I — In Joined Cases

1. PRÄSIDENT RUHRKOHLEN-VERKAUFSGESELLSCHAFT mbH, having its registered offices at Essen (Case 36/59),

2. GEITLING RUHRKOHLEN-VERKAUFSGESELLSCHAFT mbH, having its registered offices at Essen (Case 37/59),

3. MAUSEGATT RUHRKOHLEN-VERKAUFSGESELLSCHAFT mbH, having its registered offices at Essen (Case 38/59),

represented respectively by their managers,

4. THE MINING COMPANIES OF THE RUHR BASIN, grouped together within the aforesaid joint selling agencies and represented by the latter, assisted by Hans Hengeler and by Werner von Simson, both Advocates at the Düsseldorf Bar, with an address for service in Luxembourg-Bertrange at the Chambers of the said Werner von Simson,

applicants,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Erich Zimmermann, acting as Agent, assisted by Professor Konrad Duden and Heinz Rowedder, both Advocates at the Mannheim Bar, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application for the annulment of certain provisions of Decision No 36/59 of the High Authority of 17 June 1959, partly repealing and partly supplementing Decision No 17/59 of 18 February 1959 on commercial rules governing the joint selling agencies for the sale of coal from the Ruhr, published in the Journal Officiel No 40 of 8 July 1959.

II — And in Case 40/59

I. NOLD KG, a wholesale trader in coal and construction materials, Darmstadt, represented by its partner with personal liability, Erich Noldd, assisted by Georg Thomas, Advocate at the Frankfurt am Main Bar, and Josef Kübel, Advocate at the Bonn Bar, with an address for service in Luxembourg at the Chambers of Félicien Jansen, Huissier, 21 rue Aldringen,

v

applicant,

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Erich Zimmermann, acting as Agent, assisted by Professor Konrad Duden and Heinz Rowedder, both Advocates at the Mannheim Bar, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application for the annulment or, alternatively, for a declaration of the inapplicability of Article 6 (1) and (2) of Decision No 36/59 of the High Authority of 17 June 1959;

THE COURT

composed of: A. M. Donner, President, A. M. Delvaux (Rapporteur in Cases 36 to 38/59) and R. Rossi, President of Chambers, O. Riese and N. Catalano (Rapporteur in Case 40/59), Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — As regards Cases 36, 37 and 38/59

A — *Conclusions of the parties*

The *applicants* claim that the Court should:

'(A) Annul Decision No 36/59 of the High Authority No 40 of 8.7.1959, p. 736) in so far as that decision rejects the request by the applicants on 11 and 12 December 1958 for an extension for a further year of the authorizations already granted by the High Authority concerning the commercial rules which the applicants have adopted:

1. The High Authority has not authorized the following requirement as a condition for direct supply by the joint selling agencies to wholesalers in coal: the trader must have sold the following amounts on the common market during the preceding coal year: at least 60000 metric tons of solid fuels from basins in the community and of gas coke.

2. The High Authority has not authorized the following quantitative requirements for direct supply to first-hand wholesale traders:

(a) the sale, during the preceding coal year, of 30000 metric tons of coal, coke, patent hard coal fuels, brown coal briquettes, semi-coke derived from brown coal or bituminous coal originating from the producer basins of the Community and gas coke in the sales area where the

trader is to be permitted to operate (Article 6 (1) of the contested decision);

(b) the sale, during the preceding coal year, of 9000 metric tons of coal, coke and patent hard coal fuels by the trader in the sales area where he is to be permitted to operate (Article 6 (2) of the contested decision).

3. Annul Article 9, in so far as it refers to the contested criteria for admission, and Article 11 of the decision.

(B) Order the High Authority to bear the costs.'

The *defendant* contends that the Court should:

'Dismiss the applications as unfounded and order the applicants to bear the costs.'

B — *The facts*

The facts may be summarized as follows:

By its Decisions Nos 5/56, 6/56, 7/56 and 8/56, dated 15 February 1956, the High Authority authorized the creation of various organizations for the joint sale of coal from the Ruhr. These authorizations, and the agreements and resolutions of the companies concerned were limited to 31 March 1959. The mining undertakings extended the length of the validity of their agreements and resolutions until 31 March 1960 and asked the High Authority to authorize this extension.

The High Authority, considering that its authorizations had not led to the expected results and in particular that the three joint selling agencies had applied a uniform sales system contrary to the provisions of the Treaty, decided to put an end to the sales system applied up to the present, while making provision for a transitional period. It thus granted the extension requested until 31 March 1960, but amended and added to its authorizations on several points. These matters are covered in decision No 17/59 of 18 February 1959.

By its Decisions Nos 7/58, 8/58 and 9/58 of 18 June 1958 the High Authority had authorized these joint selling agencies to enter into long-term delivery contracts, subject to certain conditions. Articles 2 and 4 of Decision No 17/59 maintain these rules for contracts entered into for not more than ten years.

Decisions Nos 16/57, 17/57 and 18/57 had set strict criteria for permitting wholesaler traders in coal to obtain their supples direct from the joint selling agencies in coal from the Ruhr. Articles 5 to 11 of decision No 17/59 alter the commercial rules and considerably relax the conditions required for direct supply to wholesalers.

Articles 12 and 13 of Decision No 17/59 confirm the decision of the Standards Commission, dated 10 December 1958, on a partial modification of the decision concerning factories' own consumption, dated 13 December 1955 and prolonging the validity of Decision No 8/56 until 31 March 1960.

Finally Article 14 of Decision No 17/59 organizes the control by the High Authority over the various organizations and mining companies concerned, with a view to verifying whether they keep within the bounds of the authorizations granted, and in order to examine whether a revocation or a modification of the authorizations is necessary for the purpose of reorganizing the sale of coal from the Ruhr.

By letter dated 21 February 1959 the President of the High Authority forwarded a copy of Decision No 17/59 to the three applicant joint selling agencies. The letter draws the attention of the addresses to the principles established by the decision and tells them that they will shortly be informed of the names of the officials whose duty it will to be carry out the inspection provided for by Article 14 of the decision.

On 15 March 1959 the three joint selling agencies, Geitling, Mausegatt and Präsident, and the mining companies of the Ruhr basin lodged with the Court an application for the annulment (Cases 16/59, 17/59 and 18/59) of certain provisions of Decision No

17/59, and of the letter of the President of the High Authority dated 21 February 1959.

On 17 June 1959 the High Authority adopted Decision No 36/59 (JO of 8.7.1959) partly repealing and partly supplementing decision No 17/59 on commercial rules governing the joint selling agencies for the sale of coal from the Ruhr. Subsequently, the parties drew up additional conclusions noting that the claim that Article 11 of Decision No 17/59 should be annulled had ceased to be relevant, and the applicants lodged an application against Decision No 36/59 (Joined Cases 36, 37 and 38/59).

It should also be borne in mind that the three joint selling agencies lodged an application for an interim measure (Case 19/59 R), namely suspension of the operation of Articles 11 (application of the quantitative criteria fixed by the High Authority for authorizing wholesalers to make direct purchasers from the joint selling agencies) and the second sentence of Article 14(2) of Decision No 17/59 (dispatch of officials of the High Authority with the duty of making inquiries concerning the reorganization of the methods of sale of coal from the Ruhr) until such time as the Court had delivered judgment in Cases 16/59, 17/59 and 18/59.

This request for a suspension of operation was dismissed by the Court (order of 12 May 1959).

On 12 February 1960, the Court delivered its judgment in Joined Cases 16, 17 and 18/59. It noted the applicants' withdrawal concerning point number 8 and declared that the other heads of their conclusions were inadmissible.

Decision No 36/59, which forms the subject-matter of the present case, annuls, as of 1 July 1959, Articles 5 to 11 of Decision No 17/59, but in replaces them by provisions the tenor of which remains unchanged. As it states in the preamble to the new decision, the High Authority, mindful of a judgment of the court (Case 18/57, *Nold* v *High Authority*) which declared that the quantitative criteria in the commercial rules authorized by Decisions Nos 16/57, 17/57 and 18/57 were void because the reasons for them were insufficiently stated, takes the view that it is doubtful whether, having regard to the principles put forward by the Court in its judgment of 20 March 1959, the reasons stated in Decision No 17/59 for authorizing the quantitative criteria in the commercial rules, are sufficient in every respect. Accordingly, Decision No 36/59, which reproduces Articles 5 to 11 of Decision No 17/59 *verbatim* in its operative part, was filled out with a new preamble in which more explicit reasons were stated, having regard to the judgment of the Court in the *Nold* judgment (Case 18/57).

C — *Submissions of the parties*

1. On admissibility

The *defendant* does not dispute the admissibility of the application.

The *applicants* state that the contested decision is individual in character and that it concerns them directly, so that they can raise the grounds set out in the first paragraph of Article 33 of the Treaty.

2. On substance

(a) *On the submission of infringement of an essential procedural requirement*

The *applicants* allege that the statement of the reasons for the decision does not carry conviction and is inadequate in that it fails to mention the facts and considerations on which the decision was based. Thus review by the Court under Article 65 of the Treaty becomes impossible and Articles 5 and 15 of the Treaty are infringed.

The *defendant* denies that this allegation is sound. In fact, in the statement of reasons for the contested decision, the High Authority has explained why the quantitative criteria which it has set are in principle likely to contribute to an improvement of the distribution of fuels emanating from a selling agency. It has also mentioned the chief reasons of substance for which an extension of the quantitative criteria previously enforced could not be entertained. Therefore, the

statement of reasons which complies with the requirements of Articles 5 and 15 of the Treaty and with the case-law of the Court, is open to review by the Court under Article 65.

(b) *On the submission of infringement of the Treaty and manifest disregard for its provisions*

The *applicants* put forward a series of complaints of infringement by the High Authority of Articles 5 and 65 of the Treaty.

1. It has wrongly interpreted subparagraphs (b) and (c) of Articles 65 (2) and has infringed the rules of logic. For the High Authority judges the quantitative criteria proposed by the applicants as having more restrictive consequences than are necessary for an improvement in distribution. Its argument is that those criteria have had the result that a certain number of wholesalers of average size have lost their status as first-hand traders. The said wholesalers had obtained their supplies directly from the sales organizations of the Ruhr basin before the creation of the Common Market.

Thus the High Authority takes the situation prior to the creation of the Common Market as a yardstick for the present rules and contravenes Article 65. The High Authority has manifestly failed to have regard to the provisions of article 65(2)(b). For the best of being 'not more restrictive than is necessary' only comes into play in the case of interrelated agreements which restrict competition and which are not intended to bring about an appreciable improvement in distribution. To make distinctions on the basis of quantitative criteria is therefore permissible in principle in so far as such distinctions do not contravene Article 65(2)(c), which prohibits monopolies, and Article 4 of the Treaty, which prohibits discrimination. The traders already accepted are perfectly able to guarantee all the interests of the applicants concerning sales and it is therefore impossible to increase the number of accepted traders.

2. The High Authority is wrong in saying that in practice most of the first-hand wholesalers retained by selling agencies must also satisfy the requirements laid down for their acceptance by the two other joint selling agencies and that this situation is contrary to the general principle of the independence of the three agencies. This erroneous assertion is not based on any reason other than the fact that first-hand traders obtain their supplies principally from the coal from the Ruhr. This situation is due exclusively to natural causes such as price competition and the transport situation and not to a restriction on competition within the meaning of Article 65 of the Treaty. In the present cases the High Authority has reacted to the facts on which the Court passed judgment in Case 2/56, but those facts do not have anything in common with the present dispute.

3. The High Authority states that under the rules which it is authorizing, and taking into account the number of wholesalers accepted for direct supplies, neither the mining companies nor certain wholesalers will be able to control or limit the sales of a large percentage of fuels. Yet that assertion is neither complemented nor supported, as it ought to be, by the finding that the previous rules were capable of facilitating that control and limitation of sales over a sizeable amount of fuel.

4. The High Authority has wrongly and unwarrantably abolished criterion No 1 (sales of 60000 metric tons of Community coal within the Community). In fact any wholesaler coming within the two other minimum limits (criteria Nos 2 and 3) may, even for small orders, become a first-hand wholesaler without fulfilling any other conditions, despite being in too small a line of business to bring about an improvement in distribution as required by Article 65(2)(a) and (b).

5. The only reason stated by the High Authority for lowering criterion No 2 from 30000 to 20000 metric tons is that but for that reduction certain wholesalers would be excluded who otherwise could have been accepted as first-hand traders because of the scope of their activities. That line of reasoning is incompatible with Article 65 (2).

6. The High Authority has reduced criterion No 3 from 9000 to 6000 metric tons stating as its reason that it considers the said reduction necessary, without more explanation.

7. The High Authority has neglected to inquire into the facts enabling it to arrive at the findings required by Article 65(2). No explanation is given concerning the figures under the old rules nor concerning the number of first-hand wholesalers under the rules now authorized, and in this regard the High Authority has manifestly failed to observe the provisions of the Treaty.

8. The High Authority has contravened Article 5 of the Treaty, according to which it can only act directly on the market when the circumstances so require, and the reasons stated for the decision do not mention such circumstances.

The *defendant* denies that all or any of the complaints set out above are well founded. It answers them by putting forward both general considerations and particular refutations to the arguments raised by the applicants.

Speaking generally, the defendant argues first that under the provisions of Article 65 it is for the applicants, who ask for a restrictive agreement to be authorized, to establish on sufficient evidence that they come within the requirements laid down by the said article for obtaining the benefit of a derogation from the general principle whereby the agreements covered by Article 65(1) are prohibited. For the High Authority's task is merely to note or to find that the prescribed requirements are met and fulfilled in the particular case which is submitted to it. It ill befits the applicants to complain that the High Authority has not produced clear, relevant and concrete facts, proving that its decision is well founded, when they themselves have not produced sufficient factual evidence enabling the High Authority to find or to note that the evidence in question proves that the request for the authorization of a restrictive agreement is well founded.

Secondly, contrary to the applicants' assertion, the High Authority had the right and the duty, in setting the criteria determining the authorization of agreements, to refer to the experience of past years and to draw what seemed to it to be the right lessons therefrom, despite the fact that it had formally authorized the said agreements.

Finally, contrary to the opinion of the applicants, what matters in considering the question whether or not the old quantitative criteria are more restrictive than is necessary for the purpose of the commercial rules is the answer to the further question whether, by reason of lowering the rquirements of the criteria, a new improvement in distribution is achieved, as indeed it is in the present case, for the restrictive effect on competition must be limited to the strict minimum (Article 65(2)(b)).

After having thus put forward general considerations against the applicants' arguments, the defendant denies that the applicants' arguments, which would have it that the Treaty has been infringed, are at all relevant.

The old criteria were discarded by the High Authority because, first, they excluded a certain number of wholesalers of average size which had received direct supplies for a long time in the past, and, secondly, because the aforesaid old criteria compromised the independence of the three joint selling agencies. Thus the High Authority has found that because of their level the old criteria had a restrictive effect which was not necessary for the purpose of the joint-selling arrangement that is to say, the improvement of distribution. It is natural, contrary to what the applicants say, to take into consideration the results of a practice in force for a fairly long period before the establishment of the Common Market during which a limit of 6000 metric tons was applied, in forming an opinion on how restrictive certain criteria are.

The applicants complain that the High Authority has not taken into consideration the fact that the bringing into force of the new criteria did not noticeably alter the number of traders accepted as first-hand wholesalers compared with the previous rules and therefore the reduction in the le-

vel set by the criteria was to no purpose. This observation on the part of the applicants is surprising to say the least because it is in contradicton with all their allegations, and those allegations are to the effect that the number of first-hand traders is reduced.

On the question whether the quantitative criteria existing up till now may be opposed under Article 65(2)(b), the defendant asserts that this involves assessing a situation arising from facts or economic circumstances which are not subject to review by the Court unless the applicants establish that in this particular case there has been a manifest disregard for the Treaty or a misuse of powers. The applicants assertion that such is indeed the position because the contested decision has not been justified by a complete consideration of the circumstances or of important facts is totally unsubstantiated.

Finally, the applicants allege that the High Authority infringed Article 5 of the Treaty in refusing to authorize their agreement, thus exercising a direct action on the market which was not required by the circumstances. This complaint cannot be accepted because it is the joint selling agencies and not the High Authority that exercise a direct action on the market, and moreover, the second paragraph of Article 5 expressly confers upon the High Authority the task of ensuring the establishment, maintenance and observance of normal competitive conditions, and this is why it has refused to approve the proposed agreement, as it is incompatible with the requirements of Article 65(2) of the Treaty.

The defendant asserts that the applicants wrongly attack the case-law of the Court in Case 2/56. It is a fact that 'the High Authority is not required to alter the contents of an agreement which is submitted to it in order for it to qualify for authorization' (Rec. 1957, p. 43).

Thus the High Authority could have purely and simply refused the authorization requested since the applicants have not produced evidence that their agreement fulfils the conditions set out in Article 65 (2) of the Treaty. Nevertheless the High Authority did grant the authorization, while altering the commercial rules in such a way as to remove their restrictive nature. Therefore, in order for the applicants to succeed they must prove that the old criteria do not have the restrictive effects prohibited by Article 65(2) of the Treaty. Moreover the only difference between the facts considered in Case 2/56 and in the present dispute is that in Case 2/56 a particular criterion (25000 metric tons of coal from the Ruhr) expressly required that coal be purchased from the Ruhr prior to acceptance by a joint selling agency, whereas, in the present case, acceptance by a joint selling agency depends on the way in which the old quantitative criteria are revised. Therefore the judgment in Case 2/56 applies in the present case and the old criteria must also be declared illegal because they distort or restrict competition between the three joint selling agencies.

The High Authority alleges that in taking into consideration the experience of the years preceding the establishment of the common market in coal and steel when setting the authorized criteria it did not necessarily contravene Article 65(2)(b) and (c). This is first because from that experience the High Authority only drew one of the numerous factors which it thought fit to take into account together with many others. A further reason why the said article is not necessarily contravened is that there would not appear to be any provision prohibiting the High Authority from making such an investigation in order to help it decide whether or not the criteria fixed in the contested decision, or those proposed by the applicants, meet the legal requirement that they must not be more restrictive than is necessary for improvement in distribution.

The High Authority argues that the applicants are mistaken in asserting that the test of being 'not more restrictive than is necessary' does not apply to interrelated agreements constituting a cartel which are not intended to bring about an appreciable improvement in distribution. For such an interpretation is based on the German version of Article 65(2)(b), the wording of which does not give full force to the thinking set

out in the French version of the said subparagraph (b) which clearly imparts to the mind the fact that it refers to 'the restrictive agreement in question'. The improvement in distribution of which mention is made in subparagraph (a) must be borne in mind not only with regard to the prohibition against monopolies (subparagraph (b)) and against discrimination (Article 4), but also as regards subparagraph (c) which is to the effect that in the agreement in question shall not be more restrictive than is necessary for improvement in distribution.

(c) *On the submission of a misuse of powers*

In the alternative, the *applicant* alleges that the High Authority has misused its powers in refusing to authorize the quantitative criteria used prior to the contested decision. The High Authority has used the powers of authorization conferred upon it in order to attempt to impose a new set of commercial rules which are absolutely different from the old rules. It has thus used its powers for an illicit purpose. The said refusal of authorization is attributable to an illegal purpose, namely the introduction of a policy of aid for the middle classes, which is contrary to Article 65, for that article cannot constitute a basis for an economic or social policy.

The *defendant* denies these allegations. It argues that in lowering the level of the quantitative criteria it has only pursued one purpose, namely observance of Article 65 of the Treaty. The High Authority is not called upon and is not in any way attempting to introduce a policy of aid for the middle classes. However, the High Authority is bound to resist the proposition that powerful cartels on the market may limit direct access by traders to their sources of supply to a greater extent than is justified by the facts, with the result that a certain number of traders of average size are prevented from obtaining direct supplies.

As regards Case 40/59

Conclusions of the parties

The *applicant* claims that the Court should:

'1. Declare that Article 6(1) and (2) of Decision No 36/59 of the High Authority dated 17 June 1959 is void (JO of 8.7.1959, p. 736 *et seq.*);

2. Alternatively, declare null and void or inapplicable the provisions of Article 6 (1) and (2) of Decision No 36/59 of 17 June 1959 (JO of 8 July 1959, p. 736 *et seq.)* in so far as those provisions have the effect of excluding certain traders who, prior to that decision, were considered as first-hand wholesalers from being such.

3. Order the defendant to bear the costs.

The *defendant* claims that the Court should:

'Dismiss the application as unfounded and order the applicant to bear the costs.'

The facts

The facts may be summarized as follows:

By Decisions Nos 5/56, 6/56, 7/56 and 8/56, the High Authority has authorized the coal-mining undertakings of the Ruhr basin to sell their products jointly through three selling agencies and through certain common institutions.

By Decisions Nos 16/57, 17/57 and 18/57, it had reduced the quantitative criteria originally authorized for the acceptance of wholesalers as direct purchasers of coal from those joint selling agencies.

Since all the abovementioned decisions were due to expire on 31 March 1959, the High Authority on 18 February 1959 adopted Decision No 17/59 whereby it prolonged the validity of the rules authorized by the aforesaid decisions but further the quantitative critera laid down for the acceptance of first-hand purchasers from the three joint selling agencies.

By Article 6 of Decision No 17/59, the High Authority required the coal-mining undertakings of the Ruhr basin associated with

the joint selling agencies to abandon the first criterion then applicable (the sale of 60000 metric tons of Community coal within the Community) and to lower the two other criteria from 30000 to 9000 metric tons. According to the new rules, in order to be accepted as a first-hand wholesaler obtaining supplies from one of the joint selling agencies of the Ruhr, the trader must, during the preceding coal year, have sold at least 20000 metric tons of coal from the producer basins of the Community in the sales area for which he is to be accepted. Of those 20000 metric tons, at least 6000 metric tons must have come from the joint selling agency to which he is applying to be accepted for purchasing as a first-hand wholesaler.

After the judgment delivered on 20 March 1959 by the Court of Justice of the European Communities in Case 18/57 between the same parties, annulling Article 2(1)(2)(3) of Decisions Nos 16/57, 17/57 and 18/57 of the High Authority, the latter adopted Decision No 36/59 and annulled Articles 5 to 11 of Decision No 17/59, replacing them by similar provisions, while altering the paragraphs of the preamble referable to those articles.

C — *Submissions of the parties*

1. Admissibility

In its statement of defence, the *defendant* does not oppose the admissibility of the application. However in its rejoinder, the *defendant* alleges that the appplicant, in its reply (paragraph 2), has totally reversed the order of its conclusions. Although the defendant declares that it has no objection to make against this alteration, it points out that the change materially alters the purpose of the claim originally submitted in the alternative that an exception be made to the quantitative criteria of 20000 metric tons and 6000 metric tons in favour of the applicant because of its status as a former first-hand trader.

For this reason, the defendant is opposed to the admissibility of this claim, arguing that it is certainly inadmissible in so far as it calls for a declaration that the contested provisions are inapplicable to certain traders. The reason for this is that under Article 33 the Court may only annul the contested decisions. Moreover, according to the defendant, the other head of the claim originally submitted in the alternative (annulment of Article 6(1) and (2), in so far as that article excludes certain traders from obtaining supplies direct) is a matter concerning which an action for failure to act could have been brought under Article 35, but against which an application for annulment does not lie.

2. As to substance

(a) *As regards the principal claim*

(aa) Infringement of an essential procedural requirement

1. The *applicant* argues that the reasons put forward for the contested decision enable neither the Court nor the interested parties to ascertain whether the rules:

(a) contribute to an appreciable improvement in distribution;

(b) impose restrictions which go beyond what is necessary for achieving their purpose;

(c) render it possible for the producers or traders to control or restrict the marketing of a substantial proportion of fuels;

(d) contravene the prohibition on discrimination.

The applicant argues that in order to prove that the authorized rules meet the requirements set out at points (a) and (b), the High Authority ought to have based its reasons set out in the preamble on numerical data. In view of the fact that an improvement in distribution can only become apparent through an increase in sales or through a reduction in selling costs or through both at the same time, compared with the situation as it stood before the contested rules came in, the High Authority ought to have produced evidence of these matters by means

of figures in the reasons for the said decision, instead of contenting itself with giving reasons of a general order. Similarly, in order to show that the authorized rules do not provide for restrictions which are more severe than is justified by their purpose, the High Authority ought to have justified the correctness of its action on the basis of numerical data which alone make it possible accurately to calculate the effects of the new rules and to explain why the quantitative criteria chosen by the High Authority, (20000 metric tons and 6000 metric tons) must be considered as fair and why it was impossible to set still lower levels.

The applicant also denies that, as is claimed in the preamble to the contested decision, it is only traders distributing at least 20000 metric tons who can successfully hold a large range of different kinds of fuel. Finally, the applicant stresses that the only numerical fact appearing in the preamble concerns the limit of 6000 metric tons. It denies, however, that the said amount was required in all the sales areas because, on the contrary, the factual situation and the quantitative criteria applied in the various sales areas had always been unequal.

The *defendant* objects that it cannot include in its decision detailed predictions as to the effects of a set of rules because to do so could render its work excessively cumbersome and would, moreover, be impossible in most cases, as in the present case. Furthermore, the necessity to give reasons of a general nature for a decision, having regard to the totally divergent interests of the various parties concerned, obliged the High Authority to limit itself to stating reasons of a general order. In the case at issue, it had to explain to the joint selling agencies why it considered it necessary to reduce the quantitative criteria. In any event, according to the defendant, the reasons for the contested decision are sufficient for review by the Court to be possible, and the discussion as to the quantitative effects can be reserved to the proceedings before the Court.

The defendant states, furthermore, that it has already indicated in its preamble the reasons why the maintenance of the quantitative criteria established by Decision No 36/59 is liable to contribute to a significant improvement in distribution (cf. Part II, 6th recital). It has also explained why those criteria are not too restrictive. It has in fact stated the reasons that determined the choice of the chosen criteria: the necessity for the sales of coal of a first-hand trader reaching a given quantity; the line to be drawn between first-hand wholesalers compared with trade at lower levels; the finding that before the establishment of the common market a limit of 6000 metric tons was applied in extensive areas of German territory (cf. Part II, 10th, 11th and 12th recitals).

2. The *applicant* replies that the statement of the reasons for the contested decision discloses the considerations and the conclusions of the High Authority, but not the facts on which it based its decision. Nor, in omitting to put figures on the effects of the rules and on the probable effects of the new rules, does the contested decision permit the applicant to adduce pertinent reasons in support of the other submissions that it might have an interest in submitting.

Starting from these premises, the applicant argues that:

(a) The High Authority has accepted the proposition that the previous decisions were based on an erroneous assessment of the facts. It is not the facts which have changed but their assessment. In reality the High Authority has recognized retrospectively that the old criteria were incompatible with the Treaty.

(b) Without numerical data, it is not possible to determine whether the new assessment is illegal. Numerical data would have meant that any interested party could have checked them. A general statement of reasons must not be confused with the publication of mere general considerations. It was not enough to say that the old criteria had effects that were too restrictive; the nature and the extent of those restrictions should also have been stated.

(c) It should also have been proved that the

authorized restrictions led to a real and significant improvement in distribution because otherwise they would have been incompatible with the Treaty. It is not even possible to examine what the High Authority means by improvement in distribution. If what is meant is an increase in turnover, evidence should have been forthcoming showing why that increase could be the result of fewer and not (as the applicant thinks is the case) more first-hand traders. If what is meant is a lowering of prices to the consumer, evidence should have been forthcoming showing how that result could be achieved by limiting the number of wholesalers. The applicant argues that on the contrary the result is to increase the profits of the joint selling agencies (a purpose for which, in the opinion of the applicant, the Treaty does not provide) because in reality 80% of all tonnage is acquired by first-hand traders that are in some way connected with the collieries.

According to the applicant, to bring about a strict separation between first-hand wholesalers and second-hand wholesalers is not what the joint selling agencies are trying to do. Their real purpose is to do away with the dividing line between producers and first-hand wholesalers by practically eliminating wholesalers independent of the collieries.

To these arguments the *defendant* objects that at the time when it granted the authorization in question, that is to say, before the end of the coal-marketing year 1958–1959, it did not yet have figures available concerning the turnover of first-hand wholesalers for that period and that, therefore, it could not have referred to them in its decisions in any event. It denies, however, that it was necessary to make matters more clear with figures, arguing that the applicant is getting confused between figures and facts.

The defendant adds that it was not possible to predict what the effects of the new rules would be with enough accuracy, particularly since not all traders who meet the requirements for acceptance as first-hand traders are willing to give up their activities as second-hand traders. As regards second-hand traders it is not possible to follow their sales because there are so many of them (about 500 in the Federal Republic). Nor do the joint selling agencies have this information because they only come into contact with first-hand traders.

Finally, the defendant again asserts that sufficient reasons stating why the new rules contribute to an improvement in distribution have been given in the preamble. However, it does not directly refute the arguments put forward on this point by the applicant in its reply.

(bb) Infringement of the Treaty and misuse of powers

The *applicant* bases all its complaints on infringement of Article 65(2)(b) of the Treaty.

(a) It argues that the rules authorized by Decision No 36/59 have the effect, in its sales area, of excluding it alone from being a first-hand trader. Thus, under the guise of a set of general rules, a decision has been taken which concerns the applicant alone. It complains that the High Authority has failed in its duty to weigh the facts, because, in those circumstances, the contested rules cannot possibly bring about significant improvements in the distribution of coal. That in turn means that in eliminating the applicant the High Authority is at the same time creating a restriction which is more severe than is required by its purpose.

Improvement in distribution is a condition precedent for authorization. The burden of proving that it is met therefore lies with the High Authority.

(b) It asserts that while there may be some justification for a joint selling agency's requiring that a trader sells a minimum quantity of its production, there is nothing to justify the further requirement that it must have sold large quantities of goods from other sources. At all events the commercial organization necessary for the sale of 4000 or 5000 metric tons

of coal suffices to class the trader as a wholesale trader.

After mentioning the problem of the sale of brown coal, the applicant denies the proposition that a trader may be required to sell brown coal as well in order to be accepted as a first-hand trader.

(c) It asserts that the quantitative criteria in force in the sales area of the Oberrheinische Kohlenunion before the establishment of the Common Market could be achieved much more easily because at that time no direct supply to large-scale users took place, and the latter therefore had to go through first-hand traders.

(d) It asserts that the coal crisis, which has meant a reduction in sales, would have justified a subsequent reduction of the quantitative criteria quite apart from the complaints against the old criteria. Accordingly, not even the historical criterion of 6000 metric tons, which was justified before the entry into force of the Common Market, is justified now. Moreover the fact that a certain number of traders have gone under may aggravate the crisis, for it may be that their former customers stop using coal and go over to oil.

It argues that the authorized commercial rules not only involve a restriction more severe than is necessary for their purpose, at least as regards the limit of 20000 metric tons, but also involve discrimination against the applicant which is eliminated without justification.

It seems a contradiction between the justification of the criterion of 20000 metric tons given in the contested decision (p. 738), according to which that limit ensures that first-hand wholesalers shall have a large range of categories and types available, and the allegation in paragraph 25 of the statement of defence, according to which a wholesaler may doubtless content himself with selling coal obtained exclusively from the joint selling agency by which he wishes to be accepted, although each joint selling agency has only certain products available.

It sees a further contradiction in the reasons given in Decision No 36/59 for the limit of 20000 metric tons, in that the High Authority makes special reference to past usage in justification of the criterion of 6000 metric tons, saying that such was the criterion used in the Ruhr before the establishment of the common market. Yet that very past usage speaks out against the new limit of 20000 metric tons which did not exist at that time.

It asserts that the High Authority is not unaware of the fact that in practice coal sold in the Federal Republic comes exclusively from the Ruhr because other basins are too far away. The result of this is that the criterion of 20000 metric tons means in practice that German first-hand traders must sell 20000 metric tons of coal from the Ruhr. Therefore, the criterion of 20000 metric tons required for acceptance by a selling agency is in reality a means, in practice, of making it necessary to purchase from the other joint selling agencies of the Ruhr. Accordingly, the existence of genuine competition between those three joint selling agencies would appear at least to be doubtful.

With a view to refuting the arguments of the applicant, the *defendant,* after having stressed the position of the applicant and the reasons for which it is excluded from being a first-hand trader, bases itself in the main on the considerations relating to the applicant's special situation.

It stresses in particular that:

(a) The applicant fails to understand the purposes of the double limit. The purpose of the limit of 20000 metric tons is to establish the sales capacity of a wholesaler, and the other limit (6000 metric tons) would not be adequate because it is at too low a level. A further point is that it is not true that it is neces-

sary to have sold different types of coal, brown coal and coke.

(b) It is true that in the applicant's sales area a limit of 24000 metric tons was applied before the establishment of the Common Market, whereas a limit of 6000 metric tons was applied on the rest of German territory. There can be no possible justification for the applicant's attacking the limit of 6000 metric tons merely because its turnover has now fallen.

(c) The fall in the volume of the applicant's business is not to be explained by the commercial rules organized by the High Authority, because those rules provide that all users consuming less than 30000 metric tons per annum must address themselves to the traders. Moreover, in Southern Germany, users consuming more than 30000 metric tons were allowed to obtain supplies direct even before the rules authorized by the High Authority were adopted.

(d) The coal crisis and competition from oil cannot explain the fall in the applicant's turnover. Moreover the general reduction in the consumption of coal is not comparable with the contraction of the applicant's business. The very purpose of the new rules was to favour direct access by independent traders. In fact, since the new rules came into force thirty-nine new traders have been accepted for direct trading. That number would be higher if all the second-hand traders that satisfy the new quantitative criteria had asked to be accepted. Rather more than half of the 340 wholesalers formerly accepted were in some way connected with the collieries. Now that the new rules are in force (32 of the new traders are independent) more than half the traders are independent. As regards turnover, there still exists a preponderance of wholesalers connected in some way with the collieries, which sell two-thirds of the coal from the Ruhr. These facts suffice to refute the applicant's assertion that only traders connected with the collieries could fulfil the necessary conditions.

(e) It is true that before the establishment of the common market the selling agencies of the Ruhr applied no criterion other than that of 6000 metric tons over a large part of the Federal Republic. However it should not be forgotten that in Southern Germany the criterion was 24000 metric tons. The considerations giving rise to the criterion of 20000 metric tons is a distinction in functions to be made between the different stages of commerce. There exist quite a few second-hand traders who manage to sell as much as and more than 20000 metric tons, as is proved by the fact that there have been thirty-nine new acceptances.

(f) Even though each joint selling agency only sells coal, the coal comprises a large range of categories and types.

(g) The applicant's argument that the limit of 20000 metric tons in practice means that dealers must purchase these tonnages from other joint selling agencies of the Ruhr is unfounded. That argument was correct as regards the tonnage of 60000 metric tons and it has in effect been used by the High Authority (Decision No 36/59, II 9th recital), but it is not correct as regards the limit of 20000 metric tons. The reason for this is that, although it is true that in Germany it is mainly coal from the Ruhr that is sold, sales of brown coal, coke and coal from other basins may make up a sizeable part of the limit of 20000 metric tons. In these circumstances, the criterion of 6000 metric tons is justified, because the trader is not required to fulfil to an identical extent the conditions of acceptance of the three joint selling agencies in order to be accepted by just one of them. The fact that of thirty-nine newly accepted traders, twenty-five have been accepted by only one joint selling agency constitutes proof of this assertion.

(b) *Concerning the alternative claim*

In support of its *alternative claim* the *applicant* argues that a distinction should be made between a new trader and an under-

taking that has long since had the status of a first-hand trader. To continue to make supplies available to the previous first-hand traders has no unfavourable or discriminatory effects on anybody. First, wholesalers at present accepted and continuing their activities would not suffer any loss because they would remain accepted and, secondly, because the conditions would not be the same as between wholesalers accepted up to the present and any new candidate for acceptance as a first-hand trader by reason of the fact that the former have an acquired situation which the latter do not.

In support of its right, in its capacity as a previous first-hand trader, to continue to obtain supplies direct from the joint selling agency, the applicant refers to German case-law and in particular to a judgment of the Bundessozialgericht. That judgment says that Article 14 of the Basic Law of the Federal Republic guaranteeing private property also extends to rights protected under paragraph 823 (1) of the German Civil Code, and in particular to a 'commercial undertaking which is established and carries on business'. Since it is a fundamental right which is involved, the applicant stresses the necessity of interpreting the provisions of the ECSC Treaty in such a manner that they do not conflict with that principle of national law.

The *defendant* objects that the advantages of a provision making an exception in favour of the applicant would be contrary to the provisions in Article 4(b) of the Treaty, because this would inevitably lead to discrimination against second-hand wholesalers who transact the same amount or a higher amount of business than the applicant, but who would only be accepted if they fulfilled the general quantitative criteria. The High Authority argues that is cannot legally require the collieries to agree to sell to traders which only distribute very low tonnages because to provide for that exception could not contribute to an improvement in distribution. Finally, it would be contrary to the principles of competition to give wholesalers a guarantee of being kept on as first-hand traders regardless of any fall in their turnover. The High Authority also refers to the argument put forward on this point in the procedure in Case 18/57 (Rejoinder, p. 8 *et seq.*).

As regards the reference to German law, the defendant also denies that the applicant has a personal right to obtain supplies direct from the joint selling agencies of the Ruhr on the basis of the German legal system. In fact German law does not impose any obligation to sell in the circumstances under discussion and therefore the applicant cannot have any right to make direct purchases from the joint selling agencies. Furthermore, the exclusion of the applicant from first-hand trading cannot in any way be assimilated to an expropriation. The High Authority states that at most one could consider Article 26 of the Law prohibiting restrictions on competition. According to the defendant, that provision establishes the same principle as the one set out in Article 65(2) of the Treaty, and thus it leaves it open to sales organizations to make direct access by wholesalers subject to objective quantitative criteria.

D — *Measures of inquiry*

By letter of 18 February 1960 the Court invited the defendant to reply to six questions.

By order of 24 March 1960, the Court, acting upon a request by the defendant and in consideration of the professional secrecy incumbent on the High Authority by virtue of Article 47 of the Treaty, authorized the latter to omit the business or company names and registered offices of the various wholesalers in coal in its reply to the second question.

The replies to the six questions were duly produced.

E — *Procedure*

The procedure in each of the cases considered in this report followed the normal course and took place within the prescribed periods.

Grounds of judgment

I — Preliminary considerations

The joint selling agencies of the Ruhr, on the one hand, and the Nold undertaking, on the other, attack the same decision of the High Authority although by reason of different interests and for opposite purposes.

The submissions put forward by these applicants, although drawn up for divergent aims, are strictly speaking analogous.

In order to avoid the possibility that two different judgments might lead to discordant interpretations, the Court deems it expedient to join the cases in question so as to deliver a single judgment.

II — Admissibility

The applications brought by the joint selling agencies of the Ruhr were lodged in compliance with the prescribed formalities. Their admissibility is not disputed and does not give rise to any objection by the Court of its own motion.

Therefore they are admissible.

The application submitted by the Nold undertaking is in due form and has been lodged within the prescribed period.

The applicant has submitted two sets of conclusions, one as main conclusions and the other in the alternative.

Before examining the main conclusions it should be noted that the Nold undertaking has stated that its interest in the annulment of the contested decision would disappear or serve no useful purpose were its alternative claim for a derogation of the rules at issue in favour of previous first-hand traders to be accepted.

The applicant supports its arguments with German case-law on the interpretation of Article 14 of the Basic Law of the Federal Republic, which guarantees private property.

It is not for the Court, whose function is to judge the legality of decisions adopted by the High Authority and, as obviously follows, those adopted in the present case under Article 65 of the Treaty, to ensure that rules of internal law, even constitutional rules, enforced in one or other of the Member States are respected.

Therefore the Court may neither interpret nor apply Article 14 of the German Basic Law in examining the legality of a decision of the High Authority.

Moreover Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights.

In these circumstances, the alternative claim put forward by the Nold undertaking is not admissible, whereas the admissibility of the principal claim is not disputed by the defendant and does not give rise to any objections by the Court of its own motion.

III — Substance

A — *On the submission as to infringement of an essential procedural requirement*

The joint selling agencies and Nold, each in respect of the elements of the contested decision with which they are not content, put forward the submission of infringement of an essential procedural requirement, asserting that the necessary reasons are wanting or are faulty.

After prohibiting (Article 65(1)) cartels in a general way, the Treaty confers upon the High Authority (Article 65(2)) the power to authorize specialization agreements or joint-buying or joint-selling agreements, but subjects the exercise of that power to a finding by the High Authority that the conditions set out in subparagraphs (a), (b) and (c) of paragraph (2) are met.

That finding, by its very nature, comprises an assessment of the situation created by the economic facts or circumstances and, accordingly, is partially outside the jurisdiction of the Court.

The obligation to state specific reasons for decisions granting authorizations is rendered necessary and must be strictly observed by reason of the fact that review by the Court is limited and that the authorization requested is subject to the finding by the High Authority that the conditions set out in Article 65(2) exist and are met.

Those reasons must enable the interested parties and, in the event of legal proceedings, the court, to verify the factors by virtue of which the High Authority concluded that the conditions required for obtaining its authorization were met so as to be able to examine whether that conclusion was right both in fact and in law.

1. Refusal to authorize the criterion of 60000 metric tons

The reasons which led the High Authority to refuse authorization of this criterion are set out, generally, in the third, fourth, seventh and eighth recitals and, more explicitly, in the ninth recital in Part II of the statement of reasons.

It is evident that the combined effect of the criterion of 60000 metric tons appearing in each of the three agreements in question would in practice lead to a large extent to 'taking into account the Quantities bought from the other two joint selling agencies in each case' (Judgment in *Case 2/56, Geitling* v *High Authority*, Rec. 1957, p. 43). The said criterion therefore tends to prevent, restrict or distort competition between the joint selling agencies, and this renders it more restrictive than is necessary and permissible for the purpose of a scheme based on the neutral independence of the three agencies.

The agencies complain that the High Authority has omitted to state the reasons for which it did not even consider reducing this criterion.

Although it is true that the decision does not state explicit reasons on this point, it appears from the context of the decision that in the opinion of the High Authority the other two criteria suffice to ensure an appreciable improvement in distribution, such that the point of balance between the favourable and unfavourable effects of the agreement is best obtained by abolishing the criterion of 60000 metric tons and by maintaining, in principle, the other two criteria.

For these reasons the complaint is unfounded.

2. *Maintenance in principle and the alteration of the amounts of the criteria of 30000 (20000) and 9000 (6000) metric tons*

The Court considers that, in view of the interdependence of these two criteria, it is appropriate to examine the complaints concerning them together.

A – The considerations put forward on this matter in the statement of reasons (Part II), in so far as they are clearly expressed, may be summarized as follows:

(a) As regards the justification in principle for these criteria:

the application of such criteria is likely to improve the distribution of the fuels of a joint selling agency, in particular by preventing the distribution network from being insufficiently distended (cf. fifth and sixth recitals);

the criterion of 30000 (20000) metric tons makes it possible to limit direct trading to distributors who, by reason of the widespread scope of their business and in particular of the fact that their business includes a large range of categories and types of coal, may be considered as first-hand wholesalers (cf. tenth recital);

therefore the said criteria satisfy the conditions required by Article 65(2)(a) of the Treaty and they contribute to a substantial improvement in the distribution of fuels (cf. fourth recital);

(b) Concerning the justification for reducing the amount of these criteria to 20000 and 6000 metric tons respectively:

generally speaking, and taking into account experience acquired during the course of the last few years, the amounts of the tonnages proposed by the agencies tend to give rise to commercial effects which are more restrictive than is necessary for an improvement in distribution (cf. third, fourth, seventh, and eighth recitals);

the effect of the amount of 30000 metric tons is to exclude traders who, when the volume of their business is considered, may be regarded as first-hand wholesalers (cf. tenth recital);

the reduction of the amount of 9000 metric tons is justified by the fact that prior to the establishment of the Common Market the selling organizations of the Ruhr allowed direct supply to any trader distributing 6000 metric tons of coal from the Ruhr per annum (cf. eleventh recital);

therefore it was necessary to reduce the criteria proposed by the agencies because they were more restrictive than was necessary for the purpose of the agreements in question and because they made it possible for either the agencies or the distributors to control or limit the outlets of an important part of the produce (cf. fourth, seventh and eighth recitals).

B — Although it cannot be denied that certain quantitative restrictions may 'make for a substantial improvement in distribution' in so far as they facilitate effective and rational sales, it remains to be seen whether the High Authority has shown first that the quantitative limits which it has authorized make for an improvement in distribution, secondly whether they are not more restrictive than is necessary for the purpose of the agreement authorized and, finally, whether convincing reasons have been given for reducing the criteria from 30000 to 20000 metric tons and from 9000 to 6000 metric tons.

It is therefore necessary to proceed to a more searching inquiry based on the following considerations:

(a) Why is the interrelated maintenance of a 'Community coal' criterion and an 'agency coal' criterion essential in order to ensure an improvement in distribution?

(b) Why do acceptable expectations in an improvement in distribution depend on distributors accepted as direct traders having available 'a large range of categories and types'?

(c) Why — supposing indeed that this is the case — has the High Authority not considered that the clause approved by Article 6(3) of Decision No 17/59 as altered by the contested decision is sufficient?

(d) Have sufficient reasons been given for the reduction of the 'Community coal' criterion from 30000 to 20000 metric tons?

(e) Have sufficient reasons been given for the reduction of the 'agency coal' criterion from 9000 to 6000 metric tons?

As to (a) The statement of reasons for the decision, after justifying the principle of quantitative criteria by asserting that they make effective and rational sales possible, explains the specific function of the 'Community coal' criterion using arguments based on the extent of the traders' businesses, whereas in order to point out the value of the 'coal from the selling agencies' criterion, the High Authority does no more than state that the said criterion 'does not give rise to any objection of principle concerning the basis of furnishing supplies'.

From this it is to be concluded that in the opinion of the High Authority the specific purpose of the criterion of 'agency coal' is to reduce the distribution network, whereas the criterion of 'Community coal' serves a different interest, namely keeping certain distributors out of direct trading where they do not meet the conditions required for being first-hand traders.

Turning to another matter, the High Authority, in its answer to the fifth question put to it by the Court on 18 February 1960, after stressing the fundamental difference, which indeed is not disputed, between wholesale and retail trade, asserts that 'as regards wholesale trade, that is to say, first-hand trading and second-hand trading, there is no difference as regards the customers'.

In that same document it is asserted that 'the reason for the distinction between those two categories is to promote the rationalization of distribution by limiting the number of first-hand traders with which the joint selling agencies deal directly'.

It appears from that explanation that the distinction between first-hand trading and second-hand trading does not correspond to objective technical or economic requirements, but only to a traditional practice.

The advantages which the agencies may derive from trading with the lowest possible number of wholesalers do not constitute a sufficient reason to justify the restriction which is thereby imposed on trade, particularly since the very purpose for which the selling agencies have been created is to take away from the mines the effort involved in organizing the sale of their products on a commercial basis and

their function, which is to furnish wholesalers with supplies, constitutes the essential reason for their authorized joint-selling agreement.

Turning to another point, the applicant Nold argues that in fact the limit of 20000 metric tons forces traders to make purchases from the three agencies.

In the reasons given for the contested decision, the High Authority had found that the criterion of 60000 metric tons, which it abolishes, in practice has the effect of forcing most of the traders wishing to obtain the status of first-hand traders to get on to the books of the three agencies. The reason for this was the fact that in a large number of cases and in particular in certain sales areas, it is only coal from the Ruhr which is consumed. Thus, that criterion — as the High Authority stated — led 'to restricting the independence of the joint selling agencies'.

The independence of the three agencies is an essential prerequisite of the authorizations for joint sales under discussion. Any restriction liable to jeopardize it must be prohibited.

The criterion of 20000 metric tons, although less restrictive than the former criterion, still has the advantage noted above although to a lesser degree.

In effect, the authorized agreements tend, through the mechanism of the 20000 metric tons clause, to favour in general, or at least in fact, purchases of coal from the Ruhr, because if a trader does not purchase the 20000 metric tons from one agency, while wishing to continue to purchase the minimum of 6000 metric tons so as to remain eligible for acceptance by that agency, he is forced, in most cases, to purchase the remainder of 14000 metric tons from the other agencies.

Thus, through the combined effect of the three parallel agreements, the agencies mutually favour each other, and this is contrary to that competition which ought to exist between them and which is the very basis for the authorization granted.

Although it appears from information produced by the defendant in its answers to the questions put by the Court that a certain number of accepted traders have not been obliged to get themselves entered in the books of the three agencies in order to achieve the limit of 20000 metric tons, it is to be noted that those particular traders not only sell coal but also brown coal and coke.

Since that possibility, or advantage, is not open to traders who only purchase coal, the latter are in most cases forced to purchase at least 20000 metric tons from just one agency or to make purchases from the three agencies.

As to (b) Although restriction of direct deliveries only to customers placing orders of a largish amount with the agency concerned is obviously capable of promoting

the rationalization of sales, nevertheless it is not proven that the extent of the range of categories and types of coal held by the traders manifestly constitutes a criterion for limiting the number of traders accepted for the advantage of direct purchases from the mines.

The Court, without judging the soundness of that criterion, is of the opinion that more specific and fuller reasons should be forthcoming before it is applied.

As to (c) Even if it should be established that it is necessary to limit direct deliveries from the mines to traders holding a wide range of categories and types, the question arises why the provision in Article 6(3), as amended, of Decision No 17/59, was not considered sufficient in that respect, because that provision, which is not contested in the present applications, allows the agencies to refuse to sell to traders who cannot show that they hold such a range of categories and types, and this is regardless of any qualitative criterion.

The statement of reasons does not include any worthwhile information on this point.

It results from the foregoing that the maintenance of the criterion of 30000 (20000) metric tons is not supported by sufficient reasons at law.

As to (d) As the Court has found above that insufficient reasons have been given for the authorization of the criterion of 'Community coal', the aforementioned insufficient reasons do not render it any the more possible to assess the question whether the High Authority was justified and within its rights in reducing that criterion from 30000 to 20000 metric tons.

Therefore the complaint put forward by the agencies on this point must be accepted and upheld.

As to (e) In support of the reduction of the criterion of 'agency coal' from 9000 to 6000 metric tons, the statement of reasons only says 'that this tonnage is established taking into account the fact that prior to the establishment of the Common Market the agencies for the sale of coal from the Ruhr accepted for direct supplies a wholesale trader distributing 6000 metric tons of coal from the Ruhr per annum'.

This line of reasoning is irrelevant.

The mere reference to rules in force prior to the establishment of the Common Market is not conclusive because it is obvious that noticeably different situations are involved, and that without specific justification it would be wrong to treat as on the same footing:

a set of rules governing a national market and a set of rules governing a considerably enlarged market;

a set of rules adopted at a time of normal supply and demand or even of scarcity with a set of rules adopted in a period of plenty;

a set of rules established under an occupation régime and a set of rules envisaged in a period of normal political conditions.

Since the reduction of the criterion of 'agency coal' is not supported by sufficient reasons at law, the complaint raised against it by the agencies must be upheld.

It therefore becomes superfluous to examine the complaint put forward by Nold against the same criterion.

B — The submissions as to infringement of the Treaty and misuse of powers

Taking into account the grounds set out above, it is not necessary to examine the other complaints made by the applicant parties with the exception of the complaints made by the agencies concerning the criterion of 60000 metric tons other than the complaint already rejected above, and the complaint of misuse of powers.

1. *The complaint of infringement of the Treaty*

The High Authority may only authorize specialization agreements or joint-buying or joint-selling agreements if it finds that the requirements laid down by Article 65(2) exist and are met.

The High Authority considered that it was its duty to abolish the criterion of 60000 metric tons, having found that the said criterion tended to prevent, restrict or distort competition between the agencies, and that this not only meant that the authorized agreement was more restrictive than was necessary for its purpose but also that it did not meet the requirements of Article 65(2)(c).

The High Authority, having justified that abolition by a sufficient and appropriate statement of reasons, has not infringed the provisions of Article 65.

The agencies have failed to furnish proof of their allegation.

2. *The complaint as to misuse of powers*

The agencies allege in the alternative that there has been a misuse of powers by reason of the refusal of the High Authority to authorize the quantitative criteria in force prior to the contested decision. It is asserted that the High Authority has

used the powers of authorization conferred upon it in order to attempt to impose a new set of commercial rules absolutely different from the former rules. It has thus used its powers for the illicit purpose of implementing a policy of aid to the middle classes, and this is contrary to Article 65, for that article cannot constitute a basis for an economic or social policy.

The defendant denies those allegations. It argues that in lowering the level of the quantitative criteria it has pursued one purpose only, namely conformity with Article 65 of the Treaty.

The allegation of the agencies cannot be entertained.

They do not produce proof that the new commercial rules have been imposed by the High Authority for a purpose other than that in respect of which powers of authorization have been conferred upon it by Article 65 of the Treaty.

Nothing proves, establishes or even suggests as against the High Authority that it pursued a policy of aid to the middle classes. No act is advanced in that regard by the agencies which gives a shadow of truth to their assertion. The fact itself that a rather small number of traders of average size can have access to the sources of production and are not excluded from direct supplies cannot of itself be evidence of a policy of aid to the middle classes. Moreover, such a policy could only be presumed from a sufficiently specific set of conditions and circumstances which are lacking in the present case.

Therefore this submission is unfounded.

Costs

Article 69 of the Rules of Procedure provides that the unsuccessful party shall be ordered to pay the costs and that the Court may order that the parties shall bear their own costs in whole or in part where they fail respectively on one or several heads.

Since each of the parties has failed in part to substantiate its conclusions costs must be awarded as stated in the operative part of the judgment below.

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 4, 5, 14, 15, 31, 33, 65 and 80 of the Treaty establishing the European Coal and Steel Community;
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,

THE COURT

hereby:

1. **Declares that Applications Nos 36/59, 37/59 and 38/59 are admissible;**

2. **Declares that Application No 40/59 is admissible with the exception of its conclusions in the alternative;**

3. **Annuls Article 2 of Decision No 36/59 of the High Authority of 17 June 1959, in so far as it replaces Article 6 (1) and (2) and Article 9 of Decision No 17/59 of the High Authority of 18 February 1959;**

4. **Orders that in Cases 36/59, 37/59 and 38/59 the defendant shall bear its own costs and half of the costs of each of the applicants, the remainder to be borne by the latter;**

5. **Orders that the costs in Application No 40/59 shall be borne in the same proportions.**

Donner Delvaux Rossi
Riese Catalano

Delivered in open court in Luxembourg on 15 July 1960.

A. van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 24 MAY 1960[1]

Summary

1 — Translated from the French.