

notwithstanding their possible subsequent authorization. On the other hand, agreements and decisions already in existence remain in force provisionally until the expiry of the time-limit set by the High Authority after authorization has been refused. That emerges from the second paragraph of Article 12 of the Convention.¹ Since that provision fixes no time-limit for bringing proceedings against agreements which are already in existence, the High Authority is entitled to use its discretion in taking action.

- (b) The second paragraph of Article 12 of the Convention must be interpreted to mean that agreements entered into and decisions adopted between the entry into force of the Treaty and the establishment of the common market must also be regarded as agreements and decisions already in existence and therefore provisionally valid (ECSC Treaty, Article 65, Convention, Article 1(1), Article 1(5), fourth subparagraph of Article 2(2), Article 2(3), second subparagraph of Article 12).

In Case 1/58

FRIEDRICH STORK & Co., Kohलग्रoßhandlung, of Bünde (Westphalia) represented by Mr Krengel, Mr Hollmann and Mr Stock, of Bielefeld, with an address for service in Luxembourg at the office of Félicien Jansen, Huissier, 21 rue Aldringer,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser,*Robert Krawielicki, acting as Agent, assisted by Philipp Möhring, Advocate of the Bundesgerichtshof, Karlsruhe, with an address for service in Luxembourg at the offices of the High Authority, 2 place de Metz,

defendant,

Application for the annulment of the decision of the High Authority of 27 November 1957, notified to the applicant on 6 December 1957,

THE COURT

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

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

gives the following

¹ — Cf. paragraph 3, summary, Judgment in Case 6/54 (*Government of the Kingdom of the Netherlands v High Authority*), Rec. 1954-1955, p. 255).

JUDGMENT

Facts

I – Conclusions of the parties

The applicant claims that the Court should:

‘annul the decision of the High Authority of 27 November 1957’.

In its reply the applicant claims also that ‘to the extent to which it may be necessary’ the Court should:

‘Order the High Authority to review and amend Decisions Nos 5, 6 and 7/56, 10, 11 and 12/57 and 16, 17 and 18/57.’

In its statement of defence *the High Authority* contends that the Court should:

‘Dismiss the applicant’s application as unfounded, with all the consequences which this entails both in law and as regards the costs of the action.’

In the rejoinder the High Authority adheres to its conclusions and contends in addition that the Court should:

‘Declare inadmissible the request set out for the first time in the reply that “to the extent to which it may be necessary” the High Authority be ordered to review and amend Decisions Nos 5 to 7/56, 10 to 12/57 and 16 to 18/57.’

II – Summary of the facts

1. The applicant carries on business at Bünde (Westphalia) as a coal wholesaler and until 1952 was a first-hand wholesaler.

Order No 20 of the Allied High Commission in Germany of 9 September 1952 (Official Journal of the Allied High Commission, p. 1901, *et seq.*) reorganized the sale of coal in the Ruhr. As a result, most of the collieries in the Ruhr coalfield formed themselves into six independent joint selling agencies under the control of an organization known as the Gemeinschaftsorganisation Ruhrkohle GmbH (GEORG). With the approval of GEORG the joint selling agencies on 5 February 1963 adopted identical decisions which provided that as from the beginning of the new coal-marketing year, that is,

from 1 April 1953, they would only allow direct orders to be placed by wholesalers with an annual turnover of at least 48 000 metric tons (instead of 6 000 metric tons as previously).

2. As a result of the above decisions the applicant company became a second-hand wholesaler, since it was unable to achieve a turnover of 48 000 metric tons. On 23 April 1953 the company brought an action against GEORG before the Landgericht Essen (Essen Regional Court), in which it asked the court to:

‘Rule that the defendant is bound to pay to the applicant all damages owing to it as a result of the fact that as from 1 April 1953 it no longer receives its supplies directly as a first-hand wholesale coal dealer.’

By judgment of 6 November 1963 the *Chambre Commerciale* (Commercial Division) of the Landgericht Essen made the following order:

‘The Proceedings are stayed until the High Authority of the European Coal and Steel Community has given a ruling under Article 65(4) of the Treaty establishing the European Coal and Steel Community on the question whether the decisions of 5 February 1953 are contrary to the terms of the prohibition contained in Article 65(1) of the Treaty.’

3. In the meantime, by letters dated 25 and 31 August 1953, GEORG and the six above-mentioned joint selling agencies requested the High Authority to authorize all the agreements and decisions of 5 February 1953 in accordance with Article 65(2) of the Treaty establishing the European Coal and Steel Community. As a result of the negotiations which followed, the Ruhr collieries submitted fresh, amended requests for authorization.

By its Decisions Nos 5 to 8/56 of 15 February 1956 (JO of 13. 3. 1956, p. 29 *et seq.*) the High Authority accepted the main

points made in the requests. Those decisions were subsequently amended or supplemented as regards certain points by Decisions Nos 10 to 12/57 (JO of 16. 4. 1957, p. 159 *et seq.*) and 16 to 18/57 (JO of 10. 8. 1957, p. 319 *et seq.*).

As a result of the judgment of the Landgericht Essen of 6 November 1953, the High Authority adopted the following decision on 27 November 1957:

Article 1

Until the date of entry into force of Decisions Nos 5/56, 6/56 and 7/56 of the High Authority of 15 February 1956, that is, until 22 February 1956, the prohibitions contained in Article 65(1) of the Treaty were not applicable to the decisions adopted by the members of the defendant and the six joint selling agencies for Ruhr Coal, mbH.

Article 2

This decision shall enter into force on the date of its notification to the Landgericht Essen and to the parties concerned.'

That decision is based upon Article 65 of the Treaty establishing the European Coal and Steel Community, Article 12 of the Convention on the Transitional Provisions and Decision No 37/53 of the High Authority of 11 July 1953 (JO of 21. 7. 1953, p. 153). It was based principally on the following recitals:

The decisions in question adopted by the Ruhr organizations were adopted before the common market was established. However, the parties involved intended them to apply to the tonnage of fuels sold after that date and their validity must be considered in the light of Community law;

According to the abovementioned Decision No 37/53, the prohibition in Article 65 was not applicable to agreements for which a request for authorization had been submitted to the High Authority before 31 August 1953, provided that the High Authority had not come to a decision on such request;

The members of GEORG had submitted such requests within the prescribed period.

The decision was notified to the applicant on 6 December 1957. It forms the subject of the present application which was lodged on 4 January 1958.

III – Submissions of the parties

The submissions of the parties may be summarized as follows:

1 – Admissibility

The High Authority expressly states that it does not object to either the form or the admissibility of the application for the annulment of the decision of 27 November 1957. However, it considers that the conclusions in the reply which relate to Decisions Nos 5 to 7/56, 10 to 12/57 and 16 to 18/57 are inadmissible. The High Authority maintains that the applicant could only contest those decisions by means of a direct action.

2 – Substance

A – First ground of complaint

The High Authority was wrong when it considered that the decisions adopted by the Ruhr organizations had to be assessed in the light of Community law rather than German law.

(a) The applicant considers that the validity of the decisions adopted on 5 February 1953 must be assessed solely by reference to the law in force in Germany at that time. The common market in coal was only established on 10 February 1953. Under Article 1 of the Convention on the Transitional Provisions the High Authority had no power to take any decision before that date and therefore could not apply the provisions of the Treaty. Even if reference is made to 1 April 1953, the date on which the decisions in question took effect, the result is the same since, under the terms of Decision No 37/53, Article 65 of the Treaty only became applicable on 31 August 1953. The applicable texts are, therefore, Article 1(2) of Order No 78 of the British Military Government of 28 January 1947 and Article 134 of the Bürgerliches Gesetzbuch (Civil Code). On the basis of

those provisions the decisions of 5 February 1953 are totally void. That being so, the High Authority should not have found that they were compatible with the Treaty, since only valid decisions may be considered from the point of view of their compatibility with Community law. On the contrary, it should have ruled that the decisions could not be assessed by reference to the provisions of the Treaty.

(b) *The High Authority* replies that it alone is competent to decide whether agreements and decisions governing competition are compatible with the Treaty. It is, on the other hand, for the national courts and tribunals to decide, where necessary, whether such decisions were properly adopted in accordance with the national law which may then have been applicable.

The High Authority agrees with the applicant that Community law only became applicable on 10 February 1953; it has never made any statements or decisions to the contrary. As a result, whatever assessment was made of the decisions at the time they were adopted, they were after that date subject to the Treaty 'since, from their content, they were intended to be of continuous and permanent application'.

It is perhaps correct that where the decisions were void from the outset it was no longer necessary to consider whether the provisions of the Treaty were applicable to them. However, that question is also one for the national courts alone. The High Authority would have trespassed on their jurisdiction if it had refused to rule on the question referred to it under Article 65(4) on the ground that it was of no importance for the purposes of the judgment to be given by the national court.

As regards the rules which result from the law of the European Coal and Steel Community, the High Authority puts forward the following arguments.

Under the first paragraph of Article 8 of the Convention on the Transitional Provisions, the measures referred to in Article 4 of the Treaty came into force at the beginning of the transitional period, that is, on 10 February 1953. The provisions of Article 65

constitute the implementation of Article 4(d). It is true that at first Article 65 was not applicable without restriction to agreements concluded before 10 February 1953 but only applied subject to the provisions of the Convention and in particular of Article 12. That article reverses the principle laid down in Article 65 in so far as it allows such 'existing' agreements to continue to exist and only declares them invalid if the High Authority has refused to authorize them. When it adopted Decision No 37/53 the High Authority clarified those rules by providing that as regards the 'existing' agreements the prohibition contained in Article 65 would come into force on 30 August 1953 unless a request for the authorization of the agreement was submitted before that date, in which case the legal position resulting from Article 12 of the Convention would remain provisionally unchanged.

B — Second ground of complaint

The High Authority wrongly seeks to demonstrate the validity of the decisions of 5 February 1953 by maintaining that, in accordance with Decision No 37/53, the joint selling agencies of the Ruhr submitted a request for the authorization of their agreements within the required time and that such authorization was subsequently received.

(a) *The applicant* maintains that the contested decision wrongly assumes that the decisions of 5 February 1953 were subsequently authorized. Decisions Nos 5 to 7/56 authorized agreements which had nothing in common with the original agreements except the aim sought, namely a joint agreement on commercial practices and nothing else. As is clear from Decisions Nos 5 to 7/56, the agreements authorized are dated 13 December 1955 and 6 February 1956 and the legal persons by whom they were concluded, namely the three joint selling agencies at present in existence, are quite distinct from the six joint selling agencies in existence in 1953.

Thus, although the request for the authorization of the decisions of 5 February 1953 was submitted within the required

time, the authorization was never given. They are therefore subject to the absolute prohibition contained in Article 65 and are void under paragraph (4) thereof. Furthermore, since the request relating to the agreements actually authorized was not submitted within the required time, that is, before 31 August 1953, it could not cause the time to start to run in favour of the organizations of the Ruhr.

(b) *The High Authority* replies that the applicant's view is not justified by either the wording or the aim of Decision No 37/53.

According to the terms of that decision the entry into force of the prohibition in Article 65 is suspended by the submission of 'a reasoned, written request for authorization'. If such a request is submitted the prohibition only takes effect *ex nunc* from the moment the High Authority rejects the request and on the expiry of the time-limit which it has fixed for that purpose.

The organizations of the Ruhr submitted their request for authorization within the required time. It is true that the High Authority did not expressly reject it and fix a time-limit for that purpose, but the rejection results indirectly from the fact that by adopting Decisions Nos 5 to 7/56 the High Authority authorized the joint sale of Ruhr coal on terms different from those which formed the subject of the request submitted before 31 August. Thus, before the adoption of those decisions, the prohibition contained in Article 65 did not apply to the organizations of the Ruhr.

The suspensory effect provided for by Decision No 37/53 cannot depend on the extent to which the authorization finally granted by the High Authority coincides with the original request. The only decisive question is whether 'a decision is given on the same set of economic factors'. Such is the case in this instance. The decision as a whole concerned 'the manner in which the joint sale of Ruhr coal, which has so far been organized by virtue of the right of occupation, . . . is to be organized in the future within the context of the Treaty'.

C – Third ground of complaint

The contested decision is based on false

premises, since it wrongly assumes that Decisions Nos 5 to 7/56 are lawful.

1 – Admissibility

The High Authority maintains that the decisions in question are lawful. Although the applicant was entitled to contest them within the prescribed period, it did not do so and it cannot now do so *incidenter* in the course of the present action.

The applicant replies that it only acquired the right to contest Decisions Nos 5 to 7/56 as a result of the adoption of the contested decision of 27 November 1957.

When adopted, Decisions Nos 5 to 7/56 did not affect the applicant, since it did not satisfy the conditions laid down in the decisions of 5 February 1953 and at that time those decisions had not been dealt with by the High Authority in a manner which could be contested.

2 – The justification for the ground of complaint

(a) *The applicant* maintains that by adopting Decisions Nos 5 to 7/56 the High Authority infringed the basic principles of the Treaty, in that it authorized practices which result in discrimination against certain wholesalers and which are likely to restrict competition and completely to exclude certain interested parties. It has overlooked the fact that the wholesale coal trade was only beginning to pick up again in 1950-51 and that the decisions of 5 February 1953 have made the work of reconstruction impossible. Most wholesalers were not able to reach a turnover of 48 000 metric tons again by 1952-1953. In the Detmold Regierungsbezirk (administrative district), for example, the decisions in question resulted in 24 and perhaps even 26 out of the 27 wholesalers who were until then entitled to obtain supplies directly from the coalmines of the Ruhr becoming second-hand dealers.

The applicant describes in detail the consequences for it and the other wholesalers which, in its opinion, were caused by the decisions of 5 February 1953. It offers to produce witnesses to prove those allegations. The transitional rules contained in the foregoing decisions are also discriminatory,

since they only benefit those wholesalers whose annual turnover in 1955-1956 was at least 48 000 metric tons. The applicant is thus immediately excluded.

If, when it adopted Decisions Nos 5 to 7/56, the High Authority had taken into account the repercussions of the decisions of 5 February 1953, it would either have been unable to authorize the increase in the minimum level of sales to 75 000 metric tons or would have had to adopt different transitional rules. Decisions Nos 5 to 7/56 are thus based upon an 'incorrect assessment of the situation obtaining when the authorization was granted' and a use of the High Authority's powers for a purpose which exceeds that for which they were conferred, that is, therefore, on a wrong use of its discretionary power.

Furthermore, the High Authority failed to respect certain fundamental rights which are protected under almost all the constitutions of the Member States and limit the area of application of the Treaty. To give one example in particular, Articles 2 and 12 of the Grundgesetz (Basic Law) of the Federal Republic of Germany grant each citizen the inviolable right to the free development of his personality and to the free choice of his trade, occupation or profession.

(b) *The High Authority* replies that for the purposes of the solution to the present action it is unnecessary to decide whether or not Decisions Nos 5 to 7/56 are in accordance with the Treaty. It is not the content of those decisions which is of interest; they are only important to the extent to which they put an end to the procedure set in motion in accordance with Decision No 37/53 and thus to its suspensory effect. Even if the decisions of the High Authority in question had required a turnover of 6 000 metric tons—the limit before the adoption of the decisions of 5 February 1953—as a condition for operation as a wholesaler, the terms of the contested decision could have been no different, since the original request made by the Ruhr organizations must be regarded as only having been rejected by the final decision of the High Authority.

The applicant's criticisms of the assessment of the situation made by the High Authority in adopting Decisions Nos 5 to 7/56 are also unfounded. The High Authority was perfectly aware that before 5 February 1953 the tonnage limit for direct purchases was 6 000 metric tons but it had at the same time to take account of the fact that, in the meantime, the sale of Ruhr coal had been reorganized and that it had therefore to authorize commercial regulations which would apply without discrimination to all the dealers in the common market.

Finally, the High Authority considers that the applicant's offers of proof are without purpose and that they should be rejected.

D – Fourth ground of complaint

The High Authority failed to appreciate the fact that the decisions of 5 February 1953 were adopted in order to award the prohibition contained in Article 65 and that, for that reason, they could not enjoy the protection of the transitional rules.

(a) For the first time during the hearing *the applicant* maintained that the contested decisions had to be regarded for legal purposes as an agreement drawn up *after* the creation of the common market. As such it could not be covered by Article 12 of the Convention on the Transitional Provisions and Decision No 37/53, although it was from the outset covered by Article 65. The decisions were clearly adopted *ad hoc*, that is, with reference to the imminent entry into force of the provisions of the Treaty on agreements and concentrations, including the transitional legal provisions.

As a result, the High Authority was obliged to make an assessment of the background situation in order to reply to the question put to it by the Landgericht Essen. That should, however, have led it to acknowledge the discriminatory nature of the decisions in question and to recognize that they were incompatible with Article 65. The fact that the applicant and other wholesalers became second-hand dealers meant that a large number of the applicant's former customers left it in favour of the remaining first-hand wholesalers. The coal producers of the Ruhr have said openly that the purpose of the

commercial rules was to benefit the wholesale trade carried on directly or indirectly by the mines and thus to obtain for them an additional source of revenue. By remaining supine in the face of such action, the High Authority has in practice encouraged the concentration of the sale of coal in the mines and has contravened a principle of the Treaty.

(b) In reply the *High Authority* objects that the date of the reorganization is rather the result of the time-limit fixed by Order No 20 of the Allied High Commission. By their nature transitional rules are drawn up with reference to specific dates. Rules adopted a short time before such date cannot be subjected to special treatment on the ground that they constitute an attempt to frustrate the law, since it is impossible in such a situation to fix any clear time-limit for their adoption.

If the applicant wished to take action against the High Authority's provisional acceptance of the decisions in question, it had either to contest Decision No 37/53 or, in accordance with Article 35 of the Treaty, to invite the High Authority to take action against the commercial rules. If the High Authority had refused, it would have been open to the applicant to bring an action for failure to act.

IV — Procedure

The application was brought in due form and within the prescribed period. The procedure followed the normal course and the Advocate-General gave his opinion that the application should be dismissed.

The file from the Landgericht Essen was submitted to the Court.

Law

1. In its principal conclusions the application contests the decision of the High Authority of 27 November 1957 which, in answer to a decision to stay the proceedings adopted by the Landgericht Essen, had found that the prohibition contained in Article 65(1) of the Treaty did not apply to the decisions adopted on 5 February 1953 by the six joint selling agencies for Ruhr coal. Under the second subparagraph of Article 65(4) an application against such a decision of the High Authority may be brought before the Court, which therefore has jurisdiction in the present action.

2. Since the application is brought within the context of Article 65 of the Treaty, the applicant is entitled under Article 80 to appear before the Court, even though it is engaged in the distribution rather than the production of coal. The right of action of undertakings engaged in distribution is not limited to cases in which they are parties to the agreement in question but extends to cases such as the present in which a decision based on Article 65 directly affects the interests of the applicant distributive undertaking.

In this instance the Court is not called upon to decide whether an application based on Article 65(4) must also satisfy all the conditions laid down in Article 33 for an application for annulment, since there is no doubt that they are satisfied here. The application relates to an individual decision which concerns the applicant; on 6 December 1957 it was notified to the applicant company, which brought

proceedings against it on 4 January, that is to say, within the period of one month fixed by the third paragraph of Article 33; the contested decision is individual in character, since it rules on the legal validity of actual decisions taken by clearly defined groups of undertakings; it concerns the applicant, since it was adopted within the context of an action between that company and another party and it may exert an influence on the outcome of that action.

3. Under Article 65(4) the High Authority has jurisdiction to rule whether any agreements or decisions adopted by such groups of undertakings are compatible with the provisions of that article. That rule must be interpreted to mean that the High Authority is also entitled to rule whether the Article in principle is applicable to such agreements or decisions by virtue of other provisions of the Treaty or of the Convention on the Transitional Provisions. Therefore, no objection can be made to the fact that in this instance the High Authority did not reply directly to the question raised by the Landgericht Essen, in its decision to stay the proceedings, whether the decisions of 5 February 1953 are in breach of the prohibition contained in Article 65(1) of the Treaty but found that the prohibitions contained in Article 65 did not apply to those decisions until the entry into force of Decisions Nos 5 to 7/56. The foregoing cannot alter the fact that the Court is required to deal with an application for annulment based upon Article 65(4) of the Treaty. On the grounds set out under Nos 1 and 2 above the Court has jurisdiction to hear the action and the applicant has the right to institute proceedings.

4. The applicant considers that a misuse of powers or an infringement of the Treaty sufficient to justify the annulment of the contested decision is to be found in that the High Authority wrongly failed to take account of the fact that the decisions in question had to be assessed from the point of view of German law, by virtue of which they were void. That argument is unfounded.

(a) Under Article 8 of the Treaty the High Authority is only required to apply Community law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law. Consequently, the High Authority is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law (in particular Articles 2 and 12 of the Basic Law).

(b) It is for the High Authority to consider all the agreements and decisions which are covered by the terms of Article 65 of the Treaty and are intended to apply to the common market in order to rule on their compatibility with the provisions of that article, without regard for their validity under national law. An agreement which is

valid under national law may well run counter to the prohibition in Article 65(1). In such a case it is void under Community law (Article 65(4)). On the other hand, even if an agreement is void under national law, it may still be intended to apply to the common market and may have repercussions there which are incompatible with the Treaty. In order to avoid such a situation the High Authority must also consider whether an agreement which is allegedly void under national law is compatible with the Treaty.

In this instance the decisions adopted on 5 February 1953 were intended to come into force at the beginning of the new coal-marketing year that is, as from 1 April 1953. It was therefore the intention of the parties concerned that they should be applied at a time when the common market was already in existence. The High Authority was therefore obliged to consider them in the manner described above, that is, without reference to their validity under national law. It had to do so on the basis of Community law which, according to the terms of the final subparagraph of Article 2(2), Article 2(3), Article 1(4) and subparagraph (a) of the second paragraph of Article 8 of the Convention on the Transitional Provisions, was the only law applicable to coal after 10 February 1953 (the day on which the common market was established).

The legal position described above was in no way modified by the fact that the prohibitions contained in Article 65 did not take effect on the establishment of the common market, that is to say, on 10 February 1953, but, in accordance with Article 12 of the Convention and Decision No 37/53 of the High Authority which was adopted in implementation thereof, only on 31 August 1953 or even later.

5. Since the Court cannot base its judgment on legal arguments whose validity is not established, it considers it necessary to make a preliminary examination of the question whether Article 65 was applicable not only on the establishment of the common market in coal (10 February 1953) but already on the entry into force of the Treaty establishing the European Coal and Steel Community (on 25 July 1952).

It does not, of course, emerge directly from the wording of Article 12 of the Convention that the principle laid down by Article 1(5) of the Convention that the provisions of the Treaty shall be applicable from its entry into force shall be modified by special regulations as regards the rules on agreements and concentrations in Article 65. The second paragraph of Article 12 merely states that, where the High Authority does not grant the authorization provided for in Article 65(2), the prohibition on agreements contained in that article shall take effect on the expiry of a reasonable time-limit fixed for that purpose. Although, notwithstanding their possible subsequent authorization ('prohibition subject to authorization'), the

agreements entered into after the establishment of the common market fall immediately under the terms of the prohibition in Article 65, the 'existing' agreements remain in force provisionally until their authorization is refused and the time-limit set by the High Authority has expired. Until such time they enjoy 'authorization subject to subsequent prohibition'. However, the second paragraph of Article 12 of the Convention does not state whether those agreements drawn up since the entry into force of the Treaty must alone be regarded as 'existing' agreements or whether those drawn up between that date and the establishment of the common market must also benefit from the transitional rules.

There are, therefore, no express provisions stipulating that, as an exception to the principles laid down in Article 1(5) of the Convention, the prohibitions contained in Article 65 of the Treaty do not apply to agreements from the entry into force of that Treaty, but only from the establishment of the common market and that, in the meantime, the special rules contained in Article 12(2) of the Convention shall apply. That principle must, however, be deduced from the tenor and purpose of the transitional provisions.

As is stated in Article 1(1), the Convention was annexed to the Treaty so as to 'provide for the measures required in order to establish the common market and enable production to be progressively adapted to the new conditions, while helping to eliminate disequilibria arising out of the former conditions'. Article 12 of the Convention must be interpreted in the light of that principle.

The system established by Article 65 of the Treaty is based not only upon the prohibition of agreements laid down in paragraph (1) of that article but at the same time on the possibility of authorizing useful and necessary agreements contained in paragraph (2). That possibility of authorization is of considerable importance since, despite the restrictions set on agreements by the Treaty, it provides for and recognizes the procedure for the joint sale of coal, which has long been employed in all the countries of the Community producing coal in large quantities.

If the agreements drawn up between the entry into force of the Treaty (25 July 1952) and the establishment of the common market (10 February 1953) were subject to Article 65 of the Treaty, the result would be that, with the exception of the rule prohibiting agreements, the complete system provided for by that article could not have been implemented during the six months following the entry into force of the Treaty, since, during that period, there was no organization in existence with power to grant the authorizations. On the one hand, the High Authority was only in a position to do so after the establishment of the common market (fourth subparagraph of Article 2(2) of the Convention); on the other hand, the governments of the Member States were not empowered to apply Community law and to grant the authorizations provided for in Article 65(2) themselves. Under Article 2(3) of the Convention, they were only entitled to continue to exercise the powers conferred

on them by national law ('the relevant powers *shall continue* to be exercised by Member States') and could not act in place of the High Authority in exercising the powers conferred on that body by the Treaty.

It is inconceivable that the Contracting Parties accepted a situation whereby, for a period of uncertain duration following the entry into force of the Treaty (it in fact came to an end after six months), the prohibition in Article 65(1) was applicable, whilst the power of authorization provided for in paragraph (2) of that article and closely connected with the prohibition was inapplicable.

On the basis of the aim of the Convention, which is set out above and referred to in Article 1(1) thereof, Article 12 must be interpreted to mean that the second paragraph is also applicable to agreements drawn up between the entry into force of the Treaty and the establishment of the common market. That interpretation alone avoids the unsatisfactory situation described above, that is to say, the arbitrary separation of the various connected elements of Article 65 into those which are immediately applicable and those which would only become applicable after an indefinite period.

The different regulations applying to the prohibitions contained in Article 4(a) to (c) and the much clearer transitional provisions contained in Article 13 of the Convention governing the implementation of Article 66 of the Treaty on concentrations between undertakings do not conflict with the above interpretation, since they concern circumstances of another type which had for good reasons to be subject to another system. Paragraph 13 in particular is based on quite different premises, since transactions bringing about concentrations effected before a certain date entirely avoid the application of the Treaty, whilst Article 65 was sooner or later to apply to all agreements regardless of the date on which they were made.

Agreements made before 10 February 1953 therefore enjoy the protection of the second paragraph of Article 12 of the Convention.

6 (a) It emerges from the second paragraph of Article 12 of the Convention, together with Articles 1, 2 and 3 of Decision No 7/53 of the High Authority of 11 July 1953 (JO 1953, p. 153), that the 'existing' agreements concluded before 10 February 1953 did not become invalid on the establishment of the common market (10 February 1953) but were regarded as authorized subject to subsequent prohibition and, in the absence of any special decision adopted by the High Authority, only fell under the prohibition in Article 65 and became invalid as from 31 August 1953. If a request for authorization has been submitted before that date the said agreement remained in force as long as the High Authority adopted no decision rejecting it.

(b) If the legal principles set out above are applied to this case it appears that, when it adopted the contested decision, the High Authority rightly ruled that the prohibitions in Article 65(1) of the Treaty were not applicable to the decisions of 5 February 1953 until the entry into force of Decisions Nos 5 to 7/56, since such decisions, adopted five days before the establishment of the common market, constituted 'existing' agreements in respect of which a request for authorization had been submitted before 31 August 1953 and was only rejected by Decisions Nos 5 to 7/56.

The objections put forward by the applicant in this respect are therefore unfounded.

(i) The applicant has alleged that the decisions of 5 February 1953 were in fact not 'existing' agreements but that they had been adopted *ad hoc* only a few days before the establishment of the common market, that is, in order to avoid the immediate application of the prohibitions in Article 65(1) of the Treaty.

Even if such an intention had encouraged the parties concerned to adopt the decisions of 5 February 1953, which the Court considers to be possible but unproved, it would not be sufficient to prevent the application of Articles 1 to 3 of Decision No 37/53 of the High Authority. Order No 20 of the Council of the Allied High Commission of 9 September 1952 had compelled the joint selling agencies for Ruhr coal to reorganize the sale of coal before 31 March 1953. That measure encouraged the agencies concerned to take steps at the same time to limit the ability of wholesalers to place direct orders, *a fortiori* since Order No 2 had expressly referred to such dealers several times. Although there was, therefore, a legal obligation on the joint selling agencies for Ruhr coal to adopt agreements on their reorganization, it is not sufficiently established in law that the decisions of 5 February 1953 were only adopted in order to avoid the application of Article 65 of the Treaty.

According to Article 1 of Decision No 37/53 of the High Authority, the decisive question is whether the agreements, decisions or concerted practices were already in existence when the common market was established (10 February 1953). That question may be answered in the affirmative as regards the decisions of 5 February 1953.

(ii) The applicant also maintains that since the decisions of 5 February 1953 have never been authorized they are covered by the absolute prohibition in Article 65 and are therefore void. That argument is unfounded.

The High Authority in fact refused to authorize the decisions of 5 February 1953. That refusal has never been expressly stated but it was clearly implied in the authorization of the regulations on sales given by Decisions Nos 5 to 7/56.

The Court therefore considers the defendant to be justified in its view that the authorization given to the new regulations by Decisions Nos 5 to 7/56 amounted in law to a formal refusal to authorize the earlier regulations and that, for the reasons set out under point 6, paragraph (a) and (b) above, the date set for the entry into force of the new regulations (22 February 1956) had to be considered as the date on which, in accordance with Article 3 of Decision No 37/53, the prohibitions in Article 65 were to apply to the earlier regulations.

Furthermore, the applicant's view that from the differences between the agreements which were finally authorized and the decisions of 5 February 1953 it may be concluded that the former did not form the subject of a request for authorization submitted within the required time cannot be accepted, since the agreements authorized by Decisions Nos 5 to 7/56 were submitted for authorization by parties other than those who adopted the decisions of 5 February 1953 and the content of those authorizations does not coincide with the terms of the decisions.

After examining the regulations governing the sale of Ruhr coal which were submitted to it for examination and which included the decisions of 5 February 1953, the High Authority let it be understood that it could not authorize the regulations existing earlier. It had, however, to avoid a situation in which the previous legal organization governing the sale of Ruhr coal became ineffective without being replaced by new regulations compatible with the Treaty. To wait until the coal-mines of the Ruhr submitted new regulations which could be authorized before formally rejecting the earlier regulations corresponded to the desire, which was based on the general aims of the Treaty and in particular on Article 3(a) thereof, to avoid that situation. All the efforts towards the adoption of regulations governing the sale of Ruhr coal form a single entity, beginning with the requests for the authorization of the decisions of 5 February 1953 and ending with the authorization given to the agreements finally adapted to the requirements of the High Authority and referred to in Decisions Nos 5 to 7/56. It is impossible for that continuous development to be artificially divided and for the first request for authorization which was presented within the required time to be thereby deprived of the suspensory effect provided for in Decision No 37/53.

(c) There is therefore no error of law in the finding made by the contested decision that the prohibitions in Article 65(1) of the Treaty were not applicable to the decisions of 5 February 1953 until the entry into force of Decisions Nos 5 to 7/56 on 22 February 1956. Such a finding does not prejudice the question, which the Landgericht Essen did not raise in its decision to stay proceedings, what law to apply to those decisions during the period from 5 to 10 February and whether or not they were valid according to that law.

(d) It is true, as the applicant has observed, that the contested decision is mainly

based on the fact that the High Authority took no steps against the commercial regulations in question until Decisions Nos 5 to 7/56 were adopted. Article 12 of the Convention sets no specific period within which action must be taken against the 'existing' agreements, with the result that the High Authority is entitled to use its discretion. The fact that it took three years to make a thorough examination of the organization of the sale of Ruhr coal and to introduce a new method of organization cannot be regarded as an abuse of its discretionary power in the light of the complexity and great economic and social importance of the reorganization in question.

If the applicant considered that the High Authority should have taken separate and earlier action against the commercial regulations in dispute, it was entitled to refer the matter to it in accordance with Article 35 of the Treaty and to bring an action for failure to act if the High Authority adopted no decision or recommendation. As no such proceedings were instituted by the applicant the High Authority is deemed not to have infringed the Treaty by taking no action at that period.

7. The applicant's conclusions based on the alleged illegality of Decisions Nos 5 to 7/56 of the High Authority are no better founded.

(a) The Court of Justice of the ECSC has already ruled that an applicant could put forward the illegality of a general decision on which an individual decision was based as a ground for an action against such individual decision. Since Decisions Nos 5 to 7/56 do not form the basis of the contested decision, the Court is not required in this instance to settle the question whether the same applies where the individual decision at issue is based upon another individual decision which is alleged to be illegal. That is already clear from the fact that, as a result of the above interpretation of Article 12 of the Convention and Decision No 37/53, the contested decision had to follow the same pattern if when adopting Decision No 5 to 7/56 the High Authority started with the idea that the commercial regulations existing before the adoption of the decisions of 5 February 1953 were alone compatible with Article 65. The adoption of Decisions Nos 5 to 7/56 is only decisive for the purposes of fixing the date from which the prohibitions contained in Article 65 applied to the 'existing' agreements and decisions.

There is therefore no real link between the contested decision and Decisions Nos 5 to 7/56.

(b) In so far as the applicant contests the regularity of Decisions Nos 5 to 7/56 and, in its alternative conclusions (which, furthermore, are inadmissible since they were only put forward in the reply and therefore out of time for the purposes of Article 22 of the Protocol on the Statute of the Court and Article 29 of the Rules of Procedure of the Court, apparently seeks their annulment, the application is inad-

missible, since it refers to decisions other than that which is contested. The applicant did not contest Decisions Nos 5 to 7/56 within the period provided for by Article 33 of the Treaty. It cannot, therefore, contest them *incidenter* in the present case. The same applies to Decisions Nos 10 to 12/57 and 16 to 18/57 which merely amend and supplement Decisions Nos 5 to 7/56.

The applicant's contention that it was unable to contest Decisions Nos 5 to 7/56 when they were adopted since it did not satisfy the conditions laid down therein is unfounded. From their adoption the decisions had concerned the applicant since they had excluded it from making direct purchases. The applicant could, therefore, have contested them within the prescribed period and have obtained the legal examination of its allegations concerning the repercussions—which it considers to be both serious and incompatible with the spirit of the Treaty—of the regulations in question on the existence of many long-established first-hand wholesalers. It is, however, unnecessary to consider the question in this instance, since the action only concerns the decision of the High Authority of 27 November 1957 which is in no way connected with it.

8. The application must therefore be dismissed on those grounds and, in accordance with Article 60(1) of the Rules of Procedure of the Court, the applicant must be ordered to pay the costs.

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 3, 4, 8, 31, 33, 35, 65 and 80 of the Treaty establishing the European Coal and Steel Community, as well as Articles 1, 2, 8, 12 and 13 of the Convention on the Transitional Provisions;

Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;

Having regard to the Rules of Procedure of the Court of Justice of the European Coal and Steel Community;

Having regard to Decisions Nos 1/53 and 37/53 of the High Authority and the letters of the High Authority of 7 and 10 February 1953 addressed to the Governments of the Member States,

THE COURT

hereby:

- 1. Dismisses the application for the annulment of the decision of the High Authority of 27 November 1957, notified to the applicant on 6 December 1957;**

2. Orders the applicant to pay the costs of the action.

Donner

Riese

Rueff

Delvaux

Hammes

Rossi

Catalano

Delivered in open court in Luxembourg on 4 February 1959.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE¹

*Mr President,
Members of the Court,*

In order for my opinion to be as clear as possible, I ask your permission to give a brief preliminary sketch of the essential points of the facts and the procedure.

The applicant company is a wholesale coal dealer at Bünde (Westphalia). It satisfied the conditions for obtaining supplies direct from the mines fixed by the organizations for the joint sale of Ruhr coal – the Deutscher Kohlenverkauf or DKV – which was still active on the entry into force of the Treaty, that is, it had an annual turnover exceeding 6 000 metric tons; it was, therefore, a ‘first-hand dealer.’ However, it subsequently found itself unable to reach the turnover of 48 000 metric tons required thereafter under the rules adopted on 5 February 1953 by GEORG, the new organization set up by the coal companies of the Ruhr in implementation of the legislation of the Occupying Powers.

Therefore, on 23 April 1953 the applicant brought an action for damages against GEORG before the Landgericht Essen in respect of the loss suffered as a result of the fact that after 1 April 1953, the date on which the new system came into force, it was no longer supplied directly as a first-hand wholesaler.

By a judgment of 6 November 1953, the

Commercial Division of the Landgericht Essen made the following order:

‘The proceedings are stayed until the High Authority of the European Coal and Steel Community has given a ruling under Article 65(4) of the Treaty establishing the European Coal and Steel Community, on the question whether the joint decisions adopted by the members of the defendant and the six joint selling agencies for Ruhr coal which provide that as from 1 April 1953 the agencies will no longer deliver directly to wholesale coal dealers selling less than 48 000 metric tons of fuel per year are contrary to the terms of the prohibition contained in Article 65(1) of the abovementioned Treaty.’

The Court is aware that under the terms of Article 65(4) ‘The High Authority shall have sole jurisdiction, subject to the right to bring actions before the Court, to rule whether any . . . agreement or decision’ prohibited by paragraph (1) ‘is compatible with this Article’. Any such prohibited agreements or decisions’ shall be automatically void and may not be relied upon before any court or tribunal in the Member States’.

The High Authority only adopted its decision on 27 November 1957. The operative part of that decision is as follows:

¹ – Translated from the French.