OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 1 June 1988

My Lords,

Società Laminazione a Freddo pA ('LAF') brings this action under Articles 33 (2) and 36 of the ECSC Treaty ('the Treaty') for the annulment of an unpublished Commission Decision C(87) 51 def., of 9 January 1987 (the 'contested decision') or the reduction of the fine of ECU 50 000 imposed by virtue of Article 64 of the Treaty. The contested decision finds that LAF infringed Commission Decision 3715/83/ECSC of 23 December 1983 fixing minimum prices for certain steel products (Official Journal 1983, L 373, p. 1: the 'general decision'), a decision not itself challenged by LAF.

The general decision was taken under Article 61 of the Treaty which empowers the Commission to 'fix minimum prices within the common market if it finds that a manifest crisis exists or is imminent and that such a decision is necessary to attain the objectives set out in Article 3' of the Treaty. The general decision recites that 'in view of the scale of the difficulties facing the steel industry, the Commission has recognized the existence of a manifest crisis' (second recital). The Commission made the following particular observations:

'In order to ensure that the system of minimum prices is successful, it is necessary that it should be applied as widely as possible . . . It is therefore essential that it should apply in principle to long-term contracts as well.

The special situation of certain users who concluded long-term contracts before the introduction of minimum prices justifies derogations if firm-price contracts or contracts containing industrial cooperation clauses are involved' (ninth and tenth recitals).

Article 1 of the decision therefore imposed minimum prices for, *inter alia*, '(f) cold-rolled sheet'. By Article 3, the minimum prices were 'compulsory' for deliveries within the common market from 1 January 1984. Paragraph (2) of that article provided as follows:

'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, undertakings may obtain a derogation from the minimum prices if contracts including industrial cooperation clauses are involved or if the contracts fix the prices precisely. To this

end, undertakings should submit a duly substantiated application to the Commission by 31 January 1984 . . . The minimum prices shall apply pending a decision by the Commission on the application.'

The contested decision finds that LAF did not comply with the minimum prices imposed by the general decision in respect of sales to companies in the FIAT group of cold-rolled sheet in the first quarter of 1985.

The commercial background to the sales is that in 1982, FIAT decided to abandon the production of certain special steels hitherto carried out within the group. The production facilities for such steels were transferred to newly formed companies, the share capital of which was to be purchased by companies within the Finsider group.

Cold-rolling facilities were transferred to LAF. Nuova Italsider, a Finsider company, acquired 50% of LAF's share capital on 1 October 1982 and the remaining 50% in December 1985. FIAT agreed to purchase, and Finsider to supply, 80% of its requirements of such steels for a period of 10 years. This arrangement was recorded in an agreement of 21 July 1982 which was submitted to the Commission for approval which was granted by unpublished Decision C(82) 1302 def., of 22 September 1982.

It is not in dispute that LAF (a) made sales at prices below the minimum and (b) did not apply to the Commission under Article 3 (2) of the general decision. However, LAF's two main heads of claim are respectively that the sales in question did not fall within the scope of the minimum price system and that there was therefore no need to apply for derogation. In a third head of claim LAF asserts misuse of power by the Commission.

The gist of LAF's first head of claim is that the relevant sales were not subject to the minimum prices because they were not 'comparable transactions' within the meaning of Article 60 of the Treaty, paragraph 1 of which prohibits certain pricing practices, in particular 'discriminatory practices involving, within the common market, the application by a seller of dissimilar conditions to comparable transactions'. This involves two propositions: that the transactions were 'non-comparable' and that such transactions are not subject to the minimum price system. The Commission argues principally that the notion of comparable transactions has no place in a minimum price system imposed under Article 61 and only as a subsidiary reply that, as stated in the contested decision, the sales are in any case 'comparable transactions'. I shall take the arguments in that order.

'Comparable transactions' are referred to in that part of Article 60 (1) which prohibits discriminatory pricing practices by sellers. If

transactions are comparable, the seller must charge the same price. In order to prevent prohibited practices, to enable purchasers to compare prices to check whether discrimination has taken place and undertakings to align their prices on their competitors' (Case 1/54 *France* v *High Authority* [1954] ECR 1, at p. 9, often repeated by the Court, for example in Case 149/78 *Rumi* v *Commission* [1979] ECR 2523, at p. 2536), Article 60 (2) requires sellers to publish their price-lists in accordance with rules laid down by the High Authority. The relevant rules are contained in Decision No 31/53 (Official Journal, English Special Edition 1952-67, p. 11, as amended in particular by Decision No 72/441/ECSC, Official Journal, English Special Edition 30 and 31 December 1972, p. 22; the text in force is to be found in a Commission Communication in Official Journal 1973, C 29, p. 32; there are subsequent amendments but these are not relevant for present purposes). They make a distinction between 'publication' and 'notification'.

The general rule is that undertakings shall 'publish' their price-lists (Article 1), which means that they shall maintain lists which must be available on request to anyone interested and which have been addressed to the Commission at least two days before the prices are applied (Article 4). However, Article 5 provides that 'differentials applied to individual consumer groups' need not be made public but nevertheless must be 'notified' to the Commission. Paragraph (3) of that article requires the notification to specify the consumer groups in question.

It is understood, as the Commission states in the rejoinder, that such differentials may be applied only when the transactions concerned are non-comparable. More precisely, duly notified differentials may only be applied to categories of transaction which are not comparable with the general run of sales (to which the published prices apply).

Article 3 (1) of Decision No 30/53 lays down criteria for deciding when transactions may be regarded as comparable within the meaning of Article 60 (1) (Official Journal, English Special Edition 1952-67, p. 9, as amended in particular by Decision 72/440, Official Journal, English Special Edition 30 and 31 December 1972, p. 19, the text in force being set out in the communication of the Commission at Official Journal 1973, C 29, p. 30; subsequent amendments are not relevant to these proceedings). It provides as follows:

'Transactions shall be considered comparable within the meaning of Article 60 (1) if:

(a) they are concluded with purchasers:

who compete with another, or

who use the same or similar goods, or

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.'

The Court specified in Case 29/67 (*De Wendel* v *Commission* [1968] ECR 263), at p. 276 that 'Article 60 (1) applies to transactions which, although as compared with normal transactions they have exceptional characteristics and for this reason obtain the benefit of special conditions of sale, nevertheless remain comparable one with another'. In other words, differentials may be applied as between categories of transaction (or 'consumer groups') but not within them.

Those are the underlying rules on to which the minimum price system was grafted. These proceedings are not concerned with whether LAF's prices to FIAT were below its published prices and whether, if so, the differentials had been notified to the Commission pursuant to Article 5 of Decision No 31/53. The first issue is whether, if the sales to FIAT were 'non-comparable', they fell outside the scope of the general decision. As the Commission states, the general decision made no express provision for non-comparable transactions. LAF argues that the explanation is that the minimum prices were to be understood as applying only to transactions concluded on the basis of undertakings' price-lists and, by definition therefore, not to non-comparable transactions. Several provisions of the general decision seem to me to defeat this argument.

The first is Article 2, the relevant parts of which read as follows (with my emphasis):

'1. The minimum prices . . . shall be net of all rebates with the exception of rebates to dealers which are published in the price-lists . . .

3. Discounts and rebates, *of whatever kind*, published in the price-lists and conditions of sale *or notified to the Commission*, may not be increased.

4. Undertakings whose published price-lists *and notified conditions* give rise to prices lower than the minimum prices shall publish *or notify* new conditions to bring them into line with this decision within 15 days of its entry into force.'

The reference to 'notification' makes it clear that differentials applied in accordance with Article 5 of Decision No 31/53 (that is, notified to the Commission but not appearing in the published price-lists) could not result in prices below the minimum, and therefore that the system imposed by the general decision was not confined to list prices.

The second provision is Article 3, quoted above. The minimum prices were said to be compulsory, subject to the possibility of derogation contained in Article 3 (2). LAF argues that that paragraph only refers to two possible features of non-comparable transactions and that the general decision is therefore vitiated for making inadequate

provision for the whole range of such transactions. The Commission's argument, which I accept, is that Article 3 (2) clearly shows that only two very specific categories of exceptional transaction could be exempted from the blanket application of minimum prices. Whether the LAF/FIAT sales would have qualified for such exemption, which the Commission doubts, is not a relevant issue since no application for exemption was made.

Thirdly, support for the view that the minimum prices were to be regarded as absolute floor prices, subject only to Article 3 (2), is gained from Article 6 which provided that alignment on offers from third countries, where permissible, must not result in prices below the minimum.

Therefore undertakings are subject both to the minimum price system imposed by the general decision under Article 61 and to the obligation not to discriminate when transactions are comparable imposed by Article 60 (1), amplified by Decision No 30/53. The fact that the latter obligation can be read conversely as a freedom (differential pricing as between transactions not comparable one with another) should not be allowed to confuse the issue.

In its reply LAF argued that the general decision is void as *ultra vires* the Commission in that it is discriminatory to impose a single minimum price for different kinds of sales. Non-comparable transactions represent an insignificant proportion of sales on the steel market as a whole. The Commission countered correctly that the *ultra vires* argument is inadmissible since it is raised for the first time in the reply, but that, far from representing an insignificant share of the market, sales to the car sector account for about 25% of cold-rolled products in the Community and FIAT takes 80% of its needs from LAF. Such proportions cannot be called insignificant and must be covered by the general decision. More important is a point not taken by the Commission: the general decision does not seek to impose one price for all transactions. It imposes minimum prices below which undertakings may not sell their products, but it does not prevent them from charging higher prices, subject always to compliance with Article 60.

It is, in my view, clear that Articles 60 and 61 are dealing with quite different situations. Article 60 prohibits discriminatory practices involving the *application by a seller* of dissimilar conditions to comparable transactions. Article 61 enables the *Commission* after consultation to fix minimum prices in specific situations when it is necessary to secure the objectives set out in Article 3 of the Treaty. In this case the general decision was taken because the Commission had recognized the existence of a manifest crisis, as referred to in Article 61 (b) of the Treaty. In my opinion, the powers given by Article 61 are not to be read as subject to Article 60.

The conclusion that all transactions are subject to the minimum prices makes it strictly unnecessary to consider whether the LAF/FIAT sales can be regarded as 'non-comparable' as LAF contends. Had I come to the opposite view this would have been a matter to be considered.

In general, LAF contends that the transactions between LAF and FIAT arose out of a complex of arrangements made between the parties to the agreement of 1982 (to which it should be noted LAF was not a party): they are not simply sales and purchases in the ordinary course of trade.

In four particular respects, according to LAF, the supply contracts are quite atypical in the steel sector and particularly in the motor-car sector. First, the duration of 10 years is wholly out of line with the norm of six months or a year. Second, the price is fixed by reference to the average price charged by German and French steel makers to domestic car makers; if the parties are unable to agree on that price, the dispute is to be settled by final arbitration, a very rare provision in such agreements. Third, provision is made for exchange of commercial, research and technical information and LAF is required to comply with very specific requirements as to service, standards and innovation; failure to comply gives FIAT the right to refuse deliveries. LAF guarantees that the goods will be of comparable quality with those of French and German steel makers. Fourth and finally, FIAT is committed to taking 80% of its requirements of cold-rolled products, a percentage which would never be found in an ordinary supply agreement; however, if the main French and German car makers change their supply policies, FIAT would be entitled to a price amendment or a reduction in the proportion of its requirements which it was obliged to take.

According to LAF, these factors make the contracts wholly non-comparable with ordinary contracts for the supply of steel products for the car industry, even those concluded for a medium term. Since its incorporation in 1982, 65% of LAF's production has been sold to FIAT. Indeed, LAF asserts that it was controlled by FIAT until December 1985; the significance of this is that, according to the applicant, the Commission's practice has always been to consider that intra-group sales must be regarded as non-comparable. The Commission correctly observes that a 50% holding cannot confer control. LAF retorts that it is sufficiently high to establish mutual interest and therefore to make sales non-comparable.

LAF further asserts that the Commission has accepted that the relevant sales must be characterized as non-comparable. Before taking the contested decision, the Commission, as it is obliged to do by Article

36 of the Treaty, wrote to the applicant on 21 March 1986 to seek its comments on the alleged infringements. The Commission there alleged a breach of Decision No 30/53, namely failure to apply to the FIAT sales LAF's published conditions as to time for payment and transport costs. In its comments on that letter, LAF advanced the non-comparability argument and the contested decision makes no reference to a breach of Decision No 30/53. From that LAF draws the conclusion that the Commission accepts that the sales were not comparable.

However, whilst it is true that no fine was imposed for any breach of Decision No 30/53, the contested decision itself explicitly states that the agreements are comparable with many others in the car sector. The Commission argues that all three conditions set out in Article 3 (1) of Decision No 30/53 are satisfied: (a) because FIAT is in competition with other car producers buying similar steel products, (b) because, by the very terms of the contract, LAF's supplies to FIAT must match up in quality with those of its equivalents in France and Germany and (c) for the following reasons: although the duration of the contract is long, the price has to be fixed every six months which is the norm, the price calculation clause is sufficiently precise to make recourse to arbitration highly unlikely, thus depriving that abnormal feature of the contract of practical significance, and finally, whilst 80% of FIAT's requirements is a high proportion, French, German and British car makers also obtain their requirements in comparable proportions from steel producers located in their respective countries.

As against all these arguments it is, however, to be noted that the discriminatory pricing practices prohibited by Article 60 and Decision No 30/53 are those practised by one undertaking as amongst its buyers and not differences in the pricing practices of different undertakings.

LAF states that it attaches great importance to the non-comparable status it claims for its sales to FIAT. However, not only does that issue not fall for decision in these proceedings, on the view I have taken, but also it is impossible to come to a conclusion on the issue. The Court has no information on LAF's other sales and their features of similarity or contrast with the FIAT sales. The Commission did not pursue its allegation that LAF had breached Decision No 30/53 by departing from its published terms and conditions in FIAT's case, an allegation which necessarily implies a charge of discriminatory pricing in comparable transactions.

The Court has in effect only two items of information. The first is that LAF sold below minimum prices, which has no bearing on the comparability of those sales with its other sales. The second is that 65% of LAF's output is sold to FIAT. It seems to me hardly open to an undertaking to claim that such a high proportion of its business should be regarded as sufficiently excep-

tional to justify departure from its published prices. Faced with a similar argument in the *Rumi* case cited above, Mr Advocate General Capotorti had this to say: '... the scope of the concept of non-comparability is restricted to contracts for sale which differ fundamentally from those usually concluded by the same supplier. Transactions may thus be said to be not comparable (with those which must be effected in accordance with the price-list) only in the case of anomalous contracts which are concluded by the undertaking in a wholly exceptional way ... This certainly does not apply to the contracts in question ... which, far from constituting an exception to the sales operations of the undertaking in relation to the particular characteristics of the product sold, on the contrary constitute the rule ...' (at p. 2545).

This does not of course mean that LAF's other sales were necessarily comparable with the FIAT sales. However, the presumption is that only in the case of the other sales, the minor proportion of its business, might departure from published prices be justifiable.

It is not, however, necessary for the Court to come to a view as to the comparable nature of FIAT's sales in order to reject LAF's first, and main, head of claim.

Its second head of claim is that non-comparable transactions, not being subject to the minimum price system, do not have to be notified under Article 3 (2) of the general decision. This argument seems to me to stand or, *in casu*, fall with the first. In my view, only contracts falling within the terms of Article 3 (2) could be exempted from the minimum price system and only then on application to the Commission. The general decision made no provision for 'automatic' exemption.

The third head of claim is misuse of power by reason of the Commission's failure to give adequate reasons for finding that LAF's sales are comparable transactions. It alleges that the Commission has been contradictory in accepting on one occasion that the sales were non-comparable and now asserting that they are comparable. This allegation I reject for the reason given. In any case, the Commission urges that it only referred to the comparable nature of the transactions to reject LAF's argument on that point and was therefore entitled to be brief. Even if the reasons given by the Commission are defective, since comparability is, in my view, irrelevant to the issue whether LAF infringed the general decision, the decision on selling below minimum prices is not vitiated by a misuse of power.

However, LAF asked the Court to order the Commission to produce the data at its disposal concerning other supply agreements in the motor-car sector and the 16 other individual Commission decisions imposing fines identical with that imposed on LAF on

producers of steel products for that sector. Such information would, in my view, be irrelevant for determining whether LAF's sales to FIAT were comparable with its other sales and *a fortiori* because the notion of comparable transactions is foreign to minimum price rules imposed under Article 61.

For the reasons given, I think LAF's application fails. The contested decision should stand and there are no grounds for reducing the fine it imposed. I would order that LAF pay the Commission's costs.