of certain conditions imposed on the parties concerned, the consequences of that agreement are not prohibited by Article 65. In granting such an authorization the High Authority may impose any conditions which it considers necessary having regard to the nature and importance of the agreements authorized, in order to ensure observance of the requirements of Article 65 (2) for the whole period of the authorization. Here the High Authority has the right to exercise supervision in the form of supplementary statements and authorizations, which may, if necessary, take the form of the adoption of policies as a preliminary to certain measures amending the content of the agreements authorized. The limits of the High Authority's power are to be found both in the purpose for which it must be exercised and in the general principles of the Treaty.

4. The departments of the High Authority have no separate capacity and may only act under its responsibility.

5. The scope of an agreement only acquires significance in relation to the requirements of Article 65 (2) if it is considered both in relation to the size of the market and to the size of those economic bodies operating in this market which are the actual or potential competitors of the parties to the agreement.

In Case 66/63

GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS, represented by Professor W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs at The Hague, assisted by D. J. Veegens of The Hague, with an address for service in Luxembourg at the Netherlands Embassy,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Erich Ziemermann, acting as Agent, assisted by C. R. C. Wijckerheld Bisdom of The Hague, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application for annulment of Decisions Nos 5/63 and 6/63 of 20 March 1963 concerning the authorization of the joint selling of fuels by the mining companies of the Ruhr Basin associated within the Ruhr coal selling agencies 'Geitling' and 'Präsident';

THE COURT

composed of: A. M. Donner, President, Ch. L. Hammes and A. Trabucchi (Rapporteur) (Presidents of Chambers). L. Delvaux, R. Rossi, R. Lecourt and W. Strauss, Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:

By Decisions Nos 5/56, 6/56, 7/56 and 8/56, the High Authority authorized the mining companies of the Ruhr Basin to associate themselves into three selling agencies for a period of three years. By Decision No 17/59 the High Authority, while extending these authorizations for one year, found that in actual operation these organizations had frequently failed to comply with the authorizations granted and that, contrary to the provisions of the Treaty, a single marketing system had existed.

By Decision No 16/60, the High Authority rejected the request by almost every mining company of the Ruhr Basin for the authorization of a single joint-selling organization.

An application (Case 13/60) was lodged by the mining companies against this rejection and by Decision No 17/60 the High Authority temporarily extended the earlier authorizations.

Following the judgment of the Court of 18 May 1962 dismissing Application 13/60; the High Authority, by Decision No 6/62, fixed 31 March 1963 as the limit of validity of the earlier authorizations.

The mining companies of the Ruhr Basin then concluded new agreements associating themselves into two groups in order to sell their products jointly through the selling agencies 'Geitling' and 'Präsident', each representing one of these groups.

On 20 March 1963 the High Authority authorized these agreements by the contested Decisions Nos 5/63 and 6/63 (Official Journal, 10 April 1963, No. 57).

II — Conclusions of the parties

The *applicant* claims that the Court should:

'annul Decisions Nos 5/63 and 6/63 taken on 20 March 1963 by the High Authority of the ECSC;

order the High Authority to pay the costs.'

The *defendant* contends that the Court should:

'dismiss the application as unfounded and

order the applicant to pay the costs of the proceedings.'

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — *On admissibility*

The defendant does not question the admissibility of the application.

B — *On the substance of the case*

1. On the submission of infringement of an essential procedural requirement

(a) The *applicant* asserts that as the contracts and resolutions authorized were not published *in extenso*, the grounds for the contested Decisions give only an incomplete picture of the system approved by the High Authority.

The *defendant* replies that it is not obliged under the Treaties to publish in full the texts of the agreements which it authorizes under Article 65 (2). To enable the parties concerned to assess the legality of the measures authorized, the authorization Decisions need only set out the essential features of the agreements on which they are based.

The *applicant* contends that frequently it is the details of the companies' legal

structure which give an idea of actual intent and that therefore these should form the basis on which contracts are authorized. As neither the documents of incorporation of 'Geitling' and Präsident' nor those concerning the common organizations 'Treuhand' and 'Beratung' were received within the required time it has been unable to judge whether the High Authority has confused the essential features and the details.

The *defendant* contends that at the end of July 1963 it returned copies of all the contracts and resolutions contained in the contested Decisions to the applicant's representative. In its reply presented at the beginning of November 1963, the applicant nowhere calls attention in detail to those features of the contracts and resolutions which might be set out erroneously or incompletely in the recitals of the contested Decisions. There was, thus, no infringement of the applicant's right of appeal.

(b) The *applicant* alleges that the reasons given for the contested Decisions are not sufficient to show that the system authorized meets the requirements of the Treaty and thus do not enable it to verify the existence of the conditions required to grant the authorization. In particular, it emphasizes that the contested Decisions take into account neither the composition and structure of the associations of undertakings nor the economic situation of each association in relation to the other. Thus the High Authority has in no way shown that the system authorized guarantees the conditions of competition required by the Treaty (Article 65 (2) (c)). Also, no evidence is brought to show that the authorized agreements contributed to an improved distribution of the products concerned, as required by Article 65 (2) (a): the 26th Recital of the contested Decisions merely asserts that this condition is fulfilled. Moreover the High Authority considered only part of the provisions of the agreements authorized in order to establish (pursuant to Article 65 (2) (b)) that they were not more restrictive than was necessary for that purpose.

As regards the activities of the common organizations 'Treuhand' and 'Beratung', the applicant maintains that the definitions contained in Recitals 6, 7 and 8 of the contested Decisions are so wide as to apply to activities of widely different character and importance.

In addition, the applicant refers to the considerations set out below in support of the submission of infringement of the Treaty.

The *defendant* asserts that all the grounds of complaint put forward by the applicant are relevant only in connexion with the submission of infringement of the Treaty: in fact, in giving the reasons for its decisions, the High Authority is not bound to refute arguments which may be raised against it.

Moreover, the defendant contends that the applicant has not explained on what grounds the legal and factual reasons for the contested Decisions are insufficient. Contrary to the contention of the applicant, the first paragraph of the 26th Recital clearly explains how, in accordance with Article 65 (2) (a), the joint-selling system leads to an improved distribution of the products concerned. The defendant maintains that the second paragraph of this Recital concerning the conditions imposed by Article 65 (2) (b), contains an implied reference to Recitals 27 to 33 which completes the ground for the Decision set out in the second paragraph of Recital 26. Moreover, Recitals 20 to 25 are sufficient evidence of the existence of the conditions referred to in Article 65 (2) (c). As regards the activities and powers of the common organizations 'Treuhand' and 'Beratung', the defendant refers to Recitals 6, 7 and 8 and to Recitals 21, 27 and 28. Moreover, it refers to the considerations set out on this subject under the submission of infringement of the Treaty (see subheading 3 (b) below).

2. On the submission of lack of competence

The *applicant* maintains that the provision of the third subparagraph of Article 65 (2), by which the High Authority may grant authorizations 'subject to specified conditions and for limited periods', shows that the conditions referred to therein must regulate *directly* the subject of the agreement itself and the manner of its execution. This is not the case here, since the system envisaged by the High Authority consists of taking supervisory measures which are partly preventive and partly repressive (Article 15 (3) and (4) of the contested Decisions). In providing for such a system, therefore, the High Authority has exceeded its powers.

The contested Decisions give to the High Authority and its departments a discretionary power to declare that the agreements, resolutions and decisions meet the requirements of the authorization. These measures could thus be expressly approved or tacitly authorized by the High Authority or by its departments without giving the reasoned authorizations referred to in Article 65 (2) of the Treaty; the lack of publicity prevents those Member States who have objections from bringing an action before the Court against this method of procedure. This system of control thus leads to an improper self-delegation of power, similar to that involved in Case 9/56 (*Meroni* v *High Authority*).

Moreover, in order to give details of these complaints of lack of competence, the applicant refers to the arguments put forward to support the submission of infringement of the Treaty.

The *defendant* maintains that the system established by the contested authorizations cannot deprive Member States of their right to the protection of the Court. Article 15 (4) of the contested Decisions in no way permits the High Authority to depart tacitly from the prohibitions in Articles 4 and 65 (1) of the Treaty. This can only be done by a supplementary authorization under Article 65 (2) of the Treaty. In this way, publication and the opportunity to bring proceedings before the Court of Justice are guaranteed. Also, the certificate of 'non-opposition', referred to in Article 15 (3) of the contested Decisions can only be given by the departments of the High Authority if the measures envisaged do not contravene the Treaty or the authorization Decisions.

As regards the power to assess whether the authorization Decisions cover measures envisaged, the defendant contends that the decision whether or not the measures laid down in Article 15 (1) (a), (b) and (c) comply with the contested authorizations is always made by the High Authority; its departments merely ensure the communication and implementation of such decisions.

Moreover, in accordance with Article 15 (3) of the contested Decisions any interested party can, if necessary, raise objections even before the Court against a certificate of non-opposition, whether it be delivered by the High Authority or by one of its departments.

A clear distinction exists between the delegation of powers in this case and that criticized by the judgment of the Court in Case 9/65 (Meroni) since in this instance the powers necessary for the implementation of the decisions are held not by institutions governed by private law but by officials of the High Authority; moreover, unlike the agencies at Brussels referred to in the judgment in Case 9/56, the departments of the High Authority have no discretionary powers.

3. On the submission of infringement of the Treaty

(a) *The system of supervision*

The *applicant* maintains that the Treaty does not empower the High Authority to correct the defects of a contract which

is submitted for its approval otherwise than by amending or carrying out the obligations arising from it for the undertakings concerned. An authorization decision cannot replace the requirements of Article 65 (2), the satisfaction of which must be verified before any cartel is authorized and not by a partly preventive, partly repressive control exercised by the High Authority or by its departments over the measures taken by the undertakings in implementation of the cartel agreement authorized. The fact that the High Authority considered it necessary, in order to enforce the agreements in question, to retain the very wide powers of control referred to in Articles 15, 16 and 17 of the contested Decisions, confirms the view that the purposes and effects of these agreements do not comply with the arrangements for competition within the Common Market required by the Treaty, in particular by Articles 2 to 5, 65 and 66.

The *defendant* replies that Article 15 of the contested Decisions refers to a well-established practice of the High Authority which obliges undertakings authorized to set up a cartel to inform the High Authority of certain measures being taken in implementation of the agreement. Its purpose is merely to set out these measures in greater detail to enable the High Authority to exercise supervision over the cartels authorized. This is necessary in view of the general nature of the cartel agreements submitted for authorization and the significance of the implementing measures which will subsequently be taken by the parties concerned.

The provision of Article 16 of the contested Decisions which provides that the High Authority shall always ensure that the selling agencies observe the limits of the authorizations granted, occurred in an almost identical form in the earlier authorization Decisions Nos 5, 6 and 7/56 as well as in Decisions Nos 19/57 concerning the Oberrheinische Kohlen-Union and 30/56 concerning the Comptoirs Belges de Charbon. Article 16 only extends this provision to the extent that it also provides for a permanent supervision of export procedures to third countries and the activities of Ruhrkohle-Treuhand and Ruhrkohlen-Beratung.

Article 17 merely details the manner in which the selling agencies and mining companies are to cooperate in carrying out these controls. These obligations to communicate and supervise do not exceed the powers given to the High Authority under Articles 5, 47 and 65 (3) of the Treaty.

The *applicant* replies that the introduction of a system of controls over business activity and of direct intervention, applied separately in each case according to a subjective assessment made by officials of the High Authority after authorization under Article 65, amounts to conferring an entirely new power on the High Authority, since such authorization is based on a preliminary examination of the agreement which must also consider objectively the effects of the agreement. The applicant here refers to Opinion No 1/61 of the Court. Thus, the reference by the defendant to its earlier practices is irrelevant.

While accepting that the preliminary examination of the requirements in Article 65 cannot be replaced by a system of supervision such as that proposed in the request for revision of Article 65 dealt with by the Court in its negative Opinion No 1/61, the *defendant* maintains that the requirements in Articles 15 to 17 of the contested Decisions have nothing in common with such a system since they do not permit circumvention of Article 65 (2) (c). Far from conferring an entirely new power on the High Authority, the provisions complained of are a direct result of the performance of the obligations imposed by Article 65 on the High Authority itself. A preliminary assessment of the consequences of the implementation of the agreements concerned,

intended to modify to a considerable extent a sales organization already in existence and to intensify the degree of competition in the market, is inevitably rather uncertain. It is for this reason that the third and fourth subparagraphs of Article 65 (2) confer powers on the High Authority which are intended to ensure that when the decision is given on the request for authorization the results expected are actually achieved.

In such a complex legal and economic situation it is virtually impossible to make regulations which allow the content of the agreements themselves to remove any uncertainty as to their effects. Moreover, none of the powers given to this end to the High Authority by Articles 15 to 17 are such as to allow direct intervention in decisions taken by the selling agencies regarding their own activities. Therefore, the rôle reserved to competition by Article 65 (2) (c) can never be replaced by the exercise of these powers.

(b) *The structure of the two selling agencies and their position in the market considered in relation to Article 65 (2) (c) of the Treaty*

According to the *applicant*, the two selling agencies authorized by the contested Decisions were intentionally established in such a way as to ensure a balance of power between the two associations of undertakings, which, although by no means autonomous, constitute a single unit; this leads to undue restriction on competition in the Common Market as interpreted in the judgment in Case 13/60.

The uniform structure of the two groups is to be seen in the volume of production, of sales and of the types of products manufactured by each group, as well as in the legal and economic situation of the undertakings concerned, since the internal organization and sales regulations of the two agencies are identical and they cooperate in the two organizations 'Ruhrkohle-Treuhand' and 'Ruhrkohlen-Beratung'. This fact, in the light of economic knowledge and experience, confirms that the two sales organizations will act concurrently and in contravention of Article 65 (2) (c).

Moreover, the delegation of powers referred to in Articles 15, 16 and 17 of the contested Decisions complained of at (a) above, even had it been ordered by a court, could not safeguard the measure of competition required by the Treaty. In fact it is impossible for the High Authority to examine in each case separately 'whether or not the activities of the undertakings are determined by the subject and effects of the agreements, rather than by an assessment of the conditions of the market'.

Contrary to the assertions of the applicant which are intended to demonstrate that the sales organizations of the Ruhr in fact constitute a single unit, the *defendant* emphasizes that the contested Decisions contain a series of provisions the specific aim of which is to ensure the autonomy of each of the two selling agencies: these are Recitals 7, 8, 21, 27 and 31, and Articles 2, 4 and 7. Although it is true that the High Authority cannot exclude the possibility that, by failing to observe the agreements and the authorization provisions, the mining companies of the Ruhr are taking steps towards the establishment of a single sales organization, it could not, acting on mere conjecture, refuse to authorize the agreements submitted to it.

Although the *defendant* does not dispute that the two selling agencies show certain similarities, particularly as regards their basic agreements and the total tonnage of coal mined and coke produced by each of the two groups of companies, it contends that nevertheless the position is noticeably different as regards the various grades of coal. The defendant produces figures to support this argument. The geographical distribution of the mining companies of the two groups also results in certain differences.

It is, therefore, incorrect to assert that the structure of the two groups is identical. On the other hand, a clear distinction could not be drawn between the organizations in the two agencies for if one of the two had assumed a predominant position as a supplier in the market, this could have excluded any competition between the two groups from the outset.

Moreover, it is impossible for the High Authority to have any influence on the form of cartel agreements submitted for authorization where they meet the conditions required by Article 65 (2) (a), (b) and (c).

There is no specific economic theory of the duopoly, the results of which are scientifically ensured, which can be applicable in this case.

Moreover, the defendant asserts that the local market of the Federal Republic cannot be considered in isolation in order to maintain that the two selling agencies have power to determine the prices within the meaning of Article 65 (2) (c). The cartel's share of sales in a local market may only be considered, as it was by the Court in its judgment in Case 13/60, in order to assess whether there *exists* a power to determine the prices, but where it is necessary to know *whether this power extends to a 'substantial part'* of the products in question, the Court must not consider the local market in the Federal Republic, but the Common Market as a whole.

In its reply, the *applicant* emphasizes the contradiction existing, in its opinion, in the argument of the defendant which, having denied that the two groups have an identical structure, contends that a minimum of competition between the two selling agencies and the other units in the Common Market can only develop if the agencies are able to offer approximately the same grades and types of coal in the market.

The fact that the number of collieries affiliated to 'Geitling' and situated on waterways is larger than that contained in the 'Präsident' group cannot lead to the conclusion drawn by the defendant that 'Geitling' is in a more favourable geographical position. Such a conclusion implies precise knowledge of several factors not considered by the defendant. The defendant's contentions are not therefore such as to refute the applicant's argument that the two groups are identical in structure. This argument was also confirmed by the fact that the size and the number of the undertakings controlled by public authorities and represented in each agency was approximately the same.

This division between two agencies concerns those undertakings which concentrate expressly on sales to third parties as much as to those maintaining close relations with the petroleum industry; the same applies to coal undertakings which are owned by important iron and steel undertakings and whose production is mainly for the benefit of their shareholders.

This being so, the two agencies, even if their activities do not manifestly contravene the authorizations given, will seek and will indeed be compelled, having regard to their structure and position in the market, to follow an agreed marketing policy. Since out and out competition between them is unlikely, circumstances force them to act as one economic unit, without needing to establish specifically for this purpose official or unofficial contacts as between themselves. The applicant refers to the economic theory developed by Felner and Rotschield and to American experience in the application of anti-trust legislation to support its argument that a fixed-price structure is the most common result of an oligopoly.

Harmonization of the management of the two groups will be further facilitated by their association in the 'Ruhrkohle-Treuhand' and in the 'Ruhrkohlen-Beratung'. The selling agencies and their joint departments are housed in the same building in Essen at 5, Frau Berta-

Krupp-Strasse.
Even if the roles of 'Treuhand' and 'Beratung' are smaller than they were, the mechanical and electronic processing of the data supplied by the two agencies, the general studies of the energy market, the research and publicity given to coal from the Ruhr, can only stimulate coordination of the business of the two selling agencies.
Finally, the applicant considers that it is not reasonable for the defendant to contrast the Common Market and the local market in the Federal Republic of Germany, which itself constitutes half the Common Market. Moreover, it criticizes the defendant for having failed to examine the information concerning sales in the various local markets which is essential in order to determine the existence of real competition.
The *defendant* replies that it is not contradictory to argue that, although the structure of the two agencies is not identical, the economic strength of the agencies is comparable. This comparable strength, which does not imply an exactly identical structure, is also confirmed by the observations of the applicant on the allocation between the two agencies of those undertakings controlled by the State, those concentrating on sales to third parties and those maintaining close relations with the petroleum industry.
In its rejoinder, the defendant here provides statistical data to justify its argument. It also supplies details on the internal structure and the working of the common organizations 'Treuhand' and 'Beratung'. From these facts the defendant concludes that the activities of the two companies are generally of a technical nature and that their cooperation, justified by the need to save expenses, could not impair the independence and economy of the two agencies.
In addition, the defendant contends that the power of the oligopolies to determine the prices, accepted in the judgment in Case 13/60, only reaches the limit fixed by Article 65 (2) (c) if its effects are likely to jeopardize the measures of competition required by the Treaty and by those tasks assigned to the Community by Articles 2, 3, 4 and 5. This oligopolistic structure is a feature of the coal and steel market and does not, in itself, infringe the Treaty. One must not forget, however, that there are various factors, such as fear of a price war of significant changes in demand, which modify the relatively fixed structure which is, it is true, a basic feature of normal oligopolistic strategy. Such factors lead to uncertainty as to the result of this strategy in an oligopolistic market. Thus the minimum measure of competition required by Article 65 (2) (c) is achieved.

(c) *The position of each agency in relation to Article 65 (2) (c)*

According to the *applicant*, the requirements of Article 65 (2) (c) are still not fulfilled even if each agency is considered in isolation. The comparison in Recital 25 between each of the two agencies and Les Charbonnages de France as regards the volume of production of each undertaking fails to appreciate the scope of Article 65 of the Treaty according to which, together with Article 83, the size of an undertaking already in existence before the entry into force of the Treaty could not be used as a criterion in the authorization of agreements concluded between undertakings after its entry into force.
After reiterating the considerations in the judgment in Case 13/60 concerning competition in the Community market in coal, the *defendant* draws the conclusion that the sales organizations of the Ruhr Basin, being of approximately the same order of magnitude as Les Charbonnages de France,— as was in fact the case in each of the two agencies of the Ruhr as regards their production — does not jeopardize the minimum competi-

tion in the Common Market in coal required by the Treaty and can therefore be authorized.

The *applicant* contends that the conclusion thus drawn by the defendant from the judgment of the Court in Case 13/60, according to which any organization the size of which does not exceed that of Les Charbonnages de France meets the requirements of Article 65 (2) (c), amounts to turning the negative considerations developed by the Court into a positive argument. The applicant emphasizes that according to the judgment in question it was, in any case, the division of the Ruhr coal sales organizations into three agencies which led to the establishment of organizations of the same order of magnitude as Les Charbonnages de France.

On the other hand, the *defendant* emphasizes that the Court, in referring to these orders of magnitude, made an express reservation ('. . . whatever corrections of detail might be necessary . . .').

(d) *On the grounds of complaint based on Article 65 (2) (a) and (b)*

The *applicant* maintains that there is also a manifest failure to observe the requirements of Article 65 (2) (a) and (b). The arguments raised on this point by the High Authority in the recitals of the contested Decisions do not take into account the particular circumstances of this case, but are applicable to almost every joint-selling agreement made between mining companies. They are in particular applicable to the system referred to in the judgment of the Court in Case 13/60.

The *defendant* replies that it is not correct to say that all joint selling brings about the improvement described in the recitals of the contested Decisions: for example, it would not apply where there were only a small number of purchasers for the products in question.

Although it is correct that the justifications given in the recitals of the contested Decisions regarding Article 65 (2) (a) might also be applied to the agreements dealt with in the judgment in Case 13/60, it is also correct that Decision No 16/60 of the High Authority refusing to authorize a single cartel had expressly stated that the requirements of this provision were satisfied by the agreement in question.

As regards the requirements in Article 65 (2) (b), the defendant emphasizes that it stated that some of the effects of Recital 8 of the contested Decisions were more restrictive than was necessary for an improvement in distribution and that it therefore imposed a series of restrictions on the authorizations precisely so as to take into account the requirements of this provision of the Treaty.

Moreover, the provisions of Article 65 (2) (a) and (b) do not prevent an identical structure from existing in the two selling agencies. This is a question governed solely by Article 65 (2) (c).

In its reply, the *applicant* states that an insufficient statement of reasons for the Decision must be regarded as the basis of the complaint concerning the condition laid down in Article 65 (2) (a).

As regards Article 65 (2) (b) the applicant emphasizes that no compelling reason existed for establishing only two selling agencies for Ruhr coal.

The *defendant* replies that once it had admitted that the agreements submitted for its authorization were essential to an improvement in distribution it was not required to consider whether the creation of three or more sales organizations would contribute to this improvement to the same extent.

4. On the submission of misuse of powers

The *applicant*, relying on the allegation, already set out above in support of the submission of infringement of the Treaty, that the High Authority's permanent supervision of the selling agen-

cies is understandable only if it is accepted that the defendant was not entirely convinced that the agreements did not contravene Article 65 (2), concludes that the High Authority used its power to grant an authorization for a purpose other than that for which it was conferred.

In answer to this submission, the *defendant* refers to the arguments developed under the submission of infringement of the Treaty as regards the assessment of the obligations as to notification and supervision provided for by Articles 15 to 17 of the contested Decisions.

IV — Procedure

The procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided at the hearing on 10 March 1964 to open the oral procedure without any preparatory inquiry.

The oral part of the proceedings took place on 21 April 1964.

The Advocate-General delivered his opinion on 14 May 1964.

Grounds of judgment

A — On admissibility

The defendant has raised no objection to the admissibility of the application and no grounds exist for the Court to raise the matter of its own motion.

The application is therefore admissible.

B — On the substance of the case

1. *On the submission of infringement of an essential procedural requirement*

The applicant maintains that as the contracts and resolutions authorized were not published *in extenso*, the statements of reasons on which the contested Decisions are based give only an incomplete picture of the system approved by the High Authority.

However, the reasons given for the Decisions in question must enable the nature of the agreements authorized to be assessed having regard to the requirements of the Treaty.

To this end, it is sufficient that the authorization decisions adopted under Article 65 set out, as in this case, the essential features of the agreements to which they refer.

Moreover, the defendant has produced the complete text of the contracts and resolutions authorized in a schedule to its statement of defence.

The applicant, being thus enabled to set out any omissions in the statement of the essential features of the agreements authorized, did so neither in its reply nor during the oral procedure.

An examination of the documents produced does not show any such omissions.

This ground of complaint is therefore unjustified.

Moreover, the applicant maintains that the contested Decisions do not sufficiently show how, under Article 65 (2) (a), joint selling contributes to a substantial improvement in the distribution of the products concerned, nor how, under Article 65 (2) (b), the agreements in question are essential in order to achieve these results; in particular, these Decisions assert that the agreements authorized are of great importance ('van groot belang') in achieving an improved distribution of the products, while the Treaty requires that they be essential ('onmisbaar').

The reasons set out in this respect in Recital 26 of the contested Decisions indicate briefly but clearly the advantages of joint selling by the authorized agencies in relation to the aim of this provision of the Treaty.

The applicant does not dispute the existence of these advantages.

A comparison of the text of the contested Decisions as drafted in the various official languages of the Community shows that the difference in vocabulary referred to by the applicant is not decisive.

This ground of complaint is therefore unfounded.

Furthermore the applicant claims that the High Authority gave insufficient reasons for its opinion that the agreements were essential in order to achieve the required results and were not more restrictive than was necessary for that purpose.

In summarizing the essential features of the agreements and resolutions submitted and in stating the advantages of joint selling, the contested Decisions set out the facts necessary to examine whether they meet the

requirement of Article 65 (2) (b), since this examination consists above all of a comparison of the content of the agreements with the authorized objectives.

In this respect the significance and the scope of the various clauses of the agreements may be determined, not by considering each clause in isolation, but by a general consideration of the agreements as a whole.

Although, therefore, the High Authority, in exercising its specific powers to make an economic evaluation, is bound to examine the agreements submitted for authorization in every detail and to refuse to approve those clauses which appear 'more restrictive than is necessary for that purpose', or to modify their too restrictive effects by imposing conditions on them, it is not obliged to give the reasons for which the provisions of Article 65 (2) (b) are not infringed by each individual clause.

These grounds of complaint cannot therefore be maintained.

2. *On the submission of infringement of the Treaty, of lack of competence and misuse of powers*

(a) The system of supervision

The applicant contends that the contested Decisions infringe the Treaty and exceed the powers of the High Authority in that the effect of their Articles 15 to 17, which provide for the right of the High Authority or its departments to approve certain measures taken by the agencies, is to substitute for the powers of authorization granted to the High Authority itself within well-defined limits by Article 65 (2) a discretionary power exercised by mere servants, without either supervision or guarantees of the protection of the Court for third parties who may be concerned.

Under the third subparagraph of Article 65 (2) the High Authority may in its authorizations impose any conditions which it considers necessary having regard to the nature and importance of the agreements authorized in order to ensure observance of the requirements of the first subparagraph of Article 65 (2) for the whole period of the authorization.

The limits of the power of the High Authority are found in the purpose for which it must be exercised, as well as in the general principles of the Treaty.

The supervision provided for by the provisions complained of is clearly such as to facilitate the task of the High Authority in preventing the authorized agencies from abusing those agreements considered compatible with the Treaty and from behaving in a manner contrary to the authorizations given and, more generally, to the provisions of the Treaty.

Moreover, where the exercise of this supervision involves the High Authority in the adoption of policies likely to affect the interests of third parties, such a measure must be adopted in the manner provided for in Article 15 of the Treaty.

Article 15 (3) of the contested Decisions provide for the adoption of such policies particularly in the form of supplementary statements or authorizations. The applicant maintains that the grant of these powers to make statements of grant authorizations is contrary to the Treaty. The powers vested in the High Authority itself permit the normal adoption of policies even where no special provision exists to this effect.

Therefore, the fact that Article 15 of the contested Decisions provides for the adoption of policies as a preliminary to certain measures amending the content of the agreements authorized is not incompatible with the Treaty.

Moreover, such statements and authorizations amount to decisions within the meaning of Articles 15, 33 and 35 of the Treaty and are thereby subject to all the rules laid down in those provisions.

On the other hand, in Article 15 (3) of the contested Decisions the departments of the High Authority were wrongly referred to as distinct from the Authority itself. The departments of the High Authority have no separate capacity and may act only under its responsibility. The contested Decisions were thus required to reserve the power of decision to the High Authority alone which must arrange for such power to be exercised on its own responsibility and with due regard to the rules of the Treaty. Since the reference to the departments as separate entities is without legal foundation, it cannot properly appear in the contested Decisions. The said reference is severable from the rest of the contested Decisions with the result that their Articles 15 (3) may be annulled to the extent that they contain the words 'or its departments'.

The applicant further maintains that the extent of the supervision to which the selling agencies were subjected by the High Authority shows that the defendant itself was not convinced that the agreements were in accordance with Article 65 (2).

This ground of complaint implies that, in fixing the conditions in question, the High Authority considered that the agreements submitted for its authorization only satisfied the requirements of Article 65 (2) of the Treaty if subjected to such supervision, and that therefore, by using its power of authorization to an end other than that for which it was conferred, it misused its powers.

The High Authority cannot be denied the right to approve an agreement if it finds that, as a result of certain conditions imposed on the parties concerned, the consequences of that agreement are not prohibited by Article 65.

Moreover, the tendency of the selling agencies of Ruhr coal earlier authorized to keep within the limits of the authorizations as stated in Recital 38 of the contested Decisions, is capable by itself of justifying the supervision introduced.

Subject, therefore, to the above remarks concerning the words 'or its departments' contained in Article 15 (3) of the contested Decisions, the present ground of complaint must be rejected.

(b) The requirements of Article 65 (2) (b) and (c)

The applicant maintains that the agreements authorized do not meet the requirement of Article 65 (2) (b) of the Treaty in that the limitation of the number of selling agencies for Ruhr coal to only two is not essential in order to achieve the results envisaged and is more restrictive than necessary having regard to the purpose of the agreements.

The applicant, while contending that in this respect insufficient reasons are given for the contested Decisions, does not maintain that other aspects of the agreements do not fulfil this requirement.

One must, therefore, consider the ground of complaint based on subparagraph (b) of the above-quoted provision together with the allied grounds of complaint based on subparagraph (c). In fact, the question whether and to what extent the limitation complained of is in itself restrictive is identical to the question whether and to what extent a limited number of selling agencies is likely to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing of a substantial part of the products in question within the Common Market.

The applicant here maintains that the authorized agreements do not meet the requirements of Article 65 (2) (c), not only because of the identical

structure of the two sales organizations, which in itself reveals that they are not mutually independent, but also as a result of the economic principles applicable to oligopolies.

A consideration of the compatibility of the two selling agencies of the Ruhr Basin with those provisions of the Treaty which are in question involves an evaluation of the situation in the Common Market resulting at a given moment, from economic facts and circumstances and an evaluation of the situation in the coal-fields of the Ruhr Basin both in their relations *inter se* and with other undertakings or allied bodies.

It follows from the contested Decisions, in particular from their Recitals 20 to 25, that the High Authority based its action on such evaluations.

The Court, acting under Article 33 of the Treaty to review the legality of measures adopted by the High Authority, cannot, except in cases of flagrant error or omission by that Authority, interfere in the evaluation of the economic facts or circumstances in the light of which the contested measures were adopted.

It is true that the structure of the two agencies shows substantial uniformity both as regards the volume of production and sales of the various types of product manufactured in each group and their internal organization and control of sales. As a result of this uniformity, the two new agencies are placed on an equal footing. In an oligopolistic market the balance and independence of the large economic units which operate in it may benefit if they all have comparable economic strength. That is particularly true in the case of two agencies based in the same basin which must therefore compete directly and continuously with each other.

The applicant maintains that in these circumstances, a system, which it refers to as a 'duopoly', in the Ruhr is likely almost to eliminate the measure of competition, which according to the judgment in Case 13/60 should be maintained in the Ruhr coal basin.

However, in an oligopolistic market, characterized by a system which ensures, through the compulsory publication of scales of prices and transportation charges, publicity for the prices charged by the various undertakings, it is almost inevitable that the prices charged by units having comparable economic strength should be largely stable, even when they are actually competing, since publication to other vendors as well as to purchasers discourages any isolated effort by either economic unit to use prices

in order to conquer a larger portion of the market. This applies to the Common Market in coal today.

However, this immobility of prices in the market does not, in itself, contravene the Treaty if it results not from an agreement, even tacit, between the parties concerned, but from the interplay of the strengths and strategies of independent and opposed economic units on the market.

On the other hand, the degree of competition envisaged by the Treaty may vary, especially as regards conditions in the market and the relative importance of the various requirements arising from them.

It is conceivable that in a period characterized by strongly increased competition from coal substitutes the rationalization requirements of the production and sale of the product which is thus placed at a disadvantage are of primary importance in the market economy and prevail over the maintenance of a high degree of competition between the undertakings in difficulty, although this does not involve the elimination of all competition in the coal market.

In this case it should be observed that as the Ruhr Basin is an integral part of the Common Market in coal and steel the selling agencies, with the modern development of trade, will be more and more exposed to competition from the various units selling coal in the market.

Moreover, one particular factor continues to increase in importance, namely the competition of other products against coal.

In such a situation, the interests of coal consumers are safeguarded by the availability, if necessary, of substitute products; this makes it necessary to consider the growing importance of this factor in assessing competition and demonstrates the desirability of taking into account the general aims of Article 3.

It must also be observed that, unlike the earlier authorizations concerning organizations for the joint selling of Ruhr coal, the authorizations in question in this case are characterized by such important changes as the elimination of the 'joint office' which allocated orders between the agencies, of the 'standards board', of the joint financial arrangements for compensation and of the joint export organization as well as the substantial limitation on the roles of 'Ruhrkohle-Treuhand' and of 'Ruhrkohlen-Beratung'.

Therefore, taking into account the supervision established by the High

Authority of each agency, the points of contact existing between the two agencies are not likely to lead, with a sufficient degree of probability, to the belief that they are capable of creating between them an effective unit or to confer on them powers to determine the prices and to control or limit the production or marketing of a substantial part of the products in question in the Common Market.

In any case, if experience showed that this is the case, the High Authority would have the duty to revoke the authorizations or to amend their terms under the fourth subparagraph of Article 65 (2).

Having regard to the above considerations there is no reason to assert that in the present situation the existence of two agencies in the Ruhr coal basin is, as such, manifestly contrary to the provisions of Article 65 (2) (c).

The reasons given in this respect in the recitals of the contested Decisions appear such as to justify sufficiently the exercise in this case of the power reserved to the High Authority in this field to carry out a technical assessment.

The applicant maintains that because of the size of each of the two agencies authorized the existence of each one, even if considered in isolation and irrespective of the existence of the other, is incompatible with Article 65 (2) (c).

The scope of an agreement only acquires significance in relation to the requirements of this provision if it is considered both in relation to the size of the market and to the size of those other economic units operating in this market which are the actual or potential competitors of the parties to the agreement.

In this instance each of the agencies authorized, while supplying the market with a not inconsiderable portion of the total volume of coal sold within the Community, is faced with other economic units of comparable strength operating either in the same coal basin or in other areas of the Common Market.

Thus, it cannot be asserted, after considering the size of each of the selling agencies of the Ruhr, that the authorized agreements are capable of giving to each of the two groups of undertakings concerned 'the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the Common Market, or

to shield them against effective competition from other undertakings within the Common Market'.

Thus, the grounds of complaint based on Article 65 (2) (c) concerning both the submission of infringement of the Treaty and the insufficiency of the reasons for the decision, cannot be maintained.

(c) Misuse of powers

The applicant contends furthermore that the economic evaluations on which the contested Decisions are based, are vitiated by misuse of powers.

It has, however, failed to develop this ground of complaint and to provide evidence of such a misuse of powers.

On the contrary, it appears from its statement that it has not distinguished the submissions of manifest failure to observe the Treaty and of misuse of powers, with the result that these two submissions overlap and it suffices to state that during its consideration of the grounds of complaint the Court found no evidence of the existence of any misuse of powers by the High Authority.

This submission must therefore be rejected.

Costs

Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the pleadings.

The defendant has contended that the applicant should be ordered to pay the costs.

As the applicant has failed in all its main submissions, it is right for it to bear all the costs of the action.

On those grounds,

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 15, 33 and 65 of the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. **Dismisses the application as unfounded save as hereinafter mentioned;**

2. **Annuls the words 'or its departments' in Article 15 (3) of the contested Decisions;**

3. **Orders the applicant to pay the costs.**

Donner Hammes Trabucchi
Delvaux Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 15 July 1964.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 14 MAY 1964[1]

Mr President,
Members of the Court,

It would, I think, be an insult to the Court to relate, even summarily, the history of the joint-selling organization for Ruhr coal and the vicissitudes it has undergone since being subjected to the provisions of Article 65 of the ECSC Treaty: the Court has been too closely involved to be unable to approach with full knowledge of the facts the new situation constituted by Decisions Nos 5/63 and 6/63 of the High Authority and the application made against them by the Government of the Kingdom of the Netherlands. This does not mean, however, that the present application does not, like its predecessors, merit serious consideration, particularly in that this is the first time that a Member State has contested before you an authorization decision apparently accepted by the mining undertakings and

1—Translated from the French.