In Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79

154/78 S.P.A. FERRIERA VALSABBIA, whose registered office is in Odolo (Italy), represented by Tito Malaguti and Giuseppe Marchesini, both Advocates at the Italian Corte di Cassazione, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe II;

205/78 ACCIAIERIE E FERRIERE STEFANA FRATELLI FU GIROLAMO S.P.A., whose registered office is in Nave (Brescia, Italy), represented by Tito Malaguti and Giuseppe Marchesini, Advocates at the Italian Corte di Cassazione, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe II;

206/78 A.F.I.M. ACCIAIERIE E FERRIERE INDUSTRIA METALLURGICA, whose registered office is in Nave (Brescia, Italy), represented by Vito Landriscina and Giuseppe Marchesini, Advocates at the Italian Corte di Cassazione, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe II;

226/78 S.P.A. ACCIAIERIE E FERRIERE ANTONIO STEFANA, whose registered office is in Brescia (Italy), represented by Giuseppe Marchesini, Advocate at the Italian Corte di Cassazione, and Fabio Vischi, of the Brescia Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe II;

227/78 S.P.A. ACCIAIERIA DI DARFO, whose registered office is in Darfo-Boario Terme (Brescia, Italy), represented by Giuseppe Marchesini, Advocate at the Italian Corte di Cassazione, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe II;

228/78 S.P.A. SIDER CAMUNA, whose registered office is in Berzo Inferiore, (Brescia, Italy), represented by Giuseppe Marchesini, Advocate at the Italian Corte di Cassazione, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe II;

263/78 S.P.A. METALLURGICA LUCIANO RUMI, whose registered office is in Bergamo (Italy), represented by Manlio Brosio and Adriano Bolleto, Advocates at the Italian Corte di Cassazione, and Ernest Arendt, of the Luxembourg Bar, with an address for service at the latter's Chambers, 34 B Rue Philippe II;

264/78 S.P.A. FERALPI, whose registered office is in Lonato (Brescia, Italy), represented by Antonio Liserre and Giuseppe Gelona, of the Milan Bar, with an address for service in Luxembourg at the Chambers of Georges Margue, 20 Rue Philippe II;

39/79 O.L.S. OFFICINE LAMINATOI SEBINO — ACCIAIERIE E FERRIERE LAMINATOI E TRAFILATI, whose registered office is in Pisogna (Brescia, Italy), represented by Vito Landriscina and Giuseppe Marchesini, Advocates at the Italian Corte di Cassazione, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe II;

31/79 S.A. SOCIÉTÉ DES ACIÉRIES DE MONTEREAU, whose registered office is in Montereau Fault (Yonne, France), represented by Bruckhaus, Kreifels, Winkhaus, Lieberknecht, Canenbley and Moosecker, of the Düsseldorf Bar, with an address for service in Luxembourg at the Chambers of A. Bonn, 22 Côte d'Eich;

83/79 EISENWERK-GESELLSCHAFT MAXIMILIANSHÜTTE MBH, whose registered office is in Sulzbach-Rosenberg (Federal Republic of Germany), represented by Professor Bodo Börner, Cologne, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 6 Rue Willy Goergen;

85/79 KORF INDUSTRIE UND HANDEL GMBH & CO. KG, whose registered office is at 15 Moltkestraße, 7570 Baden-Baden, (Federal Republic of Germany), represented by Brückhaus, Kreifels, Winkhaus and Lieberknecht, of the Düsseldorf Bar, with an address for service in Luxembourg at the Chambers of A. Bonn, 22 Côte d'Eich;

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented:

— In Joined Cases 154, 205 and 206, 226 to 228, 263 and 264/78, and 39/79 by A. Prozzillo, acting as Agent, assisted in Cases 226 to 228, 263 and 264/78 and 39/79, by G. Motzo, of the Rome Bar;

— In Cases 31 and 85/79 by Götz zur Hausen, acting as Agent;

— In Case 83/79 by H. Matthies, acting as Agent,

with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION principally for the annulment of the individual decisions imposing pecuniary penalties, adopted by the Commission against each of the applicants for selling concrete reinforcement bars below the minimum prices, or alternatively either the annulment of Commission Decision No 962/77/ECSC of 4 May 1977 (Official Journal L 114 of 5 May 1977, p. 1) fixing the said mimimum prices, or a declaration that the said Commission decision does not apply, or, in the further alternative, a reduction in the amount of the said fines,

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

Joined Cases 154, 205, 206, 226 to 228, 263, 264/78 and 39/79

In all these cases the facts are similar: they concern sales of concrete reinforcement bars carried out both in Italy and by way of the export trade to another member country of the Community, at prices below those laid down by Commission Decision No 962/77/ECSC of 4 May 1977 "fixing minimum prices for certain concrete reinforcement bars" (Official Journal L 114 of 5 May 1977, p. 1) extended by Commission Decision No 3000/77/ECSC of 28 December 1977 "fixing

minimum prices for hot-rolled wide strips, merchant bars and concrete reinforcing bars" (Official Journal L 352 of 31 December 1977, p. 1).

In Cases 154/78 *Valsabbia*, 206/78 *AFIM*, 227/78 *Di Darfo* and 228/78 *Sider Camuna* the Commission also accused the undertakings concerned, at the time of its investigation, of failing to make monthly statements contrary to Commission Decision No 3017/76/ECSC of 8 December 1976 concerning the obligation of undertakings pursuing a production activity in the steel sector to supply certain data on deliveries of steel (Official Journal L 344 of 14 December 1976, p. 24), but having recognized the validity of the companies' observations on that matter, the Commission fined the undertakings only for the infringements of Decision No 962/77 laying down the minimum prices.

In each case the Commission gave the companies an opportunity to submit their comments in accordance with Article 36 of the ECSC Treaty. It also summoned each company to a hearing; only the *Di Darfo* company (Case 227/78) claims that its right to defend itself was infringed on the ground that the Commission refused to give it an extra fifteen days' notice of the hearing.

During the administrative procedure the companies pleaded that it had been "impossible" for them to comply with Decision No 962/77 and requested that that decision should not be applied to them on the ground that having tried in May and June 1977 to sell at the minimum prices, they had been forced to sell below them, on the one hand because of the market, on which their competitors were not complying with those minimum prices, and on the other hand because of their financial situation and the social situation in Italy which made redundancies impossible.

The Commission did not accept those arguments and imposed the following fines on the nine applicants:

— Valsabbia (154/78): LIT 25 840 000

— Stefana Fra. (205/78): LIT 30 332 000

— A.F.I.M. (206/78): LIT 46 917 000

— Ant. Stefana (226/78): LIT 50 852 000

— Di Darfo (227/78): LIT 27 830 000

— Sider Camuna (228/78): LIT 55 423 000

— Rumi (263/78): LIT 51 936 000

— Feralpi (264/78): LIT 55 110 000

— O.L.S. (39/79): LIT 9 500 000

It is against those decisions of the Commission that the applicants submitted the present applications, which were received at the Registry of the Court respectively on:

— 14 July 1978: Valsabbia (154/78)

— 15 September 1978: Stefana Fra. (205/78)

— 15 September 1978: A.F.I.M. (206/78)

— 11 October 1978: Ant. Stefana (266/78)

— 11 October 1978: Di Darfo (227/78)

— 11 October 1978: Sider Camuna (228/78)

— 15 December 1978: Rumi (263/78)

— 21 December 1978: Feralpi (264/78)

— 9 March 1979: O.L.S. (39/79)

By an order of 27 July 1979 the Court decided, pursuant to Article 43 of the Rules of Procedure, to join the present cases for the purpose of the oral procedure. The procedure took its normal course. After hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court dismissed the applicants' claim for an expert's report, but it added the reports of the Consultative Committee to the file and decided to open the oral procedure without holding a preparatory inquiry.

Case 31/79

The Société des Aciéries de Montereau, a French limited liability company, formed on 25 April 1973, produces concrete reinforcement bars and does not deny that it sold its products at prices lower than those laid down by Commission Decision No 962/77. On 10 January 1979 the Commission adopted an individual decision in relation to it, which was notified to it on 18 January 1979, and imposed upon it a fine of 115 896 units of account, that is FF 670 000, for having issued credit notes and given illegal discounts in respect of sales of concrete reinforcement bars between June and December 1977 which involved underpricing amounting to a total of FF 11 730 216. The total value of unlawful sales amounts to FF 61 663 456 in respect of a total quantity of 49 912.475 tonnes of concrete reinforcement bars.

The Société des Aciéries de Montereau thereupon submitted an application, which was received at the Registry of the Court on 24 February 1979. However, by an application of 5 March 1979, the applicant asked the Court to order the suspension of the operation of the Commission's Decision of 10 January 1979 pending the decision on its main application. By Order of 27 March 1979 the President of the Court dismissed the application for suspension on the ground that, as the Commission had stated that it did not wish to proceed to an enforcement of the contested decision as long as the main action was pending, the suspension of the operation of the decision was "neither urgent nor justified" and reserved costs until final judgment.

Having heard the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without holding a preparatory inquiry.

Case 83/79

The Eisenwerk-Gesellschaft Maximilianshütte (hereinafter referred to as "Maximilianshütte"), a German limited liability company, produces concrete reinforcement bars and does not deny that it sold its products below the minimum prices fixed by Decision No 962/77/ECSC. On 9 April 1979 the Commission adopted an individual decision in relation to it, which was notified on 23 April 1979, ordering it to pay a fine of 94 068 units of account, that is DM 237 000, for having issued credit notes to its customers between 14 June and 30 September 1977 which reveal underpricing totalling DM

2 370 794. The total value of unlawful sales amounts to DM 13 457 404 in respect of a total quantity of 27 159. 490 tonnes of concrete reinforcement bars.

Having heard the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without holding a preparatory inquiry.

Case 85/79

The company Korf Industrie and Handel (hereinafter referred to as "Korf"), a German Kommanditgesellschaft, produces concrete reinforcement bars and does not deny that it sold its products in the Federal Republic of Germany at prices lower than those fixed by Commission Decision No 962/77/ ECSC of 4 May 1977 (Official Journal L 114 of 5 May 1977, p. 1) "fixing minimum prices for certain concrete reinforcement bars" extended by Commission Decision No 3000/77/ ECSC of 28 December 1977 "fixing minimum prices for hot-rolled wide strips, merchant bars and concrete reinforcing bars" (Official Journal L 352 of 31 December 1977, p. 1).

On 9 April 1979 the Commission adopted an individual decision penalizing that company, notified on 20 April 1979, and imposed on it a fine of 95 260 units of account, equivalent to DM 240 000, for having sold concrete reinforcement bars during the second half of 1977 at prices lower than the minimum prices by giving credit notes which reveal under-pricing totalling DM 2 401 926.55. The total value of unlawful sales amounts to DM 9 364 586 in respect of a quantity of 17 669. 032 tonnes of concrete reinforcement bars.

Having heard the report of the Judge-Rapporteur and tho· views of the Advocate General, the Court decided to open the oral procedure without holding a preparatory inquiry.

II — Conclusions of the parties

Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78 and 39/79

The *applicants* claim that the Court should:

1. In Case 154/78 *Valsabbia:*

"1. Annul the individual decision of 30 May 1978 adopted by the Commission with regard to it under Decision No 962/77 which involves a manifest failure to observe the provisions of Article 2, Article 3 (c), (d), (f) and (g), and Articles 5 and 61 of the ECSC Treaty and misuse of powers and, alternatively, infringement of essential procedural requirements;

2. Order the Commission of the European Communities to pay the costs;

3. Admit the evidence of technical experts on the situation in the concrete reinforcement bar industry in 1976 and 1977 and on the structure of costs and prices obtaining in that sector at that time."

2. In Case 205/78 *Stefana Fratelli:*

"1. Annul the individual decision of 27 July 1978 taken by the Commission of the European Communities with regard to it under Decision No 962/77 which manifestly fails to observe the provisions of Articles 2, 3 (c), (d), (f) and (g), 5 and 61 of the ECSC Treaty and which involves misuse of powers and, alternatively, infringement of essential procedural requirements;

2. Order the Commission of the European Communities to pay the costs;

3. Admit the evidence of technical experts on the situation in the concrete reinforcement bar industry in 1976 and 1977 and on the structure of costs and prices prevailing in that sector at that time."

3. In Case 206/78 *AFIM:*

(a) In the application:

"Primarily:

1. Declare that, as against the applicant company, Decision No 962/77 which fixed minimum prices for the sale of certain concrete reinforcement bars is inapplicable;

2. Annul the individual decision of 27 July 1978 whereby the Commission of the European Communities imposed a fine of 44 194 units of account on the applicant company;

Alternatively and in the unlikely event of the dismissal of the primary claims:

3. Reduce the fine imposed to a purely symbolical amount;

By way of preparatory inquiry:

4. Admit the evidence of technical experts on the situation in the concrete reinforcement bar industry in 1976 and 1977, on the structure of costs and prices charged, on the state of supply and demand and on the quantities imported and exported by manufacturers in each of the Member States;

In any event:

5. Order the Commission of the European Communities to pay AFIM's costs.

Subject to all reservations relating to the substance of the case."

(b) In the reply:

"Footnote 1 — We request further that the expert evidence referred to in the application be extended in order to establish:

(a) The minimum and average levels of prices charged by producers applying prices slightly above marginal prices at the time of the entry into force of Decision No 962/77;

(b) The level of prices actually charged in the Community before the entry into force of the contested decision and also during the entire period of that decision's validity;

(c) The composition of the production costs of producers in the member countries;

(d) The prices charged at the time of the adoption of Decision No 962/77 by the applicant company and by the other Community undertakings in the sector charging prices slightly above marginal prices."

4. In Case 226/78 *Antonio Stefana:*

(a) In the application:

"1. *Primarily,* annul the decision of 18 August 1978 imposing a pecuniary sanction on the company on the grounds that Decision No 962/77, the breach of which is alleged in this case, is illegal and that it is vitiated by violation and manifest failure to observe the provisions of the

Treaty, misuse of powers and infringement of essential procedural requirements;

2. *Alternatively* annul the decision of 18 August 1978 on the ground of illegality arising from its own defects, involving infringements of the Treaty and of the rules of law relating to its application;

3. *In the further alternative,* amend the contested decision by providing for a purely symbolical penalty;

4. *By way of preparatory inquiry,* admit technical evidence on the situation and composition of costs and prices in the concrete reinforcement bar industry in 1977 in Italy and in the Community;

5. *In any event,* order the defendant to pay the costs."

(b) In the reply:

"1. The applicant confirms all the conclusions expressed in its application of 5 October 1978;

2. It supplements the documents produced in the course of the procedure by those which are attached to this reply;

3. In addition to its claim for a preliminary inquiry it requests that the evidence of witnesses be admitted — if necessary, under the procedure for letters rogatory laid down by Articles 1, 2 and 3 of the Supplementary Rules — on the question of the financial situation of the company at the time of the disputed offences (Mr E. Broli, 3 Piazza Duomo, Brescia) and on the question of the sales policy pursued by the company during the period in question (Ragionier Guizzi, 3 Via Conicchio, Brescia."

5. In Cases 227/78 *Di Darfo* and 228/78 *Sider Camuna:*

"1. *Primarily,* annul the decision of 18 August 1978 imposing a pecuniary sanction on the company on the grounds that Decision No 962/77, the breach of which is alleged in this case, is illegal and that it is vitiated by violation and manifest failure to observe the provisions of the Treaty, misuse of powers and infringement of essential procedural requirements;

2. *Alternatively,* annul the decision of 18 August 1978 on the ground of illegality arising from its own defects, involving infringements of the Treaty and of the rules of law relating to its application;

3. *In the further alternative,* amend the contested decision by providing for a purely symbolical penalty;

4. *By way of preparatory inquiry,* admit technical evidence on the situation and composition of costs and prices in the concrete reinforcement bar industry in 1977;

5. *In any event,* order the defendant to pay the costs."

6. In Case 263/78 *Rumi:*

"After admitting, if necessary, experts' reports on the general situation of the concrete reinforcement bar industry and of the steelworks Metallurgica Luciano Rumi in particular, for the years 1977 and 1978, and on the costs and prices prevailing at the time of the alleged infringement;

1. Annul the individual decision of the Commission of the European Communities of 18 October 1978 and declare that as against the applicant Decisions Nos 962/77 and 3000/77 are also inapplicable on the grounds of infringement of the provisions of Articles 2, 3 and 4 (b) of the Treaty of Paris, misuse of powers and infringement of essential procedural requirements;

2. Alternatively, reduce the amount of the fine imposed on the applicant;

3. In any event, order the Commission of the European Communities to pay the costs."

7. In Case 264/78 *Feralpi:*

"As a preliminary matter

— Order the joinder of this case with Cases 154/78, 205/78 and 206/78 and with any case which has the same subject-matter as this application;

Primarily

— Annul the individual decision adopted on 18 October 1978 by the Commission in relation to the applicant company with or without a prior declaration of the illegality of General Decisions Nos 962/77 of 4 May 1977 and 3000/77 of 28 December 1977;

— Order the Commission to pay compensation for the damage, to be assessed separately;

Alternatively

— Having taken note that the applicant acted in good faith, or at least that its conduct was caused by excusable errors, reduce appreciably the penalty imposed;

By way of preparatory inquiry

— Order the Commission to make available to the Court all the documents relating to the meetings and agreements (promoted by the Steel Directorate of the EEC) for the so-called channelling of the production of concrete reinforcement bars for the purpose of allowing the Court, and through it the Competition Directorate of the EEC, to form a due and appropriate evaluation in the light of Article 65 of the Treaty;

— If necessary, to obtain the opinion of an expert on the situation in the concrete reinforcement bar industry in order to ascertain whether the conditions laid down in Article 61 (b) of the Treaty were satisfied;

Costs

— Make an order for the payment of the applicant's costs."

8. In Case 39/79 *O.L.S.:*

"Primarily

1. Declare that Decision No 962/77 fixing minimum prices for sales of concrete reinforcement bars is inap-

plicable in relation to the applicant company;

2. Annul the individual decision of 10 January 1979 whereby the Commission of the European Communities imposed a fine of 8 513 units of account on the applicant company;

In the alternative, in the unlikely event of the principal claim being dismissed

3. Reduce the fine imposed to a purely symbolical amount;

By way of preparatory inquiry

4. Admit technical evidence in order to ascertain:

   (a) *In general*, the situation in the concrete reinforcement bar industry in 1976 and 1977, the structure of current costs and prices, the state of supply and demand and the quantities imported and exported by producers in each of the Member States;

   (b) *In particular*, the minimum and average level of prices charged at the time of the entry into force of Decision No 962/77 by producers operating above the margin; the level of prices actually charged within the Community before the entry into force of the said decision, and during the whole period of its application; the composition of production costs and industrial costs of producers in the various Member States; the prices charged, at the time when Decision No 962/77 was adopted, by the applicant company and by the other Community undertakings in the sector which were operating above the margin;

In any event

5. Order the Commission of the European Communities to pay to O.L.S. the costs of the action and those occasioned by the expert evidence;

Without prejudice to any other submissions of fact and law."

The *Commission* contends that the Court should:

1. In Cases 154/78 *Valsabbia*, 205/78 *Stefana Fratelli*, 206/78 *AFIM*, 263/78 *Rumi* and 29/79 *O.L.S.:*

   "— Dismiss the applications as unfounded;

   — Order the applicants to pay the costs."

2. In Cases 226/78 *Antonio Stefana*, 227/78 *Di Darfo* and 228/78 *Sider Camuna:*

   "— Declare the applications inadmissible as regards the claims alleging misuse of powers and infringement of essential procedural requirements and dismiss them as unfounded;

   — Order the applicants to pay the costs."

3. In Case 264/78 *Feralpi:*

   "— Declare the application submitted by S.p.A. Feralpi inadmissible as regards the claims alleging illegality and dismiss it as unfounded;

   — Order the applicant to pay the costs."

In Case 31/79

The *applicant* claims that the Court should:

"1. Declare that the decision of the Commission of the European Communities of 10 January 1979 concerning a fine imposed under Articles 61 and 64 of the ECSC Treaty on the Société des Aciéries de Montereau, Montereau Fault, Yonne, is null and void;

2. Alternatively:
   Reduce the fine imposed on the applicant;
3. Order the defendant to pay the costs;
4. Declare that the decision on costs is provisionally enforceable."

In a supplement to the application, the *applicant* claims that the Court should:

"Order the defendant to pay the costs occasioned by the claim for the suspension of the operation of the Decision of the Commission of the European Communities of 10 January 1979."

In its defence the *defendant* contends that the Court should:

"1. Dismiss the application;
2. Order the applicant to pay the costs."

In its rejoinder, the *defendant* amplified the second point of its conclusions in these terms:

". . .

2. Order the applicant to pay the costs of the proceedings including the costs of the proceedings for the suspension of the operation of the contested decision."

In Case 83/79

The *applicant* claims that the Court should:

(a) In its application:
   "Annul Decision K (79) 419, taken by the defendant with regard to the applicant on 9 April 1979 and notified on 23 April 1979, and order the defendant to pay the costs of the action;
   — Order measures of inquiry concerning:
      1. The number of supervisory procedures and infringement procedures which the defendant carried out during each week between the entry into force of Decision No 962 and 23 January 1978;
      2. The considerations which guided the defendant in the development of its policy concerning the initiation of supervisory procedures and infringement procedures;
      3. The effect of such action on the market in concrete reinforcement bars;
   — The said inquiry to be carried out by:
      1. Requesting information on that matter from the defendant;
      2. Ordering the responsible official of the relevant Directorate General of the Community to appear in person;
   — Order measures of inquiry in order to ascertain whether:
      1. Between the entry into force of Decision No 962 and 23 January 1978 the minimum prices laid down by the defendant for concrete reinforcement bars were largely disregarded by the market because transactions by dealers and imports did not come within the scope of the decision and because that decision was not complied with to a sufficient degree by the persons to whom it was addressed;
      2. For that reason, a supplier who complied with the minimum prices was forced to accept the loss of a considerable volume of sales;
      3. Such a supplier could avoid losing sales only by himself charging prices lower than the minimum prices;
   — The said inquiry to be carried out by:

Seeking the opinion of an expert to be appointed by the Court;

— Order the defendant to convey to it all the preliminary documents concerning the proceedings now pending."

(b) In its reply:

— "Order measures of inquiry concerning:

1. The number and results of the supervisory procedures and infringement procedures carried out in relation to the steelworks of northern Italy in relation to Decision No 962 and the dates on which those proceedings were initiated and completed; and
2. The question whether the defendant offered the steelworks of northern Italy guarantees, and if so in what form, in return for an undertaking that they would comply with Decision No 962;

— The said inquiry to be carried out by:

Requesting information on that matter from the defendant;

— Order measures of inquiry in order to ascertain:

1. Whether and during what period the undertakings, and in particular the producers of concrete reinforcement bars in the North of Italy, complied with the delivery conditions laid down by the defendant for concrete reinforcement bars; and
2. Whether and when the undertakings, and in particular the manufacturers of concrete reinforcement bars in the North of Italy, declared their actual deliveries as required by Commission Decision No 3017/76 of 8 December 1976 (Official Journal L 344 of 14 December 1976, p. 24);

— The said inquiry to be carried out by:

Requesting information on that matter from the defendant."

The *defendant* contends that the Court should:

"— Dismiss the purported offers of evidence;

— Dismiss the application and order the applicant to pay the costs."

In Case 85/79

The *applicant* claims that the Court should:

"1. Declare that the decision of the Commission of the European Communities of 9 April 1979 concerning a fine imposed under Articles 61 and 64 of the ECSC Treaty on the company Korf Industrie und Handel GmbH & Co. KG, Baden-Baden, is null and void;

2. Alternatively:

Reduce the fine imposed on the applicant;

3. Order the defendant to pay the costs."

The *defendant* contends that the Court should:

"1. Dismiss the application;

2. Order the applicant to pay the costs."

III — Summary of the submissions and arguments of the parties

In Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78 and 39/79

A — By way of introduction: Considerations regarding the market for concrete reinforcement bars and the situation of the undertakings in Brescia following Decision No 962/77/ECSC

All the applicants followed a similar scheme in setting out their submissions

and arguments: after considerations regarding the market in concrete reinforcement bars and the minimum prices, they attacked Decision No 962/77 for manifest failure to observe the provisions of the ECSC Treaty, misuse of powers and infringement of essential procedural requirements; they then attacked the individual decisions, alleging that they were both illegal and inappropriate; then, finally, some of the applicants disputed the calculations carried out by the Commission.

(a) The *applicants* start by describing the characteristics of the product which they manufacture: the concrete reinforcement bar does not require high technology, "it is obtained by the hot-rolling of ferrous material of different types (ingots, minerals, etc.)" and it has two fundamental qualities: hardness and elasticity. It is a product which is used essentially in the building industry, where, incorporated into concrete, it becomes "reinforced concrete". Following the last World War, many small and medium-sized undertakings started producing concrete reinforcement bars because, in the first place, the potential market seemed limitless (it was necessary to rebuild everything that had been destroyed between 1939 and 1945) and, secondly, since it did not require a high level of technology, unlike the production of special materials (rolled products, sheets, etc.), very little investment was required in order to set up a factory for the production of concrete reinforcement bars. Thus that product is currently manufactured principally by small and medium-sized undertakings. Further, those undertakings are concentrated mainly in Italy, and in particular around the town of Brescia, where there exists an old steel-making tradition. All that explains the extraordinary upsurge in the production of concrete reinforcement bars in that region of Italy since 1945. Thus between 1972 and 1976 Italy produced approximately 50% of the total European production of concrete reinforcement bars and the undertakings in Brescia were alone responsible for 70% of Italian production, that is to say approximately 35% of the European market.

According to the applicants, that success is explained above all by the organization of their undertakings:

— In the first place, they are completely integated "mini-steelworks" which convert the raw material (ferrous scrap and not ore, which would be much more difficult) directly into liquid steel, requiring less investment and also a smaller work force; thus production costs are relatively low in relation to those of the large steel-making concerns;

— Secondly, those mini-steelworks generally produce only one product;

— Thirdly, they have retained a family structure, the family being responsible for the management and general organization of the undertaking;

— Fourthly, they have succeeded in perfecting a short cycle between the purchase of the scrap and the collection of payment for the material produced; thus they have limited the amount of finance required.

All those characteristics show that those undertakings in Brescia are capable of

reacting to the market, adapting themselves to it on a daily basis owing to the flexibility and dynamism inherent in their structure.

Further, those undertakings are also very well organized and highly modernized, using advanced manufacturing processes, which make them very competitive. In fact, the applicants state that their rate of productivity is 4 hours per tonne, whereas the average productivity of the member countries of the ECSC is 6.38 hours per tonne, that of Italy is 5.48 hours per tonne, that of the Federal Republic of Germany is 6.37 hours per tonne and that of France 7.6 hours per tonne. They maintain that the remarks made about them, concerning the exploitation of the work force, sales below production cost and illegal aids granted to them by the Italian State are without foundation.

In the circumstances, the applicants maintain that Decision No 962/77 fixed minimum prices at too high a level in relation to the production costs of the undertakings in Brescia, that they were forced to sell at prices below the minimum prices, and that, further, that decision is politically bad for Italy where there exists a strong demand for housing which is not met because the prices are too high; Decision No 962/77 has contributed to an increase in the price of housing in view of the importance of reinforced concrete in modern buildings. Faced with that "untenable situation" caused by Decision No 962/77, the undertakings in Brescia asked the Commission on the occasion of meetings in Milan and Brussels in the autumn of 1977 to take action on the following four points:

1. Adjust the minimum prices in accordance with developments on the market, that is to say reduce them.
2. Protect the Community undertakings against imports from non-member countries carried out in conditions which constitute dumping.
3. Allow the "Bresciani" a "margin of penetration" for export sales to the other member countries.
4. Intervene at the dealer level in order to induce traders to act in a manner consistent with the prices policy required of producers.

During the negotiations, points 2 and 4 were examined by the Commission, point 1 was rejected and, as for point 3, according to Feralpi, the Bresciani agreed not to export to France, Belgium and the Federal Republic of Germany quantities in excess of 20% of demand in those countries, which proves that the Bresciani accepted a reduction of 30% in their exports as regards the Federal Republic of Germany and 40% as regards France. That system of "channelling" and quotas, which was sought by Commissioner Davignon, led to the creation of the "Ufficio Coordinamento e Ripartizione Ordini" (UCRO) which came into operation officially on 1 July 1978 and was authorized by the Commission decision of 28 July 1978 (Official Journal L 238 of 30 August 1978, p. 28) with the sole task of seeking out new export sales outlets and centralizing the administrative and statistical operations.

Thus not only did the Brescia undertakings fail to obtain a downward revision of the minimum prices, but in addition the Commission, by Decision No 1525/78 of 30 June 1978 (Official Journal L 178 of 1 July 1978, p. 90) "establishing a system for the lodging of deposits in cases of the provisional establishment of an infringement of Commission decisions fixing minimum prices for certain steel products", established a system of preventive penalties in the form of provisional deposits "in all cases where there is sufficient evidence to presume an infringement on their part of the decisions fixing minimum prices".

The applicants conclude these arguments by declaring that they "would be quite content to sell at the minimum prices", but that it is the market which compels them to sell below those prices; some of them, such as Feralpi, had even advised the Commission that they were going to be forced to sell below the minimum prices. They also call in support the fact that "Europeans and non-Europeans are selling below the minimum prices", and that Decision No 962/77 has thus failed to achieve its aims. As proof they rely on the fact that the exports of the Bresciani were maintained only because Decision No 962/77 was not adhered to by the undertakings and the increase in prices which took place in 1977 was not the result of "increased earnings" due to the growth in sales receipts, but to an increase in costs, especially labour and energy costs.

(b) The *Commission* submits an analysis containing three points:

1. Analysis of the general situation on the steel market

The Commission maintains that the steel market has been in crisis since 1975, both in terms of the quantities produced (a 20% fall in production in 1977) and in financial terms (a fall in prices in the order of 35 to 45% between 1975 and 1977). In spite of a slight recovery in 1976 the crisis worsened in 1977: the average utilization of productive capacity was 63 to 65% with the social consequences which that implies, that is to say short-time working followed by very considerable redundancies.

2. Steps taken by the Commission prior to Decision No 962/77

From the end of 1974, noting with concern market trends for iron and steel products in the Community, and in particular the considerable decline in demand, the deterioration in prices, and the consequent effects on employment, the Commission decided on the measures which would have to be taken.

— As from May 1975 it put the undertakings on notice by a communication of 2 May 1975 (published in the Official Journal C 100 of 2 May 1975, p. 1) and informed them that it would be vigilant over prices and would carry out regular checks.

— In order to have at its disposal all the information concerning forecast and actual production of crude steel and

forecasts relating to employment, the Commission took two Decisions, respectively No 1272/75/ECSC of 16 May 1975 (Official Journal L 130 of 21 May 1975, p. 7) and No 1870/75/ECSC of 17 July 1975 (Official Journal L 190 of 17 July 1975, p. 26) on the obligation of undertakings in the steel industry to supply certain information concerning, in the one case, steel production and, in the other case, employment.

— In the field of prices, the Commission contemplated minimum prices as early as 1975 and had sought the opinion of the Council and the Consultative Committee, but the recovery in 1976 caused it to abandon that project.

— Finally, at the end of 1976, two communications, one dated 23 December 1976 (Official Journal C 303 of 23 December 1976, p. 1) and the other dated 24 December 1976 (Official Journal C 304 of 24 December 1976, p. 5) relating to the application of crisis measures on the steel market, announced on the one hand the Commission's intention to make detailed forecasts, by undertakings or groups of undertakings, as regards concrete reinforcement bars (and other products) and, on the other hand, its intention to invite each undertaking or group of undertakings to enter into an engagement to limit voluntarily its deliveries to the level which would be communicated to it individually.

3. Situation on the market for concrete reinforcement bars and minimum prices (Decision No 962/77)

In the general context of the steel market the concrete reinforcement bar was a sector which was experiencing great difficulty. Further, as the voluntary undertakings to reduce production covered only 50% of production as against 90% in the other sectors affected by the crisis, the aims of the action taken ("a co-ordinated quantitative reduction and the adjustment of supply to demand") had not been attained; the more so because in that sector the fall in prices had been greater than that affecting other rolled products and the average rate of utilization of plant had been 55%, with the social consequences which that implies, that is to say massive redundancies and short-time working. In that context, the Commission considered that the conditions laid down by Article 61 (b) of the ECSC Treaty were satisfied, that a manifest crisis did indeed exist or was imminent and that a system of minimum prices was imperative.

That system was introduced in order to ensure that the undertakings had sufficient resources to be able to restructure themselves and safeguard their productive capacity and thus employment, and "not in order to benefit certain undertakings or prejudice others", since that decision was taken in application of the principle of "solidarity, which constitutes one of the guiding principles of the ECSC Treaty", and in order to:

— avoid distortions by benefiting the iron and steel industry in relation to other sectors;

— take into account the interests of the undertakings and their competitive situation (for example, between 1975

and 1977, the price of ore had increased by between 8 and 33% whilst the price of scrap had fallen by between 37 and 47%);

— avoid disturbing exports and imports.

In the light of those aims the Commission took into account, for the purpose of calculating an average price, on the one hand the prices of the users of ore and those of the users of scrap, and on the other hand the lowest prices (those of the Bresciani: between 165 and 180 units of account per tonne) and the highest prices (those of the Danish undertakings: 253 units of account); and as a result it fixed an average price of 198 units of account.

The Commission emphasizes that the Consultative Committee "has always been in favour of minimum prices". As early as 19 January 1976 it gave a favourable opinion on the introduction of such a system for iron and steel products within the Common Market (Official Journal C 24 of 24 February 1976, p. 1); it repeated that opinion with another resolution of 17 March 1977 (Official Journal C 86 of 6 April 1977, p. 1) in which it asked the Commission to exert "maximum effort ... to return prices to a sufficient level for the financial situation of the undertakings to be stabilized and employment in them to be protected". That resolution was confirmed again by the Committee's position at the session on 30 November 1978 when it issued a favourable opinion on the prolongation of the Commission's anti-crisis plan and adopted the project on minimum prices with only one vote against.

The Parliament also approved the Commission's decision in a resolution of 26 April 1977 (Official Journal C 118 of 16 May 1977, p. 56) in which it "supports the position of the Commission in trying to overcome the European steel crisis".

Finally, the Commission maintains that it monitored trade patterns, after the implementation of Decision No 962/77, and that it established that despite the minimum prices the "Bresciani" had retained their share of the market within the Community.

(c) The *applicants* — especially AFIM — maintain that the description of the situation by the Commission "disregards any analysis of the reasons and causes which led to it and which to this day impede efforts to control it". That is contrary to "the methods prescribed by political economy and economic policy (under which) it is imperative to begin with a complete analysis of the facts in order to arrive at a synthesis of observed phenomena and thus a definition of the forms of practical action between which a choice must be made", as defined by the economist Di Fenizio (*"The Laws of Economics"* published by l'Industria, Milan, 1966).

Consequently, the applicants maintain that too many steel mills were built after the war, that many of them were obsolescent in 1975 and were too labour-intensive; that the crisis affected only the badly managed undertakings; and that in the concrete reinforcement bars sector 33% of the undertakings (the Bresciani) had on the contrary enjoyed a period of expansion. The Commission's failure to

record the reality of the situation constitutes the best proof that the action taken was contrary to the principles inherent in the system of free competition adopted by the ECSC Treaty and proves that Decision No 962/77 constitutes a "protectionist policy on the part of the Commission in favour of the steel-making giants, which had become unprofitable as a result of their own managerial incompetence". The applicants rely on four objections to that decision:

— First, such a policy could be subjected to an "exemplary criticism" under the theory expounded by Samuelson (in *"Economia"*, UTET, 1977, Ninth Edition, pp. 686 and 687) who, analysing the disadvantages of oligopolies, declares that competition constitutes the only method which enables excess productive capacity to be either utilized or eliminated and that resistance to a reduction in prices risks aggravating the dangers inherent in "rampant inflation". The applicants maintain that, since the Commission is aware of those rules, "the inevitable conclusion is that the intention to protect the large undertakings constituted the concealed objective" of Decision No 962/77.

— Secondly, "the inadequate and insufficient nature of the measures" adopted by the Commission is confirmed by the subsequent interventions of the Member States designed to assist their national undertakings on an appreciable scale; thus the entire economic system, both public and private, of the Member States operates by using methods entirely contrary to the specific rules contained in Articles 4 (c) and 75 of the ECSC Treaty, and the Commission has failed to take the necessary measures under Article 88 of the Treaty and insists on the legality of the sanctions imposed, trying to resolve the "alleged crisis affecting the steel-making giants" with a system of minimum prices which has lasted for two years (which, according to the applicant, is long for a "limited period") and measures which have been shown to be "superfluous".

— Thirdly, by choosing an average price the Commission has manifestly failed to observe the provisions of the Treaty and is guilty of a misuse of powers. According to the applicants, the solution — without admitting that it would have been adequate — would have been to fix "minimum prices at the level of the lowest prices applied by the producer most proximate, in a positive direction, to the threshold of profitability, or, at least, at a level calculated by reference to the average of all the producers operating above that limit", since "the proper function of minimum prices is to prevent "cut-price" sales, and AFIM clarifies that concept by adding that minimum prices should above all prevent dumping, that is to say sales at prices below the cost of production.

— Fourthly, following the measure fixing minimum prices, the index for the growth of steel production in Italy during the first nine months of 1978 was amongst the lowest of the

European countries: 3% growth, failing to attain the Community average of 4.3%. Thus it is wrong to say that Italy retained its share of the market and AFIM concludes that Decision No 962/77 constituted "a retaliatory measure designed to penalize the Italian producers of concrete reinforcement bars for their refusal to accept a full system of quotas for their respective production and the forced direction of sales which is the corollary of such a system, which objectives the Commission (contrary to Article 4 of the ECSC Treaty) had been attempting to impose for some time and which it had even succeeded in attaining for 50% of the industry".

(d) The *Commission* notes that the applicants propose their own choices of economic policy in place of those made by the Community institutions and maintains that, whilst those choices were perfectly possible, they are "irrelevant as regards these proceedings", and it recalls in this regard that on 25 March 1977 the representatives of the independent Italian producers (small-scale steel-makers) were summoned to a meeting, the object of which was to study the market in relation to the introduction of minimum prices, and that Mr Mariggi and Mr Sorelli took part for that purpose; none the less it examines the arguments raised.

After observing that it would be absurd to regard the Community market in concrete reinforcement bars as an oligopoly, it "recalls that it clearly set out" the aims pursued by Decision No 962/77, which are those laid down by Article 3 (c), (e) and (a) of the ECSC Treaty; the fact that those measures gave more protection to the undertakings most severely affected by the crisis is simply a reflection of the choice effected by the Commission between the aims laid down by Article 3 of the ECSC Treaty.

On the second point, "the Commission is conscious of the limited effectiveness of that decision" which "is a necessary but not sufficient condition for the restructuring of the Community steel industry"; thus the intervention by the Member States in favour of their national steel industries cannot demonstrate the illegality of Decision No 962/77.

On the third point, the Commission maintains that the solution proposed by AFIM for fixing minimum prices is contrary to Article 61 of the ECSC Treaty, which confers upon the Commission the power to fix minimum prices "to attain the objectives set out in Article 3", since Article 61 does not say that the function of minimum prices is to prevent dumping.

On the fourth point the Commission shows with the support of statistics that in 1976 and 1977 Italian production of concrete reinforcement bars clearly progressed further than that of the other member countries and that the Italian producers of concrete reinforcement bars not only retained their share of the market, but even increased it. It maintains further that the figures for the first nine months of 1978 are not relevant, in the first place, because they concern steel in general and not concrete reinforcement bars in particular and, secondly, because the facts go back to 1977.

B — The first submission: Decision No 962/77 manifestly failed to observe the provisions of the Treaty and in particular the rules contained in Article 61 (b) in conjunction with Articles 2, 3 and 4 of the ECSC Treaty and with the Convention for the Protection of Human Rights

A summary of all the arguments developed in support of this claim may be set out in the following way:

1. Infringement of Article 2 of the ECSC Treaty

(a) The *applicants* maintain that Article 2 of the ECSC Treaty requires the Commission to "progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level . . ."

By adopting Decision No 962/77 introducing minimum prices, the Commission penalized the Bresciani, who have the highest level of productivity in the Community (4 hours per tonne as against 6.3 hours per tonne, the Community average) and protected the least productive undertakings. That decision was followed, on the one hand, by disastrous consequences for the level of employment in the Bergamo region, without a solution being found to the unemployment problems in the northern region, and, on the other hand, "fundamental disturbances" in the concrete reinforcement bars sector of the economy. Thus, in order to comply with the second objective referred to in the second paragraph of Article 2 of the ECSC Treaty, the Bresciani were compelled not to apply Decision No 962/77.

The *Commission* contests that argument, declaring in the first place that there is no proof that employment would have been threatened if Decision No 962/77 had been applied normally by the Brescia undertakings as a whole; secondly, that the contingency of "fundamental disturbances" is not a proper argument on which to claim the illegality of the specific course of action adopted by the Commission; thirdly, that the existence of a relationship of cause and effect between the "disturbances" apprehended and the non-compliance with Decision No 962/77 has not been proved at all.

In its treatment of the problem the Commission observes that, although it is true that Article 2 of the ECSC Treaty requires the Commission progressively to bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, that requirement is subject to an obligation to safeguard continuity of employment and to take care not to provoke fundamental and persistent disturbances in the economies of Member States and that it is also true that those general provisions must not be treated as an aim to be pursued in the abstract. In fact, in implementing them account must be taken of the economic situation at the given moment and, in the event of a crisis, they must provide the rational framework within which the Commission must adopt the measures which it finds most appropriate in order to guarantee — within the bounds of possibility — the maintenance of productivity and continuity of employment, not in one zone of the Common Market, but on the Community iron and steel market as a whole.

As a factual point, it should be noted that the production of bars in the Community as a whole fell by 9.8% between 1976 and 1977 and by 3% between the first half of 1977 and the first half of 1978; Italian production rose by 3.4% between 1976 and 1977, then it remained stable. From that it may be inferred that the disastrous effect proclaimed by the applicants did not occur.

2. The infringement of Article 3, the aims of which must be attained in the event of minimum prices being fixed under Article 61

2.1. The applicants raise a number of arguments which may all be grouped under the following headings:

(a) The Commission's duty to "ensure the establishment of the lowest prices", laid down by Article 3 (c).

The *applicants* maintain that when fixing the minimum prices, the Commission did not fix them at the lowest profitable level existing in the Community. It imposed excessively high prices in relation to the productive capacity of the small and medium-sized undertakings and fixed a minimum price calculated by reference to unprofitable undertakings, prices which permitted such undertakings to continue in existence, whereas from the technical, financial and business point of view they were no longer viable.

In reply the *Commission* states that by nature and by definition minimum prices are necessarily higher than market prices and that if the applicants' proposition were to be accepted it would be impossible to fix minimum prices. It further maintains that Article 3, which also stipulates that those "lowest prices" must allow "necessary amortization" and a "normal return" on capital, seeks to attain other objectives namely to avoid bankruptcies and factory closures. Thus, in the crisis situation through which the steel market was passing, the Commission pursued Treaty objectives neglected by the applicants, which consisted in enabling undertakings to obtain that minimum of financial resources which is essential in order to survive and to carry out necessary restructuring.

(b) The protectionism introduced by that decision in disregard of Article 3 (f).

The *applicants* maintain that the minimum prices are contrary to the obligation imposed upon the Commission to "promote the growth of international trade and ensure that equitable limits are observed in export pricing".

In effect they accuse the Commission both of being responsible for a restoration of duties on imports from non-member countries, and thus a protectionist attitude, and of preventing Community manufacturers from meeting the competition from non-member countries, since alignments on the prices charged by the latter are prohibited and the Commission is not in a position to control the prices applied to transactions between Community users and producers in non-member countries.

The *Commission* observes first of all that intra-Community trade is not affected by that argument, which concerns only

international trade; however, not wishing to leave the argument unanswered, it states in reply that, on the one hand, the abolition of duties on imports from non-member countries is not an objective of the ECSC Treaty and that, on the other hand, the prohibition of alignments on the prices of importing countries is no more than the price paid for agreements — concluded by the Commission with non-member countries constituting the principal importers — whereby the Commission had obtained commitments on the part of the latter to limit their imports.

The *applicants* consider that that reply is not in accordance with the legal position, on the ground that alignment is provided for by Article 60 (b) and that the Commission cannot introduce measures which are contrary to the law; to limit the possibilities of alignment is therefore illegal. They maintain further that the agreements — which were unofficial — were negotiated by the Commission only after Decision No 962/77 had been brought into force and not with all non-member countries. Finally, they repeat that the Commission cannot — in their view — supervise the prices actually charged between sellers in non-member countries and Community users.

The *Commission* replies that those criticisms would be relevant if the decision prohibiting alignment on the prices of the exporting countries (Decision No 527/78/ECSC of 14 March 1978, Official Journal L 73 of 15 March 1978, p. 16) had been attacked, and of Article 60 (b) of the ECSC Treaty did not exist: as those conditions are lacking the applicants' arguments are not relevant.

(c) The obligation to "ensure the maintenance of conditions which will encourage undertakings to expand and improve their production potential", laid down by Article 3 (d).

The *applicants* maintain that the system instituted by Decision No 962/77 is, on the one hand, contrary to the statements of Commissioner Davignon, who had declared that it was necessary to close obsolete, unprofitable production units, encourage the free market and restore competition, and, on the other hand, permits undertakings which are unproductive and have made no effort to improve their productivity to survive.

The *Commission* simply points out that in its opinion the applicants have confused the concepts of production potential and productivity and that as a result that argument has "nothing to do with the case in question".

(d) The Commission's obligation to "promote the orderly expansion and modernization of production ... with no protection against competing industries ...", laid down by Article 3 (g).

The *applicants* maintain that Decision No 962/77 protects unprofitable industries which have not been able to modernize and thus penalizes undertakings which have by their own efforts attained the objective laid down by that article.

The *Commission* replies that by "competing industries" Article 3 (g) means undertakings in non-member countries or industries manufacturing substitute products, and that thus the

objective laid down is extraneous to relationships between Community iron and steel undertakings

(e) The Commission's obligation to "ensure an orderly supply to the Common Market . . .", laid down by Article 3 (a).

The *applicants* declare that this objective could be attained by the Brescia undertakings at market prices under conditions of free competition and that thus Decision No 962/77 does not serve the objective laid down by Article 3 (a).

In reply to that argument the *Commission* relies on the difference existing between the situation of the Bresciani and the Italian situation as a whole, on the one hand, and between that situation and the European situation, on the other hand, and emphasizes that the supply to the Common Market must be considered as a whole.

2.2. The Commission felt it necessary to reply to the applicants' arguments concerning the infringement of Article 3 by explaining the need to make a choice between the different objectives laid down by that article.

The *Commission* considers — quoting Reuter ("*La CECA*", Paris 1953, p. 178) — that "only compromises are possible between objectives, the total attainment of which would mean a return to the golden age". It also relies on the case-law of the Court which expressed a similar view in its judgment in Case 9/56 *Meroni* [1957 and 1958] ECR 157 at p. 173:

"Reconciling the various objectives laid down in Article 3 implies a real discretion involving difficult choices, based on a consideration of the economic facts and circumstances in the light of which those choices are made".

It submits that it is in those conditions that it gave priority to three main objectives in the preparation of Decision No 962/77:

— First, in application of Article 3 (c), to enable undertakings to obtain a minimum of financial resources in order to carry out the necessary restructuring;

— Secondly, in application of Article 3 (e), to maintain the level of employment in order to avoid a deterioration in the working conditions and standard of living of the workers;

— Thirdly, in application of Article 3 (a) and in the long term, to maintain sufficient productive capacity.

It states that those choices could admittedly entail disadvantages for certain undertakings — although that has not occurred in fact — but that they are justified by the common interest.

The *applicants*, whilst recognizing the need for "compromise" between the different objectives stated by Article 3, reject that argument on the ground that the Commission omitted to take account of all the aims of Article 3, from letter (a) to letter (g), and that as a result, all interests being sacrificed, there was no possibility of a compromise. They state further that the Court, in its judgments in Case 14/59 *Pont-à-Mousson* [1959] ECR 215 and Case 15/57 *Compagnie des Hauts Fourneaux de Chasse* [1957 and 1958] ECR 211, stated that the interests of individuals cannot be ignored and that action cannot be taken if its adverse effects would exceed reasonable limits. The interests of the Bresciani were

sacrificed by the decision in question. Finally, they submit that the Commission does not enjoy a margin of discretion in the adoption of a preventive measure.

The *Commission* replies, first, that no grounds are given in support of the applicants' proposition that all the objectives referred to by Article 3 of the ECSC Treaty were disregarded.

It then insists on the need to make a choice which most closely accords with the common, institutional interest of the organization, and submits that the discretionary power does not apply solely to the extreme case in which several courses of conduct are equally valid, that is to say, in this case, all equally appropriate; it is for that reason that the applicants' proposition "amounts essentially to a claim that the Commission undertook a legal procedure which as impossible". It adds that its policy has brought progress, since the fall in the level of employment is relatively smaller than before the adoption of Decision No 962/77, and that the restructuring has begun.

3. Infringement of Articles 4 and 5 of the ECSC Treaty and of the Convention for the Protection of Human Rights and Fundamental Freedoms

The *applicants* submit that Articles 4 and 5 of the Treaty and Convention constitute a system of rules whereby the Commission is prohibited from taking measures which discriminate between producers or which interfere with the purchaser's free choice of supplier, or which tend towards the sharing or exploiting of markets (Article 4), and from depriving a person of his possessions (the Convention). Moreover, that system requires the Commission to intervene only exceptionally for "the establishment, maintenance and observance of normal competitive conditions" (Article 5). It is alleged that the Commission disregarded all those provisions.

(a) Decision No 962/77 entailed discrimination between producers, prohibited by Article 4 (b).

The *applicants* maintain that at the request of France and Belgium, countries in which concrete reinforcement bars are produced at higher cost, the Commission had used "all means" to obtain voluntary undertakings to limit production covering 50 % of the industry as a whole, and that, not satisfied with that result, it introduced the system of minimum prices which was not an egalitarian means of assisting the undertakings in the sector to recover, but a device to protect the less competitive producers in order to restore their profitability.

The *Commission* disputes those claims and considers them false, recalling the objectives of the two measures impugned (see the arguments concerning the Commission's action, *supra:* III A (b) (2) and (3) and (d)) and maintaining that those objectives are in accordance with the Treaty. Further, it emphasizes the logical progression followed by its action and its serious analysis of the situation before the introduction of the minimum prices system.

(b) Decision No 962/77 constitutes "an interference with the purchaser's free choice of supplier", prohibited by Article 4 (b), and a

quantitative restriction on the free movement of products, prohibited by Article 4 (a).

The *applicants* consider that the consequence of the minimum prices system is that, as the user's only remaining choice was between products sold at the same price, he was forced to turn to his national market, and they submit that his free choice of supplier was thus impaired. Further, that is an obstacle to the free movement of goods, and as such it is illegal on the ground that "any provision or system capable in fact of restricting the free movement of goods or partitioning the Common Market" is contrary to the Treaty.

The *Commission* maintains that a measure steering users towards national producers cannot constitute an obstacle either to the purchaser's free choice of supplier or to the free movement of goods in the Common Market.

(c) Decision No 962/77 constitutes a restrictive practice "tending towards the sharing or exploiting of markets", which is prohibited by Article 4 (d); further, it impairs free competition, and is contrary to Article 5.

The *applicants* consider that the system of the Treaty, especially as apparent in Articles 2, 3, 4, 5, third indent 60, 61 (b), 63, 65, 66 (2) and 67, seeks to create a market which should "resemble as closely as possible a model of perfect competition", and that Decision No 962/77 is contrary to the obligation laid down by the Treaty to encourage competition.

They maintain that that system makes exports to other member countries impossible, since they are deprived of their principal weapon, a competitive price, and are prevented from relying on delivery periods owing to the high level of stocks throughout the Community, which enables all the undertakings in the Community to deliver within a very short period, or on extras for quality, since Article 4 of Decision No 962/77 froze them at the level of the prices contained in price lists published or notified to the Commission at the date of the entry into force of the aforesaid decision.

They declare that as a result their share of the market fell, as is proved by the evolution of the situation during the first nine months of 1978 (see *supra*, III A (c)), and that if during 1977 their share of the market remained stable, that was due only to the commercial dynamism of the Italian producers and to their general practice of underpricing; thus the Italian producers' retention of their market share was due mainly to the fact that they did not apply Decision No 962/77.

The *Commission* considers that no rule of the Treaty imposes an obligation to encourage competition at all costs and that there are also interventionist rules, in particular Articles 58, 59, 60 and 61. Thus it maintains that in fact the Treaty establishes an optimum balance between liberty and control (provision being made for the latter especially in the event of a crisis).

It disputes the applicants' statements purporting to prove that competition is no longer possible, by emphasizing that even if delivery periods and extras for quality do not always constitute competitive weapons in the current

situation, there always remains the possibility — for the most productive undertakings — of alignment, which enables them to sell by finessing the transport costs.

As for the arguments about the market share, the Commission recalls that the 1978 figures are not relevant to this case, being subsequent to the events in question and incomplete, and that for 1977 the applicants themselves recognize that their share of the market did not fall. Finally, it disputes that underpricing was practised generally.

(d) Decision No 962/77 infringed the Convention for the Protection of Human Rights and Fundamental Freedoms.

The *applicants* maintain that if the minimum prices system had been applied by them, it would have "artificially created conditions depriving entrepreneurs of their businesses and their property", and that is contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms and to the "absolute principles" which govern the ECSC Treaty.

They further submit that the Convention forms an integral part of Community law, for in their submission it is necessary to reject the idea that the Treaties could authorize an infringement of the Convention when the Court of Justice in Case 29/69 *Stauder* [1969] ECR 419 decided that "fundamental human rights [are] enshrined in the general principles of Community law . . .".

The *Commission* rejects the applicants' arguments, submitting that no fundamental right was infringed in this case and that the Convention does not of itself form part of Community law. In any case, the Court of Justice has already dealt with this question, deciding in a similar case (Case 4/73 *Nold* [1974] ECR 491) that there is no infringement of those fundamental rights when it is a question of "mere commercial interests or opportunities".

4. Infringement of Article 61 (b) of the ECSC Treaty

(a) No manifest crisis existed or was imminent

The *applicants* submit that the small and medium-sized Italian undertakings, which represent 50% of production — and not 35%, as the Commission states — were not in a state of crisis at the beginning of 1977; they were selling at prices above their production costs, and there was no prospect of a crisis; paradoxically, they would have been in a state of crisis only if Decision No 962/77 had actually been applied.

Consequently, they consider that the Commission did not carry out serious preliminary studies, which would have led to the conclusion that, as 50% of production in the sector was not in a state of crisis, there was no need to introduce the minimum prices system.

The *Commission* first seeks to make clear the exact share of the Bresciani, maintaining that it is the whole Italian production of concrete reinforcement bars which constitutes 50% of Community production; the Bresciani are responsible for 70% of Italian

production, that is to say 35% of production in the Common Market.

It then emphasizes that the line of argument followed by the applicants is to relate the conditions required for the introduction of minimum prices exclusively to the small and medium-sized undertakings in Brescia and to accuse the Commission of having failed to consider the Bresciani in isolation.

Not only did they represent only 35% of the market, 65% being in a state of crisis, but in addition to that, the Commission was under a duty to concern itself with the sector as a whole, and with the question raised by the use of different techniques (ore and scrap). Besides, the Commission emphasizes that the applicants themselves, in their general considerations concerning concrete reinforcement bars, recognized the existence of the crisis by stating that there are too many production establishments and that they are not used to capacity.

As regards the preliminary studies, the Commission simply points out that the ECSC has been in existence since 1953 and that as a result the executive is familiar with the problems; besides, as the studies and consultations did indeed take place, that argument is not relevant.

(b) Decision No 962/77 was not necessary "to attain the objectives set out in Article 3"

The *applicants* submit that the objectives laid down were never attained, in the first place, because the prices were fixed at the wrong level, making the decision impossible to apply, and secondly, because the measures were insufficient, and finally that the solution chosen was inadequate.

(aa) The prices were fixed at the wrong level

The *applicants,* after submitting wrongly that the minimum price should have been the basis price corresponding to the lowest normal price — in fact that applies only to anti-dumping legislation — submitted that the minimum price should be the lowest profitable price and that the Commission was wrong to calculate an average price taking into account the undertakings which had chosen the technique involving the use of ore, because in that case the community (the users and consumers as a whole) — by paying higher prices — finances the businessman's mistake and thus he evades his responsibility which, however, is established under the Treaty. Further, the minimum price fixed, which is lower than all the prices of the European undertakings except those of the Bresciani, shows that the Commission calculated an arithmetical average without taking into account the proportion of the Bresciani and that as a result that minimum price entails discrimination against the latter. The applicants go on to emphasize that although prices rose in 1977 and 1978 it was not due to the increase in the cost of the products themselves — which was due to the application of Decision No 962/77 — but rather to the increase in labour and energy costs.

Finally, they declare that the minimum prices could not be applied because they were rejected by the market: Rumi even offers evidence in proof of that argument by adding to the file on the case a telex

from Mr Slawik informing it that in the Federal Republic of Germany there exist offers below the minimum prices, and that no sales will be possible in the Federal Republic at those prices; that is why all the small and medium-sized undertakings in Brescia refused to apply the minimum prices.

The *Commission* recalls that a minimum price is always an average price and is by definition higher than market prices; and that that price is different from the basis price for anti-dumping schemes, and must guarantee all undertakings a profit margin. It points out none the less that the basis price for concrete reinforcement bars lies between 206 and 228 units of account whilst the minimum prices lie between 198 and 205 units of account. It considers that the applicants are encouraging confusion between the two concepts in order to show that the Commission has made the consumers pay for the mistakes of undertakings, and submits that, whilst it is true that the objectives of the Treaty envisage the responsibility of the entrepreneur, it also provides for general price schemes accompanied by penalties in the event of a failure to observe them.

Finally, it rejects the applicants' argument to the effect that the market rejected the minimum prices, stating, in the first place, that between 15 June 1977 and 8 November 1978 officials of the Community carried out 129 inspections in relation to iron and steel undertakings (76 in Italy), which led to the establishment of infringements in 14 cases only; and, secondly, that Mr Slawik is not in its service and that he alone is responsible for his statements.

(bb) The measure was insufficient

In support of this argument the *applicants* maintain that at the date of the entry into force of the minimum prices there existed no protection against imports from non-member countries and that there was a legislative void as regards dealers who were not obliged to observe the minimum prices.

The insufficiency of the measure is also said to be proved by the fact that the Commission was obliged to extend it for one year, and that extension itself is said to prove the illegality of the measure, since as a result of successive extensions it cannot be claimed to be a temporary measure.

That insufficiency is also proved by the fact that during the period of application of Decision No 962/77 the Member States pursued a policy of aiding their steel industries, and the applicants add that the Commission should have penalized that conduct instead of showing intransigence towards the Bresciani.

Finally, in Italy itself, the Commission decided upon the channelling of concrete reinforcement bars through the UCRO, which, although its task was officially stated to be one of co-ordination, has as its principal function the fixing of quotas for exports by the Bresciani to the other member countries; according to Feralpi, the Bresciani agreed to the creation of the UCRO only because in return the creation of that office involved the repeal of Decision No 962/77 as regards Italy

by restoring the Italian undertakings' freedom on their own market.

The *Commission* first recalls its action before the application of Decision No 962/77 (III A (b) (2), *supra*), which is sufficient proof of its vigilance with regard to imports from non-member countries. As regards dealers, since they are obliged to observe list prices which are by definition in accordance with the minimum prices, it is not possible to speak of a legislative void in respect of them. It further concludes, on those two points, that to make the legal validity of a decision conditional upon the existence of other formally distinct decisions, constitutes in its opinion a new and unknown defect. It adds that the extension of the decision by a year cannot constitute proof of its insufficiency, especially as in this case it was a question of an amendment and not an extension.

It also rejects the applicants' argument purporting to prove the insufficiency of the decision by the fact that the Member States granted aid to their steel industries, submitting that Decision No 962/77 was necessary, but not sufficient, and that in those circumstances individual national policies could not prove that the measures taken through Decision No 962/77 were at that time inopportune and inappropriate in relation to the objectives laid down by that decision. It emphasizes, further, that it is not possible to rely on economic facts subsequent to Decision No 962/77 in order to contest the appropriateness of that decision.

Finally, as regards the UCRO, the Commission maintains that that body was not created by it, that on the contrary it did not become involved in the agreements concluded, and that it simply authorized that body and provided it with technical assistance. It rejects Feralpi's arguments, maintaining that the freedom relied on concerns not prices, but only relations with customers, since Decision No 962/77, which is a general decision, is still in force.

(cc) The solution chosen was inadequate

It is *Rumi* above all which maintains that the Commission should not have used Article 61 to deal with the crisis, since that provision is applicable only as a preventive measure. As the Commission maintains that there was indeed a manifest crisis throughout the steel industry, which Rumi does not deny, that undertaking considers that it is Article 58, allowing binding quotas to be fixed, which should have been applied in conjunction with agreements with non-member countries by means of the measures provided for by Article 74, and that the failure to apply Article 58 constitutes an infringement of the Treaty.

In reply to that argument the *Commission* states that the results of such an *ad hoc* decision can be judged only in the light of the economic situation and

the provisions in force, and that although the applicant remains free to propose its own choices of economic policy, that does not alter the fact that the Commission's decisions were adopted and continue to be adopted in collaboration with the undertakings and after the required consultations. It is thus within the Commission's power, at the time which it considers appropriate, to make its discretionary choice in favour of preventive measures (Article 61) without having recourse to the other measures (Article 58).

C — The second submission: Decision No 962/77 constitutes a misuse of powers on the part of the Commission

The applicants maintain that the misuse of powers arises above all from the fact that the real objectives of Decision No 962/77 are contrary to those stated by the Commission; the latter, whilst vigorously denying that allegation, pleads that the submission is inadmissible.

(a) The objectives of Decision No 962/77 are contrary to those stated by the Commission

Decision No 962/77 is vitiated by misuse of powers since by that decision the Commission pursued an aim different from that for which Article 61 authorizes it to fix minimum prices within the Common Market.

The *applicants* reiterate their arguments in support of the preceding submission, and declare that the real aims of that decision were:

— First, to support and protect the steel-making giants, which were unprofitable on the concrete reinforcement bars market, enabling them to retain their share of the market by means of minimum prices; that is utterly discriminatory and constitutes a misuse of powers since the Commission declares that one of the aims of Decision No 962/77 is to permit the restructuring of the sector; that could take place, according to the applicants, only by operation of the law of the market, which would have forced large undertakings to cease production of concrete reinforcement bars. By preventing that logical, normal development, the Commission committed a misuse of powers;

— Secondly, by favouring unproductive and insolvent undertakings, which did not deserve such protection, to the detriment of efficient undertakings and of the consumers, who should have been protected through the application of Article 61, to halt the expansison of the Bresciani, in order to "destroy" their "shining example of competition" and reduce them to the condition of unprofitable undertakings, by burdening them with the consequences of a crisis experienced by others, and all that in the name of solidarity and in wilful disregard of the fact that the small and medium-sized Italian undertakings are responsible for 50% of the production of concrete reinforcement bars; the fact of not taking into account the true situation of the small and medium-sized Italian undertakings is sufficient evidence that the Commission was guilty of a

misuse of powers; what is at issue is in fact a retaliatory measure against the Bresciani for having refused to accept a complete system of quotas for their production.

This double misuse of powers is proved by the fact that Decision No 962/77 is a general decision, thus applying to all the undertakings subject to the ECSC. As the Commission is acquainted with all the undertakings — or groups of undertakings — it could not fail to know which of them would be favoured or handicapped by the effects of a measure which the Commission must have foreseen. Thus, it knew that the Bresciani would be handicapped. In other words "in the name of an ill-defined Community solidarity the most deserving were burdened with the consequences of a crisis experienced by others".

The *Commission* rejects these arguments, maintaining that the applicants have conducted their examination of the decision in question only in the light of the situation of the small steel-makers of Brescia, and that reasoning, which constitutes the main thrust of the application, demonstrates that it is unfounded. The applicants forget that the task of the Community institutions is to consider the situation of the Community steel industry as a whole and to take measures designed to solve the problems of all the undertakings.

None the less, it replies to the various arguments used by the applicants:

— First, it considers that Article 61 of the ECSC Treaty is silent on the nature of the persons who must be protected, and that the solution proposed by the applicants implies that the Commission is guilty of a misuse of powers whenever in the exercise of its discretionary power it decides to accord priority, even temporarily, to one or other collective interest for which it is responsible and makes its choice in the light of the economic context of the moment;

— Secondly, whilst insisting that it is familiar with the market and that it was conscious of the effect which the measures taken would have, it maintains that nothing justifies the conclusion that it intended to harm the Brescia undertakings, since "their situation was duly taken into consideration"; as for the allegations, which it considers serious, regarding the Commission's supposed underhand and unlawful activity seeking to harm the Bresciani, the Commission considers that no evidence of such serious accusations has been adduced and that the burden of proof is upon the applicants.

Finally, the Commission recalls that its objectives were clearly stated when dealing with the first submission concerning the manifest failure to observe the provisions of the Treaty and that those are the objectives which Decision No 962/77 sought to attain; it submits that its "political-administrative" action must — as regards the means used to attain its objectives — conform only to the tests of rationality and economy of the procedures adopted; that is to say, it must seek to attain the objectives chosen and considered appropriate in accordance with the rule which prescribes the expenditure of the minimum necessary effort; that is precisely the system which it followed for the adoption of Decision No 962/77.

(b) The admissibility of this submission

The *Commission* contends that this submission — like that alleging an infringement of essential procedural requirements (see D, *infra*) — is inadmissible on the ground that the applicants have "not proved that the general decision injures their individual interests specifically and directly".

The *applicants* — especially Di Darfo (Case 227/78) — express in the first place their surprise at the Commission's failure to raise this plea of inadmissibility in the first three cases (Cases 154, 205 and 206/78) and emphasize that as regards those three cases that argument is consequently excluded.

They reject the argument on the ground that the Court of Justice has accepted that the mere allegation by a party that there exists a misuse of powers is sufficient to render the submission in question admissible (Case 6/54 *Government of the Netherlands* v *High Authority* [1954] ECR 103), and that the Court may in that event specifically review the appraisal of the economic situation undertaken by the executive. That solution applies *a fortiori* in this case, in view of the fact that Decision No 962/77 constitutes a general measure, that is to say an act with regard to which the Court has applied an extensive interpretation of the plea of illegality, and with regard to which it has considered the issue of misuse of powers even when that defect was not formally raised; in support of their arguments the applicants cite the judgments in Cases 15/57 *Compagnie des Hauts Fourneaux de Chasse* v *High Authority* [1957 and 1958] ECR 211, and 14/59 *Pont-à-Mousson* [1959] ECR 215.

The *Commission* emphasizes in the first place that the failure to raise this plea of inadmissibility in the first three cases does not prevent it from raising it as from the fourth, and "cannot in any way constitute a binding exclusionary rule of procedure".

It also states that the question of inadmissibility "concerns not the issue of legality (that is to say, the possibility of formulating the claim with the support of the grounds relied on), but an investigation by the Court as to whether the claim is *prima facie* allowable". The Commission maintains that the Court — which may indeed "carry out a wide-ranging and thorough inquiry" — may declare this submission unfounded if the parties do not adduce evidence of "the possession of a current and direct interest by the party which submits the claim seeking the annulment or revision of individual measures by means of a finding that a general decision contains irregularities of such a kind as to affect directly the content of the measure imposing sanctions".

D — The third submission: Decision No 962/77 constitutes an infringement of essential procedural requirements owing to the absence of a sufficient statement of reasons

The *applicants* maintain that Decision No 962/77 is not reasoned, whereas a precise statement of reasons is absolutely necessary, and that the plea of inadmissibility raised by the Commission is unfounded.

(a) The absence of a sufficient statement of reasons

The *applicants* submit that Decision No 962/77 rests on a series of unsub stantiated claims, that the reasons stated do not take into account the true situation in Italy, and that they are "distorted", "incomplete", "insufficient" and inconsistent with the objectives sought. Further, the Commission did not refer in the statement of reasons to the fact that the Consultative Committee — on which the Bresciani are not represented — referred to Article 54 and not Article 61 as a way of finding a solution to the crisis. In conclusion, they state that this inadequate reasoning is no more than the logical consequence of the vitiating factors dealt with under the two preceding submissions.

The *Commission* rejects these arguments, pointing out that the statement of reasons contained in the preamble to the decision reflects quite clearly the process of logic which it followed:

— The steel industry has been in serious difficulties for some years;

— The Commission has already adopted certain measures;

— The situation of the concrete reinforcement bars sector has deteriorated even more than that of the steel industry in general;

— That deterioration is jeopardizing the attainment of the objectives set out in Article 3 of the ECSC Treaty;

— Thus the conditions for the application of Article 61 of the ECSC Treaty are fulfilled.

In the circumstances, the Commission considers that Decision No 962/77 contained a sufficient statement of reasons, and as for the position of the Consultative Committee, it recalls that in an opinion of 16 January 1976 that body had already expressed a favourable view on the possibility of introducing a system of minimum prices.

Finally, it maintains that in any case that decision — which is a legislative measure of a general and abstract nature — requires only a general statement of reasons and that it is not necessary to give reasons for the various provisions comprised in it.

(b) The need for a precise statement of reasons

The *applicants* submit that the statement of reasons constitutes a fundamental requirement, especially when it is a question of a legislative measure involving the exercise of discretionary power — as is the case here — in order to safeguard the interests of the persons concerned and to facilitate review by the Court of Justice (in support of that argument they cite Case 18/57 *Nold* [1959] ECR 41). In addition, the Court of Justice has decided that the statement of reasons must:

— Mention all the elements of the findings of fact on which the legal justification for the measure in question depends (Case 6/54 *Netherlands* v *High Authority*, already cited);

— Show clearly and completely the reasons of fact and law on which the measure is based (Case 2/56 *Geitling* v *High Authority* [1957 and 1958] ECR 3);

— And be particularly exhaustive when a discretionary power is exercised (the *Nold* case, already cited, and Joined Cases 36, 37, 38 and 40/59 *Geitling* v *High Authority* [1960] ECR 423). The applicants vigorously repeat that the statement of the reasons upon which Decision No 962/77 is based is "distorted", "incomplete" and "insufficient", and that that therefore constitutes,

according to the case-law of the Court, an infringement of an essential procedural requirement.

The *Commission* recalls that it is not necessary to give reasons for the various provisions of a general decision, and that it is sufficient that the statement of reasons should contain the essential elements of the logical process, and it cites the case-law of the Court in support of that argument:

— Case 2/57 *Compagnie des Hauts Fourneaux* [1957 and 1958] ECR 199;

— Joined Cases 3 to 18/58, 25 and 26/58 *Barbara Erzbergbau and Others* [1960] ECR 1973;

— Case 18/62 *Barge* v *High Authority* [1963] ECR 259.

It disputes the applicants' arguments on the ground that three of the judgments cited in support (in Cases 18/57 *Nold*, 2/56 *Geitling* and 36, 37, 38 and 40/59 *Geitling)* concern only the statement of reasons under Article 65 of the Treaty and not the reasons on which legislative measures are based. Thus, only Case 6/54 deals with similar facts and the Commission, by way of reply, cites a whole page from that judgment ([1954 to 1956] ECR pp. 111 and 112) in order to show that a general statement of reasons was sufficient in this case.

(c) The admissibility of this submission

The *applicants,* pursuing the argument — on this point — already developed with regard to misuse of powers, cast doubts on the rule whereby it is claimed that they must prove that the general decision injures their individual interests specifically and directly, and submit that the connexion existing between Articles 36 and 33 of the Treaty — which the Commission overlooked — does not provide the slightest degree of support for a restrictive interpretation of that sort.

The *Commission* repeats that the Court cannot deal with the two submissions alleging misuse of powers and an infringement of essential procedural requirements until the applicants have proved that the general decision injures their individual interests specifically and directly, and it continues to maintain that those two submissions are "partially inadmissible or unfounded in the absence of any interest on the part of the applicants".

E — The fourth submission: The illegality of the individual decisions

The applicants maintain that the individual decisions imposing pecuniary sanctions taken by the Commission are illegal owing to the absence of an adequate statement of reasons and on account of *force majeure* and/or legitimate self-protection, which, in the alternative, should at the very least lead to a reduction in the fine.

(a) The illegality of the individual decisions by reason of the absence of an adequate statement of reasons

The *applicants* argue that the individual decisions do not contain an adequate statement of reasons, claiming that the reasons given are a sham amounting to nothing more than a general affirmation,

reflecting the attitude of the Commission which, acting automatically, merely imposed the fine laid down by Decision No 962/77; in support of that argument Rumi cites the reasons on which the individual decision imposing the fine on it was based: "taking into account the nature of the infringements, the amount of sales below the minimum prices and the real taxable capacity of the undertaking ..." and maintains that the Commission fixed what it called an "adequate penalty", without further comment. Thus, with such a spurious statement of reasons, the Commission could decide on whatever figure it chose, whether higher or lower.

Further, the statement of reasons does not contain any reply to the observations which the applicants made during the administrative procedure, at the request of the Commission. That constitutes an infringement of the rule *audi alteram partem*, and is symptomatic of the attitude of the Commission, which did not take into consideration the applicants' arguments, having already taken the decision to apply the penalties laid down by Decision No 962/77.

That failure to state reasons for the individual decisions is all the more serious as the cases in question raise new issues and are of such complexity that there must be a strict obligation to state reasons for them, especially since that requirement to state precise reasons constitutes the only effective protection for the rights of the individual. The Commission should have said, in particular, why in the case of Rumi a fine amounting to 25% of the quotations was imposed when in other cases the fine varied between 0.5 and 3% for the French undertakings and 0.8 and 10% for other Italian undertakings.

The *Commission* replies in the first place that the applicants have not contested the complaints made (only three of them dispute the calculations carried out) and that the inquiry took place in a proper manner. It then recalls that it is clear that the reasons given for an individual decision cannot deal with the validity of the general decision on which it is based, but must be confined to consideration of the particular case in question. It follows that, as the reasons on which the individual decisions were based:

— referred to the articles of the Treaty and the general decisions applied;

— set out the facts in the preamble; and

— provided a logical link between the operative part and the preceding part,

they were perfectly sufficient and that consequently that submission is unfounded.

Further, the protection of rights does not go so far as to require that each individual decision should contain a special statement of reasons for the general decision which it implements.

(b) The illegality of the individual decisions by reasons of force majeure *and/or legitimate self-protection*

1. The *applicants* recall in the first place that they all tried — for a period of approximately two months on average —

to sell their products at the minimum prices. Thus they showed their good will and demonstrated their good faith. Further, during the three years preceding Decision No 962/77 they had already reduced their production voluntarily, some of them — such as Sider Camuna — having reduced their production capacity to a level equal to half the Community average. As justification for their failure to adhere to the minimum prices, they all plead the state of the market and the behaviour "of the other producers" who marketed their concrete reinforcement bars at prices below the minimum prices.

Thus each applicant maintains that if in that situation it had observed the minimum prices it would have excluded itself from the market, which would have entailed redundancies — which are impossible in Italy — and so strikes and factory occupations, and consequent damage to their property, without any corresponding benefit. Thus the abandonment of the former line of conduct — compliance with Decision No 962/77 — was the result of a state of necessity or of *force majeure* which had become apparent in the meantime.

Consequently, they rely on "a rule of international law" whereby, as a person who acts in legitimate self-protection and/or out of necessity does not incur blame, such a person cannot be punished. Thus it is necessary to annul the individual decisions, which are contrary to that rule of international law or which did not take it into account at the time when the conduct of the applicants came under consideration and when the penalty was fixed.

In support of that complaint they plead that *force majeure* and/or legitimate self-protection (which is merged with the doctrine of necessity) are general principles forming part of Community law; that the Court of Justice defined the concept of *force majeure* in the *Schwarzwaldmilch* judgment (Case 4/68 [1968] ECR 377), where it was decided — according to the applicants — that circumstances outside a person's control are required which could be avoided only at the cost of excessive sacrifice. In this case the circumstances beyond the applicant's control comprise the rejection of the minimum prices by the market, and the price to be paid by the Bresciani for none the less complying with Decision No 962/77 would have been — as a result of the closure of their factories — the loss of their property. The applicants state that they rely on this submission only "for the limited purpose of precluding the possibility of punishment falling upon the individual who takes action".

2. The *Commission* rejects the argument based on the concept of *force majeure* relied on by the applicants, maintaining that the definition given by them shows that they have had recourse to criminal law and that *force majeure* in criminal law is "a quite obsolete concept". And even when the applicants — Di Darfo, for example — refer to the factors excluding liability when a debtor does not fulfil his obligations — that is to say, *force majeure* as understood in civil law — the Commission maintains its observation that the concept is obsolete.

As regards legitimate self-protection, or the defence of necessity, the Commission considers that that concept:

— First, is inconceivable, whether it be with regard to a legal rule or with regard to a factual situation, such as the evolution of the market;

— Secondly, constitutes a circumstance excluding liability;

— Thirdly, constitutes an exception to the system, justifying — under strictly defined conditions — conduct which would otherwise be unlawful;

— Fourthly, is not recognized in the Community legal order, since in Case 78/77 *Lührs* [1978] ECR 169, the Court considered that provisions of that nature contained in the national legal systems cannot be extended by analogy, but solely by legislation applicable to ethical or moral values concerning the individual, and not to material values.

Finally, the Commission also rejects the arguments purporting to rely on the concept of legitimate self-protection, which would preclude the possibility of punishing an undertaking which did not comply with Decision No 962/77, on the ground that that would constitute a very dangerous precedent because:

— First, what is at stake — by way of General Decision No 962/77 and the individual decisions imposing penalties — is the anti-crisis policy for the steel industry resting on the principle of solidarity between undertakings;

— Secondly, such a possibility would constitute a means of evading the penalty whenever material benefits are at stake;

— Thirdly, the Community penalties would lose their coercive force as a result of the aberrant behaviour of a private entity;

— Fourthly, such justification *ex post facto* for unlawful conduct cannot be taken into consideration.

3. The *applicants* maintain that *force majeure* is not an obsolete concept and that, on the contrary, it forms part of the general principles and as such belongs to Community law for the purpose of Article 33 of the Treaty. They further point out that exceptional circumstances existed, adding two more circumstances:

— The very high cost of credit;

— The impossibility of reducing the work force.

As regards the concept of legitimate self-protection (or necessity), they reject the Commission's argument — distinguishing between natural persons and legal persons — considering it unacceptable on the ground that it is necessary to avoid the discrimination between individuals which that argument necessarily entails.

Finally, in reply to the Commission they state that if the annulment of the individual decisions constituted a dangerous precedent, it would be an even more dangerous precedent to uphold their validity, because that would amount to a declaration that the Commission's discretionary power may dispense with legality.

4. The *Commission* confirms the analysis which it made earlier, and states that the action in which the Court has unlimited jurisdiction must not become a pretext for a search for alleged unforeseeable and objective exceptional circumstances, upon which a person may rely in order to evade the imposition of a penalty. The need to avoid such a situation is all the more clear in this case as the applicants, having pleaded the alleged impossibility of applying the Community legislation, put forward national circumstances; those are particularly irrelevant since a responsible trader should be able to foresee them or, at least, take them into account.

It adds that the defence of property does not constitute a case of legitimate self-protection where it amounts to protecting "mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity", as the Court put it in the *Nold* case [1974] ECR 491.

(c) The reduction of the fine

Strictly in the alternative, the *applicants* request the Court — for the reasons relied on above — to reduce the fine in the event — unlikely in their opinion — of the individual decision's not being annulled. In this regard, they maintain that the Court may take into account all the circumstances in order to reduce the fine and that the fact that the Commission declares that the amount of the fines imposed is already low cannot constitute an argument for preventing the Court from proceeding to reduce the said fines.

The *Commission* objects to this request, stating that the fines imposed are fair, since they are proportionate to the gravity of the facts, and that they are within the limits laid down by the Treaty. It further submits that such reductions are impossible on the ground that no equitable considerations recognized by the Court are applicable to the cases in question.

Finally, in the *Rumi* case it reveals the policy which it followed with regard to fines in these cases involving minimum prices:

— The first group of undertakings which sold at prices below the minimum prices received fines of an amount equal to 15% of the total value of the underpricing established, that leniency being explained by the fact that no fine had been imposed for several years;

— Subsequently, the Commission increased the fines from 15% to 25% of the value of the underpricing established, except for the undertakings in difficulties, to which a rate of 10% was applied, and the insolvent undertakings, to which a rate of 1% was applied.

F — The particular cases of Di Darfo, Rumi and Feralpi as regards the calculations effected by the Commission

(a) Di Darfo

The *applicant* relies first on what it calls a procedural defect. It did not receive the summons to attend the hearing in Brussels on 29 June until 23 June. On the same day it sent a registered letter to the Commission informing it of that fact and asking for a postponement of the

hearing and, aware of delays in the post, it sent a telex on 26 June in which it stated that the registered letter was "following", instead of saying that it had already been sent. The only reply from the Commission was a telegram dated 28 June, which was not received by Di Darfo until 29 June, rejecting the request for a postponement of the hearing. It was then obvious that Di Darfo could no longer attend that hearing. On account of that "procedural defect" the applicant requests the annulment of the individual decision of 18 August 1978 imposing a pecuniary sanction.

The more so as the applicant states that it had wished to raise at that hearing the factual points which it still contests to this day:

— First, it considers that Invoices Nos 1626, 1628 and 1630 do not concern concrete reinforcement bars, but rolled products of ST 37 quality, and so do not come within the scope of Decision No 962/77;

— Secondly, it maintains that the Commission wrongly included amongst the unlawful sales invoices in respect of orders which were made prior to the implementation of Decision No 962/77, and it states that the test for establishing the date of the contract of sale must be the date of the order and not the date of delivery. Two groups of orders are involved:

  — The first group corresponds to Invoices Nos 1315, 1316, 1416, 1454, 1514, 1691, 1705, 1713 and 1714 in respect of supplies to the Maretto Blein undertaking (France) following orders placed on 27 and 28 April 1977 through the agency of S.p.A. Darma, Milan;

  — The second group corresponds to Invoices Nos 1660, 1661 and 1662 in respect of deliveries to S.p.A. Baraclit (Italy) following confirmations of orders of 28 April 1977 from the agent undertaking Albani di Merate.

The *Commission* points out in the first place that the hearing which it grants to the parties is not a compulsory requirement and that as the written stage of the procedure finished on 13 May the fixing of the hearing for 29 June gave Di Darfo a reasonable period of notice. Besides, there is no mandatory period of notice for such hearings; hence there was no procedural defect, nor was the applicant prevented from presenting a proper and effective defence.

As regards the factual points, it maintains that:

— First, the disputed invoices relating to the ST 37 rolled products bore a stamp which stated: "Partial alignment on the AFIM price-list"; according to the Commission, AFIM produces only concrete reinforcement bars, and so it could have been a question only of concrete reinforcement bars;

— Secondly, the sales to Maretto Blein were made in pursuance of orders dated 20 June 1977, and at the time of the investigation the agent Darma had not intervened. The orders adduced by Di Darfo as evidence were not produced for the investigation.

Consequently, the Commission rejects the arguments and objections raised by Di Darfo.

(b) Rumi

The *applicant* observes first that, as the channelling agreements "promoted" by the Commission through the UCRO were not complied with by German buyers, it was forced to sell below the minimum prices in the Federal Republic of Germany. It then submits that the extent of the underpricing was wrongly calculated by the Commission: in its view, the inspector calculated the value of the underpricing practised by Rumi in relation to a price of DM 540 per tonne; those sales were carried out by way of alignment on the Saarbrücken and Oberhausen basing points and Rumi considers that, when transport costs are brought into play, "the Davignon price is in reality reduced from DM 540 to DM 451.87". Consequently, it considers that the extent of the underpricing is reduced from 20% to 10%, that is to say from LIT 200 000 000 to approximately LIT 100 000 000 and that the fine should be calculated on the basis of underpricing amounting to LIT 100 000 000.

The *Commission* points out that it never entered into any undertaking and that it never lent its support to channelling agreements. As regards the price of the sales made in the Federal Republic of Germany between 7 and 27 April 1978, the price on the invoices was DM 400 per tonne, whereas the price fixed for the Saarbrücken or Oberhausen basing point is DM 451.87 and the telex of 23 June 1978 which Rumi purports to produce as proof of the alignment "clearly concerns sales made subsequently ... by Rumi". Further, that alignment was illegal, since the disputed invoices concern sales intended for the Netherlands and in that case alignment on a German basing point is not possible under Article 60 (2) (b), fourth indent, of the ECSC Treaty.

(c) Feralpi

1. In the first place, the *applicant* submits that, as alignment on an offer from outside the Community was lawful until 15 March 1978, the date of the entry into force of Commission Decision No 527/78/ECSC of 14 March 1978 (Official Journal L 73 of 15 March 1978, p. 16) prohibiting alignment on offers of iron and steel products originating in certain third countries, an alignment on a price which had itself been aligned on an offer from outside the Community was also lawful. Similarly, it could not be argued that alignment on unlawful conduct, that is to say on a price which was already contrary to the minimum prices, is unlawful. Consequently, Feralpi submits that all the sales at prices aligned on offers which had themselves already been aligned on offers from outside the Community are exempt from the penalties laid down by Decision No 962/77. The applicant then goes on to challenge certain facts established at the time of the investigation:

— First, in the table relating to sales in Italy the Commission made a mistake concerning the quantity in respect of which the pecuniary sanction was

imposed: it stated 2 573 273 tonnes, whereas only 2 067 453 tonnes were involved: the mistake seemed to arise as a result of Invoice No 2738;

— Secondly, the Commission calculated the difference between prices charged and the minimum prices without taking into account the extras, which — including the extras for diameter — should be included in the minimum prices;

— Thirdly, as regards the sales in the Federal Republic of Germany, the applicant shows that it aligned its prices "on the price-lists used by competitors from the purchaser's region, deducting transport costs accordingly", and rejects the argument which the Commission developed at the time of the administrative procedure to the effect that the alignment on German prices should be calculated in German marks on the ground that the alignment should be calculated in the currency of the seller, otherwise — in the event of a revaluation of the competitor's currency — the price of the undertaking making the alignment would be higher than the price expressed in its own currency: that would be "an upwards alignment", and thus "absurd";

— Fourthly, the Commission accused the applicant of having charged prices below the minimum prices by means of a group of invoices on which those disputed prices were handwritten. The applicant denies that such documents have any probative value, submitting that they are of no value as between the parties and are used only for tax purposes and that in any event in Italy "no invoice may be submitted for the purpose of obtaining an import licence for a sum lower than that stated thereon".

2. The *Commission* rejects the applicant's argument concerning alignment, maintaining that Feralpi was under a duty to align its prices on a price-list and that therefore it could not align its prices on an offer made by an undertaking which had already aligned its prices on an offer originating in a non-member country; further, such alignments should be apparent from the accounting documents and should be notified individually to the Commission in accordance with the combined provisions of the last subparagraph of Article 60 (2) of the ECSC Treaty and Decision No 23/63 (Official Journal, English Special Edition 1963-1964, p. 74); consequently, such alignments cannot be relied on to justify prices lower than the minimum prices.

As regards the four specific criticisms, the Commission observes:

— First, that "the alleged error in the calculation of the quantity does not exist", quite simply because the invoice number was illegible and may have been wrongly reproduced; but that all the other details were reproduced correctly;

— Secondly, that it does not deny having calculated the value of the under-pricing in the manner described by the applicant, since "Article 2 of Decision No 3000/77/ECSC provides that the minimum prices shall be basic prices ex basing point, including extra for quality" and extras could not be varied following the adoption of Decision No 962/77;

— Thirdly, that the sales in the Federal Republic of Germany constitute infringements not because they were calculated in lire, but because the legislation on alignments provides that the aligned price can in no case be lower than the competitor's price on which it was aligned, which is what happened in this case;

— Fourthly, that it "can only repeat what it stated at the time in the reasons given for the individual measure imposing the sanction", without going into the fiscal problems which that could raise in national law.

3. The *applicant* contests the Commission's view on alignment, observing that if undertaking A aligns its prices on undertaking B, those two undertakings have a common price and that if undertaking C aligns its prices on A it would be absurd to say that it aligns on A rather than on B, and therefore that form of alignment is lawful. As for the requirement of notification, that exists only if the alignment is subject to limits laid down for each type of product. Such limits were not fixed until 15 March 1978, and in any event the fine was imposed because of the failure to observe minimum prices and not for a failure to notify legitimate alignments.

It then criticizes the Commission for replying to the point about the extras only in relation to the alteration of the price thereof. The applicant simply maintains that the "minimum price includes the extra for quality and that for this purpose the extra for diameter must also be regarded as an extra for quality" and it notes that the Commission seems to be in agreement on the last point.

Finally, with regard to the sales in the Federal Republic of Germany, it notes that the Commission has invented a new type of alignment, namely an upward alignment. In fact, alignment really constitutes an option, in certain circumstances, for an undertaking not to observe its own prices, rather than an obligation to observe the prices of other undertakings, especially where the latter have increased relatively as a result of exchange problems which the Commission should have averted by altering the minimum prices: "thus sellers may benefit from the devaluation of their national currency".

4. The *Commission* rejects the applicant's argument on alignment; the latter cannot occur as the result of hypothetical reasoning, but must take place at the time when the contract is made and must be apparent from the accounting documents; and although two undertakings may admittedly align their prices on a third, Article 60 (2) (b) of the ECSC Treaty provides that reductions (below the list price) may not exceed "the extent enabling the quotation to be aligned on the price list, based on another point". Finally, the obligation to notify the Commission of alignments made on offers from non-member countries arises as a result of Decision No 23/63 of the High Authority of 11 December 1963 requiring Community iron and steel undertakings to make returns to the High Authority of the transactions in which they align their quotations on those of undertakings outside the Community (Official Journal, English Special Edition 1963-1964, p. 74), and

not as a result of Article 61 of the Treaty, and that decision provides quite clearly that: "iron and steel undertakings shall within three days of entering into any transaction in which they align their quotations on those of undertakings outside the Community make returns thereof to the High Authority".

Therefore, the Commission did not invent "upward alignment", and it points out that such an alignment allows a price to be adjusted in accordance with a list price drawn up on another basing point and consists essentially "of an option to use a competitor's price-list".

As regards the sales in the Federal Republic of Germany, the Commission repeats that the prices at which those sales were carried out are clearly below the minimum prices. By way of proof it adds to the file on the case the telexes which state on each occasion "selling price": DM 420 or DM 430 and "invoice price": LIT 205 000 (that is to say DM 550 at that time), and the statement of Mr Petersen who carried out the inspection and who declares that it was indeed the price marked in German marks which constituted the actual price applied to the various transactions.

Case 31/79

A — Admissibility

The *applicant* makes an application for annulment on the basis of the second paragraph of Article 33 of the ECSC Treaty. It does not deny having sold concrete reinforcement bars at prices below the minimum prices laid down, but "it does not regard its conduct as an infringement of Decision No 962/77/ ECSC", because it could not reasonably be expected to comply with the minimum prices in view of the market situation.

The *defendant* observes that the applicant is in fact challenging only the imposition of the fine, and therefore Article 2 of the decision impugned. Thus the application is not directed at Article 1, but the Commission relies on the wisdom of the Court for a ruling on the admissibility of the principal claim.

B — The economic situation of the applicant in relation to the market

Although the *applicant* does not deny having sold concrete reinforcement bars at prices below those fixed in Decision No 962/77/ECSC, it considers that it was compelled to act in that way owing to the evolution of the steel market, its competitors' selling prices being appreciably lower than the minimum prices. It attempted to obtain orders at the minimum prices, but it was always confronted by competing offers at substantially lower prices. After difficult and ruinous attempts to obtain sales at the prices laid down it was able to restore its level of production only by acting as it did, which enabled it to avoid ceasing production, incurring further losses and making its 450 employees redundant. The applicant puts in evidence its order books and the opinion of an auditor and an expert.

The *defendant* describes the general phenomenon of the steel crisis and the action taken by it in the concrete reinforcement bars sector, where it found itself faced with a sharper fall in prices than in other sectors, on account of the recession in the building industry, the fall in exports, an increase in imports and a more pronounced lack of solidarity on the part of the undertakings. Before the

adoption of Decision No 962/77/ECSC the main features of the situation were an average rate of plant utilization of 55%, massive redundancies and short-time working for almost 50% of the workforce. Hence the conditions to which Article 61 of the ECSC Treaty subjects the introduction of minimum prices were satisfied.

C — The infringement of Article 61 of the ECSC Treaty and of Decision No 962/77/ECSC

The *applicant* relying on the wisdom of the Court as regards the "legal effectiveness" of Decision No 962/77/ECSC, observes that a fine imposed for infringing that decision is not justified. In fact, in using its powers under Article 61 of the ECSC Treaty, the Commission should observe the principle of proportionality, which is recognized in the legal systems of all the Member States, which "requires that action on the part of the public authorities must be appropriate and necessary in order to attain the objective sought". That principle renders illegal all action which is not a suitable means of attaining the desired ends and all action which it quickly becomes apparent cannot comply with that principle.

General Decision No 962/77/ECSC did not arrest the fall in prices or improve the profitability of the small undertakings. On the contrary, it caused a substantial deterioration in the structure of the market; besides, it turned out to be ineffective against the action of the "Bresciani" who did not comply with it. The Commission's failure to take action led to the inapplicability of the said decision and "renders illegal any coercive action against the undertakings which adapted their conduct in accordance with a development to which the Commission contributed".

The *defendant* replies, on a point of law, that the applicant's argument amounts to questioning — although it does not state clearly whether it is contesting the legality of the decision fixing the minimum prices in accordance with the third paragraph of Article 36 of the ECSC Treaty — the minimum prices device provided for by the Treaty itself. "However numerous the infringements may be, they do not in any way affect the validity of the law".

As regards the facts, the defendant observes that it used its powers to investigate and penalize a series of undertakings, initiating a large number of administrative procedures which led to the imposition of penalties in twenty cases. Moreover, the requirement of "certificates of conformity" (under General Decision No 3003/77/ECSC — Official Journal L 352 of 31 December 1977, p. 11) stating that the invoice prices conformed to the minimum prices and the requirement that such certificates should accompany deliveries made it possible after an investigation to initiate proceedings in a further hundred cases concerning an infringement of the provisions on minimum prices. Obviously, the effects of such punitive action can become apparent only gradually and a general preventive effect can be achieved only after the imposition of the penalties.

The *applicant* replies that the appropriateness of the delayed imposition of penalties, when certain offenders disregard the minimum prices from the first day, is all the more doubtful when the market is opposed to such a policy, as Commissioner Davignon himself recognized.

The *defendant* emphasizes that those criticisms do not call in question the

validity of the disputed decision. The possibility of fixing minimum prices presupposes that they will be fixed at a level higher than the market prices previously applied. Further, it is sufficient that those prices should not be fixed at an "unrealistic" level; that was ensured by fixing the compulsory minimum prices at an intermediate level between the production costs of the undertakings producing concrete reinforcement steel from iron ore and those of the undertakings using scrap. As regards Commissioner Davignon's declaration, that was an appeal for solidarity amongst market operators. Finally, the date on which action was taken has nothing to do with the validity of the general decision which authorized such action; besides, the Commission started to investigate as early as 15 June 1977 and organized inspections with the means at its disposal as from July 1977.

D — The abuse of the power of appraisal conferred by Article 64 of the ECSC Treaty

The *applicant* is of the opinion that the power of appraisal attributed to the Commission by Article 64 of the ECSC Treaty must not, as regards the imposition of sanctions, be exercised without due reflection; that is particularly true when the general decision which it is necessary to enforce was inadequate. Besides, the Commission's exercise of its power of appraisal was distorted, in view of the discrimination to which it gave rise (see below).

The *defendant* replies that the exercise of a power of appraisal need not necessarily result in abstention. Moreover, the applicant is illogical, arguing at the same time the need to deal severely with its competitors and to be lenient in its case. The fact that little heed was taken of the minimum prices does not mean that penalties designed to ensure their observance were not justifiable.

The defendant denies the allegation of discrimination in the use of its power of appraisal in the particular case of the applicant (see below).

E — The infringement of Article 60 (2) of the ECSC Treaty and of the principle of competitive prices

According to the *applicant*, the ECSC Treaty, which is based on the tenet of free competition, must, as is evidenced by the fact that the practice of alignment is permitted, enable undertakings to face competition at lower prices and thus maintain their competitive capacity. In this case there was alignment on competitors selling at prices lower than the minimum prices fixed by the Commission; in such a situation, to require some to comply with a decision infringed by others amounts to accepting discrimination, thus infringing the principle of equality.

The *defendant* replies that the possibility of alignment provided for in the Treaty constitutes a narrowly-defined derogation from the prohibition on discrimination and, moreover, allows only an alignment on the prices of a competitor which comply with the provisions in force. Moreover, the existence of a minimum price has nothing to do with

the principle of equality, but is explained by the need to prevent sales below a certain price. Minimum price does not mean sole price. Above the minimum price the normal provisions of the Treaty on prices apply.

F — Discrimination and the individual situation of the applicant

The *applicant* claims in the first place that, when fixing the fine, the Commission did not treat it in the same way as other undertakings, in particular the "Bresciani", "whose conduct is in the last analysis the main cause of the continued depression in the prices of concrete reinforcement bars despite the fixing of the minimum prices". A fine of 115 896 units of account was imposed upon it, whilst the highest fine imposed upon a steelworks in the North of Italy (Sider Camuna S.p.A.) was only 51 685 units of account. That constitutes an infringement both of the principle of equality and of the principle of proportionality.

Secondly, the applicant claims more generally that Decision No 962/77/ECSC is inapplicable because for certain undertakings it entailed excessive burdens jeopardizing their existence. Those particularly affected were the small undertakings which, like itself, specialize in a single product and which, unlike the large integrated concerns, cannot either diversify their production or endure without hardship a lengthy period of losses, in particular when they receive no State aids.

The *defendant* replies that certain undertakings did indeed have to pass through a difficult period while waiting for the minimum prices to be accepted by the market. But the applicant, whose list prices for improved adhesion bars covered by Article 1 (2) (b) of Decision No 962/77/ECSC prior to the disputed decision were eight francs higher than the minimum prices imposed by that decision, was affected only to a limited extent; however, its individual situation was taken into account in calculating the fine. The defendant observes, finally, that sales at the minimum prices would have compensated, as a result of the higher price, for the reduced number of orders received.

The *applicant* replies by insisting that it was impossible for it to obtain the smallest of contracts at the minimum prices, that it incurred losses and that as a result the defendant's arguments are highly theoretical in nature. It was possible to obtain contracts only at the real market price produced by the effects of competition.

The *defendant* takes the view that the decision on minimum prices affects particularly the specialized undertakings only because their activity is concentrated solely in the sector of production experiencing particular difficulties. The large integrated works cannot, for their part, increase at will their sales in other sectors in order to compensate for their losses on concrete reinforcement bars. Finally, the question of national aid "has nothing to do with the uniform fixing of minimum prices for a product which are binding upon all undertakings".

The defendant argues that a general decision, which is designed to ensure a long-term improvement in the financial situation of all undertakings and to

protect employment, cannot of necessity attain those objectives simultaneously in each individual case.

The *parties* use again, in support of or in opposition to this sixth submission, the arguments advanced with regard to the economic situation of the applicant in relation to the market.

G — The possibility of justification based on the principle "necessity makes the law"

The *applicant* takes the view that its economic situation and the need to survive and to safeguard 450 jobs placed it in a state of necessity. Its conduct leading to the infringement of Decision No 962/77/ECSC was inspired by the need to "protect a legal interest of a higher order which had come under threat" and was therefore not illegal.

A study of comparative law shows that in Germany, France, Italy, Great Britain and Switzerland the principle that necessity makes the law is recognized in criminal law.

The *defendant*, whilst it considers possible the existence of facts justifying a particular act on the part of an undertaking on the ground that that act is essential in order to ward off a danger directly threatening the author of the act and that there is no legal way of meeting that threat (confirmed *a contrario* by the judgment in Case 16/61 [1962] ECR 289), denies that those conditions were satisfied in this case. Other undertakings took the necessary measures (fewer, but profitable, sales at the minimum prices, short-time working, partial redundancies). In the event of a general crisis, when an appeal for solidarity is made to all concerned, a defence of legitimate self-protection cannot be accepted with regard to an individual infringement, for that would entail the risk of justifying all infringements of the same type more or less automatically.

The defendant emphasizes that the applicant's offence lay in not applying the minimum prices at any time, and that the brief period during which it did not receive any orders came after it had entered into important contracts prior to the adoption of the decision on minimum prices. The applicant has not proved that its losses are due mainly to the application of the disputed decision and that its survival was at stake.

H — The reduction of the fine

In the alternative, the *applicant* claims that the fine should be reduced. If it was at fault, the offence was minimal having regard to the situation with which it was faced. The case-law of the Court on infringements of Article 60 (judgments in Case 8/56 [1957 and 1958] ECR 95, and in Case 1/59 [1959] ECR 199) shows that the amount of the fine must take into account the nature of the provision infringed and the gravity of the infringement; it is also necessary to consider the financial difficulties experienced by the applicant and its position on the market, taking into account the particular difficulties which it encountered and which it has already described (see above). Its conduct was not inspired by an intention to jeopardize the fundamental objectives referred to in Article 3 of the ECSC Treaty, but by its concern to safeguard a legal interest worthy of protection, namely the existence of the undertaking.

Finally, there was, as was stated above, discrimination in the amount of the fines imposed on the various undertakings which were in breach of General Decision No 962/77/ECSC.

The *defendant* recalls that Article 64 of the ECSC Treaty empowers it to impose fines not exceeding twice the value of the sales effected unlawfully. In all the decisions imposing fines taken until now by the Commission under Articles 64 and 61 for infringement of the provisions on minimum prices, the basis chosen for the calculation of the fine has been the value of the underpricing established, that is to say an amount well below the value of the unlawful sales.

Generally, and in the absence of special mitigating circumstances, the fines were fixed at 25% of the amount of underpricing involved. In this case, in view of the economic situation of the undertaking and in view of its financial possibilities, that figure was reduced to 6% of the underpricing. That calculation proves that the comparison drawn with the fines imposed upon other undertakings is false, being based on absolute figures which prove nothing.

Finally, the defendant emphasizes that the seriousness of the infringement does not justify the imposition of a nominal fine and that it allowed the applicant favourable terms for payment.

I — Costs

In an addendum to the application, the *applicant* argues that the claim which it submitted for suspension of the operation of the decision was occasioned by the defendant's conduct, that is to say by the peremptory terms of the letter of 17 January 1979, which offered favourable terms for the payment of only part of the fine and which did not guarantee the applicant against enforced implementation of the decision, and by the fact that it was not until the proceedings for the adoption of interim measures had commenced, when it was too late for the applicant to withdraw its claim, that the defendant stated that there was no question of enforcing the contested decision as long as the main action was pending; the Court has already taken such circumstances into consideration (the judgments in Joined Cases 16, 17 and 18/59 [1960] ECR 17, and in Joined Cases 79 and 82/63 [1964] ECR 259).

The *defendant* submits that the costs of the application for the adoption of interim measures must be borne by the applicant, since its claim was dismissed by the Order of the President of the Court of 27 March 1979 and since it has not pleaded any exceptional circumstances justifying an order that the parties bear their own costs pursuant to the first subparagraph of Article 69 (3) of the Rules of Procedure. In fact, the existence of an enforceable claim cannot, in particular when that claim is contested in legal proceedings, be treated as an immediate risk of enforced implementation. Moreover, the letter of 17 January repeats what was said in the decision as regards part of the fine (FF 100 000), whilst it offers to negotiate as to the possibility of favourable terms for the payment of the remainder (FF 570 000); the applicant could have avoided unnecessary proceedings simply by putting the question directly to the

Commission. Finally, even if the Commission had not declared that it would not seek enforcement during the proceedings, the applicant's claim for suspension should have been dismissed for lack of proof as to its financial problems and the extent of its economic difficulties.

Case 83/79

A — The application by Maximilianshütte

The *applicant* begins by submitting a long account of the facts concerning the reasons why it sold goods below the minimum prices, before going on to state the grounds of its application.

(a) The facts

The applicant maintains that its failure to observe the minimum prices was caused by a drastic fall in sales.

1. The fall in sales

The applicant concedes that by fixing minimum prices the Commission "wished to counteract the fall in the prices for concrete reinforcement bars" and thus deal with a crisis that was manifest.

1 (1) The fall in sales of concrete reinforcement bars

The applicant recalls that the fixing of minimum prices entailed a 34% increase in the "basic price for improved adhesion bars", raising it from DM 410 on the open market to DM 530. That increase was well received by the applicant, which was eager to apply it immediately. Unfortunately, by acting in that way it placed itself in a "dangerous situation": in fact, from June to July 1977 its sales in Bavaria — where "it achieves approximately two thirds of its sales in Germany" — "fell by 90%, dropping from 9 415 tonnes to 963 tonnes" and in the Federal Republic of Germany as a whole its sales fell by 87%. The applicant explains that, taking into account its production organization and working on the most favourable assumptions, the sales recorded in July represented 7.5% of its productive capacity.

The applicant maintains, with the support of figures, that in Bavaria, as in the rest of the Federal Republic of Germany, the drastic fall in its sales in July was not due to "a general drop in sales" but to the fact that buyers "purchased in July not from the applicant, but from other suppliers" and thus Maximilianshütte lost an important part of its market: its market share in Bavaria fell from 36% to 5% and in Germany as a whole from 10% to 2%.

1 (2) The "cause of the applicant's loss of sales"

1 (2) (1) The failure of the applicant's competitors to observe the minimum prices

"The pattern of the applicant's sales in July shows that to a very large extent its competitors did not observe the minimum prices".

1 (2) (2) Reason for the failure to observe the minimum prices

1 (2) (2) (1) The defective nature of Decision No 962/77/ECSC

— Non-application to dealers

By not making its Decision No 962/77/ECSC "applicable to dealers also" the Commission made it virtually impossible

for "its measures to have an impact on the market". In fact, the dealers, who held stocks equivalent "to the quantity consumed in approximately two months", could thus charge prices lower than the minimum prices imposed upon the producers and to that end they had so much room for manoeuvre that they could, as it were, starve the producers out. In order to achieve that, all they had to do was to avoid exhausting their stocks — and the evolution of stocks in 1977 shows a fall of 15% from July to October — using a relatively small quantity to manipulate the market in concrete reinforcement bars, which "is keenly competitive".

The problem is even more serious in the case of large groups which produce and sell through a subsidiary, The parent company sells at the minimum prices to the subsidiary (the dealer) and the latter re-sells below the minimum prices, and as the subsidiary's loss is borne by the parent company that practice means that "Decision No 962/77/ECSC also creates discrimination between producers according to whether they do or do not possess their own distribution company".

— Non-application to imports

By failing , until the end of 1977, to take measures — other than compulsory consultations and declarations — concerning imports of concrete reinforcement bars, the Commission allowed certain producers, especially those in Italy, to circumvent the rules on minimum prices. In fact, all they had to do was to export their bars to Switzerland and then import them into the Federal Republic of Germany — the more so as "for imports into the Federal Republic of Germany from Switzerland it is not necessary to establish whether the goods were manufactured within the Community or outside it".

The applicant demonstrates that imports of concrete reinforcement bars from Switzerland, particularly into Southern Germany, rose appreciably between August and October 1977, which, it is claimed, proves that "imports from Italy to Bavaria, routed through Switzerland, were used to circumvent the rules on minimum prices applicable to Community production" and that the applicant was "the main victim" of that practice.

1 (2) (2) (2) Failure to supervise properly the application of Decision No 962/77/ECSC

The applicant maintains that immediately after the introduction of the minimum prices the Commission "did absolutely nothing to ensure their application in practice", relying "solely on the authority of the Official Journal". It recognized that fact itself, stating that it "had reinforced the infringement procedure . . . only progressively" in the Eleventh General Report, No 151. According to the applicant, "supervision on a massive scale" should have been carried out as from 9 May 1977 in order to induce traders to observe the minimum prices, which represented an increase of 34%, and subsequently the scale of the supervision could have been reduced.

1 (2) (2) (3) The defendant's recognition of the impossibility of charging the minimum prices

The applicant maintains that, by taking a large number of decisions in order to reinforce "appreciably" the provisions on

minimum prices, the Commission recognized that the enforcement of Decision No 962/77/ECSC "had been frustrated". "To that verbal admission it immediately added an admission by conduct when it reduced the minimum prices" by 5% (Decision No 1483/78 of 14 June 1978, Official Journal L 176 of 30 June 1978, p. 44).

Thus "by the decision imposing a fine ... the defendant requires the applicant, under a scheme which was full of gaps, to observe prices which the defendant itself had to abandon, after nervertheless attempting to fill those gaps after the event". Such conduct is contradictory.

2. The consequences for the subsequent conduct of the applicant

2 (1) In general

The applicant maintains that it tried to apply the minimum prices until August, but its observance of the law had earned it the reprobation of the market, that is to say, a drastic fall in its sales in July. Faced with that danger, it followed market prices, granting credit notes. Consequently, the applicant regards itself as merely a "victim", which suggests that the Commission "could not impose a fine upon it".

2 (2) Effects on the applicant's sales

2 (2) (1) Market shares

As soon as the applicant granted the credit notes its market share again rose without, however, reaching the level attained in the second quarter of 1977. In fact, in the second quarter of 1977 it held 36% of the Bavarian market and 10% of the market in the Federal Republic of Germany. For the years 1977 and 1978 it was not able to exceed 23% and 8% respectively.

2 (2) (2) Quantities delivered

The quantities delivered in the second quarter of 1977 were not achieved again after the collapse in July 1977. Both on the Bavarian market and on that of the Federal Republic of Germany the applicant suffered a fall in its tonnage delivered ranging between 24% and 67%. That situation is confirmed by the pattern of orders and by the "relative variation co-efficient", which is a "statistical index showing fluctuations", making it possible to "compare the relative instability of the applicant's sales with the relative stability of its competitors' sales".

The applicant concludes its account of the facts with a submission that "all the figures show that if the applicant had continued to adhere to the defendant's minimum prices, that would have constituted a display of blind confidence which would have been rewarded by the closure of the applicant's business".

(b) The grounds relied on in the application

After submitting that it is entitled to bring this action, the applicant pleads that the decision attacked is illegal on the ground that it infringes the ECSC Treaty and is based on General Decision No 962/77/ECSC, which is likewise illegal.

1. Defects in the decision attacked

1 (1) Article 1 of the ECSC Treaty

Article 1 of the ECSC Treaty establishes the principle which constitutes the basis for the legal concept of the Common Market, according to which the competitive conditions of undertakings

must result from the natural production conditions (judgment in Joined Cases 27 to 29/58 [1960] ECR 241). The Commission's inability to enforce the minimum prices led to a "distortion of the conditions of competition". In those circumstances, by deciding to align its prices on the market prices, the applicant "contributed to the restoration of the basic idea inherent in the legal concept of the Common Market and helped to eliminate the distortion of the conditions of competition".

1 (2) Article 2 of the ECSC Treaty

The applicant maintains that the first paragraph of Article 2, providing that the Community shall accomplish its task "through the establishment of a common market as provided in Article 4", has been infringed because the decision attacked is contrary to Article 4. (See 1 (4) *infra*).

But it is above all the second paragraph of that article which has been infringed.

In the first place, the decision attacked hinders "the most rational distribution of production at the highest possible level of productivity", that is to say — according to the interpretation of the Court of Justice in its judgment in Joined Cases 27 to 29/58 [1960] ECR 241 — a distribution which is "based in particular upon the composition of production costs resulting from output, that is, from the physical and technical conditions in which the various producers operate and from their individual efforts".

According to the applicant, when Article 61 is applied that distribution is produced by fixing minimum prices, but always in compliance with the first paragraph, that is to say, on the basis of objective criteria. But as a result of the penalty imposed by it, the Commission based "the distribution on an objective criterion which is in breach of the Treaty", since by selling below the minimum prices certain producers were able to "increase their sales to the detriment of the other suppliers".

The decision impugned is also alleged to be contrary to the duty to safeguard "continuity of employment" (second paragraph of Article 2), since by means of the penalty imposed it seeks to compel the applicant to abandon sales of concrete reinforcement bars completely and to dismiss its staff whilst its competitors seize its share of the market by not complying with Decision No 962/77/ECSC.

1 (3) Article 3 of the Treaty

That article, it is claimed, is applicable not only to the general decision by virtue of Article 61, which provides that minimum prices may be fixed only if they are necessary to attain the objectives set out in Article 3, but also to "all subsequent decisions enforcing a decision introducing minimum prices".

The individual decision is contrary to Article 3 (c) which places the Commission under a duty — in its prices policy — to allow necessary amortization and a normal return on invested capital. That is not the case here, since the applicant could no longer sell anything at the minimum prices which the Commission "did not manage to enforce".

For that same reason the decision impugned is also contrary to Article 3 (d), because it "destroys the conditions which induce undertakings to improve their production potential", and to Article 3 (g), because it constitutes a protective measure in favour of the

undertakings which did not comply with the minimum prices.

The decision impugned is also contrary to Article 3 (e) because it compels the applicant to dismiss a part of its workforce and thus brings unemployment to the undertakings which complied with Decision No 962/77/ECSC, whilst sparing the undertakings which did not observe the decision.

1 (4) Article 4 of the ECSC Treaty

1 (4) (1) Unequal treatment of similar situations

It is alleged that the Commission, by taking the individual decision imposing a fine, infringed the prohibition on discrimination laid down by Article 4 (b) of the Treaty, in that it did not treat comparable situations in an equal manner and the applicant submits that that decision "prescribed unequal conditions for comparable cases".

The applicant maintains that by the decision imposing a fine the Commission discriminated against it and that the Commission should, on the contrary, have treated it as "someone who has not infringed the law". In this context it develops at great length a series of arguments which in its submission lead to the conclusion that it should have been treated in the same way as the undertakings which did not contravene the provisions on minimum prices, as follows:

— The Commission itself brought about the state of necessity in which the applicant was placed, through its inability to enforce its own general decision, and it "cannot as a result of that act of self-protection, induced by it, acquire rights as against the person who takes steps to protect himself";

— If the factual situation — in the light of the principle of non-discrimination — of the applicant is compared with that of a hypothetical undertaking which observed the minimum prices, "a value judgment based on the ECSC Treaty and on the case-law of the Court" leads to the conclusion that the two situations are identical;

— The application and observance of fundamental rights, which constitute a primary objective both for the Commission and for the Court of Justice, entitle the applicant "to be protected against unjustified distortions in competitive conditions as a result of action taken by the defendant".

The applicant states that these arguments do not amount to "taking the law into one's own hands" but rather that they raise "the question whether the old rule of western law known as *venire contra factum proprium* forms part of Community law". Further, it does not rely on the fact that other undertakings which sold goods below the minimum prices were not fined, which "impedes the application of Community law", but it wishes on the contrary to be treated in the same way as the undertakings which did not infringe the law.

1 (4) (2) Equal treatment of dissimilar situations

The applicant takes the view that the Commission discriminated against it by treating it in the same way as the other undertakings which sold goods below the minimum prices, on the ground that its situation was different. In fact, whereas

the other undertakings "wilfully undercut the minimum prices at the outset and without any apparent necessity", it did so only because it was driven "by imperative necessity".

It "invites the Court to interpret Article 4 (b) of the ECSC Treaty from that angle also", especially as "the case-law of the Court does not yet seem to have definitively extended the prohibition on discrimination to the present case".

1 (5) Other articles

1 (5) (1) Articles 5 and 8 of the ECSC Treaty

In failing to observe various articles of the Treaty, the Commission thereby infringed the first paragraph of Article 5 and Article 8 of the Treaty.

As the contested decision tended "to perpetuate the gross distortion of competition which the defendant brought about", Article 5, second paragraph, third indent, of the ECSC Treaty was also infringed.

1 (5) (2) Article 64 of the ECSC Treaty

The Commission disregarded the "bounds of its power of appraisal" because "it did not succeed in harmonizing the various aims of Articles 2 to 4 of the ECSC Treaty".

1 (6) Submissions based on lack of competence and infringement of essential procedural requirements

It is argued that the reasons on which the contested decision was based do not satisfy the legal requirements on the ground that they do not explain "why the defendant considers irrelevant the fact that the applicant's initial observance of the minimum prices caused it extremely heavy losses".

Further, "as the contested decision is in breach of a number of provisions of the Treaty, the defendant was not competent to adopt that decision".

2. Defects in Decision No 962/77

2 (1) Plea of illegality

The applicant takes the view that in assessing the contested decision it is also necessary to take into account, under a plea of illegality, the illegality of Decision No 962/77, in accordance with the case-law established since the judgment in Case 1/58 [1959] ECR 17.

2 (2) Article 4 (b) of the ECSC Treaty

The applicant submits that Decision No 962/77 discriminated between producers, in the first place, because it did not apply to dealers, which allowed the very large groups to avoid applying the minimum prices (see *supra* 1 (2) (2) (1)), and, secondly, because it did not apply to imports, which allowed the Italian producers to circumvent the Community legislation (see *supra, loc.cit.)*

2 (3) Article 4 (d) of the ECSC Treaty

By forcing certain undertakings to adhere to the minimum prices, whilst others were able to avoid doing so, Decision No 962/77 deprived the former undertakings of the market and thus introduced a "restrictive practice . . . which tends towards the partitioning of markets".

2 (4) Other articles of the ECSC Treaty

The applicant further submits that the general decision is contrary to:

— Article 1 of the Treaty, on the ground that by "its unjustified differentiation it is contrary to the essential nature and aims of the Common Market";

— The first paragraph of Article 2 of the Treaty, on the ground that it "imposes a one-sided and unjustified burden in particular on southern Germany and the smaller steel producers";

— The second paragraph of Article 2 of the Treaty, on the ground that it "is detrimental to continuity of employment and provokes disturbances in the economies of the Member States";

— Article 3 (c), (d) and (g), on the ground that it does not allow the applicant to achieve necessary amortization and to obtain a normal return on its capital, and thus removes "any incentive to improve production potential and to promote the orderly expansion and modernization of production";

— The second paragraph of Article 5 of the Treaty, on the ground that it led to "a serious distortion of normal competitive conditions";

— Subparagraph (b) of the first paragraph and the second paragraph of Article 61 of the ECSC Treaty, on the ground that it "infringed Article 3 of the ECSC Treaty".

B — The Commission's defence

(a) The facts

The *Commission* emphasizes that the applicant does not dispute the facts.

1. The size of the undertaking

The Commission objects to the applicant's comments seeking to project Maximilianshütte as a small undertaking and relies on the fact that "the assets shown on its balance sheet exceed DM 500 million and the number of workers employed is over 6 000".

2. The applicant's observance of the minimum prices "at the beginning".

The Commission submits that the applicant intended from the beginning to apply, not the minimum price, but a "market price" since it had admitted that it informed its customers as early as August 1977 that it was going to take action. That promise was realized when it subsequently allowed its customers credit notes. The Commission further states that "the failure to comply with the decision on minimum prices cannot be justified either by reference to so-called 'market prices' — precisely those which should have been raised — or by reliance on infringements committed by other undertakings".

3. The fall in sales and the other statistical data provided by the applicant

The Commission prefaces its remarks with a general observation to the effect that the invoicing of the minimum price, in conjunction with a promise to rectify it, could not have led to a fall in the applicant's sales, since the prices thus charged were those of the other suppliers selling below the minimum prices.

The Commission does not dispute the figures put forward by the applicant (pages 21 to 24 of its application), but comments that the applicant "always refers to one particular month, namely

July 1977". Since the introduction of the minimum prices had been anticipated since April 1977, since contracts made before those prices were introduced were performed until June, since dealers and buyers had made contracts "which greatly exceeded their normal needs", and since "the holidays in factories and the building trade fall mainly in July", it was thus logical that sales would drop in July 1977.

Quoting only the figures for the total deliveries effected by Maximilianshütte between January 1977 and March 1978, the Commission considers that there can hardly be any question of a "disastrous slump".

It emphasizes, further, that the sale of concrete reinforcement bars — which depends on a large number of factors and not only on the price — is subject to considerable seasonal and conjunctural fluctuations. Thus, the fact of applying or not applying the minimum prices was not decisive in the event, the more so as it was eliminated by the applicant when it granted a "rectification" and "an adaptation in accordance with market conditions".

Finally, it points out that the fall in the applicant's sales may also be explained by the fact that its competitors produce concrete reinforcement bars more economically, in electric furnaces.

4. The failure to apply the minimum prices to dealers

As Article 1 (1) of Decision No 962/77 names as addressees of the decision, together with producer undertakings, their selling agencies and middlemen, those "dealers" are already subject to the provisions of the decision on minimum prices.

Moreover, Article 61 does not empower the Commission to extend the measure to other dealers; for that purpose it would have been necessary to apply the first and second paragraphs of Article 95. At the time when Decision No 962/77 was being prepared it did not seem that the necessity for such a decision in order to attain the objectives set out in Articles 2, 3 and 4 of the ECSC Treaty "had been proved". On the contrary, as stocks cover only two months of sales, it might have been expected that the transition would be swift and that the dealers would replenish their stocks at the minimum prices. Thus the undertakings which infringed Decision No 962/77 were responsible for enabling the dealers to undercut those minimum prices themselves, and their reliance on under-pricing by the dealers amounts to *venire contra factum proprium*, the more so as the applicant has, since its collaboration with the company Klöckner AG, itself become associated with a marketing company belonging to a Konzern, namely Klöckner Stahl GmbH of Essen, and it already owned three marketing companies.

5. The failure to apply the minimum prices to imports

The Commission disputes the allegation that imports from Switzerland were diverted imports from Italian producers and emphasizes that it made use of the possibilities granted by the Treaty to intervene in that respect by means of a number of measures.

6. The level of the minimum prices

The Commission rectifies the percentage put forward by the applicant for the increase represented by the minimum

prices in relation to the market price (34%), maintaining that the applicant did not include transport costs in its calculations, and that the minimum price therefore entailed an increase of only 22%.

By fixing that minimum price — not against the wishes of the undertakings, but in their interest — the Commission did not intend to impose a huge increase in prices at a stroke, "but to enable the undertakings to arrive at appropriate prices".

It points out that "long before the adoption of Decision No 962/77 the applicant's price-list showed a price of DM 600", that is to say, higher than the minimum prices.

Finally, the Commission refutes the applicant's claim that the minimum prices were reduced by 5%; on the contrary, the said Decision No 1483/78 maintained the same level of prices expressed in units of account, but adjusted those prices in accordance with changes in the rates of exchange, which explains the reduction in those prices in German marks and the increase in pounds sterling and in lire.

7. The Commission's inability to secure compliance with its decision

The Commission recalls that all it can do is "to rely on the solidarity of the undertakings" and exercise control *ex post facto* by imposing fines upon offenders where necessary, and that it does not possess "any means of direct coercion".

Whilst not disputing that such a measure may create tension, and that such tension may make further measures necessary, the Commission maintains that "it cannot be inferred from those measures intended to perfect the whole of the mechanism deployed against the crisis — of which minimum prices form only a part — that the initial measure was ineffective and therefore should not have been complied with".

Finally, the Commission points out that the first inspections were carried out as early as June 1977 and that by 23 January 1978 it had already undertaken 62 inspections and commenced proceedings for infringements in eight cases.

(b) The legal situation

The Commission considers that its remarks above on the facts "have destroyed the substance of the applicant's legal submissions" and that only a few additional remarks are required.

1. The applicant's arguments against the decision imposing a fine

According to the Commission, the method used by the applicant consists in setting out first the content of a provision of the Treaty, then repeating a passage from "the account of the facts", allegedly bearing some relationship to the rule of law cited and then concluding that the rule of law was infringed. That method leads to a repetition both of the passages concerning the facts and of the arguments; for that reason the Commission "considers it useful to use as its point of reference not the articles of the Treaty, but the arguments put forward".

1 (1) The alleged harmful effects of the application of the decision

The Commission recalls that the applicant submitted that the contested decision tends to deprive it of its outlets

for concrete reinforcement bars, thus forcing it to dismiss its workforce, and to worsen the competitive conditions in which it operated in relation to its competitors.

It considers that these are "grave allegations which amount to a claim that the Commission deliberately sought to harm the applicant", and it "denies those allegations, for which there is no justification".

It rejects the applicant's arguments, submitting that "it is not possible to deduce from the fact that the decision on prices was infringed any argument against the legality of that decision" and that the amendments and additional measures "do not in any way affect the binding nature and the legality of the decision".

1 (2) Equality of treatment between the applicant and the undertakings which did not infringe the rules on minimum prices

The Commission rejects the applicant's lengthy explanations seeking to prove that its situation is identical — for the purpose of the principle of non-discrimination — to that of an undertaking which did not infringe Decision No 962/77, because "the essential point in this matter is the question whether an undertaking has or has not observed the minimum prices".

It also rejects the argument to the effect that the applicant's situation is identical by reason of the fact that it observed the minimum prices initially, because, in the first place, the applicant was not fined for that, and, secondly, because "that statement is not materially accurate".

Finally, it rejects the argument to the effect that the contested decision violates fundamental rights on the ground that "such a violation is a further manifestation of discrimination and infringement of the principle of equality", which it has already refuted.

1 (3) The inequality of treatment between the applicant and the other undertakings which infringed the rules on minimum prices

The Commission maintains that "quite apart from the absence of any factual foundation for that argument (see B (a) (2), *supra*), it amounts to a plea of necessity".

1 (4) The applicant's alleged state of necessity

The Commission recalls that in its judgment of 12 July 1962 in Case 16/61 [1962] ECR 289 the Court of Justice laid down the conditions for the application of the concept of legitimate self-protection:

— "The threat must be immediate";

— "The danger must be imminent";

— "There must be no other lawful means of avoiding it".

As the fall in the applicant's deliveries was "slight" and "largely seasonal in nature", the applicant could have reduced its production. Also, Maximilianshütte belongs to a Konzern, is not a "one-product undertaking" and had a list containing prices higher than the minimum prices before the application of the decision on those minimum prices, with the result that those prices should not have caused the applicant any

particular difficulty. Consequently, the conditions for a state of necessity are not satisfied.

The Commission points out that at present the minimum prices "are being observed by the market and in some cases have already been exceeded", and that in any case the argument regarding a state of necessity, "which has been used by a number of the applicants", would authorize every undertaking not to observe the minimum prices on the ground that its competitors had not observed them. According to the Commission, it is necessary, on the contrary, to penalize the infringements committed "in order to induce the undertakings as a whole to maintain the discipline and solidarity which are essential for the proper working of a system of minimum prices".

1 (5) The alleged insufficiency of the statement of reasons

As "it is not true that the applicant observed the minimum prices initially and that it suffered damage as a result", the Commission submits that there was no need to refute that claim in the statement of the reasons on which its decision was based. On the other hand, those reasons took into account the "undertaking's financial and economic situation at the time" in order to determine the level of the fine.

2. The alleged illegality of Decision No 962/77

The Commission rejects the applicant's argument to the effect that Decision No 962/77 created discrimination by not applying the minimum prices to dealers and imported goods, since it "has already shown that those complaints are unfounded" (*supra*, B (a) (4) and (5)); the more so as that argument leads to the conclusion that every undertaking may circumvent the law and that those which do not have such an opportunity are discriminated against in relation to those which do; there is no support for that view in the case-law cited by the applicant.

It recalls that "Decision No 962/77 is a general decision which imposes exactly the same obligations upon undertakings which produce and sell concrete reinforcement bars", and consequently it is incorrect to claim that it sought to impose the minimum prices only on some undertakings and allowed the other undertakings to deprive them of their market share.

As for the "other articles" relied on by the applicant, as "they are also relied on in relation to that alleged discrimination, the claims are without foundation".

3. Preparatory inquiries

The Commission rejects all the applicant's claims for measures of inquiry.

C — Maximilianshütte's reply

(a) The facts

The applicant repeats and enlarges upon the arguments set out in the application. It suffered a considerable fall in sales in July 1977, of which only 40% was due to "general market conditions" and 60% to "special reasons", which reside in the fact that unlike its competitors, it observed the minimum prices in June and July 1977.

1. "First: exclusion of the sales lost by the applicant on account of general market conditions"

Reproducing in a table the figures given in the application (p. 9 of the reply), the

applicant strives to prove that the fall in sales due to the conditions relied on by the Commission, that is to say:

— The imminent entry into force of Decision No 962/77, causing customers to bring forward their purchases;

— Holidays; and

— Seasonal and conjunctural variations,

is only approximately 40% of the total (39% in Bavaria and 41% for the Federal Republic of Germany as a whole). Consequently, it lost approximately 60% of its market share for special reasons not connected with general market conditions.

In a further attempt to prove that the fall in its sales was not caused in the main by the general fluctuation of the market, the applicant ascertains by means of two different methods of calculation that the drop in its sales was actually greater than in the case of its competitors and that the relative variation coefficient (already used in the application) "shows that the fluctuation in sales was appreciably greater in its case than in the case of its competitors".

Finally, the applicant expresses surprise at the "silence observed by the defendant" concerning that proof, which had already been given in the application, and it expresses anxiety at the fact that the Commission can reply to that proof only in the rejoinder, which would deprive it of the opportunity of replying to the Commission's arguments in writing.

2. "Secondly: ascertainment of those causes of the fall in the applicant's sales which are peculiar to it"

2 (1) Rejection of the Commission's arguments

First, the applicant denies that after its integration with Klöckner-Werke AG the undertaking's policy could have been changed; so in its view that integration cannot be a cause of the fall in sales recorded in July 1977.

It also denies that its manufacturing process is more costly than the process using electric furnaces, claiming that that would only be the case if scrap-iron were sold very cheaply, since the electric furnace process uses scrap, whereas the OBM process (the Maximilianshütte oxygen blasting process) uses only 25 to 75% scrap. Therefore the use of that process does not constitute a cause of the fall in the applicant's sales either, that fall being due to the failure of other producers to comply with Decision No 962/77.

2 (2) Cases of the fall in sales peculiar to the applicant

2 (2) (1) "The applicant's observance of the minimum prices in June and July"

The applicant joins issue with the Commission over its allegation that it undercut the minimum prices from the beginning; it repeats that during an initial period — from June to August 1977 — it adhered to the minimum prices strictly; then as from August it promised its clients that it would "take action on prices", and finally, as from November and December 1977, finding "that the minimum price had not been imposed upon the market at all", it negotiated an adjustment in the price with each customer, the adjustment being effected by means of credit notes.

It offers to call witnesses and to produce its accounts in order to prove the veracity of its claims, and submits that if it had indeed promised its customers subsequent concessions on prices from the beginning, they "would not have deserted it in June and July".

As it made concessions on prices "as from mid-August", it was compelled — for commercial reasons — to "act in the same way *ex post facto* in respect of earlier transactions", that is to say, those concluded in July, although admittedly it was not legally "obliged" to grant price concessions on transactions concluded at the minimum price.

2 (2) (2) "Underpricing in relation to the minimum prices observed by the applicant until the end of July 1977"

The applicant was "faced with underpricing, practised legally by certain dealers and importers and illegally by others".

2 (2) (2) (1) The trade

Adducing various items of evidence in support of its view, the applicant considers that "all sales of concrete reinforcement bars take place through the trade"; direct sales between producers and users do not exist.

The Commission's argument to the effect that Decision No 962/77 extended the minimum prices to "selling agencies" and to "middlemen" is not relevant on the ground that "neither of those categories is important on the German market in concrete reinforcement bars".

Similarly, Decision No 31/53, contrary to the Commission's claims, did not impose an indirect obligation on the trade to observe the minimum prices, since that decision concerned only the publication of price-lists and not the level thereof and it applied moreover only to direct sales and — as such — was never observed by the trade.

Consequently, the Commission is wrong to claim that by Decision No 3002/77 it merely extended the minimum prices scheme to "the other dealers", since "no dealer on the German market in concrete reinforcement bars was concerned previously".

Besides, Decision No 3002/77 was taken too late. The Commission should have taken it at the time of the entry into force of Decision No 962/77, since it should have known that the dealers held stocks covering the demand for concrete reinforcement bars "for a sixth of the year", and further that they could replenish their stocks at prices below the minimum prices by means of imports, which had in any case shown a "strong tendency to rise" since the beginning of 1976. According to the applicant, the underpricing on the part of the dealers was all the more foreseeable as the minimum price constituted an increase of 34% over the market price previously registered. In that regard, it adds that the Commission was wrong to declare that that increase amounted to only 22%, because it compared the basic minimum price (that is to say, excluding transport costs) with the market delivered price (that is to say, including transport costs).

As regards the fact that before the entry into force of Decision No 962/77 the applicant's price-list showed a price of DM 600, that is to say higher than the future minimum price, that is unimportant since the applicant sold the bulk of its production by alignment on

the "price-lists of the manufacturers in the Brescia region", of which fact the defendant was perfectly aware.

Lastly, the applicant submits that the commercial undertakings with which it was indeed connected were sold to Klöckner & Co. in 1977, with which company it is not connected; nor is it associated with Klöckner Stahl GmbH.

Consequently "the trade can have obtained concrete reinforcement bars at prices below the minimum prices only from other producers", a fact for which the applicant should not be called to account.

2 (2) (2) (2) Imports

The applicant considers that the Commission has not replied to the "detailed considerations supported by figures" contained in the application. It states further that imports from Switzerland, which compete directly with the applicant's products in Bavaria, increased by 170% in July 1977, whilst total imports from non-member countries increased by only 6·5%. By not taking any action against such imports the Commission exposed "the applicant to the lower prices charged for imports from Switzerland".

2 (2) (2) (3) "Insufficient supervision of observance of minimum prices until the end of July"

The applicant rejects the arguments adduced by the Commission in this regard. It maintains that the figures quoted with regard to the supervision carried out by the Commission until 23 January 1978 "are not such as to support its statement to the effect that it took all measures necessary to enforce Decision No 962/77".

That is particularly so, according to the applicant, in view of the fact that the Commission could have taken preventive action, by the use of Article 47 of the Treaty, instead of "merely acting after the event".

The applicant then undertakes to prove, by means of extracts from various sources, that the Commission vacillated until the end of 1977 before investigating and dealing effectively with the Bresciani, whilst recognizing during the second half of 1977 that the Bresciani had infringed the rules on minimum prices continuously. Consequently, the applicant criticizes the Commission for not having applied Articles 47 and 64 of the Treaty from the time when Decision No 962/77 was first implemented, on the ground that that absence of control "placed the applicant in a situation of necessity". It does not see in that criticism any contradiction in connexion with the fact that it infringed Decision No 962/77 itself and that it was fined for that reason.

(b) The submissions on which the application is based

The applicant "fully maintains" the legal arguments used in its application and stands by the manner in which were expressed, adding only "a few clarifications and denials".

1. "Article 4 (b) of the Treaty"

1 (1) The general problem raised

The applicant maintains in its view that it is in the same situation as the undertakings which complied with Decision No 962/77. In reply to the Commission's arguments rejecting that submission it states that its view "derives from the fact that the applicant was placed in a state of

necessity", and that that state of necessity does not constitute an autonomous argument, but "only partially conveys the considerations which necessarily arise in relation to the interpretation of the prohibition on discrimination set out in Article 4 (b)".

Similarly, the applicant has never maintained that a state of necessity constitutes a general justification established by the ECSC Treaty, but claims that "it must be taken into account when applying the prohibition on discrimination".

Consequently, the infringement committed by the applicant "does not provide objective justification for the inequality of treatment". That inequality derives from the decision to impose a fine although the applicant was in the same situation as the undertakings which complied with the minimum prices, since it "acted in a state of necessity".

1 (2) "The applicant's state of necessity"

The applicant recalls that 60% of the fall in its sales derived from special causes which lie essentially in the fact that it observed the minimum prices whilst others disregarded them. That conduct entailed very heavy losses due to the utilization of its productive capacity at a rate of 17·6 %, which was in essence the result of the fall in sales and the worsening of its average percentage of short-time working, which rose from 13·5% in the first half of 1977 to 24·2% in the third quarter of 1977 at its factory in Haidhof. In view of the analysis of the causes of that slump in July, the applicant submits that its "only salvation" was to increase its market share by selling below the minimum prices.

The Commission's argument to the effect that the legality of General Decision No 962/77 cannot be called in question on account of the fact that certain undertakings infringed that decision is not relevant, since "it is not the legality of the general decision imposing a fine". Similarly, the illegality of that decision is not due to the fact "that other undertakings infringed Decision No 962/77" but to the fact that "the applicant was placed in a situation of necessity".

It also states that "it is not relying on the difficult situation in the steel industry, but on its own difficult situation"; nor is it relying on "the actual advantage which those undertakings [which infringed Decision No 962/77 from the beginning] obtained by undercutting the prices", but on the damage which it suffered; nor does it rely on a "deterioration" in competitive conditions, but on "the damage which it suffered as a result of that deterioration". It concludes this line of argument by protesting at the Commission's statements alleging that the applicant expressed the opinion that by Decision No 962/77 the Commission "wished to harm the applicant".

1 (3) "Effects of a decision upholding the action on the future application of Article 61 of the Treaty"

As regards the fears expressed by the Commission that such an argument (concerning the state of necessity) would entitle every undertaking to disregard Decision No 962/77 and thus lead to the

legal ineffectiveness of Article 61 of the ECSC Treaty, the applicant submits that those fears are unfounded on the grounds that:

— In the first place, each undertaking must prove "that it has made a considerable sacrifice for the Community" and that that sacrifice was the sole cause of the state of necessity;

— Secondly, there are no other cases similar to its own, since the Commission has not cited any;

— Thirdly, having observed the minimum prices in June and July, the applicant should be treated differently from the undertakings which did not observe those minimum prices from the beginning.

Consequently, the annulment of the decision impugned would not jeopardize the application of Article 61 of the ECSC Treaty, but on the contrary "such a decision would confirm the supremacy of the rule of law in the Community".

2. "Evidence"

The applicant considers that the Commission, contrary to its statements, disputes the facts with regard to which a preparatory inquiry was requested and that consequently such an inquiry is necessary, the more so as the facts which must thus be established are relevant to the outcome of the dispute.

Thus it is of primary importance for the outcome of the dispute to ascertain the number of cases investigated by the Commission, although "that evidence is important only as regards the illegality of the contested decision imposing a fine, and not with regard to 'the plea of illegality' relating to Decision No 962/77", since the legality of the latter "cannot depend *a posteriori* on the answer to the question whether its application was properly supervised".

It is also relevant to know "the reasons for the progressive increase in the supervisory activity" of the Commission in order to demonstrate the insufficiency of the Commission's activity in that field and the effect which that activity had on the market. The applicant considers that this claim for an inquiry is admissible, since the second sentence of the first paragraph of Article 33 of the ECSC Treaty "does not restrict the information which the Court must seek to obtain in order to give judgment, but only the factors which it may evaluate after they have been brought to its notice".

As regards proof of the cause of its loss of sales, the applicant considers that if the Court accepts the evidence which it has itself put forward in its pleadings no inquiry is required.

Finally, it points out that as regards the documents which it requested the Commission to produce, the latter is, by the terms of Article 23 of the Protocol on the Statute of the Court, automatically obliged to "transmit to the Court all the documents relating to the case before the Court"; the more so as in this case the production of those documents would serve to establish that the Commission knew that the Bresciani "were in every case deliberately undercutting the minimum prices" and that consequently the other undertakings observing those minimum prices were losing sales and that the only remedy for those undertakings was to undercut the minimum prices also.

D — The Commission's rejoinder

(a) The facts

The *Commission* considers that the applicant has attempted essentially to prove the existence of a causal link leading to the alleged state of necessity. In the Commission's view such a causal link does not exist for the following reasons:

1. "July"

The month of July, to which the applicant refers constantly constitutes an exception, since as from August 1977 the applicant's market share returned to its former level, as is confirmed by the applicant's graphs (pages 9a and 9b of the reply). Further, the Commission considers that it is not possible to "conclude that there was a substantial decrease in sales" on the basis of a period of only one month.

2. "May"

On the other hand, the above-mentioned graphs show for the month of May — the date of the entry into force of Decision No 962/77 — a striking increase in the applicant's market share at the expense of its competitors, a tendency which was further confirmed in June, although to a lesser extent. That means that Maximilianshütte had entered into numerous contracts at the old prices before the entry into force of Decision No 962/77, thus contributing to "the inundation of dealers and consumers with cheaper concrete reinforcement bars and frustrating the enforcement of the minimum price". That sales policy explains the "period of stagnation" observed in July 1977. The Commission adds that that sales policy, "conducted without excessive scruples", is confirmed by the failure to adhere to the delivery programme established by the Commission for the whole of the northern group in which Maximilianshütte has a share of 37%; that programme was exceeded by 32% in the second quarter of 1977.

3. There is no relationship of cause and effect involving the price factor

In the first place, the Commission takes the view that "for regular customers the price factor is not so decisive that from one month to the next they should decide to turn to new suppliers whom they do not know"; the more so as several of the buyers are undertakings belonging to the Klöckner group.

It goes on to claim that the applicant "promised to allow its purchasers rebates from the beginning depending on how prices developed, in the form of refunds subsequently credited to them". In this regard, it maintains that the explanation given by the applicant, distinguishing three phases between June 1977 and January 1978, is not convincing since it declares on the one hand that it did not promise rebates until August and on the other hand it attempts to argue that it was compelled to grant rebates in January 1978 on sales made in June and July 1977 (as evidence the Commission offers to produce two credit notes); so those rebates were promised in June.

To the extent to which it has established that "the applicant promised as early as June to revise the minimum prices originally invoiced", the Commission submits that the causal relationship "no longer holds", since the fall in sales was not caused by observance of the minimum prices and the revival of sales was not

due to undercutting of the minimum prices.

4. "Irrelevance of the figures"

All the figures concerning the alleged decrease in sales are "absolutely unnecessary from the legal point of view" on the ground that it is only necessary to prove the applicant's failure to observe the minimum prices, which "has been proved by the Commission and is not contested by the applicant".

5. "Irrelevance of production costs"

It was not the fact that the applicant "did not charge sufficiently low prices in July" which caused the fall in its market share in July, but "the saturation of demand" due essentially to the sales effected by the applicant in May and June 1977 at the old prices. The Commission points out that Mill III (for the manufacture of concrete reinforcement bars) had already caused losses before the entry into force of Decision No 962/77, whilst the Bresciani were able to sell at the old prices without incurring losses.

6. Since there was no appreciable fall in sales, the applicant's analysis of the causes of "the state of necessity justifying the failure to comply with the legal obligation" is irrelevant

None the less, the Commission defines its position on the various points raised.

6 (1) The trade

In the first place, it repeats that it was the producers, by selling below the minimum prices, who allowed the dealers also to sell below those prices since it is difficult to imagine a dealer selling below his purchase price.

It considers that "it is not true that all sales of concrete reinforcement bars are made through dealers" and maintains that in 1977 the German steel producers sold 15·3% of their total deliveries of concrete reinforcement bars directly to the consumers. It also disputes the applicant's claim that no dealer on the German market in concrete reinforcement bars was concerned before the adoption of Decision No 3002/77, because the applicant omitted to mention the selling agencies of undertakings from other Member States which also operate in the Federal Republic.

Finally, it points out that the applicant omitted to include amongst the marketing companies with which it was connected "Maxhütte Eisenhandelsgesellschaft mbH, Sulzbach-Rosenberg", which is controlled by it "according to paragraph 7 of Decision No 77/135/ECSC of 22 December 1976 (Official Journal L 43 of 14 February 1977, p. 32)".

6 (2) Imports

The Commission recalls that as early as 15 April 1977 it had given its attention to this question and that it is thus untrue to claim that throughout 1977 concrete reinforcement bars could be imported in large quantities without any difficulty. It is also untrue to claim that imports tend to increase progressively, since, in the first place, the maximum was reached in the fourth quarter of 1976 and the market share taken by imports fell back from 48·2% to 36·9% in the second half of 1977, and, secondly, that figure (quoted by the applicant) obviously

includes imports from other member countries, since in 1977 the market share taken by imports from third countries represented only 9·2% of total sales in the Federal Republic.

Those remarks apply also to the particular case of Switzerland; the Commission further emphasizes that imports from that country were abnormally high only in October and December 1977, and not during the period which is in issue here (June to September 1977).

6 (3) Inspections

In this regard, the Commission repeats that:

— The first inspections were carried out as early as June 1977;

— More frequent or "preventive" inspections would have been purposeless during the period in question;

— The factors making it possible to establish the causal link with the fall in the applicant's sales — and *a fortiori* the alleged state of necessity — are lacking.

It adds further that supervision is possible only as regards transactions in which the deliveries are invoiced and that, as there is a lengthy interval between delivery and the sending of the invoice, it would have been pointless to carry out inspections as early as the month of May. The futility of such supervision during the first months of the application of Decision No 962/77 is further confirmed by the use — by certain undertakings including the applicant — of credit notes entered into the accounts subsequently.

It also disputes the applicant's arguments blaming it for its failure to establish preventive supervision, maintaining that "inspections and penalties can only bring [infringements] to light after the event and punish them". Thus it is not the Commission's conduct, but that of the undertakings which is in issue.

As regards the accusation levelled at the Bresciani, the Commission maintains — relying on the figures drawn up in order to measure the degree of compliance with the delivery programmes established by it — that "the Bresciani displayed greater discipline in production than some of their northern competitors".

Finally, the Commission emphasizes that the applicant's arguments give the impression that "the undertakings are quite ready to sell off their products at bargain prices and that it is the Commission which is forcing them against their will once again to obtain an adequate return in order to improve their financial situation", and it concludes that "the best prescriptions of the Commission cannot achieve results if the undertakings do not observe them".

(b) The question whether the application is well-founded

The Commission takes the view that the applicant "is sounding the retreat" by dropping its claim for the state of necessity to be treated as an autonomous argument and by abandoning the plea of illegality raised against Decision No 962/77.

1. The state of necessity and the prohibition of discrimination

The Commission considers that this "joinder" effected by the applicant changes nothing as regards the

difference existing between Maximilianshütte and the undertakings which observed the minimum prices. The Commission maintains that the discrimination relied on does not exist, since the applicant's situation is not the same as that of the undertakings which observed the minimum prices.

It further observes that the rate of utilization of productive capacity of 17·6%, put forward by the applicant, concerns only the month of July and solely the production of concrete reinforcement bars; for the whole of 1977 "a rate of 56% is recorded for the applicant", whereas for the German undertakings as a whole it was only 50%, which proves that the applicant "was affected to a lesser extent than other producers by the fall in demand".

It also observes that, although the figures for the average rate of short-time working "are also rather impressive at first sight", in comparison with other undertakings "it can be seen that Maximilianshütte was relatively little affected".

2. The alleged unique situation of the applicant

The Commission rejects the applicant's claim that it should not be seen in the same light as the other undertakings which infringed Decision No 962/77, repeating that:

— In June and July 1977 the applicant did not observe the minimum prices, but merely drew up pro forma invoices, correcting them "in January 1978 with retroactive effect to June 1977: thus it did not suffer any damage as a result of its observance of the law";

— The fall in sales in July 1977 was due not to observance of the minimum prices, but above all to the increase in sales carried out in May and June 1977;

— Each of those two grounds alone enables the conclusion to be reached that the applicant did not accept any particular sacrifice and that consequently it cannot plead a state of necessity".

3. The so-called evidence

In essence, the Commission "disputes the relevance of the evidence, without examining facts which manifestly lack relevance". The irrelevance of the evidence results particularly from the absence of a relationship of cause and effect between the facts complained of and the alleged state of necessity. Since there is no state of necessity and the applicant's situation "reflects the general over-capacity and the contraction in demand in the concrete reinforcement bars sector", the undertakings' problems could not be remedied by supervision on the part of the Commission, but solely by their own willingness to make the adjustment.

Finally, the Commission points out that all documents relating to the case have already been submitted by the applicant in an annex to its application.

Case 85/79

A — Korf's application

The *applicant* submits that the Commission's decision of 9 April 1979 "is null and void" on the ground that it is contrary to Articles 61 and 64 of the ECSC Treaty and constitutes a misuse of powers on the part of the Commission. In order to prove that its application is "well-founded", it first makes factual remarks before going on to deal with "the legal appraisal".

(a) The facts

The applicant recognizes that as from 1975 the steel industry in the European Community has been in a state of crisis, but considers that a solution to that crisis "required measures to adjust the structure of the industry". The maintenance in production of obsolete plant "in England, France, Belgium and Italy" creates "excessive supply" leading to "a fall in prices".

On the concrete reinforcement bars market, the Commission — despite Decision No 962/77 — did not manage to overcome existing difficulties and suffered "a setback" because it did not "at the same time require dealers in iron and steel products not to undercut the producers' list prices". The Commission had itself recognized that loophole, since by Commission Decision No 3002/77/ECSC of 28 December 1977 (Official Journal L 352 of 31 December 1977, p. 8) it required dealers to observe the minimum prices and by Commission Decision No 3003/77/ECSC of 28 December 1977 (Official Journal L 352 of 31 December 1977, p. 11) it required undertakings in the iron and steel industry "to issue certificates of conformity in respect of certain iron and steel products".

By failing to take those measures at the same time as the fixing of the minimum prices "the Commission created one of the principal reasons for the impossibility of imposing the minimum price on the market".

Further, after the entry into force of Decision No 962/77, the Bresciani fixed a market price well below the minimum prices (DM 350 to 380 instead of DM 550), without any attempt being made by the Commission to counteract their activities. Thus those undertakings conquered large shares of the German market to the detriment of the German undertakings, especially the applicant, which "observed the minimum prices fixed by the Commission" and which as a result suffered very high losses (DM 68 million in 1977 as against 34 million in 1976) due particularly to a fall in orders in the third quarter of 1977.

In those circumstances, the applicant pointed out to the Commission that it could not comply with Decision No 962/77 if "it was not possible to contain the situation and call the steelworks in northern Italy to order by means of appropriate measures".

As the Commission "did nothing until 30 September 1977" and Commissioner Davignon made a statement at a meeting of the Chambre Syndicale in Paris, interpreted by the German participants as a concession to the German undertakings allowing them to sell below the minimum prices, the applicant issued credit notes and immediately informed the Commission thereof.

(b) The "legal appraisal"

1. The "legal effectiveness" of Decision No 962/77/ECSC

By virtue of Article 61 of the Treaty the Commission may take measures, the "legal validity" of which "depends on whether they are in accordance with the requirement of proportionality and with the prohibition of all excessive measures, which derive from the principle of the rule of law". Under that principle action is lawful only if it is essential and if "the

means chosen bear a reasonable relationship to the aim sought".

General Decision No 962/77/ECSC is inapplicable, since, in the first place, it was not necessary in order to attain the objectives set out in Article 3 of the Treaty and, secondly, it "rested on an erroneous basis", because it was "clearly doubtful from the beginning" that the Bresciani — who had already frustrated the voluntary commitments to limit production — would display solidarity, whereas the decision "pre-supposed solidarity on the part of all manufacturers".

Consequently, that decision, which was both incomplete, because dealers were not required to observe the minimum prices, and not applied, because the Commission did not carry out the necessary supervision with regard to the Bresciani, caused the applicant considerable losses and imposed upon it "an excessive burden", all of which "constitutes a serious infringement of the principle of proportionality and of the prohibition of all excessive measures". Finally, as that decision "seriously endangered" the objectives set out in Article 3 of the ECSC Treaty, "it constitutes in any case, in the circumstances, a misuse of powers on the part of the Commission".

2. The infringement of the discretionary power conferred upon the Commission by Article 64 of the Treaty

The applicant submits that the discretionary power conferred upon the Commission by Article 64 of the Treaty should have led it not to impose a fine, in view of "the development of market conditions which was beyond the applicant's control and which was not brought under control by the Commission either". In imposing the fine, "the Commission disregarded the fact that a penalty can never be an end in itself", as was demonstrated in this case where the undertaking in question, after trying to sell at the minimum prices, infringed them only in order to avoid "the risk of having to cease production".

The applicant is further of the opinion that the Commission's decision was clearly taken "because it hoped thereby to create a deterrent effect for the future", which was not necessary as regards the applicant.

3. The principle, recognized in the ECSC Treaty, of alignment on the prices of competitors

Article 60 (2) (b), which allows undertakings to practise alignment, permits them the "power to react in a manner which is appropriate to respond to the dictates of competition", and according to the applicant "such an exceptional situation occurred in this case".

4. The principle that "necessity makes the law"

This principle — which is "recognized in all the legal systems of the Member States" and "consequently applicable in Community law also" — must be applied to the situation of the applicant, which infringed Decision No 962/77/ECSC only because "a situation had been created in which the cessation of production was inevitable".

5. The "disproportionate nature" of the measure

The decision taken by the Commission to impose a penalty upon the applicant is also illegal because the "measure is objectively disproportionate".

In fact, it makes no distinction between the Bresciani, whose "lack of solidarity" determined the course taken by the market, and the undertakings (including the applicant) which were the victims of that situation and which decided only "after considerable delay to align their prices on market prices". That attitude on the part of the Commission is all the more incomprehensible as during the discussions which it held with the German undertakings in 1977 "it never displayed the slightest doubt as to its opinion that the situation on the concrete reinforcement bars market was due to the behaviour of the Bresciani".

6. The reduction of the fine

In the alternative, the applicant asks for the fine to be reduced on the ground that, if it was guilty of an infringement, the latter was minimal, since its conduct proves that it attempted initially to apply a measure of which it expected a great deal itself, and that it infringed that measure only after its failure due to a lack of solidarity on the part of the Bresciani.

Consequently, in accordance with the case-law of the Court (judgments in Case 8/56 [1957 and 1958] ECR 95 and Case 1/59 [1959] ECR 199) stating that the level of the fine must take into account the nature of the provision infringed and the gravity of the infringement, only "a nominal fine ... may be justified".

B — The Commission's defence

(a) Facts

The *Commission* maintains that it was not market developments which compelled the applicant "to make further concessions on prices by way of credit notes". In practice, when a contract was concluded the minimum price was indicated pro forma, it being understood that an "alignment" on the "market price" would be carried out subsequently, so that the client would never actually pay the minimum price; he would pay only balances, that is to say the difference between the minimum price debited and the amount credited by which that price differed from the price actually agreed on.

As the applicant entered up orders from the beginning of June and July 1977 — even orders for "considerable quantities", proving that the applicant's claim not to have had orders on the books in July 1977 is inaccurate — it infringed Decision No 962/77 from the time of its entry into force.

As regards Decisions Nos 3002 and 3003/77, the Commission adopted them "only because experience had shown that that was the only way of ensuring that the minimum prices were fully observed"; thus it had not recognized a loophole in the system since, moreover, the need for such action was not apparent when the minimum prices were introduced.

The Commission, pointing out that inspections have been carried out since June 1977 and have led to 28 decisions imposing fines, disputes the applicant's claim that it did nothing to restrain the activity of the Bresciani who did not

observe the minimum prices from the beginning.

The Commission takes the view that the Bresciani did not conquer sections of the market because they sold below the minimum prices — since the applicant did the same — but because since before the entry into force of Decision No 962/77 they had been producing at favourable cost and were able to sell their products at advantageous prices; at the same time "the applicant's price-list which was valid until 1 June 1977 indicated prices for concrete reinforcement bars which were higher than the minimum prices laid down". Thus the losses incurred by the applicant "cannot be imputed without more ado to the introduction of minimum prices, which in truth could scarcely have caused the applicant difficulties".

(b) Law

1. The applicability of Decision No 962/77

Noting in the first place that the applicant — which was in agreement with that measure before its introduction — now appears to regard "the situation which existed in May 1977 quite differently from the way it viewed it then", the Commission maintains, first, that the fact that the dealers were not obliged until December to observe the minimum prices does not enable the conclusion to be drawn, without the benefit of hindsight, that Decision No 962/77 "was obviously incapable of attaining its objectives", the more so as Article 61 of the ECSC Treaty provides for that measure to be taken only in relation to producers and as, further, by virtue of the principle of proportionality, only at a second stage was "recourse to Article 95 justified as a means of compelling dealers to observe the rules on prices" in order to ensure the application of Decision No 962/77, and secondly, that when such rules are adopted "it must be expected that they will be infringed" and a "legal obligation does not cease to be binding because it is not observed".

As regards the alleged failure of the Commission to impose the minimum prices, that institution recalls the inspections carried out and submits that "the rigour with which the observance of a binding provision is supervised and infringements are dealt with does not affect the binding nature of that provision".

Finally, as regards the right of alignment, that is possible only if carried out with reference to a competitor's prices which are calculated in accordance with the provisions in force, and it does not allow an infringement committed to be justified "by reference to the wrongful conduct of other undertakings".

2. The existence of a state of necessity

The Commission submits in the first place that that state of necessity has not been proved. In that regard, it points out that the list prices in force on 1 June 1977 were higher than the minimum prices and that the losses incurred by the undertaking were not therefore due solely to the entry into force of Decision No 962/77. Further, the applicant should — like all the other undertakings producing concrete reinforcement bars — have used legal means, that is to say, should have reduced its production until the market had made a proper recovery, the more so as compliance with the minimum prices was still more difficult for undertakings whose list prices were lower than the minimum prices.

Finally, Decision No 962/77 rests on the principle of solidarity, so that "if it were

accepted that infringements should be regarded as justified by a state of necessity, every infringement committed by a producer would justify the next producer's infringements almost automatically".

3. The alleged misuse of powers

Here the Commission replies to what the applicant has called "the infringement of the discretionary power conferred upon the Commission by Article 64".

In the first place, it notes the ambivalent attitude of the applicant, which reproaches it both for its leniency — with regard to the Bresciani — and its lack of flexibility — with regard to Korf.

It goes on to reject the applicant's argument on the ground that the possibility of imposing a fine under Article 64 is not removed by the fact that certain undertakings have committed infringements, and that when a fine was imposed on the applicant it "was simply a question of ensuring that the measure which the Commission had taken in the interest of all the undertakings actually attained the desired result".

Finally, the Commission takes the view that there is no reason not to punish that sophisticated form of undercutting the minimum prices, which is effected by means of rebates credited to customers, and that if it had refrained from imposing a fine it would have condemned the minimum prices system to failure; and it adds that it "did not on any occasion state that the minimum prices laid down did not have to be observed".

4. The amount of the fine

The defendant recalls that Article 64 of the ECSC Treaty empowers it to impose fines not exceeding twice the value of the unlawful sales. In all the decisions imposing fines taken by the Commission until now in the field of minimum prices, the basis chosen for the calculation of the amount of the fine has been the value of the underpricing, that is to say an amount well below the value of the unlawful sales. In general, and in the absence of special mitigating circumstances, the fines were fixed at 25 % of the amount of the underpricing, which would have led to a fine of DM 600 000 in this case. However, in view of the economic and financial circumstances of the undertaking in question, the rate applied was 10% of the underpricing, which "proves that there is no manifest lack of fairness".

C — Korf's reply

(a) The facts

The *applicant* repeats that it does not dispute that it undercut the prices, but states that that "does not in itself constitute an offence" since as a result of the Commission's failure to enforce the minimum prices the applicant was "forced to adjust to the conditions existing on the market".

It disputes the Commission's reply to the effect that it never applied the minimum prices, on the ground that the Commission relies only on "general practice" and merely makes suppositions not substantiated by any evidence. On the contrary, by virtue of personal contacts on the part of "Mr Dewald,

who holds a responsible post in the field of sales", the applicant sold 10 000 tonnes delivered in July and August 1977 at the minimum prices and without any promise of subsequent compensation. It was only later that its attempts to obtain sales at the minimum prices came to nothing, because the dealers "required either an adjustment in the prices for quantities already sold or the cancellation of the orders".

That fact also explains why the applicant maintained in its application that it had no orders on the books in July 1977; in fact, the orders recorded — and referred to by the Commission — were not definite, as each order had to be renegotiated with a reduction in the prices, so that those orders remained unchanged in the documents, but, commercially, "the effective level of orders at that time was nil".

The applicant repeats that the Commission has admitted that Decision No 962/77 was not capable of attaining the objectives laid down and that the objections raised in this regard by the Commission must fail in view of the terms of Decision No 3002/77 stating that "compliance with pricing rules is hindered if the dealers retain their freedom of action", and in view of the fact that "it is of no importance that that was clear from the beginning "since" it is in any case certain that Decision No 962/77/ECSC was doomed to failure, as the Commission has admitted".

Moreover, "the Commission did nothing itself to enforce the minimum price" since it did not carry out the first inspections until June and regular inspections were not carried out until July, and by that stage "the undertakings in northern Italy" had already imposed their own market price. Following the Commission's reply that it has only limited powers to supervise compliance with its decisions, the applicant submits that that argument constitutes recognition by the Commission itself that it was not able to enforce the minimum prices.

As regards solidarity — which according to the Commission is essential to the success of the minimum prices system — the applicant considers that the Commission should have expected that not all the producers in the sector would show solidarity, and there was thus a further reason for the Commission to "take measures in order to ensure that all undertakings observed the minimum prices from the beginning", the more so as those minimum prices were fixed at an unrealistic level.

In any event, in the applicant's opinion, if the powers of the Commission are insufficient to enforce Decision No 962/77, that decision cannot attain the objectives laid down, especially as Commissioner Davignon declared before the Club des Marchands de Fer de la CECA that "even with sanctions price increases cannot be imposed if the market opposes them".

Thus the applicant states that it is criticizing the Commission not for having used its powers in order to impose a fine on it, but "for failing to exercise its powers fully from the

beginning in order to ensure the success of Decision No 962/77/ECSC".

The applicant is surprised that the Commission no longer wishes "to attach importance to the fact that the uncertainty which gripped the market in 1977 is inseparably linked to the ruthless conduct and lack of solidarity of the Bresciani", the more so as it was informed thereof — by the applicant, amongst others — and "it had even considered that it was essential to find a solution to that problem". That attitude on the part of the Commission — which even treats the Bresciani as serious competitors — "shows that it is no longer prepared to take as the basis for its legal appraisal the situation which existed in the past and which it itself considered intolerable". This is particularly so as the important point is not the question why the Bresciani are in a position to sell below the minimum prices, but the fact that those sales, by creating a market price lower than the minimum prices, were the cause of the dealers' refusal to obtain supplies from undertakings which applied those minimum prices. It is against that activity that the Commission should have intervened "directly", failing which it is responsible for the situation and thus cannot impose fines on undertakings which abandoned the minimum prices only in order to prevent other undertakings — disregarding those minimum prices — from seizing shares of the market at their expense.

The applicant also disputes the claim that all undertakings were "similarly affected" by Decision No 962/77 on the grounds that:

— First, the Bresciani — taking advantage of the fact that the decision was not applicable to imports — "exported their products to Switzerland in order to import them from there into the Federal Republic of Germany", thus circumventing the said decision;

— Secondly, the large undertakings — taking advantage of the fact that the decision was not applicable to dealers — were able to dispose of their production through trading companies owned by them, thus circumventing Decision No 962/77;

— Thirdly, as a result of these possibilities of circumventing Decision No 962/77 and the absence of control on the part of the administration, there arose "considerable inequality in the treatment accorded to undertakings formally subject to the same constraints".

(b) The "legal conclusions"

Analysing the facts set out above, the applicant submits that not only was Decision No 962/77 "unsuitable for attaining the objectives pursued, but on the contrary it cast unfair and unequal burdens upon the undertakings which submitted to the minimum prices discipline during a certain period".

It states that Decision No 962/77 is contrary to the ECSC Treaty, in particular to Article 3 thereof, on the ground that "the Commission is in serious breach of that obligation [compliance with Article 3] when measures taken by it cause economic damage leading to the cessation of production and thus destroying production potential and employment".

It also submits that the contested decision is "incompatible with the principle of proportionality" which "requires that any action on the part of the public authorities must be appropriate and essential in order to attain the desired result"; thus "action entailing burdens disproportionate to the aim pursued and unduly onerous to the individuals concerned" is contrary to the principle of proportionality. And it seems clear — in the applicant's view — that Decision No 962/77 meant a reduction in turnover for some undertakings, and thus "considerable losses", whilst other undertakings increased their market share.

The applicant insists that it is of little importance that that development could have been foreseen at the time of the adoption of Decision No 962/77, but that "the consequences which the decision actually had" are the important factor, the more so as they were possibly foreseeable in view of "the attitude previously adopted by the Bresciani".

(c) The amount of the fine

The applicant submits that, as it acted "solely to avoid further damage to its business", the imposition of a fine is not justified. At the very least, the fine should be considerably reduced, since it is guilty of only "a very minor offence".

D — The Commission's rejoinder

(a) Facts

The *Commission* takes the view that the arguments put forward by the applicant concerning the claim that it applied the minimum prices from the beginning "are also likely to create a misunderstanding", on the ground that the applicant does not make any clear distinction between the 10 000 tonnes (called a goodwill order) ordered at the minimum price and subsequently cancelled, and the quantities actually sold below the minimum price. Admittedly, the "goodwill orders" may bear witness to the applicant's willingness to sell at the minimum prices, but the fact cannot be denied that the minimum prices were not actually applied, as those orders were cancelled. And in any event, that quantity of 10 000 tonnes is not involved in the dispute. As regards the other orders — the only ones in respect of which the fine was imposed — the applicant infringed Decision No 962/77, and did so from the beginning, since it is inconceivable that the dealers, who had cancelled "the so-called goodwill order" in May 1977, should have been prepared to place orders at the minimum prices as from 7 June 1977, the conclusion being that they did so only "in return for a promise, made contemporaneously, of a 'subsequent alignment' on 'market prices' ". The applicant's "allegations", which are "not particularly clear", do not enable the conclusion to be drawn that the dealers did not demand that alignment on "market prices" until a later stage; on the contrary, everything indicates that the promises of an "alignment" were made at the beginning. Thus "there is reason to conclude that the applicant did not actually apply the minimum prices at any time".

The Commission persists in its opinion concerning the applicant's order book and rejects the latter's arguments, submitting that as the contracts entered into were firm the parties were obliged to perform them, that the re-negotiations

concerned only the amount of the "alignment" on the market price and that the distinction between orders recorded in the accounting documents and orders "from the commercial point of view" cannot be relied on, because in its inspections the Commission "may take into account only the commercial and accounting documents" which the undertakings are required to make available to it.

The Commission also maintains its submission that "only practical experience revealed the justification for including dealers as a whole in the minimum prices system", since certain dealers — extensions of producer undertakings — and agents within the meaning of Decision Nos 30 and 31/53 were already included in Decision No 962/77 and since in any case, as regards the independent dealers, "there was no proof" at the time that it was necessary to include them also, and to do so only Article 95 could be used. On the contrary, it was the conduct of the undertakings which sold below the minimum prices which created that necessity. "That is why it is a *venire contra factum proprium* for the applicant to rely on the underpricing practised by the dealers."

As regards the level of the minimum prices, which is considered unrealistic by the applicant, the Commission points out that a minimum price must necessarily be higher than the market price previously charged in order to be able to attain the objectives laid down and that in this case the price was fixed taking into account the various factors involved and the different basic prices for the product concerned. It also maintains that Commissioner Davignon's statement was not "an admission that the fixing of minimum prices was inappropriate", but on the contrary "an appeal to the undertakings to display solidarity".

As regards the activities of the Bresciani, the Commission disputes the applicant's argument, pointing out that their prices were clearly the lowest before the entry into force of Decision No 962/77 and that "the reason for the introduction of the minimum prices" was the low level of market prices, and maintaining that by presenting the facts "in a false light" the applicant is merely seeking "to give the impression that it applied the minimum price for quite some time", whereas "in fact it did not apply the minimum price at any time".

The Commission also rejects the applicant's argument to the effect that the Bresciani circumvented Decision No 962/77 by exporting their products to Switzerland, whence they imported them into the Federal Republic of Germany, on the grounds that not only has no specific information been supplied in that regard, but moreover the truth of that statement has not been established (see below). It points out that it took numerous measures concerning imports, and in particular in conjunction with Switzerland, which at the beginning of 1978 "promised to comply with the minimum prices in its exports of concrete reinforcement bars to the Community".

Finally, it states that it has "difficulty in understanding the applicant's position with regard to the unequal effects said to be produced by the decision on minimum prices as a result of the diversity of

channels of distribution", that is to say, what the applicant calls the failure to apply the decision to dealers.

(b) Law

In the first place, the Commission insists that Decision No 962/77 "was entirely suited to facilitating the attainment of the objectives pursued". The applicant's argument to the effect that there is no case for fixing minimum prices if it is not certain that those prices will be observed from the beginning by all concerned is indefensible, on the ground that "a legal obligation does not cease to be binding because it is possible to infringe that obligation".

Similarly, it maintains that "the binding nature of a prohibition is not affected by the extent to which compliance with that prohibition is supervised". In this regard it states that in any event inspections were carried out, but that they could deal only with "transactions actually carried out, that is to say deliveries which were invoiced". In the steel sector there is a relatively long delay between order and delivery, and as regards concrete reinforcement bars in particular the undertakings, in anticipation of the minimum prices scheme, "had performed as many orders as possible before the entry into force of the decision"; in those circumstances inspections as early as May would have been pointless.

With regard to the question of the Italian exports to Switzerland, re-exported to the Federal Republic of Germany, it goes on to submit that "the fact that a legal obligation has been circumvented by legal means does not in any way affect the binding nature of that obligation", with the result that it is not important to ascertain the truth of the applicant's claim.

The Commission submits moreover that Decision No 962/77 did not impose intolerable constraints upon the applicant, on the ground that it could not have incurred losses as a result of the minimum prices system, since from 7 June 1977 it "accepted orders officially recorded at the minimum prices and promised refunds". There remains only the case of the order for 10 000 tonnes which was cancelled; equally, however, the loss of profit resulting from that "cannot simply be regarded as a truly unbearable loss" because there is nothing to prove that that quantity was purchased below the minimum price from other suppliers, and even if that was so, the loss would be due to the conduct of the undertakings which infringed Decision No 962/77 and not to that decision itself.

It contends that Decision No 962/77 "does not infringe" the objectives set out in Article 3 of the Treaty, that the "gloomy picture" painted by the applicant "never represented the reality of its case" and that the existence of the state of necessity has not been proved.

Finally, it maintains that Decision No 962/77 is not contrary to the "principle of equality" on the ground that, although the situations of two interested parties are different if one of them does not comply with the decision, "the obligation itself — and that alone is at issue — treats them both in the same way".

(c) The amount of the fine

The Commission considers that "the arguments set out by the applicant do not contain any new material". Consequently, it repeats that as the applicant did not apply the minimum prices even at the beginning, its conduct

in granting credits "must be considered an infringement as serious as a sale below the minimum price carried out at the outset and openly".

IV — Oral procedure

Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78 and 39, 31, 83 and 85/79

The parties presented oral argument at the hearing on 17 and 18 October 1979. They replied to the questions put by the Court and supplied all the information which they considered useful.

The Advocate General delivered his opinion at the sitting on 5 December 1979.

Decision

1 Twelve undertakings producing concrete reinforcement bars submitted applications, which were received at the Registry of the Court between 14 July 1978 and 26 May 1979, seeking the annulment and in the alternative the amendment of the individual decisions whereby the Commission had imposed upon them fines for infringements of General Decision No 962/77/ ECSC of 4 May 1977 fixing minimum prices for certain concrete reinforcement bars (Official Journal L 114, p. 1). All those undertakings based their applications on Article 36 of the ECSC Treaty, relying in the first place on the illegality of General Decision No 962/77 which they were alleged not to have observed, and, secondly, on a series of submissions concerning the individual decisions imposing fines.

2 By an order of 27 July 1979 the Court decided pursuant to Article 43 of the Rules of Procedure to join, for the purposes of the oral procedure, nine of those cases concerning undertakings from the Brescia region, namely the undertakings Valsabbia (154/78), Stefana Fratelli (205/78), A.F.I.M. (206/ 78), Antonio Stefana (226/78), Di Darfo (227/78), Sider Camuna (228/78), Rumi (263/78), Feralpi (264/78) and O.L.S. (39/79). At the hearing on 17 and 18 October 1979 three other cases were called concerning other manufacturers of concrete reinforcement bars, namely the undertakings Montereau (31/79), *Maximilianshütte* (83/79) and Korf Industrie (85/79). In view of the similar subject-matter and related nature of those twelve cases, which were confirmed by the oral hearings, there is cause to join them for the purposes of the judgment.

3 The parallel considerations dealt with in the course of the written procedure and at the hearing all concern one of the two aspects common to all the cases: the reliance on the illegality of the general decision, pursuant to the third paragraph of Article 36, and the action in which the Court has unlimited jurisdiction brought against the individual decisions imposing pecuniary sanctions, under the second paragraph of Article 36.

4 The first aspect raises the question of the admissibility of the plea of illegality and of the submissions of manifest failure to observe Treaty provisions and misuse of powers relied on in support of that plea. Therefore it is necessary to dispose of this problem as a preliminary matter.

5 It will then be necessary to examine the grounds on which the applicants impugn the legality of General Decision No 962/77, which will have to be examined both with regard to Article 61, which constitutes its legal basis, with regard to the other provisions of the ECSC Treaty and in the light of the general principles of law which govern the interpretation and application of the said treaty, and, finally, with regard to adherence to the objectives presupposed by the use of the powers which the Commission exercised in adopting the said general decision.

6 Only after the legality of the general decision has been examined will it be appropriate, where necessary, to undertake under the second aspect, a study of the individual decisions imposing fines. With regard to the latter, the applicants, pleading *force majeure*, legitimate self-protection or a state of necessity, all claim justifying circumstances, and it will be necessary to study the scope of the latter in Community law and their possible application in the field of minimum prices. It will then be necessary to consider whether the applicants were able to take advantage of a legitimate option to align their prices. Finally, it will then be possible to consider the amount of the fines the imposition of which was the cause of these actions.

Preliminary chapter

The admissibility of the plea of illegality in relation to General Decision No 962/77 and of the submissions and arguments raised by the applicants in support of the said plea

7 It is necessary to distinguish between two arguments put forward by the Commission in order to demonstrate the inadmissibility of the plea of

illegality in relation to General Decision No 962/77, raised by all the applicants. The first argument, constituting a general objection of inadmissibility, pleaded in the Commission's written conclusions, concerns only the cases brought by Antonio Stefana (226/78), Di Darfo (227/78), Sider Camuna (228/78) and Feralpi (264/78). The second argument, however, concerns all the cases in which, having pleaded its discretionary power, the Commission calls in question the admissibility of submissions which would entail an evaluation by the Court of the situation resulting from economic facts or circumstances. Even where that argument has not been formally pleaded, the Court may raise it of its own motion as it concerns the Court's jurisdiction. These two branches of the Commission's argument will have to be examined separately.

8 It may be observed that the Commission's first argument amounts to a contention that the applicants have not proved that the general decision injured their individual interests specifically and directly and that therefore, in the absence of any interest, they cannot call in question the legality of that general decision.

9 It is necessary to draw a distinction between, on the one hand, an interest in bringing proceedings against an individual decision and, on the other hand, an interest in raising, in that context, a plea of illegality in relation to the general decision which constitutes the legal basis of the said individual decision. It is beyond doubt that the applicants may, by means of an action in which the Court has unlimited jurisdiction under the second paragraph of Article 36 of the ECSC Treaty, attack the individual decisions imposing pecuniary sanctions addressed to them. Further, the third paragraph of that article provides that, in support of such an action, they may contest the legality of the general decisions which they are alleged not to have observed; but they may do so only "under the same conditions as in the first paragraph of Article 33", that is to say, in the first place, in the circumstances in which a declaration of illegality may be sought, and on proof of an interest in taking legal proceedings. As the applicants have pleaded an infringement of essential procedural requirements, an infringement of the law and misuse of powers, their applications are admissible, since their plea of illegality clearly makes submissions relating to the legality of the general decision, which they are permitted to do by the combined effects of Articles 36 and 33. Further, it cannot be doubted that they have an interest in taking legal proceedings, since the application of the disputed general decision on which the decisions

imposing pecuniary sanctions are based is of such a nature as to adversely affect their interests. Therefore, on this first point, the objection of inadmissibility entered by the Commission must be dismissed.

10 In the second place, the reference in Article 36 to the first paragraph of Article 33 concerns in particular the second sentence of that paragraph, which provides that "the Court may not ... examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the High Authority took its decisions or made its recommendations, save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application".

11 The first part of the second sentence of Article 33 thus states the limits upon the power of the Court, in its examination of the legality of a measure, to review the choices of economic policy made by the Commission; the second part removes those limitations, provided that the applicant alleges a manifest failure to observe the Treaty or a misuse of powers. According to the case-law of the Court (judgment of 21 March 1955 in Case 6/54 *Government of the Kingdom of the Netherlands* v *High Authority of the ECSC* [1954 to 1956] ECR 103) "Article 33 does not require that the objection raised be supported by full proof in advance; this moreover would immediately entail the annulment of the decision". Therefore, when considering the admissibility of the arguments intended to induce the Court to examine the evaluation of the situation resulting from the economic facts or circumstances of the case, it is necessary and sufficient that the objections of manifest failure or misuse of powers be supported by appropriate evidence. A stricter requirement would amount to confusing the admissibility of the argument with the proof of its substance; a more liberal interpretation, whereby the mere assertion of one of the claims referred to would be sufficient to open the way to review by the Court of the economic evaluation, would reduce that claim to a mere formality.

12 In this case the arguments pursued in the course of the written and oral procedures have provided sufficient proof of the difficult nature of that issue

to compel recognition of the fact that the grounds relied on are *prima facie* supported by appropriate evidence. That finding is sufficient, on this point, to render the actions admissible.

First part: The legality of General Decision No 962/77

Chapter 1: With regard to Article 61 of the ECSC Treaty

13 Decision No 962/77 was taken on the basis of Article 61 of the Treaty; the legality of the application of that article implies compliance with the conditions of form and substance, which must be examined in turn.

Section 1: Compliance with the formal conditions which must be observed when a measure is adopted under Article 61

14 The decision to impose minimum prices within the Common Market which may be adopted by the Commission is subject to various kinds of formal conditions. First, that decision must comply with the general conditions governing the form of any decision taken under the ECSC Treaty, which are laid down in Articles 5 and 15 of the Treaty. Secondly, Article 61 itself contains specific requirements which must be satisfied by the statement of reasons accompanying the decisions for which that article provides. Finally, Article 61 prescribes certain particular formalities which it requires to be observed. These three series of conditions will be examined in turn in the following three paragraphs.

Paragraph 1: Compliance with the general conditions as to form (Articles 5 and 15 of the Treaty)

15 According to Articles 5 and 15 of the ECSC Treaty, the Community must make public the reasons for its action and the decisions of the Commission must state the reasons on which they are based and refer to any opinions which were required to be obtained.

16 Certain of the applicants submit that the stating of reasons constitutes a fundamental requirement, especially in the context of a legislative measure involving the exercise of a discretionary power. According to them, the statement of reasons accompanying Decision No 962/77 is "distorted,

incomplete and insufficient", and not in accordance with the aims of the Treaty. The decision, it is argued, rests on a series of unsubstantiated statements and fails to take into account the economic situation and the conditions of production of those applicants. Also, the Commission did not mention the fact that the Consultative Committee referred to Article 54 and not to Article 61 as a means of finding a solution to the crisis.

17 The Commission rejects those arguments, pointing out that in the preamble to the decision the statement of reasons observed that the steel industry had been in serious difficulties for some years and that the concrete reinforcement bars sector was experiencing an even greater deterioration than the steel industry in general.

18 It is true that the general provisions of Articles 5 and 15 of the Treaty lay down requirements which must be observed by the Commission, but neither the form nor the extent of those requirements is specified. On a reasonable construction, when it is a question of a measure intended to apply generally, those requirements oblige the Commission to mention in the reasons on which its decision is based the situation as a whole which led to the adoption of the decision and the general objectives which it seeks to attain.

19 Therefore, the Commission cannot be required to specify the numerous, complex facts in the light of which the decision was adopted, and *a fortiori* it cannot be required to provide a more or less complete appraisal thereof or to refute the opinions expressed by the consultative bodies.

20 The statement of the reasons on which Decision No 962/77 is based satisfies the requirements of Articles 5 and 15 of the ECSC Treaty.

21 In fact, that statement of reasons starts by noting the existence of a state of crisis in the steel industry and the effects thereof on prices; it mentions the failure of the voluntary planning of deliveries in the concrete reinforcement bars sector and it insists on the particular difficulties encountered by the market for that product.

22 The complaint that the statement of reasons did not mention the economic situation and the conditions of production of the undertakings in Brescia must be dismissed on the ground that the Commission considered matters in the light of the situation of that sector of the Community industry as a whole, in view of the general nature of the decision.

23 As regards the particular observation concerning the fact that consultations with the Consultative Committee took place in the context of Article 54, relating to Community financing of undertakings' investment programmes, instead of in the context of Article 61, the relevant information is incomplete, being based on a resolution of 17 March 1977 of that Committee, failing to mention a later session on 19 April 1977, at which the Consultative Committee adopted a favourable attitude on the specific question of introducing minimum prices for concrete reinforcement bars. Besides, the last recital of the preamble to the decision mentions the consultations with the Council and studies carried out in conjunction with the undertakings.

24 It follows from these findings that, although the statement of reasons given for Decision No 962/77 may have been concise, it was legally sufficient for a general decision and the requirements of Articles 5 and 15 of the Treaty were satisfied.

Paragraph 2: Compliance with the specific requirements of Article 61 as to the statement of reasons

25 Article 61 provides that the Commission may adopt minimum prices within the Common Market only if it finds that a manifest crisis exists or is imminent and that such a decision is necessary to attain the objectives set out in Article 3. It provides further that in fixing prices, the Commission must take into account the need to ensure that the coal and steel industries and the consumer industries remain competitive, in accordance with the principles laid down in Article 3 (c). Those provisions of Article 61 lay down the conditions of substance which must be satisfied by the decision to fix minimum prices. However, it is clear that as a result the reasons given for the decisions must refer to the fulfilment of those conditions, precisely in order to facilitate judicial review on questions of substance.

26 Thus the reasons stated for a decision fixing minimum prices must mention and briefly give evidence of:

— the existence or imminence of a manifest crisis;

— the necessity for the decision in order to attain the objectives set out in Article 3;

— the maintenance of the competitiveness of the producer and consumer industries in fixing the prices.

27 Denying that the conditions of substance were satisfied (this aspect will be considered later), the applicants emphasize the alleged insufficiency of the corresponding statement of reasons. Consequently, it is necessary to examine that statement.

28 The existence of a manifest crisis is alleged in the first recital of the preamble to the decision, in which the Commission states that the steel industry has been in serious difficulties for some years. It declares that supply is in considerable excess of demand, that the share of the market taken by imports has increased sharply and that prices have been cut to well below production costs. The mention of those three aspects of the crisis is sufficient to convey an impression of its special characteristics and thus to define it adequately for the purposes of the statement of reasons.

29 That the decision was necessary in order to attain the objectives set out in Article 3 is proclaimed by the fourth recital, on the basis of the reasons stated in the second and third recitals, that is to say the previous attempts by the Commission to secure voluntary commitments on the part of the undertakings, their failure and the resulting deterioration of the market for concrete reinforcement bars and of the financial situation of the undertakings. That account of the necessity for the decision is sufficient to provide a coherent statement of reasons on that point.

30 Finally, with regard to the fixing of the prices, the need to ensure that producer and consumer undertakings remain competitive is referred to by the sixth recital, which evinces a concern to retain "flexibility in the market" in the choice of basis prices ex basing point as minimum prices, and also in the

tenth recital, where it is stated that undertakings remain free to publish basis prices above the minimum prices set. Moreover, it may be deduced *a contrario* from the eleventh recital that there exists the option of alignment on the most favourable Community prices, provided that they are in accordance with the decision on minimum prices. On this point, although the statement of reasons could doubtless have been more explicit, it is none the less sufficient.

31 Thus the specific requirements laid down by Article 61 with regard to the stating of reasons were complied with to a degree which was sufficient in law.

Paragraph 3: Compliance with the special formal conditions laid down by Article 61

32 Under Article 61 the drafting of a decision concerning the introduction of a prices system which has the effect of temporarily suspending the normal rules governing the working of the ECSC common market is surrounded by procedural requirements designed to ensure that such measures are adopted circumspectly and with caution, which requirements must be regarded as essential and which the Court must therefore examine with a view to ascertaining whether they were observed.

33 Article 61 requires in the first place that the Commission's decision fixing minimum prices be taken:

1. On the basis of studies made jointly with undertakings and associations of undertakings, in accordance with the first paragraph of Article 46 and the third paragraph of Article 48;

2. After consulting the Consultative Committee; and

3. After consulting the Council,

as to the advisability of such a measure and the price level to be determined.

34 The Court noted above that mention was made in the last recital of the preamble to Decision No 962/77 of the relevant studies and consultations.

According to the applicants, an essential procedural requirement was none the less infringed because the said studies and consultations were not carried out with sufficient care.

35 (1) The Italian applicants consider that, in the first place, the Commission did not undertake serious preliminary studies, which would have revealed in particular that 50% of the concrete reinforcement bars sector was not in crisis and, secondly, that if studies were made they were not made jointly with them.

36 The Commission points out that by virtue of the provisions of the ECSC Treaty, in particular Articles 46 and 48 thereof, it conducts a continuous study of market and price trends and that undertakings are required to convey to it periodically information on the amendment of their price-lists and the level of their imports and exports. But, in addition, it has since 1975 undertaken specific studies concerning prices; thus in a communication of 2 May 1975 addressed to all steelmaking undertakings (Official Journal C 100, p. 1), the Commission, referring to the deterioration in prices for iron and steel products in the Community and the consequent effects on employment, informed the undertakings that it was to step up its checks with regard to observance of the price rules contained in the Treaty and that it would keep a particularly close eye on the trends in steel imports into the Community and their effects on price levels. Further, the Commission refers to its Decision No 1272/75 of 16 May 1975 (Official Journal L 130, p. 7) on the obligation of undertakings to make monthly returns of their planned, estimated or actual production of crude steel, its Decision No 1870/75 of 17 July 1975 (Official Journal L 190, p. 26) relating to the requirement that steelmaking undertakings disclose certain information on employment (number of personnel employed, recruitments, redundancies, measures to reduce working time), and its Decision No 3017/76 of 8 December 1976 (Official Journal L 344, p. 24), concerning the obligation of producer undertakings to make monthly returns, as promptly as possible, of deliveries of the main steel products, including concrete reinforcement bars, effected by them within the Common Market and of their exports to non-member countries. In the field of prices, the Commission had contemplated the introduction of a minimum prices system and on 19 January 1976 the Consultative Committee discussed the advisability of such action (Doc. No A/430/76 F), which was supported by a majority of the votes cast; in the light of that vote early in 1976, and owing also to a brief improvement in the conjunctural

situation, the Commission did not persevere with that course of action and decided that satisfactory results could be obtained through non-compulsory intervention, guiding production and prices policy by means of voluntary commitments undertaken in the context of the forecasting programmes. In the context of that economic choice, the Commission published a general Communication (Official Journal C 303 of 23 December 1976, p. 3) describing the lines of action which it contemplated following. That communication covered all aspects of the problem: analysis and monitoring of the market, investments, specific crisis measures relating to production and prices, relations between the Community and non-member countries on the steel market and social and regional problems. That communication was followed by another issued pursuant to Article 46 of the ECSC Treaty (Official Journal C 304 of 24 December 1976, p. 5) in which, after recalling that in its forward programme for the first quarter of 1977 it had made forecasts for deliveries subdivided into six categories of products, including concrete reinforcement bars, the Commission announced its intention to make detailed estimates of deliveries of those products for the interior of the Community, dividing them by undertakings or groups of undertakings which would be invited to sign an "individual and confidential" engagement to limit voluntarily their deliveries to the level which would be communicated to them.

37 It emerges from this account of the Commission's action prior to Decision No 962/77 that the iron and steel undertakings could not have been unaware of the specific measures which the Commission intended to take and that thus informed they were in a position, either individually or through their trade organizations, to make their suggestions known to it.

38 Finally, the industrial association of the producers from Brescia, which represents 40 to 50 undertakings, was on several occasions invited to preparatory working meetings in which two of their representatives took part, notably to the meeting on 25 March 1977 during which a document on the production costs of undertakings, the problem of price lists, the objective sought and the method of calculating prices was discussed.

39 (2) The Consultative Committee was consulted on 19 April 1977 as to the advisability of introducing minimum prices for concrete reinforcement bars within the Common Market and on the level of those prices (Doc. No

A/1730/77 f.) and the debate produced broad agreement on the need to take such a measure; only the German producers and consumers opposed it.

40 (3) The Council was consulted on the same questions and approved the measure unanimously.

41 Further, the European Parliament passed a resolution supporting the position of the Commission in trying to overcome the European steel crisis (Official Journal C 118 of 16 May 1977, p. 56).

42 It follows from all those considerations that the procedural requirements imposed upon the Commission by the Treaty were observed and that there was no disregard of any requirement such as would entail the invalidity of the measure.

Section 2: Compliance with the conditions of substance laid down by Article 61

43 In order to fix minimum prices it is necessary that the Commission should: (1) recognize the existence or imminence of a manifest crisis, (2) recognize the need to adopt such a decision in order to attain the objectives set out in Article 3, and (3) take into account the need to ensure that the steel industry and the consumer industries remain competitive, in accordance with the principles laid down in Article 3 (c).

Paragraph 1: The existence or imminence of a manifest crisis

44 The Italian applicants maintain that the small and medium-sized undertakings manufacturing concrete reinforcement bars were not in a state of crisis at the beginning of 1977, by virtue of their structure, their degree of specialization and their choice of technique.

45 Those applicants maintain that the judgment to be made on the existence of a "crisis" should cover not only the difficulties encountered by the large iron and steel producing undertakings in the North, but also the satisfactory

working of more than a third of the concrete reinforcement bars sector. They state that that situation was a consequence of the effects of free competition from which the most advanced undertakings benefited, largely as a result of the technological level which they had attained, but that there was no question of a state of crisis.

46 The Commission, for its part, begins by considering the situation of the iron and steel industry within the Community as a whole.

47 It was in the light of the economic circumstances and of the studies carried out that, taking into consideration the recession in the production of concrete reinforcement bars in the Community as a whole and concluding that the iron and steel industry had been in serious difficulties for several years entailing the loss of 50 000 jobs between July 1975 and the end of 1977, that supply was continually exceeding demand, that the share of the market taken by imports had greatly increased and that prices had been reduced well below production costs, the Commission, realizing the consequences of those factors, recognized the existence of a manifest production crisis.

48 The Court finds that the essential feature of the Italian undertakings' applications lies in their assessment of Decision No 962/77 exclusively in the light of the situation of the small-scale steelworks in Italy.

49 The Commission is indeed under an obligation by virtue of Article 3 of the Treaty to act in the common interest, but that does not mean that it must act in the interest of all those involved without exception, for its function does not entail an obligation to act only on condition that no interest is affected. On the other hand, when taking action it must weigh up the various interests, avoiding harmful consequences where the decision to be taken reasonably so permits. The Commission may, in the general interest, exercise its decision-making power according to the requirements of the situation, even to the detriment of certain individual interests.

50 Consequently, by analysing the imbalance between production and consumption of concrete reinforcement bars as a state of manifest crisis,

observing that the German undertakings confirmed that view and that the Italian undertakings which disputed it were not able to adduce sufficient proof of their argument, the Commission did not base its decision on materially inaccurate facts or circumstances, or on a mistake of law, or on a manifestly erroneous assessment of the situation. Thus it was entitled to recognize the existence of a manifest crisis.

Paragraph 2: Compliance with Article 3 of the Treaty

51 The applicants have insisted that in their opinion the Commission simultaneously disregarded all the objectives of Article 3 listed in paragraphs (a) to (g), in particular paragraph (c) to the extent to which that provision requires it to ensure the establishment of the lowest prices, an objective which runs counter to the fixing of minimum prices. Decision No 962/77 is, they add, a protectionist measure which is contrary to economic progress, since the Commission requires that higher prices be charged for the sake of undertakings which have higher production costs.

52 By calling for the simultaneous observance of practically all the objectives set out in Article 3, the applicants are postulating an excessive and contradictory requirement.

53 In its judgments of 13 June 1958 in Case 9/56 *Meroni & Co* v *High Authority* [1957 and 1958] ECR 133 and of 21 June 1958 in Case 8/57 *Groupement des Hauts Fourneaux et Aciéries Belges* v *High Authority* [1957 and 1958] ECR 245, the Court noted that as Article 3 lays down no fewer than eight distinct objectives it is not certain that they can all be simultaneously pursued in their entirety and in all circumstances.

54 The Court inferred from that that in pursuit of the objectives laid down in Article 3 of the Treaty, the Commission must permanently reconcile any conflict which may be implied by those objectives when considered individually, and when such conflict arises must grant such priority to one or other of the objectives laid down in Article 3 as appears necessary having regard to the economic facts and circumstances in the light of which the Commission adopted its decision.

55 If the need for a compromise between the various objectives is imperative in a normal market situation, it must be accepted *a fortiori* in a state of crisis justifying the adoption of exceptional measures which derogate from the normal rules governing the working of the common market in steel and which clearly entail non-compliance with certain objectives laid down by Article 3, if only that objective (contained in paragraph (c)) which requires that the establishment of the lowest prices be ensured.

56 By virtue of its discretionary power the Commission decided to pursue three objectives:

— To enable the undertakings to obtain a minimum level of financial resources in order to carry out necessary re-structuring, in application of Article 3 (c);

— To maintain the level of employment so as to avoid a deterioration in the working conditions and standards of living of the workers, in application of Article 3 (e);

— In the long term, to maintain sufficient production capacity, in application of Article 3 (a);

those being objectives which it found to be justified by the general interests of the trade in view of the economic circumstances at the relevant time. Thus it was proper for the Commission, faced with the state of crisis in the concrete reinforcement bars industry, within the decision-making framework created for the purpose of implementing an iron and steel policy designed to alleviate a manifest state of crisis, to determine the objectives which it considered appropriate for the establishment of a social and structural programme in accordance with the scale of the problems which had arisen.

57 All these considerations lead to the conclusion that there exists sufficient evidence to maintain that — in the circumstances of the case and at the time when the decision was taken — that decision complied with the objectives set out in Article 3 which accorded with the economic and social policy chosen by the Commission.

58 For the projected decision to be lawful it is also necessary that the Commission should have recognized the need to take such a decision in order to obtain the objectives set out in Article 3.

59 The anti-crisis policy in the iron and steel sector is based on the fundamental principle of solidarity between different undertakings, proclaimed in the preamble to the ECSC Treaty and given practical expression in numerous articles, such as Article 3 (priority accorded to the common interest, which presupposes the duty of solidarity), Article 49 *et seq.* (a system of financing the Community based on levies), Article 55 (2) (general availability of the results of research in the technical and social fields), Article 56 (reconversion and readaptation aids) and Article 53 (the making of financial arrangements).

60 In pursuance of that principle the Commission considered taking non-compulsory measures designed to bring the supply of iron and steel products more into line with demand; those measures — as already explained — relied *inter alia* upon commitments by Community steel undertakings to adhere to the delivery limits set by the Commission and notified to each undertaking or group of undertakings. In contrast to the position for other rolled products, for which voluntary commitments to reduce production covered 90% of the amount fixed by the Commission, only 50% of the delivery target set for concrete reinforcement bars was covered by voluntary commitments, which figure was clearly insufficient to enable the sector to achieve the recovery hoped for. That led to a more pronounced deterioration of the market for concrete reinforcement bars. Thus the need for a compulsory system of prices for concrete reinforcement bars was demonstrated by the failure of the system of voluntary commitments aimed at reducing production, whilst for the other rolled products the Commission published guidance prices (Official Journal L 114 of 5 May 1977, p. 18).

61 Certain applicants, in particular Rumi (Case 263/78), consider that the Commission made an erroneous assessment of the economic situation amounting to a manifest failure to observe the rules of the Treaty by introducing a minimum prices scheme when "it should have had recourse to Article 58 of the Treaty and set up a scheme of production quotas in conjunction with a range of ancillary measures".

62 In order to reject this complaint of failure to intervene directly in the field of production, it is sufficient to note that Article 58 makes the introduction of a

binding system of production quotas conditional upon a finding that the means of action provided for in Article 57 are not sufficient to deal with the crisis. Those indirect means of action include intervention in regard to prices as provided for in the Treaty and therefore the introduction of a minimum prices scheme under Article 61 (b).

63 Thus, without its being necessary to have recourse to the argument that in this field the Commission has a wide discretionary power as regards economic choices which may be challenged only if it has misused its powers or manifestly failed to observe the provisions of the Treaty, it is sufficient to observe, in order to declare this submission unfounded, that the Commission could be required to introduce a system of production quotas only if it were established that the crisis could not be remedied by means of, *inter alia*, intervention in regard to prices.

64 Consequently, by weighing the disadvantages of the minimum prices scheme against the necessity for the measure adopted in order to attain the various objectives laid down by Article 3, the Commission did not exceed its discretionary power in opting for the system chosen.

Paragraph 3: The level of the prices as regards compliance with the last part of Article 61 of the Treaty

65 The last condition concerning the propriety of a decision on minimum prices relates to the fixing of the level thereof.

66 The penultimate paragraph of Article 61 provides that: "In fixing prices, the [Commission] shall take into account the need to ensure that the coal and steel industries and the consumer industries remain competitive, in accordance with the principles laid down in Article 3 (c)". According to that article it is necessary to ensure the establishment of the lowest prices, while allowing necessary amortization and normal return on invested capital.

67 In order to achieve the objective of putting in order the financial situation of the undertakings in the sector in crisis, whilst observing the objectives of Article 61, the Commission considered that:

(a) The minimum prices must be higher than the market prices, but fixed at a level such as to avoid distortions in competition in favour of the iron and steel industry and to the detriment of other economic sectors, to take into account the general objectives of economic policy and in particular the interests of undertakings consuming steel and their competitive situation and to avoid disturbances in exports and imports;

(b) It was important to take into account production costs, which vary appreciably according to the production techniques employed by the different undertakings, half of whom used iron ore, which between 1975 and 1977 had increased in price by between 8 and 35% depending on the Member State, whilst the other half used scrap iron, which had fallen in price by between 37 and 47% depending on the Member State.

68 Bearing in mind the objectives to be attained and in view of the main factual element, namely the field of prices, the only area amenable to competition in practice — differences in quality being virtually insignificant in the concrete reinforcement bars sector — it seemed reasonable to the Commission that the price to be adopted should be at a level the lowest prices, between 165 and 180 European units of account (the Bresciani), but below the highest prices, 253 European units of account (the Danish undertakings).

69 For the sake of precision the Commission calculated the basis prices per tonne on 25 April 1977 and decided to fix the compulsory minimum price at the equivalent in the national currencies of 198 European units of acount for plain reinforcement bars and 205 European units of account for improved adhesion bars.

70 The applicants have criticized the method of the arithmetical average used to fix the minimum prices; they consider that in order to comply with Article 3 (c) of the Treaty the minimum price should have been fixed on the basis of the lowest profitable price for the Community undertakings, that is, the price corresponding to the point at which supply meets demand and complying with the criteria laid down by Article 3 with regard to amortization and

return on capital. In fact, say the applicants, the minimum prices adopted favour "the less competitive or unprofitable undertakings and bring into the system an unacceptable form of dirigiste protectionism" whereas the proper function of minimum prices is "to prevent cut-price sales and to limit the risk of dangerous sales on the part of speculators inclined to practise dumping".

71 With regard to these criticisms it must be pointed out that the method used to fix the level of the prices is a discretionary and technical matter governed by the principle of solidarity, adherence to the criteria laid down by the penultimate paragraph of Article 61 and compliance with the formal requirements consisting in consultations with the Consultative Committee and the Council.

72 Only when the economic assessment discloses a manifest infringement of a legal rule may the Court review the choices made by the Commission under the last paragraph of Article 36 and, in this particular case, inquire whether the price level adopted prevented the attainment of the objectives set out in Article 3.

73 In fact, as the level of production costs showed appreciable differences within the Community, the prices could not be aligned on the costs of the undertakings having the highest productivity, for that approach would have nullified the use of minimum prices in view of the objectives which are accorded to them by the Treaty and the scheme set up by Decision No 962/77.

74 As regards the need to ensure the competitiveness of the steel undertakings, it may be noted that only the undertakings in Brescia had list prices lower than the minimum prices, whilst their competitors had list prices higher than the minimum prices imposed. By selling exactly at the minimum prices, the Brescia undertakings were still able to sell at prices lower than or at least equal to the prices of their competitors affected by the crisis; moreover, the minimum prices system did not create appreciable distortions in traditional trade patterns in relation to the total volume of trade in those products.

75 As regards the consumer industries, whose industrial capacity must also be ensured, not only had they given their agreement within the Consultative

Committee to the system introduced, but since it appears that the level of the minimum prices is lower than the Japanese and American prices, their interests were not adversely affected.

76 Finally, as regards the function ascribed to minimum prices by the applicant A.F.I.M. (Case 226/78), namely to prevent "cut-price sales", it may be observed that that amounts to attributing to Article 61 an objective which it does not pursue.

77 Thus, taking into account the complex nature of the economic forecasts which the fixing of the price level entailed, it appears that the Commission's evaluation took account of the principles set out in Article 3 (c) of the Treaty.

78 Consequently, on the basis of this general examination of the evaluation of the situation, resulting from economic facts or circumstances, in the light of which Decision No 962/77 was taken, the conclusion must be drawn that that general decision does not display any illegality with regard to Article 61 of the ECSC Treaty.

Chapter 2: Compliance with the other articles of the Treaty and with the general principles relied on by the applicants

Section 1: Compliance with Articles 2, 4 and 5 of the Treaty

79 The applicants maintain that Articles 2, 4 and 5 were manifestly disregarded by Decision No 962/77. Articles 2 and 5 lay down in broad terms the task which the Community is called upon to perform and Article 4 stipulates the principle restrictions connected with the establishment and maintenance of the common market in coal and steel; it is alleged that the attainment of the general aims set out in those articles, towards which all the Community's activity must strive, was frustrated by Decision No 962/77.

80 In making that submission, the applicants forget that by providing for intervention by means of coercive action in certain defined circumstances the Treaty derogates from the normal rules governing the working of the Common Market, which are based on the principle of the market economy.

81 In that it authorized the adoption of a measure such as the fixing of minimum prices, the Community legislature clearly accepted the possibility of derogating temporarily from the mechanisms of competition, provided only that the objectives set out in Article 3 (c) are adhered to.

82 Thus it is apparent that the conditions for the application of Article 61 are already satisfied if the general decision adheres to the concordant objectives laid down by Article 3. Although it is true that, in addition to Article 3, Articles 2, 4, and 5 lay down the fundamental objectives of the Community, it is worth noting that when the Commission is authorized to take an exceptional measure in derogation from the normal working of the market the provisions of the Treaty under which the measure is taken stipulate precisely which articles the Commission is obliged to take into account.

83 That is true of Article 53, concerning the financial arrangements which are authorized when the Commission recognizes that they are necessary for the performance of the tasks set out in Article 3 and are compatible with the Treaty, and in particular with Article 65; of Article 58, concerning quotas which may be established, taking account of the principles set out in Articles 2, 3 and 4; of Article 66, concerning certain authorizations granted to certain undertakings on condition that the principle laid down in Article 4 (b) is observed; of Article 74, whereby in relation to dumping the Commission is empowered to take any measures which are in accordance with the Treaty and in particular with Article 3; and of Article 95, concerning cases where a decision or recommendation not provided for in the Treaty is necessary, in relation to which observance of the principles laid down in Articles 2, 3, 4 and 5 is mandatory. Moreover, it is apparent from that list that the requirements of the Treaty provisions with regard to the principles and objectives which must be adhered to in order for a derogative measure to be in order correspond to the importance of the derogations impinging upon the rules and mechanisms governing the normal working of the market or upon the independence of the undertaking.

84 It follows that as a result of the very nature of the exceptional measures provided for by the Treaty, which derogate in one or more particulars from the normal working of the market and affect it more or less profoundly, such

measures are circumscribed by mandatory conditions as to form and substance which must be very strictly observed in order to ensure the legality of the decision, and amongst which are stated in an exhaustive manner the principles and objectives which must necessarily govern the adoption of the derogative decision, whilst the other principles and objectives laid down by the Treaty may be regarded as held in abeyance for the limited period during which the said derogative decision remains in force.

85 The terms of Article 61 — referring solely to Article 3 of the Treaty — must be interpreted as meaning that compliance with the objectives and principles laid down in that article of itself ensures the legality of a decision imposing minimum prices.

86 Therefore it is not necessary to deal in detail with the arguments advanced by the applicants in reliance on Articles 2, 4 and 5, since compliance with the principles laid down in those articles is not absolutely essential for a finding that Decision No 962/77 was lawful.

Section 2: The legality of Decision No 962/77 in relation to the general principles of law

87 It is necessary to point out in the first place that the object of Article 61 is to enable the Community to overcome situations of economic crisis by applying the principle of solidarity.

Paragraph 1: As regards compliance with the right to property

88 According to certain applicants, the minimum prices scheme — if it had been applied — would have created conditions such that the operators would have been deprived of the businesses belonging to them contrary to the guarantee given with regard to the right to property by the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

89 As the Court has already emphasized in its judgment of 14 May 1974 in Case 4/73 *Nold* v *Commission* [1974] ECR 491 the guarantee afforded to the ownership of property cannot be extended to protect commercial interests,

the uncertainties of which are part of the very essence of economic activity. Moreover, it should be noted that no closure of an undertaking as a result of the application of Decision No 962/77 has been recorded.

90 This submission must therefore be dismissed.

Paragraph 2: As regards compliance with the principle of proportionality

91 The applicants submit that the application of Decision No 962/77 imposed excessive burdens on the most productive undertakings and that the sacrifices thereby required of those undertakings were disproportionate on the ground that the decision was inadequate and incomplete:

— Inadequate, in that the Member States were concurrently pursuing a policy of subsidizing their national iron and steel industries, whilst the Commission had at the same time decided upon the channelling of trade in concrete reinforcement bars in Italy through the Ufficio Coordinamento e Ripartizione Ordini (UCRO) and had been too slow in setting up a system of control and monitoring to supervise the application of the measure, which because of the infringements committed had led to the establishment of market prices lower than the minimum prices;

— Incomplete, in that it did not include dealers or imports in the minimum prices system.

92 Each of these complaints must be examined separately in order to ascertain whether in fact it alleges an inadequacy or an incompleteness in the general decision; only in the event of an affirmative reply to that preliminary question will the Court have to consider whether the incompleteness or inadequacy thus established was disproportionate.

(a) The examination of the various complaints

(1) The compatibility of the measure with national aid

93 According to the applicants, the fact that in spite of Decision No 962/77 certain Member States took national measures granting aid to their iron and steel industries proves that that decision was inadequate.

94 In reply the Commission states that Decision No 962/77 was indeed necessary, but insufficient, for the re-organization of the whole of the Community iron and steel industry; thus that decision, which is itself only a part of a broader anti-crisis plan, by no means prevents the Member States from adopting measures granting aid for the purpose of restructuring their national iron and steel industries.

95 Consequently, the existence of separate national policies does not prove that the measures taken by means of Decision No 962/77 are inadequate and inappropriate in relation to the objectives laid down by that decision; therefore the applicants' reliance on that complaint is unfounded.

(2) The compatibility of the measure with the channelling of trade through the UCRO

96 The applicants infer from the creation of the UCRO not only that the Commission admitted that Decision No 962/77 was inadequate, but further that the creation of that body entailed the repeal *de facto* of Decision No 962/77 as regards the undertakings which were member of it.

97 It is true that the Commission authorized the agreement coordinating sales of concrete reinforcement bars by certain Italian steel undertakings by Decision No 78/711/ECSC of 28 July 1978 (Official Journal L 238, p. 28), but the general decision existing at the time of the creation of the UCRO could in no way be repealed by the creation of that body.

98 Therefore the applicants' reliance on that complaint is unfounded.

(3) The lack of control

99 The German and French applicants submit that the Commission was too slow in controlling the activities for which according to them the Bresciani were essentially responsible, and thus it did not during the first months following Decision No 962/77 prevent the Brescia undertakings from selling a prices below the minimum prices, with the result that those unsuppressed practices unsettled market prices, forcing the other undertakings to infringe Decision No 962/77 also.

100 But the Commission rightly points out, in the first place, that the first inspections were carried out as early as June 1977 and that earlier monitoring would have been ineffective, on the ground that it is the practice of the iron and steel industry not to issue invoices in respect of sales until two months after the conclusion thereof, and secondly that by virtue of its powers and the means at its disposal it could not carry out more inspections.

101 In fact, between June 1977 and September 1979 it carried out 181 inspections (including 19 in June and July 1977), and in addition it examined 122 797 certificates of conformity during the same period, which also enabled it to learn of the infringements.

102 Consequently, in the context of the search for possible defects in the minimum prices system this complaint must be dismissed; at most it may be re-examined during the discussion as to the facts which the applicants claim justified their conduct.

(4) The failure to apply the measures to the dealers

103 The applicants argue that by not extending its Decision No 962/77 to the independent dealers the Commission permitted those dealers to sell below the minimum prices quite legally, the more so as they held stocks equivalent to two months' turnover and were able to continue to obtain supplies on the external market since imports were not subject to the legislation on minimum

prices; that practice was further facilitated in the case of the large vertically integrated groups in which the parent producer company sells to its dealer subsidiary at the minimum prices, whilst the latter resells at a loss below the minimum prices; that uneconomic conduct is made possible by the fact that the parent company bears the losses of its subsidiary and makes up for them through its own profitable sales.

104 In its reply the Commission submits that Article 61 is applicable only to undertakings within the meaning of Article 80 of the ECSC Treaty and that it therefore concerns only producers and their sales organizations; consequently, in order to subject the independent dealers to the minimum prices, it would have been necessary to have recourse to Article 95 of the Treaty, a measure which could be considered only at a second stage.

105 It is settled that the Commission has never disputed that the dealers held stocks sufficient for two months, enabling them to sell below the minimum prices, and that 85% of sales in the Community are made through them but it did not take sufficient account of the fact that those dealers would sell a part of their stocks below the minimum prices.

106 On the other hand, the argument of the applicant Maximilianshütte (Case 83/79) concerning the possibility available to those dealers which were subsidiaries of producers of selling below the minimum prices has been advanced in a purely hypothetical form, without proof that a single dealer acted in that manner, it being submitted that the mere fact that such a possibility exists is enough to prove the inadequacy of the decision concerned; that absence of proof leads to the dismissal of the submission as regards those dealers which are subsidiaries of producers.

107 It is also settled that with regard to the determination of prices by the interplay of supply and demand a negligible dislocation in supply is a significant de-stabilizing factor; consequently, the exclusion of the dealers from the minimum prices system constituted a means by which customers

were able to bring pressure to bear with regard to the level of prices and induce the producers to grant prices below the minimum prices. These circumstances obliged the Commission to extend the system of minimum prices to dealers by Decision No 3002/77 of 28 December 1977 (Official Journal L 352, p. 8). Therefore the applicants are correct in their submission that the system established by Decision No 962/77 was defective by reason of its failure to require the independent dealers to observe the minimum prices immediately.

(5) The failure to apply the measure to imports from non-member countries, entailing the attendant possibility of alignment

108 According to the applicants, Community purchasers were able to obtain supplies at prices below the minimum prices quite legally by recourse to imports from non-member countries. According to the German applicants, the Italian producers had used the freedom thus granted in respect of such imports to sell their concrete reinforcement bars in Bavaria below the minimum prices by routing them through Switzerland, which, it is alleged, had a considerable influence on the level of prices in Bavaria, where it was no longer possible to sell at the minimum prices; further, the freedom actually granted to the Community undertakings to align their prices on offers from non-member countries which were lower than the minimum prices is said to have lasted until 14 March 1978, the date of Decision No 527/78 (Official Journal L 73, p. 16) prohibiting alignment on offers orignating in certain third countries.

109 In reply to those complaints the Commission points out in the first place that in this field Articles 74 and 86 of the Treaty do not empower it to take measures directly prohibiting imports from non-member countries, and that within the framework of its powers it had issued three recommendations on 15 April 1977 — that is, two weeks before Decision No 962/77 — all three of which were designed to combat imports originating in non-member countries (Recommendations No 77/382/ECSC, No 77/329/ECSC and No 77/330/ECSC, Official Journal L 114 of 5 May 1977, pp. 4, 6 and 15).

110 Therefore the Commission cannot be accused of not having tried to combat imports from non-member countries. It is important to point out also that in

its negotiations with non-member countries the Commission faces considerable difficulties as a result of the fact that the ECSC is a net exporter of steel; in such circumstances it is compelled to ensure the continuance of Community exports at the same time as it must attempt to limit imports into the Community, and it had reason to fear that by taking non-negotiated restrictive decisions with regard to non-member countries it might provoke retaliatory measures on their part which would be detrimental to the general interest.

111 As regards the special case of imports of Italian concrete reinforcement bars via Switzerland, the Commission maintains in the first place that such imports were abnormally high only in October and December 1977, and not from June to September 1977, and secondly that in the context of measures taken against imports it had concluded an agreement with Switzerland early in 1978 whereby that country undertook to observe the minimum prices in connexion with its exports of concrete reinforcement bars to the Common Market.

112 Therefore it appears that in this particular case and in the circumstances at the time the Commission used the means at its disposal and that it cannot be accused of having made no effort to prohibit such imports from May 1977, especially since such a prohibition could be laid down only within a negotiated system.

113 None the less, the fact remains that imports from non-member countries disturbed the market temporarily, influencing prices in particular, and more so as certain Community undertakings claim to have aligned their prices on offers below the minimum prices originating in non-member countries, such offers being lawful.

114 It must be borne in mind that Article 6 (2) of Decision No 962/77 was already designed to deal with such alignments on offers for concrete reinforcement bars from any country which is not a Member State of the Community, which are authorized only in so far as the delivered prices are not lower than the delivered prices "based on a more favourable Community price list"; in effect, therefore, that provision prevented sales below the minimum prices, since all Community price lists had to contain prices in accordance with Decision No 962/77.

115 Despite that article, it seems that alignments were carried out below the minimum prices since in the second recital of the preamble to Decision No 527/78 the Commission admitted that experience had shown that compliance with those minimum prices could not be secured if offers at lower prices and for only small quantities could be used as a basis for alignments and that it was that experience which made it necessary to abolish the option of alignment on offers originating in certain non-member countries.

116 Consequently, it must be accepted that the *de facto* tolerance of alignments on offers in respect of small quantities originating in non-member countries, together with the absence of restrictions on imports, must be considered to have been a defect in the minimum prices system.

(b) The disproportionate nature of the sacrifices demanded, in view of the omissions thus disclosed

117 It is now necessary to examine whether in view of the omissions established the obligations imposed upon the undertakings cast disproportionate burdens upon the applicants which would constitute an infringement of the principle of proportionality. In reply to the applicants' allegations on this matter, the Commission states that the validity of a general decision cannot depend on the existence or absence of other formally independent decisions.

118 That argument is not relevant in this case and the Court must inquire whether the defects established imposed disproportionate burdens upon the applicants, having regard to the objectives laid down by Decision No 962/77. But the Court has already recognized in its judgment of 24 October 1973 in Case 5/73, *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091, that "In exercising their powers, the Institutions must ensure that the amounts which commercial operators are charged are no greater than is required to achieve the aim which the authorities are to accomplish; however, it does not necessarily follow that that obligation must be measured in relation to the individual situation of any one particular group of operators".

119 It appears that, on the whole, the system established by Decision No 962/77 worked despite the omissions disclosed and in the end attained the objectives pursued by that decision. Although it is true that the burden of the sacrifices required of the applicants may have been aggravated by the omissions in the system, that does not alter the fact that that decision did not constitute a disproportionate and intolerable measure with regard to the aim pursued.

120 In those circumstances, and taking into consideration the fact that the objective laid down by Decision No 962/77 is in accordance with the Commission's duty to act in the common interest, and that a necessary consequence of the very nature of Article 61 of the ECSC Treaty is that certain undertakings must, by virtue of European solidarity, accept greater sacrifices than others, the Commission cannot be accused of having imposed disproportionate burdens upon the applicants.

Chapter 3: The complaint of misuse of powers

121 According to the applicants, Decision No 962/77 is vitiated by misuse of powers since the Commission pursued an aim different from that for which Article 61 authorizes it to fix minimum prices within the Common Market.

122 In their submission, the real aim of the decision was to protect those large iron and steel concerns which were unprofitable on the concrete reinforcement bars market, by helping them to retain their market share by means of minimum prices.

123 They submit that the restructuring of the sector — the aim declared by the Commission in Decision No 962/77 — should have been carried out through the laws of the market, which would have forced the unprofitable undertakings to cease production of concrete reinforcement bars.

124 Through that general decision applying to all undertakings — with whose situation it is well acquainted — the Commission therefore has favoured the unproductive undertakings to the detriment of consumers and the efficient undertakings. Thus it has restrained the expansion of the latter in order to

"destroy" their "shining example of competition", by burdening them with the consequences of a crisis experienced by others "in the name of an ill-defined Community solidarity".

125 In sum, the applicants see in the measure adopted an intention to apply a retaliatory measure against the efficient undertakings, and particularly those in the Brescia area which had not complied with the Commission's request to adopt production quotas.

126 The Commission observes that the applicants examine the minimum prices decision only with regard to their personal situation; they forget that the task of the Community institutions is to consider the situation of the Community iron and steel industry as a whole and to take — in accordance with the priorities laid down by the Treaty — general measures designed to resolve the problems of the area of activity concerned as a whole.

127 It points out that its objectives were clearly set out and it objects to the allegations of the Bresciani.

128 From the preamble to Decision No 962/77, the pleadings lodged by the Commission and the oral hearings it emerges that the Commission intended by that measure to redress the situation of the concrete reinforcement bars market, by seeking in particular to bring about a better balance between demand and the abundant supply, and also between prices, so as to increase the average rate of utilization of the productive capacity of the undertakings as a whole.

129 The effect of the decision concerning minimum prices on the small and medium-sized undertakings and its repercussions with regard to the large iron and steel concerns are the necessary outcome of that measure, which was adopted lawfully in a situation held to constitute a manifest crisis and in accordance with the objectives set out in Article 3 of the Treaty, as has already been demonstrated. What is at issue is an inevitable consequence of a lawful measure and not the result of an intention to harm certain undertakings individually. Moreover, the applicants have not assembled the body of concordant evidence which might justify a finding of misuse of powers.

130 Therefore the applicants have not adduced proof that the Commission's powers were used for ends other than those envisaged by Article 61.

Second part: The legality of the individual decisions imposing penalties

131 The individual decisions imposing penalties taken by the Commission under Article 64 of the Treaty must comply with the requirements laid down by the Treaty with regard to the stating of reasons; further, the Court must consider the situation of the applicants with regard to the existence of possible exonerating factors and the possibilities of alignment relied on by the applicants.

Chapter 1: The failure to furnish an adequate statement of reasons

132 The applicants claim that the individual decisions are not adequately reasoned, since the Commission confined itself to pronouncing a fine automatically merely by reference to Decision No 962/77. Thus with a spurious statement of reasons such as "taking into account the nature of the infringements, the amount of sales below the minimum prices and the real taxable capacity of the undertaking . . .", the Commission was able to fix the fine at any level it wished. The applicants also criticize the Commission for failing to reply to the observations submitted by them during the administrative procedure, which, it is argued, is all the more reprehensible as the requirement as to the statement of reasons constitutes the only effective protection of the rights of individuals.

133 The Commission argues that when the statement of the reasons on which an individual decision is based mentions the articles of the Treaty and the general decisions applied, establishes the facts in the preamble and provides a logical link between the operative part and that which has preceded it, that decision is properly reasoned.

134 The drafting of the individual decisions shows that the Commission used the same formula for all the undertakings: after referring to the provisions of the Treaty and the decisions applicable, it indicates the circumstances in which the infringements of the said provisions were found to have taken place, the

manner in which they were brought to the notice of the undertakings and how the latter submitted their observations. The facts constituting the infringement are then set out and the resulting fine is announced.

135 In view of that formula, it might be concluded that if the applicants compared the individual decision penalizing them with General Decision No 962/77 they could not fail to be aware of the precise infringements of which they were being accused; therefore the Commission cannot be accused of failing to supplement the individual decisions by stating the special reasons for the general decision which was implemented by them, which must have been known to the persons concerned. Moreover, the breadth of the submissions relied on by the applicants during the written and oral procedure shows that the existing statement of reasons did not in any way handicap the presentation of their defence.

136 Therefore this submission is unfounded.

Chapter 2: Exonerating factors pleaded

137 The applicants have pleaded a number of exonerating factors, using a variety of terms to describe the constraints threatening their existence or at least the continuity of their operations and claiming that those constraints were placed upon them as a result of the application of Decision No 962/77. They classify those exonerating factors under three heads — legitimate self-protection, *force majeure* and necessity — which must be examined in turn.

Legetimate self-protection

138 The concept of legitimate self-protection, which implies an act of defence against an unjustified attack, cannot exempt from liability commercial operators who knowingly contravene a general decision the legality of which does not give rise to doubts either taken by itself or in relation to the economic facts and circumstances in the light of which the decision was adopted. In this case, as General Decision No 962/77 has been recognized to

be lawful as regards the conditions of form and substance laid down by the ECSC Treaty, the applicants have no grounds for relying on legitimate self-protection, since that exonerating factor cannot be pleaded against a public authority acting lawfully within the legal framework of its powers.

Force majeure

139 The applicants state that as a result of the conduct "of other producers" who did not comply with the decision on minimum prices they were placed in a situation of *force majeure* which compelled them to infringe Decision No 962/77 in order to avoid exclusion from the concrete reinforcement bars market.

140 But recognition of circumstances of *force majeure* presupposes that the external cause relied on by individuals has consequences which are inexorable and inevitable to the point of making it objectively impossible for the persons concerned to comply with their obligations and, in this case, leaving them no alternative but to infringe Decision No 962/77.

141 It emerges from the documents put in evidence that of 181 undertakings investigated between June 1977 and September 1979, only 29 infringed the rules on minimum prices. Consequently, it appears that a majority of undertakings effectively adjusted to the situation, either by seeking new customers or manufacturing different products or by maintaining production at a certain level whilst complying with the minimum prices. Since, therefore, the external cause relied on by the applicants did not place them in a situation from which there was no escape the concept of *force majeure* cannot be applied in their favour.

Necessity

142 The applicants rely on the state of necessity in which they claim to have been placed and by virtue of which they were forced not to comply with the obligations imposed by General Decision No 962/77. In particular, the Italian applicants state that in practice they had no means of reducing their fixed costs in view of the risks of strikes and social upheaval in the event of redundancies and that therefore because of the loss of turnover their very

existence was threatened; the applicants Montereau and Korf consider that their conduct is justified by the principle that "necessity makes the law"; the applicant Maximilianshütte submits that the "only salvation" for its business was to recover its market share by selling below the minimum prices and considers that the state of necessity in which it was placed was the result of a number of factors including both the defects and inadequacies of the system and the fact that Maximilianshütte complied with the minimum prices in June and July, whilst its competitors did not do so. Thus with a variety of arguments the applicants allege that they were faced with a serious threat jeopardizing the existence of their businesses.

143 But without its being necessary to examine whether the threat of which they have spoken was capable of creating a state of necessity such as to justify their conduct, it is sufficient to note that none of the undertakings which complied with General Decision No 962/77 was in danger of bankruptcy or liquidation and that, although some of the applicants recorded a fall in the volume of their sales, their existence was not really threatened.

144 As regards the undertaking Antonio Stefana, which was placed in a particularly difficult financial situation, it must be noted that that situation was due to its choice of timing for structural re-organization and therefore to its erroneous evaluation of an unfavourable enonomic situation which was known to all; that personal conduct does not entitle it to rely on a state of necessity.

Chapter 3: Alignment

145 The applicant Feralpi, in company with the other Italian applicants on this point, submits that its conduct was lawful on the ground that it sold concrete reinforcement bars at minimum prices resulting from alignments undertaken in accordance with the Community rules.

146 In this regard Feralpi maintains in the first place — relying on Article 6 of Decision No 30/53 of 2 May 1953 (Official Journal, English Special Edition 1952-1958, p. 9), as amended by Article 2 of Decision No 72/440/

ECSC of 22 December 1972 (Official Journal, English Special Edition 1972 (30-31 December), p. 19) — that it was entitled to align its prices on prices actually applied by other Community undertakings, and not only on competitors' list prices.

147 But the Commission rightly submits that the said Article 6 provides that that right of alignment exists only for products for which "there exists no obligation or there exists only a limited obligation to publish prices", that is to say for products listed in Article 8 of Decision No 31/53 of 2 May 1953 (Official Journal, English Special Edition 1952-1958, p. 11), as amended by Decision No 72/441/ECSC of 22 December 1972 (Official Journal, English Special Edition 1972 (30-31 December), p. 22), which list does not include concrete reinforcement bars.

148 Consequently, as regards concrete reinforcement bars, alignment on Community prices could be validly undertaken only with reference to a Community competitor's list prices.

149 Feralpi goes on to submit that until 15 March 1978 — the date of the entry into force of Decision No 527/78/ECSC prohibiting alignment on offers of iron and steel products originating in certain third countries — it was possible for it to align its prices not only on such offers, but also on intra-Community prices previously aligned on offers from third countries.

150 In reply to that argument the Commission contends that an alignment on offers originating in third countries is valid only if the undertaking notified the transaction in which it carried out such an alignment within three days of that transaction, in accordance with Article 1 of Decision No 23/63 of 11 December 1963 (Official Journal, English Special Edition 1963-1964, p. 74).

151 If the Commission's argument concerned only the formal validity of the alignment operation it would have to be dismissed, since the absence of notification does not constitute an infringement of the rules on minimum prices.

152 However, as the Commission rightly maintains, the applicant should have adduced evidence of its alignment on offers originating in third countries; since such evidence has not been adduced by Feralpi, it is not possible to

accept the validity of such an alignment or, *a fortiori*, the validity of an alignment on an intra-Community offer which was itself previously aligned — although there is no proof of that — on an offer originating in a third country.

153 Lastly, Feralpi submits that, as regards the sales effected in the Federal Republic of Germany, it aligned its prices on lists published by German undertakings and that therefore it did not commit infringements of the rules on minimum prices, but at most, if those alignments were improper, infringements of Article 60 of the ECSC Treaty.

154 It is necessary to point out in the first place that Article 6 (1) of Decision No 962/77 does not prevent alignments "on more favourable delivered prices based on the price-lists of other producers in the Community". However, all the price-lists of undertakings in the Community must comply with the decision introducing the minimum prices and no alignment on Community prices enables sales to be made below the minimum prices. It follows that any sale below the minimum prices constitutes not only an improper alignment on other Community prices, contrary to Article 60 of the ECSC Treaty, but also an infringement of the rules on minimum prices.

155 By deducting from the German price-list on which it claimed to have aligned its prices the transport costs from Lonato (Feralpi's basing point) to the destination basing point, Feralpi obtained an "aligned" selling price which was lower than the price resulting from the application of a Community undertaking's list, a practice prohibited by Article 6 (1); consequently the sales effected in the Federal Republic of Germany below the minimum prices constitute infringements of Article 61 of the ECSC Treaty.

Third part: The reduction of the fines

Chapter 1: General

156 In the alternative the applicants have requested either in their written conclusions or during the oral procedure a reduction in the amount of the fine.

157 It must be remembered that these infringements were committed at a time of crisis, a crisis which jeopardized the existence of numerous undertakings in the sector and entailed the implementation of an anti-crisis plan based mainly on the principle of solidarity, which alone could enable the sector as a whole to overcome that crisis.

158 Admittedly, it is necessary to take note of the fact that in order to comply with that principle the most productive undertakings had to make sacrifices, especially having regard to the freedom enjoyed by the dealers and importers form non-member countries as regards prices throughout 1977, during which period most of the infringement in question were committed.

159 But by deciding to apply a relatively low coefficient for the calculation of the fines, namely 25 % of the value of the underpricing in the case of the undertakings without particular financial problems, 10 % of that value in the case of the medium-sized undertakings operating at a loss, and 1 % of that value in the case of the insolvent undertakings, having regard to the rate which it may apply under Article 64 of the Treaty — twice the value of the unlawful sales — the Commission properly took account of the circumstances of the cases.

160 Consequently, the applicants' claims for the fines to be reduced are unfounded, except for the claims which are examined below concerning an incorrect application of the rates fixes by the Commission or reductions in the value of the underpricing.

Chapter 2: Particular cases

1. Antonio Stefana

161 This undertaking has submitted that at the time when the fine was imposed on it, its financial situation was extremely critical, which submission has not been called in question by the Commission; consequently, in accordance with the criteria laid down by the Commission, the rate of 10 % of the value of the underpricing must be applied to that undertaking and not the rate of 25 %, with the result that the fine imposed upon it must be reduced from 50 852 000 lire to 20 340 800 lire.

2. The claims concerning possible reductions in the value of the underpricing

(a) Di Darfo

162 The applicant relies in the first place on a procedural defect, in so far as it was summoned to Brussels to give further oral explanations only on 23 June 1978, whilst the meeting was fixed for 29 June 1978, and its request for an extension of the period of notice met with a negative reply; for those reasons it claims that the individual decision imposing a pecuniary sanction, dated 18 August 1978, should be annulled, submitting that the Commission's refusal prevented it from properly presenting its case.

163 The Commission observes that it is not obliged to grant hearings to the parties and that there cannot therefore be any binding period of notice; consequently, there is no procedural defect in this respect, nor was Di Darfo prevented from properly defending itself.

164 Although it is true that Article 36 of the Treaty, to which Di Darfo refers, merely requires the Commission to give the party concerned the opportunity to submit its comments before a pecuniary sanction is imposed, and although in this case the undertaking was able to submit written observations, it must none the less be said that the period of notice given by the Commission to Di Darfo — in relation to its invitation to a hearing at Brussels — could have been more generously calculated so as not to affect that undertaking's opportunity to make known its point of view in good time with regard to certain disputed documents. However, that conduct does not *ipso facto* entail the annulment of the contested decision, in as much as the applicant had previously had an opportunity to submit written observations, but the documents which it failed to rely on in its written observations to the Commission, and which it claims to have wished to submit at the hearing which it was not able to attend, must be taken into consideration by the Court.

165 The applicant goes on to submit that Invoices Nos 1626, 1628 and 1630 — all three of 2 September 1977 — did not concern concrete reinforcement bars, but ST 37 rolled products, and that those invoices are not therefore covered by Decision No 962/77. But since the Commission has rightly pointed out that the invoices bear a stamp stating: "partial alignment on the

AFIM price-list", and that that price-list concerns only concrete reinforcement bars, the applicant's argument must be dismissed.

166 Finally, it submits that the Commission wrongly included in the allegedly unlawful sales invoices in respect of orders which were placed prior to the implementation of Decision No 962/77. This submission relates to two groups of orders, one for goods supplied to the undertaking Maretto Blein through the intermediary of S.p.a. Darma, Milan, and the other for goods supplied to S.p.a. Baraclit through the intermediary of the undertaking Albani di Merate.

167 The Commission has dismissed this argument on the ground that the orders put in evidence by Di Darfo were not produced at the time of the inspection. But that argument on the part of the Commission is unfounded since in this particular case it is appropriate to take into consideration the documents which the undertaking failed to submit in connexion with its written observations to the Commission and which it did not have an opportunity to submit subsequently.

168 During the oral procedure the Commission produced one of the invoices (No 1514) in respect of which Di Darfo submitted that the orders were prior to 8 May 1977; admittedly, that invoice is dated 2 August 1977, but it can in no way constitute proof discrediting the document produced by Di Darfo which established that the orders constituting a contract — by virtue of which the parties were in agreement as to the product sold and the price — had actually been placed before 8 May 1977.

169 Consequently, the applicant's argument must be accepted and the sales relating to those orders must be excluded from the list of those in respect of which fines may be imposed; since they represent 3.4 % of the total the fine imposed on Di Darfo must be reduced by 3.4 %, that is to say from 27 830 000 lire to 26 883 780 lire.

(b) Rumi

170 The applicant submits that the Commission was wrong to calculate the value of the underpricing by reference to the price of DM 540 per tonne of

concrete reinforcement bars, on the ground that it sold its concrete reinforcement bars by alignment on the basing points Saarbrücken and Oberhausen and that as a result of transport costs the price per tonne should have been reduced to DM 451.87; thus it considers that the value of the underpricing falls from 200 to approximately 100 million lire and that the fine should be calculated only in relation to the latter sum.

171 The Commission is right to point out, in the first place, that the document produced in support of this claim relates to sales subsequent to those taken into consideration for the calculation of the underpricing and, secondly, that the final destination of the goods in question was the Netherlands; in those circumstances an alignment on German basing points was contrary to Article 60 of the Treaty and, as that unlawful alignment enabled the applicant to sell below the minimum prices, it also constituted an infringement of the rules on minimum prices, with the result that the submission relied on by Rumi must be dismissed.

(c) Feralpi

172 The applicant submits that the Commission wrongly accused it of having charged prices below the minimum prices by means of a group of invoices on which the disputed prices are entered by hand, claiming that such annotations have no probative value since those invoices are extraneous to the real contractual relationship.

173 The Commission has produced copies of telex messages relating to the sales in question which show a difference between the selling price expressed in German marks, which complies with the rules on minimum prices, and the amount intended to be indicated on the invoice, which is expressed in lire and is lower than the minimum prices.

174 As that evidence was also coroborated by the written testimony of the Commission's inspector, that submission must be dismissed.

175 The applicant also submits that it sold concrete reinforcement bars with an extra for quality which the Commission did not take into account in calculating the value of the underpricing.

176 It must be remembered that Article 2 of Decision No 3000/77 states that minimum prices shall be basic prices, including extra for quality, whereas Decision No 962/77 had merely stated in Article 2 that the minimum prices should be basis prices. In those circumstances, as from 1 January 1978, on which date Decision No 3000/77 entered into force, the minimum prices included extras for quality, whilst the amount of those extras could be added to the minimum prices in Decision No 962/77.

177 As the infringements were committed between 3 March and 3 May 1978, the underpricing must be equal to the difference between the minimum price (including extras for diameter) and the selling price at which the transaction was effected, which includes the basis price and the extras for quality.

178 Consequently, taking into consideration the situation described above, the Court decides that the fine shall be reduced from 55 110 000 lire to 50 000 000 lire.

Costs

179 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

180 Under Article 69 (3), where each party succeeds on some and fails on other heads, or where the circumstances are exeptional, the Court may order that the parties should bear their own costs in whole or in part.

181 In Cases 154/78 (Valsabbia), 205/78 (Stefana Fratelli), 206/78 (A.F.I.M.), 227/78 (Di Darfo), 228/78 (Sider Camuna), 263/78 (Rumi), 264/78 (Feralpi), 31/79 (Montereau) — including the application for the adoption of interim measures — 39/79 (O.L.S.), 83/79 (Maximilianshütte), 85/79 (Korf), the applicants have basically failed in their applications and they must be ordered to pay the costs.

182 In Case 226/78 (Antonio Stefana) the Commission has failed on the alternative application for a reduction in the amount of the fine and the parties must therefore bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Reduces the fines imposed on the applicants as follows:**

   — **In the case of Antonio Stefana (226/78) to 19 042 European units of account, that is 20 340 800 lire;**

   — **In the case of Di Darfo (227/78) to 25 168 European units of account, that is 26 883 780 lire;**

   — **In the case of Feralpi (228/78) to 46 298 European units of account, that is 50 000 000 lire;**

2. **Dismisses the remainder of the applications;**

3. **Orders the applicants in Cases 154/78 (Valsabbia), 205/78 (Stefana Fratelli), 206/78 (A.F.I.M.), 227/78 (Di Darfo),228/78 (Sider Camuna), 263/78 (Rumi), 264/78 (Feralpi), 31/79 (Montereau), 39/79 (O.L.S.), 83/79 (Maximilianshütte) and 85/79 (Korf) to pay the whole of the costs;**

4. **Orders the parties in Case 226/78 (Antonio Stefana), to bear their own costs.**

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 18 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President

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Facts

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