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COMMISSION DECISION

of 22 December 1972

amending Decision No 30-53 of 2 May 1953 on practices prohibited by Article 60 (1) of the Treaty in the common market for coal and steel

(72/440/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 2 to 5, 60 and 63 (2) thereof;

Having regard to High Authority Decision No 30-53 as amended by Decision No 19/63 of 11 December 1963¹;

After consulting the Consultative Committee and the Council;

Whereas Article 60 (1) prohibits discriminatory practices involving, within the common market, the application by one and the same seller of dissimilar conditions to comparable transactions; whereas that provision specifies that the practices which are prohibited may further be defined; whereas the High Authority of the European Coal and Steel Community has in Decision No 30-53 defined the practices which are prohibited under Article 60 (1);

Whereas Article 2 of Decision No 30-53, as amended by Decision No 1-54,² provides that any departure from the price lists constitutes a discriminatory practice, unless the seller shows either that the transaction in question does not fall within the categories of transactions covered by the price list or that the prices or conditions have been departed from uniformly in all comparable transactions;

Whereas experience has shown that under this definition of what constitutes a prohibited discriminatory practice certain essential aspects of the prohibition are not covered; whereas it therefore appears necessary to specify further when transactions are to be considered comparable and in what circumstances conditions are to be considered dissimilar;

Whereas in defining comparable transactions full account must be taken of the protective aim of the prohibition against discrimination; whereas prohibition of discriminatory practices is intended mainly to protect purchasers against disadvantages which may result from the application of different prices and conditions; whereas for the purpose of determining whether transactions are comparable, it is necessary to establish whether the position of the purchasers is comparable; whereas this is the case when they compete with one another in distributing their products or when they produce the same or similar goods or carry out similar functions in distribution; whereas, moreover, the prerequisite as regards comparability of transactions is that they involve the same or similar products and that such of their commercial features as may be considered of importance do not essentially differ; whereas transactions concluded at different moments of time are not to be considered comparable when the seller has, in the meantime, altered his prices and conditions generally and not merely on a temporary basis;

Whereas as regards dissimilarity of conditions, if the conditions only make appropriate allowance for differences in the services rendered or in the carrying out of transactions, those conditions are not to be considered dissimilar; whereas where a seller allows periods for payment more favourable than those which he applies generally, this constitutes a dissimilar condition if the advantage so allowed is not offset by an increase in price;

Whereas the facts or circumstances which go to show that transactions are not comparable, or which are of importance in determining whether conditions are to be considered similar, are within the knowledge of the undertakings; whereas the undertakings must therefore be required to produce the relevant evidence;

¹ OJ No 187, 24.12.1963, p. 2969/63.

² OJ No 1, 13.1.1954, p. 217.

Whereas the rules on alignment on the lower delivered prices of other undertakings in the common market should be supplemented; whereas in cases where in accordance with the rules on publication of prices, there exists no obligation to publish prices, in respect of certain products or individual groups of purchasers for example, the prices and conditions effectively applied by the competitor are to be taken as the basis for alignment;

HAS ADOPTED THIS DECISION:

Article 1

The following Articles shall be substituted for Article 2 of Decision No 30-53:

'Article 2

1. It shall be a prohibited practice within the meaning of Article 60 (1) of the Treaty for a seller to apply in the common market dissimilar conditions (Article 4) to comparable transactions (Article 3).

2. The preceding paragraph shall be without prejudice to the application of Article 60 (2) (b) of the Treaty and of decisions adopted in connection therewith.

Article 3

1. Transactions shall be considered comparable within the meaning of Article 60 (1) if

- (a) they are concluded with purchasers,
 - who compete with one another, or
 - who produce the same or similar goods, or
 - who carry out similar functions in distribution,

(b) they involve the same or similar products,

(c) in addition, their other relevant commercial features do not essentially differ.

2. Transactions shall not be considered comparable within the meaning of Article 60 (1) if between the dates of their being agreed upon a lasting change occurred in the seller's prices and conditions of sale.

Article 4

1. Conditions shall not be considered dissimilar within the meaning of Article 60 (1) of the Treaty if different conditions, which

make appropriate allowance for differences in the services rendered, or in the carrying out of transactions, are applied by a seller to comparable transactions.

2. Conditions shall be considered dissimilar if, without a corresponding increase in price, a seller allows periods for payment more favourable than those generally applied to comparable transactions.

Article 5

Undertakings which allege that transactions are not comparable (Article 3) or that conditions are not to be considered dissimilar (Article 4) shall, at the request of the Commission, set out the facts and circumstances which may justify this.'

Article 2

The following shall be substituted for Article 3 of Decision No 30-53:

'Article 6

1. Where, under Article 60 (2) (b) of the Treaty, a seller aligns his quotation on a competitor's price list or, in so far as there exists no obligation or there exists only a limited obligation to publish prices, on the prices and conditions actually applied by a competitor, it shall be a prohibited practice within the meaning of Article 60 (1) of the Treaty for him to apply conditions affording the purchaser a delivered price lower than that at which the purchaser could obtain the goods from the competitor.

2. In calculating delivered prices account shall be taken of transport costs, surcharges or taxes borne by the purchaser, less rebates or drawbacks allowed him, in addition to the prices and conditions.

3. Where, under the last subparagraph Article 60 (2) (b) of the Treaty, the seller aligns his quotation on the conditions quoted by undertakings outside the Community, the provisions of paragraphs 1 and 2 shall apply correspondingly.

4. Undertakings which allege that pursuant to Article 60 (2) (b) they have aligned their quotation on a lower delivered price of a competitor in the common market or an undertaking outside the common market, shall, at the request of the Commission, show that the conditions for alignment had been obtained and that they had complied

with the provisions of paragraphs 1 to 3 of this Article in calculating the price.

The condition for alignment under the last subparagraph of Article 60 (2) (b) is that alignment has been imposed by the effective competition of the undertaking outside the Community.'

Article 3

Articles 4 and 6 of Decision No 30-53 shall be deleted; Article 5 shall be renumbered 7; Article 7 shall be renumbered 8.

Article 4

1. In Article 8 of Decision No 3-53:
 - in the last sentence of paragraph 1 the words 'or the prices' shall be inserted after 'the price lists' and the words 'Articles 2 to 7' shall be substituted for 'Articles 2 to 6',
 - in paragraph 3 the words 'the Commission' shall be substituted for 'the High Authority'.

2. Article 8 as so amended shall be renumbered 9.

Article 5

1. In Article 9 of Decision No 30-53 the words 'Articles 2 to 7' shall be substituted for 'Articles 2 to 6'.
2. Article 9 as so amended shall be renumbered 10.

Article 6

This Decision shall enter into force on 1 January 1973.

The text of Decision No 30-53 as amended by this Decision shall be published under information in the *Official Journal of the European Communities*.

Done at Brussels, 22 December 1972.

For the Commission

The President

S. L. MANSHOLT