THE COURT

hereby:

1. Rules that the application against the individual Decision of the High Authority of 21 June 1961 is admissible; dismisses the application as regards the first three charges made against the applicant company and grants the application as regards the fourth charge;

2. Reduces to 4 000 000 lire the amount of the fine imposed on the applicant by the contested Decision;

3. Orders the applicant to pay three-fifths of the cost of the defendant.

Donner Riese
Delvaux Hammes Trabucchi

Delivered in open court in Luxembourg on 12 July 1962.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 29 MAY 1962[1]

Summary

1 - Translated from the German.

Mr President,
Members of the Court,

This case is concerned with the legality and, secondarily, with the amount of a fine which the High Authority in its Decision of 21 June 1961 imposed on the applicant for various infringements of Article 60 of the Treaty and of implementing Decisions made under that Article.

The infringements complained of were discovered by inspectors of the High Authority when carrying out checks in 1959. Before the decision was made the applicant was given the opportunity of submitting its written and oral comments to the High Authority.

The following four cases or groups of cases are at issue:

(a) Sidercomit paid, in respect of consignments received from the applicant, part only of the amount invoiced in accordance with the price list, so that a debit balance of 437 857 lire remained outstanding. This difference was said to have been paid in cash into the applicant's account by certain of its shareholders on behalf of Sidercomit.

(b) The applicant frequently accepted bills of exchange maturing in 90 and 120 days and invoiced the corresponding additional sums due in respect of deferred payments. According to the High Authority, the applicant entered in its books of account, in favour of customers, the difference between the gross amounts on the invoices and the net amounts of the discounted bills under the heading of 'discount charges' ('spese di sconto'). This difference was greater than the discount charges actually paid to the banks. Unjustified price reductions amounting to 302 186 lire resulted from this practice.

(c) The applicant bore the transport costs in respect of deliveries to certain customers, although its price list stipulates prices exclusive of freight. The customers were thereby granted, says the High Authority, price reductions amounting to 3 164 792 lire.

(d) The applicant, according to the findings of the High Authority, granted price reductions amounting in all to 4 258 998 lire to its depository Orsi in view of the family relationship between the respective owners.

With reference to these four sets of facts, which I propose to describe as cases 1 to 4 respectively when examining them from the legal point of view, the applicant has submitted arguments, some of which apply to all four cases and others to one or some of these cases.

In order to achieve a systematic treatment of the subject it seems appropriate to divide my opinion into the following sections. The first section will be devoted to examining whether the infringements alleged by the High Authority can be justified in favour of the applicant. It will depend upon the result of this examination to what extent it will be necessary in the second section to make observations on the amount of the fine imposed.

In the first section I shall not consider the various infringements in order of sequence which would inevitably lead to

a repetition of the arguments submitted, but shall direct the legal discussion along the logical lines of the submissions made by the applicant.

The first place must therefore be given to the applicant's argument that it did not infringe the prohibition on discrimination because it applied dissimilar conditions to transactions which were not comparable. It will then be necessary to examine whether the complaint of discrimination can be dismissed on the ground that certain invoiced sums were paid not by the consignee of the goods but by a third party on its behalf. In the third place it is necessary to consider whether the reductions allegedly or in fact granted can be justified by means of an *a posteriori* alignment of prices. Lastly we must discuss the argument that there were no reductions because the invoiced amounts outstanding represented irrecoverable balances.

With regard to the amount of the fine imposed it will be necessary to consider in the second section the applicant's general objection that the High Authority did not take account of certain mitigating circumstances. The applicant also complains, as regards the first case, that the High Authority was wrong in finding an aggravating circumstance in the method of entering in its books sums received.

Legal Discussion

I — Is the fine justified in principle?

1. *The first argument of the applicant*

The application of special conditions to non-comparable single transactions does not constitute an infringement of the prohibition of discrimination (this argument applies to the second and fourth cases).

The applicant would like to infer from the preamble to Decision No 30/53 that even on the view taken by the High Authority it is the character of the buyers which is the governing factor for the purpose of comparability of transactions. Sidercomit (the buyer in the first case) is a commercial undertaking belonging to the State steel industry which does not usually buy on the private market but restricts itself to selling the products of the State steel industry. The general opinion is that the law of the Treaty with regard to prices does not apply to transactions in which States act as buyers of ECSC products (for example to supply the needs of State railways, or for military purposes). The owner of the firm Orsi (the buyer in the fourth case) is the brother-in-law of the applicant's managing director. Moreover, at the time in question this undertaking was on the verge of bankruptcy. Since the businesses of the applicant and Orsi originate from a single undertaking it has always been recognized in business circles that very close links exist between the two firms. According to the applicant Orsi should therefore, like Sidercomit, be regarded as a special customer as compared with other customers.

The question arises for the purpose of a legal examination whether the abovementioned circumstances are such as to remove from consideration the comparability between the transactions at issue and the applicant's other transactions, that is, whether they exhibit the characteristics of transactions whose significance with regard to the prohibition of discrimination may justifiably be regarded as unique.

An examination must begin with Article 60 of the Treaty which defines the prohibited discrimination as the application of dissimilar conditions to comparable *transactions*. It is obvious that according to this definition it is the *objective factors* of a transaction which are in the first place essential for the purposes of comparison, that is, those agreements and particulars relating to the nature of the goods, their quantity,

quality, dimensions, to delivery dates (seasonal differences), conditions of delivery, the period of duration of contractual relationships, etc. The Decision of the High Authority No 31/53, in particular Article 2 thereof, also follows this pattern.

The question arises, however, whether and to what extent those elements of a transaction which relate to the participants as individuals and to their particular relationships have a part to play for the purpose of comparability. When the applicant refers to Decision No 30/53, which is concerned with comparably placed purchasers, it must be said that it is not possible to find confirmation of the applicant's argument in the wording of the passage in question, taken as a whole, which reads: 'Whereas, *apart from differences related to the value or volume* of procurements by the purchaser from the seller, the application of dissimilar conditions to comparably placed purchases is incompatible with the unity of the Community'. This passage could thus be construed as meaning that the High Authority will only approve special treatment of different buyers if it is based on the value or volume of transactions entered into.

There can be no doubt, however, that for the purposes of comparability it is also necessary to take into consideration circumstances which could be properly described as subjective factors, such as the functions exercised by the buyer on the market (discounts to dealers) or the manner in which the goods bought are used (domestic fuel or for the public supply). It is certainly not easy to distinguish between relevant and irrelevant factors in this field, but unless such distinctions are made the prohibition of discrimination would be drained of all its substance because in every case there are subjective features which prevent comparison with other transactions.

It is possible to construe the wording of the Treaty as meaning that the personal relationships between the parties to a transaction do not *as a general rule* afford grounds for distinguishing between transactions. A pointer to this, in my opinion, is the express prohibition of discrimination on the grounds of the nationality of buyers which in the text of the Treaty follows directly upon the provision which declares that the application of dissimilar conditions to comparable transactions is prohibited. In the Decisions of the High Authority, too, differentiation on the grounds of the nationality or the location of the place of establishment of purchasers is expressly prohibited (Decision No 30/53, Article 6). The only permissible criterion of a subjective nature for making distinctions mentioned in the Decisions is status as a dealer which warrants a rebate (Decision No 2/54, Article 2). This case concerns the functions of a buyer in the market which have repercussions on the seller's markets and on his productivity and which therefore are connected objectively with the transaction concluded and with the economic activity of the supplier.

It is obvious that the example just mentioned cannot be even remotely compared with family relationships between buyer and seller, which have no objective influence on the nature of the transactions concluded, or with business relationships whose special characteristics reside solely in the fact that a customer belongs to a particular group as far as his ownership of property is concerned. Relationships of this kind, considered rationally from an economic point of view, are of a purely fortuitous nature and consequently of no importance. However in addition to this —and this is particularly significant— they are of no importance for the purpose of achieving the objectives of the Treaty in the light of which the prohibition of discrimination must ultimately be considered.

With regard to the transactions concluded with Sidercomit, it appears to be particularly improper to equate these

with sales to state or public bodies, made for national purposes, which might possibly justify exceptional treatment in the general interest—a matter which can in any event be left open for the present.

There is no doubt that in the present case Sidercomit operated exclusively in the private economic sector. If the State participates in economic activity by means of undertakings engaging in trade, those undertakings must accept that their transactions will be dealt with in the same way as those of private undertakings.

Finally, in regard to the fourth case, there is no justification for special treatment to be found in the contention that the firm Orsi found itself in financial difficulties which, in view of the close family ties with the applicant, gave rise to fears that they might have a harmful effect on the applicant's business. A critical situation of this kind might possibly be considered as an excuse if there were no other means of overcoming it. However it has not been proved that a departure from the price list was the only solution available.

Accordingly it may be stated that the applicant has not succeeded, in its first argument, in justifying its conduct.

2. *The second argument of the applicant*

The partial settlement of an outstanding purchase price by the applicant's shareholders does not constitute an illegal reduction. (This argument only applies to the first case).

(a) Against this the High Authority in the first place raises the objection that the applicant has neither produced nor offered any proof of the alleged payment. In answer to questions put by the Court it was stated that proof could be adduced by means of the applicant's cash book or the evidence of its chief cashier and managing director. In my opinion, however, a preparatory inquiry would be superfluous, because legal grounds already exist which make it possible to arrive at a decision.

(b) In order to justify its argument that the payment of the purchase price by the applicant's shareholders did not constitute the unlawful grant of a reduction on the part of the company, the applicant refers to the difference in the legal relationships existing on the one hand between the company as seller and Sidercomit as buyer and on the other hand between the members of the applicant company and the applicant's customers. The distinction is a proper one by virtue of the legal nature of the company as an independent legal person. Only if all its shares came into one ownership could it be thought possible to impute the actions of the owner of a company to the company itself.

The High Authority, on the other hand, takes the view that the sole deciding factor for the purpose of the prohibition of discrimination is the amount that the buyer has in fact paid.

The applicant's corporate legal structure is clear from the pleadings and the exhibits annexed. According to the statements made by its managing director at the time of his discussions with the High Authority on 15 May 1961, all the shares in the company are in the possession of one family, namely of the general manager, his wife and his sister-in-law. Even though the Reply states that the company is composed of five members, the fact nonetheless remains that the company's fortunes are guided by the family which dominates it.

The prohibition of discrimination is intended to ensure that every buyer from a producer must incur the same outlay in respect of comparable transactions. The technicalities of the legal means used to pay the purchase price cannot have a decisive effect so far as the observance of the prohibition is concerned. It is not necessary that the buyer himself should make the payment.

In particular there appears to be nothing illegal in the intervention of third parties who pay on behalf of the buyer, for example if simultaneously with the settlement of the purchase price a debt due to the buyer from the third party is discharged.

In my opinion there is likewise no objection to the third party's intending to make a gift to the buyer by paying the purchase price. Donations are not incompatible with the Treaty in so far as they do not conflict with the prohibition on subsidies contained in Article 4 (c). From the legal point of view, the payment in this case of another's debt is to be regarded as entailing, simultaneously, a gratuitous increase in the buyer's assets, not just nationally, but in fact.

The question arises, however, whether these considerations, which belong entirely to private law, can be decisive if the third party as in the present case has very close connexions with the seller. In his discussions with the High Authority the applicant's managing director stated that he had paid the balance of Sidercomit's debt out of his own pocket. In its written observations of 15 October 1960 the applicant stated that its two principal members had assumed responsibility for the balance of the debt due from Sidercomit. It was admitted moreover that there was no legal relationship between the buyer and the applicant's shareholders on the basis of which the buyer could have demanded the payment of the purchase price. The payment was rather made—as has been expressly confirmed (see the statement dated 16 May 1961)—in an endeavour to satisfy the buyer and to retain it as a customer of the applicant.

The aspects of fact and law involved in this situation lead to the conclusion that the principal participants in the company intended to do personally something which the company itself was not allowed to do, that is, to make voluntary donations to a buyer within the framework of a specific transaction, which amounts to granting illegal reductions.

As is known, jurisprudence tries to arrive at a satisfactory assessment of such factors and in particular asks to what extent it is possible to disregard the juridical structure of bodies corporate and have recourse against the natural persons who compose them, that is to say, under what conditions can the natural persons controlling a body corporate be identified with the actions of the latter? American case law in this connexion has recourse to the doctrine of 'disregard of legal entity', for example where someone who is subject to a legal prohibition pursues the activity prohibited through the agency of a legal person which he controls. Serick has examined this question in German law by studies in comparative law[1] and despite strong reservations comes to conclusions from which it is possible to draw guidance with regard to the economic law of the Community. On page 207 of his book he writes: 'For example, the evasion of a prohibition of competition imposed by statute or contract by means of the device of a legal person leads to its identification with the member who controls it and uses it for unlawful purposes and hence to the extension of the prohibition to the legal person. To give another example, if a person wishes to procure for himself illegally, a secret commission by causing it to be paid to a legal person which he controls, he must be treated as if he had received the money himself'.

In my opinion we should proceed in the same way in the present case. It seems to me in particular that there is no reason why the identification of legal persons with their members should be restricted to 'one-man companies'. It

1 — Rechtsform und Realität juristischer Personen.

must also apply where a legal person is controlled by a majority of persons who do not hold all the shares, with the result that, in certain circumstances, the actions of these persons can be imputed to the legal person. This applies above all, where, as in the present case, the legal person is a family company whose few members doubtless are united in their decisions. In such a case it would be unjustifiable, where the observance of a statutory prohibition is concerned, to which the legal person is subject, to attribute any decisive importance to the distinction between the legal person and those who in fact determine its actions. It may thus be affirmed that the consequences of the conduct of the company's affairs, namely the remission of part of the purchase price due which constitutes the illegal grant of a reduction, cannot, within the meaning of the law relating to discrimination, be remedied and abolished by compensatory action taken by the members and effective solely under private law. In the final analysis this course of action amounts to nothing other than the concealment of conduct which is contrary to the rules governing competition.

3. *Third argument of the applicant*

The sums paid to the applicant fall in each case within the limits laid down by the Treaty for legal alignments of prices. The fact that alignment on a specific price list was not expressly and consciously made when the transactions were concluded, is of no consequence in comparison with the objective result of the transaction. (This argument relates to all four cases.)

(a) To this the High Authority objects that in the oral and written observations presented by the applicant before the Decision was issued the applicant made no reference, for the purpose of justifying its actions, to the alignment of prices. An *a posteriori* alignment after the conclusion and partial performance of a contract does not, the High Authority submits, comply with Community law on prices.

So far as the first part of the objection is concerned I consider that the applicant's view is the correct one, namely that an argument is not to be excluded in proceedings before the Court of Justice merely because it was not raised in the administrative proceedings before the High Authority, particularly when the argument is of a legal character. The contrary view taken by the High Authority would mean imposing an unfair restriction on an applicant's rights of defence and would result in an unacceptable restriction of the Court's powers of review.

More important and more difficult is the question whether the Treaty permits a subsequent alignment on the prices of competing undertakings, since it is clear that in none of the four cases in dispute did the applicant seek to make an alignment at the time of the conclusion of the transactions.

The applicant refers, in support of its opinion, above all to the word 'effect' in Article 60 (2) (b) and concludes from this that for the purposes of alignment the decisive factor is the objective result, not the intention. If, however, one has regard to the wording of Article 60 as a whole, there can be no doubt that the interpretation advanced by the High Authority is the only correct one.

Article 60 (2) (b) provides that the *method of quotation* of prices must be determined in a certain way. By quotation of prices there is generally understood the determination of the price upon the conclusion of a contract, and not a unilateral amendment, especially a reduction in price, made at the time of the performance of a contract of sale.

Even more clear is the provision contained in paragraph 2 (b), invoked by the High Authority, according to which the *quotation* is enabled 'to be aligned on

the price list, based on another point'. One can only properly speak of a quotation before the contract is concluded or, more precisely, up to the moment when by virtue of the buyer's acceptance the quotation is converted into a contract. Article 60 therefore places a time limit on the power to align quotations. In addition to this, the term 'align' incontestably implies a final action, a conscious deliberate act which is orientated upon an object on which another is aligned. Even on a purely conceptual basis therefore there can be no alignment when a seller is compelled, at the time when payment of the purchase price is being made, to waive part of the price, which is what happened, according to the applicant's explanation, because of the debtors' insolvency in cases 2 and 4. It is possible that the final outcome of the transactions in this case is identical with the content of a lawful contract made on the basis of an alignment. The essential factor is that the outcome does not depend upon a decision made by the seller. This interpretation imposed by the wording of Article 60 finds confirmation in American economic law which as is known in many respects inspired the authors of the Coal and Steel Treaty. Section 2 (b) of the Robinson-Patman Act of 1936 provides:

'... nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor.'

But the view taken by the High Authority also appears to be sensible when considered from the point of view of the economic structure on which the Treaty is based. It accords best with the aims of the provision for two reasons:-

1. Since compliance with list prices is the general rule applicable in the Community, it is not surprising that in respect of exceptions which may possibly be allowed, provisions are laid down which are strict both in substance and in form. Only when it can be seen, on concluding a contract, upon which outsider's price list the prices are to be aligned, can the Community law on prices be correctly applied and its system of checks most effectively implemented, as precisely the present case clearly shows.

2. It should be noted that the Treaty permits the alignment of prices as a measure to encourage competition. When several persons who have made tenders are in competition for a particular contract they are so only for so long as the buyer, whom they wish to persuade to conclude a transaction, has not decided in favour of one of their number. If the seller makes reductions in his own prices at this preliminary stage of the transaction he is not waiving, even supposing that 'waiving' is the right word, a debt but only the uncertain prospects of a transaction.

Once the transaction has been concluded legal relations come into existence. A departure from the prices on the price list which have become the content of the transaction would then amount to a waiver of an existing debt. The seller's sacrifice would thus be greater than before the conclusion of the transaction.

When the applicant stressed in the oral procedure that this concession would constitute a competitive measure with the future development of its business relations in mind, its argument was certainly sound from an economic point of view. However it cannot be overlooked that competitive measures of this nature would expose the system of price regulation established under the Treaty to the danger of complete disintegration because transactions concluded could be amended retrospectively and there would be no possibility of

ascertaining the limits of this practice. In view of the exceptional nature of alignments on prices it cannot therefore be permissible in making an alignment to take account of the operation of what could be described as unfair competition.
In the oral procedure the applicant lastly submitted arguments by which it hoped to prove the difficulty or even the impossibility of a prior alignment.
In the applicant's opinion it is unreasonable to expect sellers to refer expressly to the lists of a competing undertaking since there is a danger that the buyer will turn in later transactions to the other tenderer. This argument essentially only relates to the question how an alignment made at the proper time must be *proved*, and thus falls outside the problem in our case where the alignment was only made after the transaction was concluded. The applicant, however, proceeds moreover on the assumption that in general buyers do not know the prices charged by potential sellers, an assumption which contradicts the system of publicity laid down by the Treaty.
In a second argument the applicant observes that in many cases it is impossible for undertakings, because of the inadequate publicity given to price lists, to effect an alignment upon the conclusion of a transaction. This argument has only a partial bearing on the question raised in the present dispute in that the applicant in fact at no time made an alignment in cases 2 and 4 (where according to its own original statements irrecoverable debts were concerned). Furthermore in my view it has not been proved that it is impossible to obtain accurate information in good time regarding competitors' price lists. Even for modest undertakings it is a rule of economic life to keep constantly in touch with the business practices of serious competitors. Moreover the guarantee that full information will be obtained lies in the concern and eagerness of customers to have a clear idea of the market at the time they are thinking of concluding a transaction.
Lastly the applicant stresses the difficulties caused by special reductions allowed by law and by transport costs which have to be taken into account in making an alignment. As a result, according to the applicant, it is often impossible to calculate accurately the cost prices of other undertakings. These difficulties do exist in practice and should on no account be overlooked. It is my opinion however that they arise in connexion with both prior and subsequent alignments, since in both cases it is necessary to make a calculation (since the transaction has not been made with a competitor) in which one has to ask oneself how a competitor would have calculated his prices in applying his price list and his conditions of sale.
The applicant's objections thus provide no grounds for departing from a strict interpretation of the Treaty. They must be regarded essentially as an unimportant criticism of the Treaty itself.
Accordingly it must be said that it is not permissible to make a subsequent alignment of prices, that is, a unilateral reduction of accounts presently due for payment to the price level of other competitors in the circumstances put forward by the applicant in the course of the proceedings, that is to say long after the conclusion and full settlement of the transactions. The applicant cannot therefore rely upon Article 60 (2) (b) in order to justify its conduct.
(b) After these remarks, any observations on compliance with the price limits for a correct alignment might appear superfluous. It is necessary however to give some consideration to the fact that an infringement of Article 60 is to be viewed in different ways according to whether it amounts to no more than a failure to observe formal requirements (prior alignment) or whether, in addition, the quantitative limits on price alignments are not observed. I should therefore like to say a few more words on the accounting aspects of the

dispute regarding the extent of alignment. As the High Authority has rightly stressed, this does not only involve a comparison of prices, but all the conditions of sale of the price list on which the alignment is based must be taken into account.
The position with regard to each of the four cases is as follows:

First case

The applicant admits, in reply to the observations made by the High Authority, that it wrongly applied a discount of 1.5% in its own comparison of prices which is only granted according to its competitor's price list in the case of payment upon *notice of consignment.* It also admits that in one case it included incorrect supplements in respect of dimensions in its comparison of prices.
The resulting rectification of incorrect calculations makes it clear that contrary to the applicant's opinion, the sums actually paid by Sidercomit fall below the limits allowed in the case of alignment on prices.

Second case

The applicant sought to prove that the alignment was correctly made by means of a single example only, and stated that the other transactions in this group of cases were carried out in a similar manner.
The High Authority observes with regard to this that no alignment was possible because the competitor's price list in force at the time in question contained a higher basic price than that shown in the applicant's price list. Moreover this list only mentions prices for bar iron for reinforced concrete but not for plates, angle irons, and T- and U- irons which the competing undertaking did not produce.
In fact, according to the wording of the Treaty an alignment of prices is only possible if the undertaking making the alignment quotes prices *lower* than those in its own list (Article 60 (2) (b)). The applicant also states that it only learned of the prices applied by means of the invoces of competitors and not from their deposited price lists and that this provides an excuse for its mistake. This argument is beside the point. The fact is that the applicant did not make a delibertate alignment on the prices of a competitor and only after the transactions were concluded did it attempt to adduce any proof that it had observed the limits on alignment. Accordingly there cannot be an error, which may possibly be excusable, in the alignment, but only an error in the proof subsequently tendered, which of course does not have the effect of an excuse.

Third case

In this case, too, the applicant does not attempt to tender any exhaustive proof but, as in the second case and on the same grounds, is content to submit examples (31 invoices in all were produced). The findings of the High Authority in the second case apply equally to some of these examples (invoices Nos 1148, 1196, 1197, 1242, 1247, 1344, 1359, 1360).
With regard to invoice No 2269 the High Authority says that there is no alignment in this case because the competitor named only manufactured part of the products mentioned in the invoice. Neither, according to the High Authority, can there be any alignment in respect of invoices Nos 2359, 2391 and 2422 since the applicant's basic price at the time in question was lower than that shown in the competitor's list.
In respect of all the examples submitted, the applicant relies on the fact that it made its comparison on the basis of prices and conditions of sale which were in fact operated. The error arising from this does not in my opinion afford any excuse, not only because the comparison was made *a posteriori,* but above all

because a correct alignment always has to be made according to the price list, which provides the only means of obtaining a reliable picture of the prices permitted and of the conditions of sale as a whole.

As regards the other 19 invoices in this case nothing conclusive can be said on the observance of the limits on alignment. The High Authority objects to the incorrect application in eight of the invoices of a discount of 1.5% which according to the competitor's price list, is not to be granted in case of payment upon receipt of invoice but only in the case of payment upon receipt of the notice of consignment. According to the figures produced by the applicant, however, it must be admitted that even if this item is ignored, the limits of alignment are not exceeded. Likewise, in respect of eight invoices in this remaining group the High Authority stated in its Rejoinder that the applicant applied a quantity discount of 3% which could not be applied according to the competitor's price list. On the other hand, in its reply to questions put by the Court of Justice, the High Authority stated that, without knowing what orders had been placed by the applicant's customers and what confirmations of acceptance had been issued by the applicant, it could not ascertain the quantity and special discounts in question.

If the Court of Justice accepts my view that, for the purpose of fixing the amount of the fine it may be of importance to know whether the limits of alignment have been observed even if the formal conditions are not met, then as regards the 19 examples mentioned which constitute a substantial part of the third case, the only alternatives remaining are to have these matters fully clarified or to resolve in favour of the applicant the fact that the High Authority has omitted to provide the necessary elucidation.

Fourth case

In the fourth case the High Authority also states that it cannot calculate the alignment owing to the absence of orders, confirmations of acceptance, invoices, etc., on which the matter turns. However, this uncertainty is not fatal in my opinion because it is possible for other reasons which I will explain later to arrive at a definitive evaluation of the facts in the fourth case.
Consequently, as regards the observance of the limits for the purposes of calculation in aligning prices, it should be said that, at least in the third case, there are certain factors which might make it possible to take a more lenient view of the infringements in question.

4. *Fourth argument of the applicant*

The decision to refrain from recovering the balances of outstanding debts from insolvent debtors does not constitute the illegal grant of a reduction (this argument relates to the second and fourth cases).
The applicant says that despite formal notices requiring payment buyers had in many instances failed to pay comparatively small balances outstanding in respect of purchase prices. It could not be expected to institute expensive and futile legal proceedings to recover small sums of money. It must moreover be entitled, before taking legal action against dilatory debtors, to weigh the effects of such action on the future development of its business relations.
The High Authority's principal criticism of this submission is that there is no evidence that the balances could not be recovered. It deduces from the applicant's methods of book-keeping that in fact reductions were concerned and not the balances of outstanding debts whose recovery was doubtful. In Italy claims against insolvent debtors are usually entered under the heading 'perdite su crediti' ('losses on accounts due'), and

not under the heading 'sconto su fattura' ('discounts on invoices') as was the applicant's practice. This latter heading is generally employed for recording in the accounts reductions granted to customers. The applicant says that this is incorrect.

Undertakings obviously cannot be accused of granting illegal rebates when they refrain from suing insolvent debtors. Such cases do not involve the voluntary waiver of part of the purchase price, but only the impossibility of recovering a debt. The only question which arises is how this can be proved.

Quite clearly there is no obligation to institute legal proceedings in every case, as the High Authority maintains, first because irrecoverable legal costs of bringing the action may be incurred in cases where the futility of the proceedings is obvious or at least probable from a prudent commercial view, and secondly because legal action to recover relatively small sums can lead to the annoyance and loss of customers who from time to time find themselves in difficulties with regard to payment but with whom there are reasonable hopes that normal business relations can be resumed in the future. But neither the High Authority nor the Court of Justice can be satisfied with a simple assertion that a debtor is insolvent, for it would otherwise be all too easy to evade the prohibition of discrimination in the Treaty. The degree of proof or credibility which is to be required must be assessed according to the circumstances of each individual case.

In the fourth case in which the outstanding balances from six invoices amounting to a total of 4 258 998 lire were unpaid, the applicant produced nine protests of bills of exchange which amount in all to the sum of 6 931 680 lire. These protests relate to the period from 13 March 1958 to 5 April 1958. So far as can be ascertained, the applicant's accounts against Orsi also became due for payment in the period from January to May 1958.

It is possible to accept that, in this case, the alleged difficulties with regard to payment have been proved even though it is open to question whether the insolvency persisted and obliged the applicant finally to write off the outstanding balances of account. It should therefore be accepted, in the applicant's favour, that the accounts against Orsi were not recoverable and that this constitutes a justification for the failure to observe the rules on prices.

With regard to the second case the applicant contented itself with submitting a statement from an advocate in Modena in which he advises against instituting legal proceedings in view of the small amount outstanding in respect of the debt and for the general reason that success in legal proceedings is not always assured. No notices demanding payment or similar documents were produced by way of proof.

I think that one should decline to regard the method of entering the outstanding balances of account in the books as proof that illegal reductions were granted. The explanations advanced by the High Authority on this point are in any event not sufficiently convincing. The dispute between the parties on this matter therefore remains open. On the other hand, however, I also think that the document produced by the applicant by way of proof (the statement of Advocate Luigi Pozzi of 10 December 1958) is not sufficient as far as the irrecoverability of the accounts in question is concerned.

In the second case, therefore, the necessary proof that the debts were beyond recovery is lacking and consequently the justification of the applicant's conduct is not established.

5. *Summary*

Having evaluated all the arguments adduced by the applicant, I will now attempt to summarize the conclusions

at which I have arrived, this time under the headings of the four separate groups of cases, as follows:

(a) First case

The three legal grounds on which the applicant seeks its discharge are not valid so that it is not necessary to investigate in detail the questions which are still unclarified (the partial payment of the purchase price by the applicant's shareholders). The infringement of the rules on prices is proved.

(b) Second case

Of the grounds submitted, only that based on the irrecoverability of accounts could constitute a valid excuse. However sufficient proof of this is lacking so that in this case too the High Authority's complaint retains its force.

(c) Third case

The observations on the alignment of prices which were the only ones submitted in this case do not amount to a justification of the infringements alleged. The finding that the Treaty was infringed is not displaced.

(d) Fourth case

The arguments on the non-comparability of the transactions effected and on the alignment of prices do not dispose of the High Authority's complaint. However the insolvency of the buyer which in this case has been sufficiently proved by protests of bills of exchange can be regarded as a sufficient justification, so that in view of this fact, contrary to the view of the High Authority, it cannot be accepted that there was an infringement of the Treaty.

II — Observations on the amount of the fine imposed

There can be no doubt that the amount of the penalty must be radically affected by the failure to sustain one of the cases of infringement complained of. Quite apart from this, in cases 1 to 3 the applicant has adduced specific arguments which relate to the assessment of the amount of the fine.

1. *Was the High Authority wrong in finding that there were aggravating circumstances in the first case?*

The High Authority found aggravating circumstances in the applicant's method of book-keeping, from which it could not be seen who in fact had paid the purchase price. It concluded that the reductions granted were deliberately concealed.

The applicant denies, on the basis of the rules of accountancy practice, that it was obliged to make a distinction according to the person who made the payments. It argues that the only decisive factor is the amount of the debt which it did in fact receive. On being requested the applicant promptly revealed who had made the payments. Under Article 47 of the Treaty, according to the applicant, a case of furnishing false information which attracts a penalty can only arise when the High Authority has made a previous request. Furthermore the High Authority was not entitled to rely on Article 47 of the Treaty in the legal proceedings since it had not mentioned this provision in its Decision.

In the opinion of the High Authority it is not sufficient that book-keeping should simply comply with certain national fiscal rules or requirements. It relies on the principle that undertakings in the Community are obliged to keep their books and the individual entries in such a way that it is clear that the provisions of the Treaty are being complied with. It is essential that the books should show that price lists are being observed and should consequently identify the

deliveries with the payments.

I would like first of all to emphasize, in connexion with this dispute, that it is impossible to apply Article 47 in the present case. In view of this there is no need to consider the question whether the High Authority is entitled to invoke a provision in legal proceedings when it made no mention of it in the preamble to its Decision. Article 47 is concerned with information, that is to say with statements, given in answer to a general or special request. The fact is that the High Authority did not issue any general directions on the manner in which the accounting documents of a business are to be kept and that, furthermore, the applicant's managing director promptly supplied, upon request, information on the way in which payments were actually made.

It may be taken for granted, moreover, that the deliberate camouflage of important business transactions, which infringe provisions of the Treaty, may constitute an aggravating factor which influences the view taken of the infringements, since it makes more difficult supervision by the High Authority (to which undertakings in the Community are generally subject) and thereby jeopardizes the efficient functioning of the Common Market. Even though the Treaty does not expressly provide that undertakings are obliged to facilitate the performance of the Community's tasks (an obligation which applies to States under the first paragraph of Article 86 of the Treaty), it must nonetheless be accepted that they have a similar duty. The result is, therefore, that business documents must be kept free from ambiguity so as to comply with the rules of the Treaty.

It cannot however be left to mere national rules on book-keeping and accounts to determine whether this obligation has been infringed.

It is, moreover, not clear in the present case, and is disputed, what requirements apply to book-keeping in Italy. No information on this point has been forthcoming in the proceedings. This, taken together with the fact that the applicant willingly supplied information and explanations when requested, makes it appear extremely doubtful whether the alleged intention to deceive is sufficiently established. It must therefore be dismissed as an aggravating factor.

2. *Did the High Authority wrongly omit to take account of mitigating circumstances?*

The applicant complains above all that the Decision contains no mention of the reasons which it advanced in its letter of 15 October 1960 in order to justify a more lenient view of its conduct (the unfavourable short-term economic circumstances obtaining in the Italian steel market, defective discipline on the part of most Italian undertakings in the matter of publication of prices, composition of price lists and alignment on prices, the difficult situation of the applicant which was in the midst of re-organization and re-equipment). It referred moreover in the oral procedure, by way of excuse, to the lack of clarity of the legislation in force.

These arguments must be examined individually:

(a) As regards the first group, it may properly be conceded that the circumstances mentioned did put the applicant in certain difficulties.

It would however be quite wrong to talk of an economic crisis or of an emergency within the meaning of penal law, which might represent an excuse, since in my opinion it has not been proved that an infringement of the Community law on prices was the only solution remaining. The High Authority has mentioned that precisely those Italian undertakings which were in competition with the applicant (producers of small sections) were subject to active inspection It is also impossible to understand why lawful measures (amendment of price lists, correct alignment on prices) should

have been taken to be signs of weakness and should therefore have to be left out of account as being unfair and ineffectual.

On the other hand, just as in penal law, it is possible to admit that these difficulties do enable a more lenient view of the infringements to be taken. It is true that the acceptance of the existence of mitigating circumstances does not necessarily entail a reduction in the fine. Since the High Authority itself kept well below the maximum permissible limits when imposing the fine I would suggest that the Court of Justice should not contemplate making any alteration in the penalty in the exercise of its discretionary powers.

(b) When the applicant attempts to derive an excuse from the lack of clarity of the legislation, we must examine what legal problems if any arose to confront the applicant. Only two of its arguments are founded upon the text of the Treaty, namely those submitted in relation to alignment of prices and comparability. With regard to the first argument, the Treaty is in my opinion mandatory and unambiguous. But even as regards the comparability of transactions, I cannot agree that there are undue difficulties presented by the wording of the Treaty and the Decisions of the High Authority in evaluating the facts in the present case. General economic criteria are enough in this case to exclude any possibility of accepting that distinctions can be allowed, since the prohibition on discrimination would otherwise escape all definition. Furthermore the circulars issued by the High Authority on the interpretation of Article 60 could serve as a guide to the applicant.

3. *Were sufficient reasons given for the calculation of the amount of the fine?*

The applicant's last objection is that no adequate statement of reasons was given in regard to the calculation of the fine. In fact, apart from the aggravating circumstances, the High Authority gave no indication of the individual factors which led it to adopt its Decision. I consider this to be unacceptable. A decision which entails the imposition of penalties requires a particularly careful statement of the reasons upon which it is founded, if the party concerned is not to be given the impression that the fine was arbitrarily assessed. This defect does not, admittedly, mean that the Decision must be annulled and referred back to the High Authority. The Court of Justice itself can amend the penalty and fix a different amount under Article 36 of the Treaty on the basis of the picture which has emerged in the course of the proceedings, because in these circumstances the Court is adjudicating with unlimited jurisdiction ('pleine juridiction'). The lack of statement of reasons may however have an effect upon the decision as to costs because it was, in part at least, the cause of the appeal.

4. *The matters of which account must consequently be taken in calculating the amount of the fine*

— The specific economic situation of the applicant, the general short-term economic situation and also the conduct of other competing undertakings do not constitute reasons for reducing the fine.

— On the other hand, the amount of the fine must reflect the fact that one of the infringements complained of (namely the so-called fourth case) has proved to have been justified and therefore does not in fact constitute a contravention of Article 60 of the Treaty. The sum of the whole of the illegal price reductions granted therefore does not amount to 8 163 829 lire but only to 3 904 831 lire.

— The Court of Justice is also free to take account of the fact that, contrary to the opinion of the High Authority, no intention to deceive has been proved. It can also take into consideration the fact that the failure to observe the limits of alignment in certain instances in the

third group of cases has not been clarified beyond all doubt.

— Finally, for the purpose of calculating the penalty the decisive factor is the capital of the company constituting the applicant undertaking and the total of its turnover or of its taxable production for the year 1958. The High Authority puts the share capital at 630 000 000 lire and in addition states that an examination of the applicant's books for the year 1958 revealed total sales of steel products amounting to approximately 1 775 000 000 lire. Estimating the tax to be charged on this sum, one arrives at an amount of less than 6 000 000 lire.

Taking all these circumstances into account it seems to me appropriate to fix the amount of the fine at no more than 4 000 000 lire.

Such are my proposals with regard to the judgment to be given. For the rest, the appeal should be dismissed. With regard to costs, in view of the fact that three of the four infringements complained of have not been found to be justified and that the Decision lacks a statement of reasons, it seems appropriate to apportion the costs, not equally between the parties (as the amended amount of the fine might suggest), but approximately in such a way that the applicant shall bear three-fifths of the costs and the High Authority the remaining two-fifths.