of that decision its application has become purposeless within the limits settled by that decision;

THE COURT

hereby:

**I. In Case 7/54**

**(a) Declares that there is no need to proceed to judgment on the first head concerning the Office Commercial du Ravitaillement;**

**(b) Dismisses the application on the second head concerning the Caisse de Compensation attached to the Office Commercial du Ravitaillement;**

**Orders the main parties to bear their own costs;**

**Orders the applicant to bear the costs of the intervener.**

**II. Declares that there is no need to proceed to judgment in Case 9/54;**

**Orders the parties, including the intervener, to bear their own costs.**

Pilotti Rueff Riese

Serrarens Delvaux Hammes van Kleffens

Delivered in open court in Luxembourg on 23 April 1956.

M. Pilotti
President

J. Rueff
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,*

I have the honour to deliver my opinion in Joined Cases 7 and 9/54, Groupement des Industries Sidérurgiques Luxembourgeoises, *applicant*, v the High Authority of the European Coal and Steel Community, *defendant*. Immediately following this I shall examine Joined Cases 8 and 10/54, Association des Utilisateurs de Charbon du Grand Duché de Luxembourg, *applicant*, v the High Authority of the European Coal and Steel Community, *defendant*.

A. I. I shall first briefly go over again the subject-matter of the applications and the course of the procedure which the Judge-Rapporteur and the representatives of the parties and of the intervener have set out in detail, with emphasis on the submissions which were last put forward.

Application 7/54 was directed against a failure of the High Authority to act and claimed that the High Authority required to take action in two different respects: first because of the activities of the Office Commercial du Ravitaillement as the sole importer of coal and secondly because of the activities of the Caisse de Compensation for domestic solid fuels.

The High Authority took a decision with regard to the first head of claim after the application had been lodged. The applicant stated in its reply that there was no need to proceed to judgment on this head of claim and concluded that the Court should order the defendant to bear the costs. In its defence the High Authority proposes that in the first place the application should be examined as to admissibility; If the application is found admissible it also claims that the Court should not proceed to judgment on the substance of the case with regard to the Office Commercial du Ravitaillement. These conclusions are still maintained today. The parties therefore agree that the Court should not deliver judgment on the substance of the first head of claim, the activities of the Office Commercial du Ravitaillement.

The factual and legal situation has also changed during the proceedings with regard to the second head of claim, the activities of the Caisse de Compensation. The High Authority at first refused to take action by means of an express decision after Application 7/54 had been lodged. This fact prompted the applicant to lodge a second application, Application 9/54. Application 9/54 puts forward primarily the

same conclusions as Application 7/54. In addition and in the alternative the applicant also claims that the Court should annul the express refusal of the High Authority, if the decision of refusal must be considered to be a decision which may be contested independently. The Court of Justice joined Application 9/54 to Application 7/54. A further change was caused by the fact that the Luxembourg Government altered, with effect from 2 April 1955, the activities of the equalization fund and the system for the subsidy on domestic fuel. Since the alteration occurred after the applicant had lodged its reply, the applicant could only adopt a viewpoint thereon after the closure of the written procedure. It did so stating that it only requests a decision on the substance of the case with regard to the former rules which were in force until 2 April 1955. Without accepting that the new system introduced on that date is compatible with the Treaty—on the contrary it describes it as being in breach of the Treaty—it does not extend its conclusions to that new system. The applicant acknowledges that its application also became purposeless as from 2 April 1955 with regard to the second head of claim. The High Authority contends with regard to this head of claim that the Court should declare that Application 7/54 has become purposeless by virtue of its express refusal and that the Court should in any case dismiss this application and Application 9/54 as unfounded. The conclusions of the Luxembourg Government which has intervened in both cases are in accordance with the conclusions of the High Authority and contend that the applications should be dismissed.

I shall now summarize:

Only a decision on the question whether the High Authority was required to taken action against the system for the subsidy on domestic fuel which was introduced by the Luxembourg legislature and was in force from 1 April 1954 to 1 April 1955 is still requested in the Case.

Before it is possible to start the examination of the substance of the case the question of the admissibility of the application must be settled. Even the statement that there is no need to proceed to judgment presupposes the admissibility of the application which, moreover, is important for the decision as to costs. Therefore a series of procedural questions must first be examined.

II. Several objections have been raised to the admissibility of Application 7/54.

1. The High Authority points out that two claims are contained in the application which in its opinion must be separated in law and in fact. However, it is impossible to argue that there is no factual connexion. In fact, objections are raised to two activities of the same institution established under Luxembourg public law, the import monopoly of the Office Commercial du Ravitaillement and the powers of the Office Commercial du Ravitaillement to increase the prices of industrial coal. The Caisse de Compensation has no legal personality of its own but merely serves to make the technical arragements for the intended subsidy. In my opinion this factual connexion is sufficient to permit the joinder of both heads of claim in one application. This is no way precludes a decision to the contrary. The improper joinder of two applications which, viewed individually, would be admissible, could not result in the inadmissibility of both applications either but only in an order by the Court to disjoin them. In any case, owing to the fact that the Court will not proceed to judgment on the first head of claim it would, in the interests of the dispatch of procedure, be no longer justifiable to order the two heads of claim to be disjoined, especially since important procedural questions arise on both in the same way. Finally, the Court of Justice has for its part already joined the two applications, 7/54 and 9/54.

The application is therefore not inadmissible from this point of view.

2. The Luxembourg Government as intervener contests the applicant's capacity to institute proceedings, because the dispute relates to coal and the applicant association is only a consumer thereof. The question arose during the hearing on the application to intervene and in the present oral

procedure whether the intervener may put forward further submissions which have not been invoked by the main party which it is supporting. This question need not be decided here for two reasons: first, it is not a submission but an argument in support of the conclusion requesting that the applications be dismissed; secondly it, is also necessary for the Court to consider of its own motion whether the applicant has the capacity to institute proceedings, as the applicant has also admitted, so that this argument is only a suggestion that the Court should examine this point.

It is necessary in this case to refer to Articles 33, 35, 48 and 80 of the Treaty for the purpose of deciding whether the applicant has the capacity to institute proceedings. Article 80 refers to undertakings engaged in production in the coal or the steel industry. This obviously means not only undertakings which produce both coal *and* steel at the same time; the provision must rather be understood as meaning that it relates to undertakings which produce either coal or steel or both. This definition applies to the whole Treaty, in other words also to Articles 48, 33 and 35. The applicant association is an association of steel producers and is therefore one of the associations entiled to institute proceedings. It is impossible to deduce from these provisions that the subject-matter of the dispute can be restricted according to the production of the individual undertaking. In an extreme case, for example where a steelproducing undertaking contests rules which relate exclusively to the coal-producing undertakings of the Community it might be possible to deny the applicant's legal interest in instituting such proceedings in spite of its capacity to do so. In this case, however, there is no need for any explanation to show that such an interest exists here. Moreover, in accordance with the scheme of the Treaty such a case would already be excluded by the fact that decisions which are individual in character must *concern* the applicant and general decisions must involve a misuse of powers *affecting it* in order that the latter may contest them. I shall return to this argument later from these angles.

However, there is no ground for the inadmissibility of the application which has been lodged merely because of the applicant's capacity as an association of steel producers.

3. The special nature of the application which has been lodged may require that further conditions be satisfied and these must be examined of the Court's own motion.

The application is first for the annulment of the implied decision of refusal which is to be inferred from the silence of the High Authority. This request is based on the third paragraph of Article 35 of the Treaty; the application is therefore a so-called action for failure to act. Where the applicant further claims that certain activities of the Office Commercial du Ravitaillement and of the Caisse de Compensation should 'consequently' be prohibited, this conclusion is inadmissible. According to the scheme of the Treaty the Court of Justice cannot declare in the case of an action for failure to act that the High Authority is under a duty to take certain action. The matter must rather, under Article 34 of the Treaty, be referred back to the High Authority in the case of annulment and the High Authority must then take action on the basis of that judgment, as indeed the applicant has stated in the oral procedure. Thus if the application is an action for failure to act under Article 35 of the Treaty, it is necessary to consider whether this provision lays down in addition special conditions for an application of that nature and, if necessary, whether these have been fulfilled.

This case involves the question under what conditions and by whom an action may be brought against the High Authority on the ground of failure to act. Generally speaking, it is necessary to explain the relationship between Article 33 and Article 35. The answer which the Court of Justice will give to that question will not only decide the present cases but will also be of fundamental importance for the future. Since this problem has arisen for the first time in these cases it is appropriate to examine it in detail.

Starting first with the wording of Article 35, it follows that the first two paragraphs do not mention proceedings but only the

power to raise the matter with the High Authority. Only the third paragraph thereof mentions proceedings without specifying the nature thereof. That paragraph states only against what these proceedings are directed—a decision of refusal inferred from a failure to act—, after how long the refusal of the complaint is inferred—two months—, and that the period within which proceedings must be instituted is one month. In order to be able to infer a decision of refusal which may be contested it is therefore necessary to raise the matter with the High Authority beforehand in accordance with the first or second paragraph. The conditions for instituting proceedings are, so to speak, set out here in advance in the conditions for validly raising a matter with the High Authority. Not every 'request' directed to the High Authority grants the right to institute proceedings if there is a failure to act. For nobody is prevented from making comments and suggestions to the High Authority. Under the second paragraph of Article 46 not only undertakings but also workers, consumers, dealers and their associations are entitled to present any suggestions or comments to the High Authority on questions affecting them. These could certainly also consist in the claim that the High Authority is required to adopt this or that measure. However, only 'States, the Council, undertakings or associations' have the right to make a request within the meaning of Article 35 and consequently the right to institute proceedings if that request is refused and indeed 'as the case may be'.

The applicant is, as has been already stated, an association within the meaning of Articles 80 and 48 of the Treaty. Accordingly, the only question is whether the applicant association was able in this actual case to raise the matter with the High Authority within the meaning of Article 35 with the resulting right to institute proceedings if no action was taken, or whether it merely, in exercise of its rights under the second paragraph of Article 46, presented suggestions and comments to the High Authority without having a right to institute proceedings if the High Authority contests the alleged obligation affecting it and makes no decision or recommendation.

The decision to be given on this question depends upon the interpretation of the words 'as the case may be' in the first paragraph of Article 35; the same applies to the second paragraph. This interpretation in its turn requires clarification of the position of Article 35, in particular in relation to Articles 33 and 34. Two views are conceivable in this case: the first view is that Article 35 covers a completely independent case, a case *sui generis*. According to the second view, Article 35 is a particular case of the application of Article 33. I shall now turn to the practical effect of these two views, which is what interests us in this case:

According to the first view, it is sufficient in the case of the first paragraph to invoke an obligation on the part of the High Authority. Undertakings and associations of undertakings could also rely upon this obligation without further ado.

According to the second view, only the Member States and the Council could invoke an obligation on the part of the High Authority to take a general decision; undertakings and associations could invoke the obligation to take decisions which are individual in character and concern them; however, undertakings and associations could only rely upon the obligation to adopt a general decision by invoking a misuse of powers affecting them.

The following arguments are conceivable with regard to the first view, in other words that Article 35 strictly covers an independent case:

(a) Article 35 contains detailed rules. If it only constituted a special case of Article 33, it would have been sufficient to add to that article a paragraph providing that it is also applicable to the implied refusal to give decisions. This argument is not valid, for the detailed rules refer only to the question under what conditions an implied decision of refusal is to be inferred; these rules would have been necessary in any case. The possibility of instituting proceedings is only mentioned in the third paragraph and there are no precise rules thereon.

(b) The very position of Article 35 shows that it must be completely separated from Article 33; otherwise the logical order would have been first to cover Article 33, then a case of its application (Article 35), and finally to lay down rules for the further treatment of both cases (Article 34). Nor does this argument seem to me conclusive in the case of this Treaty. It seems to me to be just as logical to lay down rules for the main case (Article 33) and the further treatment thereof (Article 34) and then a special case of the application of the main case (Article 35), beceause with regard to the latter it is necessary to take into consideration *both* the previous articles.

(c) It would also be possible to raise the further objection that only the second paragraph of Article 35 requires a ground of action, that is, misuse of powers, that this is the only one of the four grounds mentioned in Article 33 and that in the case of the first paragraph, in other words when the Treaty *requires* the High Authority to take a decision, there can be no question of a discretionary power and therefore of a misuse of powers.
So far as the four grounds of action mentioned in Article 33 are concerned, it follows from the very nature of the case that there is no question of lack of competence or the infringement of essential procedural requirements in the case of an abstention. Accordingly only infringement of the Treaty and misuse of powers remain. If the High Authority is required to make a decision and does not do so this is an infringement of the Treaty. The first paragraph of Article 35 does not expressly mention this ground of action but it may clearly be deduced from it. If the High Authority is not required to exercise a power but may use its discretion to do so, there can be no question of infringement of the Treaty. There remains only a misuse of powers which for that reason is mentioned and had to be mentioned in the second paragraph as the only possible ground.
Is it necessary to conclude from this that in the case of the first paragraph a misuse of powers cannot be envisaged *in addition to* infringement of the Treaty? This question seems to me to be exactly the same as in the case of the second paragraph of Article 33 with regard to general decisions. Undertakings and associations can contest general decisions 'under the same conditions', which can only mean on all four grounds of action, if they *at the same time* constitute a misuse of powers affecting them. The second paragraph of Article 33 thus presupposes simply that apart from the special misuse of powers affecting the applicant one or several other grounds of action may exist. Nor is this possibility illogical. A 'detournement de pouvoir' (misuse of powers) presupposes only a 'pouvoir' (power))and not necessarily a 'pouvoir discrétionnaire' (discretionary power). If the High Authority abstains from exercising a power although the Treaty makes it mandatory for the High Authority to do so it is quite possible that this abstention may be based on completely extraneous reasons. Evidence of a misuse of powers should not be more difficult to adduce in the case of an abstention than in the case of a positive action. Moreover, the question whether evidence of a condition imposed by the law is more or less difficult to adduce cannot be decisive, in my opinion, with regard to the interpretation.

(d) It would be possible to state further that the failure of the High Authority to fulfil an obligation on it is so important that undertakings and associations thereof must also be able to contest it without further conditions. This would mean that undertakings and associations without a direct interest of their own are called upon to defend the objective right. It would open up a public right of action restricted to them. This interpretation is contrary to the scheme of the Treaty. Under the second paragraph of Article 33 undertakings and associations may only contest general decisions which infringe the Treaty, even those which the High Authority had no jurisdiction at all to adopt (which are certainly the most serious cases), if those decisions at the same time involve a misuse of powers affecting them. I fail to see why it should be otherwise if the High Authority merely abstains from taking such a measure; it cannot be accepted that undertakings have a greater interest in the wrongful abstention

from adopting a general measure than in the adoption of a positive wrongful measure.

(e) Finally, it may be pointed out that a decision of refusal is always individual in character because it always relates to the request of the applicant. This overlooks the fact that the decision of refusal is mentioned only in the third paragraph as the formal subject-matter of the application. Thus the third paragraph does not lay down any conditions but lays down by implication a formal requirement for an application. On the other hand the first and second paragraphs mention decisions or recommendations which the High Authority is required or empowered to adopt. These constitute the actual subject-matter of the application and the words 'as the case may be' can only refer to them. 'As the case may be' can only mean: 'according to the decision or recommendation to which the failure to act and therefore the implied refusal relates'. A refusal has no independent significance but is only to be understood in relation to the action which was refused. The applicant and the intervener correctly pointed out in the oral procedure the fact that a 'decision' in the technical meaning under Articles 14 and 15 of the Treaty is characterized by its binding nature. The so-called 'implied decision of refusal' is not a decision in this sense but its negation.

Therefore no convincing arguments have emerged in favour of the view that Article 35 is an autonomous case of a special application to the Court independent of Article 33. On the contrary, this provision can only be understood as a case of the application of Article 33 with the special features which result from the fact that it is based upon an abstention and not upon a positive action.

(a) The application mentioned in the third paragraph of Article 35 and not further defined can only be an application for annulment. It is directed against a decision. The grounds of action laid down in Article 33 with the special features which result from abstention form the basis thereof. The next step can only be taken under Article 34 since the matter must be referred back to the High Authority if the decision of refusal is annulled; the High Authority must then take action within the scope of the judgment. Moreover, a special case of the action for failure to act is contained in Article 37 of the Treaty. This article provides that the Court of Justice may annul express or implied decisions of refusal and that in the case of annulment the High Authority must take certain measures within the terms of the judgment.

(b) It cannot be disputed that the legal structure of the application for annulment has been borrowed from French contentious administrative procedure. Under French law, however, a 'recours en carence' (action for failure to act) is a simple case of a 'recours pour excès de pouvoir' (action for misuse of powers). It has never been treated by learned authors or in case-law as a special case of the use of the application for annulment. The application for annulment presupposes an existing decision (décision préalable). In the treatment of this requirement with regard to a 'recours pour excès de pouvoir' it is mentioned that this existing decision may also be an implied decision, a 'decision implicite de refus' (implied decision of refusal) which may be contested under the above-mentioned rules. The conclusion which I have reached, in other words that not everyone has the subjective right in a case of an objective obligation to require action to be taken, corresponds largely to German law which even requires an entitlement or a right to have adopted the administrative measure requested.[2]

(c) The words 'as the case may be' are only comprehensible at all on the view that Article 35 is a case of the application of Article 33. They cannot have anything to do with the group of persons who have the capacity to institute proceedings since they are listed in Article 35: they are the States, the Council and undertaking and associations, in other words, precisely the persons also mentioned in Article 33 as having ca-

2 – Article 15 (3) of the Gesetz über das Bundesverwaltungsgericht (Law on the Federal Administrative Court); Article 35 of the Süddeutsche Gesetze über die Verwaltungsgerichtbarkeit (South German Laws on Administrative Jurisdiction).

pacity to institute proceedings. It is only possible to deduce from Article 33 which of those persons mentioned have such capacity in a particular case in relation to the decision to which the failure to act relates.

I therefore reach the following conclusion:

Article 35 is a case of the application of Article 33. If the failure to act relates to a general decision which the High Authority is required to take or to a recommendation which it is required to make, the States and the Council have a genuine right to make a request to the High Authority and, in the case of a failure to act, capacity to institute proceedings. Undertakings and associations only have such capacity if the abstention at the same time constitutes a misuse of powers affecting them. Undertakings and associations may require decisions concerning them which are individual in character to be taken *without* these conditions. In the case of the second paragraph the only permissible ground of action is a misuse of powers. If, in this case, the failure to act relates to a general decision or recommendation undertakings and associations must show that this misuse of powers specially affects them.

4. With regard to the application of this conclusion to the present case the first question which arises is whether the applicant association is relying upon the first paragraph or the second paragraph of Article 35. The applicant maintains that the High Authority was required to take a decision or make a recommendation; it therefore invokes the first paragraph. This raises a further question: does the failure of the High Authority to act relate, according to the applicant, to a general decision or to a decision which is individual in character and concerns it? This raises another fundamental question in these cases, in other words the distinction between general and individual decisions. This question likewise concerns the second paragraph of Article 33 and is decisive with regard to the extent of the capacity of undertakings and associations to institute proceedings. It is therefore appropriate to examine the question generally before making a decision in the present case.

From a purely formal point of view an individual decision concerning a specific undertaking is involved if the decision is directed to that undertaking, that is, if that undertaking is the addressee. This view, however, leads to unsatisfactory results because it disregards the material content of the decision. I would like to cite only two examples: the annulment of a special charge is formally addressed to a person upon whom the charge has hitherto been imposed but it concerns the person who has hitherto benefited therefrom. A decision which is directed to the government of a Member State may, in addition to other features, contain some which constitute an individual decision concerning a third party.

The addressee (destinataire) is therefore not necessarily decisive. In order to reach a reasonable interpretation it is necessary rather to take into consideration the meaning and purpose of the provisions of the Treaty in which the distinction between general and individual decisions is important.

The second paragraph of Article 15 provides that for decisions to be binding 'lorsqu'elles ont un caractère individuel' (where ... [they] are individual in character) – according to the German translation: 'wenn sie einen Einzelfall betreffen' – they must be notified to the party concerned, whilst in other cases publication is sufficient. The third paragraph of Article 33, which provides that the period within which proceedings must be instituted starts to run 'suivant le cas' (as the case may be) with the notification or publication, draws the inference from this. It is interesting to note that the German translation immediately explains the words 'suivant le cas' by stating: Nach Zustellung der individuellen Entscheidung ... oder nach Veröffentlichung der allgemeinen Entscheidung ...' (after notification of the individual decision ... or after publication of the general decision ...). The words 'suivant le cas' are thus interpreted here in exactly the same way as that in which the synonymous words 'selon le cas' (as the case may be) in the first paragraph of Article 35 must, according to my explanations, be understood.

The second provision is the second para-

graph of Article 33 which makes the extent of the capacity of undertakings and associations to institute proceedings dependent upon whether a general or an individual decision concerning the applicant is involved. This provision must, as I have stated, be applied by analogy to the action for failure to act under Article 35.

The first provision chiefly shows when publication *is sufficient* owing to the general nature of the decision. For individual decisions may also be published and are in fact often published in addition to individual notification. The interests of the High Authority make it necessary to consider publication as sufficient if at the time it is quite impossible to determine the group of persons to whom the decision might in practice be applicable or if a more extensive inquiry was first required to ascertain to whom the case at issue applies or if it appears that in this respect *all* undertakings of the category named come into question. On the other hand undertakings may be expected to obtain from the Official Journal information regarding those decisions which are of general significance and application or cover a general case in an impersonal way. An undertaking must inform itself of those decisions which may apply to it *merely* on the basis of the fact that it is an undertaking of the Community and subject to the jurisdiction of the High Authority, and there is no need for its individual case, that is, its own particular situation, to have first been ascertained and to have formed the basis of the decision.

The provision concerning the capacity of undertakings to institute proceedings chiefly shows when undertakings have an unrestricted right to contest a decision because of its *individual* nature. The group of those who have capacity to institute proceedings may be delimited in different ways. If the intention is to exclude a public right of action, there are essentially three possibilities:

1. The group of those persons who have capacity to institute proceedings is expressly stated.

2. A certain interest is required.

3. The interest is made specific by closer definition.

The third solution applies for example with regard to German administrative procedure; it requires that the applicant's rights must have been infringed[3] or prejudiced; he must rely upon a vested right or contest an obligation which has been imposed on him.[4]

French law requires merely an 'intérêt' (interest) for a 'recours pour excès de pouvoir' (action for misuse of powers) and thus adopts the second possibility. The Treaty has not adopted a uniform solution. Although in other respects the legal structure of French contentious administrative procedure has often served as an example it is clear that the intention with regard to this question was not to do the same because the concept of 'intérêt' has, in the development of the case-law of the Conseil d'Etat (administrative court of last instance) been greatly extended. The Treaty rather adopts all three solutions For example:

1. The Member States and the Council of Ministers are mentioned so to speak 'by name' in the first paragraph of Article 33 as persons entitled to institute proceedings. Thus they are readily acknowledged as having sufficient interest. In addition they are called upon to set in motion without further conditions the judicial review of the Court of Justice to determine whether the objective right has been infringed.

2. A direct interest is sufficient with regard to Article 66 (5). In this case any person directly concerned (toute personne directement intéressée) may institute proceedings.

3. Under Article 63 (2) 'the purchaser' who is affected by the order of the High

3 — Article 15 (1) of the Gesetz über das Bundesverwaltungsgericht (Law on the Federal Administrative Court); Article 35 of the Süddeutsche Gesetzeüber die Verwaltungsgerichtbarkeit (South German Laws on Administrative Jurisdiction)

4 — Article 23 of the Süddeutsche Gesetzeüber die Verwaltungsgerichtbarkeit (South German Laws on Administrative Jurisdiction)

Authority referred to in that provision has the right to bring an action; the necessary interest has therefore already been made specific.

The provision contained in the second paragraph of Article 33 must now be classified in the latter category. Undertakings are acknowledged to have sufficient interest to have capacity to institute proceedings if an individual decision concerning the applicant is involved. If a decision covers a particular personal case, then the person whose case has been covered has a specific and not only a general interest. If a decision concerns the applicant, that is to say, if it directly alters his legal situation and does not merely affect him *in certain circumstances,* the person concerned certainly has a direct interest.

These explanations have merely been intended to place the concepts of 'general' and 'individual' decisions in the context in which the distinction between them is important and to examine them more closely with regard to the function of that distinction.

I have deliberately not drawn any comparisons with national law. Of course similar delimitations are found there; for example, between regulations, 'règlements', on the one hand, and administrative measures affecting the individual and general measures of application, 'actes individuels et collectifs', on the other. In national law, however, the difference is important in other respects, for example with regard to the conditions for the adoption of a measure, the competent authority and the type of legal protection. On the other hand, the High Authority has, under the Treaty, the power to adopt both general and individual decisions and the same type of legal protection, an application for annulment, is provided for against both. In addition there are terminological obscurities and problems in national law which must be solved in accordance with the situation existing in the State concerned and can therefore hardly be used for the purposes of the interpretation of this Treaty. It is sufficient to examine the applicability of two criteria which are frequently employed with regard to regulations: a special determination of prices under Article 66 (7) is certainly an individual decision although it is to be applied to an indefinite number of factual situations, in other words all sales contracts of the undertaking concerned; the interest of that undertaking is in this case much greater than in the case of a measure which is implemented by a single operation. The criterion of the indefinite number of persons concerned may only be used conditionally because from the outset the group of persons directly concerned is limited to the undertakings of the Community within the meaning of Article 80, in other words to an ascertainable and assessable number. A decision fixing the detailed rules for the levies is certainly a general decision; it is expressly described as such in Article 50 (2). It is therefore irrelevant whether a decision of the High Authority constitutes for example a regulation or an administrative measure affecting the individual under German law; and it is not surprising that this is uncertain. Thus in his book 'das Recht der Montan-Union' (pp. 29 et seq.), Jerusalem attempts to equate general decisions under the Treaty to measures of general application (Allgemeinverfügungen) under German law, in other words administrative measures, and in addition to distinguish true regulations of the High Authority which cannot be contested by means of an application for annulment. For all these reasons I therefore consider that comparisons with related features of national law cannot be decisive with regard to the question with which we are concerned.

To summarize these considerations, they must be regarded merely as an attempt to emphasize some points which in my view must be taken into account for guidance as to whether what is involved is a general decision or an individual decision concerning particular undertakings. A more detailed definition should be built up in the development of the case-law in concrete cases. I consider that in this process the result will be practically conclusive in favour of the capacity of undertakings and associations to institute proceedings. It is not impermissible to give an interpretation having regard to the result which would follow from one or other view; indeed one is called for

in order that the objective of the law may be attained.

As essential feature of a general decision seems to me to be that an abstract factual situation is covered, or indeed a concrete situation which however concerns the whole Common Market or a sector of the Common Market which must be given special treatment under the Treaty or the Convention on the Transitional Provisions, or certain products of the Common Market.

The fact that it is impossible to ascertain at all from the decision the individual undertakings to whom it may apply (because the decision is not capable of independent direct application and first requires to be made specific by means of an individual measure), may be regarded as an indication of the existence of a general decision, or if it follows that the decision is applicable to *all* undertakings of the type generally described, merely as a consequence of the fact that they belong to the Community, and that the particular situation of individual undertakings is not important.

A decision which may be directly applied to individual undertakings described by name or ascertainable from the decision, the basis of which is a specific concrete situation existing in the case of these undertakings, may be regarded as an individual decision. The undertakings concerned have a direct and specific interest in the legality of such a decision even if the decision is formally directed to another addressee.

5. In order to be able to apply these principles to the present case it is first necessary to specify the contents of the decision which the High Authority was, according to the applicant, required to adopt. In this respect the two subjects of the applications, the Office Commercial du Ravitaillement and the Caisse de Compensation, must be examined in turn.

A decision was in fact adopted on the first subject of the application after the application had been lodged and it prompted the applicant to declare that there was no need to proceed to judgment thereon. The purpose of this decision of the High Authority of 7 January 1955 is the examination and appraisal of a concrete situation which does not concern the Common Market as a whole but the detailed rules relating to the importation of solid fuels into the Grand Duchy of Luxembourg under Luxembourg legislation. It is true that Article 31 of the Convention on the Transitional Provisions lays down special provisions for the Luxembourg steel industry on account of its particular importance for the general economy of Luxembourg; these however relate only to two cases which do not apply here and do not result in the Luxembourg steel market's being *generally* considered as a sector of the Common Market which must be given special treatment. This is thus an individual decision; the High Authority could therefore dispense with publication thereof. Article 1 of the decision provides that the Order of the Minister for Economic Affairs of 8 March 1954 which is in question is incompatible with the Treaty. Article 2 makes a recommendation leaving to the Luxembourg Government the choice of repealing that order or amending it so that it is in accordance with the Treaty. The decision therefore appraises legislative measures adopted by a Member State and requires it to amend these measures. Accordingly it certainly concerns that Member State. Thus the only question is whether this decision in addition *also* concerns the Luxembourg steel industry whose interests the applicant represents. The factual and economic interest of the applicant in the decision is undoubted. Is it however sufficient within the meaning of the Treaty to give the applicant the right to require the adoption of a measure by the High Authority which may be enforced by instituting proceedings?

The decision is not directly capable of altering the legal situation of the applicant. In order to do so, it must first be implemented by the Luxembourg Government. It can, however, be assumed that a Member State fulfils an obligation to the Community which has been laid down by the High Authority and where appropriate confirmed by the Court of Justice and it can therefore be said that the applicant nevertheless has a direct interest in the adoption of the decision. However, the applicant shares this interest with all other coal consumers and coal dealers in the Grand

Duchy of Luxembourg for it is not a special interest peculiar to the Luxembourg steel industry; on the contrary, under the implementing provisions the steel industry enjoyed a certain preferential position because it could place direct orders. The decision or the abstention from taking a decision is not therefore based on a special situation in the Luxembourg steel industry. I consider that the legal importance of the argument which the Luxembourg Government has put forward and which I have already discussed lies in that fact, in other words, the fact that the applicant only appears as *one* of several categories of consumer in these legal proceedings which concern coal. Even if it is not on that account excluded at the outset from the category of those persons having capacity to institute proceedings its *special* interest in the decision must in my opinion be denied for that reason.

Even *general* decisions can be contested by undertakings and associations by claiming that they constitute a misuse of powers affecting them. In my opinion the same must apply to individual decisions. Even if an individual decision at first concerns only a specific person it can at the same time involve a misuse of powers affecting another person so that that other person can have a direct and special interest in the decision and has the capacity to institute proceedings. If, therefore, the High Authority had abstained from taking the decision sought for extraneous reasons concerning the Luxembourg steel industry it would be necessary to state that the latter had the capacity to institute proceedings. However, no submissions have been put forward and there are no indications as to this possibility which I am only mentioning for the sake of completeness.

I therefore reach the following conclusion: The decision or recommendation which according to the applicant the High Authority was required to adopt and which it later adopted is an individual decision which concerns the Luxembourg Government. It does not in addition concern the applicant specially. The fact that it had not been adopted would likewise not be a misuse of powers affecting the applicant.

It will be possible to raise the objection that according to this conclusion only other Member States or the Council could have invoked the obligation of the High Authority. This criticism, however, is directed to the scheme of the Treaty which has not granted consumers a direct right to institute proceedings but refers them to other indirect possibilities of legal protection.

I therefore consider that the first head of claim contained in the application is inadmissible.

6. With regard to the second head of claim, the applicant states that the High Authority was required to take a decision or make a recommendation ordering that the existing system for the subsidizing of domestic fuels under Luxembourg legislation be amended. This decision was also supposed to apply to a concrete situation which was special for Luxembourg and would thus, the applicant claims, be individual in character. It concerns Luxembourg legislation and thus the Member State of Luxembourg.

The applicant undoubtedly has a factual and economic interest in this decision. It states, as the High Authority admits, that the imposition of the price increase of 8 francs per metric ton on all coal consumers with the exception of consumers of domestic fuels concerns almost exclusively the Luxembourg steel industry. According to the applicant's statements, which must form the starting-point for the examination as to admissibility, this constitutes several infringements of the Treaty affecting it, in other words a special charge and discrimination affecting it and the infringement of price rules. It must, however, be acknowledged that undertakings upon which such charges are imposed contrary to the Treaty have a direct and special interest in the abolition of those charges. Even if such charges had not been imposed directly by the High Authority it would be necessary to regard the High Authority's failure to act as implied condonation of them which may constitute an infringement of the Treaty. The person on whom the charge has been imposed must therefore be able to require that the High Authority does its best within the context of its powers, either directly or by means of

an order to a Member State, to bring about the abolition of such charges which are incompatible with the Treaty.

I therefore consider that the second head of claim contained in the application is admissible.

It may at first sight be surprising that the decision that both heads of claim are admissible leads to different results. The explanation lies in the fact that the applicant made itself so to speak the spokesman for *all* coal consumers in respect of the first head of claim although its own interests were *smaller* than those of the other persons concerned on account of the authorization to place direct orders. On the other hand, the applicant is the person almost exclusively concerned as regards the second head of claim.

III. Now that it has been ascertained that the second head of claim of the application is admissible it is necessary to examine the influence of the changes which occured after the application had been lodged.

1. The first change which occured is the express decision of refusal which the High Authority sent to the applicant. The High Authority considers that with this the application lodged against its silence has become purposeless. The applicant contests this view but has, however, for this reason lodged Application 9/54 as a precaution. Thus the following examination will at the same time deal partially with the fate of Application 9/54. The intervener considers, and in this much it agrees with the applicant, that the express refusal is irrelevant and therefore has no influence on Application 7/54.

There would be no need to proceed to judgment in respect of the application if the applicant merely relied upon a formal claim to an examination and a decision one way or the order. This is, however, not the case. Nor does Article 35 concern such a formal right but covers cases in which the High Authority is required or empowered under the Treaty to make a certain decision or recommendation. The result of the absence of a decision is, under Article 35, not a right to obtain a decision by instituting proceedings, after which the decision thus obtained could, for its part, again be contested, but the irrebuttable presumption of the refusal of the request which may immediately be contested. If the refusal is then expressly stated after the application has been lodged this can only mean that the irrebuttable presumption which already existed beforehand is confirmed. This in no way alters the nature and subject-matter of the application, for the High Authority has still not fulfilled the alleged obligation. It makes no difference whether the High Authority discloses the reasons for its refusal in the reply alone or whether it reveals them in addition in a special letter to the applicant, as happened in this case.

To complete the explanations which I have given with regard to the interpretation of Article 35 I therefore reach the following conclusion:

The first and second paragraphs of Article 35 lay down the conditions in which a genuine right to make a request exists and if this is refused there is a right to institute proceedings. In the case of failure to act the refusal is an irrebuttable presumption under the conditions laid down in the third paragraph. The third paragraph might perhaps have been drafted as follows:

'If the High Authority refuses to take the decision or make the recommendation requested under the first or second paragraphs this refusal may be contested by lodging an application within one month. If the High Authority has not given a decision on the request for two months after the request was made this is also deemed to be a refusal.'

It was evidently considered superfluous to mention express refusal; this was otherwise in Article 37 in which express and implied refusals are both mentioned and treated in the same way. The fact that the express decision of refusal is not the positive decision for which provision is made in Article 33, but only the negation of the decision requested, follows from the consideration that the grounds of action of lack of competence and the infringement of essential procedural requirements are not appropriate to the express refusal. On

the other hand the High Authority could state that its refusal was based upon *lack of competence* and the applicant could, on the other hand, claim that the High Authority was *competent* and therefore also required or empowered to adopt the decision sought.

In conclusion I therefore consider that the applicant's view is correct, in other words that the subject-matter of the application under Article 35 is the refusal and that this article must *a fortiori* apply to an express refusal, in contrast to the view of the High Authority which wishes to apply Article 33 directly in the case of an express refusal. What constitutes the difference between Article 33 and Article 35 is not whether the decision is express or implied but whether it is positive or negative; more precisely: whether it is a decision imposing an obligation or granting a benefit or a refusal to make such a decision. The intervener also first stated in the oral procedure that Article 35 only presupposes the absence of a positive decision and therefore an express refusal is irrelevant even before the period of two months has expired; however, it later, so far as I have correctly understood these statements, drew the contradictory conclusion that an express refusal does not fulfil the conditions laid down in Article 35 or those laid down in Article 33 and may therefore never be contested.

The application has therefore not become purposeless by virtue of the subsequent express refusal; it must rather be extended to this express refusal.

2. The second change which occured after the application had been lodged is the fact that the Luxembourg Government abolished the contested system of subsidies for domestic fuel on its own initiative and replaced it with new rules. While the High Authority points out in this respect only the fact that the Court of Justice will have to examine whether the applicant under these circumstances still has an *interest* today in proceeding with the action, the Luxembourg Government as intervener expressly claims that the action has thereby become purposeless. It is necessary to consider this argument. It may be deduced from the submissions of the main party; the applicant stated in the oral procedure that this argument was brought before the Court of Justice in the submissions of the High Authority. Moreover, it is necessary for the Court to consider of its own motion the fact that the applicant declared there was no need to proceed to judgment, as the Court of Justice has already done in the judgments in Cases 3/54 and 4/54 and as the applicant has also put forward for consideration.

The question which arises in this case must, however, not be based upon whether the interest of the applicant in obtaining a judgment of the Court of Justice has now ceased. As I have stated, the Treaty provides for the interest by making it a condition that the contested or requested decision must concern the applicant or involve a misuse of powers affecting it. These conditions must be judged according to the situation at the date when the application is lodged; the examination has led the Court to state that the application is admissible. Subsequent changes can only deprive the application of its subject-matter so that it is necessary to declare that there is no need to proceed to judgment. Since the situation to which objections have been raised on the ground that it is contrary to the Treaty has existed for a certain period of time and has only ceased to exist with regard to the future the application, as the applicant has correctly stated, has retained its subject-matter in respect of that period.

The question whether the High Authority has infringed the Treaty by rejecting the applicant's complaint, in other words the question whether this decision of refusal must be annulled, still remains open. Under Article 34 of the Treaty the matter must be referred back to the High Authority if the Court declares a decision or recommendation void. For its part, the High Authority must take the necessary measures to comply with the decision of annulment. It is not for the Court of Justice to decide what those measures are. The High Authority must rather re-examine the matter on the basis of the judgment. In this case the intervener correctly points out that a number of measures are conceivable and that it is impossible to foresee what

form they might take. It only contests the fact that they might be made retroactive. The answer to the question thus raised required an exhaustive examination of all measures which might come into consideration. For this purpose the Court of Justice would have to go into the substance of the case and assume that the application is well founded. Then it could examine whether measures are still possible which could put right today the presumed infringement of the Treaty committed previously. This decision must, however, first be left to the High Authority. Only after the appropriate time could the question be raised during fresh proceedings under the second paragraph of Article 34 whether the High Authority had exhausted all possibilities. I do not therefore consider that the Court of Justice should in these proceedings enter into a hypothetical examination of this type. The subject-matter of the present proceedings consists in the question whether the High Authority has infringed the Treaty by the rejection of the applicant's complaint. This question is not affected by the repeal of the rules introduced by the Luxenbourg Government to which objection has been made which took place only with regard to the future and not retroactively. This change, which occured during the proceedings, is accordingly no bar to an examination of the substance of the case. If the application proves to be well founded the judgment of the Court of Justice must be confined to the annulment of the decision of refusal of the High Authority and the refereñce of the matter back to the High Authority.

IV. The examination of the substance of the case, to which I shall now turn, must be carried out in two stages. There could only have been a reason for the High Authority to take action at all, as the applicant too asserts, if the system of subsidies to which objection has been made was incompatible with the Treaty. Only after ascertaining this can it be examined whether and how far the High Authority was *required* to take action under the Treaty in view of this situation which was incompatible therewith. This order seems to me to be essential because only when it has been ascertained in what respect, for what reasons and to what extent the rules were contrary to the Treaty can it be seen what the High Authority should have and could have done. For not every situation which is contrary to the Treaty automatically gives rise to the same obligation on the part of the High Authority to prohibit this situation immediately and unconditionally. This applies in particular during the transitional period in which we now find ourselves and to the question at issue here, in other words the amendment of the legislation of a Member State. If, conversely, an attempt were first made to ascertain a duty on the part of the High Authority it would be necessary to work once more on the basis of suppositions, in other words the assumption that the situation which is presupposed in the provision laying down the duty actually exists.

The applicant deduces from Article 4 of the Treaty the arguments from which it concludes that the equalization system is incompatible with the Treaty. This fact has given rise to a debate as to whether Article 4 constitutes directly and independently applicable law, as the applicant and the High Authority essentially consider, or whether it only posits general principles which still require special provisions in the Treaty for their application, as the Luxembourg Government, as intervener, considers. This difference of opinion seems to me upon closer examination to be smaller than it appears at first sight. According to the wording of Article 4 there can be no doubt that the measures and practices listed there are in principle abolished and prohibited. This prohibition is directly applicable but 'as provided in this Treaty'. The expression 'this Treaty' covers, according to the definition laid down in Article 84, in particular the Convention on the Transitional Provisions in addition. The restriction 'as provided in this Treaty' is therefore intended to take particular account of the fact that the prohibitions which have been laid down could not come into force in *all* cases immediately the Common Market had been opened. The transitional period is precisely intended progressively to abolish such obstacles to the Common Market; it may even be necessary for the purpose of

avoiding serious economic disturbances to maintain provisionally certain situations which are in principle incompatible with the Common Market. However, this in no way alters the fact that in the absence of any special provisions the provisions of Article 4 are directly applicable. With regard to the prohibition on customs duties under paragraph (a) this is expressly provided in Article 9 of the Convention on the Transitional Provisions and, with the exception of certain special provisions, with regard to Belgium and Italy. Likewise, Article 8 of the Convention on the Transitional Provisions speaks of the 'mesures d'application de l'article 4' (as effect is given to Article 4).

It is accordingly clear that it is possible to deduce directly from Article 4 which measures and practices are incompatible with the Common Market. If such a measure has been recorded the High Authority must make use of the possibilities of intervention given to it by the Treaty; under the first paragraph of Article 95 it may even, with the unanimous decision of the Council and after the Consultative Committee has been consulted, take decisions or make recommendations which are, it is true, not provided for in the Treaty, but which appear necessary to attain *inter alia* the objectives laid down in Article 4. It is therefore quite reasonable to examine first whether the rules criticized are in breach of Article 4. Only if the answer to this question is in the affirmative does the second question arise: what measure the High Authority was required or empowered to take in this particular case.

1. The applicant regards the equalization system as discrimination prohibited under Article 4 (b) and a special charge prohibited under Article 4 (c). It was correctly stressed during the oral procedure that the prohibition on discrimination must be regarded as a guiding principle underlying the whole Treaty and that the prohibition on special charges is only a special concrete case of this prohibition. In addition, the prohibition on special charges is directed only to the governments of the Member States. For these reasons it seems to be to be appropriate to examine first the question of discrimination as being the more extensive.

The applicant regards the different treatment of Luxembourg consumers of industrial coal and consumers of the same kind in other countries of the Community as discrimination. It is necessary to ask the question here *who* is supposed to have treated them differently since the decisive test of discrimination should be the fact that *the same person* treats unequally several others who are comparably placed. Now the Luxembourg Government does not have any powers to impose on the industries of other countries of the Community likewise a charge of 8 francs per metric ton. It is therefore impossible to reproach it for having not done what it was completely unable to do. Nor can it be said that the Luxembourg Government imposed a charge only on imported coal but not on its own coal, for the special feature of this case is precisely the fact that the Member State of Luxembourg in question produces no coal of its own. Discrimination on the part of the Luxembourg Government could only be conceivable with regard to various categories of Luxembourg consumers. Such discrimination is, however, not alleged by the applicant; in particular, the applicant does not object to the principle of subsidizing domestic coal and the social reasons which were put forward in its favour but objects merely to the method of raising the funds to cover the subsidy.

The High Authority could produce discrimination if it treated differently similar charges on Community industries in the various Member States. There are no indications of such conduct on the part of the High Authority even according to the applicant.

Although, finally, the applicant complains that the financing for the subsidy for domestic fuel was not derived from the general tax yield, it could thereby allege discrimination in relation to the other tax-payers of the Grand Duchy of Luxembourg. This would, however, not concern the Common Market and it would be necessary to decide whether it were permissible in accordance with Luxembourg law alone. In spite of the expression 'price increase' which was used, what is involved,

from an economic point of view, is a parafiscal countervailing charge which is imposed for social reasons. However, the applicant also denies that there is discrimination in this case.
In my opinion it is therefore impossible to find an infringement of the prohibition against discrimination.

2. As I have already mentioned, it is possible to consider the prohibition on special charges as a special form of the more extensive prohibition on discrimination. Since it has been found that there is no discrimination this is also a certain indication that it is not a special charge which is prohibited within the meaning of the Treaty.
In fact the first doubt regarding the existence of a special charge results from the very fact that this countervailing charge affects *all* coal consumers with the exception of those whom the subsidy thereby made possible is precisely intended to benefit. This charge is also not imposed directly on the production of the steel industry but affects it only indirectly in its capacity as a coal consumer.
It has indeed correctly been emphasized that a mere literal interpretation cannot give any decisive evidence concerning the concept of special charge. It is therefore necessary to place this prohibition in the whole framework of Article 4 and inquire as to its meaning and purpose. Since Article 4 lists practices which are incompatible with the nature of the Common Market a charge may only constitute a special charge within the meaning of that provision if it has an influence on the Common Market. In this connexion I shall quote from the report (p. 80) of the French delegation according to which:

'In order that this competition between suppliers may lead to the development of the most economical production it is necessary to abolish subsudies which enable the weaknesses of certain producers to be concealed apart from those which may be necessary provisionally or which are intended to correct certain abnormal charges. Conversely, special charges imposed on certain undertakings must be removed.'

The purpose of the abolition of subsidies and aids is accordingly to eliminate artificial advantages in competition. Conversely, the purpose of the prohibition on special charges is to allow natural advantages to produce their full effect. Only in this way is it possible to achieve a situation in which production is carried out in the most economical way. The following definition is contained in the oft-quoted work of Reuter (p. 195):

'(It is necessary) . . . to consider that all measures involving a charge or a special benefit granted with the aim of distorting competition are prohibited.'

In the same way Reuter (p. 196) shows by using the example contained in Article 67 (2) that 'special charges' in their common meaning are not always prohibited.
The applicant has itself quoted an example given by Reuter: if specially high charges arise for mining undertakings from the special social disbursements in favour of miners these do not constitute a prohibited special charge within the meaning of the Treaty because they are not intended to favour or prejudice particular undertakings of the Community in relation to other undertakings but because they stem from social considerations. This condition seems to me also to be fulfilled in the present case. There is no indication that the Luxembourg Government intended to prejudice the steel industry in its country in relation to the steel industries of other countries of the Community, nor has the applicant made any submissions to that effect. Allow me to make a purely hypothetical reflection which is based on the consideration that *de facto* the revenue for the financing of the subsidy for domestic fuel is almost exclusively raised from the steel industry. If the Luxembourg Government introduces a tax by means of a legislative measure, a tax which is calculated according to the profit of all industrial undertakings in the country or increases an existing tax of that nature, the steel industry will have to provide by far the larger part of this tax as a result of the situation created by the nature and industrial development of the country. Does this conclusion justify

the statement that such a tax constitutes a prohibited special charge? Such charges imposed on the steel industry in the Grand Duchy of Luxembourg are particularly noticeable merely as a result of the fact that this industry predominantly represents the industrial earning capacity of the country. Such measures could at the most be open to question in the national legal system but could not be regarded in any case as prohibited special charges within the meaning of the Treaty. The High Authority may only intervene subject to further conditions as laid down for example in Article 67 of the Treaty and, with regard to already existing measures of that kind, in Article 2 (4) of the Convention on the Transitional Provisions.
The social principle of the subsidy for domestic fuel has been approved by the applicant itself. However, its implementation does not influence competition in the Common Market in this case: with regard to competition in the coal sector the measure has no influence at all; with regard to competition in the steel sector it only has an indirect influence and in so small a measure that it does not prejudice the objective, which is the most economical production without artificial distortion. In the last analysis this is the important factor as far as we are concerned.
Therefore I do not consider that a prohibited special charge exists within the meaning of the Treaty.

3. In conclusion, it is therefore impossible to find that the rules for the subsidizing of domestic fuel as laid down by the Luxembourg Government until 2 April 1955 were incompatible with the Treaty. The refusal by the High Authority of the applicant's request was therefore not contrary to the Treaty.

V. Therefore I conclude that in Case 7/54, Groupement des Industries Sidérurgiques Luxembourgeoises v the High Authority:

the first head of claim in the application should be dismissed as inadmissible and the second head of claim declared unfounded; the applicant should be ordered to bear the costs, including the costs of the application to intervene.

VI. Application 9/54 puts forward primarily the same conclusions as Application 7/54. These conclusions are inadmissible because the applicant has no interest in a second identical decision and because the period for instituting proceedings under the third paragraph of Article 33 had expired in the meantime.
The conclusions put forward in the alternative are directed against the letter of the High Authority of 27 November 1954 and are put forward as a precaution in case the implied decision of refusal resulting from the failure of the High Authority to act should have been deprived of its subject-matter by virtue of this express refusal and the express refusal should have had once more to be contested. As I have stated, this assumption is incorrect and therefore the alternative conclusions have proved also to be inadmissible.
In Case 9/54, Groupement des Industries Sidérurgiques Luxembourgeoises v the High Authority, I therefore conclude that:

the application should be dismissed as inadmissible and the applicant should be ordered to bear the costs, including the costs of the application to intervene.

B. I. The parallel applications, 8/54 and 10/54, relate to the same subject-matter and are also practically identical in the pleadings with the differences which the Judge-Rapporteur has indicated. The legally decisive difference lies in the fact that in these applications the Association des Utilisateurs de Charbon du Grand-Duché de Luxembourg appears as the applicant. The High Authority has already claimed in the reply that the application is inadmissible because the applicant does not have the capacity to institute proceedings and the High Authority based its main that the application should be dismissed on that ground. The Government of the Grand Duchy of Luxembourg has also put forward this viewpoint after its intervention. The defendant and the intervener state in addition that, under Article 35, just as under Article 33, only undertakings and asso-

ciations within the meaning of Articles 80 and 48 of the Treaty have the right to institute proceedings. They claim that the applicant does not come within this definition because it is an association of consumers. Nor can it rely on the fact that one of its members is an association of producers, in other words the Groupement des Industries Sidérurgiques Luxembourgeoises, because it has a legal personality different from the latter and the Groupement des Industries Sidérurgiques Luxembourgeoises has lodged its own application.

The applicant counters this argument by referring to the fact that Article 35 does not contain the reference to Article 48 made in Article 33. Therefore the group of persons entitled to institute proceedings is wider in Article 35 than in Article 33 and covers all associations within the meaning of Article 46 of the Treaty.

According to the statements made in Application 7/54, to which I refer, Article 35 is a case of the application of Article 33. The group of persons who have capacity to institute proceedings is in both cases the same. Article 35 must be completed with the help of Article 33, as was necessary with regard to the words 'as the case may be' and for the purpose of ascertaining the nature of the application provided for in the third paragraph. It is also impossible to understand why the group of persons who can invoke a duty or power to act in the case of a failure to act on the part of the High Authority should be more extensive than the group of persons entitled to contest a positive wrongful measure. As I have also already stated, the right of undertakings, employees, consumers and dealers and their associations to present any suggestions or comments to the High Authority on questions affecting them which is laid down in the second paragraph of Article 46 does not in my opinion state whether these persons also have the right to institute proceedings if the High Authority does not follow their suggestions. The capacity to institute proceedings must rather be deduced merely from Article 35 and must be delimited there by analogy with Article 33.

For these reasons I do not see any possibility of declaring these applications admissible. Therefore in my opinion all further legal considerations and examinations to which the statements of the parties and of the intervener would have otherwise given rise are inapplicable.

II. In Joined Cases 8/54 and 10/54, Association des Utilisateurs de Charbon du Grand-Duché de Luxembourg v the High Authority, I conclude that

the applications should be dismissed as inadmissible and the applicant should be ordered to bear the costs, including the costs of the application to intervene.

## ORDER OF THE COURT
## 24 NOVEMBER 1955[1]

Having regard to the application submitted by the Luxembourg Government on 30 September 1955 to intervene in the actions pending before the Court of Justice of the European Communities

between

GROUPEMENT DES INDUSTRIES SIDÉRURGIQUES LUXEMBOURGEOISES

1 — Language of the Case: French.