Upon reading the pleadings;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 33, 39, 65 and 80 of the Treaty;
Having regard to Article 33 of the Protocol on the Statute of the Court of Justice;
Having regard to Articles 63 to 68 of the Rules of Procedure of the Court,

THE COURT

hereby:

Rules that the application is admissible and well founded;

Orders that until final judgment application of Decisions Nos 16 to 18/57 of 26 July 1957 is suspended in so far as the commercial rules provided for in those decisions deprive the applicant of the status of first-hand wholesaler.

Costs are reserved until final judgment.

Pilotti Hammes Serrarens

Riese Delvaux Rueff van Kleffens

Delivered in open court in Luxembourg on 4 December 1957.

M. Pilotti
President

Ch. L. Hammes
Judge-Rapporteur

A. Van Houtte
Registrar

OPINION OF MR ADVOCATE GENERAL ROEMER[1]

Summary

1 — Translated from the German.

Mr President,
Members of the Court,

To conclude the oral procedure in Case 18/57, *Firma J. Nold KG, Darmstadt* v *High Authority* in which oral submissions were made by the representatives of the parties on 12 November, it is my duty under Article 11 of the Statute of the Court of Justice,

'acting with complete impartiality and independence, to make, in open court, oral and reasoned submissions.'

In dealing with the facts and the law my opinion has had regard to the summary nature of the proceedings. First, I would like to remind the Court of the procedure and the submissions of the parties.

I — Procedure and submissions of the parties

On 26 September 1957 an action in the name of J. Nold, KG, Kohlen- und Baustoffgroßhandlung was brought before the Court against the High Authority and the three Ruhr coal-selling agencies. In so far as the action is directed against the High Authority it contains the claim that Decisions Nos 16, 17, 18 and 19/57 of 26 July 1957 should be annulled.

On 3 October 1957 a separate written application addressed to the President of the Court was made for the suspension of application of the contested decisions. The procedure is governed by Article 39 of the Treaty, Article 33 of the Statute of the Court of Justice and Articles 63 to 68 of the Rules of Procedure of the Court. Under Article 66 of the Rules of Procedure the President referred the application to the Court for consideration and judgment. The Court ordered an oral procedure on the application and this began on 12 November and is concluded with my opinion.

In the oral procedure the applicant on request limited its application in the alternative to a suspension of application of the commercial rules contained in the contested decisions. As grounds it alleges that it has previously received supplies of Ruhr coal as a first-hand wholesaler and that the three Ruhr coal-selling agencies are refusing further direct supplies on the basis of the commercial rules contained in the contested decisions. The applicant considers that those commercial rules discriminate against it; in the oral procedure it further alleged misuse of powers and an insufficient statement of reasons for the decisions. Finally, the applicant justifies the urgency of the suspension of application applied for on the grounds that irreparable damage through the loss of its previous customers and its business existence would otherwise occur.

The *High Authority* has submitted that the application should be dismissed. It takes the view that the applicant, as a trading undertaking which is not a party to the agreements approved by the contested decisions, has no right of action and therefore no right to make an application for an interim suspension of application. Secondly, it alleges that the action is not well founded and that the application for a suspension of application cannot benefit the applicant in the way it wishes. In the oral procedure the High Authority further alleged that the action is inadmissible because it is out of time; finally, it denied that the applicant is unable to continue its business as a wholesaler. It considers it necessary to secure production of the figures with regard to turnover in coal from the territory covered by the Treaty and in Ruhr coal, and a comparison of these turnover figures with the figures contained in the commercial rules of recent years, and it asks for an order for production of such figures in so far as the applicant does not voluntarily give them. In this respect the applicant says that it is not obliged to produce its turnover figures and that the Court does not need to know them, since it has operated as a first-hand wholesaler in the sale of coal without regard to the amount of its turnover; it would however notify the Court of this figures in writing, if the Court requires it.

I refer to the pleadings and the record of the oral procedure for the parties' additional submissions; I shall go into details if necessary in the legal discussion.

II — Legal discussion

In considering the application from the le-

gal point of view it must be borne in mind, first, that it is a summary, expedited procedure which, secondly, has as its objective a temporary measure which does not prejudice the substance of the case. Article 63 (3) of the Rules of Procedure of the Court therefore requires only a *prima facie* case both from the factual and legal points of view and not full proof of the necessity of the suspension of application applied for. Although the applicant has referred to the claim in the main action in support of his application, nevertheless the main action cannot be entered into already in the present procedure and the questions of fact and of law raised by the main action cannot yet be conclusively decided.

1. *Is the action in time?*

The High Authority objects that the application made is inadmissible because the main action was not brought in time. It alleges that the action was brought on the basis of an authority to act signed by Erich Nold on 25 September 1957; at the time, Erich Nold had no legal connexion with the firm cited as applicant, as the copy of the business register of 15 October 1957 shows. The applicant counters that Erich Nold was empowered *at any time* to act on behalf of the undertaking; it refers to the fact that the selling agencies of the Ruhr have dealt with him.

In my view this raises a question which will be dealt with in the main action. It will have to be borne in mind that, as is shown by the business register, at the time when the action was brought the applicant firm was dissolved by operation of law and it did not have a legal representative.For the present proceedings it seems to me to suffice that there is already an action on the substance of the case before the Court and that accordingly the condition contained in Article 65 (1) of the Rules of Procedure is satisfied.

2. *Right of action*

Accordingly, I turn to the question: 'Is there a right of action?'

The second objection raised by the High Authority, that there is no right of action, is likewise an obstacle to the proceedings. The right of action in these proceedings must be considered by the Court of its own motion. The applicant and defendant are unanimous in asking that this be decided as a preliminary issue.

According to our Treaty a right of action must be judged according to the status of the applicant and the nature of the contested decisions. Even where the status of the applicant is no obstacle to a right of action the scope of that right may differ according to the nature of the contested decisions. The applicant does not necessarily have a right of action pursuant to Article 33 *et seq.* of the Treaty. However, the right of action of undertakings engaged in production is extended by Article 80 and Articles 65 and 66 of the Treaty to undertakings engaged in distribution. After stating that for the purposes of the Treaty 'undertaking' means any undertaking engaged in production, Article 80 continues as follows:

'... and also, for the purposes of Articles 65 an d 66 and of information required for their application and proceedings in connexion with them, any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries.'

The French version is as follows:

'... en outre, en ce qui concerne les articles 65 et 66, ainsi que les informations requises pour leur application et les recours formés à leur occasion, les entreprises ou organismes qui exercent habituellement une activité de distribution autre que la vente aux consommateurs domestiques ou à l'artisanat.'

It seems to me that a careful linguistic and grammatical examination and analysis of the French version shows that the words 'à leur occasion'—'les recours formés à leur occasion'—relate not to the words 'les informations requises' but to 'leur application', that is 'l'application des articles 65 et 66'. This interpretation derived from the French version accords with the words of the German version and the meaning of its content. What follows from this?

The applicant alleges that it is an undertak-

ing operating as a wholesaler. The next question is whether the proceedings are proceedings in connexion with Articles 65 and 66 (in the French version: 'recours formés à leur occasion') within the meaning of Article 80 of the Treaty. The contested decisions are decisions of the High Authority granting authorization on the basis of Article 65 to the Ruhr coal-selling agencies for joint sale and to the Oberrheinische Kohlenunion for joint purchase. In particular, the decisions contain the commercial rules. These determine according to general and objective criteria which wholesalers may obtain supplies direct and, in consequence, which dealers are excluded from direct supply by the Ruhr coal-selling agencies. It is these rules which are the central issue of the action.

The reference to the principle of Article 19 of the Constitution of the Federal Republic of Germany in relation to the right of action and the rights which this gives the applicant in the national context of its country is, in my opinion, misconceived since that part of the national constitution cannot have legal force in the context of the supra-national Treaty of the European Coal and Steel Community. The applicant, as it seems to me, cited this provision of the constitution during the oral procedure, and not during the written procedure, for the sole purpose of interpreting the ECSC law which, as it has emphasized, is alone applicable here.

In its defence the High Authority refers to the judgment of the Court in Joined Cases 8 and 10/54 and advocates a restrictive interpretation of Article 80 as meaning that only the parties to agreements and decisions have a right of action; it alleges that the extension of the right of action is tantamount to the extension of the powers of the High Authority.

Moreover, consumers likewise affected by the commercial rules certainly have no right of action.

My observations on this are as follows: Joined Cases 8 and 10/54 were concerned with consumers and not dealers; moreover, those actions were not concerned with facts coming under Articles 65 or 66. The wording of Article 80 does not mean that only parties to cartel decisions have a right of action. It is true, as the applicant has said, that if their applications are approved by the High Authority such parties do not generally need to bring an action to obtain legal protection. It is, however, conceivable that even a party to an authorized concentration may have reason to bring an action if the authorization is made subject to certain conditions. It is also conceivable that the authorization is made in such a way that a dealer who wishes to participate in the concentration is excluded. That dealer, who has possibly been unjustly disadvantaged, cannot be denied a right of action. There remains another question: whether, having regard to the relevant objective criteria which the High Authority has to consider in the light of general economic factors and circumstances and the situation arising therefrom, a dealer who from the outset has not been considered in relation to the concentration and has not attempted to participate therein should nevertheless have a right of action.

It should be observed that when the High Authority authorizes marketing rules, in this case those of the Ruhr coal-selling agencies, it exercises powers which have a considerable effect on the participation of commercial undertakings in trade. On the other hand, consumers are in general only directly affected, or at least not in the same way as commercial undertakings. Consumers are not prevented by commercial rules from obtaining supplies from a first or second-hand wholesaler or from a retailer as they think fit. As regards the special position of large industrial consumers, it can only be observed that the commercial rules, at Article 5 of Decisions Nos 5 to 7/56, contain provisions which would affect such industrial consumers directly only if those rules laid down that they could only buy directly. There is no such restriction, however, for they may obtain supplies as they please either from first-hand wholesalers or from the Ruhr coal-selling agencies.

For all these reasons I am of the opinion that undertakings engaged in distribution which are prevented by the commercial rules from obtaining supplies direct have a right of action. Therefore they also have the right to apply for a suspension of application. The solution to which I come seems to accord with the relevant provisions and also

to be justified by the facts. The right of the applicant to make an application for a suspension of application of such decisions must therefore be recognized.

3. *Scope of the right of action*

The scope of the right of action which I have recognized depends on the nature of the contested decisions. Since this question is important for the application for a suspension of application, in particular in judging the necessity from the legal point of view, it must be considered here.

The applicant itself seems to assume that it is a general decision, since in the application it alleges a misuse of powers affecting it. I agree with this view. Although in relation to those undertakings which have submitted their agreements to the High Authority for authorization the decision taken by the latter is individual, it must not be overlooked that the subject-matter of that authorization is a body of general commercial rules which will be generally applicable in the common market as a result of authorization by the High Authority. It must be observed that the effects of the individual decisions are largely of a general nature as a result of the general commercial rules. I think this is the point of the High Authority's argument, namely that the applicant was not a party to the decision on the commercial rules. If the High Authority itself had adopted commercial rules by its own direct decision, it would certainly be a general decision. The commercial rules do not determine the particular case of the applicant, but lay down general criteria affecting it and others.

The objective of the action and of the application for a suspension of application and the effect of the latter are also of a general nature. As was stated during the oral procedure the applicant is not seeking individual exemption for itself, but ultimately the extension of the general transitional rules in favour of previously recognized first-hand wholesalers. The objective of the application is thus likewise a general measure.

The action is therefore admissible under the second paragraph of Article 33 of the Treaty only if the applicant alleges a misuse of powers affecting it. That restriction applies to a direct application for annulment; it leaves open other possibilities of legal redress. Although, understandably, the applicant has stated that it should not be referred to the right of action which it has in its own country, nevertheless, contrary to what it thinks, it has the possibility of challenging the validity of the decisions of the High Authority in an action before a national court and of prompting a reference to our Court for a preliminary ruling under Article 41 of our Treaty.

4. *Necessity for the suspension claimed*

As I have already explained, in my view it does not have to be decided on this application whether the main action, apart from the right of action, is admissible or inadmissible; only the conditions for the suspension of application claimed have to be considered. I do not therefore have to examine whether the legal grounds of formal defect and misuse of powers alleged in the oral procedure in support of the suspension claimed are admissible and valid. On the other hand, for the purposes of the following inquiry as to whether a suspension of application of the decisions of the High Authority is necessary, it is well to point out that the application has as its objective a general measure.

(a) From the legal point of view:

The High Authority alleges that the suspension of application is not necessary because it would not help the applicant to achieve the desired result, namely to continue provisionally to receive supplies as a first-hand wholesaler. If this is so, the suspension of application cannot be necessary and the application should be dismissed on this ground alone.

The applicant desires, as it made clear during the oral procedure, that neither the criteria of Decisions Nos 5/56, 6/56 and 7/56 nor of Decisions Nos 16/57, 17/57 and 18/57 should be applied to it, but that the transitional rules should continue to apply to those previously accepted as wholesalers. The High Authority rightly countered that it was not the contested decisions, suspension of the application of which is being sought, which terminated those transitional

rules. The transitional rules were contained in Article 9 (3) of Decisions Nos 5/56, 6/56 and 7/56; they were there limited to the expiry of the 1956/57 coal marketing year, that is until 31 March 1957. Decisions Nos 10/57, 11/57 and 12/57 of the High Authority extended the transitional rules until 30 June 1957; after that date they were no longer in force. As appears from what the applicant has said it in fact continued to receive supplies until 1 October 1957. Since Decisions Nos 16/57, 17/57, 18/57 and 19/57 did not determine the expiry of the transitional rules, a suspension of application of these decisions cannot bring the transitional rules back into force.

In the event that the transitional rules should not enter automatically into force again as a result of the annulment of the contested decisions or the temporary suspension of their application, the applicant has suggested that 'a hiatus' would arise which the High Authority would have to or could fill by appropriate provision. This can only mean that the termination of the transitional rules applying to those 'previously in title' would be rescinded as being contrary to the Treaty and that under Article 34 of the Treaty the High Authority would have to provide in future for the application of the transitional rules and the admission of those 'previously in title' without regard to the general criteria applicable. Such a judgment could be given only in an action which was directed against the decisions which provided for the termination of the transitional rules. The applicant ought therefore to have contested Decisions Nos 10/57, 11/57 and 12/57 or even Article 9 (3) of Decisions Nos 5/56, 6/56 and 7/56, especially as the application of the Ruhr coal-selling agencies to retain the transitional rules until there were sufficient supplies for a whole marketing year was not authorized. The application for annulment which I consider necessary was not made; in the meantime the time-limit for bringing an application for annulment of the decisions of the High Authority which I have mentioned has expired.

I thus come to the conclusion that the suspension of application of Decisions Nos 16 to 19/57 applied for cannot fulfil the objectives sought by the applicant, namely that it should continue to be supplied by the Ruhr coal-selling agencies as 'one previously in title' although not fulfilling the generally applicable criteria.

(b) From the practical point of view:

In view of this conclusion further observations as to whether the suspension of application from the practical point of view are unnecessary. I will therefore deal with this question only summarily to complete what I have said.

In my view, the applicant has not made out a *prima facie* case that in future it will no longer be able to receive coal deliveries and will therefore lose its means of existence. The High Authority has rightly stated that the applicant can in any event continue in business in the Ruhr as a second-hand wholesaler and even as a first-hand wholesaler for coal districts other than the Ruhr. This seems to me undisputed. That other sales arrangements may be necessary is a normal instance of competition. It is a common experience for those engaged in competition that the assertion and defence of a position obtained on the market may in certain circumstances require financial sacrifices, for example an increase in turnover and a reduction in profits, in the interests of the future, and that this individual competitive position cannot be regarded as an unjustified disadvantage. The applicant is not entitled to invoke against this the principles of free competition in support of its view that simply because it has for a long time past been a first-hand wholesaler for Ruhr coal it should continue to be so in future. From the sworn statements produced by the applicant (I refer in particular to Annex 9 in the file) it appears that the significance of the tonnage limits and the pending restructuring of the Oberrheinische Kohlenunion were known to the applicant.

Further, the applicant has not made out a sufficient *prima facie* case that if it had received supplies to the extent of its orders it would have achieved in the last coal marketing year the turnover required by the decisions granting authorization.

III — Conclusions

I come therefore to my final opinion:

The application for an interim suspension of application of Decisions Nos 16, 17, 18 and 19 of the High Authority of 26 July 1957 should be dismissed as unfounded and the applicant should be ordered to bear the costs of the application.