OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 2 MARCH 1962[1]

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Mr President,
Members of the Court,

In this Case the Court is required to give a ruling upon the interpretation and application of one of the most important provisions of the ECSC Treaty, namely that relating to Community law on agreements. This is not the first time that the Court has had to consider a case on the subject and the applicants themselves have previously been in conflict with the High Authority in connexion with the problems raised by this provision of the Treaty. However, the question now before the Court is without precedent in previous proceedings. In all fairness it can be said that all concerned have made an exceptionally conscientious attempt to contribute to the elucidation of the points at issue; witness the comprehensive pleadings, with their wealth of factual information, legal arguments, quotations from legal authors, as well as the wide-ranging and penetrating nature of the oral observations. If

1 — Translated from the German.

doubts were harboured in any quarter as to the wide range of economic questions in this case they would be dispelled by the mighty volume of material presented before the Court and by the serious and undeniably objective manner in which the proceedings have been conducted by those concerned.

It will be no easy task for the Court to find the legal solution. But it must be borne in mind that this task is one of interpretation and application of existing provisions, which must stop short of criticism of the texts in force. Subject to this reservation, the advocates' recommendation of a bold interpretation of the law, with a view to the future, is worthy of the Court's consideration and does not threaten that fundamental element of the Community system, as necessary to this as to any other legal system, namely the concept of legal certainty.

A — Facts and Conclusions of the parties

The facts may be summarized briefly as follows. The applicants are concerned with the establishment of a concentration and a uniform sales system embracing virtually all the coal mines of the Ruhr. For this purpose a private company limited by shares ('Gesellschaft mit beschränkter Haftung') was formed on 17 May 1960, comprising 38 colliery companies operating in the Ruhr Valley, three existing joint selling agencies (the Geitling, Präsident and Mausegatt companies), whose activities are at present still authorized by a provisional Decision of the High Authority,[1] and Ruhrkohletreuhand GmbH. At the same time the association agreements of the Präsident, Mausegatt and Geitling joint-selling agencies were appropriately amended.

By clause 2 of the association agreement it was provided that the objects of the undertaking were to be the sale of hard coal, coke derived from hard coal, semi-coke derived from hard coal and hard coal briquettes from the plants of the members. It was further provided that the sales company should have the exclusive right of disposing of the quantities of coal and coal products from time to time 'declared' by members. This is the effect of clause 6 of the association agreement read with clause 6 of the association agreements of Geitling, Mausegatt and Präsident, which are identical in wording, and to which reference is made as follows:

'For the purpose of implementing the practice of joint selling, the member companies, Geitling, Mausegatt and Präsident, agencies for the sale of coal products of the Ruhr, Ruhrkohlen-Verkaufsgesellschaft mbH, shall assign to the company the functions, rights and obligations arising from their association agreements and from decisions of the said agencies which are still in force. The member companies which are associated with the said agencies shall consent to this assignment. The company shall be subrogated to the rights and duties of the said selling agencies.'

When, in the course of this case, cartel agreements for joint selling are under consideration, the whole of these agreements must accordingly be taken into account.

Additional decisions taken by the members pursuant to these arrangements include the allocation of orders, balance of employment and procedure for allowances of various kinds. For details of these matters I would refer to the documents in the Court file relating to the case. It was agreed that the joint-selling agency was to come into effect on 1 July 1960, and that the agreements were to remain in force until 31 March 1963.

1 — Decision 17/60, Official Journal, 23 July 1960, p. 1028.

On 20 May 1960, the applicants lodged their association agreements as a whole with the High Authority for authorization, together with a long statement of the grounds of their application, which is also to be found in the Court file.

As is known, the High Authority could not bring itself to agree and indeed on 22 June 1960 refused authorization under Article 65 of the Treaty in its Decision of 22 June 1960. (*Official Journal* of 23 July 1960, pp. 1014 et seq.).

The reasons given for that Decision may be summarized as follows:

The agreements submitted exclude the normal operation of competition between the undertakings in question; consequently, they fall within the prohibition contained in Article 65(1).

For the purpose of applying Article 65(2), the first point which can be made is that joint selling practised by a number of collieries makes for substantial improvement in the distribution of their products. As far as the condition imposed by Article 65(2)(b) is concerned, an analysis of the facts, bearing in mind the nature of the undertakings concerned, the conditions of exploitation and sales for their different types of coal products, does not justify a finding:

— that, to solve the problems stated by applicants, it is absolutely necessary to have available the substantial resources which the proposed sales organization would involve; or
— that it would be technically impossible to solve their problems by other agreements.

As to Article 65(2)(c), the High Authority argues as follows:

The phrase 'products in question', within the meaning of Article 65(2)(c) refers only to those products which are to be sold under the agreement. A comparison of the total quantities of coal, briquettes and coke sold in 1959 in the Common Market (including imports from third countries) with the quantities sold by the applicants, makes it clear that the proportion sold by the applicants forms a substantial part of the products in question within the Common Market. (This comparison does not take into account consumption by the mines themselves for their own purposes, concessionary coal allowed to employees and free supplies, deliveries to coke plants and briquette compression plants belonging to the mines in question, free sales and deliveries made outside the Common Market; on the other hand, local sales and other reserved quantities are taken into account).

Prices are to be determined by the joint-selling agency through the establishment of price lists and conditions of sale, fixed by the joint agreement of the members and applied uniformly to all products sold through the agency.

Prices are also to be determined in respect of local sales; the same would be true of deliveries between the separate corporate entities belonging to the association, since there was a prohibition on discrimination, and goods not bought by the member undertakings could be sold only through the agency or by means of local sales. The possibility of determining prices also existed in the case of alignments. The determination of prices by the joint-selling agency would thus extend to all the products of its members sold within the Community and accordingly to a substantial part of those products within the Common Market.

By way of a subsidiary consideration, the High Authority analyses the influence of competition from third countries and from suppliers of other sources of energy. It also gives particulars of the sales of coal and coke on the market of the Federal Republic of Germany during 1959.

The High Authority finds no evidence that the Ruhr Valley undertakings had determined their price levels on the basis of price movements elsewhere

in the Community. On the contrary, the prices of Ruhr coal influenced the structure of prices in neighbouring coalfields and the Ruhr Valley undertakings had made very little use of opportunities to align their prices on those of other suppliers.

As to the influence of coal imports from third countries the High Authority gives details of imports into the Federal Republic during 1959. It draws attention to the possibility of a policy of price-alignment and to the introduction by the Federal Government of an import duty on coal. Even before the latter was imposed, the Ruhr had not adapted its list prices to those of imported coal.

The competition of fuel-oil affects different types of coal in different ways. According to the information furnished by the High Authority, coking-coal is the commodity least affected. Similarly, certain types of anthracite are relatively insensitive to competition, as are blast-furnace coke and foundry coke. The position of coal for use in power stations, for example, is also strongly entrenched. In no case had the applicants, in reducing their own prices, followed the prices of fuel-oil closely enough to make it possible to say that their prices were determined by fuel-oil prices. Moreover, the latter commodity was subject to taxation in the Federal Republic, which was the region where the undertakings concerned sold the majority of their products.

As a result the undertakings in question are in a position to determine their prices and conditions of sale, in respect of the great majority of their sales, independently of the market.

Since the applicants would transfer exclusive rights of sale to the joint-selling company, and since the latter would fix all standards, regulations and conditions as regards reserved tonnages, and since every other form of sale to third parties would be forbidden, and as these conditions would be binding upon the associated undertakings and upon consumers supplied by local sales, then the sale of the total production of the undertakings concerned would be subject to the control of the single joint-selling company. This control would extend over a substantial part of the products within the Common Market.

As a result, the agreements were not compatible with Article 65(2)(c) of the ECSC Treaty and could not, therefore, be authorized by the High Authority.

The present application is directed against this Decision, which, according to the applicants, was notified to them on 1 July 1960. It was signed by all the parties to the association agreement and lodged on 6 August 1960.

In their conclusions the applicants seek the annulment of the Decision of the High Authority.

The applicants are supported in their conclusions by the Land of North Rhine-Westphalia whose intervention was allowed by Order of the Court of 3 May 1961.

The applicants plead all the four grounds under Article 33 of the Treaty, as well as alleging manifest failure to observe the provisions of the Treaty. In their reply, the applicants abandoned the allegation of a misuse of powers.

B — Legal Discussion

An examination of the facts raises no questions as to the admissibility of this application. It has been made in good time. The High Authority has raised no objections and there appear to be no grounds for the Court to raise the matter of its own motion.

The legal discussion can therefore go straight to the wide-ranging arguments which have been put forward on the substance of the case. The pleadings and the oral proceedings clearly reveal what the parties agree is the essential point of contention, namely, Article 65(2)(c) of the Treaty. The High Authority has expressly admitted that it has not

entered into an exhaustive analysis of Article 65(2)(b) but that its Decision is essentially founded on Article 65(2)(c). I therefore take the view that there is no need for me to deal in my opinion with the subparagraphs of Article 65(2) in the order in which they appear in the text of the Treaty and I shall therefore begin with subparagraph (c). There is all the less reason to object to this procedure since the criteria laid down in subparagraph (c), from the legal point of view, stand alone. They are in themselves sufficient to justify the refusal to authorize a cartel agreement. Only if it transpires that the basis of the High Authority's Decision under subparagraph (c) cannot be supported is it necessary to consider the arguments in respect of subparagraph (b).

I — *Article 65(2)(c)*

Before proceeding to my examination it may be helpful to recall the text of this provision:

'However, the High Authority shall authorize specialization agreements or joint-buying or joint-selling agreements in respect of particular products, if it finds that:

. . . . . .

. . . . . .

(c) the agreement 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.'

It should be noted at this point that the German text contains an inaccurate translation in the final phrase of the subparagraph, which is revealed by a comparison with the French text which alone is authentic. The High Authority rightly observes that for the words 'diese Erzeugnisse' there should be read 'diese Unternehmen', or better still, 'sie', since 'les' in the French text can refer only to 'entreprises'. It is appropriate to make a point of this correction in the interest of establishing a clear basis for discussion, although in fact nothing of decisive importance turns upon it so far as the case is concerned.

It is immediately clear from a reading of subparagraph (c) that an analysis of its interpretation and its application to the facts of this case should be subdivided. The problems fall under two heads:

— first the meaning of the concept of 'determination of prices' and of 'control of marketing';

— secondly, the definition of 'a substantial part'.

Since both parties agree that the concepts of 'determination of prices' and of 'control of marketing' are to be construed as being broadly equivalent in meaning, a section will first of all be devoted to their interpretation.

1. What does the Treaty mean by 'determination of prices' and 'control of marketing'?

The view taken by the applicants may be summarized as follows:

Subparagraph (c) is aimed at preventing domination of the market, that is, a power over the market amounting to monopoly. A power to determine prices only exists when there is a position in the market which makes it possible to ignore market data when establishing a price structure and above all to increase prices to an appreciable extent without running the risk of losing a substantial share of the market, that is, without any real competition.

The control of marketing is largely the same thing: it is a market power which makes it possible to control distribution, to determine the type and quantity of goods sold, to divide markets, to bring about a shortage of goods and as a result to jeopardize the objectives of the Treaty.

According to the applicants, when apply-

ing subparagraph (c) greater weight must be attached to these qualitative elements than to the quantitative elements of 'a substantial part of the products in question'.

(a) *Fundamental observations with regard to interpretation*

As a general justification of their view, the applicants argue that subparagraph (c) is to be strictly interpreted, since it constitutes an exception to the principles laid down by subparagraphs (a) and (b), according to which beneficial agreements are to be authorized. Subparagraph (c) is intended to prohibit those agreements which are contrary to the general objectives of the Treaty, and not those which appear to be necessary for the attainment of those objectives. Furthermore, the applicants stress that it is necessary to develop the law when there are substantial changes in the economic situation.

The Government of the Land of North Rhine-Westphalia, intervening in the case, argues along similar lines for a wide interpretation of the rules relating to authorization of agreements in lieu of a literal application of these provisions. Unforeseeable changes in the pattern of competition make it essential to make good the gaps in the law with general principles, which, according to the Treaty, include the preservation of the ability to compete. The intervener also maintains that in unusual situations derogations from the written law are possible and desirable.

Presented with this endeavour to define the proper area of application for the ECSC law on agreements at the present time — at least as concerns coal — and to point to the only possible line of development which can lead to results which are reasonable from an economic point of view, I do not think it would be right to dismiss this attempt *a priori* as totally lacking in persuasive power or justification. This view would not be correct for the argument that subparagraph (c) should be strictly interpreted because it constitutes an exception to subparagraphs (a) and (b) since obviously the criteria set out in subparagraphs (a) to (c) carry equal weight as regards authorization of agreements. But it would apply to the other arguments which have been advanced.

However, the question to be asked is whether or not the point of view taken by the applicants is one which fits into the legal framework of the Treaty.

Quite recently, the Court had occasion to give an advisory opinion on the ECSC law on agreements. I refer to Opinion 1/61 on the revision of the Treaty. It was mentioned in the course of the oral proceedings and its wording is known to both parties. In the present case it cannot be disregarded, even if the Court may hesitate to follow it on certain particular points.

The proposed revision of the Treaty sought to widen the provisions with regard to agreements so as to allow those which cover a whole coalfield, if they would contribute to the restoration of the competitive capacity of coal and to the prevention of economic and social disturbance (cf. application for amendment, pp. 11, 16 and 22). It is no secret that the applicants in the proceedings for revision of the Treaty had in mind precisely the situation in the Ruhr and its wide implications.

Looking at the Court's Opinion from this point of view, the following picture emerges:

According to the Court, the proposed adaptation agreements were drafted with too little precision (p. 6); in view of the precise way in which the authorized categories of agreements are defined by the law presently in force from the point of view both of their nature and of their object, these proposals would not constitute a permissible amendment of the Treaty in the sense of Article 95. In other words, the Treaty does not permit the abandonment of the precisely defined

rules of the law relating to agreements of their strict application. This has a particularly important bearing on the argument that the objectives of the Treaty are the essential factors which must first and foremost be taken into account for the purpose of defining the features of agreements permissible under the Treaty.

As regards subparagraph (c), the Court's Opinion, at pp. 10 and 12, contains expressions which recall the appellants' arguments.

'The importance of this condition in the context of the objectives and structure of the Common Market is all the more obvious in that it is designed to ensure that no agreement, no matter how acceptable and no matter what its intrinsic merits may be, can put the persons concerned in a position, as a result of their power in a particular sector of the market, to control the market for the products in question or frustrate the very objectives of the Common Market with regard to these products.'

'It is necessary to examine whether the proposal is compatible with Article 4(d) of the Treaty. For this purpose, the scope of the prohibition laid down by that provision must first be considered. It is quite clear that the purpose of this prohibition is to prevent undertakings from acquiring by means of restrictive practices a position permitting them to share or exploit markets.'

However, a few paragraphs further on, the Court observes that the provisions of subparagraph (c) 'provide an objective criterion making it possible to determine in what circumstances an agreement would in any case be incompatible with the prohibition laid down by Article 4(d): the fact that the agreement concerns "a substantial part of the products in question within the Common Market".'

The emphasis which the Court in its Opinion laid on the quantitative element is of particular importance in connexion with those grounds in support of the proposed revision which sought to permit agreements covering whole coalfields. It is difficult to see how, in view of this finding, there can be any justification for the method of interpretation proposed by the applicants, which reaches, even though it may not exceed, the very limits of an extremely wide interpretation If such an argument were to prove acceptable to the Court, the view would inevitably have emerged in its opinion on the revision of the Treaty, at least with regard to the extension of the scope of cartel agreements, that there was no *necessity* for any amendment to the Treaty in view of the existing possibilities of interpretation.

On the contrary, the means available in the Treaty itself, under the first, second and third paragraphs of Article 95 for supplementing and amending it require a cautious application of traditional principles with regard to the question of making good lacunae in the law and ensuring its further development.

In view of the system enshrined in the Treaty and the background and working methods employed with regard to the last minor revision of the Treaty there would appear to be no possibility of the Court's approving the applicants' basic argument as to the interpretation of Article 65(2)(c).

(b) *The individual arguments of the applicants*

However, it is important for the purpose of the legal examination to deal with the applicants' individual arguments as to the definition of the words of subparagraph (c).

The applicants derive one of their arguments from the use of the words 'pouvoir' and 'déterminer' in the French text. 'Pouvoir' is said to be a stronger word than 'possibilité'; 'pouvoir' involves power. 'Déterminer' has to be contrasted with 'fixer' (Article 65(1)); while 'fixer' denotes a legal power to lay down prices

as a matter of record, 'déterminer' refers, it is said, to the free determination of prices.

It is generally admitted, however, that arguments of this sort, based on the letter of the text, have little persuasive force particularly in the context of the ECSC Treaty since, when it was drawn up, there was no time to produce the meticulously drafted text that would be expected of a stature under national law.

Apart from this, it is hardly the case that the word 'pouvoir' must necessarily involve power over the market. If the word is taken not alone, but, as in the Treaty, together with the verb 'déterminer', it is clear that from a linguistic point of view it could also refer to a power in the sense of an actual or legal possibility of exerting an influence. The High Authority rightly points out that in the corresponding provisions of the EEC Treaty the word 'possibilité' was used.

According to Littré, 'déterminer' means 'préciser', 'décider', arrêter' or 'régler'. If 'déterminer' and 'fixer' are contrasted (cf. Article 65(1)), the inference naturally to be drawn is that 'fixer' connotes a direct and specific process of establishing, while 'déterminer' connotes an indirect influence ('déterminer' being thus a wider but less forceful word than 'fixer'). At all events, there seems no reason to suppose that 'déterminer' must be read as including the idea of 'regardless of developments in the market'.

Conversely, in Article 61, the term 'fixer' is employed for the establishment by the High Authority of maximum and minimum prices, and here it quite clearly includes a freedom of action as to the actual content of the Decision.

— The applicants' reference to American law on competition, which also employs the expression 'power to fix prices', is of no assistance since the American term is applied to denote individual undertakings having a dominant position in the market, while collective price-fixing is absolutely prohibited by the American anti-trust law. It is precisely when one starts with the premise that the drafting of the ECSC Treaty was influenced by American law, that it becomes doubtful whether 'déterminer les prix' in the Community's law with regard to agreements has the same meaning as 'power to fix prices'.

— The applicants consider that the drafting of the text of subparagraph (c) would certainly have been different had the draftsmen not had in mind the objective which the applicants consider to be the right one (namely, to prevent the exercise of power over the market amounting to monopoly) in which case the text would have read something like this: 'that, in so far as the agreement refers to prices, production or sales, it affects a substantial part of the products in question within the Common Market' (reply, p. 34), or else 'that the agreement does not affect a substantial part of the products in question within the Common Market'.

To this the High Authority rightly raises the objection that the mention of the nature and method of influence on the market (price-determination, control of marketing and of production) does not appear to be superfluous at all. Subparagraph (c) was intened to exclude only those limitations on competition which had a certain effect or were of a certain range, and this result would not be achieved in the same way with the words suggested by the applicants, which refer only to the share market. A sales agreement does not necessarily contain an element of price-fixing.

— In support of their argument, the applicants also refer to Article 85(3)(b) of the EEC Treaty, which speaks of the possibility of 'eliminating competition in respect of a substantial part of the products in question'. However, they are mistaken in assimilating this formula to that of Article 65(2)(c), 'shield them against effective competition'. It is

precisely this textual difference between the provisions that suggests that Article 85 is aimed not at the aggregate external effect of the cartel agreement on the market, but at the elimination of competition *between the parties to the agreement themselves,* that is, at what the applicants called the internal effect of the agreement.

— The applicants cite a whole series of legal authors and parliamentary debates to show that the object of Article 65 is to prevent the market from being dominated. Although the High Authority is able to reduce the evidential value of some of these quotations by expanding upon them, correcting them and explaining them, it cannot be denied that such terms as 'market-dominating size', 'monopoly situation', 'prohibition of monopoly', 'dominant position' and 'dominant position in the market' do in fact appear here and there. But, in the absence of a detailed discussion of the problems of subparagraph (c) as they appear in this case, it is open to doubt whether any of the passages cited was ever intended to do more than describe, in slogan form, the aims and objects of Article 65, without going into the legal technicalities of the ways and means which the Treaty has chosen in order to attain them. The quotation from Ophüls[1] is perhaps characteristic; it is true that he speaks of 'market-dominating size' but, in the same article, he points out that in the Schuman Declaration of 9 May 1950 the contrast between the system which it was desired to achieve and that of cartel agreements was strongly stressed and that the Treaty's legislation with regard to agreements in substance tends to follow the views of the Freiburg school and predominant thinking in America.

However, it seems to me doubtful whether the passages cited are of such a nature as to displace the main argument which can be drawn from a detailed examination of the criteria established by subparagraph (c) and, above all, to exercise any substantial influence on the trend of interpretation contained in the Court's opinion.

— It is noteworthy that the term 'dominant position' ('position dominante') is by no means foreign to the Treaty. It is used in Article 66(7) for the purpose of assessing the position of individual undertakings on the market. But it cannot be accepted that the occasional imperfections to be found in the drafting of the ECSC Treaty are of such an order that two provisions following directly on each other would use terms so strikingly different directly on each other would use terms so strikingly different to describe the same concept. These significant differences in drafting must on the contrary imply that corresponding differences in content were intended.

— Finally, the applicants' construction of subparagraph (c) has this defect, that the various criteria in this provision are divested of their individual meaning. According to the applicants, the powers of undertakings to control marketing, determine prices and shield themselves from competition (the so-called 'shield' factor) would express no more than the idea of domination of the market. Even the concept of a 'substantial part' would, in view of this, lose part of its individual significance as the applicants emphasize. It is in fact difficult to concieve that an agreement can dominate the market without at the same time affecting a substantial part of it. Such drafting would however be incomprehensible by all usual standards. As regards the 'shield' factor ('les soustraire à une concurrence effective') the applicants' attempts to give it a distinct meaning despite everything are unsuccessful. They rely on the erroneous German translation of 'les' as referring to

1 — Neue Juristische Wochenschrift, 51, p. 382.

the products ('Erzeugnisse') whereas in actual fact as has already been pointed out 'les' refers to undertakings. The applicants consider that the 'shield' factor is intended to prevent products, by means of trade barriers and boycotts, from escaping competition (barriers against outsiders or boycotting by vertical agreements).

If this construction were adopted, however, the criterion would take on such a narrow meaning that, in Article 66(7) where it also appears, it would be an insufficient safeguard against abuse of a position in the market.

For the purposes of this factor, there would seem to be no reason why, in subparagraph (c), the additional requirement of 'a substantial part' should be omitted. It is only by following their erroneous interpretation of the word 'les' that the applicants are able to come to the conclusion that the element of 'a substantial part' also applies to the 'shield' factor.

More convincing in my opinion, with regard to the interpretation of this criterion, is the view taken by the High Authority, according to which the reference is to those cases in which cartel agreements do not relate to a substantial part of the Common Market, but bring about the elimination of competition by isolating part of the market.

In summarizing, the following conclusions are therefore reached:

— Applying the traditional method of interpretation, which cannot be disregarded wholly even in respect of the Treaty, and which depends on examining the terms used in the text and comparing them with other related texts, it is impossible to find that in subparagraph (c) domination of the market is a decisive ground for the refusal to authorize an agreement.

—Similarly, a fundamental change in the economic situation, which could not be foreseen at the time of the establishment of the Community, scarcely affords ground under the Treaty (Article 95) for finding a judicial solution to the problem and developing the law in such a way that concepts which may appear rather formalistic give place to a criterion which would be extremely difficult for either a lawyer or an economist to apply. At the very least it is doubtful whether the Court, after its latest statement on the law of agreements, would approve of such an extension of the text.

— Determination of prices and control of marketing must therefore be understood to mean what the ordinary meaning of the words (and particularly of the French words) suggests:

— an independent fixing of prices and conditions of sale; and

— a decisive influence on, and organization of, selling in the sense of an independent sales policy.

Plainly, it is impossible to speak of price structuring and control over marketing in a case where the market situation, even for a cartel, offers no alternative but complete adaptation to the prevailing market conditions and where all freedom of independent economic decision is absent.

An appreciation of the market situation, taking into account all essential factors, is thus also essential to that interpretation of subparagraph (c) which I submit to be the correct one. In no circumstances would it be proper for the High Authority to satisfy itself merely with ascertaining a specific proportion of the market, since this would be bound to make the mention of the various possibilities of producing an effect upon the market, taken together with the criterion of a 'substantial part' in subparagraph (c), appear superfluous. Subparagraph (c), however, must always be examined as a whole, without according precedence to any one of its component elements over the others.

2. Did the High Authority apply the

concepts of 'determination of prices' and 'control of marketing' correctly in its Decision?

(a) *Determination of prices*

When the High Authority, in Recital No 10 of the statement of reasons for its Decision, finds that the determination of prices by the joint-selling agency consists of the establishment of price lists and conditions of sale, fixed jointly by the parties concerned and applied uniformly to products sold by the Ruhrkohlen-verkaufsgesellschaft, it may appear to have been proceeding on the basis of a purely formal concept which takes no account of the market situation and which therefore is too narrow in view of the definition just given.

It continues its examination, however, in Recital No 11 and deals with influences on the market. Although it leaves open the question whether such an examination is required in the context of Article 65(2)(c) it makes it clear that in this context it understands determination of prices to mean the capacity to make an *independent* choice of price levels for a substantial part of the market, and further to determine independently the areas in which, and the quantities and prices with which, competition from other undertakings and other products are to be countered. The High Authority thus chose a basis in law for its Decision which in my opinion is in accordance with the Treaty.

As regards the manner in which its examination of law and fact was carried out, it must be said that in the statement of reasons for its Decision, the High Authority uses a large number of purely quantitative elements, for example, in Recital No 12(a) (proportion of sales inside the Federal Republic), in Recital No 12(c) (comparison of imports into the Federal Republic with the applicants' production), in Recital No 12(d) (percentage of fat coals in the applicants' production). These details serve purely as *indications* for the purpose of assessing the applicants' position in the market. Besides, the High Authority goes on to other considerations and analyses: the variations in list prices in comparison with those of other coalfields, the extent of alignments, protective measures of commercial policy (customs duties on coal, taxes on fuel-oil), the possibility of selling fuel-oil, bearing in mind the different competitive pressures on the various types of coal (coke, anthracite), the coal situation in the case of major consumers.

The applicants criticize these analyses in detail as incomplete or partially incorrect. It must be remembered, however, that these criticisms are based upon a concept of the power to determine prices which is appreciably wider than that envisaged by the High Authority and in comparison with which the High Authority's examination would in fact seem inadequate. For the purpose of applying the correct concept, the essential fact is that the applicants themselves admitted in the grounds of their request (p. 25): 'Joint selling would clearly bring with it the possibility of exercising a limited influence on prices'. This statement, taken together with the preamble to the Decision, makes it unarguable that the High Authority failed to give detailed consideration to the question whether, for a group cartel, the freedom to calculate prices is completely excluded or is so drastically curtailed that it cannot significantly affect either the economy or the market.

In my opinion, therefore, the High Authority was in no way at fault in its examination of the question of the determination of prices.

(b) *Control of marketing*

As to the control of marketing, the High Authority first of all states in

Recital No 13 of the statement of reasons for its Decision, that the participating undertakings are assigning the exclusive rights of selling their products to the joint-selling company (the remarks which follow deal with special problems of reserved tonnages which must be considered later).

The High Authority continues as follows: 'By virtue of these agreements, the selling company is enabled, by suitably directing the sales of those tonnages put at its disposal for sale, to reinforce the desired competitive measures in the manner described in the discussion on the determination of prices.'
and concludes:

'By independently establishing rules of this kind covering all sales and binding on all parties concerned, and by its capacity to direct sales independently in the manner described, the selling company is controlling marketing within the meaning of Article 65(2)(c) of the Treaty. This control is exercised over the entire sales of the parties concerned and thus, for the reasons given above, over a substantial part of the products in question within the Common Market'.

On the basis of this reasoning, it seems doubtful whether the High Authority has properly grasped the criterion of the control of marketing. Even without leaning towards the broad view taken by the applicants, it is impossible to ignore the context of the Treaty, in which the factors of production and marketing on the one hand, and control and restriction on the other are bound together. This leads one to conclude that control over marketing, in its repercussions on the market, must be more than a mere grouping of sales.

Doubts also remain if the hint of an extension of this concept in the words *'independent direction of sales'* are regarded as adequate. It is quite clear that in its Decision, the High Authority makes no effort to justify the finding of the existence of a real control of marketing with the help of particular economic considerations. In other words, it makes no attempt to carry out at least some part of that qualitative examination of the situation which the applicants rightly demand in principle, although they require it to cover too wide a field. It may also be doubted whether this examination could have been made satisfactorily with the analysis which was actually carried out in respect of *determination of prices* in Recital No 11, since the criteria of determination of prices and control of marketing do not overlap, and since the position of a cartel in a particular market does not have the same effects in respect of the two separate functions.

It therefore seems to me that the High Authority's explanations relating to the problem of control of marketing are, unlike those relating to the question of determination of prices, not free from error both in its interpretation of the law and in its statement of reasons.

3. The determination of the part of the market

Article 65(2)(c) is applicable only if the cartel agreement gives the undertakings concerned the power to determine prices etc. 'of a substantial part of the products in question within the Common Market'. The question therefore arises as to the meaning of the criterion of 'substantial part' under the Treaty.

In this connexion the applicants put forward the following grounds of complaint:

(a) that the High Authority gave no legal definition for the concept 'substantial part';

(b) that the High Authority was in error when it made allowances for local sales and other reserved tonnages in ascertaining the proportion of the market. According to the applicants, the following distinction must be drawn:

— As far as the question of determining prices is concerned, the High Authority took no account of deliveries to the coke plants and briquette factories attached to the collieries, but on the other hand it did add other deliveries which took place within single undertakings, while the statement of reasons for the Decision only deals with the question of determining the prices of deliveries made between associated undertakings, that is, between different legal persons.

— The cartel does indeed have the power to determine prices for local sales, but not for deliveries made between associated undertakings; the latter, therefore, ought not to have been taken into account.

— The control of marketing by the cartel does not extend to local sales or to deliveries between associated undertakings.

(c) According to the applicants, it is wrong to take the market of the Federal Republic as a yardstick for comparison. The decisive test is the Common Market and the proportion of that market.

Finally, the intervener submitted that although the proportion of the market is only to be determined on the basis of coal sales alone, the vague concept of 'substantial' in the notion 'substantial part of the market' must be saitsfied by taking into account the influence of coal substitutes on the coal market.

I shall now examine these complaints, but not necessarily in the above order.

(a) *The statement of reasons as it relates to a 'substantial part'*

The statement of reasons for the Decision is not in fact presented in an abstract, theoretical form. Perhaps this is not possible without employing in the place of the concept contained in the Treaty another general concept, which could not really elucidate the matter. The statement of reasons contains an application of the law to specific facts, and it is possible to see quite clearly both the data and the orders of priority which the High Authority regards as important in the present case. Thus, in my opinion, a sufficient statement of reasons is given for the Decision.

(b) *The limitation of the examination to the market in the Federal Republic of Germany*

It seems to me quite clear from the text of Article 65 that the market, with reference to which the proportion of the market is to be determined, must be the Common Market as a whole and not a part of a market ascertained by factors of geography of economics. If, within the Community, there exist isolated markets in respect of which, for geographical, economic or technical reasons, only supplies from certain specific areas of the Common Market require consideration, such a situation cannot be dealt with in the law of agreements by reference to the criterion of a 'substantial part of the products in question within the Common Market' (where the essential reference is only to a part of the market); on the contrary, in such a case the last criterion contained in subparagraph (c) (that is, the so-called 'shield' factor) must be invoked as the proper ground for refusing authorization of an agreement.

In the present case, this question is immaterial, since, in Recital No 9 of the statement of reasons for the Decision, which is concerened with determining the applicants' share of sales on the market, the criterion of comparison which emerges is not the market in the Federal Republic but the whole of the sales in the Common Market. It is only later on, during the examination of the influence of the market upon the applicants' power to determine prices, that references were made, *inter alia,* to production and sales in the Federal Republic.

This complaint is therefore invalid.

(c) *The problem of deliveries to associated undertakings and of local sales*

(i) Determining prices

The fact that, in dealing with the question of the power to determine prices, the High Authority included local sales in its calculation of the proportion of the market is not even criticized by the applicants, for by clause 21(3) of the association agreement it is expressly provided that such sales shall be made 'at the same prices and upon the same conditions as apply to quantities sold through the company'.

The only question at issue is the fate of the other reserved tonnages, that is to say, deliveries to factories within a single undertaking for their own consumption and deliveries to associated undertakings, that is, deliveries by a dominant to a servient undertaking or *vice versa*.

First of all, as regards internal consumption by factories, the table in Recital No 9 of the statement of reasons for the Decision shows that the High Authority did not add to the applicants' sales total tonnages supplied to coking plants and briquette factories belonging to the mines (to mention only the most important categories listed from 1-6 in note I). On the other hand, it did include in its calculation the tonnages mentioned in clause 18 of the association agreement under the heading 'used by the mines themselves', that is to say, deliveries of fuel used in other divisions of an associated company. That this was not done by mistake, we learned from the written and oral procedure, in which the High Authority sought to justify the inclusion of tonnages used by the mines themselves ('Zechenselbstverbrauch') with the tonnages sold under the joint sales procedure.

What appears to be important, as the applicants point out, is that the statement of reasons for the Decision deals expressly only with the inclusion of deliveries to associated undertakings, that is, deliveries between different legal entities, by reference to the prohibition of discrimination. Naturally, there can be no doubt that this reasoning does not cover the different case of supplies to factories for their own consumption. On the other hand, a justification for the inclusion of deliveries under this last head would have been readily to hand, since the High Authority did not, *expressis verbis*, add to the tonnages sold under the cartel the quantities delivered to coking plants and briquette factories, which are analogous from the economic point of view.

In the course of the proceedings, the applicants gave the figures for tonnages sold within single undertakings. According to the information given by them during the financial year 1960/61, the corresponding deliveries of coal and coke amounted to some 7.2 million metric tons. From the point of view of the investigation as a whole, then, these deliveries and quantities are very far from being of secondary importance. If they were passed over in the statement of reasons for the Decision, it follows that this amounts to an infringement which makes it appear that the Decision is defective in an essential part of its content.

What of the situation with regard to *deliveries between associated undertakings*, that is to say, those movements of goods which, under clause 19 of the cartel agreement, take place between undertakings one of which is controlled by the other either by means of precisely stipulated majority shareholding or by specific agreements?

The cartel agreement makes no provision as to price determination in this case as it does for local sales. On the contrary, according to clause 6(3),

'the members shall be free to dispose as they see fit of tonnages which are not assigned to the company for sale (reserved tonnages).'

According to the High Authority, however, such tonnages ought nonetheless to be taken into consideration in calculating the proportion in respect of which a cartel determines prices, for two reasons:

— they constitute in the opinion of the High Authority potential sales by the cartel, which thus give rise to a potential capacity to determine prices;

— by virtue of the prohibition on discrimination, they must also be sold according to the conditions of the cartel's price lists.

The first question to arise is therefore whether *potential capacity to determine prices* is sufficient for the purpose of the application of Article 65(2)(c).

Under the cartel agreement, the syndicate, that is, the undertakings as a group, has only a limited influence on the organization of deliveries between the associated undertakings. The selling company cannot decide of its own accord that deliveries to associated undertakings must, as a whole or in part, be included in the joint sales. Only to an insignificant degree can one discover the possibility of exercising influence by means of a discretionary power, in that the tonnages committee must decide whether or not the influence resulting from association of member undertakings is to be limited in a particular instance (which would involve the exclusion of supplies to associated undertakings). The tonnages committee must further decide whether certain contracts ought to be considered as amounting to a merger, in the economic sense, of the parties concerned and, where there is a joint shareholding in a coal-consuming undertaking, the members' meeting shall decide by a majority of three quarters of the votes cast whether to grant a delivery of supplies to an associated undertaking.

If the cartel has power to influence supplies to associated undertakings to this extent, it must also be said to have a potential power to determine prices. However, it is clear from what has been said that at most only a small fraction of the deliveries to associated undertakings, in the form of possible joint sales, could be added to the tonnage sold by the cartel.

Moreover, it is up to each undertaking to decide whether it intends to make deliveries to its associates or to renounce them. Their decision depends on legal factors (continuance of association between undertakings), economic factors (level of the market price), but also on technical considerations, and those in the nature of traditions — the close-knit links between various undertakings. This is not to say that sharp or perceptible changes take place over a short period of time. Above all, it should be noted that according to the cartel agreement, annual declarations may in general be modified only in respect of the following accounting year of the industry, and moreover only in certain circumstances, for example, where the conditions of association cease to be present (clause 10) or in cases of unfair hardship (clause 13).

In view of these factors, and bearing in mind the time limit in the joint-selling agreement, it is not enough, in order to affirm the existence of a potential power to determine prices, for the High Authority to consider what changes in the development of deliveries between associated undertakings might occur over an indefinite period of time. An estimation of the probable development of the extent of deliveries between associated undertakings by comparison with total output and with the sales of the cartel must rely on the previous history of these factors and must take account of present economic trends. Thus, for the period in question it must not be assumed that proportions will change in favour of sales by the cartel. Neither in its Decision nor in its explanations given in these proceedings

did the High Authority argue the contrary.

Consequently, the concept of 'potential capacity to determine prices' cannot justify the inclusion of all deliveries between associated undertakings in the calcualtion of the proportion of the market covered by the cartel agreement.

It remains to be considered whether, in referring to the '*prohibition of discrimination*', the High Authority offered a valid justification for dealing with deliveries between associated undertakings in its contested Decision. The statement of reasons for the Decision contains only the following sentence: 'Under the provisions of the Treaty relating to the prohibition of discriminatory practices, these deliveries would likewise have to be effected in accordance with the conditions laid down in the price lists'.

The following objections by the applicants must be considered at this point:

— the High Authority gave no reasons for the application of the prohibition on discrimination;

— the prohibition on discrimination does not apply to deliveries between associated undertakings;

— if it did apply, the legal grounds for the application of cartel prices to such deliveries must be sought in this legal provision, and not in a decision of the cartel.

Finally, the applicants again observe that no account should be taken of deliveries between associated undertakings since, from the economic point of view, they do not come on to the market.

As to *the first objection*, it is hard to say that the High Authority's statement, just cited, constitutes a sufficient statement of the grounds for the application of a legal rule which, in its repercussions, is of crucial interest in the present case. To say the least, one may reasonably entertain considerable doubts as to the regularity of this part of the Decision even if it is thought that, bearing in mind what was said about potential capacity to determine prices, it is not necessary to go into a lengthy discussion of the prohibition of discrimination.

It seems doubtful whether the prohibition of discriminatory practices includes deliveries between associated undertakings. In the forefront of the High Authority's argument is the fact that the undertakings concerned are legally independent bodies. From the point of view, however, of economic analysis, which may be regarded as of the foremost importance in the law of competition, it will be seen immediately that a legal appraisal of these relationships is of no decisive value. On the economic level the undertakings concerned, by reason of their association, are in the same position as single undertakings or in one which approximates to it. If there is then, in fact, unity in this sense, it follows that the rule against discrimination cannot operate since it is impossible to imagine such a thing as self-discrimination. Furthermore, it must be emphasized that the relationships of associated undertakings involve rights and obligations of a long-term character as to delivering and receiving supplies and these are all unique by reason of the objective circumstances surrounding them and cannot be classed according to a price-list (consortium or 'Organschaft' with transfer of profits and losses). Finally, however, the question of the application of the prohibition of discrimination may be left open because other considerations appear.

Even if it is admitted that the prohibition of discrimination would apply to deliveries between associated undertakings, it should still be considered whether there is here a power to determine prices within the meaning of Article 65. Certainly there is no doubt that it is not enough to take account only of the tonnage sold by the cartel, and the prices applied by it. On a correct view of the matter, when

ascertaining the relevant proportion of the market, tonnages offered for sale at the same prices outside the joint-selling agency, by reason of the influence of the cartel on the market, would have to be considered. But in any case the cartel only determines prices in so far as the calculation and application of prices to particular sales result directly from decisions of the cartel or are the outcome of its strength in the market. Where the application of cartel prices to sales other than through the cartel is prescribed by a legislative provision (as would be the case for all sales by individual members over which the members as a body have no influence), then, to the extent that that provision covers indirect determination of prices by the cartel, by a sort of reflex action, the decisive factor in law (as the applicants rightly admit) is the legal requirement and not the decision of the cartel.

It thus appears that to take account of deliveries between associated undertakings in connexion with the question of determination of prices is wrong in law.

Finally, it remains to examine the applicants' fourth objection, which is that only *sales on the market* should be taken into account.

Under Article 65(2)(c) it must be ascertained whether prices are determined over a substantial part of the products *within the Common Market.* The concept of a 'common market' appears in many provisions of the Treaty. Clearly, in some of these cases it is used in its geographical sense to define the area to which the rules of the Treaty apply. Article 65 deals with restrictions on competition, that is, with behaviour which affects the market in the economic sense. It obviously follows from this that the concept of the market is here to be understood in its economic sense as the area or level where supply and demand meet each other freely and where economic and commercial exchanges take place according to the rules of competition.

According to the commentary on the law against restrictions on competition by Müller-Henneberg-Schwartz (paragraph 22, p. 491): 'In the economic sciences the market is defined as the meeting of supply and demand. Persons who by making offers and demands participate in forming the market are known as the two sides of the market. The sellers' side is made up of the totality of competing offers.'

The High Authority used similar terms during the oral procedure when its representative said that 'the market should designate that area where an undertaking or group of undertakings operates and has to take account of effective competition'.

The applicants rightly point out that deliveries between associated undertakings, that is between a dominant and a servient undertaking or *vice versa,* should be approached in the same way as the movement of goods within a single undertaking. There is no room for a choice to be made as there is on the open market; it is this or that specified delivery which is ordered. Such transactions consequently take place outside the market. This was as much the case before as after the conclusion of the cartel agreement, that is, the agreement makes no direct change in conditions of competition for deliveries between associated undertakings. Such deliveries should therefore be left out of account when ascertaining the cartel's proportion of the market.

In this connexion I refer to various authorities on the law relating to company groupings, amongst whom the representatives of the High Authority has himself made notable and useful contributions. He has written:[1]

'The freedom of enterprise of the servient

1 — cf. Mestmäcker, "Verwaltung, Konzerngewalt und Rechte der Aktionäre," 1958.

company is reduced to nothing by the "unified control" of the group and by the incorporation of the subsidiary into the economic scheme of the parent company. Affiliation to the group deprives the subsidiary company of the ability to act according to an economic scheme of its own. The "given conditions" of such a subsidiary's operation are prescribed not by the market but by the instructions of the principal company. (P. 303).

'The servient company is put to the service of an alien undertaking; it renounces its power of making decisions in favour of those who control the group as a whole. The results of such a change cannot be stated too forcibly. The group management decides how the company invests, what it produces and sells, how it is to be supplied with the necessary preliminary products, with raw materials, semi-finished or finished products. The group management decides from whom the company buys and in what quantities, what quality to buy and at what prices, whether it is to acquire its own basis of raw materials or is to enter into long-term supply contracts, whether it is to obtain necessary supplies on the market as the need arises or is to be provisioned by the group ... The relationship of the servient company to the market is geared entirely to suit the needs of the group as a whole. This frequently involves the servient company's renouncing its true position in the market, particularly in respect of its relations with its customers, without which no firm can survive on its own (p. 304) ...

'The prices used for accounting purposes, as figures, are aligned with those of the market, but they remain mere figures, and do not represent the true market price. Changes in price entail no change in economic behaviour within the group; they affect only the unit of account.

'Consequently, prices lose their most important function as indices of economic behaviour ... In the case of a fall in prices, an associated company within the group would not cut down deliveries, but on the contrary would continue to supply the needs of the group as before. (P. 306).

'From a technical point of view, market prices are not suitable as accounting prices within the group because they follow the fluctuations in the state of the market. As a result it is difficult to keep cost accounts or to calculate costs consistently. Although external effects can be allowed for in accounting, this procedure involves so much additional expense that it is not surprising that group directorates usually base their accounting prices on cost prices.' (P. 309).

The following observations by Rasch, in his book 'Deutsches Konzernrecht', may be mentioned:

'Thus, the interests of the individual business unit are by no means always the same as those of the larger entity in which the firm is merged, those of the group and of the other associated companies, which the board of a member company of the group is also expected to keep in mind. Daily illustrations of this principle may be seen in those cases where the board of one company is prompted to supply another member company with goods below the market price. (P. 99).

'"Unified management" of a group (paragraph 15 of the German law on limited companies) would be impossible in every case if the boards of the member companies were allowed to refuse to order the suspension of the production of particular products as decided by the group management, or the delivery of certain goods at preferential prices to other member companies of the group because they saw the various interests in a different light from the group management. (P. 101).

'A book debt against an associated company in the group has a different

economic character from that of a debt against an independent firm. The dominant company exercises great influence over both its creation and its amount. It can make the dependent undertaking agree to make purchases from the parent company, and also determine the prices.' (P. 147).

The so-called aluminium case quoted by the High Authority from American case law (rejoinder, p. 73) does not seem to run counter to the views just stated. That case concerned a single undertaking processing raw aluminium in various divisions of its enterprise and thus, from a legal point of view, able to sell on the open market the quantities intended for processing. It would be on all fours with the present case only if the cartel, that is to say the participating members as a group, were able to exert influence on the organization of deliveries between the associated undertakings — in other words, if, by their own decisions, they could add their deliveries to the sales of the cartel, which, however, in the case of the great majority of such deliveries, cannot be done.

To summarize therefore, it is possible to come to the following conclusions with respect to the capacity to determine prices for deliveries between associated undertakings and supplies to factories for their own use.

The High Authority's Decision contains an error of law because it gives no reasons for including internal consumption within a factory, or for the application of the prohibition of discrimination to deliveries between associated undertakings and because, even when applying the prohibition of discrimination, there are no grounds for assuming that the cartel was in a position to determine prices in respect of an unknown and possibly the greater part of deliveries between member undertakings.

(ii) The control of marketing

Since any one of the criteria contained in Article 65(2)(c) may be sufficient grounds for the Decision, I shall continue my examination and proceed to deal with the question whether control of marketing exists in respect of a substantial part of the Common Market, although it should be stressed that, in view of the objections raised at the outset against the High Authority's definition and application of control of marketing, the following examination which will be concerned with determination of the proportion of the market in question, can have no more than secondary importance.

According to the High Authority, (Recital No 13 of the statement of reasons for the Decision) it is enough that the cartel agreement fixes 'rules and conditions relating to reserved tonnages', and further that it should guarantee (by imposing an obligation even on subsequent purchasers) that there should be no other market for these tonnages.

If by control of marketing is meant, as I tried to show in the earlier part of this opinion, the exercise of considerable influence over the organization of marketing and sales policy such as to produce repercussions on the competitive situation in the Common Market, then the situation must be interpreted as follows:

— Local Sales:

There is no doubt that deliveries for local sales appear on the Common Market in the economic sense. The members' power to dispose of these tonnages as they see fit as mentioned in clause 6 of the cartel agreement, is actually subject, by virtue of clause 21, to certain restrictions (the definition of groups of consumers, geographical boundaries of the market, sale only from certain specific points). Within these limits, the member undertaking is free to decide on quantities, categories, types and sales areas; similarly, it is free to decide whether to sell at all (in times of overproduction, this is only a theoretical choice).

Even though the cartel cannot influence the individual sales to each consumer, in the sense of directing and calculating the tonnages delivered, it is nonetheless clear that by means of the cartel agreement even the possibility of making local sales is subjected to restrictions, which bear witness to the considerable influence on those sales exerted by the cartel.

Thus, even as concerns control of marketing, local sales tonnages cannot be left out of account in deciding whether a substantial part of the market is affected.

— Other reserved tonnages: deliveries between associated undertakings and deliveries within single undertakings

It is quite clear that the cartel agreement itself puts appreciable limits on the possibilities of sale in respect of these deliveries just as on those of local sales. Once again, however, the question arises whether one can speak of a sale *on the market* because these tonnages are not sold on the market according to the law of supply and demand, that is, in competition with other products, but outside the market on the instructions of the dominant undertaking or, in the case of single undertakings, by order of their managements. The answer to this question must be the same as that given in connexion with the determination of prices: sales within a single undertaking or within a group of undertakings integrated to such a degree as to approximate economically to a single undertaking, are not functionally related to the Common Market. The extent of deliveries between associated undertakings is, within the limits laid down by the cartel agreement, decided *unilaterally* by one of the member undertakings. Even in the absence of a cartel agreement, these tonnages would not enter into competition between undertakings as they do not come into the market, or only to an insignificant extent. It must not be forgotten, moreover, that under the cartel agreement votes are weighted according to 'declared' tonnages, and that undertakings having large reserved tonnages have less influence within the cartel, and consequently less influence over sales. Such reserved tonnages cannot for this reason serve the cartel, that is to say, the member undertakings as a group, as a means of influencing the market. They must not be taken into account in ascertaining the proportion of the market subject to marketing control.

The High Authority's argument that the whole output of the cartel represents its potential sales, and is thus potentially subject to its control over marketing, is manifestly wrong. (Thus, in the case of use by the mines themselves, it would not be proper to speak of sales). Moreover, my remarks on the question of the determination of prices are equally applicable here. It is necessary to know to what extent there may in fact be variations in deliveries between associated undertakings and consumption of fuel by the factories themselves, taking account of legal, technical and economic factors. Only to this extent do these deliveries represent a potential part of the total sales of the joint-selling agency.

My *conclusion* is this: in calculating the proportion of the market of the undertakings belonging to the cartel, the High Authority was in error in partially taking into account deliveries within single undertakings, and, in their entirety, deliveries between associated undertakings. As the sales figures produced by the applicants during the oral procedure show, the calculation of the proportion of the market given by the High Authority in Recital No 9 of the statement of reasons for its Decision is seriously defective.

(iii) Assessment of the proportion of the market

Since the High Authority, in its Decision, did not say whether even the *proportion*

of the market reduced in this way should be regarded as *substantial* within the meaning of Article 65(2)(c) the problem arises whether the Court is entitled to decide the point.

Two objections may be raised here:

— It is for the High Authority to evaluate questions of fact arising out of a cartel agreement. As the High Authority rightly points out, we are concerned here with an economic assessment of the whole situation, in which regard must be paid to the factual situation in the market, influences at work in the market and actual changes taking place within it. The Court can go into such an inquiry only to a limited extent, and accordingly it would be all the more wrong for it to do so in the High Authority's place.

— The facts of the present case are not such that it is merely necessary to make simple, exact subtractions within a body of figures. As we have seen, within the category of deliveries between associated undertakings, a certain degree of variation must be taken into account. Also, it is not only the applicants' proportion of the market which has to be rectified, but also the comparative figures relating to sales on the open market, which, as the High Authority says, comprise both deliveries between associated undertakings and consumption by plants for their own use, without showing exact amounts for each category.

Should the High Authority's Decision be annulled for the reasons given above, the High Authority would have to make a fresh mathematical calculation with the assistance of the guidance which has been given with regard to interpretation and, on the basis of these values, carry out a new general assessment.

(d) *What other factors must be taken into account when assessing the proportion of the market?*

One last objection, raised by the intervener, remains to be examined in the context of subparagraph (c), still with regard to the criterion of 'a substantial part'. The representative of the Land of North Rhine-Westphalia submitted that the words 'partie des produits en cause' in the text of the Treaty must be read for purposes of the present case as referring only to the proportion of the coal market; but that, in assessing what would be a substantial proportion, all external forces that might act on the coal market must be taken into account. It is certainly correct to describe the criterion of 'a substantial part' as an indeterminate legal concept which has to be given precise content by reference to the sense and purpose of the provision of which it is part. If, under Article 65, the uttermost limits for cartels capable of being authorized must be determined by reference to the proportion of the market of the undertakings concerned, this is because the attempt is being made to exclude limitations on competition which attain substantial proportions and thus jeopardize the system of competition as provided by the Treaty. What is to be understood by 'substantial limitation on competition' must be ascertained in relation to the normal situation, that is to say, in relation to normal conditions of competition to be established within the Community under Articles 5 and 65(1) of the Treaty. It is from the point of view of this normal situation that all cartel agreements must be examined.

It is not difficult to see, and in fact it has not otherwise been argued, what sort of factual economic picture the draftsmen of the ECSC Treaty had in mind when they inserted the words 'normal competitive conditions'. The situation was then characterized by an excess of demand, that is, it was one in which coal had a strong position in the energy market. Accordingly, a strict application of the rules of competition was in principle required if normal competitive conditions were to be achieved as far as possible.

It has been shown not only in this case, but in important publications issued by the High Authority, in technical literature and scientific opinion, that the starting situation which existed in 1952 has fundamentally altered. The Court of Justice itself pointed out how fundamental this change was in its advisory opinion on the revision of Articles 56 and 65.

The importance of coal in the market has decreased, its place being taken increasingly by other sources of primary energy, such as imported coals, oils and natural gas. It is undeniable that coal, oil and natural gas now form a single market.

However, the rules of competition contained in the ECSC Treaty (for example, those relating to publication of price lists and to equal treatment of buyers) are not those available to the suppliers of oil and gas.

This change in the economic situation makes it imperative that the concept of 'normal competition in the Common Market' should be understood differently from the way it was understood at the time of the establishment of the Community. As early as the stage of negotiations for the Treaty, it was said that the extent of competition could be measured only in a given factual situation. It is consequently impossible to neglect the changed situation in the market when applying the individual criteria laid down by Article 65.

This is not all however as regards the present situation. The applicants rightly point out that the Common Market is not only influenced from without by the competition of substitute fuels. Within the market also a situation has developed that is at variance with the original concept of 'normal competitive conditions'.

According to the Treaty, all coal produced within the Community is legally entitled to be made available to all consumers within the Common Market. Any limitation on access to particular sections of the Common Market, even if it results from legal measures or from factors other than competition, has the legal effect that the concept of a common market within the meaning of the Treaty cannot be applied. It can hardly be denied that at the present time what confronts us is not a single unified market at all, but separate markets where production and distribution are not governed by the same conditions of competition.

Coal-mining in the Community is in part nationalized, and to that extent the sale of coal is accordingly centralized, as are the import and transportation of coal, and sources of energy are to some extent subject to strict governmental control. In these cases internal competition between producers and distributors is eliminated, abolished by the central board of management which is also responsible for equalizing trading results uniformly between the various companies concerned.

Even if it is not conceded that the finding of the deficiencies in the Common Market existing today makes it impossible to apply the rules of competition (the view, for example, expressed by Dr Kronstein in his lecture at Frankfurt[1], which goes beyond the claims of the applicants), it is nonetheless, in my opinion, undeniable that the given legal and economic situation in all its aspects must be taken into account in interpreting indefinite legal concepts, that is to say, an application must be sought which takes sufficient account of the changes in the normal state of competition. In other words, it would be possible in this context to take into account the factual changes on which the applicants have laid much stress, without distorting the Treaty. Such a

1 — 'Die Bedeutung der Wettbewerbsregeln im Gesamtrahmen des Montanvertrages und des Vertrages über die Europäische Wirtschaftsgemeinschaft'. International Conference on the law relating to cartels, June 1960.

view, however, must be adopted if one is not to lay oneself open to the accusation of supplying the content for an undefined concept in an inadequate and one-sided manner.

It seems clear, then, that the adverse effect upon competition resulting from a particular sector of the coal market must be judged differently according to whether an isolated coal market exists or whether other energy sources are having an effect upon the coal market. If the pressure of external competition is found to be heavy, the existence of a coal cartel agreement can exercise an appreciable influence only if the importance of coal in the fuel market is as great as that of substitute fuels. In other words, pressure of external competition on the common market in coal necessitates an extension of the scale of permissible cartels.

One may well wonder whether the High Authority took proper account in its Decision of these requirements. In Recital No 11 of the statement of reasons for the Decision it states that:

'it is not unmindful of the influence on competition, in the case of certain categories of coal, of tenders from third countries and of other forms of power; it has therefore examined this influence. . .'

Against this it might be argued, however, that the High Authority made this investigation only in order to satisfy itself that the members of the cartel were in a position to determine prices. For purposes of ascertaining the relevant proportion of the market, it contented itself with a comparison with the sale of coal in the Community (Recital No 9). In no instance did the High Authority make much of the influence of the special structure of certain parts of the market which I have just indicated, despite the fact that, as the applicants rightly point out, whenever there is strict public control of the supply of power, no matter how small the area of market concerned, its influence on the market can be greater than that of a private cartel with larger sales figures. This appears to me to emerge as a grave flaw in the High Authority's reasoning, possibly the gravest of all those mentioned so far. It also seems to me that at this point the applicants' appeal for a dynamic interpretation and development of the law side by side with economic developments is particularly apt. It is above all in relation to these considerations that the decision of the High Authority is defective, since it cannot be assumed that its calculations might not have been different had it taken all the necessary factors into account.

II — *Article 65(2)(b)*

Completeness demands that some reference be made to Article 65(2)(b), because even though it has been shown that the High Authority's Decision, in so far as it rests on subparagraph (c), has the shakiest of legal foundations, a sufficient independent basis for the Decision might be found in the autonomous criterion in subparagraph (b).

The applicants attacked the High Authority's findings with regard to subparagraph 2(b) above all on the grounds of insufficiency of reasons.

The reasoning in the Decision is as follows: For the Purposes of subparagraph (b), it is necessary to examine whether the nature of the agreement, the scope of the means employed and methods of application, bearing in mind the restriction of competition involved, are essential to bring about the required improvements in marketing, and whether other agreements involving less restriction of competition would have the same effects. The evaluation of the facts did not afford grounds for finding that the problems posed by the applicants could be solved with the aid only of the considerable resources inherent in the selling organization, and that it would

be technically impossible to achieve the same results with other agreements. Having regard to the character of the undertakings concerned and the various circumstances in which they produce and market different categories and types of fuel it would be technically feasible to draft other regulations for the organization of the selling agency for Ruhr coal.

The High Authority was accordingly unable to decide that the agreement submitted to it fulfilled the conditions for authorization laid down by Article 65(2)(b).

The Court has to decide whether these brief observations satisfy the requirements with regard to the statement of the reasons for decisions which the Court has stated in earlier cases.

Essentially, the High Authority gives no more than the barest summary of the procedure followed and the subject matter of its inquiry, to which it adds objections based on the ambit of the proposed cartel, without giving the results of its inquiries in detail together or mentioning the necessary legal criteria upon which they were based. In particular, it is impossible to gather from the High Authority's Decision the point at which the proposed cartel system goes beyond what was essential for the achievement of the objectives pursued.

These points will hardly enable the Court to trace even in crudest outline the legal reasoning essential to the High Authority's decision on the basis of the factual data.

Consequently, the statement of reasons would appear to be inadequate in that it does not conform to the criteria laid down by the Treaty.

For these reasons, and because the High Authority itself admits that it has not made an exhaustive analysis of subparagraph (b) in all its necessary aspects (statement of defence, p.6) it is unnecessary to examine further the various additional arguments of the applicants.

The deliberations of the High Authority relating to subparagraph (b) succeed in providing an adequate basis for its Decision and this in the last analysis justified the amendment of the Decision.

III — *Conclusions*

In view of the defects which vitiate the High Authority's negative Decision, I propose that the Court should:

— annul the Decision and refer the matter back to the High Authority for further consideration;

— order the High Authority to bear the costs of the case.