeuvre* if they wasted it on publishing prices different from those which they were applying at the time of publication'.

Thus the prices published must be real prices, and moreover, of course, any excess of the mean variation puts the undertaking in breach of Decision No 2/54 and Article 60 (2) which forms the basis thereof, without prejudice to any possible infringement of the rule of non-discrimination.

One last difficulty then remains to be solved, and it is certainly not the least:

Let me read the words of Article 60 (2) (a) once again: 'the price-lists and conditions of sale applied by undertakings within the Common Market must be made public *to the extent*', and so on. If the expression 'to the extent' must be taken in the fullest sense, as I think it must, it would follow that the concept of a price-list exists independently of the concept of publication. If price-lists can be made public to a given extent, the fact is that they were not public theretofore. Moreover, under the system set up by Decision No 2/54, price-lists may be altered within certain limits without those alterations being published: if that happens, the result is that in reality at any given time there would be two price-lists, the one which was published and which no longer corresponds to reality and the one which, faithfully following the 'minor or temporary fluctuations', continues to reflect exactly the state of the market.

But then, the following objection arises: is there any such concept as the concept of 'an unpublished price-list', in particular in the trade in steel? If there is no such concept, then does not the system collapse, first because the provisions of Article 60 can no longer be applied, and secondly because it will then become impossible for buyers to know the real prices and that will stop prices finding their own level which is however the aim of the operation, and at the same time supervision of non-discrimination will again be as difficult as before? If on the contrary there really are price-lists, even unpublished ones, that is to say not published as prescribed by the High Authority, but comprising a list of prices and a statement of conditions of sale, if buyers are sufficiently aware of those price-lists for the price-lists to play their part in enabling prices to find their level, then why should publication of them not be required, and what disadvantage can that present for anyone?

That is the dilemma.

I think that, as is often the case, it only appears to be a problem. The purely logical reasoning which leads to it, however attractive it may seem, is not decisive, because economic relationships and commercial practice are not governed by pure logic.

To confine myself to the trade in steel, particularly as it has operated since the contested decisions were adopted, I do not think that strictly speaking there are unpublished price-lists alongside the published price-lists. From what we know, there are those price-lists which have been validly lodged with the High Authority, which are fairly widely distributed and

which the buyers know. Then there is a *discount*, since up to now the variations have only been downward. In most cases, at least in the first months of the application of Decision No 2/54, it seems that the discount was equal to the authorized maximum, that is, 2.5%; this was expressly acknowledged during the hearing by the High Authority's representative. It seems that this is called the 'Monnet discount', and that it was given by most undertakings. However, subsequently, certain fluctuations appeared, as an increasingly pronounced upward trend made itself felt. This resulted in the formation of a real *rate* for those fluctuations remaining between the official price and the maximum authorized variation. Traces of it are to be found in the trade papers. Sellers spontaneously align themselves on the one among them who has given the biggest variation, and it is above all in this way that this semi-official 'rate' is naturally formed alongside the price-list. Alignments, as I have already said, are widely practised, which proves that the real prices are known.

On the other hand, although, at least up to now, there has been no general revision of price-lists, the publication of certain amendments or rectifications to the price-lists previously lodged has been fairly frequent, and it is known, for it was said during the hearing, that recently some undertakings have lodged fresh price-lists without agreement and in a sense individually. Thus it seems that the system functioned in the very spirit in which it had been conceived, at least after a few weeks. However, it can hardly be said that in each undertaking that 'rate' of real prices takes the form of an actual 'price-list', in effect the 'list of prices charged or applied', alongside the published price-list. Moreover, it should be noted that the expression 'list of prices actually applied' which the High Authority uses in its defence to the French Government's application is not repeated in the statements in defence entered against the Italian Government's application: the latter speak rather of a 'tolerance' or 'limited variation between prices published and prices charged'. It is easy to see here that the High Authority finds itself in some difficulty. Furthermore, the concept of a price-list as applying to the prices actually applied by undertakings is not the concept found in Decision No 1/54. When that decision states that: '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 ... (*inter alia*) that the prices or conditions have been departed from uniformly in all comparable transactions', it is clear that it is referring to the *published* price-list, since the variations are calculated by reference to that price-list. Moreover, if it were otherwise, Decision No 1/54 would be absolutely nugatory; in fact, Decision No 30/53 which it amends, already considered it to be a 'prohibited practice' for a seller to apply increases or reductions on 'his published price-list and conditions of sale'; that rule would have remained perfectly valid under the new publication rules enacted by Decision No 2/54.

In my opinion, too much importance should not be attached to what is after all only a dispute about words which arises from the somewhat loose drafting of Article 60 (2)(a). It is clear that, as has been seen, the concept of a price-list of itself implies a degree of publication: therefore, when the provisions state that they must be 'made public', it must not be inferred therefrom, by an exaggerated process of reasoning *a contrario*, that previously they were not such. It was not for the Treaty to pass judgment on a past situation. It had to take things as they were. The Treaty is concerned with prices and conditions of sale and the publication which they must henceforward be given; that is why it speaks not of 'price-lists' but of '*the* price-lists' and conditions of sale. In reality, it would have been better drafting to say: 'The *prices* and conditions of sale applied by undertakings within the Common Market must be made public, *in the form of price-lists*, to the extent', and so on. Does this interpretation go too far? In all sincerity, I do not think so. Far from distorting the purport of the provisions, on the contrary this interpretation in view gives it back its true meaning.

Therefore in my opinion it is not necessary

to postulate that applied price-lists exist alongside the published price-lists. The only price-lists are those which have been lodged with the High Authority and duly published, in accordance with the prices actually applied by the undertakings at the time of publication; and then there are the prices actually charged, which correspond to the notorious 'minor or temporary fluctuations' and which, without necessarily requiring actual price-lists in the strict sense of the word to be drawn up, correspond to the commercial rate resulting from the operation of the law of supply and demand, but of which sellers and buyers must be sufficiently aware to enable that law to operate normally.

If this interpretation of the wording of Article 60 (2) (a) is accepted, the same interpretation *mutatis mutandis* must be accepted as regards Article 60 (2) (b) on alignment. Where the latter subparagraph enables 'the quotation to be aligned on the *price-list*, based on another point *which secures the buyer the most advantageous delivered terms*', it goes without saying that here again it concerns the prices and conditions of sale which are actually applied in accordance with the price-list drawn up on the basis of the other delivery point and taking account of any authorized variations which the application of that price-list may involve.

There then remains the objection based on the second horn of the dilemma: if the departures from the published price-lists are really the subject of an actual, semi-official rate of which the interested parties are aware, does it not follow that each undertaking is able at any time to determine its own price with full knowledge of the facts, and if that is so why should it not be obliged to publish it? It would be all the more easy since Decision No 2/54 reduces the time-limit for publication to one day.

In my opinion the answer is found in the High Authority's communication, which I have already mentioned, in the Journal Officiel of 13 January 1954, p. 222: 'Variations applied must be extended without discrimination to all comparable transactions. If they are not published immediately, that is not so much because of the material difficulty which would result from it at a time of rapid variation in prices. *It is rather because publication binds undertakings*, and consequently extends over a period of time price conditions which by their nature may respond to a purely momentary fluctuation in the market'.

That explanation, which was repeated and developed during the hearing, seems cogent to me. It is clear that the publication of fresh prices tends, if not to crystallize those prices, at least to slow down the natural trends on the market and tends to prevent prices finding their own level, which as has been seen is an essential condition for there to be a genuine market.

Undertakings have a quite normal tendency to publish prices somewhat higher than the actual market rate, because in that way they provide against the consequences of any rise in prices which, as we have seen, would oblige them to publish new prices before they could conclude any contract at a price higher than the one in the published price-list, which amounts to an offer to do business; whereas when prices are going down or even stagnating, keeping the prices published in a price-list slightly above the normal rate gives them room for discussion allowing them to give discounts: the essential point is that that room should not be used for discriminatory purposes, but that the flexibility thus introduced into the system should result in a true commercial rate coming into being. For that reason the High Authority seems to me to be right when it states that publication binds an undertaking and tends by its nature to prevent prices finding their own level in accordance with the law of supply and demand. Doubtless in theory this should not be the case, but the present market in steel is not an ideal market, and it is the High Authority's duty to take account of realities.

On the other hand, did the High Authority exercise its powers of supervision with sufficient 'authority'? For example, can it be said that the price-lists which were published when the new system entered into force truly corresponded to prices as they really were at that time, as should have been the case according to the High Authority's own provisions, or on the contrary did the undertakings retain the guar-

antee of a certain amount of latitude on that occasion as well, which would explain the fact that *from the following day* and for approximately three months the actual prices were practically the same as the maximum authorized downward variation? It is very possible, if not even highly probable. However, that is not what the Court has to decide upon. It is not for the Court to censure the conduct of the High Authority, but only to decide whether the new system is in itself *such* as to attain the objectives referred to in the Treaty, in particular Article 60 thereof, and whether it is compatible with the provisions of the Treaty—which I think I have proved.

To conclude, I am of the opinion that the contested decisions are not contrary to the provisions of Article 60 and that the first submission in the application cannot be upheld.

Submission of misuse of powers

I shall deal more briefly with the second submission, that of misuse of powers. In fact, I think that the considerations which I set out in my examination of the first submission will make the examination of the second one easier.

Moreover, I propose to make a general examination of the concept of misuse of powers in the Treaty, which I consider I must do, not here but in relation to the applications by the associations, in regard to which the problem presents itself in its fullest form because of the restrictions contained in Article 33.

It is alleged in the application that the misuse of powers which vitiates the contested decisions relates both to Article 61 on price fixing and to Article 65 on agreements. It is alleged that the High Authority sacrificed what the applicant calls 'the specific effects' of Article 60 in order to obtain other 'specific effects' which, in the applicant's submission, could be obtained only by the application either of Article 61 on maximum prices or of Article 65 on agreements.

As regards Article 61, the High Authority is accused of having used its powers under Article 60, not for the purposes set out in that article, that is, in order to attempt to prevent discrimination, but with a view to bringing prices down, whereas the weapons which it has for the latter purpose, consisting in particular of fixing maximum prices, are given to it by Article 61.

That accusation is unfounded. First, it is clear that the machinery of Article 61 would not have achieved its aim in this case because prices were already falling and because when the contected decisions were adopted actual prices were considerably lower than the price-lists. But above all, it is not true to say that the High Authority sought to bring prices down or to accentuate the falling trend. As has been seen, it confined itself in fact to helping prices to find their own level, and they went down as a natural result of the general economic situation. That is quite a different matter and, as I think I have proved, it fell within the framework of the purposes which the High Authority had to pursue in laying down the rules for the publication of prices.

As regards Article 65, the problem is a little more difficult. The High Authority does not deny that it had the impression, if not the firm belief, that the simultaneous fixing of prices at a higher level by the undertakings was or could only be the result of an agreement between producers. The statements made either by the President or by the Vice-President of the High Authority, which have been mentioned, make no secret of this.

Does it follow that the High Authority was *bound* to set in motion the procedure laid down in Article 65, and to attempt to break the agreement in question? It would probably have been entitled to do so, but it was not legally bound to do so. Although the agreements referred to in Article 65 are automatically void, although it is true that practices having the same purpose are prohibited, it is for the High Authority alone to rule on whether such agreements are void and to penalize such practices: Article 65 (5) provides 'The High Authority *may* impose ...' fines or periodic penalty payments on any undertaking which has entered into such an agreement or has engaged in the practices in question. It may well be thought that the High Authority was right to refrain from making use of that

weapon, which is as delicate as it is redoubtable (redoubtable for the one who uses it and not only for the one that against whom it is used), since the putative agreement probably concerned all the undertakings in the Community, and it would have amounted to a sort of declaration of war on producers at the very time when the Common Market had just opened; that, however, is a consideration which bears on the High Authority's *policy* and which comes under another institution. For my purposes, it suffices to state that there was no duty to act under Article 65; this is not a case of wrongful failure to act.

Moreover, it cannot be said that the aim pursued by the High Authority, under the pretext of laying down the rules for the publication of prices, was *really* to break up by an indirect means an agreement which it would not or could not challenge by the regular means, namely under Article 65. The Court knows the real aim: it consisted in bringing into being such conditions for publication as were best suited, in view of the market situation, to keep a check on non-discrimination and to help prices to find their own level, and, as has been seen, this came exactly within the ambit of Article 60. Thus in no way was there any departure from the 'specific' purpose of that article. The best proof of this is that substantial results have been achieved in that field and that no-one can deny that, although it is not perfect—far from it—the Common Market is today beginning to be a reality.

At the end of this excessively long opinion, I am tempted to sum up. In order to avoid making it still longer, I shall refrain from doing so.

I shall merely say that although my views are clear, I none the less acknowledge that the question is a difficult and complex one, that in this first case brought before the Court for its judgment that question puts in issue problems concerning the substance of the Treaty and even to a certain extent its philosophy as I have already said, and that that question puts the Court under an obligation to decide on difficulties concerning not only the legislation, but also the extent of its own powers and the method of interpretation which it should adopt. On that point, there is no doubt that it is setting a precedent for the future. Therefore the French Government was right to raise the question.

The decision of the Court cannot fail to have far-reaching effects, and whichever way it goes, I am convinced that it will be useful to the Community.

I am of the opinion that the Court should dismiss the application.