Puton & Co., Mannheim, on the part of the Société Rhénane d'Exploitation et de Manutention, Strasbourg;

2. Orders the High Authority of the European Coal and Steel Community to pay the costs in the main action and orders the costs of the application for the adoption of the interim measure to be borne by the applicant.

Donner Hammes Trabucchi

Delvaux Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 19 March 1964.

H. J. Eversen
Assistant Registrar
For the Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 28 JANUARY 1964[1]

Mr President,
Members of the Court,

The applicant in the present proceedings is a French limited liability company, consisting in the main of wholesale coal merchants. Its objects are 'toutes les opérations se rapportant à la manutention, l'entreposage, le transport, le commerce des combustibles solides et autres matières pondéreuses dans les régions desservies par le Rhin-Amont et les régions limitrophes et notamment l'exploitation des chantiers du port de Kehl' (all business relating to the handling, storage, transport of and trading in solid fuels and other bulk goods in the areas supplied by the Upper Rhine and adjoining areas and especially the operations of the yards at the port of Kehl) (Article 2 of its articles of association). Since the formation of the OKU (Oberrheinische Kohlenunion Bettag, Puton & Co., Mannheim) in 1947 it was a member of that company. It now complains that the High Authority, by Decision No 8/63 of 30 April 1963 (published in the Official Journal of 11 May 1963), has withdrawn its authorization for the applicant to be a member of the OKU.

The course of events which led up to this Decision has been gone into at length in the proceedings. I must however return briefly to it for a better understanding of my conclusions on the legal position.

When the Common Market was inaugurated the OKU was an organization for the joint selling of coal in South Germany from the areas of Aachen, the Ruhr, the Saar and Lorraine. The agreement on which it was founded was

1—Translated from the German.

submitted in due time to the High Authority in accordance with Decision No 37/53 for authorization under Article 65 of the ECSC Treaty and Article 12 of the Convention on the Transitional Provisions, with the result that it remained provisionally in force. As the High Authority took the view that the OKU in its original form was incompatible with the Treaty negotiations for its restructuring took place. As a result the OKU sales organization became an organization for the joint *buying* of fuels from the mining companies in the areas of Aachen, the Ruhr, the Saar and Lorraine for resale in South Germany. This agreement was authorized by the High Authority in Decision No 19/57 of 26 July 1957 (Official Journal, p. 352) and was to remain in force up to 31 March 1959. In the same Decision a transitional period, to expire on 31 March 1958, was fixed for membership of the OKU by the French wholesale coal merchants belonging to SOREMA. As a further consequence a distinction must be drawn between authorization of the activities of the OKU as such and of the French wholesale coal merchant's direct or indirect membership of the OKU.

For the latter purpose the original transitional period was extended to 31 July 1958 by Decision No 4/58 of 2 April 1958 (Official Journal, p. 169) but a further extension was refused by letter of 15 July 1958 (Official Journal, p. 286) so that from 31 July 1958 the French wholesale coal merchants were not directly members of the OKU.

By Decision No 23/59 of 25 March 1959 (Official Journal, p. 240) the High Authority authorized the activity of the OKU for a further two months. By Decision No 31/59 of 27 May 1959 (Official Journal p. 697) this authorization was extended to 31 March 1962 and by Decision No 3/62 of 28 March 1962 (Official Journal, p. 873) was finally once again extended to 31 March 1967. As regards the French wholesale coal merchants, the High Authority by Decision No 31/59 authorized only the corporate membership of SOREMA within the OKU. The authorization was limited to a period expiring on 31 March 1960. It was extended by Decision No 12/60 of 18 May 1960 (Official Journal, p. 813) up to 31 March 1962 and finally once again in Decision No 3/62, but this time no expiry date was fixed. This was to be done by a further special decision which in the event was Decision No 8/63 of 30 April 1963 and this set the expiry date of the authorization for membership of the OKU at 30 June 1963.

There then is the history of events leading up to the proceedings and a history of the OKU.

The applicant now seeks to contest the last-mentioned of this series of Decisions to secure its annulment by invoking, as the grounds of its application, infringement of essential procedural requirements, infringement of the Treaty and misuse of powers. It claims in particular that:

— SOREMA is not an undertaking engaged in distribution within the meaning of the Treaty and is therefore not caught by Article 65;
— the contested Decision No 8/63 is a decision revoking an authorization under the fourth subparagraph of Article 65 (2) but does not fulfil the conditions for revocation therein prescribed;
— in its Decision to revoke, the High Authority refers to a condition not previously imposed;
— before issuing the revocation the High Authority failed to fix the period during which the authorization granted in Decision No 3/62 was to remain in force;
— the High Authority has not shown in Decision No 8/63 in what way SOREMA's membership of the OKU tends to distort competition; no such distortion can in fact be proved.

We shall have to examine the question

whether these objections are tenable and can lead to annulment of Decision No 8/63.

Legal Consideration

I—Admissibility

The first question to be considered is a problem of admissibility, which arises out of the applicant's observation that its case is not caught by Article 65 of the Treaty, since the applicant ought not to be considered as a distribution undertaking within the meaning of the Treaty.

The High Authority took up this argument and drew from it the conclusion that if the application could not be considered as an undertaking, its application must be dismissed as inadmissible.

The fact is that under Article 33 of the Treaty, a right of action in principle is open only, apart from Member States and the Council, to undertakings or associations of undertakings. Article 80 of the Treaty defines an 'undertaking' as any undertaking engaged in production in the coal or the steel industry or, for the purpose of Articles 65 and 66, any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries.

But if it is the case, as the applicant affirms, that in spite of the form of wording chosen to define its objects in Article 2 of its articles of association the applicant does not *in fact* engage in distribution, it is not an undertaking within the meaning of the Treaty, and not entitled to bring an action as such. It can then only be asked whether the attempts made to prove that the application is nevertheless admissible can succeed. On this it makes two points:

— first, the determining factor governing the right of action is an acceptance by the High Authority that a person qualifies as an undertaking, even if this does not accord with fact.

— secondly, SOREMA might be considered as an association of undertakings.

(a) As to the first argument, I cannot accept it. It finds no support in the wording of the Treaty, which starts quite clearly from the *objective* criterion of the activity carried out. Nor is there, in my opinion, any reason to admit it in the interest of ensuring legal protection for undertakings outside the Community which might be named by the High Authority in a decision which exceeds its competence — a case more theoretical than practical. Even without admitting that such undertakings have a right to institute proceedings, their interests, as the High Authority has shown, are sufficiently protected. Were they to make an application for annulment, the High Authority would also have to submit to the consequences, arising under Article 34 of the Treaty, of a judgment declaring the application to be inadmissible because of the failure of the applicant to qualify as an undertaking, and amend its decision to accord with the limits of its competence. In addition, there is the possibility open to each party concerned of applying for damages under Article 40 of the Treaty and if occasion arises of seeking clarification in proceedings brought before its national courts which can lead to a reference to the Court under Article 41 of the ECSC Treaty.

(b) On the other hand, the admissibility of the application must be considered from the point of view of SOREMA's *qualifying as an association of undertakings*; as we have seen, SOREMA is in fact made up principally of wholesale coal merchants, which are themselves undertakings within the meaning of Articles 80 and 65 of the Treaty.

The Treaty nowhere defines what should be considered as an association of undertakings. But, bearing in mind the func-

tions which the Treaty assigns to associations (Article 48 — consultations with the High Authority, submitting suggestions to the institutions of the Community, in general protecting the interests of Community undertakings), one might think the Treaty starts with a concept long known to the economic law of Member States. On this point, I quote Huber, Wirtschaftsverwaltungsrecht, 1953, who defines in Volume I on page 243 the concept of an association of undertakings as follows:

'An association of undertakings is an association of entrepreneurs (and undertakings) in the same business sector of the economy which promotes the economic interests of its members, and represents them especially vis-à-vis the public, government, administrative and legislative bodies and other sectors of the economy'.

The observations in Reuter's 'La Communauté Européenne du Charbon et de L'Acier', page 111, would lead to a similar definition as would those in 'La Communauté Européenne du Charbon et de l'Acier par un groupe d'étude de l'Institut des Relations internationales', page 34.

It appears to me that SOREMA too can act in this way by virtue of Article 2 (2) of its articles of association which states (*inter alia*) 'Elle peut assurer directement ou indirectment la contrôle ou la gérance do tout organisme, association ou part d'intérêts concourant à la réalisation de l'objet précité' ('It may directly or indirectly control or manage any body, association or share in a business having the aforementioned objects').

In this case it has without doubt acted as representing the interests of the wholesale coal merchants who are its members and for whom it seeks to obtain certain advantages arising out of membership of a powerful sales and transport organization.

When, on the other hand, the High Authority suggests that SOREMA is, according to its articles, a company having among its objects the making of profits, this should not take away its character as an association, for nowhere is it laid down that an association cannot pursue an economic activity whilst at the same time watching over the general economic interests of its members.

Consequently, I incline to the view that the exercise by SOREMA of a function, justified by its articles, which is typically that of an association, is sufficient to give the right to bring an application which should be declared admissible.

II—Substance

1. Before beginning an examination of the substance of the objections raised, I must make quite clear what is the one purpose of the contested Decision and so of the judicial proceedings. I do this in the context of the question, discussed at length during the oral proceedings, whether SOREMA's membership of the OKU is caught by Article 65, and whether as a restriction on competition it requires authorization. This is a question which in the applicant's view has to be examined as much from the point of the lack of a statement of reasons as from that of infringement of the Treaty.

But to do that, it is essential to look once again briefly at the series of decisions which have already been mentioned in the recital of facts to see, when viewed as a whole, what light they throw on the question posed.

In the preamble to Decision No 19/57, the first decision dealing with the OKU, the following sentences are to be found, which, because of their importance I am repeating *verbatim*.

'Nevertheless, these new agreements' (meaning agreements including the establishment and the objects of the OKU) 'having as their object joint buying by wholesale merchants must in accordance with Article 80 of the Treaty

be regarded as falling within the provisions of Article 65 thereof'. . . 'Joint buying ensures for the wholesale merchant members a considerable influence over the market which in turn opens up the possibilitity of practices being applied which are contrary to the provisions of Article 4 (b) or (d) of the Treaty, particularly the prohibition on discrimination and sharing or exploiting of markets.'

The passages quoted apply without distinction to the German and the French wholesale merchants participating in the OKU and make clear that the High Authority thought itself bound to consider the concentration from the point of view of Article 65 and concluded that under that Article it was *subject to authorization.*

It does not seem that this basic assessment had changed when SOREMA was substituted for the French wholesale coal merchants as a member of the OKU (Decision No 31/59), or that therefore, as the applicant assumes, there was at this time any change of view on the position as to membership. SOREMA's membership of the OKU, likewise authorized under Article 65, simply meant that the French wholesale coal merchants, who had previously been able to participate in the OKU decisions individually (but who in fact, as we have learned, were already represented by SOREMA), were in future necessarily represented as a group. That is why Decision No 31/59 is expressly designated as an extension of Decision No 19/57, and why one finds it stated there that SOREMA looks after the interests of the French merchants in the OKU.

Nor do the later decisions of the High Authority reveal any change of treatment of SOREMA's legal position. When Decision No 12/60 *approved* SOREMA's membership of the OKU, this can only mean that authorization under Article 65 of the Treaty was given. Besides, it clearly emerges from the preamble to Decision No 12/60 that the High Authority made no difference of principle between individual French merchants' membership of the OKU and their collective representation through SOREMA, for the Decision speaks expressly of the *link between the Oberrheinische Kohlenunion*, and the French *merchants* grouped together in SOREMA.

Finally the last of the authorizing decisions (No 3/62) does not depart from this view; this can be seen, for example, by the reproduction of SOREMA's request in the grounds of which reference is made to the usefulness of cooperation with the OKU because of *growing competition* and the *necessity for an accurate survey of the market.* The fact that the High Authority reproduced precisely this part of the request in the preamble to its Decision shows in what context the High Authority was prepared to view SOREMA's membership. Thus there seems no doubt that in all its authorizing decisions the High Authority treated the link between SOREMA and the OKU as falling within Article 65 of the Treaty and regarded it as subject to authorization under Article 65.

This treatment for legal purposes has not been challenged in any way. It could only have been made a subject for argument in the present case if Decision No 8/63, now being contested, had proceeded to a reassessment of the concentration or confirmed it for it is not possible to attack previous *individual* decisions by raising an objection of illegality.

But that is clearly not the case. As the short operative part of Decision No 8/63 clearly shows, the sole object of the Decision was to fix a *final time-limit* for the authorization given to SOREMA for membership of the OKU, and thus to *put an end* to the development. Nothing in the Decision, either in the operative part or in the preamble, indicates that the High Authority had made any fresh approach to the question of the *necessity for authorization*, in the way of reconsider-

ation, reexamination and redetermination. It regarded the necessity for authorization rather as a definitively established fact and based the contested Decision on it.
Consequently, our case turns solely on the question whether fault can be found in the *fixing of a period of validity* of the earlier authorization, and all arguments not bearing on this issue can be disregarded as irrelevant to the subject matter of the proceedings.

2. After this necessary delimitation of the subject matter which is open to discussion, I turn to the few remaining submissions.

(a) The applicant alleges that Decision No 8/63 constitutes a decision of revocation which does not fulfil the conditions specified in the fourth subparagraph of Article 65 (2). In so doing, it points to the rule which permits the High Authority to revoke an authorization given to an agreement should it find that, through a change in circumstances, the agreement no longer meets the requirements laid down in the first subparagraph of Article 65 (2), or that the actual results of the agreement or of the application thereof are contrary to the requirements for its authorization. According to the applicant, a revocation could have been made only if a change of circumstances after the adoption of Decision No 3/62 could have been proved.
The High Authority, on the contrary, alleges that it has not made use of the provisions for revocation in Article 65, but has limited itself in Decision No 8/63 to establishing a period for the expiry of transitional rules as it had previously deemed to be necessary.
In my opinion this explanation is consistent both with the wording of Decision No 8/63, which nowhere speaks of revocation, and with the whole development of the scheme of authorizing decisions.

All decisions as to the admission of the French wholesalers to membership, direct or indirect, of the OKU have always been expressly qualified as transitional decisions limited in time (as for instance Decisions Nos 19/57 and 4/58 on individual membership of the French wholesale coal merchants, and Decisions Nos 31/59 and 12/60 on SOREMA's membership). If the last authorizing Decision, No 3/62, failed to fix a limit to its duration this was not to cut across this practice or to indicate that the basic principle of transitional rules considered necessary from the outset no longer applied. Here also it is clear that provision was made only for a transitional authorization for SOREMA, the duration of which was omitted because its calculation depended on events whose exact date could not be determined in this case, namely, as the preamble shows, the establishment of new trading rules for the Ruhr. The Decision now being contested, No 8/63, was adopted on 30 April 1963, shortly after the date on which these trading rules had been established (they had been adopted on 11 February 1963 by the two sales organizations 'Präsident' and 'Geitling' and authorized by the High Authority on 20 March 1963).
In fact, Decision No 8/63 does not constitute the revocation of an authorization of an agreement, but a necessary *supplement*, for which provision had already been made in Decision No 3/62, *to that Decision as regards time factors* for which the conditions in the fourth subparagraph of Article 65 (2) do not have to be taken into account.

(b) But if this is the case, if there was no revocation, the applicant's other argument, that the adoption of Decision No 8/63 was based on a *condition* not previously imposed, also fails. At the most, one might query whether the supplementary Decision No 8/63 really accords with the framework provided by Decision No 3/62. But in my opinion

this is the case.

As the High Authority has rightly said, all the decisions authorizing the membership of French wholesalers within the OKU rest on the same consideration, even if their meaning has perhaps not always been expressed too happily or with complete precision. After the basic authorizing Decision No 19/57, only those organizations which were entitled to order directly from the mining companies *and* who carried on a sales activity in South Germany could be members of the OKU; this was done to avoid serious restriction of competition and to observe the prohibition on discrimination. This is clear from the preamble to the Decision and Article 1 of the operative part. As the French wholesale coal merchants, because of the sales organization hitherto existing, could not fulfil the conditions for admission in 1957, they did not strictly have the right to participate in the advantages of the buying and transport organization of the OKU. To avoid this stringency, their admission to the OKU was allowed as an exception, contrary to the conditions laid down in the Decision, but only for a transitional period during which they might so organize themselves as to fulfil the ordinary conditions of admission. None of the subsequent Decisions, including those relating to the membership of SOREMA, departed from this fundamental condition as is shown by the constant reference back to Articles 1 to 9 of Decision No 19/57 made in Decisions Nos 31/59 and 3/62. The temporary situation had merely been prolonged again and again as time went by for different reasons (entry into force of the Treaty on the Saar, the market situation, etc.), until finally Decision No 3/62 laid down that the previously existing obstacles to direct access by French merchants to the Ruhr coal-selling companies, had disappeared during 1961, a statement confirmed by the applicant during the proceedings. That clearly amounts to saying that at that time no other grounds existed for the retention of the transitional rules than the conditions of admission to the Ruhr companies. However, if the High Authority considered itself able to grant a fresh transitional period of respite, perhaps out of an excess of indulgence, it is because the conditions of admission already mentioned were only *transitional rules* which were to remain in force until the adoption of definitive trading rules. When these had been adopted and authorized and when it was clear that they were completely in accordance with those in force since April 1961, in that French wholesalers were required to have bought 2500 metric tons of coal from a selling agency for resale in the Common Market, the High Authority immediately drew the consequences which inevitably followed from the preamble to Decision No 3/62, and ordered an end to the *collective* membership of SOREMA within the OKU which had been authorized as a transitional measure.

Thus Decision No 8/63 exactly followed the considerations which are clearly to be seen in Decision No 3/62, as the determining factors for the purposes of a transitional period of respite. There could therefore be no question of invoking a condition not imposed at the outset for putting an end to an authorizing Decision.

(c) Finally there remains for consideration the argument that the High Authority wrongly omitted to fix the period of validity of the transitional rules before adopting the Decision terminating them, as provided for in Decision No 3/62.

It can hardly be doubted, after all that has been said on Decision No 3/62, that this argument is clearly irrelevant. If it had been said in effect in Article 2 of Decision No 3/62 that the High Authority would fix, in a later decision, the end of the transitional period provided, that

would have meant, taking the content of that Decision alone, that the High Authority intended to await the adoption of new trading rules for the Ruhr. When it was apparent that these new rules, precisely because they accorded with the previously existing transitional rules, could no more justify a transitional period in favour of SOREMA's membership (as stated in the preamble to Decision No 3/62), the High Authority ordered SOREMA to leave the OKU within a relatively short time. So far as concerns the calculation of the period of validity of Decision No 3/62, this accords exactly with the programme outlined by that Decision. Nor has the applicant alleged that this time-limit was too short, for example, as far as concerns the requirements for making preparations to leave.

3. All the arguments submitted do not therefore warrant the annulment of Decision No 8/63, whilst those which one might have expected to hear based on the meaning of the transitional rules made for SOREMA's benefit, for example that the transitional period did not give enough time to fulfil the ordinary conditions for admission, have not been raised at all.

III—Consequently, my opinion is that the application by SOREMA is admissible but that it should be dismissed as unfounded, with the consequences in the matter of costs as stated in Article 69 of the Rules of Procedure.

ORDER OF THE PRESIDENT OF THE COURT
24 SEPTEMBER 1963[1]

In Case 67/63 R

SOCIÉTÉ RHÉNANE D'EXPLOITATION ET DE MANUTENTION 'SOREMA', a limited liability company having its registered office in Strasbourg at 11 rue Fischart, represented by its managers, and by R. Garnon of the Strasbourg Bar, 8 rue du Marché, with an address for service in Luxembourg at the offices of Nicholas Wennmacher, huissier, 17 boulevard Royal,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Advisers, Messrs Matthies and Olivier, with an address for service in Luxembourg at its registered office, 2 place de Metz,

defendant,

Application for suspension of operation of Decision No 8/63 of 30 April 1963 of the High Authority, contested in the application in the main action,

1—Language of the Case: French.