

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI
 DELIVERED ON 28 MARCH 1974 ¹

*Mr President,
 Members of the Court,*

The applicant undertaking, which has for a very long time carried on business as a direct wholesaler of Ruhr coal, and has in the past obtained, by repeated actions before this Court, the annulment of several decisions of the High Authority authorizing producers of Ruhr coal to introduce conditions restricting the sale of their products and likely to compromise the undertaking's chances of continued access to direct supplies, alleges that it is now under a new threat exerted by the Decision of the Commission of 21 December 1972 authorizing new terms of business of Ruhrkohle AG, more restrictive than the preceding ones.

As is generally known, the Commission had authorized, by the Decision of 27 November 1969, the merger of the mining companies of the Ruhr Basin by the transfer of colliery assets to the company Ruhrkohle AG on the basis of Article 66 (2) of the ECSC Treaty. This means that, unlike the previous cases, which concerned the authorization of agreements between the various Ruhr coal selling agencies operating at that time, agreements which had to be judged on the basis of Article 65 of the ECSC Treaty, the present case comes essentially within the ambit of Article 66 on concentrations. It should be noted that, as a condition of allowing the merger of the various Ruhr mining companies into a single company, the aforementioned Decision of 27 November 1969 obliged this newly constituted company to submit, for prior authorization by the Commission, any change in its terms of business.

Whereas in the previous cases brought by the Nold undertaking the question at

issue was the maintenance of competition, or at least the possibility of competition, between producers of Ruhr coal, in this case the question of maintenance of healthy conditions of competition is instead concerned essentially with the wholesale trade.

With regard to the right of coal dealers to qualify for direct purchase from Ruhrkohle AG, the change brought about by the Decision of 21 December 1971 and which is now in dispute, consists above all in the fact that such admission is dependent on the conclusion of a two-year contract to purchase at least 6 000 metric tons a year of Ruhr coal for the domestic and small-consumer sector. The increase in the severity of the conditions relating to the right of direct purchase is justified essentially by the need to rationalize the coal trade, on account of the continual recession which had occurred in this sector.

Moreover, according to the new rules, before a dealer can supply industrial consumers he must be authorized to supply the domestic and small-consumer sector. What is more, in place of the previous criterion of a minimum annual coal consumption of 30 000 metric tons of solid fuels of any provenance, it is now necessary for the dealer to have acquired that tonnage of Ruhr products.

Finally, in respect of the supply of industrial consumers who acquire more than 30 000 metric tons a year of Ruhr products, the wholesaler is required to meet further conditions consisting in the rendering of special services laid down in Article 2 (3) of the contested Decision.

It was envisaged that the application of the new rules would cause about sixty dealers to lose their right to qualify as direct wholesalers of Ruhr coal. As

¹ — Translated from the Italian.

regards the applicant undertaking, it must be pointed out that according to the data put forward by the interveners, Ruhrkohle AG and Ruhrkohle Verkaufsgesellschaft, at the time when the application was made to the Court, the Nold undertaking no longer satisfied the requirements for the right of direct purchase even under the rules applicable before the entry into force of the present contested Decision.

On the basis of this factor, the interveners have pleaded the inadmissibility of the action on the grounds of lack of any legally significant interest, since, by its request for the annulment of the Decision impugned, the applicant cannot in any case obtain the result which it seeks. In fact, in the case of annulment, the former terms of business would revive and, by virtue of their renewed application the applicant would likewise necessarily lose its right of direct purchase of Ruhr coal.

I do not consider this plea of inadmissibility well founded.

It has not been disputed that at the when the application was made to this Court the Nold undertaking still had, at least in practice, direct access to supplies from Ruhrkohle. It is not however certain that if the previous terms were to revive it would necessarily lose its right of access to direct supplies. Even assuming that at a particular time the applicant undertaking may not even have satisfied the previous criteria, certainly less restrictive than those at present in force, one cannot exclude the possibility of a change in the applicant's sales such as to enable it now to satisfy these criteria. Recent experiences have shown us how rapidly the state of the market can change as a result of unforeseen events, even in respect of coal sales. Consequently, the applicant may have a valid interest in obtaining the abolition of the more restrictive conditions of sale authorized by the contested Decision.

As for the substance of the application, from the arguments and considerations

put forward by the applicant, the following submissions may be specified:

1. The Decision impugned, the effect of which is to exclude the applicant from the direct wholesale trade, violates a general principle of the ECSC Treaty as it discriminates between Community dealers.
2. The Decision impugned, the effect of which is to take away the applicant undertaking's qualification and thus its right to the status of direct coal wholesaler, conflicts with a general principle which is enacted and protected in the German Federal Constitution (Article 14) and in the Constitution of the Land of Hesse, both of which guarantee individual property rights.
3. It is in its reply that the applicant first maintains that the new conditions of sale, instead of contributing to an improvement in coal distribution, render it more difficult; or that, in any case, the Decision impugned is not sufficiently well reasoned with regard to this matter. As the applicant fails to specify its grounds this objection is, as far as one can perceive, either a submission of infringement of the Treaty or a submission of infringement of essential procedural requirements.

Before examining each of these questions separately it will be useful to clear the ground of a number of elements which the applicant introduced into the procedure but which logically fall outside this case. The Nold undertaking has argued at length on the change in the position of the coal market which occurred last Autumn and the alleged unfair behaviour of Ruhrkohle, the latter consisting both in the unjustifiable competition which it exercises against dealers by the practice of fixing prices appreciably lower than those laid down in the price lists and in the refusal to meet certain orders of the applicant undertaking for the purchase of large quantities of coal made towards the end

of 1973 following the increased market demand for this product.

We are here faced with circumstances and behaviour which, even though they might be relevant within the Community context for the purposes of a possible change in the terms of business criticized, which had been authorized by the Commission on the basis of a different state of the market, and also to impose penalties where an abuse of a dominant position may be established under Article 66 (7) of the ECSC Treaty, are, however, completely irrelevant in this case, which is essentially concerned with the question of the validity of a Decision adopted before these factors arose. The legality of this act cannot be affected therefore by subsequent economic events, unforeseeable at the time when the Decision was taken, nor can it be affected by any illegal behaviour committed by the addressee of the Decision impugned in relation to the applicant undertaking.

Moving on now to examine the individual submissions, I consider that as the last to be raised were adduced too late, they must be considered inadmissible on the basis of Article 42 (2) of the Rules of Procedure. However, as lack of reasoning is an issue which has previously been held to be a matter of public policy, it can be considered by the Court of its own motion, as the Court has indeed already done in a previous case brought by the same applicant (see judgment in Case 18/57, *Nold v High Authority*, Rec. 1959, p. 109).

But in this case the alleged lack of reasoning is anything but obvious. The applicant's criticism concerns essentially the condition relating to the two-year contract for the purchase of at least 6 000 metric tons of coal for the domestic and small-consumer sector. The contested Decision points out with regard to this matter that it is clearly reasonable that Ruhrkohle should wish to take account of the major decline in coal sales in its distribution

arrangements by limiting direct business to dealers operating on a sufficient scale. This justification, in truth rather brief, was expanded by the Commission in the course of the proceedings, as it observed in its statement of defence that the replacement of the criterion of overall sale of at least 6 000 metric tons per annum of coal by the criterion laying down the obligatory sale of at least 6 000 metric tons per annum to the domestic and small-consumer sector, plus the prior obligation to purchase this minimum quantity for two years, tend to limit the right to qualify for direct purchase to those dealers who really make an effort to sell Ruhrkohle's products. The more detailed explanation of this condition is given by the Commission in its rejoinder, where it emphasises that strong competition from other sources of energy, to which coal is subject, has been felt chiefly in the domestic and small-consumer sectors, as can be seen by the trend in Ruhr coal sales. There is a connexion between this last explanation and the observation made in a recital of the Decision impugned, justifying the introduction of the condition under examination by the need to induce the wholesaler to concentrate primarily on these two sectors in which there is greater scope for the promotion of coal sales by their efforts.

Consequently, bearing in mind the explanations put forward in these proceedings, the grounds advanced in the statement of reasons of the Decision impugned, the merits of which the applicant has not contested, can be regarded as sufficient to justify the change in the terms of business. Thus, even if the Court should consider it necessary to make of its own motion an examination of the question raised too late by the applicant, the Decision impugned should not be held void for infringement of essential procedural requirements.

The plea of discrimination is clearly unfounded. The terms of business

authorized by the Commission are in fact based on objective criteria which rule out any possibility of discrimination against coal wholesalers. All those who satisfy the objective conditions required have the right to qualify for direct purchase.

The submission of violation of fundamental rights, put forward by the applicant, must be considered insofar as the right invoked is protected by the system. As emerges from the case law of this Court, the fundamental rights generally recognized by the Member States form an integral part of our Community system, which, by drawing inspiration from the common traditions of the Member States, guarantees respect for these rights within the limits of the powers conferred on the Community and in accordance with the objectives assigned to it. It is therefore necessary to establish first of all whether the fact that the contested rules may have the effect of depriving the applicant undertaking of the possibility of direct access to supplies of Ruhr coal can constitute a violation of one of those fundamental rights which, because of their prime importance, must be protected by the Community legal order.

The applicant claims to have an established right to its status as a direct coal wholesaler, by reason of the fact that the undertaking has held that status for more than a century and, more generally, that anyone has the right to carry out such an activity, virtually on the basis of an inherent right, out of respect for the principle of freedom of trade and the need to ensure that individuals have the means to realise their capabilities to the full. If this argument were correct, it would mean completely denying the Community executive any power to authorize terms of business. To impose conditions on the right of direct access to coal supplies implies that, however wide these conditions may be, there might always be an undertaking which is unable to satisfy them and which is consequently

deprived of the possibility of carrying on direct trade. In that way, the result would be to deny the Community executive any power to intervene in the economy, something which is contrary not only to the spirit and to the very aims of the ECSC Treaty but, much more generally, to the requirements essential to the modern organization of society. The applicant would probably be appalled if faced with the extreme consequences inherent in its argument. It probably did not intend to venture so far. The question raised, expressed in more concrete and realistic terms, can lead us to examine whether the power which the Commission undoubtedly holds to authorize rules which producers have freely drawn up for the purposes of fixing their conditions of sale, has been exercised in a manner which does not offend against general principles which, even if not expressly laid down in the Treaty, are an integral part of the Community order. It will be necessary to examine in particular whether there has been any violation of the general principle of protection of property which is recognized by all the Constitutions of the Member States and which, without doubt, is also an integral part of the Community order.

After the specific statements on the matter which this Court has already clearly expressed, it is perhaps unnecessary to recall that, if the task of the Court of Justice as an institution is that of ensuring that in the application of the Treaties the law is observed, this means that the Court should be particularly sensitive when dealing with problems which concern those fundamental rights forming the basis of every civil society. The respect for liberty, for property ownership, the declaration of principles of equality, of non-discrimination, of proportionality — to cite only a number of those which are really fully recognized — form a part of that concept of law which governs and forms the framework for the whole Community system and from which that

system, even in its application to individual cases, may never deviate.

But a declaration like the one we have here sought to emphasize *ad abundantiam* needs also to have its detailed application spelt out before it can be taken seriously and one can actually believe in its value. In short, it is always a question of those principles *quarum causa omne ius constitutum est*: we find them in the ancient laws, as the written basis of human society, we find them in the codes of the nineteenth century, which were conceived precisely for the purpose of setting out the validity of those declarations in the form of Articles; we now find them more formally proclaimed in modern Constitutions, among which is Article 14 of the German Constitution invoked in this case. The acts of the Community authorities must all respect these principles and the duty of the Court is to ensure that they are fully applied. But it is for the very purpose of ensuring fundamental respect for these rights that their exercise must be regulated. Recognition by the Constitution does not mean that the subject matter is no longer subject to any rules, but that the rules must be inspired and limited by an effective and essential recognition of the principles. Therefore, one cannot in general invoke one of these basic norms to avoid in an actual concrete situation those obligations and burdens which the legal order has established or authorized (as is here the case) for the precise purpose of obtaining a functional application of those rules which are in accordance with the spirit of the system. Any violation must actually strike at the existence of the right recognized constitutionally as an indisputable characteristic of human personality. The Court ensures respect for these fundamental rights, which the Community must adopt by recognising that there are limits to the activity of organs and individuals and by, if necessary, recognizing liability. But both forms of recognition conform to

the realities and to the requirements of the various forms of protection. I repeat that the very importance of these essential forms of recognition of fundamental rights requires that they should not be invoked as a general ground by which to deny a more specific obligation or to impede the demands of social conduct which require that everyone should accept limitations and sacrifices in exercising his rights.

Indeed, the right of the individual is always also the result of limiting an aspect of liberty. Like every freedom, an individual right is not without its limits: every right must therefore be exercised in accordance with the rules which govern it. The Community order certainly cannot disregard the right of every citizen to engage in trade. The protection of the public interest, both by national legal orders and by the Community legal order, does however limit in several respects the exercise of trading activity. An example in the Community sphere is the case of the rules on competition, which prohibit many types of behaviour, transactions and practices. Also, out of respect for the principle of free movement of goods within the Community, the limitation can go as far as to prohibit specific uses of property, as has occurred in the field of trademark rights or rights similar to copyright. Such important limitations are justified by the general interest in the proper functioning of the common market; this is not the only consideration; one must regard these limitations as established for the purpose of supporting the other fundamental criterion relating to the safeguarding of the essential right to trade. Even though they fetter the initiative of private individuals, limitations on direct access to supplies from the coal producers can in turn contribute to well-ordered economic, commercial and productive activities, in the interests not only of producers, but also of consumers, by means of a reduction in distribution costs, and they can therefore stimulate

the competition existing between coal and other sources of energy. It is for this reason that the Treaty allows the Commission to authorize conditions of this nature.

The applicant could have attempted to contest, by invoking the rules on competition and by citing the actual market position of the product in question, the type of conditions actually prescribed, but it preferred to have recourse above all to general assertions which go too far and prove nothing, as when the applicant claims an absolute right to continue as a direct wholesaler by reason of the fact that it has carried on such a business for more than a hundred years. The applicant thereby assumes a proprietary right to continue on this basis, which the Community legal order does not protect unconditionally, nor, certainly, do the national legal orders.

In this connexion, it also suffices to refer to certain fundamental criteria of law to demonstrate the insubstantiality of the applicant's claim to the protection of principles which, in its opinion, are not subject to change over the course of time. The essence of the claim to protection of a vested right consists, even in accordance with the basic rule on protection of fundamental rights of the person, in the recognition of the existence of the rights themselves, but not, as regards their exercise, in the recognition of all the powers which can make up the content of those rights. In all legal orders, their exercise and their particular composition are without doubt subject to the evolution of rules whose respect for the right is unassailable only so far as concerns the essence of the right, which alone is regarded as inviting fundamental protection. This applies especially to the right of property ownership invoked by the applicant; it is a right recognized by all the Constitutions of the countries of the free world but one which is everywhere subject to continual change in accordance with the requirements of

economic and social progress to which law must conform.

It is moreover relevant here to refer to Article 222 of the EEC Treaty, which states that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

This distinction, necessary for protection of the right in the constitutional context, between the essence of the right of property ownership and the attributes it may possess is generally recognized in the Member States and expressly or impliedly, serves as the basis for rulings of supreme courts, including the German Federal Constitutional Court: see, for example, judgment No 21 of 29 November 1961, No 16 of 22 May 1963 and No 12 of 18 March 1970. In this last judgment the German court stated in particular that 'Article 14 of the Federal Constitution protects property as it has been defined by civil law and social conceptions, without, on the other hand, protecting the interests, possibilities and perspectives of gain'; this conception is similar to that declared by the Bundesgerichtshof (judgment of 7 December 1967, in *Neue Juristische Wochenschrift*, 1968, p. 293), according to which the protection of an undertaking's property does not extend to all the factual circumstances or all the rules existing in favour of the undertaking.

No Constitution can crystallize the rules needed to satisfy the changing requirements of economic reality. If the position of the coal market changes and necessitates, in the common interest, the rationalization of the distribution organization so as to reduce costs and stimulate more effective competition with other products, it would be irrational to oppose the economic requirements and support the continuance of an established state of affairs. That would be contrary to progress and to the capacity for change existing within the economic system. It is of the essence of a market based on the

principle of competition that undertakings must be able to rationalize their activity, including that relating to distribution of their products, even if under the control of a responsible authority.

Recognition as a coal wholesaler is not an inalienable right, nor is it a *status* granted unconditionally. The direct wholesaler performs a useful function for society if his activity is organized so as to correspond with the real needs of the economic system. If these needs change, the requirements needed to retain the status of direct wholesaler must also follow suit.

The new terms of business under examination do not have, as their aim or as their effect, that of preventing the applicant undertaking from carrying on business as a coal wholesaler. If the

applicant is disinclined to combine with other dealers so as to satisfy the conditions required for direct supplies it can however continue to be a coal wholesaler even though no longer a direct wholesaler as in the past. As the applicant has not adopted valid arguments establishing that the conditions of sale which it criticizes do not meet real and essential economic requirements, it is impossible to oppose their application to a single undertaking on the grounds that it would be excluded not so much from a particular commercial activity but simply from a special benefit (direct purchase from the producer) which it enjoyed in the past. Consequently, even though the loss of the possibility of direct purchase of coal from the producers may be damaging economically, it is not equivalent to expropriation.

I would thus advise the Court to dismiss the action and order the applicant to bear the costs of the proceedings.