OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 11 MARCH 1965[1]

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Mr President,
Members of the Court,

During the past year the SOREMA case has already been the subject under Case 67/63 of proceedings for annulment in which the question at issue was whether the High Authority had lawfully ordered this company to withdraw from the Oberrheinische Kohleunion Bettag, Puton & Co. (OKU) of Mannheim. Today I can thus dispense with setting out again before you the facts of the case, that is to say, with explaining the composition and the functions of the two companies concerned, their mutual relationship and the decisions of the High Authority applying to their activities.

You know in particular that by its Decision No 3/62 of 28 March 1962 the High Authority authorized SOREMA to continue to belong to OKU, that in Article 2 (2) of this Decision it reserved to itself the right to fix by a later measure the time at which such participation must terminate, and that in fact Decision No 8/63 of 30 April 1963 stated that the authorization would expire on 30 June 1963.

By its judgment of 19 March 1964, contrary to what I had proposed, the Court annulled this Decision for reasons to which I shall return later.

The result was first of all that the authorization granted by Decision No 3/62 continued in force; further, the High Authority found itself compelled to re-examine the case in the light of the judgment given. This examination resulted in Decision No 15/64 of 15 July 1964 (Official Journal, 1964, page 1969) which once more ordered SOREMA to withdraw from OKU as from 30 September 1964.

It is against this Decision that the pres-

1 — Translated from the German.

ent application for annulment is made. Its principal claim is for the annulment of the said Decision, whilst the High Authority asks that the application be dismissed as unfounded.

Legal Consideration

In launching upon a new legal examination of this dispute I must of course proceed on the basis of the conclusions drawn by the Court in its judgment in Case 67/63 on the nature and meaning of the essential decisions concerning the relationships between SOREMA and OKU.

The judgment was based fundamentally on the finding that, as far as the participation of SOREMA in OKU is concerned, Decisions Nos 31/59 and 12/60 had amended Decision No 19/57 both as regards its subject matter and its statement of reasons. By Decision No 31/59, the High Authority inaugurated a new phase in the relationship between SOREMA and OKU. By this Decision it not only extended the time-limit given to the merchants grouped together within SOREMA to withdraw from OKU, but it *authorized* its participation in OKU on certain stated conditions and for a limited period and this by virtue not of paragraph 12 of the Convention on the Transitional Provisions, but of Article 65 (2) of the Treaty. In these circumstances the withdrawal of SOREMA from OKU could not take place as a consequence of the stipulation of the transitional period contained in Decision No 3/62, but only on the basis of the conditions required by Article 65 (2) for the revocation or refusal to renew an authorization already given to a cartel.

Let us consequently examine how the new decision of the High Authority must be viewed in the light of these considerations: is it based on the principles of the judgment in Case 67/63, as the High Authority maintains, is it in conformity with that judgment, or does it appear to be defective (which is the point of view of the applicant) when measured against the criteria set out in Article 65 of the Treaty? For this examination I shall not follow exactly the order adopted by the applicant for the presentation of its submissions.

I — Does the participation of SOREMA in OKU in any way constitute a restriction on competition?

It is logical to examine first the applicants argument that the High Authority has given no indication of any facts which might demonstrate why the association of SOREMA with OKU and its participation in the activities of the latter should be regarded as a restriction on competition. In its opinion, even in the case of a revocation of an authorization given to a cartel, an examination should first be carried out to verify whether the agreement under review still falls within the scope of Article 65 (1).

In fact the recitals of the Decision in this respect merely contain the laconic assertion that the prohibition contained in Article 65 (1) also applies to SOREMA. I am, however, of the opinion that the High Authority did not have to give a more extensive explanation of this subject in the contested Decision. In fact the need for an authorization for SOREMA's participation in OKU, and thus the question whether Article 65 (1) is at all applicable to this relationship, was contained in earlier Decisions, namely No 31/59, 12/60 and 3/62. The applicant has never challenged these Decisions, although from its own point of view it had every interest in doing so, since its participation has only ever been authorized subject to serious restrictions (for a transitional period). Consequently, these Decisions with all their findings have ac-

quired the force of *res judicata* (so far as one can use that expression at all with regard to administrative measures). On the contrary, the sole object of the Decision now being challenged is to withdraw the authorization already given; it is founded on the previous Decisions, and presupposes their existence and their observations on the necessity for authorization. In reality, the adoption of Decision No 15/64 would have given rise to an examination of the question whether the prohibition in Article 65 (1) still applied to SOREMA's participation in OKU only if new facts had emerged, such as changes in the market which could influence the result. The applicant has however said nothing on this subject. It is content rather to refer to the conditions of competition before its participation in OKU and before the entry into force of the Treaty, and to the fact that it was founded in 1946 with a view to its adaptation to certain known conditions of competition. I consider therefore that this first submission must be dismissed as unfounded.

II — Can the revocation of the authorization be contested for other reasons?

1. It is convenient to examine in the second place the complaint that the reservation contained in Article 2 of Decision No 3/62 as to the fixing of a time-limit is not valid. We must remember that Decision No 3/62 did not itself fix the duration of the validity of the authorization, but reserved this question for settlement in a later measure. According to the applicant, the High Authority thereby distorted the system laid down in the Treaty, with the result that Decision No 15/64, which is founded on the 'illegal' reservation contained in Decision No 3/62, must also be considered illegal.

To this complaint it may in the first place also be objected that Decision No 3/62 was never contested, although it could, in the applicant's opinion, justifiably have been challenged on the possibility of determining the length of time for which an authorization could be given to a cartel, that is to say, of making the grant of an authorization subject to burdensome restrictions. Decision No 3/62 has accordingly full legal effect, and, what is more, according to the case-law of the Court, as it is an individual decision, it cannot now be made the subject of examination by using the objection of illegality as a means of challenging it.

In addition, I have the impression that in Decision No 15/64 the High Authority did not use the reservation as to the fixing of a time-limit set out in Decision No 3/62 in the sense which was first attributed to it, that is to say, in the way in which it was applied in Decision No 8/63. In other words the High Authority did not content itself with fixing the end of the transitional period mentioned in Decision No 3/62 but, as the judgment in Case No 67/63 requires, it gave *at least one additional reason* for the revocation of the authorization of the cartel, in conformity with the requirements of Article 65 (2). The legality of this reservation is thus not decisive, so that this second objection is without influence on the result of this application.

2. But there are much more important arguments in the application which concern the question under what conditions and in what form can an authorization given to a cartel be revoked in accordance with the Treaty. In my opinion this is the nub of the case.

According to the fourth subparagraph of Article 65 (2) the High Authority may revoke an authorization if it finds that as a result of a change in circumstances the authorized agreement no longer meets the requirements of paragraph (2) (a) to (c), or that the actual

results of the agreement or the application thereof are contrary to the requirements for its authorization.

It is indeed clear from Decision No 15/64 that the revocation contained in it is based at least *alternatively* on the wording of Article 65, in fact on the second alternative eventuality which I have just quoted (thus not on a change in circumstances).

But if I understand it correctly, the High Authority's intention is to justify the revocation principally by the fact that, at the time when Decision No 3/62 was taken, the conditions required by Article 65 (2) (a) and (b) with regard to the participation of SOREMA in OKU were not fulfilled.

In this light the situation is as follows: in the present case just as in Case 67/63, the High Authority has stated that, in adopting Decision No 3/62 as in all the earlier decisions, it had not in fact the intention to accord, in respect of SOREMA's participation in OKU, a proper authorization under Article 65 (2) of the Treaty, but to tolerate this participation as an exception for a transitional period *in spite of* the conditions specified in Article 65. To this end it first made use of paragraph 12 of the Convention on the Transitional Provisions, according to which if it does not grant authorization under Article 65 (2) it shall set reasonable time-limits after which the prohibitions contained in this Article shall apply. Then, still with the same object in view, it based itself on general considerations drawn from the overall concept of the Treaty (see page 14 of the rejoinder in Case 67/63). We know that in Case 67/63 the Court did not accept that explanation and that it preferred to base its judgment on an *objective* interpretation of the High Authority's decision based upon *what the Treaty permits*; this interpretation led the Court to see in Decision No 3/62 an authorization given to a cartel by virtue of Article 65 (2). The High Authority was thus forced to see attributed to its decision a meaning different from that which it had given itself; in other words, its legal explanation, after the Court's interpretation, took on an expression which did not correspond to its real intention. In private law this discrepancy between the real intention and the form of its declaration comes within the procedure available for rectifying mistakes ('Irrtumsanfechtung'), which allows a later correction to be made with consequences which are laid down by law. The opinion is unanimously held that this instrument is unknown to public law. What is decisive in this respect is the objective agreement between an administrative measure and the requirements of law and the administration is always entitled to revoke an administrative measure which by this criterion is shown to be defective.

(a) Consequently the first question which arises for us is whether the Treaty recognizes such a revocation of authorizations for cartels, that is to say, a revocation based on the absence of the necessary conditions at the time it was issued, or whether it permits this only in cases expressly mentioned in the law. As you perhaps know, in German cartel law the answer to this question is that the law contains an exhaustive enumeration of all available grounds of revocation which excludes recourse to general principles of administrative law.[1]

In Community law, however, this argument does not appear to me to be valid because of the different way in which that law is formulated. It would be defensible only if the Treaty set out *unequivocally* the exclusive character of the conditions which could justify revocation. I believe like the High Authority therefore that the very strictness of the rules governing the problems of competition in the Treaty suggests that re-

1 — Cf. Müller-Henneberg-Schwartz, Gemeinschaftskommentar zum Gesetz gegen Wettbewerbsbeschränkungen, 1963 Note 12 to Article 11.

spect for the principle of competition must be ensured by all means available and thus, *inter alia,* by applying general principles of law to the revocation of defective administrative measures.

(b) Let us therefore consider further whether, according to this principle, the conditions for revoking Decision No 3/62 are in fact fulfilled in the present case. The following recitals set out in Decision No 15/64 become important from this point of view. The High Authority argues that SOREMA's participation in OKU does not contribute to any *substantial improvement in the distribution of coal* (Article 65 (2) (a)), that in particular in so far as it involves taking part in the deliberations and the taking of decisions in OKU it is *not essential* to the attainment of the object of the cartel agreement; that it is of a *more restrictive* nature than is necessary for the purpose of the agreement (Article 65 (2) (b)), and that it constitutes *discrimination* against all those wholesale coal merchants who are excluded from participating in OKU because they fail to fulfil the proper requirements for admission.

As to the first point (substantial improvement in coal distribution), the applicant has raised two objections, one of form and the other of substance.

First as to the formal complaint, the High Authority is criticized for having given an inadequate statement of the reasons for the decision which simply states that SOREMA has not undertaken any commercial activity in Southern Germany. In the applicant's opinion, the High Authority should on the contrary have taken into consideration all the conceivable effects of SOREMA's participation in OKU.

This point of view misjudges the extent of the duty to state reasons, which is not measured by reference to the conditions for taking action disclosed by an objective interpretation of the Treaty, but solely by reference to the reasoning and deductions *which the High Authority* considered to be correct. Given that in examining the conditions in Article 65 (2) (a) the High Authority obviously was solely concerned with commercial activity in Southern Germany, the statement of reasons which it gave could, from its own point of view, have been considered as sufficient since it contains all essential considerations of fact and law and the case-law of the Court does not require more.

Consequently, in my opinion, the complaint of infringement of an essential procedural requirement should be dismissed.

As to the correctness *in substance* of the reasoning employed by the defendant founded on Article 65 (2) (a), the applicant points out that the High Authority is wrong in proceeding on the basis that only participation by SOREMA in the commercial activity of Southern Germany could be expected to lead to an improvement in distribution. To be correct, the High Authority should base itself upon all the activities falling within the framework of the authorized cartel agreement and, above all, take into consideration their effects on the whole Common Market, and not only upon one region within this market.

In this respect also, I am unable to share the applicant's views, at least in their entirety. According to Article 65 (2) (a), before authorizing an agreement of the kind with which we are concerned, the High Authority must ascertain whether the joint buying will make for 'a substantial improvement in . . . the distribution of *those* products'. In my opinion, this formula should be understood in the sense of taking into consideration the specific joint-buying agreement, with its specific object, and in this case, as appears in Article 1 of Decision 3/62 which refers to Articles 1 to 9 of Decision No 19/57, of the agreement between a group of undertakings 'for the joint buying from the mining companies in the coalfields of Aachen, the Ruhr, the

Saar and Lorraine, or from the selling agencies of the said mining companies, of fuels intended for *re-sale in Southern Germany*'.

It is the distribution *of these* products in that region that the cartel must improve, and it is not the improvement of the distribution of any other similar products anywhere in the Common Market which is decisive. However it must be admitted that this does not yet answer the question whether distribution can be improved solely by *commercial* activity within the sector indicated, or by another type of activity within the framework of the cartel. All the same I do not consider that this question needs to be further examined in this case. The applicant has not in fact given any information which would indicate that the mere fact of its participation in OKU has favourable effects on the improvement of distribution in the sense of Article 65, an argument against which there exists at least a presumption of fact and which requires, in consequence, proof on the part of the person who relies on it.

Just as important for the purpose of an assessment of the dispute is the fact that the High Authority based its decision to revoke not only on the absence of the conditions required by Article 65 (2) (a), but also on the assertion that the mere participation of SOREMA in OKU was in any event not *essential* to achieve the result of an improvement and was of a *more restrictive* character than the purpose of the cartel required (Article 65 (2) (b)). If I am not mistaken, the applicant has not submitted any comments at all on this point, and it would furthermore be difficult to imagine how the argument could be defended that the mere fact of the participation of SOREMA in OKU is essential to achieve the purpose of the OKU cartel, in so far as this may be deduced from Decision No 19/57.

Thus all that needs to be said has been said concerning the original deficiency in authorization No 3/62 granted in favour of SOREMA. Nevertheless I would like once more to consider the infringement of the prohibition of discrimination on which the High Authority also relied in Decision No 15/64, and to see whether the applicant's complaints are not well founded at least on this point.

That does not seem to me to be the case because of its idea that the prohibition of discrimination applies only to the extent that free competition is adversely affected. The sole effect of SOREMA's participation in the activity of OKU, on the contrary, was to counteract certain competitive disadvantages; it effected this compensation because the High Authority has omitted up to the present time to ensure equal access to production by taking effective measures in the field of the publication of transport rates and their non-discriminatory application. With this argument the applicant is essentially putting forward the view that, as long as the High Authority or the Member States have not completely fulfilled their obligations, undertakings within the Community are equally free not to observe the provisions of the Treaty which apply to them. But this kind of 'book-keeping' of infringement of the Treaty, whether actual or imaginary, is contrary to the principles laid down by the case-law of the Court (mainly in those cases concerning Article 169 of the EEC Treaty). The applicant cannot succeed in this way in setting aside or restricting the prohibition of discrimination provided for in the Treaty.

It seems that SOREMA is just as much mistaken in thinking that the prohibition of discrimination does not apply to itself because it is directed only to buyers, and it does not itself exercise any commercial activity. In this respect, the High Authority correctly points out that the fact that SOREMA groups together the interests of its members

as buyers is decisive as far as concerns the application to it not only of Article 65 but also of the prohibition of discrimination. Each time that SOREMA obtains an advantage from the market, it can only in the last resort be an advantage obtained by those merchants grouped together in SOREMA and whose interests it represents.

In this respect it is impossible also to accept the applicant's assertion that there is no infringement of Article 4 of Decision No 19/57 (and thus of the prohibition of discrimination), for the good reason that, although it does not have the character of a wholesaler as provided for in Decision No 19/57, Decision No 31/59 has already permitted it to belong to OKU, which proves that it rightly occupies a special position under that Decision. In my opinion Decision No 31/59 and the other decisions could only help towards the consideration of this case if it had not been shown that at that time the High Authority had granted authorization to SOREMA by way of an *exception and in spite of* the provisions of Article 65, that is to say on the basis of paragraph 12 of the Convention on the Transitional Provisions. Since the judgment in Case 67/63 has rendered this point of view invalid and since the High Authority must now base itself solely on the general rules contained in Article 65, it is no longer justifiable to grant SOREMA special treatment.

Finally, contrary to the applicant's opinion the fact that the supply conditions at the collieries or their sales companies, to which Decision No 19/57 refers, do not depend on the sale of coal in Southern Germany has no relevance to the solution of the problem. In fact it is not the supply conditions at the collieries but only the provisions governing admission to OKU contained in its articles of association which provide the criterion for deciding whether or not there is equality of treatment between the undertakings in their relationships with OKU. But these, in accordance with the objects of the company, provide for sales in Southern Germany.

That is why the High Authority's reliance on the prohibition of discrimination laid down in the Treaty, and the defects of Decision No 3/62 which must be deduced from it, is proved to be justified.

However it is clear from the Court's case-law that with regard to the revocation of an administrative measure which has granted subjective rights, simple proof of an original defect contained in it is not sufficient. Whether, to what degree and with what effects (*ex nunc* or *ex tunc*) the revocation is permissible must be decided in each case by weighing all the interests concerned. In the present case these consist of the public interest in the application of the principle of competition and observance of the rule of equality of treatment of comparably placed undertakings, and on the other hand of the interests of SOREMA and its member undertakings in their capacity as traders in not being disappointed in their trust in the continued existence of the cartel authorization, and thus in not seeing their commercial plans upset.

As to this last point, however, the wording and particularly the limitation of the validity of the earlier decisions of the earlier decisions of the High Authority concerning the relationship between SOREMA and OKU, but also the form taken by Decision No 3/62, should have warned against placing too much trust in the principle of the preservation of confidence. Merely from the reservation contained in Article 2 of Decision No 3/62, the applicant should have concluded that in principle the High Authority had envisaged a shorter period for its participation than for the authorization of OKU itself. The statement of reasons for the Decision read as a whole reveals what would be called in civil law the 'basis of the con-

tract' ('Geschäftsgrundlage'), even if it cannot be considered, in the law governing cartels, as a condition or obligation. We read there that, even when Decision No 3/62 was taken, because of the new commercial regulations for the Ruhr in force since 1961, French wholesale coal merchants met no obstacle to being supplied directly from the Ruhr, and thus equally (it must be added) to fulfilling the ordinary conditions for participation in OKU. Although nevertheless, and still provisionally, SOREMA's membership of OKU was authorized, it was solely because the *final* structure of the conditions of sale operating in the Ruhr was not established and could not be shown. But it is, in my opinion, this circumstance which showed clearly that after they were definitely and uniformly fixed, the collective participation of SOREMA in OKU could no longer be justified. As we know the condition to which I have just referred appeared in 1963, and the High Authority had already drawn attention to it in Case 67/63. As from that time, the applicant should have expected to have its participation in OKU terminated, and consequently, as from that date, there could no longer be a question of an interest entitled to judicial protection based on the hope of stabilizing the situation ('Vertrauensinteresse'). Moreover, the applicant has not disputed the statement of the High Authority that, from that time, the various French wholesale coal merchants in fact fulfilled the conditions governing supply from the Ruhr, and that it has become economically feasible for them to engage in commercial activities in Southern Germany. Nothing prevents them therefore from fulfilling the conditions for becoming directly associated with OKU and thereby ensuring for themselves the consequentional advantages.

Taking all these factors together and carrying out the necessary balance of interests one is led to the conclusion that there is no valid criticism of the revocation of the cartel authorization, which was defective in the first place, contained in the High Authority's Decision No 15/64.

III — Summary and conclusion

Consequently without examining other possible justifications for the revocation or the arguments submitted in the application with regard to them, my final opinion is as follows:

The application by SOREMA must be dismissed as unfounded and the applicant must be ordered to bear the costs.

ORDER OF THE PRESIDENT OF THE COURT
17 SEPTEMBER 1964[1]

In Case 36/64 R

SOCIÉTÉ RHÉNANE D'EXPLOITATION ET DE MANUTENTION 'SOREMA', a limited liability company having its registered office in Strasbourg, 11 rue Fischart, represented by its managers and by R. Garon, Advocate of the

1 — Language of the Case: French.