2. **Dismisses the remainder of the application;**

3. **Orders the parties to bear their own costs.**

Koopmans Bahlmann

Pescatore O'Keeffe Bosco

Delivered in open court in Luxembourg on 28 March 1984.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the Fourth Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 18 JANUARY 1984 [1]

Mr President,
Members of the Court,

1. Nature of and background to Article 60 of the ECSC Treaty.

1.1. To ensure a proper understanding of the Bertoli case, I believe it is necessary to make some brief opening remarks concerning the nature of, and the background to, Article 60 of the ECSC Treaty.

In contrast to Articles 58 and 61 and other provisions of the ECSC Treaty which provide rather for intervention, Article 60, like Articles 65 and 66 of the ECSC Treaty, belong to the group of provisions whose purpose is to ensure genuine and fair competition on the market in coal and steel.[2]

It is well-known that American anti-trust legislation was an important source of inspiration for the last-mentioned three provisions and that is particularly true as regards the prohibition of price discrimination which is laid down in Article 60. As is stated in the latest extensive commentary on that article,[3] the Clayton Act of 1914 and the Robinson-Patman Act of 1936 in the United States

1 — Translated from the Dutch.

2 — See in that respect Zimmermann in Quadri-Monaco-Trabucchi, Commentario CECA, Part II, Milan 1970, p. 780.

3 — Ibidem, also as regards the rules on the alignment of prices, p. 813.

were the most important sources of inspiration, as is also clear from a comparison of the texts, for the complex rules of Article 60. In addition, though to a lesser extent, the French prohibition of price discrimination of 1953 and the existing prohibitions of price discrimination in the Federal Republic of Germany applicable to public utility companies and undertakings occupying a dominant position on the market also served as a model. [1] Since the main sources of inspiration for Article 60 were United States legislation, the background to the relevant American legislation is not devoid of interest. It is quite clear from the two extensive commentaries on that legislation, to which the Italian commentary on the ECSC Treaty also refers, that the aim of the United States legislation was to protect small undertakings against misuses of power involving price discrimination on the part of the monopolistic or oligopolistic undertakings in order to strengthen their dominant position on the market. The purpose of that legislation is therefore to counter practices in restraint of competition which are pursued by oligopolistic undertakings. [2]

The fact that in those circumstances the ECSC Treaty contains a prohibition of price discrimination within the meaning of the Robinson-Patman Act, but that the EEC Treaty contains no such prohibition, can easily be explained in the light of that background to Article 60. The market in coal and steel was essentially in the nature of an oligopoly. In 1958 that was not the case in the majority of the economic sectors which fell within the scope of the EEC Treaty, with the result that in principle the prohibitions of price discrimination contained in Articles 85 and 86 of the EEC Treaty and the prohibition of discrimination on grounds of nationality laid down in Article 7 and based *inter alia* on Article 60 of the ECSC Treaty were sufficient.

A further observation which must, however, be added to these remarks is that the purpose of Article 60, according to the second indent of paragraph (1) thereof and to the provisions adopted for the implementation of that article, is to prevent certain purchasers from being adversely affected by price discrimination (particularly on grounds of nationality). In the fourth recital in the preamble to Decision 72/440/ECSC of 22 December 1972 amending Decision No 30/53 (Official Journal, English Special Edition 1972 (30-31 December), p. 19), the purpose of Article 60 is considered also in rather general terms, to be primarily the protection of *purchasers.*

1.2. Against that background to Article 60, which I have described in outline; it is possible at once to make the following rather general observations concerning the Bertoli case in which I give my opinion today:

Since the prohibition of price discrimination forms part of competition policy and is closely related to the other rules of competition applicable to undertakings, in principle any implementing decision must *in the first place* state the reasons on which it is based with the same degree of care as is customary in the case of the decisions implementing Articles 85 and 86 of the EEC Treaty and as is required in such cases also by the Court of Justice. This is one of the most complicated aspects of competition policy. The two United States com-

1 — Loc. cit., pp. 780 and 781.

2 — Corwin Edwards, The Price Discrimination Law, Washington 1959, pp. 4, 12, 38 (first paragraph) and 619, and Frederick M. Rowe, Price Discrimination under the Robinson-Patman Act, Boston/Toronto 1962, pp. 24 and 28. Rowe also rightly points out (on page 26) that for undertakings not occupying a dominant position on the market price discrimination is precisely an indication of genuine competition (pages 26 and 27). As in most Member States price discrimination is not prohibited as such by the EEC Treaty. The EEC Treaty forbids price discrimination in principle only where it is the result of an agreement, decision or concerted practice (Article 85) or where one or more undertakings occupy a dominant position on the market (Article 86).

mentaries, referred to earlier, on the comparable provisions in force in the United States are each over 600 pages long, that is, they are longer than many commentaries on other aspects of United States or Community anti-trust legislation .[1]

Secondly, a statement of reasons which is as concise as that which is customary in the case of the decisions imposing a fine on undertakings for infringing the system of steel quotas is not in principle sufficient. The facts, in cases involving such infringements, are as a rule extremely simple to establish and to assess. The general decisions in question also provide for the imposition of fines at a codified fixed rate from which it is possible to depart on the basis of the provision in question and of the case-law of the Court only in exceptional circumstances to be pleaded by the undertakings concerned (see *inter alia* the judgment of the Court of 16 November 1983 in Case 188/82 *Thyssen* v *Commission* [1983] ECR paragraphs 20 to 23 of the decision). As regards Article 60, the Commission provides, according to the documents before the Court, merely for a standard rate which is fixed internally. I shall return to the significance of this later.

Thirdly, it is certainly paradoxical, in the light of the United States and German sources of inspiration for Article 60, that the latter provision is not applied to undertakings occupying a very strong position on the market in order to protect smaller competitors, but that it is applied without distinction also to small and medium-sized undertakings which, by aligning their prices, endeavour to resist competition from larger undertakings. Against that, however, as I have already said, is the fact that the second indent of Article 60 (1), in the same way as Article 60 (2) and the provisions implementing Article 60, and like the French legislation of 1953, in principle accord equal treatment to all undertakings in that regard. To clarify the purpose of Article 60, the second indent of paragraph (1) contains only ("in particular") a reference to the application of dissimilar conditions on grounds of the *nationality* of the buyer. That kind of discrimination is not at issue in the present case but the provisions implementing Article 60 do not mention that restriction of the scope of the prohibition on price discrimination either, as I pointed out earlier.

Fourthly, it is clear from the documents before the Court that it is especially the series of problems relating to the alignment of prices under the second indent of Article 60 (2) (b) which gives rise to serious practical difficulties for small undertakings. The case-law of the United States courts shows that precisely that series of problems concerning the alignment of prices, also viewed in more general terms, is one of the most complex aspects of the provisions prohibiting price discrimination such as those at issue in this case. [2]

It is therefore striking that the contested decision in this case disregards that series of problems in their entirety although the applicant relies precisely on this possibility of aligning its prices.

As a *fifth observation,* it must however be stated that the wording of Article 60 — in spite of the objectives of promoting genuine and fair competition and of combating discrimination on grounds

1 — As regards the American version of Article 60, Rowe points out in the first sentence of the introduction to his commentary that: "This volume undertakes to chart directions through the most complex and controversial of the Federal anti-trust laws: the Robinson-Patman Act."

2 — See Corwin Edwards, loc. cit., pp. 546 to 584 and Rowe, loc. cit., pp. 207 to 264.

of nationality in a predominantly oligopolistic market, which are specified in that article and confirmed by historical analysis and by authoritative literature on the matter — also enables that provision to be used as an instrument to *restrict competition.* The United States version on that provision, namely the Robinson-Patman Act, also seems, in the light of its application in practice; to have the effect of *restricting* competition, in addition to the desired effect of *protecting* it. When, at the beginning of 1958 in the context of the European Productivity Agency of the Organization for European Economic Cooperation (OEEC) I spent a month on study leave in the United States with specialists in competition law from practically every country in Western Europe, those international contradictions in the application of the Robinson-Patman Act seemed to constitute the most disputed and most discussed aspect of the United States anti-trust legislation. It is clear from the information concerning its policy on checks and penalties, supplied by the Commission in reply to the questions put to it by the Court, that the Commission, particularly after the steel crisis became more acute in 1980 had recourse to Article 60 as an appropriate instrument for restricting price competition. In that regard it attributed much greater significance than before to strict compliance with the duty to publish prices. In a predominantly oligopolistic market, such a duty in itself greatly contributes to a far-reaching elimination of price competition between oligopolistic undertakings, as Zimmerman also points out in his contribution to the Italian commentary mentioned earlier (p. 784). If, in addition, smaller undertakings are also strictly bound by the duty to publish prices, and the provisions concerning the alignment of prices are also applied to them according to the letter but not the spirit of Article 60, that article becomes an important instrument for enforcing compliance with the system of steel quotas. That shift in policy is clearly reflected particularly in the Commission's gradual increase of the rate at which fines have been imposed since its meeting of 2 June 1981 (Annex 2 to the Commission's reply of 7 October 1982 to the questions put to it by the Court). [1] I do not regard such a shift in policy, in spite of the other objectives referred to in Article 60, as a misuse of power, [2] provided that it is clearly brought to the attention of *all* undertakings; that the fines are increased gradually and not without warning, in accordance with internal guidelines, so that actual knowledge of the new policy is taken into account. However, I consider it highly significant in that regard that the Commission, as is well known, recently consulted the Council with regard to its intention of using the instrument of minimum prices on the basis of Article 61 of the ECSC Treaty to support the steel quota system on the ground that such an instrument is even more appropriate for the purpose.

1 — As regards the period preceding the present steel crisis it is important to state that in the Court's most recent judgment concerning Article 60 (Case 149/78 *Rumi* v *Commission* [1979] ECR 2523) the fine at issue amounted to merely 15% of the price undercharged. None the less, even at the time of the price undercharged. None the less, even at the time the Court reduced the fine to 10% of the amount undercharged on the ground that in "times of disturbance . . ., the publication of price lists could not so effectively ensure the transparency of the market as in a period of relative stability, so that the damage caused by Rumi's conduct appears less serious than if it had taken place in less unsettled times" (paragraph 39 of the decision).

2 — Even price cartels are, as is well known, at times used by the competent authorities (for example in the Netherlands) as an instrument of price control, not as an instrument to promote competition, and such an improper use of the legislation on cartels has never, so far as is known, been contested at law as a misuse of power.

2. The most important facts and principal submissions relied upon in the present case

2.1 The applicant in the present case brought an action against the Commission decision of 9 December 1982 imposing upon it a fine of Lit 94 579 100 for infringing Article 60 of the ECSC Treaty. The fine was equal to 110% of the amounts by which the applicant had allegedly undercut its list prices in the period between 1 July and 30 September 1981, and was in accordance with the rates of fine which the Commission had laid down at its meeting on 6 December 1982 (Annex 3 to the Commission's reply of 7 October 1983 to the questions put to it by the Court), but marked a departure from the much lower internal rates of fine which, according to Annex 2 to that reply, were in force during the period in which the relevant infringements of the ECSC Treaty were committed.

2.2 At the hearing on 21 June 1982 which preceded the imposition of the fine, the applicant based its arguments primarily on the need to align its prices on those charged by its competitors for deliveries. However, it is clear from the documents before the Court that in so doing the applicant — contrary to the provisions of Article 60 and of general Decision 72/440/ECSC of 22 December 1972 amending Decision No 30/53 of 2 May 1953 (Official Journal, English Special Edition, 1972 (30-31 December), p. 19, and Official Journal 1973, C 23, p. 30) — aligned its prices not on the price lists of its competitors but on the prices actually invoiced by them. Article 6 of Decision No 30/53, as amended in 1972, made possible such an alignment on the prices invoiced by a competitor in cases — not further specified in the decision itself — in which there is no duty, or only a limited duty, to publish prices. Those exceptions to, and restrictions on, the duty to publish prices are set out in the Communication of the Commission relating to the amended text, as it is now in force, of Decision No 31/53 (Official Journal 1973, C 29, p. 32). In that connection I would refer to Article 5 and specially to Article 8 of Decision No 31/53 in the version at present in force. The exception contained in Article 8 (4) of that decision for second class and off-grade products is particularly relevant to these proceedings.

2.3 The preamble to the contested decision of 9 December 1982 imposing a fine (see annex to the application) contains only six recitals. I stated earlier that this decision thus bears a closer resemblance to the decisions imposing fines in the case of infringements of the steel quota system than to decisions imposing fines in the case of infringements of Articles 85 and 86 of the EEC Treaty which are by nature more closely related to Article 60.

The first recital in the preamble states, without further explanation, that certain sales contrary to Article 60 have been established. The decisions implementing Article 60 are not enumerated.

The second and third recitals refer to the applicant's responsibility for the alleged infringements of the ECSC Treaty and to the manner in which it was given an opportunity to defend itself against those charges.

The fourth recital records, with reference to Annexes I and II to the decision, the sales of first-grade products

and products "which are not of the first grade" (in respect of which reductions were granted but not published, supplements were published but not invoiced, or were invoiced only in part, and transport costs were not invoiced. Moreover, the total quantity of goods sold irregularly is fixed at 1 625 tonnes, the amount of the price reductions at LIT 85 981 000 and the total value of the irregular sales at LIT 572 231 000.

In the fifth recital it is stated that the applicant explained its conduct by the contention that, in view of its marginal importance on the Italian market in steel, it was compelled to abide by the principle of supply and demand and, consequently, to carry out partial alignments whilst maintaining its own prices at a level higher than those of its competitors. In that regard, the decision merely states, without further clarification, "that those explanations cannot justify the infringements in question".

In the sixth recital, the imposition of the fine is stated to be based on the following six grounds (letters supplied by me):

(a) the applicant is liable under Article 64 of the ECSC Treaty to a fine which may be as high as twice the value of the irregular sales;

(b) the amount of the fine must be such as to deter the company from undercharging in future;

(c) accordingly a fine equal to 100% of the price reductions is justified;

(d) in the present case the price reductions amount to more than 10% of the prices which should have been charged;

(e) consequently it is appropriate to increase the rate of the fine by 10%;

(f) a fine of LIT 94 579 100 seems appropriate.

The annexes to the decision consist of tables showing, in successive columns, the invoices concerned, the quantities in question, the price lists applied (almost invariably those of the applicant's competitors, Sisma and Piombino), the prices invoiced, the value of irregular sales, the applicant's own list prices, the reductions shown against the price list and any additional discounts, any supplements whether invoiced or not, the transport costs not invoiced and the amount of the price reductions.

The prices specified on the price lists allegedly applied by competitors are not set out. In the light of the explanations given by the Commission during the oral procedure, the reason for their omission is the fact that the applicant, unfamiliar with the price lists of the competitors in question, aligned its prices not on those price lists but on the invoices of its competitors. During the oral procedure the Commission confirmed, in reply to questions from me, that in calculating the amount of the price reductions it took no account of the extent to which Bertoli, in aligning its prices, actually went further than was justified by an alignment on the price lists of its competitors. In other words it confirmed on that occasion that Bertoli was being charged in the present case exclusively

with a formal and not with a substantive infringement of the provisions on the alignment of prices.

2.4 In its application Bertoli seeks primarily a declaration that the decision is void and, in the alternative, a reduction of the fine in accordance with the criteria which were laid down by the Commission itself as its policy on fines and which were in force during the period to which the monitoring inspection related.

The submissions relied upon by the applicant, further details of which may be found in the Report for the Hearing, may be summarized as follows:

First submission: inadequate statement of the reasons on which the decision in based.

Second submission: infringement of the ECSC Treaty and of the rules of law relating to its application, inasmuch as the Commission in disregard of Article 4 of Decision No 31/53, failed to give effect to the intention set out therein that a special publication on price lists and conditions of sale should be issued. The applicant was therefore compelled in practice to align its prices on those invoiced by its competitors.

Third submission: misuse of power inasmuch as the Commission, after laying down on 4 June 1981 objective criteria for the imposition of fines for the period in question, applied in the present case an entirely different set of criteria established after the period in which the infringements were alleged to have been committed.

I shall deal with each of those submissions in turn.

3. First submission

As regards the contention that the statement of reasons is insufficient, the Commission puts forward the view that its inspectors had established the irregularities directly on the basis of the invoices. Moreover, the Commission claims that in its decision it was in no way remiss in complying with the obligation to provide a full statement of reasons, in so far as it failed to consider in detail the arguments put forward by the applicant at the hearing. Furthermore, the applicant's arguments set out in the decision contain the gist of those which it put forward.

The Commission's defence (pages 4 and 5 in the defence) as I have briefly summarized it, is however preceded by the striking remark that: "The submission is unfounded since in this case the applicant is entitled to challenge the measure and the Court, for its part, may review its legality".

It seems clear to me, in the light of the case-law of the Court, that the Commission's premise, to which I have just referred, cannot be accepted. Thus, the Court held in paragraph 18 of its judgment of 28 October 1982 in Joined Cases 292 and 293/81 *Lion, Loiret and Haentjens* v *FIRS* [1982] ECR 3887 and in paragraph 32 of its judgment of 11 May 1983 in Joined Cases 311/81 and 30/82 *Klöckner* v *Commission* [1983] ECR 1549, as regards the parallel requirement of a statement of reasons laid down by the EEC Treaty and with reference to the Court's previous decisions that: "According to the case-law of the Court, the statement of reasons required by Article 190 of the Treaty must be appropriate to the nature of the measure in question. It must show clearly and unequivocally the reasoning of the Community authority which issued the contested measure so as to inform the persons concerned of the justifications for the measure adopted and to enable the Court to exercise its power of review".

In Case 24/62 *Germany* v *Commission* [1963] ECR 63 (the spirits case), the

Court had already made it clear that the purpose of the obligation to state reasons is "to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty". Paragraph 14 of the Court's judgment of 17 March 1983 in Case 294/81 *Commission* v *Control Data Belgium* [1983] ECR 911, is to the same effect.

It is clear from that case-law that the Commission cannot defer the submission of a more detailed statement of reasons until such time as proceedings may be instituted before the Court, and that the decision itself must express the Commission's reasoning sufficiently clearly and unequivocally to enable the parties concerned to develop their counter-arguments in their application and also to enable the Court to elicit from the decision at least the most important and the most relevant information, without having to ask the Commission for further details.

The statement of reasons which I referred to earlier does not in my opinion satisfy those requirements in full. To begin with, I observed earlier that according to the recitals in the preamble to the general decision of 22 December 1972, the prohibition of price discrimination serves mainly to protect purchasers against such discrimination. Thus the decision should at least have made it clear, as an indication of the gravity of the infringements established, that such infringements were not merely of a formal nature but might also adversely affect purchasers other than Bertoli's customers if it actually established that competitors' price lists had been undercut.

Moreover, in the fourth recital no explanation whatsoever is given as to why the sales referred to in Annex 2 to the decision did not come within the scope of the exemption from the prohibition laid down by Article 6 of Decision No 30/53 in conjunction with Article 8 (4) of Decision No 31/53.

Thirdly, the statement in the fifth recital, not clarified in greater detail, to the effect that the explanations furnished by the applicant cannot justify the infringements in question, can scarcely be regarded as satisfying the requirement laid down by the Court in its case-law that the statement of reasons must give the parties an opportunity to assert their rights. In that connection I would recall that decisions imposing a fine for the infringement of Articles 85 and 86 of the EEC Treaty normally contain a detailed refutation at least of the essential features of the defence relied upon by the parties concerned. In the light of my earlier observations concerning the fourth recital in the preamble to the decision and of the background to Article 60 which I described earlier, it is not at all self-evident without further qualification — and not only as far as the *gravity* of the infringements established is concerned — that on the whole no importance may be attributed to Bertoli's explanation summarized in the fifth recital or why that should be so.

The sixth recital — which however merely justifies the amount of the fine imposed and not the establishment of the infringements themselves — is in itself sufficiently clear to enable the applicant to defend itself. The applicant's views in that regard are set out mainly in its third submission.

The annexes to the decision on the other hand do not in my opinion enable either the applicant or the Court to ascertain, without further information from the Commission, the existence of infringements of the provisions on alignment or the actual gravity of any such infringements. No information concerning the competitors' price lists is given. The Court has been obliged to request the Commission to submit that information in addition to details of the applicant's price lists. Moreover, the Court has been obliged to request a great deal of additional information required in order to arrive at a decision. No mention is made, in the decision itself or in the annexes thereto either, of the reasons for which alignments on the actual prices invoiced by the competitors in question were not permitted, or of the provisions of Article 60 and the decisions concerned which are supposed to support that conclusion. The general decisions in their present versions which are important for the establishment of the infringements in question are not mentioned even in general terms, as I observed earlier, either in the decision imposing a fine or in the annexes thereto.

Accordingly, I consider the applicant's first submission to be well founded and I am of the opinion that this ground alone is sufficient to warrant a declaration that the contested decision is void.

4. Second submission

I consider the applicant's second submission unfounded inasmuch as it does not contest the statement made by the Commission that the latter has for a number of years made it possible to subscribe to a periodically updated publication which sets out the price lists of all the undertakings concerned. The Commission also maintains that interested persons may contact the relevant officers of the Commission at any time for information. The applicant's contention that between 1973 and 1981 the Commission pursued neither a very active nor, in those cases which arose, a very strict policy in prosecuting infringements of Article 60, is in my view to a large extent confirmed not only by the relevant annexes to the Commission's reply of 1 August 1983 but also (as regards the rates at which fines were imposed at the time) by the judgment of the Court in the *Rumi* case to which I referred in footnote 1, p. 1668 to this Opinion. It would appear that between 1972 and 1977 the Commission did not fine a single undertaking for infringing Article 60. As regards the press notices and other communications issued in 1981 regarding the tightening of the policy of inspection, which were referred to by the Commission in the same reply of 1 August, there is no certainty that they ever came to Bertoli's attention. Since 1962, the Commission has, according to information furnished by itself, ceased to transmit a general explanatory circular to all the undertakings affected by Article 60.

Nevertheless, on balance, I consider the Commission's defence in relation to the applicant's second submission to be sufficiently sound to deny the validity of that submission as a decisive factor in this case. In that connection I would also refer to paragraph 9 of the judgment of the Court in Case 1252/79 *Lucchini* v *Commission* [1980] ECR 3753 at p. 3763), even though the judgment was concerned with Article 61 and not with Article 60.

5. Third submission

In its third submission the applicant contends that the Commission was guilty

of a misuse of power by imposing a fine in the present case. In particular, the Commission wrongly refrained from imposing a fine in this case in accordance with the lower rates referred to in its decision of 4 June conferring authorization on its Vice-President, Mr Davignon, and instead applied a rate which was not fixed until well after a year from the date on which the alleged infringements were committed.

In its defence, the Commission maintains essentially that the maxim *nullum crimen, nulla poena sine lege* which is relied upon by the applicant, is inapplicable in administrative proceedings such as those at issue. It then points out that the powers delegated to a Member of the Commission were no doubt subject to certain restrictions in view of their nature and could at any time be revoked or even, in specific exceptional cases, be disregarded by the Commission. In its rejoinder the Commission added in that regard that the principle that the administration is bound by its own acts implies that it can cease to bind itself at any time. In that connection, the Commission makes a significant lapse on page 10 of its rejoinder where it states that in the present case it merely applied Article 58 of the ECSC Treaty. That lapse is significant because it would have been difficult to demonstrate more clearly the extent to which the Commission at present bases its policy concerning Article 60 on its policy concerning steel quotas, which is confirmed moreover by the record of the written procedure of 6 December 1982 set out in Annex 3 to the Commission's reply to the questions put to it by the Court.

In the light of the documents relating to the meeting held on 4 June 1981 and to the written procedure of 6 December 1982, which were submitted by the Commission at the Court's request as Annexes 2 and 3 to its reply of 7 October 1983, the arguments put forward by the Commission which I referred to earlier are in my view insufficient to refute the applicant's third submission.

As far as infringements of Article 60 are concerned, the Court of Justice has already held, in Case 8/56 *ALMA* v *High Authority* [1957 and 1958] ECR 95, in particular at p. 100, and in Case 1/59 *Dalmas* v *High Authority* [1959] ECR 199, in particular at p. 205, that the amount of the fine must be appropriate to the gravity and to the duration of the infringements in question and must be proportionate to their consequences. I have already pointed out that in the *Rumi* judgment, referred to earlier, the Court also took account of the "times of disturbance" which dated back to before 1977 and which have certainly not improved since and it regarded such "times of disturbance" as a mitigating factor justifying a reduction of the fine imposed.

In its recent case-law concerning Article 58 (4) of the ECSC Treaty, which is structurally similar to Article 64 (see *inter alia* the *Thyssen* judgment referred to earlier), the Court also made it plain that there can be no question either of complete freedom of action on the part of the Commission with regard to the determination of the amount of the fine or even of the automatic application of the standard rate of fines codified in the steel quota system.

The question whether such decisions imposing fines come within the scope of criminal law or administrative law may therefore be disregarded. If they are recognized as coming within the scope of administrative law, it will be necessary, on the basis of principles of proper administration, as is clear from the case-law of the Court cited earlier, to take into account the gravity and the

duration of the infringement and any special circumstances ruling out or mitigating the responsibility of the perpetrator of the infringement.

It is apparent however from the decision and from the information furnished thereon during the written and oral procedure, that the Commission does not on the whole attach any importance to the gravity of the alleged infringements, inasmuch as it treats purely formal infringements of Article 60 as equivalent to substantive infringements. The Commission has not contested the fact that Bertoli aligned its prices on the actual (invoice) prices of several important competitors. Nor has it argued, still less has it demonstrated, that in so doing Bertoli sold its products at prices lower than the list prices of its competitors or applied less stringent conditions of sale, thereby acting in a manner which is, not only in formal but also in substantive terms, contrary to Article 60 (2) (b) of the ECSC Treaty and the provisions implementing that article. The Commission simply correlated the gravity of the infringements with the applicant's own price lists on the sole ground that the applicant, being unfamiliar with its competitors' price lists, aligned its own prices on the actual prices invoiced by those competitors and not on their price lists. I consider such a method of calculating the fine to be contrary to the case-law of the Court and also to the unequivocal objective of Article 60 (1) and (2) and of the provisions implementing that article. It is clear from the objective of those provisions that the ultimate purpose of the rules on the publication of prices is either to counter the establishment of a monopoly position on the Community market or to prevent certain purchasers from sustaining actual damage as a result of price discrimination. It is thus clear that, in order to assess the gravity of an infringement, greater weight must be attached to the question whether the list prices of a competitor have actually been undercut than to the question whether the formal provisions applicable pursuant to Article 60 (2) for the attainment of the objectives of Article 60 (1) have been complied with. Since in the present case the Commission has not on the whole devoted any attention to those factors which are crucial as regards the assessment of the gravity of the practices complained of, its decision must, also on that ground and in the light of the case-law of the Court, be declared void.

Moreover, unlike the provisions implementing Article 58 of the ECSC Treaty, the provisions implementing Article 60 do not refer to any previously published standard rate of fines from which it is possible to depart only in exceptional circumstances. In view of the wide range of obligations and prohibitions laid down by Article 60 and its implementing provisions, and of the greater or lesser importance of those various obligations and prohibitions, such a standard rate of fine is as indefensible in this case as in the case of infringements of Article 65 or 66 of the ECSC Treaty or of Article 85 or 86 of the EEC Treaty. In fact, Article 64 of the ECSC Treaty (like Regulation No. 17 implementing Articles 85 and 86 of the EEC Treaty) specifies only the upper limit of the fines to be imposed. Within the limits laid down, the gravity and the duration of the infringement established, and the general economic situation must

in accordance with the case-law of the Court be taken into account. As far as the general economic situation is concerned, it may be stated, without fear of contradiction, that it was certainly no less "disturbed" at the time at which the infringements complained of were committed than during the period on the basis of which the Court reduced the fine in the *Rumi* case.

Thus, although no rate for the imposition of fines was published in connection with Article 60, in contrast to the position with regard to Article 58, the Commissions seems to have applied during the period in question a carefully balanced "normal" rate in cases in which undertakings charged prices lower than their own list prices. As regards the period prior to 30 June 1981, that "normal" rate, according to the authorization conferred on 4 June 1981 on a Member of the Commission, was 7.5% of the price reduction. In the case of infringements committed between 1 July 1981 and 31 August 1981, the rate was 15% of the price reduction and in the case of infringements committed after 31 August 1981 25%. It was possible, according to point 3 of the decision conferring authorization, to increase or reduce those percentages by 40% of their value in order to take account of the peculiarities of specific cases. Point 4 of that decision established a procedure for the transmission of information to other Members of the Commission from which it was possible to deduce by implication the possibility that the Commission might adopt a different decision in each specific case. In that regard, the Commission should in my view have taken into account in order to prevent arbitrary action the rules carefully laid down by the decision conferring authorization.

With regard to the decision conferring authorization I should like to make the following remarks. In the first place it is clear from that decision that the Commission's deliberate intention was that the rate of the fine should be increased only gradually. Continuity was therefore established with the preceding "times of disturbance", in respect of which the undertakings could rely on the principles laid down by the Court in the *Rumi* judgment.

Secondly, it is clear from that decision that at the time the Commission expressly made provision for downward adjustments in addition to upward adjustments in the rates of the fine. It was thus made clear that the competent Member of the Commission was required, in accordance with the case-law of the Court, to take account also of the gravity of the infringements established.

Thirdly, it is clear from the record of the written procedure of 6 December 1982 (that is to say, over a year after the establishment of the contested infringements) that the Commission considered it necessary at the time, in order to re-establish a degree of authority over the market, to penalize *henceforth* (dorénavant) undertakings which charged prices higher or lower than their list prices by the imposition of fines at a normal rate of 100%.

Moreover, "by analogy with Article 58", the possibility of increasing that rate by 10% was considered appropriate in the event of a difference of 10% or more between the prices charged and the list prices. The decision of 6 December 1982 did not, any more than the decision of 4 June 1981 conferring authorization, draw a distinction between formal infringements and substantive infringements or between infringements of Article 60 (1) and Article 60 (2) (a) and the various kinds of infringement of Article 60 (2) (b). The present case, as I said earlier, concerns a formal infringement of the first part of the second indent of Article 60 (2) (b), although

that is not mentioned in the statement of the reasons on which the decision is based. The possibility of aligning prices is in fact simply disregarded in the decision of 4 June 1981 conferring authorization, in the written procedure of 6 December 1982 and in the contested decision imposing a fine.

Even if the decision were not already void on the ground that it is based on an insufficient statement of reasons and that it takes no account of the gravity of the infringement complained of, it could not in my view be upheld. It was rightly considered necessary in the decision of 4 June 1981 conferring authorization to increase the rates of the fines only gradually.

In order to avoid any inconsistency in the application of its carefully-planned policy relating to fines, the Commission ought to have adhered, in accordance with the principle of proper administration, at least to the rates established at the time for the periods in question. In this case, therefore, it should in any event follow that even if all the infringements complained of were established, the rate of fine of 110% of the amounts by which Bertoli undercut its own list prices should be reduced to 15% in the case of the sales effected before 31 August 1981 and to 25% in the case of the sales effected subsequently, with a further deduction of 40% in view of the purely formal nature of the alleged infringements.

Since, however, the decision must in my view, as I have stated, be declared void on other grounds, I consider that no purpose is served by calculating in detail the considerably lower amount to which the fine should in any event be reduced.

It will in any case be clear to the Court that I also regard the applicant's third submission as well founded.

6. Summary and conclusion

In conclusion, I am of the opinion that the contested decision should be declared void in view of the serious deficiencies in the statement of the reasons on which the decision is based, which I referred to earlier, the failure to take account of the case-law of the Court concerning the Commission's policy relating to fines and the subsequent reversal of the previous policy relating to fines which was established internally for the period in question.

I therefore recommend that:

(a) the decision of 9 December 1982 imposing on the applicant a fine of LIT 94 579 100 for infringing Article 60 of the ECSC Treaty should be declared void;

(b) the Commission should be ordered to pay the costs.