to restrictions laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched. The above guarantees can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.

In Case 4/73

J. NOLD, KOHLEN- UND BAUSTOFFGROSSHANDLUNG, a limited partnership governed by German law, having its registered office in Darmstadt, represented by Manfred Lütkehaus, advocate of the Essen Bar, with an address for service in Luxembourg at the chambers of André Elvinger, 84 Grand-Rue

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Dieter Oldekop, acting as agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Pierre Lamoureux, 4 boulevard Royal

defendant,

supported by

RUHRKOHLE AKTIENGESELLSCHAFT, a limited company having its registered office in Essen

and

RUHRKOHLE VERKAUFS-GESELLSCHAFT MBH, a private limited company having its registered office in Essen, represented by Otfried Lieberknecht, advocate of the Düsseldorf Bar, with an address for service in Luxembourg at the chambers of Alex Bonn, 22, côte d'Eich,

interveners

Application for annulment of the Decision of the Commission of 21 December 1972, authorizing new terms of business of Ruhrkohle AG,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, P. Pescatore (Rapporteur), H. Kutscher, C. Ó Dálaigh and A. J. Mackenzie Stuart, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments developed by the parties in the course of the written procedure may be summarized as follows:

I — The facts

In pursuance of paragraph (2) of Article 12 of the Convention on the Transitional Provisions annexed to the ECSC Treaty and of Article 3 of the Decision of the High Authority No 37/53 of 11 July 1953 on the date of implementation of the prohibitions relating to agreements laid down by Article 65 of the Treaty (OJ, p. 153), the High Authority informed the mining companies of the Ruhr Basin, in May 1954, that it could not authorize the continued existence of the 'Gemeinschaftsorganisation Ruhrkohle GmbH' (GEORG), the central organization for the coal, set up before the establishment of the common market in coal.

On 15 February 1956, by Decisions Nos 5/56 (OJ, p. 29), 6/56 (OJ, p. 43) and 7/56 (OJ, p. 56), the High Authority authorized, subject to certain conditions, the joint sale of fuels by the mining companies of the Ruhr Basin associated to form the three selling agencies 'Geitling', 'Präsident' and 'Mausegatt'.

The trading rules authorized on that occasion by the High Authority fixed, in particular, the conditions required for acquisition of the status of direct wholesaler, with the right to direct purchase from a selling agency. For direct purchase from an agency, the dealer had to meet not only the conditions ordinarily required of a wholesaler (creditworthiness, establishment within a sales area, storage capacity, knowledge of the market and the products, extensive custom, wide range of categories and sorts for sale), but also to have sold, during the preceding coal industry year,

(a) within the common market, at least 75 000 metric tons of fuels originating from Community coalfields,

(b) of which at least 40 000 metric tons were to have been sold in the sales area where he wished to acquire the right to operate as a dealer,

(c) of which at least 12 500 metric tons were to have been bought from the selling agency concerned.

By way of derogation from these conditions, the right of direct purchase from selling agencies was also granted, for a transitional period originally limited to 31 March 1957 and extended to 1 July 1957 by Decisions of the High Authority Nos 10/57 (OJ, p. 159), 11/57 (OJ, p. 160) and 12/57 (OJ, p. 161), of 1 April 1957, to wholesalers who, even though failing to satisfy the quantitative criteria imposed, had been supplied as direct wholesalers during the preceding coal industry year or who could establish that they fulfilled the conditions required during that year for supply as direct wholesalers (sale of 6 000 metric tons per annum of Ruhr coal).

An action for annulment of Decision No 5/56, brought by the selling agency 'Geitling', was dismissed by the Court in its Judgment of 20 March 1957 (Case 2/56, Rec. 1957, p. 11).

By Decisions Nos 16/57 (OJ, p. 319), 17/57 (OJ, p. 330) and 18/57 (OJ, p. 341) of 26 July 1957 the High Authority supplemented and amended Decisions Nos 5/56, 6/56 and 7/56 of 15 February 1956 authorizing the joint sale of fuels by the mining companies of the Ruhr Basin.

As regards qualification as a coal wholesaler with the right of direct purchase, the respective quantitative minima were reduced from 75 000 to 60 000 metric tons, from 40 000 to 30 000 metric tons and from 12 500 to 9 000 metric tons.

The Decisions of the High Authority Nos 16/57, 17/57 and 18/57 did not maintain the derogations provided for the benefit of 'former' wholesalers. Accordingly, in September 1957, the three selling agencies for Ruhr coal informed the Nold company that they could no longer supply it as a direct wholesaler as from 1 October 1957.

In an action brought by Nold the Court, in its Judgment of 20 March 1959 (Case 18/57, Rec. 1959, p. 89), annulled, by reason of insufficient grounds, the provisions of Decisions Nos 16, 17 and 18/57 relating to the conditions for qualification as a direct wholesaler.

By Decision No 17/59 of 18 February 1959 extending the authorizations relating to the marketing organizations of the Ruhr Basin (OJ, p. 279) and Decision No 36/59 of 17 June 1959 rescinding and supplementing part of Decision No 17/59 concerning the trading rules for the Ruhr coal selling agencies (OJ, p. 736), the High Authority, abolished in respect of the conditions for qualification as direct coal dealer, the criterion of sales of 60 000 metric tons of Community coal within the common market and reduced respectively from 30 000 to 20 000 metric tons per annum the criterion of sales of Community coal within a particular sales area and from 9 000 to 6 000 metric tons the criterion of sales within that same area of coal from a specific selling agency.

The essential provisions of Decision No 36/59 were annulled in an action brought by the three selling agencies, by the mining companies of the Ruhr Basin and by Firma Nold, by Judgment of the Court of 15 July 1960 (Joined Cases 36, 37, 38 and 40/59, Rec. 1960, p. 857).

By Decision No 16/60 of 22 June 1960 on the refusal to authorize a joint marketing organization of mining companies of the Ruhr Basin (OJ, p. 1014), the High Authority opposed the substitution for the system of sale by three independent agencies, of a single sales organization embracing almost all the mining companies of the Ruhr Basin.

An action brought against this Decision by the selling agencies was dismissed by Judgment of the Court of 18 May 1962 (Case 13/60, Rec. 1962, p. 165).

On 8 February 1961, by Decision No 3/61 amending Decision No 17/59 (amended by Decision No 36/59) as regards trading rules for the coal selling agencies of the Ruhr (OJ, p. 413), the High Authority authorized the Ruhr coal selling agencies to render direct supplies to coal wholesalers subject to a single quantitative criterion, namely the sale, within the common market, during the preceding coal industry year, of at least 6 000 metric tons of fuels originating from the selling agency supplying the accredited dealer.

By Decisions Nos 5/63 (OJ, p. 1173) and 6/63 (OJ, p. 1191) of 20 March 1963, the High Authority authorized the joint selling of fuels by the mining companies of the Ruhr Basin organized into the two selling agencies 'Geitling' and 'Präsident', while maintaining in force, with regard to the trading rules, the conditions for admitting coal wholesalers to the right of direct supply.

The principal grounds of the action brought against these Decisions by the Government of the Kingdom of the Netherlands were dismissed by the Court in its Judgment of 15 July 1964 (Case 66/63, Rec. 1964, p. 1049).

By Decision of 27 November 1969 authorizing the merger of the mining companies of the Ruhr Basin by the transfer of colliery assets to the company Ruhrkohle AG, the Commission of the European Communities, applying Article 66 (2) of the ECSC Treaty, authorized the merger of the mining companies of

the Ruhr Basin into a single company, Ruhrkohle AG, and obliged the latter to submit for its authorization any amendment to its terms of business.

Also on 27 November 1969, the Commission took two Decisions (OJ, L 304, pp. 11 and 12) revoking, as from 31 December 1969, its Decisions Nos 5/63 and 6/63.

The Commission, by a Decision of 21 December 1972 authorizing new terms of business of Ruhrkohle AG (OJ 1973, L 120, p. 14), authorized trading rules which, by comparison with those in force included, in particular, the following changes:

(a) the entitlement of a wholesaler to buy direct is now subject, not to his having sold not less than 6 000 metric tons of Ruhr coal in the preceding coal year, but to the conclusion of a two-year contract to purchase not less than 6 000 metric tons a year from Ruhrkohle AG for the supply of domestic and small consumers;

(b) before a dealer is entitled to supply industrial consumers he must first be admitted to supply domestic and small consumers;

(c) the qualification required of admitted direct buying dealers for the supply of large industrial concerns is not, as heretofore, a minimal annual consumption of 30 000 metric tons of solid fuels of any provenance, but the taking of that tonnage of Ruhr products; dealers may sell to consumers beyond this limit only if they render special services.

However, provisionally, in the first year following the entry into force of the new terms of business, Ruhrkohle AG had to allow wholesalers contracting for the stipulated minimum amount of 6 000 metric tons a year of products for domestic and small consumers to take up to 15 % less than that amount.

On 10 January 1973, Ruhrkohle-Verkauf GmbH, the marketing agency for Ruhrkohle AG, sent to direct coal wholesalers and in particular to the Nold undertaking, the text of the new trading rules authorized by the Commission's Decision of 21 December 1972 and applicable as from 1 January 1973, and informed them that as from that date commercial transactions between them would be carried out on that basis.

II — Procedure

On 31 January 1973 the Nold undertaking brought an action for the annulment of the Commission's Decision of 21 December 1972. The action was directed against both the European Economic Community, represented by Ruhrkohle-Verkauf GmbH.

An application to suspend the operation of the Commission's Decision of 21 December 1972, brought by the Nold undertaking on 13 February 1973, was removed from the Register of the Court by Order of the President of 14 March 1973 at the request of the applicant. This Order reserved the costs.

In its reply, the applicant informed the Court that it was withdrawing its action in respect of Ruhrkohle AG and Ruhrkohle-Verkauf GmbH. By Order of 21 June 1973 the Court decided to remove the case from the Register in so far as it concerned these two companies and ordered the applicant to bear the costs incurred by the said companies in the main action and in the interim procedure.

The written procedure in the dispute between the Nold undertaking and the Commission alone followed the normal course.

By application made on 29 October 1973 Ruhrkohle AG and Ruhrkohle-Verkauf GmbH asked to be allowed to intervene in the main action in support of the conclusions of the Commission. Having heard the opinion of the Advocate-

General, the Court, by Order of 21 November 1973, allowed this application and reserved the costs.

On 28 December 1973, the interveners stated in writing the grounds for their conclusions. The applicant gave its reply to these conclusions on 16 January and 8 February and the defendant did likewise on 8 February 1974.

Having heard the report of the Judge-Rapporteur and the opinion of the Advocate-General the Court decided to open the oral procedure without any preparatory inquiry.

III — Submissions and arguments of the parties

A — As to admissibility

The *interveners* plead the inadmissibility of the action on the grounds of lack of any legal interest.

In their opinion, the applicant can be considered as justifying a legally protected interest only if its action could have the effect of obliging the interveners to continue to supply it directly. That is clearly not the case.

The terms of business authorized by the Decision in dispute replace the rules in force up till then; in the case of annulment, therefore, the interveners can sell only in accordance with the rules previously in force. The latter rules made the direct supplying of coal wholesalers subject to the condition of annual sales, within the common market, of at least 6 000 metric tons of fuels, a condition which, on its own admission, the applicant is very far from satisfying. Thus, it has in any case no right to direct supply.

In respect of 1973, the applicant can derive no rights from the fact that it continued to obtain direct supplies in 1972 when already during the preceding year it had not satisfied the quantitative criteria laid down with regard to this matter. That the applicant obtained direct supplies in 1972 is explained by the fact that the interveners, because of doubts as to whether the terms of business in force up till then related to the coal marketing year or the year for civil purposes, waited, for the benefit of the undertakings concerned, for the situation to become clearer during the following year before applying the terms of business relating to direct supply. The applicant, although it continued to obtain direct supplies, had, in 1972, sold only 700 metric tons. In these circumstances, direct supply could not have been envisaged for the future even if the terms of business in force up to that time had continued to apply.

The *applicant* refutes the contention that the action is inadmissible on the grounds of lack of any legally protected interest.

During the interim procedure the applicant obtained the assurance that it would continue to be supplied as a direct wholesaler until this case was settled; it has therefore never ceased to be supplied on that basis. Consequently, it is of little importance to determine whether, accepting, for the sake of argument, the validity of the old terms of business, it had a right which it could assert in this connexion.

In its opinion, under the former terms of business of Ruhrkohle AG, no dealer automatically lost its status of wholesaler by reason of the fact that it did not sell an annual minimum of 6 000 metric tons. It is of little importance to determine whether the mining companies had the right to withhold supplies to the applicant as a direct wholesaler since, in any case, they did not make use of any such possible right.

B — As to the substance

1. Violation of the principle of non-discrimination

The *applicant* points out that, as from 1 January 1973, it can no longer, in

accordance with the new terms of business of Ruhrkohle AG, be considered as a direct wholesaler in the coal trade. It is therefore a victim of serious discrimination.

(a) The terms of business of Ruhrkohle AG make deliveries on wholesale-market terms subject to a clause obliging the dealer to acquire at least 6 000 metric tons per annum of fuels for the domestic and small consumer sector; during the last two years the applicant has been unable to reach the minimum quota henceforth required.

However, it cannot be reproached for this. In fact, fundamental changes have been apparent in the energy sector over the past few years: coal sales have dropped continuously and it is therefore natural that not only the mining industries but also the wholesale and retail trade should suffer the consequences. But, in the last analysis, the responsibility for the fact that the applicant can no longer sell even 6 000 metric tons per annum lies with Ruhrkohle AG and Ruhrkohle-Verkauf GmbH or the former coal distribution companies of the Ruhr. In fact, Ruhrkohle AG concludes direct contracts for annual deliveries of more than 30 000 metric tons. This is the reason why, because it has suffered discrimination, the applicant has been unable to supply an important and long-standing customer, the undertaking Adam Opel AG of Rüsselheim, with the quantities which it desired. Ruhrkohle AG is also in direct competition with the applicant and other wholesalers through its subsidiaries. In addition, Ruhrkohle AG and Ruhrkohle-Verkauf GmbH offer fuels for sale at prices very much lower than the list prices, and companies controlled by Ruhrkohle AG supply national purchasers, within the Federal Republic of Germany, with 'Belgian coke' at a free-at-frontier price of around 90 DM per metric ton; this product is also sold directly to domestic and small consumers at prices which obviate all competition.

(b) In the case of the applicant, the loss of the status of wholesaler and of the means of obtaining direct supplies involves lasting consequences especially if there should be a change in the demand for coal. In this connexion account should be taken of the fact that the drop in sales of coal to domestic consumers over the last few years is largely due to fairly exceptional climatic conditions and, moreover, that the sales situation could change dramatically if there were difficulties — of a political nature — in the supply of petroleum or natural gas. If it accepts the new terms of business the applicant will probably never again have the opportunity to buy greater quantities, for, as a retailer, it will not in any case be able to offer conditions similar to those of wholesalers and undertakings which obtain direct supplies or those of the subsidiaries of Ruhrkohle AG and Ruhrkohle-Verkauf GmbH. That is the reason why in the second heading of its conclusions the applicant asks that, at the very least, it should be exempt from the new terms of business.

(c) The applicant cannot be obliged to enter into an association with other wholesalers who may be in a similar position and to combine its purchases with theirs. It does not see any reason to limit its independence in order to protect itself from the discriminatory consequences of the terms of business of Ruhrkohle AG.

Moreover, there is no evidence in these terms of business that Ruhrkohle AG is obliged to aggregate the turnovers of dealers who decide to combine, nor do they contain any definition of the concept of 'combination'.

The *defendant* points out that there can be discrimination only if dealers in a similar position to that of the applicant are treated differently in respect of admission to direct purchase; that is not the case, as the criteria adopted are equally valid for all dealers in the Community, including subsidiaries of Ruhrkohle AG. The fact that the

applicant must compete with dealers associated with Ruhrkohle AG does not therefore constitute discrimination against it.

(a) The complaint that Ruhrkohle AG and Ruhrkohle-Verkauf GmbH are responsible for the fact that the applicant is no longer in a position, by reason of alleged discrimination on the part of those two companies, to purchase 6 000 metric tons of coal per annum is not based on concrete data; in any case, the objection does not in the defendant's opinion, cast doubt on the validity of the new terms of business of Ruhrkohle AG or their authorization by the Commission.

However that may be, it is not true that subsidiaries of Ruhrkohle AG and Ruhrkohle-Verkauf GmbH or dealers associated with the shareholders of Ruhrkohle AG have offered coal for sale at prices below list prices. There is no denying that before the implementation of the new terms of business Ruhrkohle AG granted a special contractual discount ('Vertragsrabatt') to dealers who undertook by contract to buy a specific quantity of coal; but there was mention of this discount in the price list of Ruhrkohle-Verkauf GmbH and it was granted to all dealers, without distinction, for purchases of similar amounts.

The prices of imported fuels, fixed by the producers, range in practice from 95 to 110 DM; but imports of fuels from other Member States are independent of the influence of Ruhrkohle AG, with the result that the latter's marketing companies are in competition with other wholesalers. As imports from other Member States can have a considerable effect on sales of Ruhr coal it is natural that the marketing companies of Ruhrkohle AG should participate in this trade in order to compensate their losses. As for direct transactions between Ruhrkohle-Verkauf GmbH and customers in industry whose consumption exceeds 30 000 metric tons per annum, it should be recalled that these purchasers have had, since the end of 1963, the choice between supply through a dealer or direct from the selling agencies. The exclusion of dealers from transactions with the railways and certain other industrial consumers applies to all dealers without distinction and is, moreover, objectively justified by the particular circumstances with regard to these categories of consumer. The new provision in the terms of business, according to which deliveries by wholesalers to industrial consumers who purchase annually more than 30 000 metric tons of Ruhr coal are subject to the rendering of certain special services, also applies in an identical manner to all wholesalers qualifying for direct purchase.

The drop in the volume of sales by the applicant to a mere 700 metric tons in 1972 is not the result of discrimination but is due to a general reduction in coal consumption and, above all, to the way in which the applicant conducts its business.

(b) In this connexion, it should be remembered that the applicant can retain its right to direct purchase by combining its purchases with those of other wholesalers in a similar position. This possibility is made clear by the fact that the new terms of business merely require the conclusion of a two-year contract to take 6 000 metric tons a year for the domestic and small consumer sector, but do not oblige one dealer alone to sell this quantity. The details of cooperation are left to the discretion of dealers. The slight blow to their independence to which they may have to consent, appears, considering the present state of the coal market, to constitute an insignificant evil.

(c) The second heading of the conclusions, directed at an annulment — in favour of the applicant alone — of part of the contested Decision, is incompatible with the necessarily general nature of the latter. The criteria laid down by the new terms of business must

apply, in a like manner, to all Community dealers. In any case, the applicant does not put forward any factor capable of justifying his contention that the treatment he receives should differ from that received by all other wholesalers.

2. *Lack of substantial improvement in the distribution of fuels*

The *applicant* considers that the new terms of business, far from contributing to a substantial improvement in the distribution of fuels, render such distribution more difficult.

(a) In the applicant's opinion, the effect of the new terms of business is to favour the concentration of this distribution into the hands of a small number of major dealers. On the Commission's own admission, the new trading rules, which make a dealer's qualification for direct wholesaler status dependent no longer upon the sale of a minimum 6 000 metric tons of Ruhr coal within the common market but upon the conclusion of a two-year contract for the supply of a fixed quantity of at least 6 000 metric tons per annum to domestic and small consumers, have the effect of withdrawing the entitlement of a certain number of dealers to buy direct from Ruhrkohle AG. Although in its opinion 'it is clearly reasonable that Ruhrkohle AG should wish to take account of the major decline in coal sales in its distribution arrangements and to adjust its terms of business to the altered state of affairs in such a way as to do business direct only with dealers operating on a sufficient scale' the Commission, in its contested Decision, does not put forward any grounds in support of this alleged justification.

(b) In fact, Ruhrkohle AG enjoys a real monopoly position, as sales of Ruhr coal are henceforth organized on the basis of Ruhrkohle-Verkauf GmbH alone.

(c) Nor is it possible to claim an improvement in the distribution of fuels on the basis of the fact that a wholesaler's industrial transactions must henceforth be dependent upon his obtaining dealer status in the domestic and small consumer sector, so as to concentrate his activity on this latter market.

(d) Therefore, there is no real evidence contained in the Commission's Decision of 21 December 1972 modifying the conditions for obtaining direct wholesaler status to show that it is likely substantially to improve the distribution of fuels.

The *defendant* makes the point that this submission disregards the legal basis in accordance with which the Decision in dispute must be judged. In fact, the criterion of substantial improvement in distribution is only valid where, applying Article 65 (2) of the ECSC Treaty, authorization is granted to joint-selling agreements concluded between several undertakings. The Decision of 21 December 1972 derives from the Commission's Decision of 27 November 1969 authorizing, on the basis of Article 66 (2), the merger of the mining companies of the Ruhr Basin by transfer of their colliery assets to Ruhrkohle AG. Its legal basis is the obligation under Article 2 of the Decision of 27 November 1969, to submit to the Commission for its authorization any new trading rules. For the purposes of appraisal of the contested Decision one must therefore consider not the criteria laid down in Article 65 (2) of the ECSC Treaty but the purpose of the obligation imposed by Article 2 of the Decision of 27 November 1969. That purpose is to prevent, in consideration of Ruhrkohle AG's strong position on the market, undue restriction of competition among dealers or the growth of discrimination between wholesalers and consumers in respect of the right of access to the products of Ruhrkohle AG.

(a) In the Commission's opinion, the new terms of business of Ruhrkohle AG, authorized by the disputed Decision, are

completely compatible with this purpose, bearing in mind in particular the current state of the market in coal.

Since 1959, this market has been characterized, particularly in the Ruhr, by an almost continuous fall in coal sales, especially in the domestic sector. This recession is essentially due to the increasing restructuring of the energy market and, especially, to the substitution for coal of other types of energy, in particular of domestic fuel oil. Ruhrkohle AG is obliged to attempt to limit, at least in some degree, the heavy financial losses which it has suffered by reason of inadequate profitability, by modifying its marketing organization since in practice the structure of production costs prevents the application of an effective stimulus to sales through price reductions.

The principal feature of the new terms of business, namely the conclusion of a two-year contract for the purchase of at least 6 000 metric tons per annum of coal produced by Ruhrkohle AG for resale to domestic and small consumers, this being the condition for entitlement to direct purchase and sale to industrial consumers, is bound up with two factors which play an important rôle in the sale of coal: on the one hand, the structure of sales through dealers and, on the other hand, the efficiency of and interest for dealers having the right of access to direct supplies.

The activity of dealers in the domestic and small consumer sector is particularly effective for the sale of coal, as the producers exercise only a relatively limited influence on sales in this sector; on the other hand, the possibilities for dealers are restricted as regards sales to industry.

Subjecting the right to qualify as a direct wholesaler to the sale of a minimum quantity to domestic and small consumers is thus intended to encourage dealers to concentrate their efforts on this category of customer, on whom their marketing influence is greatest. The requirement of a two-year contract can lead to a degree of stabilization of the level of coal sales and it can help Ruhrkohle AG to plan its production. Moreover, the two-year contract gives those wholesalers whose sales the preceding year did not quite reach the stipulated level the possibility, through increased effort, of obtaining their entitlement to direct purchase; the transitional period of one year, in conjunction with the tolerance of 15 % below the stipulated mimimum, is intended to give them the opportunity of attaining this objective.

The new quantitative criterion tends to restrict the right of direct purchase to dealers who really strive to sell the products of Ruhrkohle AG. Dealers whose sales fall on or below the tonnage qualification will be tempted, in order to ensure the full use of their labour force and the potential of their undertaking, to sell other fuels instead, in particular fuel oil, or to carry out other commercial operations. The obligation to sell a minimum quantity of 6 000 metric tons of coal per annum to domestic and small consumers, which is also the condition for the right to supply industrial consumers, should induce dealers to make the necessary commercial effort to sell Ruhr coal, so as effectively to combat the fall in sales.

(b) When the Commission took the contested Decision, it was conscious of the fact that the adoption of the new terms of business by Ruhrkohle AG would have the effect, in Germany, of excluding from direct supply about sixty 'independent' wholesalers who do not hold, directly or indirectly, any shares in Ruhrkohle AG. However, one must take account of the fact that, among the latter, there were already about thirty who no longer satisfied the criteria laid down by the terms of business previously in force; this is the position of the applicant company, which in 1971 and 1972 sold only 3 100 and 700 metric tons of coal respectively. The decrease in the number of direct wholesalers is not however, in itself, a development which

must be resisted. It is at least in part a natural consequence of the constant and rapid fall in sales leading, of necessity, to changes in the structure of the coal trade. The Commission did not consider that the fact that these changes will tend to reduce the number of direct wholesalers constitutes a ground for opposing the adoption of the new terms of business of Ruhrkohle AG, which are an effective means of combatting the decline in sales of coal. Moreover, these terms of business do not jeopardize the existence of effective competition in the coal trade: the number of wholesalers who will retain the right of direct purchase is sufficient to ensure, in the present circumstances, the maintenance of effective competition.

(c) There is no question of Ruhrkohle AG holding a monopoly. On the contrary, it has to face very strong competition, in particular from other sources of energy, and this applies especially in the domestic and small consumer sector, as well as in that of industrial consumption.

3. Failure to respect certain conditions of the authorization

The *applicant* maintains, in respect of the three sales areas provided by the contested Decision apart from the Federal Republic of Germany, that Ruhrkohle AG supplies coke for export at a price of 80 DM per metric ton whereas its price in Germany, according to list prices, is around 140 DM.

The *defendant* refutes this assertion. Moreover, a distinction must be made between exports to third countries and exports to other Member States of the Community. The latter — the only exports which can possibly be relevant in this case — are carried out under two-year contracts which are also concluded on the basis of list prices. In any case, even if the applicant's assertions were correct, they do not affect the validity of the contested Decision. Such practices can only induce the Commission to impose the penalties laid down in Article 64 of the ECSC Treaty.

4. Violation of fundamental rights

The *applicant* raises the objection that the terms of business of Ruhrkohle AG and their application violate certain fundamental rights enshrined by the national Constitutions and 'received' into Community law. This is the case in respect of the right of property ownership, the protection of which is ensured in particular by Article 14 of the 'Grundgesetz' of the Federal Republic of Germany and the Constitution of the Land of Hesse. The applicant's exclusion from the coal trade is equivalent to expropriation, because it deprives it of 'actual possession'. The following rights are also at issue in this case: the right to free development of the personality, the right to freedom of economic action and the principle of proportionality.

The *defendant* points out that it is not for the Court of Justice to interpret and apply rules of domestic law of a Member State, even those appertaining to the Constitution. Moreover, the ECSC Treaty contains no general principle of law, written or unwritten, guaranteeing the maintenance of acquired positions.

IV — Conclusions of the parties

The *applicant,* having amended its first conclusions, claims that the Court should

(a) declare that the Decision of the Commission of the European Communities of 21 December 1972 ('Handelsregelung Ruhr') on changes in the distribution network of Ruhrkohle AG within the Common Market, applicable as from 1 January 1973, is void;

(b) as a subsidiary matter: declare that the said Decision of the Commission is void and inapplicable insofar as it relates to the applicant;

(c) order the defendant to bear the costs of the dispute, including the costs incurred or to be incurred by the applicant and declare the judgment provisionally enforceable in respect of the costs.

The *Commission* contends that the Court should

(a) dismiss the whole action as unfounded;

(b) order the applicant to bear the costs of the action.

The *interveners* contend that the Court should

(a) dismiss the action as inadmissible;

(b) in any case, order the applicant to bear part of the costs.

The oral observations of the parties and their replies to certain questions put by the Court were heard on 14 March 1974. During the above hearing the parties put forward new facts and arguments which may be summarized as follows:

The *applicant* points out that since its establishment more than a century ago it has never been able to sell 6 000 metric tons of fuels per annum to domestic and small consumers. On the other hand, it has supplied far greater quantities to industry. If this has not been the case during the last few years the reason is Ruhrkohle AG's refusal to supply it. That is why it was unable, in 1970, to meet an important order from Rheinstahl AG.

Furthermore, the fundamental changes which have recently occurred in the energy sector, in particular as regards competition between coal and petroleum, raise doubts as to whether the disputed trading rules are justified. In contrast to what the Commission permitted when it authorized the merger of the mining companies of the Ruhr Basin by the transfer of colliery assets to Ruhrkohle AG, the latter is now in a position to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market.

It could be accepted that in this case the provisions of Article 65 of the ECSC Treaty are applicable by analogy. Under this provision a joint-selling agreement can only be authorized by the Commission if it makes for a substantial improvement in the distribution of particular products. This condition, which applies to an agreement between several undertakings, applies *a fortiori* to the case where terms of business are established by a single undertaking formed by the merger of several others and whose position in the market is particularly strong.

The contested Decision violates several fundamental rights recognized by the Constitution of the Federal Republic of Germany, in particular, the right of free development of the personality, the free choice and pursuit of employment and the guarantee of property ownership, proclaimed by Article 14. These rights are also recognized by the Constitutions of other Member States of the Community, by international Conventions and by the ECSC Treaty itself, in particular at Articles 4, 65 and 66. The Decision of the Commission directly and illegally interferes with the exercise of these rights.

The *defendant* maintains that the instances of refusal to supply and the discrimination which the applicant claims to have suffered through the action of Ruhrkohle AG have no relevance to the question — the only matter at issue in this case — of the legality of the contested Decision. The same applies to the consequences, as yet unforeseeable, of the recent energy crisis. Subsequent events cannot cast doubt upon the legality of a Community act.

As for the question of fundamental rights, the protection of property ownership constitutes without any doubt one of the guarantees recognized by Community law which, in this connexion, is based on the constitutional traditions of Member States and on acts of public international law, such as the Convention for the Protection of

Human Rights and Fundamental Freedoms. As the concept of effective protection of the right of property ownership varies from one Member State to another, its practical application must take account of that national norm which affords the greatest protection; that is the reason why German constitutional law must in particular be taken into account. In this connexion, it should be stated, first, that the right of a wholesaler to qualify for direct supplies is not a right covered by the guarantee of property ownership, and secondly, that in any case the Community has not interfered with any such right.

The protection of the proprietary rights of commercial and industrial undertakings extend to those elements which as a whole make up the economic value of the undertaking or represent a legal interest; but it does not cover all the factual circumstances or existing rules favourable to the undertaking or, in particular, the interests, opportunities for gain, hopes or expectations of profit of that undertaking.

Moreover, the Commission does not directly intervene in relation to any possible proprietary right: the terms of business of which the applicant complains have not lost their character of acts of private law by reason of the fact that the Commission has authorized them.

The *interveners* point out that, far from holding a monopoly position, they must be satisfied with a 50 % to 60 % share of the market in fuels for domestic and small consumers. In this market, despite the recent energy crisis, few changes are foreseeable in the coming years.

The new terms of business authorized by the contested Decision are justified by the consideration that Ruhrkohle AG, in order to reduce its losses as much as possible, has a major interest in ensuring the continued sale of fuels and for this purpose it must have partners who have the necessary storage capacity and who in fact perform the wholesaler's marketing functions by concluding long-term contracts for specific quantities of fuels.

The Advocate-General delivered his opinion on 28 March 1974.

Law

1 By application lodged on 31 January 1973, the undertaking J. Nold, a limited partnership carrying on a wholesale coal and construction materials' business in Darmstadt, requested — in the final version of its conclusions — that the Court should annul the Commission's Decision of 21 December 1972 authorizing new terms of business of Ruhrkohle AG (OJ 1973, L 120, p. 14) and, as a subsidiary matter, that it should declare that Decision null and inapplicable insofar as it relates to the applicant.

The applicant objects essentially to the fact that the Decision authorized the Ruhr coal selling agency to render direct supplies of coal subject to the conclusion of fixed two-year contracts stipulating the purchase of at least 6000 metric tons per annum for the domestic and small-consumer sector, a quantity which greatly exceeds its annual sales in this sector, and that the Decision thereby withdrew its status of direct wholesaler.

As to admissibility

2 The Commission has not contested the admissibility of the application.

On the other hand, Ruhrkohle AG and Ruhrkohle-Verkauf GmbH, the interveners, have contended that the action is inadmissible on the gound that the applicant lacks a legal interest.

They consider in fact that if the applicant wins its case and obtains the annulment of the Decision of 21 December 1972, the Court's judgment would have the effect of reviving the trading rules in force before those which constitute the subject-matter of the Decision in issue.

The applicant does not satisfy the requirements of the previous rules, so that it would, whatever the outcome of the action, lose its status of direct wholesaler.

3 This plea cannot be accepted.

In fact, if the contested Decision is annulled on the grounds of the objections raised, the Commission would, in all likelihood, have to replace the authorized trading rules by new provisions more in keeping with the applicant's position.

Accordingly, it cannot be denied that the latter has an interest in seeking the annulment of the Decision in issue.

On the substance

4 The applicant has not specified, with regard to the grounds for annulment set out in Article 33 of the ECSC Treaty, those upon which it is basing its action against the contested Decision.

5 In any case, an appreciable part of its argument must be dismissed directly, to the extent that the objections raised therein do not relate to the

provisions of the disputed Decision of the Commission but to the applicant's relationship with the interveners.

6 To the extent that the objections do concern the Commission's Decision, the applicant's written and oral arguments invoke in substance the grounds of infringement of an essential procedural requirement and infringement of the Treaty or of any rule of law relating to its application.

These grounds are adduced, more particularly, as regards the new conditions laid down for the right to direct supplies from the collieries, from the lack of reasoning of the contested Decision, from discrimination against the applicant, and from alleged breaches of its fundamental rights.

1. As to the objections of lack of reasoning and discrimination

7 By a Decision of 27 November 1969 the Commission authorized, on the basis of Article 66 (1) and (2) of the ECSC Treaty, the merger of most of the mining companies of the Ruhr into a single company, Ruhrkohle AG.

Under Article 2 (1) of this Decision the new company was obliged to submit to the Commission for authorization any change in its terms of business.

An application to this effect was submitted by Ruhrkohle AG to the Commission on 30 June 1972.

The Commission's authorization was granted by the Decision of 21 December 1972, which is the object of the dispute.

The rules approved by that Decision laid down new conditions stipulating the minimum quantities that dealers must undertake to purchase in order to acquire entitlement to direct supply from the producer.

In particular, direct deliveries are subject to the condition that a dealer shall conclude a two-year contract to take not less than 6000 metric tons per annum for the domestic and small consumer sector.

8 It is objected that the Commission allowed Ruhrkohle AG arbitrarily to fix this requirement so that, having regard to the quantity and nature of its annual sales, the applicant has lost its entitlement to direct supplies and is relegated to the position of having to deal through an intermediary, with all the commercial disadvantages which this involves.

Firstly, the applicant considers it to be discriminatory that, unlike other undertakings, it should lose its entitlement to direct supplies from the producer and should thereby be in a more unfavourable position than other dealers who continue to enjoy this advantage.

Secondly, it invokes Article 65 (2) which in a similar case to that envisaged under Article 66 authorizes joint-selling agreements only if such arrangements will make for 'a substantial improvement in the production or distribution' of the products concerned.

9 In the reasoning given in its Decision the Commission emphasized that it was aware that the introduction of the new terms of business would mean that a number of dealers would lose their entitlement to buy direct from the producer, due to their inability to undertake the obligations specified above.

It justifies this measure by the need for Ruhrkohle AG, in view of the major decline in coal sales, to rationalize its marketing system in such a way as to limit direct business association to dealers operating on a sufficient scale.

The requirement that dealers contract for an annual minimum quantity is in fact intended to ensure that the collieries can market their products on a regular basis and in quantities suited to their production capacity.

10 It emerges from the explanations given by the Commission and the interveners that the imposition of the criteria indicated above can be justified on the grounds not only of the technical conditions appertaining to coal mining but also of the particular economic difficulties created by the recession in coal production.

It therefore appears that these criteria, established by an administrative act of general application, cannot be considered discriminatory and, for the purposes of law, were sufficiently well-reasoned in the Decision of 21 December 1972.

As regards the application of these criteria, it is not alleged that the applicant is treated differently from other undertakings which, having failed to meet the requirements laid down under the new rules, have likewise lost the advantage of their entitlement to purchase direct from the producer.

11 These submissions must therefore be dismissed.

2. As to the objection based on an alleged violation of fundamental rights

12 The applicant asserts finally that certain of its fundamental rights have been violated, in that the restrictions introduced by the new trading rules authorized by the Commission have the effect, by depriving it of direct supplies, of jeopardizing both the profitability of the undertaking and the free development of its business activity, to the point of endangering its very existence.

In this way, the Decision is said to violate, in respect of the applicant, a right akin to a proprietary right, as well as its right to the free pursuit of business activity, as protected by the Grundgesetz of the Federal Republic of Germany and by the Constitutions of other Member States and various international treaties, including in particular the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocol to that Convention of 20 March 1952.

13 As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

The submissions of the applicant must be examined in the light of these principles.

14 If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder.

For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest.

Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched.

As regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.

15 The disadvantages claimed by the applicant are in fact the result of economic change and not of the contested Decision.

It was for the applicant, confronted by the economic changes brought about by the recession in coal production, to acknowledge the situation and itself carry out the necessary adaptations.

16 This submission must be dismissed for all the reasons outlined above.

17 The action must accordingly be dismissed.

Costs

19 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

The applicant has failed in its pleas.

The Order of the President of 14 March 1973 and the Order of the Court of 21 November 1973 reserved the costs relating to the application to suspend the operation of the contested Decision and the application to intervene.

By the Order of 21 June 1973 the Court ordered the applicant to bear the costs incurred, at that date, by the companies Ruhrkohle AG and Ruhrkohle-Verkauf GmbH in the main action and in the interim procedure.

On those grounds

THE COURT

hereby:

1. **Dismisses the action as unfounded;**
2. **Orders the applicant to bear the costs of the action including the costs reserved by the Orders of 13 February and 21 November 1973 and those awarded by the Order of 21 June 1973.**

Lecourt		Donner	Sørensen
Pescatore	Kutscher	Ó Dálaigh	Mackenzie Stuart

Delivered in open court in Luxembourg on 14 May 1974.

A. Van Houtte
Registrar

R Lecourt
President