Orders the applicants to bear the costs.

Pilotti Hammes Serrarens

Delvaux Rueff

Delivered in open court in Luxembourg on 20 March 1957.

M. Pilotti
President

Ch. L. Hammes
Judge-Rapporteur

A. Van Houtte
Registrar

OPINION OF MR ADVOCATE-GENERAL ROEMER[1]

Summary

Mr President,
Members of the Court,

I — Facts

This case, brought before the Court by 19 mining undertakings of the Ruhr basin and the selling agency which they have set up in the form of a limited company under German law against the High Authority of the European Coal and Steel Community, in which the oral procedure will be brought to an end by the delivery of my opinion, does not involve assessing the facts and their legal consequences. Nor does it involve legal examination of concrete events. The case is about a clearly defined passage in the text of an agreement. That text sets out an arrangement made by the coal-producing undertakings of the Ruhr concerning the joint selling and the rules applicable thereto. The Court is called upon to examine whether that specific clause of the trading rules submitted for authorization at the same time as the articles of association of the company is compatible with the provisions of the Treaty concerning cartels.

The text of the trading rules and the content of the decision adopted by the High Authority on the request for an authorization

1 — Translated from the German.

submitted by the applicants at 1 are known to you from the written procedure. The Judge-Rapporteur has presented them to you in outline during the oral procedure. The representatives of the parties have reproduced or quoted what seems to them to matter.

This treatment of the subject-matter enables me to limit myself to a reference in general terms. But it seems to me necessary to emphasize that in order to assess this single clause the rejection of which is contested by the applicants, one cannot neglect the context into which it has to be put.

The articles of association and the trading rules contain agreements concerning the joint selling of fuels from the installations of the 19 mining undertakings concerned, who are the applicants at 1, within the Common Market. We know that previously almost all the mining undertakings of the Ruhr basin had cooperated within one joint-selling organization. Thus the creation of the three independent selling agencies, among them the applicant at 2, constitutes a compromise between the joint-selling organization in which all the mining undertakings of the Ruhr had participated and the system whereby each of the some fifty mining undertakings of the Ruhr basin carries out its own sales independently. Basically the High Authority has authorized these agreements relating to joint selling, each of which has been drawn up in identical terms, by about one third of the undertakings of the Ruhr basin. It acknowledged that such joint selling would make for an improved distribution of fuels, taking into account in particular the position of the coal mining undertakings and that it was both necessary and sufficient to ensure that sales would be profitable, that employment would be stable, and that supplies would be regular. In so far as that purpose required it, the High Authority also authorized certain organizations common to the three selling agencies for Ruhr coal or agreed that no authorization was necessary for their creation. However, it did not authorize agreements more restrictive than was required by that purpose, and it subjected the authorized agreements to certain limitations and conditions intended in particular to guarantee the independence of the three selling agencies, and to permit them to form their own sales and production policy.

It is in this perspective that consideration must be given to the refusal to authorize one of the criteria which the applicants had imposed as a condition for admission to direct purchases from a selling agency, that is to say for qualifying as a wholesale trader at first hand.

II — Conclusions and admissibility of the application

1. The application is directed against the refusal to authorize that condition laid down in the trading rules. The authorization requested was refused by Article 8 of Decision No 5/56 of the High Authority of 15 February 1956, and the application claims that the said article should be annulled.

The High Authority as defendant did not raise any objection during the written procedure against the form or the admissibility of the application, but claimed that it should be rejected as unfounded.

During the oral procedure, the Advocate for the High Authority did indeed raise the question whether an application against just one article of a decision covering a complete set of facts is admissible. He was of the opinion that if the Court of Justice annulled the article in question in this case it would in practice be substituting itself for the High Authority as regards granting the authorization requested. He said that the subject-matter of the application could be interpreted differently and be extended to the whole of the decision.

However, such an interpretation would not do justice to the subject-matter of the application. The Court only has to rule on the question whether the refusal to authorize the clause at issue infringes essential procedural requirements or provisions of the Treaty. Nothing in the arguments of the applicants suggests that they also intend to contest other articles of the decision. Nor has the defendant shown that the decision only granted all the other authorizations subject to the clause at issue being prohibited. Thus in order to asses the dispute, it is necessary to start on the basis that the other parts of the decision have been accepted by the applicants. This limitation of the sub-

ject-matter of the application is admissible. Despite the wording of Article 4 of Decision No 5/56, the annulling of Article 8 thereof would not necessarily bring about the granting of the authorization. On the contrary, in accordance with Article 34 of the Treaty the High Authority could equally be required, depending on the wording of the grounds of judgment, to undertake a new examination, to make up for omissions of form or even to amend the article annulled.

2. From the requisite formal examination as to admissibility the following facts appear:

The partially contested decision was notified to the applicants on 22 February 1956. The application was lodged on 25 March 1956, and thus was lodged in due time as regards the provisions of the third paragraph of Article 33 of the Treaty in conjunction with Article 85 of the Rules of Procedure of the Court.
The applicants are, first, the 19 mining undertakings which are parties to the agreement, that is to say coal-producing undertakings, directly affected by the decision and thus entitled to bring an application.
Secondly, the Geitling selling agency created by agreement between the 19 undertakings appears as applicant. In the decision many limitations, conditions and obligations are imposed on this company by name. After the creation of the said company, which must be considered as definitive in the absence of any evidence to the contrary, it is required to perform all the duties arising by way of joint selling on behalf of the 19 member undertakings. It is an undertaking engaged in distribution which, under Article 80 of the Treaty, equally has the right to bring an application based on Article 65 of the Treaty.

3. In limiting the application of the clause at issue, Article 8 of Decision No 5/56 imposes an obligation not to act and thus constitutes a decision for the purposes of Article 33 of the Treaty.
Should Article 8 be annulled, this could have the effect of obliging the High Authority to authorize the clause at issue. On this point, the application can be considered as also claiming that the High Authority is required to take a decision – as provided by the first paragraph of Article 35 – granting the authorization requested.
At any rate, the decision is an individual decision concerning the applicants. The latter may therefore put forward all the grounds set out in the first paragraph of Article 33.

4. Therefore the application is admissible.

It is based on the grounds of infringement of essential procedural requirements, infringement of the Treaty, and manifest failure to observe its provisions.

III – Infringement of essential procedural requirements

1. The applicants argue that essential procedural requirements have been infringed in that the supporting reasons for Article 8 of Decision No 5/56 are inadequate. In their opinion, the reason to the effect that the clause is not necessary for establishing a rule concerning a certain volume of wholesale business could equally have been used to prohibit the other criteria, with the exception of one criterion which would be sufficient to establish such a rule. The applicants further argue that the reasons do not state any findings of fact showing that the clause restricts competition and is incompatible with Article 65 (2).
The High Authority replies that in order to assess whether sufficient reasons are given for its decision, it is necessary to start with its own view of the law. It has set out that view in the statement of reasons, and on that basis, sufficient reasons for the decision also appear as regards the facts.

2. Two points should be stressed in assessing this submission.

First, we are concerned with only one of the 14 articles of the decision granting authorization. It was not possible to state separate and independent reasons for that article. On the contrary it is necessary to take into account all the factors in the reasons for the decision, as a coherent whole, which equally concern the article at issue. In view of the length of the text of the agreement, includ-

ing the trading rules, the High Authority's obligation to state reasons for its decisions would be taken to unreasonable extremes were it to be said that it had to set out its general point of view over again exhaustively in respect of each limitation or refusal of authorization.

Secondly, an investigation whether requirements as to form have been observed must not trespass on the examination as to substance. The Court has already decided that in the reasons for a decision it is not necessary to refute opinions expressed to the contrary, but that the reasons must contain the essential elements and findings of fact on which the legal justification for the decision depends (so held in the judgments in Cases 4/54 and 6/54). Thus it does not suffice to reproduce the text of the Treaty in the reasons. On the contrary, it is necessary to give an adequate definition of the concrete facts on which the High Authority has applied the provision of the Treaty quoted.

Those requirements are necessary, but also sufficient for the purpose of meeting the obligation to state reasons: the interested parties must know what the concrete circumstances are to which the High Authority has applied the provisions of the Treaty on which it has based its decision. Should litigation arise, the Court can examine whether those facts have been correctly found and whether they justify the application of the provisions of the Treaty put forward.

3. As I have already said at the beginning, the present case does not involve assessing concrete events. It involves reviewing the admissibilty of a part of the trading rules, namely provisions relating to the admission of first-hand traders to the selling agency. The decisive elements of those provisions are stated in the reasons for the decision (JO No 6 of 13.3.1956, p. 33). Before examining them from the legal point of view, the High Authority drew certain conclusions of fact from them. The first concerns all the criteria, including, therefore, the clause at issue. In the fixing of the conditions required for direct supplies, all traders who do not fulfil the conditions are precluded from obtaining supplies from the selling agency (JO No 6 of 13.3.1956, p. 33). In drawing this conclusion which is obvious and moreover is not contested in the application and taking into account the allocation of sales areas in accordance with the terms of the trading rules and the fixing of limits as to tonnage, the High Authority has legally assessed the factual situation as a sharing of customers and of markets within meaning of Article 4 (d) and of Article 65 (1) (for this see the reasons, JO No 6 of 13.3.1956, p.33). When the applicants also claim that the repercussions of the rules as regards the restricting of competition should be indicated in detail, they are going too far, to my mind, having regard to the factual evidence. Above all, and still less than in the case of the terms of the trading rules themselves, it would certainly not be a question of findings of fact, but of a prediction of the consequences of a general set of rules of an economic character, which is closely bound up with the legal assessment. For all these reasons, it is necessary to await the examination as to substance in order to establish whether the findings of fact as stated justify the legal consequence which has been drawn from them, or whether they are incomplete or whether it will be possible for them to be developed more clearly during the course of the case.

I thus come to the conclusion that the restriction on competition resulting from the conditions for being admitted to direct supply, amongst which appears the clause at issue, constitutes sufficient reasons for the application of Article 65 (1) of the Treaty.

The second factual deduction that the High Authority drew from the terms of the trading rules only concerns the clause at issue and the remaining criteria relating to direct purchases. After having found that the other criteria fulfil the conditions set out in Article 65 (2), the High Authority continued (JO No 6 of 13.3.1956, p. 34):

'The consequence of the clause at issue is that the trader — in order that he shall be assured of the advantage of direct purchases — will prefer to purchase fuels from the other two selling agencies for Ruhr coal up to an amount of 25 000 metric tons per year and therefore, will defer the purchase of fuel from producers of other basins.'

The special feature of the criterion at issue

compared to the other conditions authorized lies, in the opinion of the High Authority, in the fact that it leads to giving a preference to the other two selling agencies for Ruhr coal, as against the rest of the producers of the Community. This reason makes it clear that the decisive factor to be taken into account was that the clause at issue rendered it possible to make purchases from certain other agencies. The other clauses only mention a given volume of purchases from within the Community as a whole or from the applicants, but not from certain other given agencies. Therefore I cannot agree with the applicants when they argue that the reasons stated could equally have been used in order to prohibit any other clause. I shall leave to my examination as to substance the questions whether the High Authority has put a correct legal interpretation on this factual situation and in particular whether it was right to rely on the prohibition on discrimination in Article 4 (b) to which it refers.

4. It appears that the reasons on which Article 8 of Decision No 5/56 is based emerged sufficiently from the general reasons for the said decision. And this is equally true both as regards the circumstances which led to applying the prohibition on principle of the restrictions of competition laid down by Article 56 (1) and as regards the circumstances which, more particularly, led to deciding that Article 65 (2) did not permit the clause at issue to be authorized.
I would add that a careful study of all the reasons renders it possible only to say that they were drafted with particular detail and care.

IV – Relationship between discrimination (Article 4 (b)) and restriction on competition (Article 65)

1. Several grounds have been put forward in support of the complaint of infringement of the Treaty. The applicants are of the opinion that the clause at issue is not caught by the prohibition on discrimination in Article 4 (b), nor by the prohibition on cartels in Article 65. The applicants keep to this order in all their pleadings, although they maintain, in advance, that the principle of the prohibition on discrimination is wholly immaterial as regards the procedure for authorization under Article 65. This raises the question of principle as to the relationship existing between Article 65 and Article 4 (b). That relationship can matter as to the order in which the questions are to be examined. In the applicants' way of thinking, it renders the examination as regards discrimination unnecessary.

Thus this question must be gone into first to the extent required by the present case.

2. The *applicants* are of the opinion that Article 65 constitutes a *lex specialis* in relation to Article 4. Apart from the special provision in Article 12 of the Convention on the Transitional Provisions, Article 65 (2) states the grounds of refusal exhaustively, so that Article 4, standing alone, has no significance. The applicants argue on the one hand that agreements involving discrimination cannot be authorized under Article 65 (2) (b), because they always go beyond what is necessary for their legitimate purpose and that conversely a set of rules which satisfies the conditions set out in Article 65 (2) does not constitute an infringement of Article 4. On the other hand, however, they affirm that discriminatory practices are covered by Article 65 (1) and that they can, therefore, be authorized under Article 65 (2).
The *defendant* seems to share this point of view in that it also proceeds on the basis that a discriminatory agreement is not essential to the purpose of a permissible restriction on competition and that such an agreement contains more extensive restrictions than are necessary. From this it deduces that in the examination required by Article 65 (2), it is always necessary, directly or indirectly, to examine whether the agreement involves discrimination. It matters but little therefore, whether the High Authority relies only on Article 65 (2) or whether in addition it expressly refers to Article 4 (b). As it has done both in the contested decision, the question raised by the applicants is of no consequence.

3. A quick look at the works on cartels shows that the relationship between dis-

crimination and the law on cartels has been under constant discussion. Undertakings participating in cartels claim in particular that some kinds of discrimination are inevitable if a cartel is to qualify for authorization. For their part, the authorities responsible start at the discrimination end with a view to prohibiting cartels. I shall not go into the vast literature, because I could only make an arbitrary and incomplete selection of items from it.
I would just like to mention the 1955 report of the British Monopolies Commission, which deals specialy with cases of collective discrimination.
I should be going far beyond the purpose of my task in the present case if I sought to take up a position of principle on these questions. Even in limiting myself to Community law it is necessary to consider the concept of discrimination and restriction on competition in the light of the Treaty, and where it is necessary to study and take into consideration the conditions proper to the basic industries thus combined, it is impossible to go into this problem in depth in the context of an opinion delivered in a case actually before the Court. All I can do, without claiming to be complete, is to state some general points of view and then to set out the problem exclusively in terms which enable the present case to be disposed of.

4. The first proposition that can be established is as follows: not every restriction on competition within the meaning of Article 65 is necessarily discrimination prohibited by Article 4 (b).
An example consists in joint selling carried out on behalf of several producer undertakings. This does indeed restrict competition and must therefore first be authorized under Article 65 (2). But it is perfectly possible so to organize this joint selling that it does not involve discrimination in any way.
From this proposition the following conclusion may be drawn as regards the problem before us:

Even if the examination of an agreement setting up a cartel shows that it is not contrary to the prohibition in Article 4 (b), it is still necessary to examine whether the conditions in Article 65 (2) are fulfilled.

5. Does the opposite hold good, namely can the following be said:

Not every discrimination which, taken in itself, is prohibited by Article 4 (b) automatically constitutes at the same time an illegal restriction on competition under Article 65?
Here, it is necessary to distinguish. There can indeed exist discriminatory practices which do not have an appreciable influence on competition. Such is the case, as a general rule, if the discrimination is exercised by undertakings which do not themselves have any significant influence on competition. However, cartels and undertakings having a dominant position on the market can also restrict competition by discrimination.
In any event, the obvious conclusion is that it does not suffice for an independent examination, made with reference to Article 4 (b), to show that discrimination exists in order to assert that there is a restriction on competition incompatible with Article 65 (2).

6. The two considerations which I have just stated lead to the conclusion that the examination under Article 65 (2) can never be dispensed with. Therefore the authorization procedure must start with such an examination. Anyway it is doubtful whether a separate examination is possible.
The Court has already ruled (I am quoting the judgment in Case 1/54) that:

'Articles 2, 3 and 4 of the Treaty... constitute fundamental provisions establishing the Common Market and the... objectives of the Community. Their importance is clear from Article 95. In authorizing the High Authority to define the prohibited practices, the Treaty obliges it to take into account all the aims laid down in Articles 2, 3 and 4.' (Rec. 1954-1955, p. 23 under II, 1(a)).

The Court referred to that case in the judgment in Cases 7 and 9/54 and held in addition that:

'Where the provisions of Article 4 are referred to, restated or elaborated on in other

parts of the Treaty, the texts ... must be considered as a whole and applied simultaneously.'

In my opinion in that case I said that the prohibition on discrimination takes effect 'as provided in this Treaty'. It is possible, according to what I have said, that the prohibitions on discrimination and on cartels partially overlap so the two provisions can complement each other perfectly. I am therefore inclined to think that in the authorization procedure provided for by Article 65, it is necessary to start with the provisions of that article whilst nevertheless taking Article 4 (b) into account and referring to it so as to interpret Article 65 (2), but that, notwithstanding this, the prohibition on discrimination taken by itself does not constitute a particular ground of refusal under Article 65 (2).

7. The High Authority somehow seems to share this conception, as appears from certain points in its statement of reasons.
The High Authority has clearly said that the trading rules involve a sharing of customers and of markets and that therefore they are caught not only by Article 65 (1) but also by Article 4 (d), which is another fundamental provision. But, despite this infringement of the fundamental prohibition laid down in Article 4, it has authorized the greater part of the said rules.
In the second place, the High Authority has established that the authorization for joint selling gives the participating mining undertakings a considerable influence on the market which in turn makes it possible to apply practices contrary to the provisions of Article 4 (b) and (d), particularly as regards the prohibition on discrimination and on the sharing of markets (JO No 6 of 13.3. 1956, p. 32). That possibility of practising discrimination, which does not arise from the contents of the rules themselves which are submitted for authorization, did not result in the joint selling agreement being prohibited, but merely in a warning against practices in the application of the rules which the High Authority considered as discriminatory.

8. The above examination makes it clear that in the present case the right approach is to start by examining whether the conditions in Article 65 (2) are fulfilled. This examination will show how far, at the time when it is carried out, the aspect of discrimination must be taken into account and whether it is possible or necessary to proceed thereafter to a separate examination of discrimination. The general considerations set out above on the relationship existing between the two prohibitions will thus be confirmed or completed to the extend required by the present case.

V – Restriction on competition within the meaning of Article 65 (1)

1. Before the question whether the clause at issue fulfils the conditions in Article 65 (2) and whether it must therefore be authorized can be examined, it is first necessary to establish and to show in what way, directly or indirectly the clause prevents, restricts or distorts normal competition within the meaning of Article 65 (1).
Admittedly it was only in their reply that the applicants argued that the unauthorized clause does not establish any restriction on competition at all and therefore needs no authorization. If one were to see in this a new and independent submission made in support of the application, it would be impossible to declare it admissible, in view of the express provision in Article 22 of the Statute of the Court. However, such a ruling as to inadmissibility would only be of merely formal significance. In reality, a finding that the clause establishes a restriction on competition within the meaning of Article 65 (1) is a necessary pre-condition for examining whether the restriction, once found to exist, must be authorized under Article 65 (2). It may also be thought that since the relationship is in reality very close, this is not a new submission but simply the development and extension of a submission already raised in the application. In the latter, the applicants had argued that the clause is not more restrictive than is necessary for the purpose of the trading rules. After the defendant had stated in what circumstances it saw the restriction on competition, the applicants extended their

line of argument in asserting that those alleged restrictions on competition simply did not exist.
Thus it is in any event necessary to proceed to an examination as to substance.

2. In the statement of reasons for its decision, the High Authority reproduced the relevant part of the trading rules and then declared (I quote):

'Whereas such agreements involved a sharing of customers and of the market within the meaning of Articles 4 (d) and 65 (1) of the Treaty.'

In its defence, the High Authority said that the clause at issue constitutes an element of an agreement having the effect of sharing the market and the customers. In addition, the clause restricts competition for acceptance between the three selling agencies; for, since the three agencies apply the same rules, they constitute, as a result, one economic entity (p. 38 of the defence). When a trader has reached the figure of 12 500 metric tons of purchases from the agency by which he wishes to be accepted as a first-hand trader, the effect of the clause is to take away the interest which that trader might otherwise have had in purchasing 12 500 extra metric tons from the said agency, that is to say in reaching a figure of 25 000 metric tons. Finally, the clause involves an unjustified differentiation as regards the competitive situation of the traders because their ability to satisfy the requirements of the clause varies according to their sales area. In particular, the clause does not in practice affect German traders, whereas it is of decisive importance as regards the traders from the other countries of the Community.

The applicants reply with two arguments:

(a) There is no sharing of customers of such a nature as to restrict competition, because some 400 wholesalers remain accepted and because in addition the corrective clause in Article 9 (4) of Decision No 5/56 prevents restrictions being imposed on competition.

(b) In fact, without the clause, there is no competition between the three selling agencies because, with it or without it, in order to qualify as a wholesaler it does not matter from which of the three selling agencies for Ruhr coal the quantity exceeding 12 500 metric tons is purchased. The clause is not intended to influence the market, and cannot do so; it only intended to ensure an adequate standard for acceptance as a wholesaler.

3. If the arguments of the applicants are taken literally, and if they are interpreted as meaning that the clause is not caught by Article 65, it is not necessary to proceed to a long examination in order to refute this conception.
It is possible to observe, so to speak, several degrees of restrictions on competition in the agreements as a whole which are covered by Decision No 5/56. In the first place, the agreement on joint selling by 19 undertakings is caught by the very general prohibition of principle in Article 65 (1), because it restricts in particular the mutual competition existing between the individual undertakings participating. It is not necessary for an agreement on joint selling also to include a restrictive definition of first-hand wholesalers. So that is a supplementary restriction on competition, which arises from accepting certain traders to the exclusion of certain others and is of such a nature as to limit competition between traders. But as regards Article 65 (1) the number of wholesalers accepted is irrelevant. Nor does the corrective clause in Article 9 (4) of Decision No 5/56 affect the prohibition of principle in Article 65 (1) of the Treaty. Its purpose is only to ensure that the existing restrictions shall not go further that Article 65 (2) allows (cf. the statement of reasons for the decision, JO No 6 of 13.3.1956, p. 34, where as regards Article 65 (2) both the number of wholesalers likely to be doing business in the different sales areas and the effect of the corrective clause are taken into account).
As the clause at issue is an element of the trading rules which is concerned with defining the category of wholesalers accepted for direct supplies, the considerations set out above suffice to show that this clause also is caught by the prohibition of principle

in Article 65 (1) and that it therefore requires authorization.

4. In order to demonstrate this, it is not necessary to go further and examine what are the particular restrictions on competition which arise, in addition, from this clause. However, it seems that at this stage there should be an examination as to the particular point on which the clause affects competition, because the other restrictions on competition arising from the joint-selling agreement and from the trading rules have for the most part been authorized, unlike the clause at issue.
This examination will be a forerunner to the examination required under Article 65 (2). The latter will be concerned mainly with the question whether the specific extra restriction on competition, the existence of which has been established, goes too far. It is also possible to see in the argument of the applicants the assertion that the clause at issue does not have the effect of establishing particular restrictions on competition beyond those which have been authorized. The conception of the applicants to the effect that there does not seem to be any reason why the clause at issue was not approved, whereas the other clauses were, also points in the same direction.
During the oral procedure, the applicants' Advocate agreed that the trading rules, taken as a whole, required authorization; he merely contested the view that the clause contributed or even increased the restriction of competition.

5. In examining whether the reasons for Decision No 5/56 are sufficient, I have already quoted the part of the reasons which is exclusively concerned with the clause at issue and not with the other criteria established in respect of direct supplies. The issue is one of a preference, resulting from the effects of that clause, given to the two other selling agencies for Ruhr coal as against the remaining producers of the Community, and of the taking into account of purchases made from certain agencies other than Geitling. Similarly, in examining the submission of infringement of essential procedural requirements, I have already said that this deduction made from the contents of the clause is not so much a finding of fact as an economic assessment of the probable consequences of a set of trading rules. That assessment is closely tied in with the legal assessment of the clause. Therefore, to elaborate on the assessment and to develop it during the hearing does not constitute the raising of fresh submissions. On the contrary, quite apart from the exposition of the parties, the Court has power to examine what are the particular restrictions on competition which arise from the clause at issue.
During the course of the oral procedure and as regards the extent of the powers of review vested in the Court, the applicants themselves emphasized that the decision whether discrimination or a restriction on competition exists has nothing to do with the economic facts but depends on the interpretation of the Treaty. Thus the Court is fully empowered to examine this question. But, in these circumstances, the Court must equally be free to assess the effects of the clause wholly independently, without being bound by the arguments which have been put forward by the High Authority in its decision or which have only been put forward for the first time in the course of the proceedings. It is only after having done this that the Court will be in a position to give a pertinent answer to the question whether the clause has the effect of increasing the restrictive character of the trading rules. On this, moreover, the issue is really one of arguments in the strict sense of the term, or more exactly deductions of fact or of law which can be drawn directly from the text of the trading rules without its being necessary to go into a new analysis of the facts for the purpose here considered.

6. In order to examine the question, it is necessary to be clear about the contents of the clause. As regards this, two points call for consideration:

(a) *First* the clause was *not* prohibited by reason of the *quantity* of 25 000 metric tons required. The applicants rightly stress that the decision does not set out such considerations. As regards this, it would have been necessary for the purpose of the examination provided for by Article 65 (2), to deter-

mine what was in fact the number of traders remaining accepted. There is also relevant, here, the argument of the applicants that the corrective clause prevented an excessive reduction in the number of traders accepted. But given that the volume of purchases did not play a decisive part in the prohibition, there can be no taking into account of the extra restriction arising from the increase from 12 500 to 25 000 metric tons.

(b) *Secondly*, the clause *does not impose an obligation* to obtain supplies from the two other selling agencies for Ruhr coal. On the contrary, the trader satisfies the requirements of the clause even if he purchases all the 25 000 metric tons from Geitling.
I shall come back later to these two points in another connexion. As regards the restriction on competition, which I am examining at the moment, it is enough to note the following:
It cannot be claimed that in requiring a quantity of 25 000 metric tons instead of 12 500 metric tons, the clause involves an extra restriction on competition, because it is not on this point that the prohibition is based. Nor can it be claimed that the restriction on competition arises from the ostensible obligation also to obtain supplies from certain other agencies, because according to the wording of the clause no such obligation exists.
There only remains one element which may bring about a particular restriction on competition, namely the possibility that it gives the trader of having his purchases from the two other agencies taken into account up to a certain quantity.

7. It is on this basis that it is now necessary to examine whether the clause has the effect of restricting competition and in what way.
These effects could arise: with the traders; in the relationship between the producers of the Ruhr and the other producers of the Community; and finally in respect of the relationship of the three agencies *inter se*.

(a) The clause involves a further restriction on competition between traders who wish to be accepted as wholesalers by Geitling, but solely by reason of the quantity required. Whereas 12 500 metric tons were sufficient according to the other conditions, 25 000 metric tons are now necessary. This additional requirement for the traders is however, made less rigid by the fact that it is not *necessary* for the 25 000 metric tons to come from Geitling, but that half that quantity may be purchased from the other two agencies.
Thus the possibility of having this amount taken into account — the only particular element of the clause that can be considered here — does not constitute a new restriction as regards the trader. On the contrary, its effect is to ease a restriction which itself follows from the fact that the tonnage limit has already been increased.

(b) It would not appear that the clause affects competition between the producers of the Ruhr in general and the remainder of the producers of the Community. Since in this respect the producers of the Ruhr must be considered in any event as forming a single entity, the possibility of taking into account purchases made from the three agencies cannot alter the position. The most that can be said is that the competitive position of each of the agencies, and thus also of the applicants, *vis-à-vis* the remaining producers of the Community, is strengthened by this reciprocal arrangement and that normal competition between each agency and its competitors on the Common Market is thus distorted.

(c) But the possibility of having this tonnage taken into account has repercussions principally in respect of the relationship between the three selling agencies for Ruhr coal *inter se*. As the volume of purchases required is not relevant, the requirements of '12 500 metric tons from Geitling' and '25 000 metric tons from the Ruhr' must not be compared. On the contrary, the particular nature of the possibility only appears when a comparison is made between '25 000 metric tons from Geitling' and '12 500 metric tons from Geitling; 12 500 metric tons obtained from other selling agencies for Ruhr coal'. It is only when the second clause is applied instead of the first that a restriction on competition be-

tween the three agencies is to be found. This is why the applicants side-step the essence of the problem when they claim that with or without the clause it makes no difference from which of the agencies the excess over 12 500 meric tons is purchased. The difference lies rather in the fact that *without* the clause all that is required is a certain volume of purchases from Geitling and that therefore the question from which agency the purchases are made is far from being of no consequence. The alternative is only offered by the clause at issue.

In this investigation, one can start by agreeing that acceptance as a wholesaler is a means of competition. The applicants have themselves indicated that as businessmen they are entitled to say to a trader: 'if you make an effort for *my* coal, you will get special treatment'. This effort is required of the trader in applying the clause as to '25 000 metric tons from Geitling'. That requirement is attenuated by the alternative and the possibility of having taken into account: '12 500 metric tons from Geitling; 12 500 metric tons from other selling agencies for Ruhr coal'. As we have seen, that can make the trader's position easier. But what is the significance of this as regards the relationships *inter se* of the three selling agencies? The only possible significance is that Geitling does not require more than half the effort to be put into its *own* products and that it credits the trader with the trouble he has taken for other selling agencies for Ruhr coal. Thus Geitling partially gives up a means of competition that it claims for itself, and limits the sales competition of its *own* products in favour of the two other agencies.

The applicants require that their wholesalers must order 25 000 metric tons of Ruhr coal. They claim that they use every possible means of ensuring that the 25 000 metric tons are obtained from Geitling. But by reason of the taking into account of purchases, they partially give up one of those means. That suffices to distort competition between the three agencies, without its mattering whether competition remains possible in other respects.

The applicants have themselves said during the oral procedure that the clause must first enable Ruhr coal to break in to the market. Thereafter, the competition between the three agencies will itself intensify. But this is to say clearly that for reasons of *common* interests, the three agencies limit competition to the sale of their products and thus limit competition between themselves, and that they thus want above all to act as a single entity.

8. Thus the possibility introduced by the clause has the effect, without the volume of purchases required playing a part, that Geitling partially sacrifices its *own* interests in selling its products in favour of the *collective* interests attaching to the sale, generally, of *Ruhr* coal. That involves partly giving up an independent sales policy, and doing so constitutes a restriction on competition as regards the two other selling agencies for Ruhr coal.

I shall have to examine hereafter whether, in the light of Article 65 (2) (b), that particular effect is essential to the purpose of the joint-selling agreement and to the trading rules and whether it is not more restrictive than is necessary for that purpose.

VI – Possibility of authorization under Article 65 (2)

1. In the reasons for its decision, the *High Authority* has given a negative answer to this question in finding, apart from the matter of discrimination, that the criterion at issue is more restrictive than is required by the need to fix the volume of purchases, namely the establishment of a standard for a certain volume of wholesale trade. Thus the criterion did not meet the conditions of Article 65 (2), and accordingly could not be authorized (JO No 6 of 13.3.1956, p. 34).

In their application, the *applicants* say that the High Authority clearly did not proceed to the examination required by Article 65 (2), because it thought from the outset that it could not give its authorization by reason of the existence of discrimination. That argument is contradicted by the text of the statement of reasons, which expressly finds an infringement of Article 65 (2).

The applicants then state in detail that the clause was necessary for the clearly understood purpose of the trading rules. They alleged that the sale of 12 500 metric tons of

their coal is too low a figure in itself and that it is only enough for letting a trader qualify as a wholesaler on condition that 12 500 metric tons of Ruhr coal be added. The applicants ought really to have required the sale of 25 000 metric tons of *their* coal. However, in order not to set higher limits than necessary, they contented themselves with requiring that only half that amount had to come from their production. They consider that the taking into account of orders placed with the two other selling agencies is justified because what is involved is coal of the same quality, coming from the same basins, the sale of which is carried out under the same conditions, particularly as regards freight, insurance and storage. At the same time, this rule facilitates the obtaining of supplies in the case of a temporary shortage at one of the selling agencies. It also renders it easier for taders to be accepted simultaneously as first-hand traders by several selling agencies for Ruhr coal.

2. In order to assess this argument, it is necessary to start with the special restriction on competition which has been found and which, by reason of the clause at issue, is additional to the restrictions which, for the most part, have been authorized. We must consider whether that special restriction is necessary for a proper choice of first-hand traders accepted by Geitling. As to this, I would observe that this defining of wholesale traders only forms of itself a part of the joint-selling agreement concluded by the 19 undertakings participating in Geitling and that the said agreement itself can only be authorized in so far as it contributes to a noticeable improvement in the distribution of the products of Geitling and is necessary for that purpose.

3. Looked at from this angle, it clearly appears that none of the arguments of the applicants in favour of taking into account purchases made from the other two selling agencies shows that this contributes to a noticeable improvement in the distribution of their own coal. Their arguments, at most, show that the distribution of *Ruhr* coal taken as a whole, is favoured.

But the authorization granted to the applicants only covers the joint selling of their own products. The purpose of the general reorganization of the sale of Ruhr coal is the creation of three independent selling agencies, having their own production and sales policy (JO No 6 of 13.3.1956, p. 32). In this new system, the High Authority did not overlook the natural conditions which the applicants advocated in support of all coal from the Ruhr being treated as the same. On the contrary, certain organizations and certain measures common to the three selling agencies created were authorized. As regards the Ruhrkohlen-Exportgesellschaft, the Ruhrkohlen-Beratungsgesellschaft and the Ruhrkohle-Treuhandgesellschaft, the High Authority took the view that no authorization was necessary for these organizations, which do not perform any functions liable to restrict competition on the Common Market (JO No 6 of 13.3.1956, p. 31).

In Decision No 8/56, the High Authority authorized a common bureau, a commission on standards, and certain financial arrangements for the three selling agencies on the ground that the purpose of the three selling agencies can only be achieved if all the mining undertakings concerned and the three selling agencies for Ruhr coal work together within *prescribed limits*. The common measures and arrangements must, however, be restricted to what is necessary in order to achieve that purpose (JO No 6 of 13.3.1956, p. 71).

The applicants themselves say that the clause introduces an 'element of competition' where Ruhr coal is concerned. The High Authority rightly answers that publicity for Ruhr coal is the responsibility of the Ruhrkohlen-Beratungsgesellschaft (JO No 6 of 13.3.1956).

Where the applicants say that the clause facilitates obtaining supplies in cases of temporary shortages on the part of one selling agency, it must be pointed out that this has been taken into account in the tasks allotted to the Common Bureau (cf. JO No 6 of 13. 3. 1956, p. 71). Finally, Decision No 8/56 enumerates the rules the uniformity of which was recognized as necessary for the three selling agencies (JO No 6 of 13.3. 1956, pp. 71 and 72). Amongst those rules, no criterion is to be found as regards the acceptance of wholesale traders by the various selling agencies.

4. After the foregoing considerations, it is possible to give, a *comprehensive* answer to the question here considered, in so far as it is concerned with the taking into account of orders placed with the two other selling agencies.

The clause at issue restricts competition between the three agencies. The arguments of the applicants in favour of treating the coal of the three agencies as the same do not succeed in proving that the limitation is necessary for improving the distribution of their products and for proceeding to a proper choice of their wholesale traders. The applicants have not refuted the finding that the purchases from other selling agencies of the same basin, but independent of Geitling, are not an essential element as regards the qualifications of their own wholesale traders.

From the point of view of review by the Court, let me say again that the decision by the High Authority whether certain agreements are essential in order to achieve a purpose and are not more restrictive than is necessary for that purpose, constitutes a general economic evaluation for the purposes of the second sentence of the first paragraph of Article 33 of the Treaty. Therefore the applicants ought to have proved that the said evaluation was made with a 'manifest' failure to observe the provisions of the Treaty. To my mind, the arguments of the applicants on this point are inadequate.

5. I must now come back once again to the argument of the applicants concerning the *quantity* of purchases necessary.

The applicants assert that the purchase of 12 500 metric tons of their products is insufficient for qualification as a first-hand trader and that in reality they ought to have required 25 000 metric tons. If one takes the view that the trading rules were drafted accordingly and that, in addition to the first two criteria, the rules only required the purchase of 25 000 metric tons from *the applicants*, the restriction on competition found as between the three agencies does not arise. The High Authority held that the clause at issue involved an excessive restriction by reason of its special effect and not by reason of the quantity required. In these circumstances it is necessary to consider whether the High Authority had the right purely and simply to strike out the clause at issue or whether it ought to have drawn different deductions from the reasons which it stated.

6. In order that a trader might be accepted for direct purchase, the trading rules laid down as a third condition that a minimun of 25 000 metric tons must be purchased 'from the selling agencies for Ruhr coal' and as a fourth condition 'of which half at least must be from Geitling'. Thus the two conditions were both fulfilled where a trader simply purchased 25 000 metric tons from Geitling. Should not the High Authority have also taken this possibility into account and should it not have amended the requirement of '25 000 metric tons of coal from the Ruhr' to '25 000 metric tons from Geitling', which would have rendered the fourth condition irrelevant? And in order to arrive at the decision which it in fact adopted, should not the High Authority have established in the statement of reasons that the requirement of a purchase of 25 000 metric tons from Geitling was excessive?

In order to answer these questions, it is necessary to proceed in on the basis that the High Authority is only required to approve an agreement which is submitted to it for authorization, or to refuse it. The third subparagraph of Article 65 (2) of the Treaty provides that authorizations may be granted subject to specified conditions and for limited periods. The fourth subparagraph thereof only provides for the later amending of the terms of an authorization granted where there has been a change in circumstances. According to those provisions the High Authority thus has the right to impose conditions, but it does not have the right, or at least it is not required, to amend the terms of an agreement which is submitted to it in such a way that it may be authorized. In the present case, by reason of its nature and of its contents the clause '25 000 metric tons from the selling agencies for Ruhr coal' must be considered as different from the clause '25 000 metric tons from Geitling'. That results from the very fact that it is only through the effect of the first of those clauses that there arises the restriction on

competition which has been established. Thus the High Authority could confine itself to the quantity of purchase required from Geitling, whether the figure was clearly expressed or whether it was possible easily and certainly to determine it. If the High Authority did not criticize that figure as representing an excessive requirement, it had no reason to take into consideration what the required quantities were.

7. Thus the applicants' assertion to the effect that the purchase of 25 000 metric tons is necessary in order to qualify as their wholesalers cannot bring about the annulment of Article 8 of the decision, as they claim.
Nor can it be taken into consideration in the present case. The Court only has jurisdiction to examine whether a decision, under Article 65 (2) and in the prescribed form, responsibly adopted by the High Authority as a collegiate body, is legal and in accord with the provisions of the Treaty. I have in mind the second sentence of the first paragraph of Article 33. The Court cannot itself take a direct decision on a request for authorization addressed to it, and indeed the applicants have not submitted any such request, for their arguments go only to justifying the rules submitted. Nor can the defendant's Advocate make declarations during the hearing binding the High Authority as to how it would deal with a request that might be submitted to it.
I therefore draw the attention of the applicants to the possibility, which is open to them, of amending their trading rules and of submitting them to the High Authority, a possibility which, I should add, is provided for in Decision No 5/56 (Article 3 (10) (a), Articles 11 and 12).

8. My examination leads me to the conclusion that it is impossible to see an infringement of Article 65 of the Treaty in the rejection of the clause at issue. Since the contested part of the decision is based on that article, especially paragraph (2) (b) thereof, and that it thus rests on a sufficient legal basis, the applications must already be rejected at this stage of the examination.
For the sake of completeness and in order to round off the general considerations which I have put on the relationships between the prohibition on discrimination and the prohibition on cartels, I shall add a few explanations on the question of discrimination, which the parties have treated as a primary issue.

VII — Discrimination

1. In the statement of reasons for its decision, the High Authority says that in addition to having the effect of limiting competition to an extent more than necessary the criterion at issue also sets up discrimination, particularly as regards producers in other basins of the Community.
The *applicants* consider it as impossible at law for producers to discriminate as regards other producers. They are of the opinion that what is involved is a legitimate competitive practice in favour of Ruhr coal and assert that it would, on the contrary, be discriminatory to set up an artificial difference between the coals offered by the three agencies.
The *High Authority* sees the difference from a legitimate practice in the fact that the intention of the applicants is to establish an objectively unjustified difference in treatment not as between other producers and themselves, but as between several other producers.

2. On the argument that it is not possible to conceive of discrimination between entities situated at one and the same economic level, it is to be said that any discrimination can have a number of different affects, some perhaps consciously intended in the first place, others following inevitably. The Treaty itself, in the second indent of Article 60 (1), supplies an example of discrimination on the part of producers, directed against competitors: it concerns local price reductions, called differential prices, which are intended to eliminate competitors situated in a certain area. As regards this it could be said that the *purchasers* in other areas are treated in a discriminatory way because the lower differential prices are not granted to them, but that is only a secondary consequence; the purpose is to encourage the purchasers situated in the area in question to give preference to the producer

practising discrimination as against other *producers*, who are his competitors, It is always a fact that a differentiation at the same economic level can only be effected indirectly. But this indirectness does not give any indication whether the indirectly caused differentiation is objectively justified.

If one now considers the arguments of the parties, it appears that these have been largely taken into account in the examinations required under Article 65 (1) and (2). Here again, the applicants point out that the coal from the three agencies is of a comparable kind, and thus point to the concept of 'Ruhr coal' whereas the High Authority puts the emphasis on the fact that the other two agencies are autonomous and independent of the applicants.

The purpose of Geitling must provide the answer to the question whether treating all Ruhr coal as one and the same is objectively justified. Geitling's purpose is not the joint selling of Ruhr coal, but only the joint selling of the products of the 19 participating undertakings. The function of the trading rules is to establish the qualifications for Geitling's wholesalers, and not to require that traders shall be specialists in the *Ruhr*, which is the avowed purpose of the clause as the applicants themselves say. In reality, their argument that it is artificial and unjustified to make a distinction between the coals of the three agencies, calls back into question the principle of the creation of three independent agencies having their own sales policy and being unable to co-operate save to a limited extent. Thus the discrimination consists in the fact that the applicants credit *their* wholesalers with tonnages purchased from *certain other agencies*, although the latter ought to have as much independence in respect of the applicants concerning their policy on purchases and sales as the remaining producers of the Community, whose sales are not credited to the wholesalers by the applicants.

I thus reach the *conclusion* that the criterion at issue also establishes discrimination between the remaining producers of the Community and the producers of the Ruhr.

3. The *High Authority* has explained during these proceedings that there is also discrimination between traders, namely as between those who satisfy the other conditions, and who therefore, in the opinion of the High Authority, are sufficiently qualified to be Geitling's wholesalers, and on the other hand those who also meet the condition at issue. That differentiation is not objectively justified, because the extra purchases from certain other agencies have nothing to do with the qualifications required for being accepted as a wholesaler by the applicant agency. In practice it even leads to national discrimination, since the prohibited criterion scarcely matters for traders situated in Germany, whereas it is decisive for the other traders.

The *applicants* doubt first whether the Treaty grants independent protection against discrimination to individual traders. They are of the opinion that the differentiation established by the clause is objectively justified because it was necessary for them to require a sufficient volume of trade in coal from the same source and to reserve the position of wholesalers to 'specialists in Ruhr coal'.

4. On this point again, we can say that for the most part the arguments raised have already been examined from the point of view of Article 65. They do not affect the substance of the case because the volume of purchases required cannot be taken into consideration, and because the clause does not have the effect of *forcing* the traders to obtain supplies from the other selling agencies for Ruhr coal. On the contrary, we have established that the decisive element is the possibility of crediting purchases introduced by the clause at issue. Thus it is necessary to compare the following two groups of traders:

the first group, which purchases the 25 000 metric tons required exclusively from Geitling;

and the second group, which takes advantage of the alternative offered to it by the clause and which also, in part, obtains its supplies from the other two agencies.

In order to asses this situation, it is necessary to start with the fact that acceptance as a first-hand trader and the granting of dis-

count which depends on it are intended to reward the trader for his efforts. The applicants have themselves indicated this.
The result is that the same discount is given to two traders although the first sells 25 000 metric tons fom Geitling, whereas the second only sells 12 500 metric tons. For the same discount, the trader who also sells coal from the other agencies is required to make less effort for the applicants than a trader who directs his energies exclusively to selling the applicants' products. Two traders who achieve the same result for Geitling, that is to say who wish to sell 12 500 metric tons of its products, are treated differently depending on whether they in addition make purchases from Präsident and Mausegatt or, on the contrary, from other producers of the Community. It thus clearly appears that the clause at issue enables traders to be treated differently.
In answer to the applicants' doubts in principle, whether the trader is entitled at all to independent protection against discrimination, the High Authority rightly referred to the text of Article 4 (b), which expressly mentions purchasers as well as prices and delivery terms. The parties are agreed that the word 'purchasers' must mean traders. They must be right about that. The arguments which the applicants attempt to draw from Article 3 cannot be convincing. To a large extent, the access of users to the sources of production is only possible through the trade, and is influenced by it. The producers themelves have also shown a keen interest in the organization of outlets. It is enough to point to the examples of the selling agencies belonging to the mines. The applicants themselves admit that the traders must be protected when the position of the producer on the market is affected. We have observed that such is the case because the cause leads to a discrimination between producers and to a restriction on competition between the producers of the Ruhr.

Thus discrimination also exists between traders.

5. In connexion with the general considerations on the relationship between the prohibition on discrimination and the prohibition on cartels, the present case affords confirmation that the two provisions can complement each other perfectly. The necessity or simply the suitability of examining, first, how far a restriction on competition is legitimate has appeared in the fact that, supposing different terms exist restricting competition, the question of their objective justification is closely bound up with the question whether the restriction on competition is essential and necessary for the legitimate purpose of the cartel.

VIII — Result and conclusion

I shall summarize the result of my exposition as follows:

1. Sufficient reasons are stated for the contested Article 8 of Decision No 5/56 of the High Authority of 15 February 1956, both as regards the effect of the clause in limiting competition and as regards its being more restrictive than is necessary for its purpose.

2. The clause at issue results in a special restriction on competition, and this effect goes beyond the effect of the other criteria.

3. That special limitation is not necessary in order to determine the wholesalers to be accepted for direct supplies from Geitling, the applicant selling agency.

The question whether the remaining conditions authorized ensure a sufficient volume of trade for that purpose is of little relevance in deciding the case.

4. The clause at issue also establishes discrimination as between producers. Furthermore, it establishes discrimination as between traders.

Therefore the submissions raised are not well founded.

I am accordingly of the opinion that the application should be dismissed and that the consequences laid down as to costs by Article 60 (1) of the Rules of Procedure of the Court of Justice should follow.