3. The concept of *force majeure* must be defined in each case in terms of the legal framework within which its application is invoked.

4. It is clear from Article 60 (2) (b) of the ECSC Treaty that alignment constitutes an exception to the principle concerning list prices and that the offer made to the customer must be aligned on a price list based on another point which secures the buyer more advantageous terms. Alignment is accordingly prohibited between undertakings quoting on the basis of the same basing points. That prohibition, which has regard for the general system of the Treaty, is intended to ensure compliance with the obligation to make public price lists and conditions of sale and to maintain the transparency of the market.

5. In fixing a fine pursuant to Article 64 of the ECSC Treaty the Commission and the Court must take account of the seriousness of the infringement.

   To that end, in the case of an infringement of the obligation to publish price lists, account must be taken, where appropriate, of the fact that in times of disturbance, entailing rapid changes in prices, the publication of price lists cannot so effectively ensure the transparency of the market as in a period of relative stability, so that the damage caused by the infringement appears less serious than if it had taken place in less unsettled times.

In Case 149/78

METALLURGICA LUCIANO RUMI, a limited liability company, having its registered office at 2 Via Dei Caniana, Bergamo, represented by Carlo Rumi, its Chairman and Managing Director, assisted by Giacomo Fustinoni, of the Bergamo Bar, with an address for service in Luxembourg at the Chambers of Fernand Faber, 15 Boulevard Roosevelt,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Alberto Prozzillo, acting as Agent, assisted by Sergio Fabro, with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment or in the alternative the amendment of the individual decision adopted on 30 May 1978 by the Commission of the European Communities, hereinafter referred to as "the Commission", imposing a pecuniary sanction on the applicant on the ground of infringements of Article 60 of the ECSC Treaty and of the decisions adopted in implementation thereof by the Commission,

THE COURT

composed of: J. Mertens de Wilmars, President of the First Chamber, acting as President, Lord Mackenzie Stuart (President of the Second Chamber), P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges

Advocate General: F. Capotorti
Registrar: J. A. Pompe, Assistant Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

From 15 to 21 June 1977 the Commission carried out checks on Metallurgica Luciano Rumi S.p.A., hereinafter referred to as "Rumi". The Commission informed Rumi by registered letter of 20 September 1977 that it considered that certain sales of concrete reinforcement bars in France and in the Federal Republic of Germany "do not appear to have been effected in accordance with the provisions in force in the common market". The inspector had found that between 15 April and 5 May 1977 (the date when the minimum prices fixed in Commission Decision No 962/77/ECSC of 4 May 1977 fixing minimum prices for certain concrete reinforcement bars (Official Journal 1977, L 114, p. 1) became applicable) large quantities of reinforcement bars had been sold and that the contracts for sale, which were concluded at fixed prices, were not in accordance with the prices stated in Rumi's price list which was in force at that time. The inspector found in particular that the quotations at less than list prices related to sales in France. The group of contracts in question is mentioned in the registered letter of 20 September 1977 and appears as an annex to the Commission's defence.

In accordance with Article 36 of the ECSC Treaty Rumi submitted written observations dated 15 October 1977 which were supplemented by statements

made at a hearing chaired by Mr Chuffart in Brussels on 12 April 1978 and by observations submitted by Telex dated 17 April 1978. In its defence Rumi relied upon three arguments:

First, it stated that at the time of the sales in question (15 April to 5 May 1977) its price list dated 6 February 1976 was no longer in accordance with the situation on the market since the crisis had caused a sharp fall in steel prices. Furthermore, in view of competition it could no longer maintain a price for "more than two or three days in succession"; thus it refrained from drawing up a new price list and therefore maintains that it did not quote prices lower than those on that list.

Secondly, it considered that there was no infringement of Article 60 of the ECSC Treaty since the prices charged were arrived at by aligning them on the price lists of other producers in the Community (the undertakings Feralpi and IRO) for comparable transactions.

Thirdly, it explained that as the reinforcement bars sold to a single customer in France and to three customers in the Federal Republic of Germany have particular characteristics, there can be no question of discrimination.

However, since the Commission considered that the facts were not in dispute and that it could not accept the arguments advanced in justification by the applicant because, on the one hand, the former price list remained in force since it had not been modified and, on the other, the alleged alignment should be considered merely as a retrospective justification, ordered Rumi, by a decision of 30 May 1978 which was notified on 31 May 1978, to pay a fine amounting to 65 135 units of account, corresponding to a sum of Lit 68 800 040 within a period of 30 days from notification of the said decision.

That is the decision against which the applicant submitted the present application, which was received at the Court Registry on 22 June 1978.

The procedure followed the normal course. The Court, having heard the views of the Advocate General and the report of the Judge-Rapporteur, refused the applicant's offer to provide evidence in connexion with an inquiry and decided to open the oral procedure without any preliminary inquiry.

II — Conclusions of the parties

The *applicant* claimed that the Court should:

" Principally, declare null and devoid of legal effect the contested decision of the Commission of the European Communities of 30 May 1978;

— Alternatively, reduce the amount of the fine imposed on the applicant;

— In any event, order the Commission of the European Communities to bear the costs and expenses of the present proceedings."

In its application it further claimed that the Court should:

"In the event of an inquiry, admit, if necessary, the evidence of witnesses as to the following circumstances:

(1) That the reinforcement bars which the undertaking Metallurgica Rumi produces for its sole French customer possess specific technical and mechanical characteristics, in order to satisfy the requirements of the legislation in force in France and the stringent checks, including those of the customs authorities, to which they are at all times subject;

(2) That the product in question is a steel displaying particular technical characteristics which, precisely because of its specific nature, cannot

be sold in any other State of the Community;

(3) That Metallurgica Luciano Rumi S.p.A. has and has always had only one customer in France, namely the customer with whom the undertaking concluded the contracts of sale to which objection has been raised by the Commission;

(4) That Metallurgica Luciano Rumi S.p.A. requested its own competitors to notify to it the bases of their price lists and that it drew up and agreed, in accordance with that information, the prices which were stated in the contracts of sale concluded between 15 April 1977 and 5 May 1977 and which were noted by the Commission of the European Communities in the notification of the charges in question.

We expressly reserve the right to supplement the conclusions in relation to an inquiry and we now submit as a witness Mr Franco Novara, 2 Via Dei Caniana, Bergamo, of Metallurgica Luciano Rumi S.p.A."

In its reply it altered the wording of its conclusions regarding the inquiry:

"A — Admit the evidence of witnesses as to the following circumstances:

(1) - (2) That the Fe E 45 reinforcement bar with improved adhesion is produced by Metallurgica Luciano Rumi exclusively for the French market and that this type of bar has never been sold in other countries of the European Community;

(3) That Metallurgica Luciano Rumi S.p.A. has and always has had only one customer in France, namely the Descours & Cabaud concern with whom it concluded the contract of sale to which objection has been raised by the Commission;

(4) That Metallurgica Luciano Rumi S.p.A. requested its own competitors to notify to it the bases of their price lists and that it drew up and agreed, in accordance with that information, the prices which were stipulated in the contracts of sale concluded between 15 April 1977 and 5 May 1977 and which were noted by the Commission of the European Communities in the notification of the charges in question.

We submit as a witness Mr Franco Novara, sales manager of S.p.A. Metallurgica Luciano Rumi, 2 Via Dei Caniana, Bergamo.

B — Order an expert opinion, requiring the experts chosen to describe the Fe E 45 reinforcement bar produced by Metallurgica Luciano Rumi for the French market and to clarify the characteristics, in particular the geometrical characteristics, which distinguish it from the other bars which Metallurgica Luciano Rumi produces for the other Member States of the European Community."

The *Commission* contended that the Court should:

"(a) Dismiss the application;

(b) Order the applicant to pay the costs."

III — Summary of the submissions and arguments of the parties

First of all the parties made three submissions as to law and then set out detailed remarks on three particular points.

(A) Submissions as to law

First submission: manifest failure to observe the Treaty, in particular Article 60 (2) (a); distortion of the facts; lack of a statement of reasons concerning a decisive point in the dispute

The *applicant* recalls that Article 60 of the ECSC Treaty applies only to comparable transactions, as is made clear by the general structure of the article and by the obligation to publish prices. The applicant produces a special type of reinforcement bar to the specification of its sole French customer.

Thus "it is automatically necessary to rule out the argument that comparable transactions can exist in respect of that special product, which consequently is not covered by the obligation to publish prices since it cannot form the subject-matter of comparable transactions". Furthermore, the applicant relies upon Commission Decision No 72/440/ECSC of 22 December 1972 (Official Journal, English Special Edition 1972 (30-31 December), p. 19), according to which Article 3 (1) of Decision No 30-53 states that "Transactions shall be considered comparable within the meaning of Article 60 (1) if

(a) they are concluded with purchasers, — who compete with one another . . .".

The applicant maintains that it has only one customer and considers accordingly that there is no competition between purchasers. It concludes first "that with regard at any event to the orders G 20 RM of 28 April 1977 and G 21 RM of 2 May 1977 there was no breach of the obligation to publish prices nor, in consequence, was there any under-pricing in relation to the binding price list, precisely because there was no obligation to publish"; and secondly that, since the Commission failed to refer to these facts or "to their legal relevance", "the contested decision also appears to be vitiated by a lack of a statement of reasons".

The *Commission* in its defence, whilst concurring in the point that "the obligation to accord equal treatment in fact applies only to comparable transactions and not to non-comparable transaction", recalls the definition given by the High Authority in Article 1 of Decision No 1-54 (Official Journal, English Special Edition 1952-1958, p. 14). Such non-comparable transactions are contracts which do "not fall within the categories of transactions covered by [the] price list"; they are accordingly "anomalous contracts" which constitute exceptional features in the commercial operations of the undertaking.

The Commission considers that in the present case an "absolutely normal situation" is concerned: reinforcement bars fulfil the same functions in all countries and are identical in all cases; the differences arise solely from "the disparity between national technical standards which do not affect the essential characteristics of the product but only unimportant details". In order to substantiate its argument the Commission considers the various standards in force in France, Italy and Germany, at least with regard to plain reinforcement bars Fe B 22 K and Fe B 32 K and ribbed bars Fe E 45, and finds that they are almost identical. Furthermore, as the prices of those products are contained in Rumi's price list the Commission maintains that "it thus appears clearly that the product sold in France is identical with that sold on the Italian market".

The Commission does not accept the argument concerning the single customer since it considers that, even if the orders originated solely from that undertaking, the products were invoiced and sent to it

and to many other undertakings; as evidence of this it refers to the list of invoices annexed to the decision of the Comission.

In conclusion it appears to the Commission that a more detailed examination would serve no purpose since the material sold appeared on the price list and "it was a perfectly ordinary material".

Second submission: manifest failure to observe the Treaty, in particular Article 60 (2) (a); distortion of the facts, failure to have regard to a circumstance excluding liability and constituting *force majeure;* misuse of powers

The applicant returns to the argument already set out in its observations concerning Article 36 of the ECSC Treaty, to the effect that its own price list had been rendered out of date by the situation on the market. Consequently, it considers that the sole complaint which can be levelled against it is that of failure to publish the amendment to its price list, which complaint cannot be sustained since the crisis prevailing at the time prevented, according to the applicant, the maintenance of a price for more than two or three days at a time, thereby constituting a case of *force majeure;* accordingly the applicant's liability is excluded. In face of the Commission's refusal to accept that argument, Rumi recalls that the High Authority and the Commission have "on a number of occasions authorized a flexible interpretation of the obligation to publish prices" and that "in exceptional circumstances they have formally agreed to the possibility of quoting prices lower by a specified percentage than the list prices without requiring any amendment to the price list itself".

The applicant considers that the situation in 1977 was of an exceptional nature and maintains that the case of *force majeure* must be taken into consideration, constituting in the present instance "a case where a rule has not been infringed".

The applicant recalls that it has advanced that second submission only in case the first should be rejected by the Court and then endeavours to show that it had no intention of committing fraud, maintaining that it would have been very easy for it to comply with the requirement as to publication of prices by suspending conclusion of the contract for two days in order to amend its price list and concludes that "a self-righteous attitude of formal respect for the rule" would have shielded it from that "heavy" pecuniary sanction. It also relies in its defence on "the climate of tolerance" which had existed for years concerning the requirement as to publication of prices. Finally, it maintains that that sanction is too heavy, having regard to what it considers to be the purely formal nature of the infringement; furthermore, that sanction has caused it non-material damage, "by creating the impression throughout the entire ECSC", through publicity in the press, that Rumi had been guilty of a serious violation of the principles of the ECSC. For those reasons the applicant considers that the decision in question "appears to be *ultra vires*". The Commission intended to penalize the conclusion by Rumi of important contracts at prices lower than the minimum prices fixed by the Commission in its above-mentioned Decision No 962/77/ECSC, whereas Rumi concluded contracts fully in accordance with the law before 5 May 1977.

In conclusion, the applicant requests the Court "if, as appears improbable to it", the Court does not annul the contested decision, at least to amend it "by reducing the penalty imposed to a

symbolic amount, having regard to the trifling nature of the infringement committed".

The *Commission* first disputes the existence in the common market of a crisis capable of constituting circumstances of *force majeure* such as to preclude liability. It considers, in reliance on the decisions of the Court of Justice (judgment of 12 July 1962 in Case 16/61 *Acciaierie Ferriere e Fonderie di Modena* v *High Authority* [1962] ECR 289) that the obligation to draw up a price list and to notify it to the Commission could not have "entailed exceptional duties" and accordingly that the hypothesis of *force majeure* must be ruled out.

Secondly, the defendant maintains that what is involved here is not a merely formal infringement but "on the contrary, an infringement of substantive law since, if price lists are not published the market cannot be transparent, with all that that entails (infringement of the principle of non-discrimination, inability of the Commission's departments to supervise developments on the market, and so on)".

Third submission; manifest failure to observe the Treaty, in particular Article 60 (2) (b); distortion of the facts; misuse of powers

The *applicant* states first of all that it puts forward this third submission in the alternative. It repeats the argument concerning alignment which it has set out above in the observations concerning Article 36 of the ECSC Treaty. It considers, on the one hand, that it provided technical evidence concerning the alignments effected and, on the other, that that evidence was accepted by the Commission despite the fact that the latter did not concede the legal significance of the facts set out.

When raising the objection in the course of the hearing in Brussels on 14 April 1978 Rumi stated that "the price finally agreed was higher than the delivery price charged by the competitor on whom we aligned ourselves".

The Commission, without challenging the facts, dismissed the argument on the pretext that it was a justification *ex post facto* and accordingly inadmissible. The applicant maintains that that attitude is unjustified because in the present case "there was in fact a careful study of the market leading to the calculation of the selling prices which were stipulated in the contracts in dispute". It also maintains that the fact that it did not raise the matter of the alignment at the time of the investigation "is irrelevant" since "it was not the appropriate time", and that on the contrary it put forward the defence relating to the alignment as soon as the charge was set out in the registered letter of 20 September 1977. Finally, it puts forward its good faith with regard to the failure to comply with the obligation to mention the alignments "in its business books and accounting documents" on the ground that it was the first time that it had charged prices lower than those on its price list by aligning itself on a competitor. In any event the alignment, in real terms, took place when the contract was concluded.

Thus, according to the applicant, since the conditions laid down concerning alignment were complied with — a fact which is not disputed by the Commission — and since the alignment was effected in good time, the charge of quoting prices lower than those on its price list is unfounded and "the whole matter now amounts to a purely formal charge", for which no provision is made either in the ECSC Treaty or in the relevant implementing decisions. The applicant concludes by recalling its arguments set out in the foregoing submission,

requesting that the decision in question should at least be amended for the purpose of reducing the fine.

The *Commission* maintains its refusal to accept the arguments of the applicant. It recalls that at the time of the investigation no observation had been submitted in that connexion, that it was only after the registered letter of 20 September 1977 had been sent that Rumi mentioned the alignment and that the details were only provided in the Telex message of 17 April 1978 to supplement the information supplied at the hearing in Brussels on 12 April 1978. It considers that "for that reason no credibility or relevance may be attributed to the statements of the applicant". In fact the alignment must be shown in the accounting documents which undertakings are obliged to keep pursuant to Decision No 14-64 of the High Authority (Official Journal, English Special Edition 1963-1964, p. 162), which provides in Article 1 that:

"Undertakings shall keep, and make available to the officials or agents of the High Authority carrying out checks or verifications as regards prices, business books and accounting documents including at least the following:

...

price and all other conditions of sale."

The Commission considers it clear that the method of price-formation, and thus the alignment itself, must emerge from accounting documents and not from a justification *ex post facto*, which would furthermore render nugatory the decisions of the Court based on the above-mentioned judgment in Case 16/61 by permitting an undertaking to justify an alignment *ex post facto* by the evidence of witnesses.

The Commission also opposes the claim for amendment, considering that it imposed a moderate penalty since the fine is equal to 15 % of the amount of the discounts over the list prices, whereas under Article 64 of the ECSC Treaty it may impose fines amounting to as much as twice the value of irregular sales. It also considers that it has already taken sufficient account of the nature and seriousness of the infringement. Finally, with regard to the inquiry requested by the applicant, the Commission observes that the characteristics of the reinforcement bars cannot be established by witnesses, only by an expert opinion. With regard to the evidence of the alignment it considers in the first place that the sole witness is Rumi's sales manager and that it doubts whether he constitutes a reliable witness, and above all it raises the problem of "the admissibility of testimony at variance with the accounting documents".

(B) Specific points

First point: the special nature of the Fe E 45 reinforcement bar produced by Rumi for the French market

In its reply the *applicant* disputes the Commission's statement that the reinforcement bar sold in France does not differ from that sold in Italy. In this connexion it produces Decision No 21 of 18 February 1975 published in the Bulletin Officiel du Ministère de l'Équipement [Official Bulletin of the French Ministry of Supply] (lodged as an annex) which "approves the Rumi Fe E 45 reinforcement bar and allocates to it identification card No 25 a". The applicant considers that this is sufficient to show that the reinforcement bar produced for the French market differs

from the kinds of bar produced for the other markets of the Community.

Furthermore, it maintains its arguments which it considers may be established by testimony (in this connexion it refers to p. 4 of its submissions).

The *Commission*, in its rejoinder, does not recognize the applicant's statements as having "any decisive relevance". First of all, with regard to the evidence of witnesses, it has never disputed that the Fe E 45 bar is manufactured by Rumi for French customers or that it is not sold in other countries of the Community. Nevertheless, it considers that "the absence of sales of a given product in certain countries by no means indicates that that product is exceptional, merely that there is no demand for it on the market".

With regard to the documentary evidence (the decision of 18 February 1975 lodged by Rumi) this merely means, according to the French provisions, that that bar may be sold in France; it by no means proves that Rumi alone is authorized to sell it: the Commission observes in this connexion that "various Italian undertakings are authorized to sell reinforcement bars with improved adhesion in France". Nor, furthermore, does that document constitute proof of the exceptional and "non-comparable" character of the product.

The Commission returns to the substance of the dispute, observing that if, as the applicant maintains, the transactions in question were not comparable (or anomalous) there would be no obligation concerning publicity. However, Rumi published a list of prices in which bar Fe E 45 appears and "it is precisely that quotation at less than the list price which was penalized by a fine".

Finally, the Commission emphasizes "the inconsistency" of Rumi's arguments; it relies first of all in its defence on the argument that the transaction is anomalous, and then, in order to justify the sale at less than the list price, on the alignment on the price of a competitor who *"does not produce the bar in question"* but a different bar. This in fact establishes that the transaction in question was comparable since alignment can be effected only in respect of comparable transactions. The Commission concludes that there "is no occasion to undertake technical examinations in greater detail since the publication of the price in the price list of the undertaking itself takes precedence over all other considerations".

Second Point: the sole customer in France

The *applicant* reaffirms that it has indeed only one customer in France: the Descours & Cabaud concern. That concern has many warehouses in France, which is the reason for the different names on the invoices. Nevertheless Rumi has only concluded a single contract with Descours & Cabaud, merely agreeing to make separate deliveries to the various warehouses. The applicant maintains that the inspector could have established this.

The *Commission*, whilst concurring in those arguments in so far as the order placed by Descours & Cabaud is concerned, observes that Inspector Lalitte, in his report, also noted that the undertaking Ferromontan, 20 Via Valtellina, Milan, had ordered the same product from Rumi in order to market it in France. Accordingly, even if Descours & Cabaud is Rumi's main customer it is not its only customer in France.

Third point: the admissibility of evidence concerning alignment

The *applicant* maintains that it was its intention to put forward only one witness because he, as sales manager, was best suited to recall the circumstances in question since he had been personally concerned with them. It objects to what it terms the "unpleasant insinuation" of the Commission which cast doubt on the status of such testimony and stated that "that would mean an end to all supervision of prices", observing that there is no rule of procedure which prohibits the sales manager of an undertaking from giving evidence in an action to which his undertaking is a party and that the honesty of Mr Franco Novara — who has reached "the highest level in his profession" — "cannot be disregarded" on the pretext that he is to give evidence in proceedings to which his undertaking is a party.

The *Commission* points out that it is not the person of the witness which is at issue "but the admissibility of evidence concerning a factor in the formation of prices, such as alignment, which must, on the contrary, be established on the basis of accounting documents". That is why it considers that such evidence cannot be admitted.

IV — Oral procedure

In the course of the oral procedure the parties adduced the following further particulars:

At the suggestion of the Judge-Rapporteur and of the Advocate General the Commission was requested to lodge, on the one hand, the administrative file concerning the case so that the Court might acquaint itself with all the facts and, on the other, a table of the price lists published by the other steel undertakings in order that the Court might acquaint itself with the difficulties encountered by the undertakings in drawing up their price lists and the opportunities for Rumi to align itself on Feralpi and IRO.

The Commission communicated those documents to *Rumi* which made no comment on the administrative file but observed that in the table of price lists sent by the Commission there is very little information on producers of reinforcement bars, and, indeed, amongst such producers, there are very few price lists from undertakings specializing in the production of reinforcement bars; most of the price-lists were sent by large undertakings "which had seized on the production of reinforcement bars in order to compensate for the temporary fall in demand for other steel products".

What is meant by "alignment" was also debated. The *Commission* made the following points:

Even if the price lists of Feralpi and of IRO existed, and even if the prices charged by Rumi corresponded to those lists, "that fact would not be relevant" since, according to Article 60 of the ECSC Treaty, the alignment must "relate to the location of the basing point in relation to which the list was drawn up". If prices are aligned on undertakings situated in Bergamo, like Feralpi and IRO, an aligned price may be charged only in that area and not in France or Germany. In fact, if this is not the case, what occurs is an alignment on the actual price, which is contrary to the system prescribed by the Treaty: the result is Rumi's practice, of "an alignment on an alignment on an alignment and consequently an end to transparency of prices and to orderly prices".

The Commission, in transmitting the documents to the Court, submitted a prefatory note in which it recalls first of all that publicity "is not a merely formal requirement" but is indispensable "in order to ensure the transparency of the market and to maintain competition amongst undertakings".

It then turns to the definition of alignment, confirming what it stated at the hearing, urging that "alignment must be based on the prices on the list and not on an offer below such prices. It is impossible to align prices on an alignment". If such alignment had actually taken place it "would have been quite illegal and contrary to the principles of economics". It adds that in addition the calculation made concerning the alignment should have appeared in the accounting documents. Finally, the alignment was also illegal in the present case because the type Fe E 45 does not appear in the price lists of Feralpi and IRO.

Rumi, in reply to those points made by the Commission, maintains that, in accordance with Decision No 30-53, "the decisive point is that the contractual price should be higher than the price 'free at destination' of the competitor upon whose price list the alignment is effected "and that this is precisely what Rumi was careful to ensure.

With regard to the fact that the price lists of Feralpi and IRO do not contain bars of the type Fe E 45, Rumi considers that the products offered by those two undertakings are nevertheless comparable to the reinforcement bar Fe E 45 since their characteristics and use are in fact "basically similar".

The Advocate General delivered his opinion at the hearing on 21 June 1979.

Decision

1 On 22 June 1978 Metallurgica Luciano Rumi S.p.A., hereinafter referred to as "Rumi", lodged at the Court Registry an action subject to the Court's unlimited jurisdiction in pursuance of Article 36 of the ECSC Treaty for the annulment or in the alternative the amendment of the individual decision of the Commission of the European Communities of 30 May 1978 ordering it to pay a fine of 65 135 units of account, corresponding to a sum of Lit 68 840 000 for having breached Article 60 of the Treaty and its implementing decisions.

2 That decision is based upon the fact, which is not in dispute, that Rumi sold between 15 April 1977 and 5 May 1977 (the date of the entry into force of Decision No 962/77/ECSC of 4 May 1977 (Official Journal 1977, L 114,

p. 1) fixing minimum prices for certain concrete reinforcement bars) large quantities of reinforcement bars in France to be delivered until the second quarter of 1978 at fixed prices not in accordance with the prices in its price list published on 6 February 1976 which was still in force throughout the period when those sales took place.

3 According to the decision the irregular sales amounted to Lit 1 678 688 435.29 for a total of 9 341.929 tonnes.

4 The applicant relies on three submissions. By the principal of these it endeavours to show that it was not in breach of its obligation, pursuant to Article 60 (2) (a) of the ECSC Treaty, to make public its price lists and conditions of sale within the common market because, having regard to the situation on the market in reinforcement bars, it may claim exemption in view of the existence of circumstances of *force majeure*. It also complains that there has been misuse of powers by the Commission.

5 The applicant claims that when the contested sales were effected it was clear that its price list, published on 6 February 1976, was no longer in accordance with the situation on the market and could no longer constitute a point of reference. Moreover, it explains that the crisis in the sector and the competition made it impossible to maintain prices for more than two or three successive days so that it found itself, owing to the swift developments on the market, "in circumstances of *force majeure*" which prevented it from bringing its price list up to date.

6 According to the applicant, since the Commission failed to take account of that situation, it has adopted too rigid an interpretation of the Treaty, from which it has itself departed on several occasions in the past, conceding the right to make quotations at less than list prices within the limits of a given percentage without the need to modify the price list itself where there are circumstances of an exceptional nature, and it is that situation which constitutes a case of *force majeure*.

7 Furthermore, for an infringement which Rumi describes as trifling and of a purely formal nature, consisting solely in its failure to inform the Commission of the amendments made to its price list, the Commission imposed upon it a heavy fine in excess of those imposed at the same time on other undertakings which were guilty of infringements of a substantive

nature in failing to comply with the system of minimum prices prescribed by Decision No 962/77. Rumi maintains that, considered from this point of view, the decision appears to be vitiated by misuse of powers.

8 In view of those objections it is necessary to recall the function of the publication of prices, which constitutes one of the essential elements, in matters of competition between undertakings and of transparency of the market, of the ECSC Treaty.

9 It derives from Article 60 (2) (a) which requires the price lists and conditions of sale applied by undertakings within the common market to be made public.

10 The purpose of that compulsory publication is (1) as far as possible to prevent prohibited practices (2) to enable purchasers to learn exactly what prices will be charged and be able themselves to check whether any discrimination has taken place and (3) to enable undertakings to have an accurate knowledge of the prices of their competitors so as to enable them to align their prices.

11 The objectives of publication show that failure to publish constitutes an infringement of substantive law since, if price lists are not made public, the market cannot be transparent, which in turn leads to the following consequences: violation of the principle of non-discrimination and the inability of the departments of the Commission to supervise developments on the market, prices and compliance with the arrangements regarding competition.

12 Rumi could not have been unaware of these principles, which the High Authority recalled in its circulars of 12 December 1956, 19 December 1960 and of 20 December 1962 and which have been upheld by the Court on a number of occasions (judgment of 21 December 1954 in Case 1/54, *Government of the French Republic* v *High Authority* [1954] ECR 9 *et seq.*; judgment of 12 July 1962 in Case 16/61 *Acciaierie Ferriere e Fonderie di Modena* v *High Authority* [1962] ECR 289).

13 Likewise it could not have been unaware that Article 1 of Decision No 2-54 of the High Authority of 7 January 1954 (Official Journal, English Special

Edition 1952-1958, p. 15) which authorized maximum mean-price variations of 2.5% in the face of minor and temporary fluctuations in the market was annulled by the judgment of 21 December 1954 (Case 1/54, *Government of the French Republic* v *High Authority*, cited above).

14 Thus it appears that the principle of compulsory publication embodied in the Treaty is of a general nature and in no way depends upon the short-term economic situation and that the applicant was obliged to notify the Commission of any amendment to its price list, subject to circumstances of *force majeure*, which concept must be defined in terms of the legal framework within which its application is invoked and which, in the present case, involved the virtual impossibility of including in a price list changes in prices which had occurred.

15 It was established during the oral procedure that the other undertakings had, at more or less regular intervals, published their price lists without difficulty, which shows that a diligent and prudent undertaking could comply without undue sacrifice with the obligation concerning publication, which is a basic principle of the system established by the ECSC Treaty.

16 Furthermore, should further consideration of this aspect be thought necessary, it must be emphasized that the applicant, far from demonstrating that it was impossible for it to comply with the obligation to publish its price lists, has even conceded that it could have complied with that obligation by postponing conclusion of the contract for two days, had it considered that that was necessary to avoid a breach of Community law.

17 With regard to the second head of that principal submission the applicant complains that the Commission has extended the criteria set out in Decision No 962/77 to a commercial transaction prior to the entry into force of that decision, thereby misusing its powers.

18 However, the Commission did not refer to Decision No 962/77 either during the administrative procedure or in the course of the action. The fine was imposed for infringement of Article 60 of the Treaty and the amount thereof is within the limits laid down by Article 64 of the ECSC Treaty.

19 It must be concluded from the foregoing that the principal submission as a whole is not well-founded.

20 In a further submission the applicant complains that the Commission manifestly failed to observe the Treaty, in particular Article 60 (2) (a), and failed to provide a sufficient statement of reasons for its decision.

21 It complains that the Commission failed to take account of the exceptional nature of the transaction in question, which constitutes an exception to the principle of publication, by failing to take into consideration the following two facts:

(a) that it manufactures a ribbed reinforcement bar having a high degree of adhesion, designated Fe E 45, which differs from the smooth or ribbed reinforcement bars used in the other Member States,

(b) that it has only one customer for whom the said product is specially manufactured.

22 Those two facts, namely production of a special type of bar to the order of a single customer, are, according to the applicant, of fundamental legal importance since, if they are taken into consideration, "it is automatically necessary to rule out the argument that comparable transactions can exist in respect of that special product, which consequently is not covered by the obligation to publish prices since it cannot form the subject-matter of comparable transactions".

23 That argument is based on Article 2 of Decision No 30-53 of 2 May 1953 (Official Journal, English Special Edition 1952-1958, p. 9) on practices prohibited by Article 60 (1) of the Treaty in the common market for coal and steel, which was replaced by Article 1 of Decision No 72/440/ECSC of 22 November 1972 (Official Journal, English Special Edition 1972 (30-31 December), p. 19) which provides that "Transactions shall be considered comparable within the meaning of Article 60 (1) if ... they are concluded with purchasers ... who compete with one another".

24 The applicant concludes from this that the product Fe E 45 cannot give rise to a situation of competition with other purchasers who do not exist, since it is manufactured exclusively for a single customer and that accordingly, "with regard at any event to the order G 20 RM of 28 April 1977", there was no

breach of the obligation to publish prices nor, in consequence, was there any under-pricing in relation to the binding price list, since there was no obligation to publish.

25 Those arguments fail to take account of the fact that the applicant entered the product Fe E 45 in its price list and conditions of sale which were duly communicated to the Commission and accordingly made public within the meaning of Article 60 (2) of the ECSC Treaty, whilst there is no requirement as to publicity in respect of transactions which are not comparable since they constitute contracts which by their nature are exceptional and therefore do not fall within the scope of the provisions governing publication.

26 The presence of that material in the price list therefore indicated that it was a product offered for sale and placed on the market in the normal way, with the result that Rumi was subject to the legal obligation to sell it at the prices stated to any purchaser who wished to buy it.

27 The fine was imposed precisely because that product was sold at a price lower than that appearing on the price list.

28 With regard to the objection that there was a failure to provide an adequate statement of reasons the applicant maintains that, since the Commission made no mention in the preamble to its decision of those facts or of their legal relevance, it "appears" that that decision is vitiated by a lack of a statement of reasons.

29 The objection of a failure to state the reasons for this aspect of the decision is likewise unfounded since no observation concerning anomalous transactions was submitted at the time of the investigation or during the initial inquiry; the arguments concerning such transactions were put forward by the applicant only in the course of the written procedure whereas, in view of the validity of the Commission's attitude concerning the sales of the product Fe E 45, it could not have foreseen the objection which was to be raised by the applicant and have met it in advance in the decision.

30 Accordingly, the decision is not in breach of Article 60 (2) (a) and the statement of reasons is not defective with regard to its application of that provision.

31 Finally, the applicant alleges in a third submission that the Commission has manifestly failed to observe Article 60 (2) (b) and has misused its powers.

32 The applicant remarks that, according to Article 60 (2) (b) of the ECSC Treaty, although any increase is formally prohibited, reductions are permitted provided that they do not exceed "the extent enabling the quotation to be aligned on the price list, based on another point which secures the buyer the most advantageous delivered terms". The applicant claims to be in a position to establish by the evidence of witnesses that the prices which it charged in the transactions recorded by the Commission's inspector are aligned on the prices charged by other producers in the Community (Feralpi and IRO) in comparable transactions and concludes from this that it was not in breach of its obligation to refrain from quoting prices lower than those on its list.

33 These arguments must accordingly be considered with regard to Article 60 (2) (b) which states that, for the purposes set out in paragraph (1) of that article, "the methods of quotation used must not have the effect that prices charged by an undertaking in the common market, when reduced to their equivalent at the point chosen for its price lists", result in reductions below the price shown in the price list in question for a comparable transaction "the amount of which exceeds ... the extent enabling the quotation to be aligned on the price list, based on another point which secures the buyer the most advantageous delivery terms".

34 That provision shows that alignment constitutes an exception to the principle concerning list prices and that the offer made to the customer must be aligned on a price list based on another point which secures the buyer more advantageous terms. Alignment is accordingly prohibited between undertakings quoting on the basis of the same basing points. That prohibition, which has regard for the general system of the Treaty, is intended to ensure compliance with the obligation to make public price lists and conditions of sale and to maintain the transparency of the market.

35 Accordingly Rumi, whose basing point is Montello, could not align itself on the undertakings Feralpi and IRO, whose basing points are Lonato and Odolo respectively, which are situated in the same zone and do not entail more advantageous delivery terms for the French customer to whom the reinforcement bars were sold.

36 It is clear from those considerations that the third submission must be rejected, including that aspect of it claiming a misuse of powers, in support of which no argument was adduced.

37 In the event of the action for annulment being dismissed the applicant has, claimed in the alternative that the fine, which amounts to 65 135 units of account, corresponding to a sum of Lit 68 840 000, in respect of irregular sales of an estimated value of Lit 1 678 688 435.29, should be reduced to a nominal sum, claiming that the infringement recorded is "mild in character and purely formal".

38 In relation to the imposition of the fine in question the Commission states that it applied Article 64 of the ECSC Treaty which authorizes it to impose "upon undertakings which infringe [in particular, Article 60] . . . or decisions taken thereunder fines not exceeding twice the value of the sales effected in disregard thereof" and that accordingly its exercise in the present case of its discretionary power displayed the utmost restraint "since the fine imposed is equal to 15% of the amount whereby the list prices exceeded the prices charged, that being the proportional criterion chosen, which takes account of the nature and gravity of the infringement".

39 Whilst it must be held that the infringements of which the applicant was guilty are not purely formal but affect the transparency of the market established under the general system of the ECSC Treaty, which excludes reduction of the fine to a nominal amount, regard must nevertheless be had for the serious disturbances on the market in reinforcement bars at the time of the infringements, which affected in particular undertakings such as Rumi whose activity consists almost exclusively in the production of such bars. It must be recognized that in such times of disturbance, entailing rapid changes in prices, the publication of price lists could not so effectively ensure the transparency of the market as in a period of relative stability, so that the damage caused by Rumi's conduct appears less serious than if it had taken place in less unsettled times.

40 Those considerations lead the Court to reduce the fine from 15% to 10% of the amount whereby the list prices exceeded the prices charged, that is 43 423 units of account corresponding to a sum of Lit 45 890 000, so that the amount of the fine is proportionate to the consequences of the infringements committed.

Costs

41 Since the applicant has been unsuccessful in all its submissions as to law it must be ordered to pay the costs pursuant to Article 69 of the Rules of Procedure.

On those grounds,

THE COURT

hereby rules:

1. **The individual decision of the Commission of the European Communities dated 30 May 1978, ordering Metallurgica Lucanio Rumi S.p.A. to pay a fine is amended, the amount of the fine being reduced to 43 423 units of account, corresponding to a sum of Lit 45 890 000.**

2. **The applicant is ordered to pay the costs.**

Mertens de Wilmars Mackenzie Stuart Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 12 July 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber,
Acting as President