OPINION OF MR ADVOCATE-GENERAL ROEMER[1] DELIVERED ON 26 MARCH 1968

Index

Introduction (Facts, conclusions of the parties) 281
Legal consideration 282
1. Classification of transactions alleged to be illegal 282
2. The duty of publication 285
3. Infringement of the prohibition against discrimination . . . 287
4. Inadequacy of the statement of reasons for the decision . . 289
5. Summary. 290

Mr President,
Members of the Court,

The applicant in the case on which I give my opinion today is a French company which is engaged in production in the iron and steel industry. It is alleged to have infringed the provisions on prices contained in the ECSC Treaty and the decisions taken in implementation thereof.

The High Authority found that there had been infringements after it had carried out an inspection of the applicant's business between 26 September and 12 October 1966, an inspection which had been carried out in all Member States at the end of 1965 and during 1966 having regard to the existing market conditions, the main feature of which was intense competition between producers caused by an increase in their production capacity.

The findings resulting from the inspection were notified to the applicant in a letter of 10 March 1967 to enable it to submit its comments in accordance with Article 36 of the ECSC Treaty. The applicant submitted its comments in a letter of 11 April, 1967 and repeated them in a conversation which took place at the offices of the High Authority on 25 May 1967. It did not however succeed in persuading the High Authority to change its mind on any essential point. The result was that the High Authority issued on 28 June 1967 a formal decision imposing a sanction. It sets out a series of infringements of the prohibition against discrimination in Article 60 and of the provisions relating to the publication of prices which the applicant is alleged to have committed in transactions entered into in 1965 and 1966. Its detailed findings are that in transactions for the delivery of thin steel sheets to three German motor car manufacturers there are justified reductions of the list prices but that exception is taken to the failure to make these reductions public. With regard to the transactions entered into with twelve French users of thin steel sheets, including three motor car manufacturers and seven other buyers of various products, the decision also mentions some variations from the price list which were justified but not made public and some practices which are prohibited because 'discounts allowing for variations in current economic trends' ('conjunctural' discounts) had been allowed to a series of French customers having regard to market conditions. For these reasons the High Authority imposed a fine of FF 160 000 under Article 64 of the ECSC Treaty. The decision further complained of an infringement of Article 47 of the Treaty in conjunction with Decision No 24/63, that is to say, the failure by the applicant to give notice that it allowed discounts for indirect export as was provided in transactions entered into with one buyer. For this offence the High Authority imposed a fine of FF 40 000 under Article 47 of the Treaty.

The Société de Wendel challenged this decision in so far as it imposed a fine under

1 — Translated from the German.

Article 64 of the ECSC Treaty. Its application was lodged at the Court on 1 August 1967, that is to say, after the replacement of the High Authority by the single Commission of the European Communities which is accordingly the defendant.

In its application the applicant submits that the High Authority has incorrectly classified the transactions which it criticized. In fact these are transactions having exceptional characteristics, to which Article 60 of the Treaty and the implementing decisions made in connexion therewith do not apply. The High Authority has also been guilty of discrimination by holding that departures from the list prices in favour of German buyers are justified and only mentioning prohibited practices in relation to transactions with the applicant's French customers. Finally the statement of the reasons upon which the decision is based is said in many respects to be inadequate.

The applicant takes the view that these considerations justify the application for the annulment of the decision imposing the fine as well as that of the second sentence of the first paragraph of Article 2 of Decision No 30/53 as amended by Decision No 1/54.

The Commission on the other hand (as legal successor of the High Authority) adheres to the view taken in the contested decision and contends that the application should be dismissed and that the applicant should be ordered to pay the costs.

Legal consideration

For the legal consideration of the facts of this case, which provides an opportunity, which we have not had for a long time, of discussing the provisions relating to prices contained in the ECSC Treaty, it appears to be most expedient to consider first of all whether, having regard to their nature, Article 60 and its related implementing decisions apply to the transactions which have been criticized, in the second place to ascertain the position with regard to the obligation to make price reductions public, in the third place to examine the complaint by the High Authority that there has been an infringement of the prohibition against discrimination and finally to review the requirements of the duty to state the reasons upon which decisions are based. In my view an examination of the relevant questions in this order is the most appropriate way of dealing with the essential issues in this case.

1. Classification of the transactions alleged to be illegal

The applicant's principal argument is that the transactions criticized by the High Authority are transactions of an 'exceptional' nature, which did not come within the provisions of Article 60 and in respect of which niether the obligation to publish prices and conditions of sale nor an infringement of the prohibition against discrimination can arise. According to the applicant the meaning of the word 'singulier' ('exceptional') in Article 2 of Decision No 2/54 (French version), if it is correctly understood is not 'unique' but primarily 'uncommon, infrequent' (inusité, peu fréquent). 'Singularité' can therefore be said to exist where a transaction stands out from the mass of usual transactions, that is to say, it cannot be included under any of the items in the fixed price list. The transactions which have been criticized belong to this category, because each of them displays a number of the following characteristics:

— existence of a long-standing commercial relationship between the Société de Wendel and its customer,
— the large quantities of the products purchased,
— the obligations on the part of the buyer to meet part of its requirements by purchases from the applicant and the obligations on the part of the applicant to satisfy these requirements,
— special technical cooperation.

The Commission's answer to this argument was first of all that a transaction can only be exceptional if it *cannot be repeated.* The transactions in question are however comparable to each other and therefore can on most favourable interpretation only be regarded as belonging to the special category of transactions (transactions particulières) to which Article 2 of Decision No 2/54 applies.

Having regard to these completely opposed points of view it appears to be appropriate

to call attention to begin with to the finding of the Court in its first judgment relating to Article 60, that is to say, to its finding 'que la notion de transactions singulières... se prête mal à une définition abstraite' ('that the concept of an exceptional transaction does not lend itself to an abstract definition') (Rec. 1954–1955, p. 21).[1] In this matter we must therefore proceed step by step and attempt with reference to the special features of each of the transactions under consideration to find a workable definition of this concept.

If we proceed in this way, it certainly becomes immediately clear that the definition adopted by the applicant, that is to say, with reference to its price list, cannot be correct. If in fact one had to determined, solely with the price list as guidance, whether one was faced with transactions having exceptional characteristics entered into by the various undertakings, then the application of the rules of the Treaty would depend upon subjective factors, namely upon the differences between the commercial practices of the undertakings and misunderstandings could not be ruled out. Therefore the fact that the applicant—as we learned during the oral procedure—made no provision at all in its price list for loyalty discounts, is not in itself enough to classify as 'exceptional' transactions in which reductions were allowed in view of long-standing business relations. It is instead necessary to look for objective criteria which can be applied suitably and uniformly to a large number of undertakings.

In doing so—and this must be said at once—account must of course also be taken of the customs and needs of business life, as had already been mentioned as well in the judgment in Case 1/54, if we are to avoid unrealistic rules which would be felt by undertakings to be unfair and cannot have been intended by the Treaty.

Bearing in mind these considerations the formula of non-recurring transactions, which the Commission first suggested for the definition of this concept, certainly appears to be too narrow, because it centres solely on the possibility of the transactions being repeated which, contrary to any reasonable economic point of view, would qualify transactions having exceptional characteristics as extremely rare cases. It appears on the other hand much more relevant to ask—as the Commission suggests in another form of wording—whether the *very nature* of a transaction takes it outside the general fixing of prices and perhaps to extend the scope of the question by asking whether, having regard to the nature of a transaction, the general fixing of prices appears to be appropriate in the light of the rules of economic life. In this connexion, having regard to the central concept of comparability as stated in Article 60 of the Treaty, the finding that certain features of one transaction also appear in other transactions entered into by one and the same undertaking, that comparable transactions have in the past been entered into by one undertaking or in all probability will be repeated, can be of particular significance. If those characteristics from which, according to the applicant, the exceptional nature of its transactions are to be inferred, are considered in the light of these—naturally vague—guidelines, we reach the following conclusions.

In my opinion no difficulties are presented for the purpose of our appraisal by the following factors: long-standing business relations, the size of the deliveries and the obligation of the buyer to guarantee to purchase part of its requirements from the seller. They are quantitative factors which it is customary to take into account in business in order to determine the amount of discounts and which are to be encountered in a whole series of transactions entered into by the applicant. Their presence may also justify the conclusion that these are transactions of a *special* nature which stand out from the mass of transactions; but there is no justification for going on to describe such transactions as having *exceptional* characteristics. And this is so even where these factors appear in various combinations, because it is difficult to maintain that any combination of these characteristics, even if it were exceptional at any particular time, is unlikely to recur. This view moreover is borne out by the fact that Decision

1 — This is quoted from the French text, French being the language of the case.

No 2/54 to which we shall return later, expressly provides in Article 2(f) for the publication of loyalty discounts (that is to say, of reductions in view of the long-standing nature of business relations and for guarantees by the buyer to meet part of its requirements by purchasing from the seller) and also for the publication of quantity discounts.

Therefore those transactions, which are *only* distinguished from the others owing to the existence of the said three factors and in which on the admission of the applicant there is no agreement for technical cooperation, cannot be classified as transactions having exceptional characteristics. This is the position in the case of the deliveries to Opel, to the Tréfileries du Sud-Est, to Henaff and Rivière-Casalis.

It is more difficult on the other hand, as it is connected with technical problems, to answer the question whether it is possible to regard as exceptional those transactions which are said to include technical cooperation as well as the said three factors, that is to say, an agreement through joint research (either at the works of the applicant or of the buyer or of a customer of the buyer) to use their best endeavours to improve the conditions of production, or develop new products. As we know, the applicant maintains that this was the the position in the case of the transactions which it entered into with all the other eighteen customers. We cannot simply ignore this claim, because even the Commission concedes that the conclusion of agreements for *genuine* technical cooperation can confer on contracts an exceptional feature (although it takes the view that it is more usual in such a case to enter into a separate agreement, unconnected with the contract for sale and delivery, having its own provisions with regard to the payment of a consideration).

Let us therefore examine how the facts of this case appear in this connexion from a study of the written procedure—technical cooperation was not mentioned during the oral procedure. In this examination it is of no crucial significance whether there is a specific *written* agreement for technical cooperation, because in the absence of any such agreement cooperation may in fact have progressed to such an extent as to make it appear subsequently that the grant of special conditions of sale is justified.

In this complicated study of a technical nature the applicant's observations which refer in fact to *commercial* assistance, to the furtherance of purely *commercial* interests, must certainly be ruled out from the very beginning. They relate to a series of arguments, to the extent to which for example they mention investigations into questions of standardization, the value of establishing connexions with customers who belong to a large group, or business connexions which are useful for increasing sales outlets. These transactions are not in any way concerned with *technical* cooperation. Equally those transactions which only provide for the exchange of technical *information* and *documents* but not for *mutual* technical assistance may without further comment be eliminated, because in this connexion it may be assumed that producers were not given any special advantages, which might have had an effect on prices.

Further, the principal question, which arises and which it is difficult for one who is not a technical expert to answer, is where the line must be drawn between *services rendered to customers in the normal course of business* and more far-reaching technical cooperation. But, and I am in agreement with the Commission on this point, in the former category can certainly be numbered those transactions which deal with the problems of the processing of the products supplied (the use of special oils for pickling metal surfaces, packing) or the detection and elimination of defects. There can in addition be included in the same category efforts made in a more limited field to improve the quality of products to meet customers' requirements and also more generally everything which comes under the heading of the adaptation of products to the particular requirements of a customer's business and which obviously includes the problem of the deep drawing of steel sheets. The Commission convincingly explains in this connexion that all these operations are examples of the current practice of producing 'tailor-made products'.

If this cooperation is on a larger scale and has wider objectives, the question which

must in particular be asked for the purposes of our examination is whether there were comparable forms of technical cooperation between the applicant and *other customers* or whether a particular form of technical cooperation with the buyers of certain products was the normal practice—even if there were similar arrangements with other producers—, because even then it is difficult to regard these types of relations as having exceptional characteristics. This is the view which the Commission has taken without being challenged with reference to the problems of covering sheets with a single coat of enamel, the weldability of electrogalvanized steel sheets, the production of thin sheets for the manufacture of drums, the production of concrete reinforcing bars, the examination of the uniformity of the mechanical characteristics of steel sheets and research work relating to metals with a low degree of ductility.

Having regard to these considerations—if I am not mistaken—the question of genuine technical cooperation of an exceptional nature can in fact only arise in the case of the applicant's relations with Simca, Spaba and the Volkswagen works, that is to say, customers who are said to have collaborated in the development of the quality of round bars, in the examination of the principles of deep drawing by a network of circles, in research into the use of hot steel sheets for the production of wheel hubs and in the development of steel having a high resistance to fatigue. In this connexion however I consider it right to follow the Commission's view and to find that, in the absence of more specific information from the applicant, it cannot be said that the technical cooperation exceeded the normal degree of collaboration with suppliers of steel sheets and concrete reinforcing bars or was of an 'exceptional' nature. Nevertheless Decision No 1/54—and logically this is correct—provides that undertakings which claim that a special situation permits them to depart from their price lists have to produce to the High Authority (now the Commission) the necessary proof that such a situation exists. With regard to the first argument in support of the application we can therefore adhere to the view that transactions are not exceptional, and therefore outside the scope of the prices provisions of the Treaty, simply because it appears to be impossible to incorporate them in an undertaking's price list, but that they are perhaps only exceptional if they are distinguished by factors which do not recur in other transactions or are unlikely to be repeated in future transactions. In view of these considerations no objection can be taken to the refusal by the High Authority to classify the twenty-two transactions under consideration as having exceptional characteristics.

2. The duty of publication

In its second argument the applicant submits that it cannot also be said to have infringed the provisions relating to prices, even if the said transactions are only regarded as special because for such transactions, where they are comparable, the application of the same conditions but not prior publication of the conditions is stipulated. Two arguments are put forward in support of this submission.

In the first place the applicant attaches importance to the following reasoning. It concedes that Article 1 of Decision No 1/54, under which in certain circumstances, of which we are aware, departures from the price list are admissible, contains a reference to the conditions for the publication of prices. Basing itself on the French text, which uses the word 'limites', it however takes the view that this reference relates to the limits of the Monnet discount in Decision No 2/54, that is to say, to the provision that mean variations either upward or downward of up to 2.5% in the basic prices applicable under the price lists are permitted without prior publication. Decision No 3/54 imposes upon undertakings the *obligation to supply at a later date* information concerning these mean variations. After the provisions relating to the Monnet discount were annulled by the judgment of the Court of 20 December 1954 undertakings were also released from the duty to supply information under Decision No 3/54 by Decision No 1/55 of the High Authority. This left a gap in the system established by the High Authority for the publication of prices. Finally the communication published by the High Authority on page 543 of the

Official Journal of 11 January 1955 which states that 'it (the High Authority) intends ... to examine the amendments which must be made to Article 2 of Decision No 2/54' gives by no means inconsiderable support for this proposition. As no such amendments were made it must be assumed that the reference in Article 1 of Decision No 2/54 to publication of prices no longer has any purpose and that prior publication of the conditions of special transactions cannot be required. In its second argument with which we are concerned the applicant asserted that it makes no differences if the work 'limites' refers to the reductions in the list prices. The adoption of this interpretation would lead to the conclusion that Decision No 1/54 contains an inner contradiction, because undertakings could be permitted to vary prices in the price list and at the same time be required to observe the limits applicable to reductions in the list prices. Having regard to this contradiction the second sentence of the first paragraph of Article 1 of Decision No 1/54 is said to be illegal and must be annulled.

These ingenious endeavours to establish such an interpretation nevertheless do not carry conviction.

First, with regard to the submission relating to the Monnet discounts and to the need to interpret Decision No 1/54 with reference to this discount it appears to me that it overlooks the scope of Decision No 1/54. The main purpose of this decision, which was made in order to define prohibited practices under Article 60, is to draw a clear distinction between the provisions relating to publication and those relating to non-discrimination. This emerges clearly from the first relevant recital of the decision. Pursuant thereto Article 1 lays down—and not only for the Monnet discount—the general conditions in which variations from the price list are not prohibited practices. Otherwise it would be difficult to understand why the special provision relating to the Monnet discount contains, just as Decision No 1/54 does, the requirement that 'variations' must not result in 'discrimination against any transaction' (the last paragraph of Article 1a inserted in Decision No 31/53 by Article 1 of Decision No 2/54). It must consequently also be assumed that the reference in the second sentence of the first paragraph of Article 2 of Decision No 30/53 as amended by Article 1 of Decision No 1/54 has a meaning which is not restricted only to the Monnet discount; moreover, the German text of that Article speaks of 'provisions for the publication of prices' ('Vorschriften über die Veröffentlichung der Preise') and not 'limits' ('Grenzen'). But it follows from the foregoing that after the abolition of the Monnet discount as well as the related obligation to supply information concerning price lists contained in Decision No 3/54, this reference still had a meaning particularly as regards *Article 2* of Decision No 2/54. Moreover such conclusions are to be inferred from the judgment of the Court in Case 1/54, which emphasizes that Decision No 1/54 in no way abolished the obligation to publish prices and conditions of sale, and that this obligation must be discharged in the case of transactions which cannot be classified under the items in the price list. Similarly the communication of the High Authority in 1955 mentioned by the applicant appears to be quite clear on this point. It declares emphatically that this judgment confirmed the validity of Decision No 2/54 which contains the provisions relating to publication, that is to say, it recognized that the obligation to make prices public must be discharged in the case of uniformly applied departures from the price lists. 'Each undertaking', the communication reads, 'which intends in the future to apply prices which differ from those in its current price list, must publish *in advance* a new price list'. When the communication finally goes on to state that the High Authority intended 'to examine the amendments which will have to be made to Decision No 2/54 this in fact'—as is shown by the wording—amounts to no more than a declaration of intent. But the fact that after this no such examination took place can only be interpreted as evidence of the view that there is no gap in the system, but that the application of the provisions of Decision No 2/54, which remain in force, is enough to ensure that the system continues to function satisfactorily. Consequently the applicant's first argument on the obligation to publish prices and conditions of sale is not valid.

I do not have to spend much time on the second argument which alleges that there is a contradiction in Decision No 1/54 which must lead to the annulment of the second sentence of the first paragraph of Article 1 (in fact what the applicant is really asking for is a declaration of its illegality). The contradiction indeed only appears to exist if it is incorrectly assumed that the general definition of prohibited practices in the first sentence is directly connected, through the second sentence, to the limits to variations in the list prices, whereas in fact the second sentence contains a reference to the duty of publication. Even without this reference Decision No 2/54 with its specific provisions relating to the publication of price lists must be observed, in particular Article 2 which provides for the publication of *rebates* and does not exempt special transactions but only transactions with exceptional characteristics from this obligation. Moreover this clearly makes good sense because observance of the prohibition against discrimination, which also applies to variations from the price list, is best guaranteed with the cooperation of a producer's customers, who can rely on the published price lists.

Taking every factor into consideration I therefore adhere to the following view:

Since the attempts by the applicant to interpret the duty of publication in a particular way have failed and since, on the other hand, the nature of the transactions considered has not been proved, the High Authority's complaint that the applicant has committed a breach of its duties under the Treaty by not making public the loyalty and quantity discounts which it allowed, is justified. It has also committed a breach of its duty to make public conjunctural discounts which were also allowed in a series of comparable transactions. Therefore no case has been made out for the annulment of the decision imposing a fine upon the applicant to the extent to which it is based on failure to observe the duty of publication.

3. Infringement of the prohibition against discrimination

In addition to alleging that the applicant infringed the provisions relating to publicity the contested decision complains that it disregarded the prohibition against discrimination in that it allowed sixteen French customers but none of its other customers a conjunctural discount with reference to market conditions.

The applicant's answer to this complaint consists also of two arguments. First it takes the view that the crucial factor is not the designation of the discounts which it allowed but only a comparison of the actual final prices. Such a comparison shows that the applicant has not discriminated between customers, but, as Decision No 30/53 provides, applied to all customers in a comparable situation similar conditions, the test of course being whether they are approximately the same and not whether a mathematician would regard them as being exactly similar. Secondly the applicant objects that the High Authority has in turn been guilty of discrimination in its appraisal by stating that the reductions allowed to the German motor car manufacturers are justified and only condemning those allowed to certain French customers. This distinction was made, in spite of the fact that in both cases the applicant proceeded in accordance with the same principles and granted allowances which were approximately the same, although if anything larger in the case of the German users.

Before we examine these arguments it is useful to make it clear that the complaint of discrimination is not based on discounts allowed by the applicant which are not enumerated in Article 2(f) of Decision No 2/54. Even the Commission takes the view that the discounts in the list in Decision No 2/54 are not exhaustively enumerated. Similarly the issue is not whether within the group of customers benefiting from the conjunctural rebates there are unjustified variations of the premiums (for example if they are checked against the quantities purchased) although during the procedure the Commission indicated in reliance on the annex to the contested decision that this might be the case, a view which the applicant opposed by attempting to establish the existence of categories of comparable transactions. We are rather only concerned with the question whether the fact that the applicant only allowed a conjunctural dis-

count to some but not all of its customers amounts to discrimination.

When the applicant points out in this connexion—and this is its first argument—that too much weight must not be attached to the *designation* of the discounts and that it is on the contrary the *final price*, after deducting all discounts, which was to be considered, it is difficult to follow this particular argument. We find in fact in the exhibits annexed to the Commission's rejoinder, the correctness of which has not been challenged by the applicant, that the agreements with the sixteen French buyers, which must now be considered, distinguish very carefully between loyalty (or quantity) discounts, which were a fixed and unchanging percentage, and the criticized conjunctural discounts. The latter were fixed periodically (usually every quarter) having regard to market conditions, that is to say, according to the conditions of sale applied by other producers. According to the market situation there could either be a reduction of or an increase in the price. It was in addition—at all events in some agreements—provided that the determination of these variations was to lead to an amendment of the price list, which also reflects market trends, apparently to avoid taking market conditions into consideration twice. In fact there were—as we learn from the annex to the contested decision—frequent, sometimes monthly fluctuations in the amount of the conjunctural premium, which, even though the percentages varied for the different undertakings which benefited, show on the whole the same trend. This finding and the fact that in some agreements discounts were expressly fixed without taking into account current economic trends, only allows the conclusion to be drawn that the designation of the premium corresponds to its actual function, and that we are concerned with a reduction which was allowed by reason of market conditions and current economic trends. Since on the other hand, as the Commission rightly emphasizes, a change in market conditions and current economic trends is a *general phenomenon*, which can be presumed to have affected all the applicant's buyers in the same way, the fact that the discount for current trends was given to certain customers must be regarded as discriminatory in the absence of evidence that the customers who benefited were in a special situation precisely because of the development of current economic trends. However the applicant never attempted to produce such evidence but sought instead to justify its conduct solely with reference to its long-standing relations with its customers, the quantities purchased, the guarantee to satisfy a proportion of its customers' requirements and technical cooperation. As it did not do so, its attempt to reject the allegation of discrimination must be regarded as unsuccessful.

With regard to the second argument with which we are concerned alleging that the High Authority's appraisal was discriminatory the first question is whether the applicant is arguing that it has cause for complaint and whether it has an interest in making this complaint. According to the state of affairs as presented to us the applicant would have to expect that the acceptance of its argument would immediately lead to the conclusion that it has also applied discriminatory practices in its transactions with German customers. This would certainly not be a good way of removing the sanction but would only aggravate it, because the amount of the fine imposed under Article 64 of the Treaty is proportionate to the volume of the sales effected in disregard thereof.

If however this consideration is left out of account for the moment and it is in addition admitted that there has been discrimination even of the kind alleged by the applicant, the following considerations apply.

In the light of what we have learnt from the documents produced during the procedure it must be made clear that the applicant, when dealing with its German customers, did not adopt the same kind of agreement as it did in its dealings with the French buyers. If in the latter agreements—as I have already mentioned—a clear distinction is drawn between loyalty and quantity discounts on the one hand and conjunctural rebates on the other, the transactions entered into with German customers consisted solely of an exchange of letters, the more recent of which, to be precise those exchanged with Volkswagen and Opel,

were produced during the oral procedure. There was apparently in addition similar correspondence with Daimler-Benz. In these letters reference is first made to the length and extent of the business relations and the technical cooperation which had taken place. There follows an agreement that prices will be periodically fixed after taking account of the known market conditions, that is to say, after taking into account the conditions of sale applied by other producers in the Community, but in particular by aligning them on the prices applied by undertakings in third countries. After the High Authority in its first letter to the applicant of 10 March 1967 had stated in this connexion that it had reason to believe discriminatory practices were being applied, the applicant in its reply of 11 April 1967 justified them by referring to the size of the deliveries to the German buyers, the long-standing nature of the business relations and the technical cooperation. It would appear that its main reason for doing so was that it wished to avoid being accused of failing to give the prescribed notice in respect of the alignment of prices.

Consequently it can, as the Commission has stated, in fact be assumed, that with regard to the German buyers a situation had arisen which could be interpreted in more than one way. However, having regard to this ambiguity the High Authority did not believe it could adduce evidence of prohibited practices and therefore came to the conclusion that it had to limit its complaint —in application of the principle *in dubio pro reo*—to a finding of infringement of the provisions relating to publication. It is therefore the distinction from the point of view of procedure which has led to a difference of evaluation. On the other hand there can be no question of any discrimination (even if this word is given its widest meaning), not least because in fact the evaluation, which has been described, of the transactions entered into with German customers does not mean that there was a *definite* probability that sanctions in a positive sense would be imposed in respect thereof and because the possibility cannot be ruled out that the applicant will be able to guarantee similar advantages for French buyers in a comparable situation by means of an effective modification of the system it has adopted in France.

Bearing in mind all these factors and now that my examination of this complaint has been concluded, it must therefore be stated that the arguments put forward by the applicant are not capable of defeating the complaint that by granting conjunctural rebates it has infringed the prohibition against discrimination.

4. Inadequacy of the statement of the reasons upon which the decision is based

Finally the applicant submits that in many respects the statement of the reasons upon which the contested decision is based is inadequate and that this is equivalent to the absence of such a statement and so justifies annulment. It argues that the decision does not state why the High Authority, contrary to the applicant's claim, has not acknowledged the exceptional character of the transactions which it has considered. It also asserts that the statement of reasons does not make it clear why the reduction granted to the German buyers but not the premiums granted to the French customers are regarded as being justified. Finally it claims that the decision does not explain the distinction between the amounts of the variations which are justified and those which are not, which are listed in the annex to the decision.

A preliminary examination of the decision imposing the fine certainly leads to the conclusion that these arguments are by no means unimpressive, if we bear in mind the fact that it is drawn up in an exceedingly concise form. In fact the statement of reasons for a decision dealing with no less than twenty-two buyers of various kinds only covers altogether four pages. However the decision cannot be judged by reference to a quantitative criterion of this nature. Let us therefore examine in greater detail the criticisms made by the applicant.

The Commission's answer to the first argument (it has to deal with the applicant's view that its transactions have exceptional features) is to refer in particular to the existing case-law of the Court. According to Case 2/56 (Rec. 1957, p. 37), it is un-

necessary in the statement of reasons for the High Authority to 'discuss all the possible objections which might be raised against the decision'. Further, the High Authority (Case 21/64 [1965] E.C.R. 188) when imposing a pecuniary sanction does not have 'to explain the reasons why it has not acted on ... the comments submitted by the parties concerned'. There is no objection in principle to these rules. Without casting any doubt on the principles laid down in the case-law the only question that might be asked is whether in fact it is sufficient in a case such as this, where a fine has been imposed, simply to refer to the case-law or whether it is not preferable to proceed on the basis that the authority imposing a sanction is under a duty to deal thoroughly with any serious counter-allegations made by an interested party which amount to a justification of its conduct and to define its position to them in the statement of the reasons upon which the decision is based. If the existence of such a duty has to be accepted the present case does not in fact give a wholly satisfactory picture. As we know, the applicant's argument that the combination of a number of factors for the justification of loyalty and quantity discounts could render a transaction exceptional has been rejected by *implication* only, and in the case of technical cooperation, which is also a factor capable of conferring an exceptional character on a business transaction, the High Authority, in spite of the many forms of cooperation which we have come across in this case, came to the conclusion that in general they were in fact only a method of adapting products to the needs of the customers, which did not go beyond current practices. Since however, on the other hand, the determinative considerations of the High Authority, even if they are concisely worded, can be inferred from the statement of reasons upon which the decision is based and since the applicant after repeated written and oral communications with representatives of the High Authority had been made aware of its point of view, so that its right to defend its interests was not prejudiced, the objections which have been raised in this case should be rejected. I should not in any case like to assert that the statement of the reasons upon which the decision is based is so inadequate that it could justify the annulment of the decision.

The same view applies to the two other points.

With regard to the different treatment of the German and French buyers it can be seen from the decision that in the case of the former the applicant's statement, that is to say, its reference to the duration and extent of its business relations, was accepted and that the existence of a special situation was acknowledged. In the case of the latter however the decisive feature was that measured against a general phenomenon, that is to say, the short-term economic situation, premiums were granted which were denied to all other buyers who were presumably all similarly affected, and it is precisely this which was held to be discriminatory.

Finally, with regard to the amounts of the justified and unjustified variations from the price list as set out in the annex to the decision, it must be said that some idea of the way they were calculated and distinguished can easily be obtained from the preceding recitals. As they moreover only serve to determine under Article 64 of the Treaty the upper limit of the permissible fines, in other words as they are only relevant as a guideline for calculating the amount of the fine, and as the fine which was in fact imposed was obviously far less than the permitted maximum, the High Authority did not have to explain in detail its method of calculation.

The arguments put forward by the applicant concerning the obligation to state the reasons upon which the decision was based cannot therefore, taken as a whole, lead to the annulment of the contested decision.

5. Summary

In spite of certain objections relating to the scope of the statement of the reasons upon which the decision is based and relating to the degree of care shown by the

High Authority in its explanation of the facts before the decision was issued, it seems that the application, by reason of the arguments put forward during the proceedings, which enabled an adequate examination of the case to be carried out in accordance with the principles to be followed by a court having unlimited jurisdiction ('pleine juridiction'), appears to be unfounded. As, moreover, the fine which has been imposed reveals a moderate assessment of the infringements of the price provisions of the Treaty the application must be dismissed with costs.