Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby:

1. **Declares that Applications Nos 36/59, 37/59 and 38/59 are admissible;**

2. **Declares that Application No 40/59 is admissible with the exception of its conclusions in the alternative;**

3. **Annuls Article 2 of Decision No 36/59 of the High Authority of 17 June 1959, in so far as it replaces Article 6 (1) and (2) and Article 9 of Decision No 17/59 of the High Authority of 18 February 1959;**

4. **Orders that in Cases 36/59, 37/59 and 38/59 the defendant shall bear its own costs and half of the costs of each of the applicants, the remainder to be borne by the latter;**

5. **Orders that the costs in Application No 40/59 shall be borne in the same proportions.**

Donner Delvaux Rossi
Riese Catalano

Delivered in open court in Luxembourg on 15 July 1960.

A. van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 24 MAY 1960[1]

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Mr President,
Members of the Court,

I am called upon to give my opinion on Joined Cases 36, 37 and 38/59 brought by the agencies for the sale of coal from the Ruhr, Präsident, Geitling and Mausegatt, and the mining companies associated with each of them, against certain provisions of Decision No 36/59 of the High Authority of 17 June 1959 laying down commercial rules for the agencies, and secondly on Case 40/59 brought by the Nold undertaking, a wholesale trader in coal and construction materials at Darmstadt, against the same decision.

Although the Court has not seen fit to order the joinder of these applications, even for the purposes of the oral procedure, I would ask you to permit me to examine them together, exclusively for the purposes of clarity. For the conclusions of the agencies, just as those of Nold, attack the same provisions of the contested decision, namely those concerning the conditions as to tonnage required of wholesale traders so as to qualify for receipt of supplies direct from the agencies. Those conditions, although considerably relaxed, are still judged too strict by Nold, whereas the agencies complain against the refusal of the High Authority to authorize the maintenance of the old conditions. Moreover, apart from a few details, both of the cases concern the legality of the contested decision from the point of view of the provisions of the Treaty, in particular Article 65(2).

I – Facts and conclusions of the applications

I shall dispense with an exposition of the facts for the Court is well aware of them both through examining previous cases and, supposing that did not suffice, through the very full reports from the judges acting as Rapporteurs.

Let me simply remind the Court that the subject-matter of the contested decision, so far as its material content is concerned, is as follows (new Article 6):

1. The first condition previously required, namely the sale during the course of the preceding coal year of 60000 metric tons of Community coal, is abolished (it no longer appears in the operative part of the decision, and that means that the agencies no longer have the right to insist upon it).

2. The second and third conditions (to have sold a minimum tonnage of Community coal *in the sales area* for which the trader is to be accepted; to have sold, again in the sales area, a minimum tonnage of *coal products from the joint selling agency* to which the trader is affiliated) are retained, but the minimum tonnages are reduced from 30000 metric tons to

20000 metric tons in the first case, and from 9000 to 6000 metric tons in the second (Article 6(1) and (2)).

The new Article 11 rejects 'the wider demands put forward by the interested mining companies concerning the commercial rules'.

This means that the conditions required by the commercial rules established by the agencies are not authorized in so far as they are more severe than those appearing in the decision. It is against this partial refusal that the conclusions for annulment put forward by the agencies are directed.

As for Nold, it puts forward a principal conclusion for the annulment of Article 6(1) and (2), which retains the second and third conditions as to tonnage, while reducing the figure.

In the alternative, it claims that the Court should declare that the same provisions of Article 6 are 'void or inapplicable',

'in so far as those provisions have the effect of excluding certain traders who, prior to that decision, were considered as first-hand wholesalers from being such'.

II — Admissibility

As regards *admissibility,* there is nothing to be said in respect of the applications of the agencies, and little to be said concerning Nold's application.

For it appears from the case-law of the Court (*Nold*, 20 March 1959) that decisions granting authorizations adopted under Article 65(2) are individual decisions not only as regards those requesting the authorization but also as regards third parties. This is even the position, moreover, to the extent to which such decisions apply to a set of rules, where the latter are referable to private law. A direct *interest* on the part of the third party applicant suffices; although the judgment does not say so in many words, it is quite clear that it refers to that concept. It is undeniable, nor is it denied, that such is indeed the case of the Nold undertaking.

However, in its rejoinder, the High Authority argues that Nold's *alternative conclusions,* such as they are allegedly drafted afresh and put somewhat differently in the reply, are inadmissible. It is argued that Nold has reversed the order of its conclusions and put in a principal claim that the Court should either

'declare that points 1 and 2 of Article 6 of the contested decision are void in so far as those provisions exclude certain traders from direct supplies'

or

'declare that provision inapplicable to certain traders'.

It is argued that in their original version such conclusions are in reality in the nature of an action for failure to act, although no proceedings have been brought under Article 35, and in the second version of them they are outside the scope of an application for annulment.

The facts are that the applicant has not put forward new conclusions in its reply, nor even modified the tenor of its original conclusions. All it has done is to point out (and this is obvious) that, if its alternative conclusions were to be upheld, the conditions required by Article 6 could continue in force without any disadvantage to itself since they would only be applicable for the future.

I think that the alternative conclusions are admissible. In fact they consist in arguing that the High Authority *could not legally* grant its authorization for the application of a set of commercial rules containing certain limits as to tonnage (the ones which are set out in Article 6(1) and (2)) in so far as those limits prevent a former first-hand wholesaler from remaining in the category of such traders. In other words, a set of rules more strict than the ones formerly in force can only legally be authorized if it preserves the acquired rights of those that fulfilled the old conditions. This is not an action for failure to act: it is still the authorization, positively granted, that is criticized, in so far as *it does not include* a provision which, according to

the applicant, is essential to its validity.

III – The alternative conclusions in Case 40/59

But although those conclusions seem to me to be admissible, they are certainly not well founded, and it is from this angle that, without bothering too much with what would be logical, I shall start my examination as to substance in order to dispose of the point once and for all.

It will be convenient to note, first of all, that the contested decision *lowers* – even considerably – the conditions as to tonnage required by the decisions previously in force. Transitional provisions are called for when new rules, stricter than the ones which they replace, aggravate the situation, and not when they improve it. For the truth is that although the applicant still qualifies as a first-hand trader, it is only thanks to the extension of time granted to it by the Court on the occasion of its first application against Decisions Nos 16 to 18/57, and then thanks to the annulment of those decisions, which followed. Previously, Nold had qualified under the transitional rules, authorized by Decisions Nos 5 to 7/56 for the coal year 1956/1957. Transitional provisions were justified and perhaps even necessary as regards those rules because they rendered the conditions required of wholesalers wishing to obtain direct supplies considerably more burdensome. Quite otherwise is the case of the contested decision. Thus the applicant cannot successfully argue that the authorization could only legally be granted provided that it included transitional provisions. Moreover the effect of a transitional provision is, in the nature of the case, necessarily limited as to time.

In reality the applicant is claiming a so-called 'vested right' arising by reason of its former position as a first-hand trader. It relies, in this respect, on the rules of German law on the protection of the right to property, extended to commercial property, guaranteed by Article 14 of the Basic Law.

The appropriate answer to this is that it is up to the applicant to bring such action as it may consider expedient before the courts of its country against a set of commercial rules referable to private law. But it is not for the Court, whose function is to judge the legality of the authorizations, to apply, *or at least to do so directly,* rules of national law, even constitutional rules, in force in one or other of the Member States (judgment of 4 February 1959 in *Stork* v *High Authority*). It may only allow itself to be influenced by such rules in so far as, where appropriate, it may see in them the expression of a general principle of law which may be taken into consideration in applying the Treaty.

While it may certainly be admitted that the protection of the right to property, including the remedies which must be available against any infringement of that right, such as expropriation, is a rule of law common to the six countries, it is certain beyond doubt that the present case is not one of such a kind. There is no infringement of property rights, even understood widely, of which the High Authority may have been guilty.

Moreover, there is no discrimination once it be a fact that the conditions for obtaining direct supplies are fixed objectively. On the contrary, there would be discrimination if, beyond a transitional period limited in time, a permanent difference in criteria subsisted, founded exclusively on how long ago it was that the trader was accepted.

IV – The principal conclusions of the applications

I come now to Nold's principal conclusions and to the conclusions of the agencies on the fixing of the quantitative criteria. Each of the applicants puts forward three submissions: infringement of an essential procedural requirement for want of or for insufficient reasons, infringement of the Treaty and misuse of powers.

1. *General considerations*

I should like first to state some general considerations on want of or insufficiency of reasons with particular reference to the decisions granting authorization that the High

Authority is led to adopt under Article 65(2).

The duty incumbent on the High Authority to state reasons for its decisions, recommendations and opinions, as provided in Article 15 of the Treaty, fulfils two purposes. First, it constitutes, from the point of view of public opinion, a guarantee against arbitrary action, by enabling the public to understand and investigate the actions of an executive invested with important powers. This is necessary, in particular, for the Assembly. It is this which explains and justifies the fact that reasons must be stated for all the decisions of the High Authority, even those which would appear to be primarily imputable to the exercise of a discretionary power.

But the duty to state reasons is also necessary so as to enable decisions to be subjected to *legal review* should they be contested before the Court. Where a review of *legality* is involved, usually taking place by way of an application for annulment, in which the powers of the Court are limited, and which implies that the powers and responsibilities of the Court co-exist with those of the executive, the borderline often being difficult to trace, it is indispensable that the decision must clearly state all the elements of fact so that the Court may examine whether the decision has been taken legally. This is indeed what the Court expressed in the judgment of 20 March 1959 in *Nold* v *High Authority* stating:

'The obligation under Article 15 of the ECSC Treaty on the High Authority to state the reasons for its decisions is not only for the protection of the interested parties, but also has as objective to enable the Court to review the decisions fully from the legal point of view as required by the Treaty'.

From this the judgment even drew the consequence that:

'The Court can and must of its own motion take exception to any deficiencies in the reasons which would make such review more difficult'.

That supposes, of course, that *submissions as to legality* have been raised, for without them it is the *application* which would not be supported by reasons. But if such submissions have been raised, it is not necessary for the applicant to have put forward *expressis verbis* the submissions based on infringement of an essential procedural requirement. Once it is established that the reasoning set out in the decision is such that the Court is unable to pass judgment on the question whether that decision is legal or not from the point of view of the Treaty, it 'may and ought' to annul it for want of reasons.

So it would appear that the requirements as to the statement of reasons vary according to the nature and subject-matter of the decision. In so far as the decision is adopted in the exercise of a power involving some assessment and is more or less discretionary, the requirements are necessarily reduced; it is enough that the reasons make it possible to satisfy oneself at least *prima facie* (and subject to proof to the contrary establishing, for example, the existence of a misuse of powers) that the decision has indeed been adopted within the confines of a given power, in accordance with the public interest and without irresponsibility. But, in so far as the exercise of the power in question is subjected by the law (which in the present instance is the Treaty) to specified conditions, the reasons must make it clearly appear that *all* those conditions were fulfilled and state the reasons of law and of fact for which the High Authority considered that they were fulfilled.

It suffices to read Article 65 in order to convince oneself that the requirements as to the statement of reasons must be particularly strict as regards decisions granting authorizations adopted by virtue of Article 65(2). The importance for the proper functioning of the Common Market which the Treaty attaches to respect for the rule prohibiting agreements appearing at the beginning of the article, the exceptional character of the authorization (exceptional in the legal sense of the term, that is to say, not necessarily 'rare' in its application, but making an exception with reference to a basic rule)

and, finally, the wording of Article 65(2) itself in that it enumerates three conditions which are required in order that the authorization shall be legal (in which case, moreover, it must be granted) – all of this constitutes an extremely tight set of checks and balances on the High Authority and requires it to explain itself in a particularly precise and concrete way.

The reasons for an authorization under Article 65(2) must, in so far as their essential content is concerned, say that the conditions set out at paragraphs (a), (b) and (c) of that provision are met, after dealing in appropriate cases with the question whether an agreement prohibited under Article 65(1) is involved. This requirement holds good even where the decision only amends a previous decision, so far as justifying the amendments is concerned. Even if the latter are more liberal than the previous provisions, the statement of reasons may yet prove necessary should it be found that the reasons for the previous decisions were inadequate. This is what the High Authority has quite rightly said in its defence to the applications of the agencies.

However it goes without saying that even the most liberal decisions – by that I mean decisions which refuse to approve agreements or partial agreements on the ground that they are too strict despite the fact that they have been authorized previously – must, where they make amendments, also be supported by reasons in order that nothing shall take place irresponsibly. I said as much in my opinion in Joined Cases 16 to 18/59 when arguing that were it to have been necessary to look upon the very wide reasons for the decisions therein contested as containing a decision (which was not the case) they would have been insufficient. In other words, if the High Authority changes its opinion, even in a liberal direction, it must say why.

I should like to submit one last, although to my mind essential, observation of a general nature.

In reading Article 65(2) it will be seen that in reality the first two conditions (those at (a) and (b)) stand in opposition to the third condition set out at (c). The High Authority must first satisfy itself that the agreement which is submitted to it, which must be a specialization agreement, or a joint-buying or joint-selling agreement, 'will make for a substantial improvement in the production or distribution' of the products concerned, that it is essential in order to achieve these results and that it is not more restrictive than is necessary for that purpose (which in reality makes three conditions already). However, when the answer on these three points is in the affirmative, it remains necessary (this is (c)) that the agreement in question is

'not liable 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, or to shield them against *effective competition* from other undertakings within the common market'.

As Mr von Simson rightly pointed out at the end of the hearing, the Treaty strikes a balance between the purely economic purpose which may legitimately be pursued in an agreement, for example, improvement of distribution, and freedom of competition. In investigating whether the conditions at (a) and (b) are fulfilled, the right approach is to examine the agreement as a whole and in its different parts, and see whether it is capable, for example, of improving distribution without being more restrictive than is necessary *in relation to that purpose,* even should it hurt certain interests. But there is a limit, and that is the ill effects on competition *on the market,* which could result from the *dominant position* which the agreement, while perhaps bringing about the best possible conditions of production or distribution, might give to the undertakings concerned; in this case the preservation of competition must take precedence.

Here we meet the central point of the application of all legislation on agreements, whether it be founded on a mere 'abuse', or on the theory of 'good' and 'bad' agree-

ments and whatever be the legal system to which one has recourse: automatic nullity save authorization, liberty except in case of administrative intervention or legal proceedings, etc. There always comes a time when the authority having jurisdiction, whether it be administrative or judicial, is called upon, if it wishes to get at what really matters, *to strike a balance between* the advantages and disadvantages of the agreement and to elaborate the conditions necessary for the former to outweigh the latter. During the written and oral procedure reference has been made to interesting decisions of the Federal Cartels Office in Germany. Let me, in turn, cite an opinion (one of those which have been published) of the technical commission on cartels, which is in France, the pivot of the application of the legislation on agreements even though its functions are only advisory. The agreement in question involved the production and sale of yeast for the baking of bread:

'Whereas, we read in the said opinion (*Journal Officiel de la République Française*, Edition des Documents Administratifs, 1960, p. 9), these clauses (concerning in particular the fixing of prices and sales quotas) inevitably imply, in addition, a distribution organization which does not constitute a special agreement, but which follows necessarily from the measures taken at the stage of production, *and which essentially consists in the limitation of the number of traders,* each of them being alone in a position, barring exceptions, to sell yeast in a given sector ...'.

After condemning the agreement as regards its effect on sales prices, the commission adds:

'Whereas, *as regards distribution,* despite the fact that the present organization ensures that the bakers receive regular supplies and although the limitation on the number of traders entitled to sell yeast would appear likely to render possible some economies as regards transport and the currents of trade, *nevertheless the undesirable consequences of this organization outweigh the advantages*; in particular, the monopoly which the agreement in fact confers upon the sole distributor in each sector renders the users utterly dependent on just one trader and means that they cannot usefully discuss either prices or the quality of the services ...'.

The opinion then sets out numerous considerations of fact and finally arrives at a whole series of recommendations indicating the conditions which, according to the commission, the agreement should satisfy in order to conform with the law.

It may well be that only remote analogies exist between French trade in yeast for the baking of bread and coal from the Ruhr. Again, the clauses of the agreements are very different in the two cases. Even so, I have felt it right to cite this opinion in order to show the attitude with which, in my opinion, the examination of a request for authorization under the anti-cartel legislation of the Treaty should be conducted: first, the advantages of the agreement with regard to achieving its purpose, in this case the improvement of distribution, should, to the maximum possible extent and *with the utmost realism be weighed up,* on the one hand, *and compared,* on the other, with the disadvantages of the same agreement in respect of the restrictions on competition to which it gives rise. In doubtful cases the answer is to be found in the Treaty itself at (c): if the agreement would appear to be liable to give a dominant position to the undertakings concerned, it cannot be authorized.

2. *Examination of the three criteria*

Let us now come to the examination of the three criteria which are in dispute in this litigation. I shall examine the contested decision on each of these three matters, both from the point of view of inadequate reasons and from the point of view of infringement of the Treaty.

A — Abolition of the condition concerning the distribution of 60000 metric tons of Community coal

Naturally enough the decision on this point is only contested by the agencies.

The reasons for the decision as regards this

are to be found in the two reasons set out on page 738 of the Journal Officiel, left hand column. The first of these reasons justifies the easing of the conditions generally and the second justifies more particularly the abolition of the criterion of 60000 metric tons.

An analysis of these reasons yields, first of all, two findings of fact:

1. The condition required has had the effect of excluding a relatively high number of *independent* wholesalers of average size from direct access to the agencies. In reality, although there exist some 'large' independent traders and some non-independent (that is to say, traders tied to the mines) of only 'average' size, this is the exception, and it is certain that to make the conditions as to tonnage heavier is proportionally favourable to the non-independent ones. This appears from the documents produced and is not disputed.

2. The practical effect of the condition as to 60000 metric tons is to force most traders wishing to be accepted as first-hand traders to get on to the books of the three agencies. This results from the fact that in a large number of cases, and in particular in certain sales areas, only coal from the Ruhr is consumed. Thus the third condition (sale of 9000 metric tons of coal from the agency to which the dealer wishes to be affiliated) becomes virtually irrelevant.

What are the effects arising from these two findings?

(a) As regards the first (keeping down the number of independent dealers to an extent considered excessive), the High Authority remarks:

'Prior to the establishment of the Common Market, the sales organizations of the Ruhr basin applied an appreciably lower tonnage limit'.

(the word 'appreciably' is euphemistic: 6000 metric tons were enough!) and it draws the conclusion that

'this criterion (the 60000 metric tons) renders direct access to the agencies much harder than is necessary in order to achieve the intended improvement in spread'

(the word 'spread' was apparently a slip of the pen by the High Authority; obviously it should read 'distribution').

Here the reasoning is in my opinion incomplete: the High Authority is not saying (as perhaps it could have done) that the new criterion does not have any appreciable influence on the improvement of distribution and that it does not contribute to such an improvement. All it says is that the desired improvement did not require so considerable a limitation as regards direct access to the agencies, a limitation involving the exclusion of a large number of independent traders, but it does not say why. In reality, the High Authority has stuck inside (a) and (b) of Article 65(2) whereas it ought to have proceeded to an examination of the question *with reference to the provisions of (c),* that is to say, *compared* the advantages resulting from the improvement in distribution (for it does not deny that they exist) with the disadvantages which the new criterion involved *as regards competition.* To reduce the number of independent traders does not of itself run counter to an improvement in distribution; it may even be that the contrary is the case. On the other hand, a reduction has undoubted effects as regards the restriction on competition and the dominant position which it encourages in respect of the undertakings from the commercial point of view.

Admittedly this idea is expressed in a very general way at the end of the last reason set out on page 737, which ends at the top of the left hand column of page 738 where it is stated that experience has

'shown that the quantitative criteria applied until the present by the joint selling agencies have had, *from the commercial point of view,* more restrictive effects than is required by the improvement in spread'

(here again the word 'spread' appears instead of the word distribution!). But this

assertion, which is vital, ought to have been stated afresh and *justified* in respect of the criterion of 60000 metric tons.

(b) However, *the second finding* (that most of the first-hand traders have to belong to the three agencies) gives rise to a deduction supported by sound reasoning, which decisively justifies the abolition of the criterion: this criterion, says the High Authority,

'tends in the end to restrict the independence of the joint selling agencies'.

In fact, the independence of the agencies which are required, it should be noted, 'to develop an independent sales policy' was one of the essential conditions established by the High Authority in respect of the very principle of authorizing the sales cartels of the collieries of the Ruhr. The Court has noted and accepted this necessity in the judgment in Case 2/56, *Geitling* v *High Authority* (Rec. 1957, p. 43) and my colleague Roemer insisted upon it in his opinion. Now it is obvious that a system having the effect that most of the first-hand traders are in fact and have to be on the books of the three agencies means that any chance of each of the agencies developing an independent policy is doomed to failure. In each area they are represented by the same traders! How can the latter, taken one by one, have an interest in encouraging the sale of the products of one agency rather than of another?

It is true, and the applicants do not fail to point this out, that we are not concerned with any change in the economic situation which might have occurred since the first decision which approved the condition, and even a tougher condition, since the minimum tonnage was 75000 metric tons. It is also true that there was scarcely any need of several years 'experience' in order to discover an effect that could have been foreseen with certainty by means of a simple multiplication (three times nine never make anything other than twenty-seven), since the High Authority could obviously not have been unaware of the virtual monopoly enjoyed by coal from the Ruhr in a large part of the Community, particularly in Germany, simply because of natural conditions. But the error thus committed, and indeed expressly admitted by the High Authority, only rendered it the more necessary to correct it upon the occasion of a later authorization. Under the fourth paragraph of Article 65(2) it could even have revoked the authorization prior to expiry thereof once it had found that

'the actual results of the agreement or of the application thereof (were) contrary to the requirements for its authorization'.

Thus, not only are sufficient reasons given for the abolition of the first condition, but the abolition is legally justified in respect of Article 65 when one considers the authorization granted for the joint-selling agreement.

B — Second condition: the sale of a minimum tonnage of Community coal in the sales area

This condition has been maintained, but the tonnage-limit has been reduced from 30000 to 20000 metric tons.

As regards inadequacy of reasons, I think that it is right to be more strict in respect of the justification for the *criterion itself* than, once this justification has been produced, in respect of the fixing of the figure chosen as the limit, which to all intents and purposes falls within the discretionary power of the High Authority. As I have said, the Court's power of review over this discretion is necessarily more limited.

So the essential question is whether, *as a matter of principle*, this criterion is justified, in view of the fact that the necessity for the third criterion is not disputed (except as regards its amount).

(a) *Examination with reference to Article 65(2) (a) and (b)*

According to the contested decision (page 738, right hand column, first recital) the criterion at issue

'is intended to determine the scope of the

business of a first-hand wholesaler. The joint selling agencies may require that the sales of a first-hand wholesaler shall include a large range of categories and types. To this effect it is necessary that a wholesaler's sales of coal shall total a given amount. Moreover this criterion is capable of establishing a distinction between first-hand wholesalers and large retailers, who fulfil another function in the distribution network'.

Thus two reasons are given: (1) that a wholesaler must necessarily cover an adequate 'scope' and have available a 'large range of categories and types'; (2) the need to distinguish him from the retailer.

The High Authority has pressed the first point at length both in its pleadings and in its reply to the questions put by the Court in the *Nold* case. The agencies, for their part, have devoted a lot of time and argument to it. To the necessity for a range of categories and types, there have been added the need for financial standing, for the ability to hold stocks, and for a good number of customers. All these conditions are allegedly indispensable for the first-hand wholesaler if he is to fulfil the function which is expected of him in the distribution process. The agencies also argue that in order to organize their commercial affairs properly they can only make direct supplies available to a relatively low number of traders, for otherwise the machinery for distribution would be uselessly overburdened.

I admit quite frankly that I have not been convinced by all these explanations despite their being so well presented and abundantly expressed.

I well understand that the *colliery companies* need to delegate the problem of distribution to a common organization, for otherwise they would each have to set up and keep in being their own sales organization. Rationalization is required in this area and it is this which justifies the principle of creating common sales organizations. Moreover their existence is traditional in the Ruhr and nobody denies their legality. I also understand the fact that this necessity has been considered as outweighing the disadvantages of the restrictions on competition which result from such an organization.

I also understand, at least as to their principle, the conditions required for direct access to the mines by certain users (those consuming a large tonnage, so-called 'local' sales, etc.) notwithstanding the fact that, and this should not be forgotten, these conditions mean that the greater part of the coal extracted from the Ruhr bypasses the traders.

Finally I understand the distinction between wholesale and retail trade, which is in line with the reality of the matter.

However, within the area of wholesale trade I find it less easy to understand the *necessity* to make a sort of sub-distinction between so-called 'first-hand' wholesale trade and that described as 'second-hand'. Such a distinction does not of itself have any meaning. The High Authority has itself explained (reply to the fifth question put by the Court) that

'as regards wholesale trade – that is to say first-hand trading and second-hand trading – there is no difference as regards the customers'.

In these circumstances – and again the High Authority admits this – the only purpose of the distinction is to *limit* the number of wholesalers having access to the agencies.

Now the reasons which are put forward in support of such a limitation (necessity for a large range of categories and types, financial standing, etc.) concern the criteria which are *the very ones* which normally set apart the wholesalers from the retailers: to convince oneself of this it is sufficient to look at Article 6 (3) of the contested decision, the legality of which is contested neither by the agencies nor by Nold and which, moreover, is reproduced from previous decisions:

'The trader [it is talking of a trader applying to be accepted for direct supplies] must *fulfil the conditions usually required of a wholesaler*

(for example, it must be financially sound, put up a sufficient deposit, have an establishment situated in the sales area, be able to hold large stocks, have a knowledge of the market and of the products, have a good number of customers, *and have sold a large range of categories and types*)'.

The provision then specifies the extent to which the holding of stocks must be possible, and it appears that this exactly fits the limited requirements on this point mentioned at the hearing, the coal usually being delivered direct to the user or to the retailer.

So what more is required? In these circumstances, the necessities of 'rationalization' seem to boil down to the advantage derived by the agencies from trading with the smallest possible number of wholesalers. This is really not very much compared with the restriction which is imposed, in view of the fact that the very purpose for which the agencies have been created is to relieve the mines of the whole selling side of the business and that their function is none other than to supply the wholesalers.

Moreover the fear that the number of first-hand wholesalers might increase too much does not appear to be founded in fact, for experience has shown that, since the criteria were lowered, only some of the wholesalers fulfilling the new conditions and who did not fulfil the old ones have applied to be accepted as first-hand wholesalers. According to the High Authority, that proves that the limit of 20000 metric tons is reasonable and ties in as near as may be with the true borderline between the first-hand trader and the second-hand trader. But why decree from on high a limit which, as we have seen, does not reflect a commercial necessity? The facts noted by the High Authority show on the contrary that *freedom is no doubt the best regulator of the matter,* for while the agencies are entitled to require that their traders receiving direct supplies must have the usual attributes of a wholesaler (and we have seen that they have received satisfaction on this point) no wholesaler is *required* to apply for the position. He may prefer to content himself with satisfying the needs of his customers, receiving remuneration by way of the part of the commission which he gets from the first-hand trader, as has been explained to us.

Still less do I understand the supposed necessity of fixing a limit corresponding to the maximum tonnage which can be achieved within retail trade because, whatever his turnover or annual tonnage sold may be, the retailer can never qualify for receipt of direct supplies.

Finally, it should not be forgotten that before the establishment of the Common Market, it was considered enough (except in Southern Germany where special rules applied) to require the sale of 6000 metric tons of coal from the Ruhr. This limit is now 6000 metric tons of coal *from the agency in the sales area.*

In short, it does not seem to me to be established that the fixing of a lower limit of tonnage of Community coal sold annually in the sales area, added to the conditions normally required of a wholesaler, is capable of making for 'a substantial improvement' in distribution. Already on this point, the contested decision does not seem to me to be legally justified.

(b) *Examination with reference to Article 65(2)(c)*

However I think that two other points of view, differing in importance, lead to the same conclusion.

1. *The first* concerns the restriction that the criterion can have on the independence of the agencies, that is to say, on that 'independent policy' which they ought to develop as I have already stated in examining the first criterion. The facts are that, whereas the first criterion (the 60000 metric tons) has been abolished, the third has been reduced from 9000 to 6000 metric tons, so that although the second, which is the one being considered at the moment, has also been reduced (from 30000 to 20000 metric tons) it is still a little bit over three times as high as the third. In other words, supposing the trader to be obtaining supplies of coal only from the mines affiliated to the agen-

cies, it is in fact still necessary for him to be on the books of each of them in order to fulfil the condition (three times six equals eighteen and we have got to find 20000 metric tons). In fact, to be precise, this is not always the case because products other than coal may be included in the tonnage of 20000 metric tons, particularly brown coal and gas coke. The table produced by the High Authority in Annex II in answer to one of the questions asked shows that a considerable proportion of the traders duly registered as first-hand traders only applied for registration with just one agency, although the tonnage of coal from that agency sold by them was often very much lower than 20000 metric tons. Nevertheless they fulfilled the condition as to 20000 metric tons thanks to lignite or gas coke.

While less restrictive than the previous condition, the condition as to 20000 metric tons still involves, although to a lesser extent, the disadvantage noted above, as indeed the High Authority admits (rejoinder in the *Nold* case, No 25). There is no doubt that a certain number of traders still find themselves forced to sell coal from two or even three agencies so as to be in a position to get on to the books of one of them. However I do not see why the fact of selling brown coal and gas coke, that is to say, products not coming from the agencies, is capable of improving the conditions of distribution of the products of an agency.

This argument certainly has some legal force because, when one considers the system in respect of which the High Authority gave its first authorization (Decisions Nos 5 to 7/56), and the contested decision is referable to the same context, the independence of the agencies was an essential condition of the authorization of jointselling as such. Therefore any restriction liable to interfere with it must in principle be prohibited. This is the very reason for which I have taken the view that the abolition of the criterion of 60000 metric tons was legally justified.

2. However, it must be recognized that in *fact* these considerations have lost all relevance, first, because it is admitted today that the 'independent sales policy' of the agencies has never existed, as has been formally recognized by the High Authority in the reasons for Decision No 17/59. Secondly, it is doubtful whether the addition of a number of new first-hand traders has suddenly had the effect of promoting that independent sales policy.

This is why I regard it as appropriate to approach another point, which, this time, goes directly to the heart of the matter. Indeed, the submission is expressly raised in the *Nold* case (Application, paragraph 3(c), from the point of view of want of reasons, and paragraph (f) towards the end, from the point of view of infringement of the Treaty). It is developed in the reply at paragraph 9. What is involved is the question whether the contested decision is justified from the point of view of subparagraph (c) of Article 65(2). This question, we have seen, is essential in respect of the correct exercise of the power of authorization. The agreement, even if it fulfils the conditions set out at subparagraph (a) and (b) must not be liable to give the undertakings concerned a dominant position enabling them in particular to control or restrict the production *or marketing* of the products in question. I would add that this requirement has been recognized by the High Authority in the contested decision (p. 739, left hand column at top).

The existence of an adequate set of commercial rules is the necessary counterpart of the authorization of a sales cartel on the part of producers. This is emphasized by my colleague Roemer in his opinion on *Nold*, Case 18/57, in the following terms:

'If it is assumed that the principle of the joint sale of Ruhr coal by free marketing companies is proper (I have no cause to go into this question further in the present action) there then arises the indisputable requirement of regulating the conduct of the sale in such a manner as to exclude arbitrary measures on the part of the joint selling agencies. In other words: the commercial rules were not introduced to continue the old coal-marketing practices but were required for a proper regulation of the market, for without such an organization the joint selling agencies would have been free to

stipulate and alter their conditions of sale as they pleased.'

In order for matters to work out like this, it is absolutely vital for the trade to be in the hands of traders independent of the agencies, at least to a large extent. Otherwise the undertakings which, by reason of the existence of the sales cartel, already have the power to regulate production and to influence the prices (if not 'determine' them which is prohibited) would also be in control of the marketing through the traders which are tied to them.

Indeed the High Authority is perfectly aware of this danger. We read, for example, in paragraph 36 of the statement of defence to the applications of the agencies, the following particularly significant passage:

'The applicants consider it necessary to protect the large commercial undertakings, which occupy a strong position on the coal market in any event by reason of their large turnover and their financial strength, against wholesalers of average size, and to do so by excluding the latter from direct supplies. If one takes the point that the large commercial undertakings are, for the most part, undertakings tied to the mines, it becomes clear that it is *the interests of the mining companies that are being pleaded.* The mining companies of the Ruhr basin grouped together in the three selling agencies seek to *concentrate* the sales made through the wholesalers on the *large commercial undertakings with which they have ties* and thus *extend without limit their undoubtedly already strong influence over the market to the first level of distribution.*'[1]

In these circumstances the question arises as to what is to be thought of the assertion contained in the recital to which I have just referred set out in the contested decision (bottom of p. 738, and p. 739):

'... in view of the number of wholesalers accepted for direct supplies *neither the colliery companies*, nor certain wholesalers are able to control or limit the distribution of a significant percentage of fuels'.

First of all, this reason is only concerned with the number of *wholesalers*, and this is not enough because what matters more is the number of *independent* traders. Moreover numbers are not enough: what matters more is the *relative importance* of the tonnages handled by independent traders and by traders tied to the mines. The decision does not contain any clue on these two cardinal matters. It is therefore vitiated for manifestly inadequate reasons having regard to Article 65(2)(c).

But I do not think that we are faced with a case of reasons which are merely formally inadequate. On the contrary, taking into account the finding of the High Authority itself and the written information amassed at the behest of the Court, it must be admitted that the contested decision is not legally justified under Article 65.

The main facts which we have available are as follows and they concern the situation subsequent to the application of the contested decision. They take into account the rectification inserted further to the error admitted by the High Authority — in great fairness I should add — concerning the classifying of a very large non-German trader.

1. As regards the *number* of independent traders: according to the High Authority there are 205 of them as against 181 traders tied to the mines, in other words 53% are independent. At the hearing these figures were rectified to a slight extent: 204 independent as against 175 attached to the mines, which gives a slightly different total. We should note that the figures are necessarily approximate but in its statement of defence to the applications of the agencies (para. 14) the High Authority declares:

'As regards this matter, *it is only undertakings whose link with the mines are irrefutably proven which are counted as such*'.

1 — The passages in italics are underlined in the provision.

2. As regards the *tonnage* sold by each of the two categories respectively, the percentage of deliveries to the independent traders is 43%, as against 57% of deliveries to the non-independent ones. (Under the system in force under earlier decisions the percentages were 39% and 61% respectively.) At the hearing the advocate for the High Authority even declared:

'*two-thirds* of the supplies are sold through the intermediary of the trading undertakings tied to the mines'.

3. The independent non-German traders take 375000 metric tons of coal from the Ruhr, whereas the non-German traders tied to the mines take about 1160000 metric tons.

To use a well-known expression, the figures speak for themselves. From them it appears not only that the greater part of the tonnage is distributed through traders tied to the mines, but that the traders tied to the mines are on average larger than the independent ones. It also appears from the figures that when one looks at the already slight extent to which non-German traders have direct access to the mines, more than three-quarters is in the hands of traders tied to the mines, and one of these is a particularly large trader for it alone distributes 1102000 metric tons:

If one also takes into account the fact that, as I have already pointed out, the proportion of the production of the Ruhr which is distributed through the traders is appreciably lower than the proportion which does not go through the traders, it becomes abundantly clear that, contrary to what the contested decision asserts, the mining companies are in a position to control and limit the sale of an important proportion of the fuels which they produce. This may be said without even going into the fact that the mining industry is to a large extent controlled by the steel industry, while at the same time important links exist between the mining undertakings themselves. Therefore the decision is not really justified having regard to the application of Article 65(2)(c). Nor is it thus required in respect of Article 3(b) of the Treaty, which says that the institutions of the Community shall ensure that all comparably placed consumers in the Common Market shall have equal access to the sources of production.

Admittedly, the High Authority argues that it *does not have the power* to force companies to alter the structure of their undertakings. This is perfectly true and is similar to what the Court said in Case 2/56 (Rec. 1957, p. 43),

'the High Authority was not required to alter the content of an agreement which was submitted to it in order that it should qualify for authorization'.

But the High Authority has the right to make its authorization dependent on certain conditions (third paragraph of Article 65(2)). Moreover it has frequently used this right. Where it appears that the independence of the trader is a necessary condition of any authorization, it is up to the High Authority to insist upon it. The High Authority is entitled to determine in detail the means whereby this condition may be fulfilled having regard to its purpose, which is to prevent the authorized agreement from acquiring, by way of traders tightly bound to the producers, a position such that it is able to control the market. If the interested parties accept these conditions, it is up to them to impose them on their buyers, the situation then being fairly similar to that laid down in Article 63. If they do not accept the conditions, the High Authority then has no other choice than to refuse the authorization.

Let me add, in finishing, that the reason why I have thought it necessary to place such great stress on this question of the independence of the traders is that it seems to me to be one of the essential conditions of any authorization, especially in the case (which I do not have to consider today) where the legality of a sole cartel might be accepted because of the crisis. The independence of the traders is just as necessary in times of crisis as in times of shortage.

C — Third condition: the sale of a minimum tonnage of 6000 metric tons of the coal of an agency

There is little to say on this point. The *principle* of this condition is not disputed. As for its amount, this seems to have been fixed reasonably, because the figure of 6000 metric tons was the one required in the old days before the establishment of the Common Market. Nold claims that it should be reduced to 4000 or 5000 metric tons so as to take account of the present crisis and the slack in demand for coal. But this argument is not decisive because the abolition of the two other conditions may to a certain extent justify an increase in the minimum tonnage in the interests of improved distribution. That, when all is said and done, may be a factor justifying the maintenance of the present figure. Here we are within a discretionary area which in principle is not subject to review by the Court.

However if you adopt my approach on the other points, especially on the need to treat the independence of the traders with particular care, it is possible to imagine that the question takes on a different aspect. For if, as I think, the essential condition of any authorization is that wholesale trade must be made truly independent, it is perhaps possible, once this condition is fulfilled, to be bolder as regards measures of rationalization intended to improve distribution. Supposing, for example, that all the wholesalers having direct access to the agencies were entirely free of any kind of bond with the mining companies (doubtless this is to imagine the extreme), there would then be nothing but advantages to be obtained in reducing the number of those traders, the reduction to be of a reasonable extent of course, and to take into account the provisions of Article 65(a) and (b).

This is why I think that the decision on this point should also be annulled.

V — Final conclusions

I am in some difficulty as to my conclusion. For, in view of the fact that the Court has not ordered a joinder and that it is unlikely that it shall see fit to deliver just one judgment, everything depends on the order in which the two judgments are delivered.

However I must presume that they will be delivered in the order of the lodging of the applications, which means that the applications of the agencies shall be taken first. Supposing this to be the case, those applications should be dismissed because the submissions and arguments on which I have relied and which have led me to favour annulment are in direct opposition to the line of reasoning put forward by the agencies. Moreover those submissions and arguments have not been raised by them and obviously cannot be raised by the Court of its own motion. I should just point out, although this remark cannot have any legal effect on the operative part of the judgment, that a latter annulment declared on the Nold application might on one point be advantageous to the agencies supposing that, subject to the conditions that I have thought necessary, the lower limit of 6000 metric tons, which is justified on principle, were to be raised.

I am of the opinion that:

1. As to Applications Nos 36, 37 and 38/59 brought by the agencies and the undertakings affiliated to them:

the said applications should be dismissed, and the costs should be borne by the applicants;

2. As to Application No 40/59 brought by the Nold undertaking:

Article 6(1) and (2) of Decision No 17/59 as amended by the contested decision should be annulled, and

the costs should be borne by the High Authority.