In Case 30/59

DE GEZAMENLIJKE STEENKOLENMIJNEN IN LIMBURG, an association of undertakings within the meaning of Article 48 of the Treaty, of 16, Dr Poelstraat, Heerlen (Netherlands), represented by H. H. Wemmers, President, and P. A. A. Wirtz, appointed by the annual meeting of members of the association, assisted by W. L. Haardt, Advocate at the High Court of the Netherlands, lecturer at the University of Leyden and W. C. L. van der Grinten, Professor at the Catholic University of Nijmegen, with an address for service in Luxembourg at 83, boulevard Grande-Duchesse Charlotte.

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by F. van Houten, Legal Adviser to the High Authority, acting as Agent, assisted by C. R. C. Wyckerheld Bisdom, Advocate at the High Court of the Netherlands, with an address for service in Luxembourg at the offices of the High Authority at 2, place de Metz,

defendant,

supported by

THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, represented by Professor Ludwig Erhard, Federal Minister for Economic Affairs, assisted by Konrad Zweigert, Resident Professor of the Faculty of Law of the University of Hamburg, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany at 3, boulevard Royal,

intervener,

Application for

(a) annulment of the decision adopted by the High Authority in its letter of 30 April 1959 rejecting the request submitted by the applicant in its letter of 9 March 1959 that the High Authority should record by a decision that, in financing the 'Bergmannsprämie' out of public funds, the Federal Republic of Germany has failed to fulfil one of its obligations under the Treaty;

(b) a declaration by the High Authority that, in deciding so to finance it, the Federal Republic of Germany has failed to fulfil its obligations under the Treaty;

THE COURT

composed of: A. M. Donner, President, Ch. L. Hammes and N. Catalano, Presidents of Chambers, O. Riese, L. Delvaux, J. Rueff (Rapporteur) and R. Rossi, Judges.

Advocate-General: M. Lagrange
Registrar: A. Van Houtte

gives the following

## JUDGMENT

### Issues of fact and of law

I — Facts

The facts may be summarized as follows:
Case 30/59 was preceded by Case 17/57. De Gezamenlijke Steenkolenmijnen had in fact already brought a double action for annulment against a decision of rejection by the High Authority and against its failure to act; this double action arose from the existence in Germany of the 'Bergmannsprämie (miner's bonus) with the acquiescence of the High Authority.
On 4 February 1959 the Court of Justice of the European Communities delivered its judgment in Case 17/57. The application of the applicant was declared inadmissible (Rec. 1958–1959, p. 9 *et seq.).*
By letter of 9 March 1959 the applicant, pursuant to the provisions of Article 35 of the Treaty, raised the matter with the High Authority and asked it to record by a decision that, in financing the 'Bergmannsprämie' from public funds, the Federal Republic of Germany had failed to fulfil one of its obligations under the Treaty.
To this request the High Authority replied by letter of 30 April 1959, the essential part of which was as follows:

> 'As you know, the effects of the financing out of public funds of the German miners' bonus were eliminated when the Federal Government suspended payment of a State subsidy permitted under the Treaty and used for miners' old-age insurance. The High Authority does not consider that the situation thus created is such as to cause material damage to your association or the undertakings affiliated to it. In the circumstances your request is really for a decision on a theoretical question concerning the interpretation of Article 4(c) of the Treaty and the High Authority cannot consider this question as constituting for your association sufficient interest within the meaning of Article 35.
> It is not, therefore, in a position to accede to your request.
> In any case it appears from fresh study, in their entirety, of the questions relating to the German miners' bonus that the situation created by the Government of the Federal Republic is not incompatible with the Treaty so long as the actual conditions laid down in the High Authority's letter dated 21 June 1957 are fulfilled, which is the situation at the moment. In consequence, a decision cannot validly be taken in respect of the Federal Republic of Germany pursuant to the first paragraph of Article 88 of the Treaty.'

On receiving this letter, the applicant brought its application before the Court on 3 June 1959.

On 11 December 1959, the Government of the Federal Republic of Germany made an application to intervene before the Court. By Order of 18 February 1960 the Court allowed the intervention.

## II – Conclusions of the Parties

The *applicant* claims that the Court should:

annul the contested decision;

declare that the High Authority shall record by a decision that, by financing out of public funds a tax-free bonus granted to miners working underground, the Federal Republic of Germany has failed to fulfil its obligation under the Treaty and that it must accordingly annul this measure;

make any other order which the Court considers necessary;

order the High Authority to pay the costs.

The *defendant* contends that the Court should:

note that the High Authority, in accordance with Article 32 (2) of the Rules of Procedure of the Court, has an address for service in Luxembourg at 2, place de Metz; rule that the application of 3 June 1959 from the Gezamenlijke Steenkolenmijnen in Limburg is inadmissible or, in the alternative, dismiss the action;

order the applicant to pay the costs;

order the intervener to pay the costs incurred by the High Authority in contesting its application.

The *intervener* contends that the Court should:

dismiss the application of the applicant in the main action, as requested by the defendant;

order the applicant to pay the costs, including those incurred by the intervener.

## III – Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

### A *Submissions and arguments of the parties in the main action before the intervention*

Admissibility

1. *The application 'viewed in its entirety'*

The *applicant,* while emphasizing that, in its view, Article 35, on which its action is based, 'in no way requires the existence of a legal interest' refers to the following four grounds as establishing an interest:

The conditions of competition are in fact changed by the grant of a substantial subsidy, financed out of public funds, to the German undertakings.

'Sufficient interest' to act is not only a 'direct financial or economic interest'; it can be other than material.

The decision in this case will establish a precedent.

The rejection contained in the contested letter is an individual decision affecting the applicant.

The *defendant* replies as follows:

The refusal against which the applicant is moving has no significance in itself. A rejection of this kind can have meaning only in terms of the measure which it refuses. It is accordingly the character of the measure which decides the admissibility or otherwise of the application.

Even if the contested measure is individual in character, the condition that the decision must 'concern' the applicant within the meaning of the second paragraph of Article 33 must be complied with. In fact:

(a) A decision 'concerns' the applicant, when it directly changes the legal position of the applicant, which thereby has a 'direct and special interest' in its annulment, and not the same interest as that of other undertakings of which it is the self-appointed spokesman.

(b) A fairly close connexion must be established between the sphere in which the decision applies and the sphere of interest represented by the applicant.

(c) Implementation of the decision adopted must have 'a direct effect on the applicant's position'.

(d) Article 173 of the Treaty establishing the European Economic Community emphasizes that the decision must be 'of direct and individual concern' to any applicant.

The applicant is not directly affected by the inaction of the High Authority because any loss which it suffers is merely the result of 'general repercussions on the common market'. Moreover, the compensatory levy imposed on the German coal industry does not mean that the financing of the 'Bergmannsprämie' out of public funds produces any reduction whatsoever in the production costs of German mines or provokes an artificial distortion of the conditions of competition.

To recognize the claim that the applicant has a 'sufficient interest' would be to introduce the *actio popularis* into the Community.

All these arguments apply *a fortiori* since the applicant is instituting proceedings for failure to act involving the refusal of a decision which does not concern the applicant.

The *applicant* replies:

The High Authority has lost the right to contend for the inadmissibility of the application in view of its attitude in Case 17/57 and the contents of its reply of 30 April 1959.

In contrast to the second paragraph of Article 33 of the Treaty, Article 35 contains no restriction under which proceedings may be instituted only against a decision of individual concern to the applicant or against a general decision involving a misuse of powers affecting it. Article 35, as interpreted by the Court in Joined Cases 7 and 9/54, rightly grants the applicant the right to bring proceedings against the refusal to take a decision because it has an interest in the decision which the High Authority was required to take.

The nature of the decision which the defendant refused to take matters little; the refusal which is the subject of the proceedings constitutes a decision concerning the applicant. The decision which the High Authority ought to have taken would in any case have been an individual one since it would have been taken in respect of the Federal Government and not in respect of all the undertakings of the Community.

The qualification 'direct and individual' is included in the wording of the second paragraph of Article 173 of the Treaty establishing the European Economic Community only because, under its terms, it is open to any natural or legal person to institute proceedings.

In Joined Cases 7 and 9/54, the Court placed a wide interpretation on the words 'concerning them'. Moreover, it is possible in this case to establish an analogy with the interpretation placed on the words 'affecting them' in the judgment in Cases 8/55 whereby an individual decision concerns the applicant not only when it is directly addressed to it but also when it is to its detriment.

The decision which the High Authority should have taken would have specially 'concerned' the Netherlands in view of:

(a) the practice of basing Netherlands prices for coal on German prices;

(b) the competition which exists between Netherlands and German coal;

(c) the drain of labour attracted by the 'Bergmannsprämie' and the conditions on which it is granted.

The fact that the 'Bergmannsprämie' system is offset by a 'compensatory levy' does not expunge its illegality.

It should be noted that, in the case of proceedings based on a misuse of powers, it is not necessary to go into the question whether the decision adopted is individual or general in character

The *defendant,* in its rejoinder, reiterates the arguments contained in its defence and states:

The so-called attitude adopted by the High Authority in Case 17/57 in no way alters the fact that the Treaty exhaustively lists the circumstances and conditions in which proceedings may be brought before the Court, which must consider whether the provisions of the Treaty are being observed.

The reference to the contention advanced by

the High Authority in Case 17/57 is in any case inaccurate.

The High Authority rejects the interpretation which the applicant places on its letter of 30 April 1959 and denies having admitted that the applicant could institute proceedings against it under Article 35.

The restrictive provision in the second paragraph of Article 33 is of general application and applies to proceedings instituted under Article 35.

The words 'as the case may be' may perhaps mean that the group of bodies referred to in the first paragraph of Article 35 must be restricted to those which have the right to institute proceedings against the contested decision under the second paragraph of Article 33.

A decision addressed to the Federal Government in the terms desired by the applicant cannot 'concern' the latter for the following reasons:

(a) Article 173 of the EEC Treaty makes it possible to clarify the scope of the existing ECSC provision.

(b) In the judgment in Case 18/57, *J. Nold K.G.* v *High Authority of the ECSC*, the Court did not place a 'wide' interpretation on the words 'concerning them'.

(c) The applicant's attempt to place the same interpretation on the words 'concerning them' as on the words 'affecting them' is unconvincing. The judgment in Case 8/55 places a rather strict interpretation on the latter expression.

(d) The Member States and the Council may, in appropriate cases, have a right of action, hence the interpretation placed by the defendant on the words 'concerning them' and the requirement that the applicant must have a 'direct and individual interest'.

This 'direct and individual interest' has not been demonstrated; in fact:

(a) The prices for German coal have repercussions on the whole of the market in which there is German competition, but there is no 'basing' of the Netherlands prices on German prices.

(b) Competition exists to the same extent between all the competing coalfields.

(c) Although miners go to work on the other side of the frontier, the reason for this is not the financing of the 'Bergmannsprämie' out of public funds but simply the attraction of higher pay in German collieries.

The applicant's contention that proceedings based on misuse of powers is admissible in all cases is unfounded because it is impossible to see how a decision which does not concern the applicant can constitute a misuse of powers affecting it.

2. *The second head of claim*

The *defendant* contends that, in contrast to appeals in which the Court has unlimited jurisdiction, actions to have decisions declared void cannot seek to 'compel the High Authority to perform a specific act'.

The *applicant* maintains its claim and relies on Articles 31, 34 and 35 of the Treaty

Substance

First submission: *Infringement of the Treaty*

1. *Can a State subsidy be compensated for?*

The *applicant* contends that a prohibited subsidy cannot be compensated for. Any subsidy or aid granted by a State must be considered on its own and its illegality cannot be removed by the withdrawal of other measures.

In the *defendant's* view, the real issue is whether, having regard to the provisions of Articles 2 and 4(c) of the Treaty, the High Authority had the right to conclude that, without any need to change the outward form of a subsidy, it sufficed to eliminate its harmful effect on the functioning of the Common Market.

Article 4(c), a 'short and almost laconic' provision, must be interpreted with 'care'. Up to the present, in none of the six signatory countries of the Treaty has there emerged any clear and generally accepted idea of 'subsidy' and still less in the law of the Community, where the question is com-

plicated by subsidiary issues arising from partial integration *ratione personae et ratione materiae.*

There is, in fact, no real subsidy involved here. As is clear from the statements of the Federal Government, the main reason why the 'Bergmannsprämie', was established was to confer a mark of special consideration on miners and, with a view to increasing coal production, thereby to make a career in mining more attractive. Furthermore, for reasons of general policy on prices, there was no intention of letting the undertakings bear the cost of this bonus from the State because this would mean the coal consumers would have had to pay higher prices.

The form in which a particular set of regulations appears is of only secondary importance in establishing whether they involve a prohibited subsidy. The decisive factor is the effect of the 'subsidy' system. The purpose of the prohibition of subsidies in Article 4(c) is to prevent the conditions of competition from being artificially distorted. For a set of regulations to constitute a prohibited subsidy, they have only to reduce production costs and affect the natural conditions of competition. Once these effects are eliminated, there is no longer any infringement of the Treaty.

The *applicant* replies that the High Authority itself treated the 'Bergmannsprämie', as a prohibited subsidy and that it was only in its letter of 17 January 1957 that it changed its mind.

The real object of the measure was an unavoidable increase in the pay of underground workers, but the Government's desire to maintain the price of coal at a fairly low level induced the State to bear the cost of this increase in pay, and this distorted the conditions of competition.

A *de facto* situation cannot make a State subsidy legal; Article 4 of the Treaty, which the defendant itself considers to be an 'almost laconic provision', puts this beyond dispute.

The view of the High Authority amounts to saying that States may act unlawfully provided that they make good the damage. But the infringement of a lawful prohibition cannot be justified by the elimination of or compensation for its effects.

The *defendant* replies that the prohibition of subsidies is intended to prevent competition in the Common Market from being artificially distorted.

In interpreting concepts in the Treaty such as 'prohibited discrimination' and 'special charges', the Court has indicated that, in such cases, a system of interpretation which takes account of the context and the circumstances must be applied

2. *Was not the Government's contribution to miners' old-age insurance due to cease in any event and does its withdrawal offset the Bergmannsprämie?*

The *applicant* contends that, in the present case, there can be no question of a counterbalance, since the contribution to miners' old-age insurance itself constituted a subsidy prohibited by the Treaty.

The *defendant* replies that the contribution of the State to pension funds does not conflict with the Treaty. It does not matter when this contribution by the State was established; the abandonment of the contribution has had the effect of imposing a new and real burden on the undertakings.

The *applicant* maintains that each of the measures should be appraised 'on its merits'; it recalls the circumstances in which the contribution to old-age insurance was maintained and then withdrawn and it argues from this that the withdrawal of this contribution cannot conceivably offset the 'Bergmannsprämie' or make it legal.

The *defendant* replies that, within the limits imposed by Article 67 of the Treaty, the Government's hands are free as regards the cost of social services and their financing. Why, therefore, in a field where the Governments are left some freedom of action, should counterbalancing be disallowed?

3. *If it possible for the contribution to old-age insurance and the 'Bergmannsprämie, to be set off against each other, is the balance absolutely even?*

The *applicant* alleges that it has in no way been established that the amount of the

'Bergmannsprämie' and of the income tax levied on the bonus of which the German Federal State has been deprived is equal to the contribution previously granted by the Federal Government to miners' old-age insurance. The applicant believes that, in the form of the 'Bergmannsprämie', the subsidy is very much more substantial than the State's contribution to the pension fund. Even if, at a given moment, these amounts were found to be equal, it does not follow that they will always remain so.

The *defendant* maintains that no grounds have been adduced for this assertion and it refers to the correspondence which took place on this subject with the Federal Government. For the material period, which was from 1 April 1958 to 1 April 1959, the amount of the 'Bergmannsprämie' rose to DM 195 million, whereas the payment by the undertakings of 6·5% of wages amounted to DM 209·5 million. The High Authority will see to it that, in future, this proportion is observed and ensures a proper balance.

The *applicant* disputes the figure of DM 195 million; even if this figure is accepted, account must be taken of the information supplied by the Federal Government (the average increase in income tax not collected amounts to 10%); the amount of the 'Bergmannsprämie', is in fact as high as DM 214·5 million. There is therefore an imbalance of DM 5 million compared with the total payment of 6·5% of wages, which the High Authority itself estimates at DM 209·5 million.

The *defendant,* in its reply to the question put on this subject by the Court, corrects the figures previously supplied; after indicating the sources of its information and the method of calculation used, it states that the amount of the 'Bergmannsprämie' should be re-stated as DM 173 502 992.

4. *Has the High Authority allowed the two subsidies of the Federal Government of Germany, to continue, temporarily, without lawful justification?*

*The applicant* emphasizes that, during the period from 15 February 1956 to 31 March 1958, the two measures of the Federal Government were maintained simultaneously and that, in consequence, the High Authority was seriously at fault in allowing the continuation for such a long period of a situation which, according to its own argument, was unlawful.

As evidence of its good faith the *defendant* refers to the correspondence exchanged with the Federal Government.

Second submission: *Misuse of powers*

1. *Does the fact that the High Authority has used its powers for a purpose contrary to the fundamental principles of the Community and of the Common Market constitute a misuse of powers?*

The *applicant* contends that there is a misuse of powers in that, by its refusal, the High Authority is undermining the basic objectives of a rational common market and the fundamental principles of the Community.

Moreover the facts are sufficiently proved by the admission of the High Authority recognizing that, during the coal year 1958/1959 the German coalfields received a subsidy of DM 195 million; competition was in consequence distorted.

The *defendant* replies that what in fact is involved is a complaint of infringement of the Treaty and that all the applicant does is to repeat what it has already said under that heading; it refers to the correspondence exchanged between the defendant and the Federal Government.

2. *Does the fact that, in yielding to certain political pressures, the High Authority wished to show favour to a Member State of the Community constitute misuse of powers?*

The *applicant* states that it does and emphasizes that, in so doing, the High Authority ignored 'the interests and objectives which it must protect'. In support of this argument the applicant offers two facts; first, the sudden change observed in the attitude of the defendant in the course of negotiations with the Federal Government,

in which Chancellor Adenauer personally took part, and, second, the temporary maintenance for nine months by the High Authority of 'a situation which, according to its own argument, which it has revised in the meantime, was manifestly contrary to the Treaty'.

The *defendant* replies that these are all unsubstantiated statements. In the first place any exchange of views may result in a change of opinion without this change necessarily constituting an indication, still less proof, of a misuse of powers; in the second place, there was no change of view by the High Authority; it was the problem itself which took on a different aspect when it became involved with the compensatory levy.

Finally, the time-limit of nine months granted at the time to the Federal Government is consonant with the first paragraph of Article 88.

3. *Did the alleged misuse of powers 'affect' the applicant?*

*The applicant* considers that it is the specific object or at least the victim of the misuse of powers of which it complains, in view especially of its geographical position; it suggests that the Court should treat the phrases 'concerning them' and 'affecting them' as synonymous because 'it is inconceivable that the victim of a general decision involving a misuse of powers should be able to protect himself whereas a party protecting himself against an individual decision involving a misuse of powers is subject to other conditions'.

In reply, the *defendant* states that the question is of 'no relevance in the present case, which is concerned with an individual decision'.

B *Submissions and arguments of the parties after the intervention.*

First submission: *Infringement of the Treaty*

(a) The *intervener* endeavours first to demonstrate the complexity of the problem the existence of which the applicant tries to deny by arguing that, because the prohibition of subsidies is so tersely stated, it requires no interpretation. It quotes a number of legal writers and German financiers. In Community affairs, different conditions also make it difficult to give a valid definition of the concept of subsidy. This must be particularly borne in mind in interpreting the meaning of the concept of prohibited subsidy within the meaning of Article 4(c) of the Treaty.

The prohibition referred to represents the demarcation between, on one hand, the powers of the agencies of the European Coal and Steel Community and, on the other, those of the Member States. This is borne out by the prohibition which the Treaty imposes on the Member States, but not on the agencies of the Community and, in particular, the High Authority, against interfering with the market by the grant of subsidies. On the basis of the second paragraph of Article 5 and subparagraph (a) of the first paragraph of Article 53 of the Treaty together with Article 23 of the Convention on the Transitional Provisions, learned writers have interpreted the Treaty as implying that a subsidy is one of the methods which the High Authority is empowered to adopt.

The object of Article 4(c) of the Treaty is to ensure that the market policy of the High Authority, which must concern itself with high-level Community interests, is not complicated by measures, such as subsidies, adopted by the Member States and designed to further the particular interests of the coal and steel industry of one of the Member States.

After emphasizing, rightly, the effect of Article 4(c) of the Treaty in so far as it lays down rules on the subject of jurisdiction, the applicant wrongly concludes that the provision removes all doubt on the question whether a subsidy by one of the States is permissible. The opposite is true: it is precisely because of recognition that Article 4(c) in no way contains an absolute prohibition of subsidies but a set of rules governing the respective powers of the States and the Community that it becomes necessary to discover a reason for the shift

in these powers. In view of the fact that the European Coal and Steel Community represents no more than a partial integration, it is clear that the Member States have retained the power to grant subsidies to the extent to which integration does not affect their sovereign rights.

The States, in signing the Treaty establishing the European Coal and Steel Community, did not lay down detailed regulations which took account of all political and economic requirements as, five years later, they did when they signed the Treaty establishing the European Economic Community (cf. Article 92). But it must not be forgotten that Article 4 of the ECSC Treaty already contained the words '... shall accordingly be abolished and prohibited ... as provided in this Treaty ...'. The Court, with the general approval of learned writers, has interpreted this clause as meaning that, in interpreting all the general prohibitions contained in Article 4 of the Treaty, account must be taken of all the other provisions of the Treaty, to which must be added the annexes, the protocols and the Convention on the Transitional Provisions.

The *defendant* agrees that the word 'subsidy' is not clearly defined but it is unable to accept the argument that the prohibition of subsidies contained in Article 4(c) is, in the main, a set of rules governing the powers and a demarcation of the respective powers of the agencies of the European Coal and Steel Community and those of the Member States.

Article 4 contains several fundamental prohibitions which constitute essential elements of the common market system. This is expressly stated by the article itself. It is also clear from other articles, such as the first paragraph of Article 2 and the second paragraph of Article 86 of the Treaty, where there are references to a 'common market as provided in Article 4' and to the 'common market referred to in Articles 1 and 4'.

To hold that the High Authority is in principle authorized to do anything which Article 4 prohibits would be tantamount to depriving the common market concept of its real meaning.

The High Authority is obviously not seeking to deny all possibility of derogation from the prohibitions contained in Article 4. There is express reference to it in several parts of the Treaty. But these exceptions merely confirm the rule in Article 4 prohibiting restrictions, discrimination and, in particular, subsidies or aids granted by the States. The inclusion in subsection (c) of the article of the words 'by States' distinguishes between the latter and private parties in law who can assist each other without infringing the principle of the Treaty. This distinction does not apply in the case of the High Authority.

Accordingly, the High Authority follows and must, pursuant to Article 4, follow a policy of opposition to subsidies. The fact that the High Authority has the power to grant a subsidy in certain specific cases does not conflict with this general principle.

The *applicant* contends that the authors of the Treaty gave clear expression to their intentions in drafting Article 4. The object of the Treaty is to establish a common market in coal and steel; the breaking down of the common market into individual markets as the result of action by the Member States is inconsistent with this objective. The various prohibitions contained in Article 4 are merely the logical conclusion of this premise.

As the intervener emphasises, Article 4 contains an absolute prohibition on the grant of subsidies by Member States. It is clear from other provisions of the Treaty that, in certain cases, the High Authority can grant subsidies. But the extent of the High Authority's powers to grant subsidies does not limit the effect of the prohibition of subsidies in the case of Member States; there is no connection between, on one hand, the High Authority's powers in relation to subsidies and, on the other, the absence of powers in the case of Member States.

Any comparison with the system created by the Treaty establishing the European Economic Community is irrelevant because the structure of that Community is essentially different from the basic structure of

the European Coal and Steel Community.
The applicant readily accepts that it is difficult if not impossible to define the concept of 'subsidy'. What matters is that the prohibition of subsidies allows of no argument; once it is established that there is a subsidy, there can be no longer any argument about whether the subsidy artificially distorts conditions of competition for undertakings or whether or not the subsidy is offset by a charge levied on the undertakings.
(b) The *intervener* attempts to demonstrate that the prohibition of subsidies contained in Article 4(c) of the Treaty cannot apply to the 'Bergmannsprämie'. It approaches the question under three headings, set out below, and declares that only if any of the points for which it contends are held to be incorrect can the grant of the 'Bergmannsprämie' be treated as an infringement of the Treaty.
The *applicant* points out that the intervener must accept the case as he finds it at the time of his intervention and that it is possible for the Court to reject of its own motion the fresh arguments for which the intervener contends. Nevertheless, the applicant refrains from relying on Article 93(5) of the Rules of Procedure so as to allow the Court to decide on the merits of the intervener's argument.

1. The recipient of the grant

The *intervener* quotes paragraph 1 of the Law establishing the 'Bergmannsprämie' dated 20 December 1956 (BGBI., I, p. 927):

> 'Mine workers employed underground shall receive the miner's bonus subject to the conditions laid down in this Law'.

The intervener quotes a number of writers who describe grants from the State as subsidies only when the recipient possesses a certain characteristic and acknowledge that it is only a subsidy when the owner of an industrial undertaking is the recipient.
The 'Bergmannsprämie' is not a subsidy in the legal sense of the word because it is not granted to undertakings but to mine workers.
The Treaty establishing the European Coal and Steel Community confers limited powers on the High Authority in respect of both physical assets and staff and these powers must be interpreted on the basis of the principle that the list of those powers is exhaustive and this conflicts with the principle of absolute power applied under the national law of the States. The powers of the High Authority are similarly restricted in respect of the conditions to which they are subject and the way in which they are exercised. This does not apply to those powers of the States which are not affected by the application of the Treaty. The same applies to Article 68, and the 'Bergmannsprämie' must be treated as one of the welfare benefits fixed by the State and authorized under Article 68(1) of the Treaty.
As regards the direct influence of the 'Bergmannsprämie' on the market, the intervener replies that, in order to obtain an accurate idea of the concept of subsidy referred to in Article 4(c), attention must not be confined to the criterion consisting of the effect of the State grant on the market of the European Coal and Steel Community; on the contrary, the concept cannot be defined in accordance with the tenor of the other provisions of the Treaty unless, as stated above, the person in receipt of the grant is adopted as the distinguishing criterion.
Nor, moreover, does the question of a favourable or unfavourable effect on the market make it possible to draw the line between an authorized subsidy and a subsidy which is prohibited within the meaning of Article 4(c) or, generally, to grasp the meaning of subsidy.
The *defendant* replies that the arguments developed by the Federal Government on the concept of subsidy translate abstract ideas to justify terminology which the author of those ideas considers to be better suited to its purpose. Those arguments are, in any event, of only relative importance to the question involved in this case.
The real question is whether, even though the 'Bergmannsprämie' is paid to the workers, it does in fact benefit the mining

undertakings. The intervener has realized the difficulties of the over-strict criterion which it proposes and defends itself in advance by emphasizing that almost all grants from the State indirectly serve the interests of the undertakings.

Adoption of the purely formal criterion based on the recipient of the grant conflicts with economic reality. Subsidies which are manifestly illegal may be made available in a legally acceptable form if they appear to be paid to third parties although the real beneficiaries are the undertakings.

The concept of subsidy in the Treaty must be interpreted in the light of economic considerations. There is a prohibited subsidy whenever this confers an economic advantage on an undertaking which distorts the conditions of competition with other coal or steel undertakings, in other words, whenever the 'most rational distribution of production at the highest possible level of productivity' within the meaning of the second paragraph of Article 2 of the Treaty is infringed by the grant of an advantage to one or more undertakings.

In introducing the 'Bergmannsprämie' the Federal Government had a threefold objective:

to prevent miners from leaving and thus to increase production in the coal industry;

to make it possible for the coal undertakings not to raise salaries by more than 6% at a time when they were being asked to increase them by 9% and, in this way, to benefit them to the extent of 3% of basic pay;

to avoid an increase in the price of coal and the concomitant inflationary effect.

The letter addressed on 4 February 1956 by the Federal Government to the High Authority and the ensuing correspondence support the above conclusions, which are based on economic reality.

The *applicant* is also of the opinion that the real beneficiary of the 'Bergmannsprämie' is not the miner but the undertaking which employs him. Like other wages, the bonus forms part of the costs of coal production. The financing of the bonus out of public funds means that the Federal Government takes over part of the production costs of the coalmines.

In the main, the applicant uses the same arguments as the defendant. Nevertheless it is at special pains to refute the argument which the intervener bases on Article 68 of the Treaty.

The contention of the Federal Government that the miner is the one who really benefits from the 'Bergmannsprämie' amounts to saying that, without infringing the prohibition against subsidies, the State may make itself wholly responsible for miners' pay. From there it would constitute only a short step to recognizing that the Member States can freely grant subsidies to undertakings provided that the total amount of the subsidy does not exceed the total sum paid by the undertakings in wages. This argument is defeated by its own absurdity.

2. Nature of effect on the market

The *intervener* contends that the requirement in Article 4(c) is applicable only to grants from a State which constitute an unacceptable interference with the conditions of the market.

The Federal Government states that it concurs with the explanations supplied on this subject by the High Authority and refers to the considerations set out in its letter of 22 October 1956 to the High Authority.

The intervener finds in Article 92 of the Treaty establishing the European Economic Community confirmation of its view that the provision in Article 4(c) of the Treaty establishing the European Coal and Steel Community should be applied only to State grants which distort or threaten to distort competition, because their influence on the competitive position of coal and steel undertakings affects the common market.

The High Authority has never demonstrated:

a reduction in the production costs of German mines through the grant of the 'Bergmannsprämie';

the effect of this reduction in production

costs on the conditions of competition on the market in coal and steel.

It is, in fact, impossible to assert that the bulk of wages paid by the mining undertakings is reduced by an amount equal to the 'Bergmannsprämie' or that, in granting the bonus, the Federal Government has, even in part, financed wages out of public funds. The 'Bergmannsprämie' which, by its nature, cannot constitute a bonus intended to make up for loss of wages is more of an allowance which is paid, over and above their wages, to underground workers out of public funds and which, for reasons of general social and economic interest, are intended as a mark of special consideration for underground workers. The 'Bergmannsprämie' has not, therefore, had the effect of reducing production costs in German mines, nor was it ever intended that it should.

Moreover, the introduction of the 'Bergmannsprämie' took place at the same time as a rise in wages of 6%, which shows that the two measures are of a different character. In any case the proposal to introduce the 'Bergmannsprämie' was a long-standing one and was worked out during a period prior to the formulation of the wage claims which produced a 6% increase.

The figures show clearly that, since the 'Bergmannsprämie' was introduced in the Federal Republic, namely after 1956, deliveries of German coal and coke to the Netherlands have fallen.

Similarly, there is statistical evidence that the competitive position of German and Netherlands coal on the markets of the four other countries of the Community is increasingly in favour of Netherlands coal.

The *defendant* replies that, although the bulk of miners' wages was not actually reduced by an amount equivalent to the 'Bergmannsprämie', it must not be forgotten that there is a reduction in the production costs not only when the level of these costs is reduced but also when countervailing measures prevent the level from rising.

If the 'Bergmannspramie' had not been introduced, the rise in wages would have been in the region of 9%; the bonus enabled the increase to be reduced to 6%.

The figures and statistics produced by the intervener are hardly convincing because the Netherlands undertakings probably based their prices on the prices of German coal while themselves suffering from a loss of revenue which in the case of the German miners was offset by the 'Bergmannsprämie'.

Finally, the parties in the main action are agreed that the 'Bergmannsprämie' affects production costs and the conditions of competition and, under Article 93(5) of the Rules of Procedure of the Court, the Federal Government must accept the case as it finds it at the time of its intervention.

The *applicant's* arguments are somewhat similar to those of the defendant. It emphasizes that the Treaty establishing the European Coal and Steel Community, in contrast to that establishing the European Economic Community, prohibits subsidies regardless of whether thay have a tangible effect on the common market. This deprives the statistical arguments of the intervener of most of their weight; the figures produced are in any case open to question.

The correspondence exchanged on the subject of the 'Bergmannsprämie' between the Federal Government and the High Authority reveal the real intentions of the intervener and shows that the sole purpose of the bonus was to improve the economic position of the mining undertakings.

On the last point raised by the intervener, the applicant emphasizes that the 'Bergmannsprämie' affected the Netherlands undertakings to an extent that was all the more serious in that the latter had to accede to an increase in wages in order to avoid an exodus of their workers to their German competitors. This increase in costs and the need to base prices on those of competitors receiving preferential treatment distorted the conditions of competition from the stand-point both of production costs and the selling price.

3. The industry concerned

The *intervener,* relying on the judgment in Joined Cases 7 and 9/54 (Rec. 1955-1956,

from p. 91) and on a declaration made by the High Authority in that case (Rec. 1955-56, p. 77) contends that Article 4(c) of the Treaty is applicable only when the contested measure specifically concerns the coal and steel industry.

It recalls that the application of Article 4(c) must be consistent with that of Article 67(3) of the Treaty, which does not permit the High Authority to take action against measures adopted by a State which do not allow special benefits to or impose special charges exclusively on undertakings within the meaning of the Treaty but on a wider circle of undertakings in the same country.

Article 92 of the Treaty establishing the European Economic Community supports this interpretation of Article 4(c) of the Treaty establishing the European Coal and Steel Community.

The 'Bergmannsprämie' is an allowance granted to all underground miners employed in the territory of the Federal Republic of Germany; it is of little importance whether they work in undertakings within the meaning of the Treaty or in other mining undertakings.

The *defendant* replies that:

the 'Bergmannsprämie' was, in the beginning, intended solely for coal-miners and was only later applied to other underground miners;

the concept of a special subsidy should be based on facts rather than a legal formula; a subsidy measure is special not only where it is concerned solely with the coal industry but also when it secures advantages for that industry and for other specific industries; Article 67 refers to measures of a very general character such as taxes, welfare benefits, rates of exchange, etc.;

in fact, 89% of the 'Bergmannsprämie' is paid to the collieries; it is inconceivable that such a subsidy should be illegal in the Netherlands because that country has no potash or mineral mines while remaining lawful in Germany because it has them.

The *applicant* points out that the judgment of the Court in Joined Cases 7 and 9/54, cited by the intervener, is concerned not with subsidies but with taxes.

For the subsidy to be caught by Article 4(c), it is not necessary for it to have a special character or to involve only the coal and steel industry. In terms of the common market, a general subsidy granted by a Member State to national industry as a whole or to a particular industry is still illegal because it places the coal and steel industry of that State at an advantage compared with the same industry in other Member States.

There is little doubt that the 'Bergmannsprämie' is, in fact a subsidy of a special character in view of the fact that its extension to cover all underground workers without distinction was, apparently, approved only because it made a new defence submission available to the Federal Government.

(c) Additionally, the *intervener* generally adopts the arguments of the High Authority relating to the balance struck between the introduction of the 'Bergmannsprämie' and the abolition of the subsidy paid out of public funds to finance the 'Knappschaftliche Rentenversicherung'.

The *applicant* states that the intervener has finally shown itself in its true colours by thus supporting the conclusions of the defendant.

Second submission: *Misuse of powers*

The arguments between the parties, after the intervention, about the possibility of a misuse of powers adds nothing to what has already been said by the parties in the main action

## IV – Procedure

The procedure in the main action and on the intervention followed its normal course. Nevertheless it has to be recorded that, on 24 March 1960, the Court made an Order enjoining the intervener to use the language of the case in setting forth its submissions in writing and authorizing it to use the German language for the oral procedure.

By Order of the President of the Court

dated 24 March 1960 Mr Advocate-General Lagrange was, at the joint request of the two Advocates-General, designated to replace Mr Advocate-General Roemer, who is normally responsible for delivering an opinion in cases assigned to the Second Chamber.
The Court, after hearing the views of the Advocate-General, decided to open the oral procedure without any preparatory inquiry but decided to put a question to the parties on the figure for compensation (if any).
The parties agreed to this request.
The Advocate-General delivered his opinion at the hearing on 5 November 1960 to the effect that the application in Case 30/59 was admissible and well founded.

## Grounds of judgment

A – Admissibility

1. *Correctness of the procedure*

By letter of 9 March 1959, the applicant raised with the High Authority under Article 35 of the Treaty establishing the European Coal and Steel Community the need for it to record by a decision that, in financing the miner's bonus out of public funds, the Federal Republic of Germany had failed to fulfill one of its obligations under the Treaty.

By letter dated 30 April 1959 but postmarked 8 May 1959, the High Authority informed the applicant that it could not see its way to acceding to its request. The communication notifies the applicant of the High Authority's decision not to take the decision requested of it.

Application No 30/59 seeks the annulment of this decision of rejection, and, accordingly, constitutes an action to have a decision declared void under Article 33 of the Treaty.

Since the application was entered at the Court Registry on 5 June 1959, the time-limit of one month contained in the last paragraph of Article 33 has been complied with when account is taken of the date of despatch of the High Authority's reply as shown by the postmark.

2. *Applicant's right of action*

The contested decision is that in which the High Authority refused to take the decision which, according to the applicant, it was under a duty to take under Article 88.

The decision of rejection is, as required under Article 33, of the same character as the positive decision refused by the High Authority would have had.

The High Authority explains its decision of rejection by stating that the situation created by the introduction by the Government of the Federal Republic of the miner's bonus is not incompatible with the Treaty, so long as the conditions laid down by the High Authority in its letter of 21 June 1957 are satisfied.

Thus, the decision which, according to the applicant, the High Authority was under a duty to take would, if it had been taken, have referred to a particular measure adopted by a particular Member State and would, accordingly have been a decision which was individual in character.

The decision in which the High Authority refuses to take this decision, which is individual in character, is itself a decision individual in character.

The applicant claims that the High Authority's decision of rejection concerns it.

For an application for annulment of a decision which is individual in character, submitted by an undertaking, to be admissible it is enough that the applicant claims that the decision concerns it and supports its claim by an appropriate statement explaining the interest which it has in having the decision declared void.

The applicant contends that:

'Netherlands prices for coal are usually based on German prices;

the artificial reduction of the German prices for coal by means of State subsidies places the Netherlands undertakings which do not receive such a subsidy in a difficult position;

there is fierce competition from German coal on the Netherlands market;

the Netherlands have to protect their coal exports to Germany;

the introduction of the miner's bonus in Germany caused labour from the neighbouring Netherlands undertakings to emigrate to Germany;

this effect on labour was enhanced by the fact that the miner's bonus was exempt from social insurance contributions and income tax;

the mass resignation of miners experienced in the Netherlands collieries obliged the latter to embark on their own campaign of incentives, especially by raising wages.'

These statements appear to be relevant but their precise meaning can only be decided by going into the substance of the case. Contrary to the contention of the

defendant, to enable an undertaking to institute proceedings against a decision concerning it which is individual in character, it is not necessary that it should be the only, or almost the only, party concerned by the decision.

Since the contested decision is a decision affecting the applicant which is individual in character, the applicant has the right to institute proceedings.

3. *The conclusions of the applicant*

The applicant not only claims that the Court should annul the contested decision but also requests it to:

> 'declare that the High Authority shall record by a decision that, by financing out of public funds a tax-free bonus granted to miners working underground, the Federal Republic of Germany has failed to fulfil its obligations under the Treaty and that it must accordingly annul this measure.'

Under Article 34 of the Treaty, 'If the Court declares a decision or recommendation void, it shall refer the matter back to the High Authority' and the latter 'shall take the necessary steps to comply with the judgment'.

If the Court entertains the application, it may not dictate to the High Authority the decisions which should be consequent upon the judgment annulling the decision but the Court must confine itself to referring the matter back to the High Authority. In the circumstances, the second and third heads of the applicant's conclusions are inadmissible.

On the other hand, the first and fourth heads of the applicant's conclusions come within the ambit of proceedings for annulment and are therefore admissible.

4. *Submissions and arguments of the Government of the Federal Republic of Germany, as intervener*

The application to intervene of the Government of the Federal Republic of Germany was declared to have been allowed by Order of the Court dated 18 February 1960.

Although, in its statement as intervener, the Government of the Federal Republic of Germany broadly supports the conclusions of the defendant, it uses arguments which conflict with those of the defendant and with which the latter has expressly disagreed.

The applicant contends that, since Article 93(5) of the Rules of Procedure compel an intervener to accept the case as he finds it at the time of his intervention, from

the time when, after delivery of the rejoinder, the intervener intervened, it is no longer free to raise a fundamental argument which conflicts with those of the party which it is supposed to support.

However, in order not to prevent the Court from considering the argument set out in the application, the applicant waives the right to invoke Article 93(5) of the Rules of Procedure.

The question must, therefore, receive consideration by the Court.

Under Article 34 of the Protocol on the Statute of the Court of Justice, submissions made in an application to intervene shall be limited to supporting or requesting the rejection of the submissions of one of the parties.

In its intervention the Government of the Federal Republic of Germany supports the submissions of the defendant and maintains that, although the arguments which it advances differ from those of the defendant, they seek rejection of the applicant's submissions. The intervention procedure would be deprived of all meaning if the intervener were to be denied the use of any argument which had not been used by the party which it supported.

In the circumstances, the arguments submitted by the Government of the Federal Republic of Germany as intervener are admissible.

## B – Substance

### *I – Infringement of the Treaty*

The applicant and the defendant are agreed that the shift bonus, viewed on its own, is a subsidy which was abolished and prohibited by Article 4 (c) of the Treaty, whereas the intervener regards it as compatible with the provisions of the Treaty. In the applicant's view, the fact that the Federal Government offset the shift bonus by abolishing, with effect from 1 April 1958, its responsibility for 6·5% of the employers' contributions to the miners' pension insurance does not take away from the shift bonus its character of a subsidy abolished and prohibited by Article 4 (c) of the Treaty, whereas the defendant and the intervener are agreed that this offsetting of one against the other makes the bonus nevertheless compatible with the provisions of the Treaty. These two contentions make it necessary for separate consideration to be given to the question of the character, under the Treaty, of the shift bonus and of the manner in which this character is affected by the machinery for offsetting it.

1. *Viewed on its own, namely without regard to any offsetting arrangements, is the shift bonus a subsidy which was abolished and prohibited by Article 4 (c) of the Treaty?*

(a) The concept of subsidy under the ECSC Treaty.

Article 4 of the Treaty reads as follows:

'The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: . . . (c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever.'

The Treaty contains no express definition of the concept of subsidy or aid referred to under Article 4 (c). A subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.

Since these definitions are not contained in the Treaty, they are acceptable only if they are substantially borne out by the provisions of the Treaty or by the objects which it pursues.

Among the declared aims of the Community, in Article 2 of the Treaty, is that it 'shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States'.

A subsidy or aid, within the meaning of the definition given above in itself constitutes an obstacle to the most rational distribution of production at the highest possible level of productivity inasmuch as, being a payment made by someone other than the purchaser or consumer, it makes it possible to fix or maintain selling prices which are not directly related to production costs and thereby to establish, maintain and develop economic activity which does not represent the most rational distribution of production at the highest possible level of productivity.

Judged on this basis and in the sense in which they are normally defined, subsidies or aids granted by the States are incompatible with the common market because they constitute an obstacle to one of its essential aims.

In view of this, it must be recognized that subsidies and aids, in the sense in which they have traditionally been and are usually understood, are what Article 4(c) recognizes as incompatible with the common market and accordingly declares abolished and prohibited.

This conclusion is confirmed by the third indent of the second paragraph of Article 5, which lays down the Communities' principal task as being to 'ensure the establishment, maintenance and observance of normal competitive conditions', since payment of a proportion of the costs of production by someone other than the purchaser or consumer manifestly obstructs the establishment of normal competitive conditions.

The above interpretation is confirmed by the fifth paragraph of Article 54 of the Treaty, which reads: 'If the High Authority finds that the financing of a programme or the operation of the installations therein planned would involve subsidies, aids, protection or discrimination contrary to this Treaty, the adverse opinion delivered by it on these grounds shall have the force of a decision within the meaning of Article 14 and the effect of prohibiting the undertaking concerned from drawing on resources other than its own funds to carry out the programme'.

(b) Is Article 67 an implementing regulation of Article 4(c)?

In its statement as intervener, the Federal Government contends that the admissibility of certain subsidies from the State may be inferred from Article 67 and that, in consequence, that article qualifies the prohibition contained in Article 4(c) of the Treaty.

Since this contention, being in general terms, covers the various subparagraphs of Article 4 it could, if accepted, lead to the conclusion that, in certain circumstances, the Treaty authorizes the restoration of import and export duties or charges having equivalent effect, and even quantitative restrictions on the movement of products. It must therefore be considered with particular care.

If the authors of the Treaty wished to make substantial inroads into the prohibitions laid down in Article 4, it would scarcely accord with the preciseness of the Treaty as a whole to refer to them under different descriptions both in the title of Chapter VII ('Interference with Conditions of Competition') and in the wording of Article 67. Although, however, it is true that the words 'special charges' appear both in Article 4(c) and in Article 67(3), in the latter article they refer to charges

which may be imposed on coal and steel undertakings compared with other industries in the same country, and this qualification draws a connexion between the said special charges and the general economic policy of the State concerned. It is hard to believe that the authors of the Treaty intended not only to weaken but, in certain circumstances, to annul the abolitions and prohibitions laid down with particular force in Article 4 without referring to the article whose effect they intended to limit.

Although Article 4 contains various prohibitions, it specifies that they are laid down 'as provided in this Treaty'. Article 67(3) covers action by a Member State which confers a special advantage or imposes special charges on the coal or steel undertakings within its jurisdiction, in comparison with the other industries in the same country, and implicitly recognizes the legality of these advantages or charges by empowering the High Authority to make the necessary recommendations to the State concerned. Article 67 comes immediately after Articles 60 to 66, which lay down the conditions for application of some of the prohibitions contained in Article 4. Its position in the Treaty might have the effect of conferring on Article 67 a significance similar to that of Article 60 to 66 and of making it a kind of implementing regulation for the prohibition contained in Article 4(c).

If this interpretation of Article 67 is correct, the abolitions and prohibitions contained in Article 4(c) are covered and governed by Article 67 and both articles must be viewed as a whole and simultaneously applied.

Such an interpretation would substantially modify the effect of the prohibition contained in Article 4(c).

This makes it necessary to consider whether this interpretation is possible.

Article 4(c) prohibits subsidies or aids granted by States 'in any form whatsoever'.

This description does not appear in subparagraphs (a) (b) and (d) of Article 4.

This gives an unusually wide meaning to the prohibition which it describes. Without sufficient proof to the contrary, it is inconceivable that the authors of the Treaty declared in Article 4(c) that subsidies and aids granted by States in any form whatsoever should be abolished and prohibited and then declared in Article 67 that, without even having been authorized by the High Authority, they could be allowed subject to the measures recommended by the High Authority to mitigate or remedy the effects thereof.

Such an interpretation would be conceivable only if it were demonstrated that the interference with the conditions of competition within the meaning of Article 67 referred to the measures or practices set out in Article 4, especially Article 4(c).

Although Article 4 and Article 67 have basically the same objects, because they endeavour to 'ensure the establishment, maintenance and observance of normal competitive conditions', when their contents are analysed, as is done hereunder, it is clear that they make different fields subject to different procedures.

Article 4 refers to action taken 'within the Community', namely within the field covered by the Treaty which established it.

Under Article 1 of the Treaty the Community is founded upon a common market, common objectives and common institutions.

In the Community field, namely in respect of everything that pertains to the pursuit of the common objectives within the common market, the institutions of the Community have been endowed with exclusive authority.

Although financial assistance may be allocated to coal- and steel-producing undertakings this can only be done by the High Authority or on express authorization by it, as is clear from Articles 55(2) and 58(2) and from Article 11 of the Convention on the Transitional Provisions.

On the other hand, Article 4(c) refers to subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever and declares them to be incompatible with the common market.

This difference highlights the intention of the Treaty to reserve to the Community institutions and withhold from the States the right to grant, within the Community, subsidies or aids and to impose special charges in any form whatsoever.

The strict wording of Article 4 itself emphasizes the exclusive character of the Community's jurisdiction within the Community.

Article 67 refers exclusively to action by a Member State which is liable to have appreciable repercussions on conditions of competition in the coal or the steel industry.

It contains no provision for the abolition or the direct prohibition of such action but provides only for it to be counterbalanced by an appropriate aid or for its harmful effects to be mitigated by the High Authority making the 'necessary recommendations' to the State concerned (paragraph 3) or by such measures as that State 'may consider most compatible with its own economic equilibrium' (third subparagraph of paragraph 2).

Clearly, action taken under such provisions cannot be what, in any form whatsoever, Article 4 declares to be incompatible with the common market for coal and steel and abolished and prohibited.

Under the Treaty, those sectors of the economy of the Member States which do not come within the province of the Community are not subject to the decisions of the High Authority.

For example, under the Treaty, the affairs of distributing undertakings, excluded under Article 80, and, more generally, all economic activity which the Treaty has not brought within the province of the Community have been left outside it.

Article 2 confirms this interpretation by stating that the Community 'shall have as its task' to carry out the responsibilities entrusted to it 'in harmony with the general economy of the Member States'.

Article 26 of the Treaty makes it clear that the Treaty has not relieved Member States of responsibility for their general economic policy, since it enjoins the Council 'to harmonize the action of the High Authority and that of the Governments, which are responsible for the general economic policies of their countries'.

These provisions illustrate the partial nature of the integration effected by the Treaty since the Governments of the Member States remain responsible for all aspects of their economic policy which have not, under the Treaty, been expressly placed within the province of the Community.

Thus, in accordance with Article 68(1), they remain in full control of their social policy.

Clearly, the same applies over a wide area of their fiscal policy.

Through the exercise of these residual powers, action by the Member States is liable 'to have appreciable repercussions on conditions of competition in the coal or the steel industry'.

The existence of the common market sought in Article 2 of the Treaty under the conditions laid down in Article 4 could have been prejudiced by this interference with competition against which no protection was provided under Article 4.

Since the causes of this interference with competition did not come within the province of the High Authority it was essential, in order to safeguard the existence of the common market, for the High Authority to be placed in a position to correct or mitigate its effects. It is, in fact, this basic requirement which is fulfilled by Article 67.

The difference between the fields in which, respectively, Articles 4 and 67 operate is illustrated and confirmed by the difference of the means made available to the High Authority for their application.

If Article 67 is treated as an implementing regulation for Article 4(c), it would be impossible to explain why, when action by a Member State 'is having harmful effects on the coal or steel undertakings within the jurisdiction of other Member States', the High Authority is empowered only to make 'a recommendation to that State with a view to remedying these effects by such measures as that State may consider most compatible with its own economic equilibrium' and has no power to order the immediate abolition of aids or subsidies which conflict with the Treaty.

On the other hand, the restrictions imposed in the third paragraph of Article 67(2) and the similar one contained in Article 67(3) are easy to understand in the light of the interpretation placed above on the wording of Articles 4 and 67 and also on the structure of the Treaty.

Integration was only partly established by the Treaty and, owing to the power retained by the Member States, the coal and steel undertakings established in their respective territories remain subject to different legislation and regulations the provisions of which are liable to operate to the advantage or the disadvantage of the coal or steel industry of a Member State in comparison with the same industry coming under the jurisdiction of the other Member States or with other industries in the same State.

Although these situations conflict with the general purpose of the Treaty, they are the inevitable and legitimate outcome of the partial integration which the Treaty seeks to attain.

This means that, although it is incumbent on the High Authority to remind Member States of the objectives which they accept on entering the Community, it obviously cannot dictate the methods whereby they can be achieved since these methods involve the use of powers which do not fall within the jurisdiction of the Community or of powers which the States have not transferred to the High Authority by the Treaty.

The fact that the third subparagraph of Article 67(2) and Article 67(3) endow the High Authority with only a limited power of recommendation is evidence that the article does not refer to application of the automatic abolition and prohibitions in Article 4 but is designed to enable the jurisdiction of the Community to impinge on national sovereignty in cases where, because of the power retained by the Member States, this is necessary to prevent the effectiveness of the Treaty from being considerably weakened and its purpose from being seriously compromised.

Regard must also be paid to Article 11 of the Convention on the Transitional Provisions which brings into effect the prohibition of subsidies, aids or special charges established before the High Authority took office.

The wording of this provision makes it possible to ascertain the intention of the authors of the Treaty in this field.

Article 11 of the Convention on the Transitional Provisions provides as follows:

> '. . . Unless the High Authority agrees to the continuance of such aids, subsidies or special charges and to the terms on which they are to be continued, they shall be withdrawn, when and in the manner which the High Authority shall determine after consulting the Council, though it shall not be mandatory to withdraw them until the opening date of the transitional period for the products in question'.

Article 67, which confers a power of recommendation on the High Authority only in cases of serious disequilibrium provoked by substantially increasing differences in production costs is appreciably less strict than Article 11 of the Convention on the Transitional Provisions.

Had the authors of the Treaty intended Article 67 to serve as the definitive implementing regulation for Article 4(c), the conclusion would be inescapable that they intended to treat subsidies and aids which were in existence when the Treaty entered into force with greater severity than those granted after its entry into force.

Such a conclusion would conflict not only with common sense but also with a logical application of the Treaty.

The foregoing analysis leads to the conclusion that Article 4(c) and Article 67 cover two different fields: the first article abolishes and prohibits certain actions by Member States in the field which, under the Treaty, comes within the jurisdiction of the Community, the second is intended to prevent the distortion of competition which exercise of the residual powers of the Member States inevitably entails.

(c) Shift bonus in relation to the provisions of Article 4(c)

In the light of the foregoing considerations, it must now be established whether the shift bonus is a subsidy or aid abolished and prohibited by Article 4(c) of the Treaty.

It is clear and common ground that the shift bonus makes the public funds of the Federal Republic responsible for paying a portion of the production costs of German coal and, in so doing, relieves mining undertakings, purchaser and consumer from paying it.

The nature of the shift bonus is specified in the letter dated 4 February 1956 of the

Federal Minister for Economic Affairs (III D 2 70230/56, Doc. No 1231/56 f) in which the following paragraphs appear:

'The High Authority has received an application from the Unternehmensverband Ruhrbergbau for coal prices to be increased by an average of DM 3. The application is based on the fact that, as a result of negotiations between the Unternehmensverband Ruhrbergbau and the Industriegewerkschaft Bergbau, miners' wages are to be increased by, on average, 9% with effect from 15 February, in order to meet the threatened departures of mineworkers to other industries. The Unternehmensverband Ruhrbergbau has, in addition, stated that a further increase in price of about DM 3 per metric ton is required to wipe out a long-standing deficit.

I am afraid that such a change in the price of coal may have unfortunate effects on the price structure as a whole, especially in the Federal Republic, but also in other countries of the Community whose consumers depend on coal from the Ruhr. In the course of discussions in depth with those concerned, I have endeavoured to find ways of improving the profitability of the coal mines and, in particular, of reducing their overheads so that this increase in price can be kept within comparatively narrow limits.

.....

The following measures are contemplated:

(1) Amendment of the pricing instructions
(2) Reduction in the turnover tax
(3) Retirement pensions under the miners' insurance fund

.....

In addition, it must be borne in mind that the coal industry, where wages and salaries are equivalent to nearly 50% of turnover, is one of those industries where wages and salaries are proportionately the largest item of expenditure, with the result that outgoings on social security are a notable factor in increasing costs.

This is why consideration is being given to making part of the workers' contributions, up to a maximum of 6·5%, payable directly by the State into the provident funds. Its assumption of responsibility for 6·5% will be equivalent to a reduction of DM 1·77 per metric ton in the cost of commercial coal-mining. The measure proposed would apply not only to coal-mining but also to other sections of the mining industry, among them those which do not come under the jurisdiction of the High Authority.

The measure under consideration involves a change in the financing of social security pursuant to the second subparagraph of Article 68 (5) of the Treaty which, however, would not cause any disturbances within the meaning of Article 67 (2) and (3) of the Treaty since this relief will likewise do no more than partly offset the effect of a rise in the price of coal.

.....

(4) Award of a tax-free shift bonus

It is proposed to grant all who work underground in the mines, for each full shift worked, a tax-free shift bonus to be paid by the undertakings by deduction from tax paid on wages. For workers paid by the day the shift bonus will amount to DM 1·25 and to DM 2·50 for pickmen and piece-workers.

It is true that this measure would not involve any direct financial concession for the undertakings but it seems calculated to make underground work specially attractive and thus to offset threatened departures and at the same time give a fillip to the badly needed recruitment of new workers. It therefore accords with the objectives and the tasks of the Community referred to in Articles 2 and 3 (a) and (g) of the Treaty.

.....'

The last paragraph states that the shift bonus 'would not involve any direct financial concession for the undertakings' but this contradicts the first paragraph of the letters in which two increases are declared to be necessary: 'An increase of, on average, 9% in miners' wages with effect from 15 February, in order to meet the threatened departures of mineworkers to other industries, and an increase in price of about DM 3 per metric ton in order to wipe out a long-standing deficit'.

The Federal Government expresses the fear 'that such an increase in the price of coal may have unfortunate effects on the price structure as a whole, especially in the Federal Republic, but also in other countries of the Community whose consumers depend on coal from the Ruhr'.

The above mentioned letter of 4 February 1956 makes it abundantly clear that the introduction of the shift bonus makes it possible to avoid an increase in the price of coal which would otherwise be inevitable. The same letter makes it clear that while involving no 'financial concession for the undertakings', the shift bonus relieves them of an addition to their costs which the undertakings would otherwise have to bear and that, although it does not reduce the present costs, the miners' bonus reduces costs which they would inevitably incur.

Moreover, the letter of the Federal Minister for Economic Affairs to the High Authority dated 12 March 1956 (III D 2 70672/56, Doc. No 2426/56 f) states, *inter alia,* that:

'. . . these bonuses, including the miner's bonus, are also intended to prevent underground workers from leaving the mine for other employment, which gives rise to concern, to forestall serious fluctuations in the labour force in the mines, and to make a career in mining once more attractive for young men'.

The letter of the Federal Minister for Economic Affairs to the High Authority of 23 March 1956 (III D 2 70765/56, Doc. No 2781/56 f) states:

'. . . I am also enclosing other documents concerning the measures described in my letter of 1 March 1956 for the abolition of certain costs peculiar to the coal industry'.

The letter from the Minister of Finance for Nord Rhein-Westfalen to the associations of coal undertakings, dated 6 March 1956 (Ref. S 2034-2812/VB-2/H 2030-2507 II B 2), states:

'A law under which miners will be granted bonuses is being prepared in order to cope effectively with the threatened departure of underground workers from the mines.'

The letter of the Federal Ministry for Economic Affairs to the High Authority of 22 October 1956 (Ref. III D 2 71933/56) states:

'. . . It was stated in that letter that the Federal Government has set itself the aim of improving the profitability of the coalfields by reducing the special charges which, in contrast with other industries, this section of the economy has had to bear . . .'

However, the letter quoted immediately above contains a paragraph in which it is added as follows:

'. . . As a purely precautionary measure, I must point out that, even if payment of the miners' bonus substantially widened differences in production costs, this would be quite lawful since it would be the outcome of a change in productivity. As the High Authority will be aware, the output of the German coal industry can be considerably enhanced without fresh investment if the number of underground workers can be increased, because the reason why existing capacity cannot be fully used is the shortage of miners. It follows that an increase in the number working underground, referred to above in paragraph II, had undoubtedly led to greater productivity.'

This straightforward quotation confirms that the German coal industry believes that its output and productivity will be enhanced by an increase in the number of underground workers as a result of the increase in miners' pay produced by the shift bonus.

This increase in pay is undoubtedly an element in production costs.

If it is separated from it (as it is, in fact, by the financing of the shift bonus out of public funds), the coal industry pockets the saving without bearing the cost of a measure which increases both its output and its productivity.

This means that production costs are not the true costs of the coal which it has actually mined.

This artificial reduction in accountable production costs places the coal industry which benefits from it in a privileged competitive position compared with that of coal industries which have to pay for the whole of their production costs on their own.

In its letter of 22 October 1956 (III D 2 71933/56), quoted earlier, the Government of the Federal Republic recalled the wording of the statement of grounds for the draft law on the miner's bonus (Document No 2351 of the Bundestag dated 3 May 1956) and reiterated that:

> '. . . Latterly, it has become more and more noticeable that this professional pride on the part of miners has vanished in face of the attraction offered by other trades where work is easier and the pay is higher'.

This general idea was expressed in greater detail at the hearing, when the representative of the Government of the Federal Republic stated that the shift bonus was a kind of tribute to a very demanding calling, that it had not perhaps taken the form of a medal, because it was necessary for the tribute always to be and remain tangible and concrete to prevent its attraction from losing its value, and that the law on the miner's bonus was not intended to grant a subsidy to the mining undertakings but rather to create a privilege for the miner, and more particularly for the underground miner.

According to this explanation the shift bonus can, in the final analysis, only be regarded as supplementary pay.

Although such supplementary pay would, if paid by the coal industry, not be caught by the Treaty, it cannot fail to constitute a subsidy in circumstances where it represents a pay increase financed out of public funds by the Government of the Federal Republic.

Nevertheless it remains to be determined whether the subsidy or aid which the shift bonus appears to constitute satisfies some of the requirements laid down in Article 2 of the Treaty, namely, that it should safeguard continuity of employment and take care not to provoke fundamental and persistant disturbances in the economies of Member States.

In the part of its letter, quoted above, of 12 March 1956 (III D 2 70672/56, Doc. No 2426/56 f), the Federal Government itself specified that the shift bonus is also 'intended to prevent underground mine-workers from leaving the mine for other employment'. This statement makes it abundantly clear that the miner's bonus cannot be regarded as helping to safeguard continuity of employment or to prevent unemployment since, on the contrary, it was introduced at a time when abandonment of a career in mining was a 'source of concern' to the Federal Government. Finally, no steps were taken to apply the special procedure under Article 37 covering the possibility of fundamental and persistent disturbances.

The intervener has contended that the shift bonus comes under Article 67 of the Treaty and constitutes an 'aid' within the meaning of the second subparagraph of Article 67 (2). This contention cannot, in any event, be justified solely by the fact that Article 67 makes the granting of the aid referred to in the second subparagraph of paragraph (2) thereof subject to prior authorization by the High Authority (which is obliged to consult the Consultative Committee and the Council of Ministers) and lays down that the amount of the aid, as well as its its conditions and duration, shall be determined in agreement with the High Authority. In the present case there has been no question of consultation with the Consultative Committee or the Council of Ministers, or of authorization by the High Authority, or of the agreement provided for under the second subparagraph of Article 67 (2). The fact is that, on the contrary, the High Authority refrained from taking any action.

For the foregoing reasons, viewed in itself, the miner's bonus, financed out of public funds, constitutes a subsidy or aid granted by the Government of the Federal Republic to the German coal-mining industry and there is no valid reason, based on the Treaty, which could invalidate this description. In consequence, it must, viewed in isolation, be held to be incompatible with the common market in coal and steel, and, as such, prohibited by the Treaty.

2. *Does the countervailing effect of the abolition, with effect from 1 April 1958, of the assumption by the Federal Government of responsibility for a proportion of the employers' contribution to the miners' pension insurance take away from the shift bonus its character of a subsidy or aid prohibited under Article 4 (c) of the Treaty?*

The Government of the Federal Republic revoked, with effect from 1 April 1958, its decision of February 1956 to assume responsibility for a proportion, amounting to 6·5% of total pay, of the employers' contribution to miners' pension insurance.

In its statement of defence, the defendant declares that, although a payment considered in isolation may appear to be a prohibited subsidy because it 'reduces production costs and affects the natural conditions of competition', the elimination of these effects suffices 'for there to be no longer any breach of the Treaty'. In these circumstances 'there would really be no longer any question of a subsidy which is prohibited under the Treaty in the interests of fair competition'.

While maintaining that 'the grant of the miners' bonus does not conflict with Article 4 (c) of the Treaty' the Government of the Federal Republic contends that there can no longer be any conflict because 'with effect from 1 April 1958, the Federal Republic stopped paying 6·5% of the wage bill as part payment of the employers' contribution to miners' pension insurance, which it had made on behalf of the coal-mining undertakings since 15 February 1956'.

The defendant and the intervener state that the additional payment thereby imposed on mining undertakings is equal to or greater than the amount of the miner's bonus.

These two statements make it necessary to decide whether the fact that the Federal Government stopped paying a contribution of 6·5% of the total wage bill into the miners' pension fund is such as to take away from the shift bonus its character as a subsidy or aid prohibited under Article 4 (c) of the Treaty.

The repayment by the coal producer to the Federal Government of the exact amount paid to the miners in the form of a shift bonus and of the tax payable on that amount under fiscal law resulted in eliminating, as far as the coal producers were concerned, all economic effects of the shift bonus without, however, depriving them of the psychological benefits which the Federal Government declares that it was seeking by the establishment of the said bonus. The question arises whether such a repayment changes the character of the shift bonus as a subsidy prohibited under Article 4 (c) of the Treaty.

However, it is not necessary in this case to find an answer to this question because the compensation procedure, permitted by the defendant and relied upon by the intervener, does not in any respect constitute a repayment which is at all times equivalent to the amount of expenditure to be reimbursed. If the Federal Government had wished, with absolute precision, to eliminate the economic effects of the shift bonus, it is not clear why coal-mining undertakings were not called upon to make such repayments. Because of the complicated nature of the assistance given by the Federal Government during the material period in connection with the costs and charges of miners' pension insurance, the procedure followed establishes only a vague and unconvincing connection between the subsidy and the increase in expenditure intended to compensate for it.

Since the abolition and prohibition contained in Article 4 (c) are general and absolute in character, they cannot in any case be annulled by application of a vague and ill-defined procedure for compensation. For these reasons, the abolition, with effect from 1 April 1958, of the assumption by the Federal Government of responsibility for paying a contribution amounting to 6·5% of the total wage bill to the miners' pension fund does not take away from the shift bonus its character of a subsidy or aid prohibited under Article 4 (c) of the Treaty.

*II – Misuse of powers*

In support of its application for annulment of the rejection of its request, the applicant relies on the submission of misuse of powers.

As the finding that the shift bonus is a subsidy prohibited under Article 4 (c) of the Treaty is sufficient to entail annulment of the contested decision, a decision is not necessary on this submission.

For all the other reasons set out above, the decision of rejection, set out in the letter from the High Authority to the applicant dated 30 April 1959, must be declared to be void.

## Costs

Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

The defendant and the intervener have failed in their submissions.

Accordingly, they must be ordered to pay the costs, the intervener paying its own costs and those consequent upon its intervention.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 2, 3, 4, 5, 14, 26, 33, 34, 35, 54, 55, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 80 and 88 of the Treaty establishing the European Coal and Steel Community;
Having regard to Article 11 of the Convention on the Transitional Provisions;

Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69 (2),

THE COURT

hereby:

1. **Declares that the first and fourth heads of the conclusions of the association of undertakings De Gezamenlijke Steenkolenmijnen in Limburg for annulment of the contested decision and for an order that the High Authority shall pay the costs are admissible; that the second and third heads for a declaration that the High Authority shall record by a decision that, in financing out of public funds a tax-free bonus granted to underground mineworkers, the Federal Republic of Germany has failed to carry out its obligations under the Treaty; for annulment of that measure; and for any further order which the Court may consider necessary are inadmissable;**

2. **Annuls the decision of rejection set out in the letter from the High Authority to the applicant dated 30 April 1959;**

3. **Refers the matter back to the High Authority;**

4. **Orders the defendant and the intervener to pay the costs, the latter bearing its own costs and those consequent upon its intervention.**

Donner Hammes Catalano

Riese Delvaux Rueff Rossi

Delivered in open court in Luxembourg on 23 February 1961.

A. Van Houtte
Registrar

A. M. Donner
President