THE COURT

hereby:

1. **Declares Applications 2/60 and 3/60 for the annulment of Articles 1, 3 and 5 of Decision No 46/59 of the High Authority of 23 January 1959, as amended by Decision No 1/60 of 18 January 1960, to be inadmissible.**

2. **Orders the parties to bear their own costs.**

Donner Hammes Catalano

Riese Delvaux Rueff Rossi

Delivered in open court in Luxembourg on 13 July 1961.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 19 MAY 1961[1]

Summary

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Mr President,
Members of the Court,

This case, the first concerning the application of Article 37, poses some extremely delicate questions concerning both the conditions for the admissibility of proceedings instituted under that provision and the extent of the powers which the provision assigns to the High Authority and in both respects it requires an exhaustive interpretation of the article taking account of its position in the general system established by the Treaty.

In addition both aspects, the admissibility and the substance, are to a certain extent correlated and the fact that the Court joined to the main proceedings the objection of inadmissibility raised by the defendant in the form of an application for a decision on a preliminary objection is to be welcomed.

I – The opposing points of view

The opposing points of view may be summarized as follows:

1 – Translated from the French.

1. *Admissibility*

(a) The applicants maintain *principally* that the admissibility of their action is justified on the basis of Article 37 alone. Indeed, this article is of an autonomous nature and the rules concerning the *capacity* to institute proceedings set out in the third paragraph must be derived solely from this provision without reference to Article 33. It is true that only a Member State which feels that because of an action or failure to act on the part of the High Authority it is threatened by fundamental and persistent disturbances is able to bring the matter before the Court when the High Authority gives a *negative* decision, that is, when the High Authority *refuses* to recognize the existence of the situation described in the first paragraph. However any other Member State and any undertaking or association showing legitimate interest must have the right to contest an *affirmative* decision adopted by the High Authority as being contrary to the Treaty by all the appropriate means in view of the full powers given to the Court in this field.

Alternatively, while accepting that the third paragraph of Article 37 merely serves to complement Article 33, proceedings against even a general decision taken on the basis of Article 37 may nevertheless be based on the four methods of recourse set out in the first paragraph of Article 33 in view of the extension of the powers of the Court. Furthermore, the applicants allege that all the provisions of the contested decision at issue in these proceedings, that is to say, Article 1 which recognizes the existence of disturbances and also Articles 3 and 5 which establish the import quotas, constitute an individual decision. Moreover, should the decision be regarded as a general decision, it involves misuse of powers affecting the applicants.

Finally, *further in the alternative,* if it is held that undertakings may rely on Article 33 without reference to Article 37, the same arguments are put forward as to the individual nature of the decision and to the fact that it concerns the applicants but solely on the basis of Article 33. In this respect the applicants emphasize the unjust nature of the view denying any legal protection save to the State which claims to be subject to disturbances.

(b) The *High Authority* is in agreement with the applicants as to one aspect of their principal points of view, namely the autonomy of Article 37 in respect of Article 33. However, the High Authority draws the conclusion that only the State subject to disturbances is able to institute proceedings under the third paragraph of Article 37. In any case, in constitutional matters of this nature a right of action cannot be granted to private individuals.

Alternatively, whilst accepting that Article 33 may be regarded as applicable either concurrently with Article 37 or in isolation, the High Authority refuses to recognize that the contested decision is of an individual nature either as regards Article 1 or Articles 3 and 5. Moreover no 'misuse of powers affecting' the applicants has been established.

2. *As to the substance* the contentions in the application relate basically to three aspects:

(a) The applicants challenge the existence or the prospect of a threat of fundamental and persistent disturbances in the Belgian economy;

(b) They contest that the situation was caused by the action or failure to act on the part of the High Authority;

(c) They contend that far from being taken 'in accordance with the provisions of this Treaty' the measures adopted by the contested decision under the second paragraph of Article 37 were taken in breach of those provisions.

II – Admissibility

As the parties have recognized, the various questions of admissibility at issue cannot be resolved without the nature of the proceedings under Article 37 being clearly delineated and determination of the nature of the action in itself requires as clear a view as possible of the aim of the provision in question.

This provision cannot be dissociated from the second paragraph of Article 2 which provides that:

> 'The Community shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States.'

The bringing about of 'conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity' is the fundamental rule of the common market in coal and steel as conceived by the Treaty. There is no need to go into this point which was emphasized by the authors of the Treaty and has always been confirmed by the case-law of the Court; I merely refer to the judgments of 10 May 1960 in Case 19/58 *Government of the Federal Republic of Germany* v *High Authority of the ECSC* (Rec. 1960, p. 469) Joined Cases 3 to 18, 25 and 26/58, *Barbara Erzbergbau AG and Others* v *High Authority of the ECSC* (Rec. 1960, p. 367) relating to support tariffs. The Treaty considered that the various rules which it established for the promotion and maintenance 'of normal competitive conditions', as provided by Article 5, including, but solely in cases of necessity, the power to exert 'direct influence upon production or upon the market' should suffice —in conjunction with compliance with the prohibitions contained in Article 4 regarded as incompatible with the common market—to ensure the establishment and functioning of this market. However this result was to be obtained progressively and without disruption. The specific purpose of the Convention on the Transitional Provisions (as expressly stated in Article 1) is

> '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.'

Thus, in particular with regard to coal, Article 24 provides that

> 'during the transitional period, *safeguards* will be necessary to avoid *sudden and harmful shifts in production levels*.'

To this end, the Convention permits or even requires during the transitional period, some derogation from the Treaty rules and, as is known, in respect of Belgian coal Article 26(3) even allows the Belgian market to be insulated from the common market.

Thus the Treaty intended that *in no case should the application of the rules of the common market have the effect of disrupting the economy of a Member State* and during the transitional period every precaution was taken to enable such a risk to be avoided. Subsequently, when disparities had been removed, the normal rules would be applicable.

Nevertheless, whatever the confidence of the authors of the Treaty in the efficacity of their own system, they had the wisdom to establish *on a permanent basis* what is often—justifiably—called a safeguard clause: this is Article 37 which thus appears as the establishment of a special procedure to protect Member States against the risk of having serious disturbances arise in their economies *specifically because of the normal application* of the rules of the Treaty.

In this respect the provisions of Article 2 concerning fundamental and persistent disturbances, as supplemented by Article 37, appear, as to their legal effect, very different from the provisions of Article 3. The latter provisions set out the various objects to be sought by the Community institutions but it is self-evident that these objectives cannot all be attained simultaneously nor all completely; some form of compromise is indispensable. The Court stated this in its judgments of 21 and 26 June 1958 in Cases 8/57 (Rec. 1958, p. 223) and 13/57 (Rec. 1958, p. 261) concerning the legality of the famous Decision No 2/57 concerning the equalization of ferrous scrap:

> 'In pursuing the aims set out in Article 3 of the Treaty the High Authority must ensure the permanent compromise which

may be required by possible contradictions between these aims considered separately and, where such conciliation is not possible, the High Authority must grant to one or other of them temporary precedence which may appear to be required by the economic facts or circumstances in the light of which it adopts its decision in carrying out the task assigned to it by Article 8 of the Treaty.'

Therefore Article 3 constitutes the general framework within the limits of which the High Authority may define and pursue its policy of action.

Article 2 is quite different; it lays down an imperative rule, an absolute limit for any action by the Community; in all circumstances the Community must avoid provoking fundamental and persistent disturbances in the economy of Member States. If such a risk does exist the progressive achievement 'of conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity' that is, as we have seen, the fundamental rule of the common market, must give way before another imperative requirement of avoiding disturbances. Another proof of the same idea is to be found in Article 26(4) *in fine* of the Convention. This refers to the possibility that the High Authority may authorize subsidies at the expense of the Belgian Government if integration of the Belgian market in coal is not wholly attained at the expiry of the transitional period. It provides that these subsidies must be lowered as quickly as possible but 'ensuring that the scale of such production cutbacks as may be made does not give rise to fundamental disturbances in the Belgian economy'.

The rule is thus clear. However it is evident that its *legal sanction* would certainly have been extremely difficult to apply if solely the ordinary law of the Treaty had remained applicable. These difficulties would have been caused not so much by the restrictions in Article 33 as to the Court's power to assess economic facts and circumstances—such an assessment is always possible under the heading of 'flagrant infringement'—but rather by the fact that a judgment relating to infringement of such a rule does not easily fall within the context of the method of contending legality, namely an application for annulment. In addition, it would not have been possible for the question to be raised in the course of any action without even the State whose economy the applicant alleged to be threatened with fundamental and persistent disturbances itself raising the least objection in this respect.

For that reason special proceedings were set up assigning particular powers to the Court.

What is the exact nature of these powers and the proceedings designed to implement them?

If one seeks analogies in national law and in the treaty itself which is based on national laws, it may be said that proceedings under Article 37 are based both on the application for annulment and appeals in which the Court has unlimited jurisdiction.

Its form is based on the application for annulment since it seeks to obtain the annulment of a decision of the High Authority and the operative part of the judgment can only be dismissal or annulment.

However, it is also based, and in fact to a much greater extent, on an appeal in which the Court has unlimited jurisdiction. The latter is traditionally characterized by two factors concerning, on the one hand, the *powers of the court* which consist not only in the power of annulment but also of amendment and in certain cases powers of injunction and of imposition of pecuniary penalties and, on the other hand, the *subject matter of the proceedings* which concerns subjective rights and not the objective legality of an administrative measure. As the Court knows, this latter criterion is of particular importance in Italy and Belgium, where at least as a general rule it is the basis of the division of powers between administrative courts and common law courts: the distinction between subjective rights and legitimate interests.

While it is true that in the case of Article 37 the Court may only annul the decision of the High Authority, nevertheless it must, at least in the grounds of its decision, deter-

mine the 'framework', that is to say, the general tenor and the extent of the measures which should be taken by the High Authority to put an end to the disturbed situation, which goes far beyond the normal powers of a court examining the legality of a measure: this is provided by the last paragraph of Article 37. On the other hand, the protection given to the Member State concerned, *which it alone may seek* (the first paragraph of Article 37), is certainly closer to a subjective right than to a rule of objective legality compliance with which may be enforced by any interested party.

In fact this action goes far beyond the contested administrative proceedings and, as the defendant correctly observed in its submissions, we are here concerned rather with a constitutional matter of a federal nature. Article 37 permits suspension of the normal application of the Treaty for the benefit of a Member State whose essential economic interests conflict with those of the Community. Arbitration is therefore evidently necessary and this task is assigned to the Court. This was stated in the report of the French delegation (at page 42):

> 'In this special case the role of the Court appears essentially as being that of an *arbitrator* between the interests of the common market, which could perfectly well have been defended by the High Authority by strict application of the provisions of the Treaty, and the fundamental economic interests of one of the Member States,'

and it is for this reason that the powers of assessment are all assigned to the Court. Nevertheless, as the same report further explains,

> 'the normal framework of the procedure has not been altered: as the High Authority is better placed because of its technical powers and because of its habitual responsibilities, the matter must first be raised with it and then, abandoning the strict viewpoint of defence of the common market, it must decide *on an equitable basis* all the measures necessary to be taken 'to end . . . such a situation . . . while at the same time safeguarding the essential interests of the Community' that is to say, it must itself carry out the necessary arbitration.'

Subsequently, proceedings may be instituted against its decision, whether positive or negative, in the Court which is thus called upon to exercise 'the supreme role in the arbitration'.

These commentaries clearly show that here the application for annulment is only used as a *technical procedure* to involve the High Authority in the matter while giving the maximum regard to the unity of procedure before the Court which was a constant aim of the authors of the Treaty. However, by their very nature these proceedings under Article 37 are quite different from the proceedings as to legality under Article 33.

I therefore agree with the principal view of both parties as to the *autonomous* nature of Article 37 in respect of Article 33. I thus agree with them in seeking in the context of this provision alone the rules as to the ability to institute proceedings under the third paragraph.

In this connexion the following distinctions must be made:

1. First, according to whether the decision of the High Authority is positive or negative. *If it is negative,* that is, if the High Authority refuses to recognize the existence of disturbances or the nature of cause and effect of action or failure to act on the part of the High Authority and the disturbances, once again I agree with the parties and admit that proceedings may only be instituted by the State which considers itself to be the victim of the disturbances and whose request was not granted. I have already given my explanation on this point: Article 37 is a safeguard clause in favour of the Member States and each of these States is the sole judge of the proper moment to request the application of this clause. The actual wording of the first paragraph of Article 37 confirms this view and what is true for raising the matter with the High Authority must also apply to instituting proceedings in the Court if the High Authority did not grant the request.

2. On the other hand, the question who may

bring proceedings in the case of a *positive decision* is much more difficult and here the parties do not agree. In this respect, a further distinction must be made as to whether the action relates to the recognition of the situation set out in the first paragaph, that is, the existence of disturbances and the causal link between these disturbances and action or failure to act on the part of the High Authority or whether it relates to measures adopted by the High Authority to put an end to the situation.

(a) In the first situation I believe that the right to institute proceedings is open to all Member States of the Community, not only the State suffering the disturbances, but not to undertakings or associations of undertakings. As we have seen, it is a question of arbitration between the fundamental economic interests of a Member State and the essential interests of the Community. It is my opinion that *each Member State has the capacity to defend the general interests of* the Community which it helped to create and of which it forms part under Article 1 of the Treaty. It may be recalled that no special condition, not even evidence of an interest, is required of the Member States for applications for annulment under Article 33: they may contest any decision of the High Authority under this provision. It would be quite strange to deny them a right of action against a decision which may imperil 'the essential interests of the Community', which interests some may confuse with their own interests. The Council must, of course, be recognized as having the same right.

On the other hand, it does not seem possible to allow undertakings and associations to defend these 'essential interests of the Community' in proceedings of such a nature which are at the level of constitutional relations between Member States and the Community. It is quite natural that undertakings of the Member State affected by the disturbance are not able to substitute their own judgment for that of the Government of their country as to the existence of fundamental disturbances in the national economy or for the right to request the application of the safeguard clause. However, it is incomprehensible that other undertakings carrying out activities in the same country or in other countries of the Community should have the right to defend the Community if no Member State felt it necessary to do so. It also appears abnormal, if not even frankly rather shocking, to find a private undertaking setting itself up as the judge of the existence of disturbances affecting the general economy of a foreign State, of the degree of gravity of those disturbances and of their causes. On the other hand, the suspension of the normal application of the Treaty with regard to the rules of the common market cannot assume the nature of infringement of the 'fundamental rights' of persons as protected, for example, by the constitution of the Federal Republic of Germany. *In respect of undertakings* this suspension takes the form of certain measures in the context of economic interventionism as may be found in any country. It is only *with regard to States* that the question assumes a constitutional nature. It is for this reason that such a case cannot be heard without the Member State suffering disturbances being involved as it is in fact the true defendant. The proceedings under Article 37 may only be instituted by that State and in these particular circumstances, although it is not a court, the High Authority in fact assumes to a certain degree the role of a court of first instance. Of course, the Rules of Procedure of this Court do not provide expressly for such automatic involvement but the general principles seem to require it especially before a court working on the basis of inquiry such as this Court does. If the application were granted, this would be the sole way of avoiding third party proceedings the admissibility of which would not be in doubt and which would require the process to be recommenced: the consequence would be all the more serious in that the judgment of the Court would be executory in the meantime and consequently any measures already taken or in the course of being taken to put an end to the disturbances would be annulled or modified and troubles of judicial

origin would be added to the troubles of economic origin . . .

(b) We may now examine the second case of proceedings against a positive decision, that is to say, against *measures* adopted to put an end to the situation.

Seen in the light of the aims of Article 37 and the objective of such measures, the solution must be the same: the measures to be adopted must be such as to put an end to the situation while safeguarding the essential interests of the Community. It is therefore the same exercise of the power of arbitration established by Article 37 requiring a comparative assessment of the opposing interests and a value judgment of all measures which may produce an equitable solution to the dispute. In the same way as the first, such an assessment falls outside the scope of proceedings as to the legality of measures and, furthermore, for reasons which I have set out above, only other Member States are able to defend the interests of the Community in such a dispute.

One difficulty remains however; the most problematical of all relating to the phrase 'in accordance with the provisions of this Treaty' in the second paragraph of Article 37. It is possible that this is a precise restriction on the exercise of the power of arbitration established by Article 37 with the force of a rule of law the infringement of which may give rise to an application for annulment on the basis of Article 33. On the one hand, proceedings concerning legality would then appear to be admissible because of the existence of the rule of law and, on the other hand, the right of action of undertakings would be more easily acceptable, in so far as they are authorized by the Treaty to challenge illegal decisions affecting them.

This raises the delicate problem, not uncommon in national law, of the overlapping of different legal remedies and, more particularly in administrative law, of the extent to which an action for annulment may be relied on in a case which is within the scope of proceedings under unlimited jurisdiction. Thus in French law the decided cases distinguish in the context of administrative contracts (for example, concessionary contracts of public services) between the concessionaire, the co-contractor, who may only rely on the provisions of the contract against the public body before the court with jurisdiction over the contract and the users of the service who may, on the contrary, by means of an action for annulment, challenge an administrative decision refusing to apply to their benefit a clause of the contract (Conseil d'Etat, Syndicat des Propriétaires et Contribuables du Quartier Croix de Seguey-Tivoli à Bordeaux, 21 December 1906, Rec. p. 961, including the opinion of Mr Romieu).

With regard to Article 37, the question of the overlapping of applications for annulment under Article 33 has been raised on several occasions by various writers (many references were made to this in both the written and oral procedures) but without clearly convincing arguments either way.

In my opinion, the whole question depends on the interpretation given to the phrase 'in accordance with the provisions of this Treaty'. If it is held that the provisions must be interpreted literally it follows as we have just seen that proceedings concerning legality would be possible in the context of Article 33 on the part of 'third parties', that is, the undertakings affected by the measures. If, on the other hand, the provision is interpreted in a more flexible manner and so that the application of the provision in question is more or less closely linked with the assessment of the whole undertaken by the High Authority and the Court in their role as arbitrators, then proceedings for annulment 'in isolation' would no longer be possible.

I myself believe that the literal interpretation cannot reasonably be applied in this case. Indeed, as we have seen, the safeguard clause set out in Article 37 is intended to bend *temporarily the normal rules of the common market* in order to avoid the occurrence of serious disturbances in the economy of a Member State and to allow the removal of the threat of disturbances as quickly as possible. It is clear that the safeguard clause contained in Article 37 loses all meaning if no divergence is possible from the rules of

the Treaty defining the market, that is to say, essentially the second paragraph of Article 2 and Article 4. In particular, the temporary provision of import or export quotas may be indispensable. It is self-evident that if the normal application of the Treaty with the whole range of measures permissible is sufficient to avoid the risk of disturbances, these provisions alone should be applied and if they are insufficient the Member State concerned has only to set in motion the *ad hoc* procedure under Article 35. Certainly in Article 33 there are further restrictions as to the Court's power of assessment but in a case such as the risk of grave disturbances in the economy of a Member State they would undoubtedly carry little weight. In any case it is inconceivable that the authors of the Treaty decided to establish such an imposing provision as Article 37 to cover such a minor eventuality: this really would be using a hammer to crack a nut.

I therefore believe that the phrase 'in accordance with the provisions of this Treaty' in Article 37 must be understood to mean that the measures to be taken must comply with the rules of the Treaty, *in so far as this is compatible with their purpose,* by using, for example, the proceedings made available therein in the prescribed form, to avoid discrimination within the scope of the measures taken, etc.

It has been pointed out that the Treaty contains a revision clause, namely the third and fourth paragraphs of Article 95 providing a procedure for a new power to be created (first paragraph of Article 95). In both these cases the unanimous assent of the Council is required; even in a less serious case, Article 58 concerning a declaration of a state of crisis, the assent of the Council is required. In addition, in any of these cases it is impossible to diverge from the fundamental provisions of Articles 2, 3 and 4. How can it therefore be accepted that Article 37 authorizes the bypassing of the prohibitions contained in Article 4 by mere consultation with the Council?

The answer is quite simple: on the one hand, in the case of Article 95 we are concerned with amending or altering permanently the rules for the functioning of the common market. Here, on the other hand, we are concerned with the *temporary suspension* of these rules, quite a different matter. Further, it is clear that the requirement of the assent of the Council, even by simple majority (the votes being, of course, weighted), would have denied any guarantee to a State complaining of disturbances in its economy and quite possibly in conflict with the majority of the other Member States.

The problem is nevertheless very difficult as it is only too apparent that there exists here a conflict between the letter of the provision and its purpose and if a literal interpretation is thought necessary it would, as we have seen, be fairly difficult to justify the exclusion of any proceedings as to legality on the basis of Article 33. The principle of the autonomy of Article 37 certainly admits of an exception with regard to the present point, that is to say, whether the measures adopted are in conformity with the provisions of the Treaty.

For reasons which I have already given I believe that we must attempt to make an interpretation.

Perhaps, in addition, it is possible to take account of a supplementary argument put forward by the High Authority in support of 'flexible' interpretation of the phrase 'in accordance with the provisions of this Treaty' ('dans les conditions prévues au present traité'): the German version translates this phrase as 'im Rahmen dieses Vertrages', that is to say, literally *'in the framework* of this Treaty', while in other provisions (Articles 4, 5 and 8) where the same expression 'in accordance with the provisions of this Treaty' is used it has been translated differently in each case. Therefore each time the German translation introduces very interesting nuances varying according to the nature or the purpose of the particular provision. It is clear that as regards Article 37 the formula 'in the framework of this Treaty' corresponds perfectly to the only interpretation which appears reasonable to me and which I have for this reason supported. Clearly this argument has little legal force since the French version alone is authentic,

but perhaps it may be recognized to have a certain indicative value as to the intentions of the authors of the Treaty at the time when it was approved.

If the 'flexible' interpretation is allowed, I believe that here again there is no possibility of special proceedings concerning legality under Article 33. Compliance with the conditions in the Treaty comes to depend essentially on the nature and the purpose of the measures adopted and their necessity for the purposes of the provision in question, that is, for obtaining as quickly as possible the removal of the threat of disturbances while safeguarding the essential interests of the Community. The limits imposed on the action of the High Authority by the provision in question no longer has the nature of a condition of objective legality but now falls within and is one factor in the subjective assessment of the whole which must be undertaken by the High Authority and possibly by the Court.

Finally, I believe that the actions are also inadmissible on the basis of Article 33 as in the present case there is no room for proceedings concerning legality on the basis of Article 37 since the proceedings were not instituted by one of the Member States or by the Council.

If, however, this view is not accepted, particularly with regard to the conclusions as to the annulment of the 'measures adopted' (Articles 3 and 5 of the contested decision), in so far as those conclusions are based on the infringement of 'the provisions of this Treaty', it would then be necessary to examine whether and to what extent the actions comply with the conditions for admissibility set out in Article 33. Can the contested decision be regarded as an 'individual decision affecting' the applicants?

In view of the particularly liberal case-law of the Court on this subject (Judgment of 23 April 1956 in Joined Cases 7 and 9/54, *Groupement des Industries Sidérurgiques Luxembourgeoises* v *High Authority of the ECSC*, Rec. 1955-1956, p. 53; Judgment of 20 March 1959 in Case 18/57, *Firma I. Nold KG* v *High Authority of the ECSC*, Rec. 1958-1959, p. 89; Judgment of 15 July 1960 in Joined Cases 24 and 34/58, *Chambre Syndical de la Sidérurgie de l'Est de la France and Others* v *High Authority of the ECSC*, Rec. 1960, p. 573; Judgment of 23 February 1961 in Cases 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority of the ECSC*, Rec. 1961, p. 1) the Court would perhaps be led to recognize that the contested decision, which is addressed solely to the Belgian Government, is of an individual nature and would admit that the decision 'affects' the applicants since it interests them.

Nevertheless some doubt is possible. The present case concerns a measure which establishes the conditions for general rules valid for Belgium establishing a system of import and export quotas and for the fixing of maximum tonnages. It is characteristic of a general and impersonal measure. Indisputably the decision has no direct effect in respect of those at whom it is aimed: however, it *obliges* the Belgian Government to adopt implementing measures which, although of a secondary nature, are measures in the nature of a regulation. The situation is therefore quite different from that in the *Nold* case in particular where the decisions at issue had (as the Court ruled) *'authorized,* subject to certain conditions and restrictions, these rules and this contract (it involved commercial rules and a contract of association established by the sales agency of the Ruhr coal industries) and therefore ruled as to the legal validity of actual decisions taken by clearly identified undertakings'. In the present case the situation is very analogous to that produced in an internal situation if a *law* were adopted setting out the broad outline and essential rules of a quota scheme while leaving the task of fixing the implementing details to *regulations.* Some doubts at least would be justified if a direct action by private individuals were admitted against a measure which in a Member State would normally be part of the legislative power and if the same act in a community context were regarded as an individual decision affecting a particular undertaking. -

With regard to the existence of a 'misuse of

powers affecting' the applicants which would be brought into question if the decision were regarded as a general one, I shall go on to examine this shortly in conjunction with the substance of the case since, according to the case-law of the Court, it is a question of substance and it is admissible simply because the argument has been raised (Judgment in Case 3/54, *Assider* v *High Authority*, Rec. 1954-1955, p. 123).

III – Substance

My examination of the substance of the case is merely of a subsidiary nature and may be very brief.

1. *With regard to the existence of a situation comprising the threat of fundamental and persistent disturbances in the Belgian economy*, the applicants deny that the Belgian economy suffers from a disturbance of the degree of gravity required by the first paragraph of Article 37. They maintain that there are no reasons to suppose that any subsequent recession in the sale of Belgian coal, as is also to be found in all the other coal producing countries of the Community, will lead to disturbances of this nature.

The applicant in Case 3/60 submits statistics to support this view. It states in particular that in September 1959 the miners in Belgium represented merely 3·5% of all wage earners. As Belgium had full employment, the miners who were thus released would without difficulty be able to be employed in the other sectors of the Belgian economy. In addition, the applicant emphasizes the increase in industrial production in Belgium, in the volume of exports, in bank deposits, in savings accounts and in the demand for Belgian industrial products. It estimates that the proportion of the mining industry in the gross national product is 4% and challenges the figure of 12% relied on by the High Authority in the preamble to the contested decision.

In reply to this argument the High Authority first emphasizes that the authors of the Treaty themselves recognized that a close correlation exists between the activities of the mining industry and the whole of the Belgian economy, as is shown by Article 26 (1 and 4) of the Convention on the Transitional Provisions. The High Authority infers from these provisions that the authors of the Treaty intended that Belgian coal production should not have to bear a reduction in coal production of over 900 000 metric tons a year since any greater reduction would probably be such as to cause grave harm to the whole of the Belgian economy. However, coal production was reduced by 7 million metric tons in three years. The High Authority denies that Belgium had full employment in 1959. It submits a statistical table showing that the percentage of unemployed compared with employed persons had increased from 3·25% in 1957 to 5·05% in 1958 and to 5·55% in 1959. In the coal industry the number of unemployed persons had increased from 1 132 in 1957 to 9 706 in 1958 and 20 571 in 1959. At the same time sales of coal continued to decrease and stocks continued to increase. The High Authority observes finally that both the Council of Ministers and also the Assembly agreed with its assessment of the coal situation in Belgium and the effects on the whole of the Belgian economy.

In the light of the information contained in the file these explanations appear relevant. I would add only that the importance of the coal industry in the *regional* economy is such that the grave disturbances which would inevitably be caused by the comprehensive application of the rules of the common market in the most susceptible regions would certainly constitute a disturbance affecting the whole of the country's economy.

2. *The causal link between the disturbances and action or failure to act on the part of the High Authority*

The applicants' view is well-known: accepting that it exists, the disturbed situation was not due to action on the part of the High Authority, that is, action undertaken within the framework of the Treaty, which incidentally nobody alleges. Nor is it due to a failure to act on the part of the High

Authority. For this to be the case, the possibility of acting would have had to exist. Certainly the High Authority relies on inability to establish a system of production quotas under Article 58 because of the refusal of consent by the Council in 1959, but Article 37 cannot be used to bypass such a refusal. There is no causal link between the failure to act forced on the High Authority for this reason and the particular situation of disturbances in the Belgian economy.

With regard to this latter point the applicants are indeed correct. The High Authority is convinced that the establishment of quotas in 1958 would have resolved the specific Belgian problem at the same time as the general problem of the coal crisis within the Community. However the Council took a contrary view. It is deemed to have acted correctly and there can be no doubt that the High Authority cannot use the procedure under Article 37 to deal with a situation covered by Article 58: that would be a misuse of procedure, in other words a misuse of powers, and I believe that the defendant was extremely unwise to rely on the setback which it suffered in 1959 in justification *in law* of its subsequent action under Article 37.

The truth is that Article 37 has a different purpose from Article 58, namely to remove the threat of grave disturbances in the economy of a Member State, while Article 58 is intended to deal with a crisis situation in the whole of the Community concerning one of the products under the Treaty.

The real problem is what exactly is meant by 'action or failure to act on the part of the High Authority' within the meaning of Article 37.

I believe that this problem can only be resolved by comparing Article 37 with the second paragraph of Article 2 which, as we saw at the beginning, it is intended to implement. The hypothesis is that whereby the normal functioning of the common market as sought and organized by the Treaty gives rise to disturbances in the economy of one of the Member States. Thus the actual cause of the disturbances is *the common market itself,* that is to say, the integration achieved by the Treaty. The reference in Article 37 to action or failure to act on the part of the High Authority means that the High Authority, which has 'the duty . . . to ensure that the objectives set out in this Treaty are attained in accordance with the provisions thereof' (Article 8), that is, primarily the proper functioning of the common market, is not able to prevent this proper functioning from causing the threat of disturbances in the economy of a Member State either because of 'action' or a 'failure to act' imposed on it by the normal application of the Treaty.

Therefore it is not relevant that the conduct of the High Authority is the result of the exercise of a power of discretion or a legal inability to act. It may even be said that in the first case, where the power to act is provided in law, the High Authority is *obliged* to make use of this to put an end to the disturbance, although this may not be in the interests of the whole of the common market. As we have already seen, if only this hypothesis existed, Article 37 would be of little value. The particularly interesting case where the safeguard clause is required to take full effect is that where the High Authority has no means of avoiding a threat of disturbances in the implementation of the rules of the common market as set out in the Treaty, that is, the hypothetical case of the requirement to suspend provisionally some of the rules governing the market. This is the case which concerns us.

3. *Infringement of the second paragraph of Article 37,* in that the measures adopted by the decision in question were not adopted 'in accordance with the provisions of this Treaty'.

I believe that I have dealt with this problem sufficiently in my examination of admissibility. Certainly if, contrary to my suggestion, you adopt the narrow interpretation of the provision, Articles 3 and 5 of the contested decision would have to be regarded as illegal since the quotas set out in these articles are contrary to Article 4 of the Treaty which prohibits 'quantitative restrictions on the movement of products'.

If, on the other hand, the Court does accept my interpretation, I do not believe that the argument would be upheld in the context of the examination of the whole which would then be undertaken. In fact the partial and temporary isolation of the Belgian market in coal appears indispensable to the accomplishment of the rationalization programme without serious disturbances in order to permit the return to the ordinary law of the Treaty as rapidly as possible. The time limit was only fixed at one year. It is true that it was subsequently extended but that decision was not contested. On the other hand, all the measures adopted by Articles 6 to 11 of the contested decision in particular show that the High Authority remained 'within the framework' of the Treaty and observed the provisions of the Treaty in so far as this was not rendered impossible by the need to put an end to the threat of disturbances. In my opinion, it properly exercised the task of arbitrator assigned to it by Article 37 and in the evidence before me I find no grounds in support of any assessment different from the one which it arrived at.

So far I have only dealt with the arguments as to legality. However the applicants also allege lack of competence, infringement of an essential procedural requirement and misuse of powers.

As to the allegation of lack of competence, I fail to see how this argument differs from that of infringement of the Treaty. The High Authority merely exercised the powers assigned to it by Article 37.

As to infringement of an essential procedural requirement, the contested decision is allegedly vitiated for failure to state sufficient reasons with regard both to the existence of disturbances and to the fixing of total quotas and the German quota.

It is sufficient to read the preamble to the decision to see that this is not true. With regard to the existence of disturbances, the reasons are clearly set out. The same applies to the need to fix quotas. As to the justification of the *figures* chosen, the High Authority relies on surveys carried out jointly by itself and the Belgian Government which appears to me to be sufficient statement of reasons. According to the settled case-law of the Court the formal requirements of stating reasons must not be confused with justification that the decision is well founded. The formal requirements are proportionately less strict as the Court's power of review is more extensive; in the present case this power is unlimited.

With regard to misuse of powers, the only persuasive argument is that whereby the High Authority relies on the proceedings under Article 37 solely in order to bypass what Article 58 was unable to achieve. I have already stated my views on this point.

Finally, the applicants submit subsidiary claims asking the Court to 'declare that the contested decision' in one of the actions and 'the contested provisions' in the other action 'is or are vitiated by an error giving rise to the liability of the Community'.

The very brief attention given by the applications to this question shows that these conclusions cannot be regarded as constituting an application for compensation for a wrongful act or omission on the basis of Article 40 of the Treaty. Moreover, reference has only been made to the first paragraph of Article 34: however, in this context the conclusions are evidently premature. In addition, they are supported by no evidence.

In my opinion

–the applications should be dismissed as inadmissible

–the costs should be borne by the applicants.