to the continued existence or to the creation of large production or sales units, such as are characteristic of the coal and steel market, on condition that the resulting system of imperfect competition serves the objectives of the Treaty and, in particular, that it safeguards within that market the measure of competition essential for the observance of the requirements of the second paragraph of Article 2.

3. A cartel which has the ability to regulate the marketing of a substantial part of a given product within the Common Market exercises a power of control over marketing within the meaning of Article 65(2)(c) of the ECSC Treaty.

4. By permitting the continued existence and creation of large production and sales units within the Common Market for coal and steel, the ECSC Treaty grants those who take part in this market a measure of power to determine prices, which is, however, limited by provisions such as those of Article 65(2)(c) which are intended to safeguard a necessary minimum of competition.

5. A power to determine prices or to control marketing applies to a substantial part of certain products within the Common Market when the full extent of the effects which it produces is not of secondary or minor importance, but is such as to jeopardize, within the said market, the measure of competition intended by the Treaty or the execution of the tasks which Articles 2, 3, 4 and 5 assign to the Community.

In Case 13/60

1. 'GEITLING' RUHRKOHLEN-VERKAUFSGESELLSCHAFT MBH, represented by its managers at Essen, Frau-Bertha-Krupp-Strasse 4,

2. 'MAUSEGATT' RUHRKOHLEN-VERKAUFSGESELLSCHAFT MBH, represented by its managers at Essen, Frau-Bertha-Krupp-Strasse 4,

3. 'PRÄSIDENT' RUHRKOHLEN-VERKAUFSGESELLSCHAFT MBH, represented by its managers at Essen, Frau-Bertha-Krupp-Strasse 4,

4. the following MINING COMPANIES OF THE RUHR BASIN, affiliated to and represented by the above marketing companies, acting also in their capacity as members of the 'Ruhrkohle Verkaufsgesellschaft mbH', a company in the course of formation,

Gewerkschaft Auguste Victoria,
Marl-Hüls,

Deutsche Erdöl-Aktiengesellschaft
Steinkohlenbergwerk Graf Bismarck,
Gelsenkirchen,

Concordia Bergbau-Aktiengesellschaft,
Oberhausen,

Hütten-und Bergwerke Rheinhausen Aktiengesellschaft,
Essen,

Bergwerksgesellschaft Dahlbusch,
Gelsenkirchen,

Emscher-Lippe Bergbau-Aktiengesellschaft,
Datteln,

Essener Steinkohlenbergwerke Aktiengesellschaft
in Vertretung der Mannesmann Aktiengesellschaft,
Essen,

Ewald-Kohle Aktiengesellschaft,
Recklinghausen,

Gewerkschaft des Steinkohlenbergwerks Haus Aden,
Recklinghausen,

Ilseder Hütte, Steinkohlenbergwerke Friedrich der Grosse,
Herne,

Steinkohlenbergwerk Friedrich Heinrich Aktiengesellschaft,
Kamp-Lintfort, Kreis Moers,

Harpener Bergbau-Aktiengesellschaft,
Dortmund,

Heinrich Bergbau Aktiengesellschaft,
Essen-Kupferdreh,

Steinkohlenbergwerk Heinrich Robert Aktiengesellschaft,
Herringen b. Hamm,

Bergwerksgesellschaft Hibernia Aktiengesellschaft,
Herne,

Hoesch Aktiengesellschaft,
Dortmund,

Gelsenkirchener Bergwerks-Aktiengesellschaft,
Essen,

Hansa Bergbau Aktiengesellschaft,
Dortmund,

Carolinenglück Bergbau Aktiengesellschaft,
Bochum,

Graf Moltke Bergbau Aktiengesellschaft,
Gelsenkirchen,

Hamborner Bergbau Aktiengesellschaft,
Duisburg-Hamborn,

Friedrich Thyssen Bergbau Aktiengesellschaft,
Duisburg-Hamborn,

Gewerkschaft Alte Haase,
Sprockhövel,

Klöckner-Bergbau Königsborn-Werne Aktiengesellschaft,
Unna-Königsborn,

Langenbrahm Steinkohlenbergbau Aktiengesellschaft,
Essen,

Bergbau Aktiengesellschaft Lothringen,
Bochum,

Steinkohlenbergwerk Mansfeld GmbH,
Bochum-Langendreer,

Märkische Steinkohlengewerkschaft,
Hessen b. Hamm,

Steinkohlenbergwerke Mathias Stinnes Aktiengesellschaft,
Essen,

Hüttenwerk Oberhausen Aktiengesellschaft,
Oberhausen,

Niederrheinische Bergwerks-Aktiengesellschaft,
Düsseldorf,

Gewerkschaft Petrus Segen,
Niederstüter über Hattingen,

Rheinpreussen Aktiengesellschaft für Bergbau und Chemie,
Homberg/Niederrhein,

Rheinstahl Bergbau Aktiengesellschaft,
Essen,

Gebrüder Stumm Gesellschaft mit beschränkter Haftung Zeche Minister Achenbach,
Brambauer/Westfalen,

Klöckner-Werke Aktiengesellschaft Bergbau Victor-Ickern,
Castrop-Rauxel,

Bergwerksgesellschaft Walsum mit beschränkter Haftung,
Walsum/Niederrhein,

Steinkohlenbergwerk Westfalen Aktiengesellschaft,
Ahlen

jointly represented by Mr Werner von Simson, Advocate of the Düsseldorf Oberlandesgericht, and Mr Hans Hengeler, Advocate of the Düsseldorf Landgericht, with an address for service in Luxembourg at the office of Mr Werner von Simson at Bertrange,

applicants,

supported by the Government of the Land of North Rhine-Westphalia, represented by its Minister of Economics and Transport, assisted by Dr Joseph H. Kaiser, Professor at the University of Freiburg im Breisgau, acting as Agent, with an address for service in Luxembourg at the office of Mr Werner von Simson at Bertrange,

intervener,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Dr Heinrich Matthies, acting as Agent, assisted by Dr Ernst Joachim Mestmäcker, Professor at the University of Saarbrücken, with an address for service in Luxembourg at its offices, 2 Place de Metz,

defendant,

Application for the annulment of Decision No 16/60 of the High Authority of 22 June 1960 (Official Journal of the European Communities No 47 of 23

July 1960), refusing the applicants authority to form a single marketing company, the 'Ruhrkohle Verkaufsgesellschaft mit beschränkter Haftung', for the sale of their coal products,

THE COURT

composed of: A. M. Donner, President, O. Riese and J. Rueff (Rapporteur) (Presidents of Chambers), Ch. L. Hammes and R. Rossi, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:

On 19 February 1959 the High Authority took Decision No 17/59, published in the *Official Journal of the European Communities* dated 7 March 1959 (pp. 279/59 et seq.), declaring the formation of a uniform sales organization for all the mining companies of the Ruhr valley to be incompatible with the ECSC Treaty. The President of the High Authority confirmed this view by letter of 21 February 1959.

However, the mining companies of the Ruhr valley, at a meeting held on 17 May 1960, agreed to sell part of their production through a single selling agency, the 'Ruhrkohle Verkaufsgesellschaft mbH', as from 1 July 1960.

A request for the authorization of this agreement and the accompanying decisions was placed before the High Authority on 20 May 1960 by the companies empowered to do so.

The High Authority rejected this application by Decision No 16/60 of 22 June 1960, published in the *Official Journal of the European Communities* dated 23 July 1960 (pp. 1014/60 et seq.). This Decision is the subject of the present application, which was lodged with the Registry of the Court of Justice of the European Communities on 6 August 1960.

By Order of 3 May 1961 the Court permitted the Land of North Rhine-Westphalia to intervene in the pending proceedings.

II — Conclusions of the parties

The *applicants* claim that the Court should:

'1. annul Decision No 16/60 of the High Authority of 22 June 1960 (*Official Journal of the European Communities*, 3rd Year, No 47, of 23 July 1960, pp. 1014/60 et seq.);
2. order the High Authority to pay the costs.'

The *defendant* contends that the Court should:

— 'dismiss the application as unfounded; and
— order the applicants to pay the costs.'

The *intervener* submits that the Court should:

1. annul Decision No 16/60 of the High Authority of 22 June 1960 (*Official Journal of the European Communities*, 3rd Year, No 47, of 23 July 1960, pp. 1014/60 et seq.);
2. order the High Authority to pay the costs.'

III — Summary of the submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

On the substance of the case

1. *Infringement of essential procedural requirements*

(a) Insufficiency of reasons for the finding as to the requirements of Article 65(2)(a) and (b) of the Treaty

The *applicants* claim that the reasons given in Recital No 7 in the Preamble to Decision No 16/60 as a basis for the finding that the proposed agreement does not conform with the requirements of Article 65(2) (a) and (b), are insufficient. They maintain that in order to base its refusal upon paragraphs (a) and (b) of Article 65(2) the High Authority should have shown in detail and for what reasons the various results of an improvement in production and distribution, for which provision is made in the agreement submitted for authorization and the achievement of which was sought by the practice of joint selling, could be obtained by means of a lesser degree of limitation upon competition and under just as favourable conditions.

The only indications of the motives which guided the High Authority in its analysis of subparagraphs (a) and (b) of Article 65(2) are to be found in the use of the words 'considerable resources' and 'centralization'. At most, it is apparent from these expressions that the High Authority sees in the joint-selling agency an undesirable concentration of power.

The High Authority repeats the applicants' arguments in an incomplete and often inaccurate way.

Without having clearly established the advantages in the sense of paragraph (2)(a) which can be obtained, no one can say that an agreement is more restrictive than its objectives require. The High Authority came to no definite conclusions with regard to subparagraph (b).

The *defendant* replies that according to the Treaty the only positive result to be taken into account as likely to justify a joint-buying or joint-selling agreement is an improvement in distribution or production. The applicants do not substantiate their statement that the proposed cartel would bring about advantages for production. Further. since the High Authority was not in a position to establish whether a single selling-agency for all the Ruhr companies was essential in order to achieve a marked improvement in distribution it did not have to examine whether the agreement to form an association was more restrictive than its objectives require.

The High Authority does not have to express an opinion upon all the reasons advanced in the request for authorization, and is only required to justify its own decision, without having to concern itself with contrary arguments (Judgment 4/54, Rec. 1954-1955, p. 196; Judgment 6/54, Rec. 1954-1955, p. 220; Judgment 2/56, Rec. 1957, p. 36).

Above all, the High Authority came to no final decision with regard to the conditions for authorization contained in paragraph (2) (a) and (b) since the incompatibility of the agreement with paragraph (2)(c) was already clear.

(b) Insufficiency of reasons with reference to the requirements of Article 65(2)(c) of the Treaty, especially with regard to a power to determine prices of Ruhr coal

(a) According to the *applicants* the High Authority does not have sufficient regard to 'the qualitative aspect of the power to determine prices' and infers this solely from a few statistics, in particular from the fact that the applicants effect 80% of their sales in the Federal Republic and fulfil 73.1% of Germany's coal consumption requirements, and also from the fact that their sales within the Federal Republic represent 59% and 48.5% respectively of sales in the Common Market of coal and coke. This shows clearly that the concept of 'power to determine prices' has been misunderstood. This power can never result from mere figures.

The *defendant* states that on the basis of the above figures it would be illogical to deny that the undertakings in question are in a position to determine prices on the market. In Recital No 12 of the statement of reasons for the Decision, here referred to by the applicants, the High Authority first studied the various aspects of the problem and then recapitulated the constituent factors of the situation in a 'comprehensive assessment'.

(b) According to the *applicants* the High Authority also failed to appreciate the fact that a power to determine prices can never be ascertained on the basis of the circumstances obtaining during a given year; the High Authority has consistently taken as its basis the year 1959 alone, whereas the market situation and the actual state of competition can only be judged over a longer period of time. Had the High Authority adopted the latter method it would have found that the state of competition in respect of coal production in general, and of Ruhr coal in particular, had been deteriorating steadily for years, notably because of the increasing consumption of fuel-oils within the Federal Republic. The *defendant* replies that the year 1959, upon which the contested Decision is principally based, was the most unfavourable year for the coal market up to the present time. It is thus in the applicants' interest that it be taken into account. Furthermore, 1959 was the most recent complete year when the decision was taken.

Further developments would not necessarily follow the pattern predicted by the applicants since in 1960 a measure of equilibrium between production, employment of workers and sales was already beginning to emerge in the Ruhr coalfield. This is borne out by the decrease in production losses as a result of working hours lost through absenteeism and the diminution of pit-head stockpiles.

Finally, the argument as to competition from fuel-oils is only of very relative value. The use of fuel-oils in proportion to the total consumption of energy is less in the Federal Republic than in the other coal-producing countries of the Community.

(c) The *applicants* state that:

— the High Authority clearly misunderstood the concept of 'power to determine prices' and thus did not conduct a sufficiently rigorous examination of the facts;

— the High Authority is unable to show that a power to determine prices independently of the market situation would arise;

— the mere fact that Ruhr prices have for many years stood below cost prices and are, almost without exception, the lowest in the Common Market, shows that they are not established freely but rather as a result of the competition between Ruhr coal and coal from other mining areas of the Common Market and third countries;

— the High Authority states that a

joint-selling agency could compensate decreases in revenue brought about by measures intended to meet competition and provide a choice between those mines best able the make deliveries at competitive prices. The ability to bear decreases in revenue does not depend upon turnover figures but upon costs and profit-margins; furthermore, improved distribution by means of the careful choice of suppliers has nothing to do with the power to determine prices.

The *defendant* observes that although this matter has no bearing upon the present case, it would like to point out certain inconsistencies on the part of the applicants and to correct certain statements. In particular, the defendant emphasizes that coal prices are showing a tendency to rise, whereas fuel-oil prices are falling.

The fact that the cartel is not capable of raising prices does not indicate that it is not in a position to determine them; it merely shows that the cartel has already exhausted its influence over the market and that the present price level is due to the existence and power of the cartel. Any power over the market, even a monopoly, has natural limitations.

(d) The *applicants* state that the High Authority was mistaken upon certain matters of detail; by arriving at inexact or incomplete findings in respect of isolated facts it was acting contrary to its Eighth General Report on the activities of the Community; it failed to appreciate the following matters, amongst others:

— the competition from coal from Belgium and the Netherlands, particularly in Southern Germany, and the fact that deliveries of coal from the Ruhr to the Netherlands have for some time been made at prices aligned on Dutch prices;

— the competition existing between Ruhr coal and coal from the other German coalfields, as well as the fact that neither German nor foreign coalfields reacted to any great extent to price changes effected a short time previously in the Ruhr;

— the importance of many facts as to competition from coal from third countries;

— the High Authority itself finds that coal is faced with ever increasing competition from fuel-oils. How can this fact be reconciled with the alleged power to determine prices? Although it is true that competition from fuel-oils affects different types of coal in different ways, these different types are interdependent to a large extent, since the various solid fuels are very widely interchangeable;

— the High Authority ignores several aspects of the development of competition between coal and fuel-oils.

The *intervener* accuses the High Authority of illogical behaviour, in that it did not draw the requisite conclusions from its own Ninth General Report and from the statement of the President of the High Authority before the European Parliament on 8 May 1961. Furthermore the High Authority failed to take sufficient account of the opinions of experts and trade unions, and of social requirements.

The *defendant* gives the following reply to these matters:

— The High Authority considers that the Common Market exists on the basis of normal competition. The real question is whether the influence exerted by other Community undertakings on the prices of Ruhr undertakings is so strong that the latter can no longer determine independently list prices within their principal sales-area.

— There is nothing contradictory in stating that competition from coal from third countries co-exists with the power to determine prices.

— The applicants' view, that even a small volume of imports can influence

price-levels, clearly amounts to saying that a cartel which dominates the market must be authorized if between 5 and 10% of 'outsider' undertakings threaten its position. The references to the Eighth General Report are beside the point; even in the event of a structural crisis the Treaty does not provide for a 'structural crisis cartel' to resolve it. The proposed agreement has no such object in view, since it does not provide for a controlled decrease in production capacity.

— If one deduces from the use of measures dictated by commercial policy that the Ruhr lacks the power to determine prices one is led back to the argument that the High Authority and the Government of Member States have no right to intervene as long as cartels are capable of attaining the objectives of the Treaty.

— The extensive exposition devoted to the question of fuel-oils is irrelevant. The High Authority gave express recognition in the statement of reasons for its contested Decision to the fact that fuel-oils present a strong and ever-growing element of competition. It is generally agreed, moreover, that this competition affects different types of coal in differing ways.

— Coking coal appears to be least affected by competition from fuel-oils. Prices of this type of coal have been rising steadily and were raised again in 1960. The general decrease in production affected coking coal less than other types. In fact 1% more was extracted in the Ruhr in 1960 than in 1959. Furthermore, stocks fell and statistics show that cokes for blast furnaces and foundries are virtually immune to competition from fuel-oils. The alleged tendency amongst smelting-works to product their own coke is also unfounded: the proportion of coke produced in this way has for years amounted to less than 10% of total production in the Federal Republic.

— As for 'certain types of anthracite', it is characteristic of the applicants to request authorization to conclude agreements for the balance of employment, wherein it is noted that, with regard to the anthracite in question, far from experiencing a recession, producers are often unable to meet the demand.

(e) The *applicants* express the opinion that the 'Ruhrkohle Verkaufsgesellschaft mit beschränkter Haftung' has no 'power to determine prices' since it cannot make an independent choice as to the level of prices in respect of a substantial proportion of its sales. The influence on prices which would result naturally from the formation of a single joint-selling agency, in that it eliminates competition between the members of the cartel, is not relevant to the question whether the cartel as such has the actual power to determine prices on the market for the goods it sells. The influence upon prices exercised by the practice of joint selling does not amount to domination of the market or to the exercise of a power to determine prices within the meaning of Article 65(2)(c) (cf. the opinion of Mr Advocate-General Lagrange in Joined Cases 36 to 38/59). In the present case, there could only be said to be a prohibited cartel if 'Ruhrkohle Verkaufsgesellschaft' no longer encountered any real competition on the market.

The *defendant* emphasizes the difference between 'fixing' and 'determining' prices. Moreover, certain statistics constitute in themselves a statement of reasons and dispense with the necessity for lengthy observations; 80% of the applicants' total sales are made in the Federal Republic, and 73.1% of German coal consumption is met by undertakings in the Ruhr basin. These figures raise a presumption that a power of determining prices independently on the German market does exist. This being so, it is for

the applicants to show that there is real competition.

(f) The *applicants* state that there is clearly no cartellization in respect of a substantial proportion of the products in question in the Common Market.

As already observed, the absence of the qualitative element precludes the existence of a prohibited cartel. Some examination should however be made, as it were by way of a subsidiary consideration, of the extent of the quantitative element. First, the data provided by the High Authority contain a large number of uncertain factors which are useful only as approximations, and which impart a measure of unreliability particularly to the figures with regard to coke. Moreover the High Authority should not have taken into account reserved stocks, that is, sales made not through the joint-selling agency but directly by the mines themselves, as for example in the case of all deliveries for the use of an undertaking of which the mine is merely one part, as well as deliveries between associated undertakings. Quantities thus delivered fall outside the control of the joint-selling agency, do not come on to the market and do not affect competition.

In its Decision the High Authority at no point defines in detail what it means precisely by a 'substantial part' of the 'products in question' or why, in its view and on the basis of the figures it uses, it should be thought that the cartel in fact covers a 'substantial part' of those products within the Common Market.

The High Authority does not indicate why the 'products in question' should not rather mean the total of primary sources of power available for sale within the Common Market.

As to the matter of the accuracy of the figures contained in the statement of reasons for its Decision, the *defendant* recalls that these figures are intended to form the basis of a value judgment and indicate an order of magnitude. As the applicants themselves admit, all such calculations contain a large number of uncertain factors. The statistics contained in the Decision and the pleadings were supplied either by the Statistical Office of the European Communities or by the official departments in Germany.

It is not true to say that 'internal consumption', apart from consumption by the mines themselves, and deliveries to associated undertakings should not be attributed to the undertakings in question, because the market and competition would not be effected by them. The cartel defines the 'concepts, rules and conditions governing internal consumption by factories' and it supervises adherence thereto. This system enables the cartel to control sales and to determine prices.

It should be mentioned that deliveries made through the cartel for internal consumption by factories always come within the sphere of reciprocal economic relations, to the exclusion of all competition. The price and sales policy practised by the cartel determines the extent to which it is in the interest of the undertakings in question to obtain their supplies through the channel of internal consumption. It is for this reason that decisions with regard to prices taken by the cartel also affect all deliveries for internal consumption.

2. *Infringement of the Treaty*

(a) Infringement of Article 65(2)(a) and (b)

The *applicants* take the view that although the High Authority recognized that the necessary conditions for authorization contained in Article 65(2)(a) were fulfilled, it chose the wrong point of departure for its further argument. The question whether an agreement is more restrictive than its objective requires is unanswerable without clearly establishing all the positive results, both immediate and future, in the sense

intended by Article 65(2)(a), which could be attained by the application of that agreement.

The insufficiency of the statement of reasons is such as to constitute in itself an infringement by the High Authority of its obligation under the Treaty to examine the facts of its own motion.

The only indications of the reasoning adopted by the High Authority in construing Article 65(2)(b) lie in its use of the expressions 'considerable resources' and 'centralization' (paragraphs 5 and 6 of Recital No 7 of the Preamble to the contested Decision). These show, at most, that the High Authority sees in the joint-selling agency an undesirable concentration of power. Furthermore it is clear from the French text of Article 65(2)(b) that it applies to the relationship between the cartel and its members, not to that between the cartel and the rest of the market, which is governed by Article 65(2)(c). This interpretation is confirmed by the similar provision contained in Article 85(3)(a) of the Treaty establishing the European Economic Community, which clearly expresses the same objective as that assigned to Article 65(2)(b), namely that restrictions imposed upon the members of the cartel by the terms of the agreement must be limited to what is indispensable.

As a subsidiary point the *applicants* maintain that whatever interpretation is put upon Article 65(2)(b), even if account is taken of the effects of the cartel upon the market, it cannot be said, in this case, that any restriction exists which is not covered by those objectives of the agreement which are recognized as legitimate by Article 65(2)(a).

The *defendant* in the first place qualifies to a certain degree the assertion that it had acknowledged that the conditions for authorization required by Article 65(2)(a) were fulfilled.

As to the alleged infringement of Article 65(2)(b), the *defendant* observes that:

— It is not easy to understand how a buying and selling organization can result in improvements in production.

— The High Authority was unable to find that a single sales organization was essential in order to achieve noticeable improvement in distribution. A more thorough examination of this question would have been necessary only if the agreement was one for which authorization could be granted. Since, however, this is not the case no decision was taken with regard to Article 65(2)(b).

— The provisions of subparagraph (b) do not only refer to internal relationships between members of the cartel. Reference should be made in this connexion to the judgment of the Court in cases 36, 38 and 40/59 of 15 July 1960, which establishes that there is no justification for pleading in support of Article 85 of the Treaty establishing the European Economic Community. 'More restrictive', within the meaning of Article 65(2)(b), refers to restrictions upon competition whose importance grows with the number of undertakings which are coordinating their market behaviour.

(b) Infringement of Article 65(2)(c)

(a) General

It is the opinion of the *applicants* that Article 65(2)(c) should be interpreted in the light of the general objectives of the Treaty and that its intention is to avoid an 'excessive' restriction of competition where a cartel operates usefully in accordance with the requirements of Article 65(2)(a) and (b).

By enabling the High Authority to refuse its authorization for a cartel agreement under certain circumstances, even if it would make for a substantial improvement in production or distribution, Article 65(2)(c) represents an exception to the rule that 'useful' cartels,

for the purposes of subparagraphs (a) and (b), are to be authorized. According to a general principle of interpretation, a provision creating an exception to a rule is to be construed strictly (Judgment 7/56 and 3 to 7/57, Rec. 1957).

The applicants give an account of their interpretation of Article 65(2)(c) and extract the four conditions contained in this provision. They emphasize that the extent of the cartel (quantitative criterion) is only of importance if, in relation to this cartel, 'a certain concentration of power' (qualitative criterion) has previously been established. Comparison with Article 85(3)(b) of the EEC Treaty is especially rewarding, as it also is intended to preclude domination of the market through the concentration of economic power and the elimination of competition. A cartel can only have a decisive influence on the market when the market is already 'essentially independent of the law of supply and demand' by reason of the existence of the cartel and its monopolistic power to determine prices. The French version of the Treaty, American anti-trust case law, numerous authors and various parliamentary documents relating to the ratification of the Treaty are in favour of this interpretation.

However, the High Authority (Recitals 9 and 10 of the preamble to the contested Decision) considers the 'part of the market' covered by a sales cartel only as a quantitative element, although it appears on occasion to have held the contrary view (Recital 11 of the preamble to the contested Decision and especially Decision No 44/59).

Such an interpretation of Article 65(2)(c) infringes the Treaty.

The *defendant* is of the opinion that the legal arguments put forward by the applicants and the intervener take Article 65(2)(c) out of context and alter its meaning. According to them the essential condition which emerges from it is that the common organization must not dominate the market in fuel and power. So construed, Article 65 would be practically pointless and the High Authority would be able, in particular, to authorize a cartel of all the coal producers of the Community, which would be absurd. Special care must also be taken in examining the reference to the general objectives of the Treaty. The Treaty contains no provision from which it is possible to conclude that cartels have the right to take upon themselves the Community's organizational duties, and thus to encroach upon the jurisdiction of the High Authority. The provisions with regard to agreements are not contained in Articles 2 and 3 of the Treaty but solely in Article 65. The rule is as follows: 'The elimination of competition as such by the formation of cartels is illegal, prohibited and void'. Article 65(2)(c) is not an exception. The prohibition of cartels is the rule, their authorization the exception.

It is not the abstract or concrete danger that the objectives of the Treaty will be contravened which forms the subject matter of Article 65(2)(c), but the extent of the restriction upon competition as such. Agreements falling with Article 65(2)(c) are absolutely prohibited as the result of what according to the clear wording of the Treaty is an insurmountable contradiction of the principle of competition. The exceptional authorization of a cartel agreement cannot in any event be granted where the results of this agreement may concern a 'substantial part of the products in question', since the market would thereby be so deprived of competition that the absolute limit laid down for the intervention of cartels on the market would be reached.

This provision may be regarded as 'quantitative' in character, but it should not be forgotten that its sole aim is to limit the extent of restrictions upon competition, which is of wholly material significance.

Article 85 of the EEC Treaty, in contrast

to Article 86, speaks not of a dominant position within the market, but of the elimination of competition, thus reinforcing the High Authority's argument.

(b) The four conditions contained in Article 65(2)(c)

(i) The concept of 'power to determine prices'

The *applicants* explain their conception of 'power to determine prices' within the meaning of Article 65(2)(c) of the Treaty. In order to be able to come to the conclusion that this condition has in fact been fulfilled the High Authority would have had to take account in concrete form of the actual market situation, and in particular of:

— the changed position of coal on the fuel and power market;

— competition not only from other Community undertakings but also from undertakings in third countries and above all from suppliers of fuel oils;

— the pressure on prices resulting from the high level of stocks and the existence of substitute products.

The High Authority itself states, in its Eighth General Report (1960, p. 28) under heading 34:

'The multiplicity of sources of power and of their application, as well as the growing interchangeability of forms of power of themselves make for the creation of a single power-market.'

Thus there can be no question of the domination of the market by a single selling agency for Ruhr coal.

The *intervener* emphasizes that a 'realistic and plausible conception of a monopoly' must be adopted, such as that advocated by the mineworkers' union, which stated, in 1960, that the High Authority's argument was contradicted 'by the coal and coke reserves stocked within the Ruhr and by the difficulties which have been experienced since 1957 in effecting sales, since whoever dominates the market can avoid loss of sales at the expense of other producers'.

The High Authority ought to take account of all factors relevant to the market situation, whether these factors fall within the sphere of the Common Market or not (for example general power policy and social repercussions). The High Authority's General Reports and certain of its members have expressed similar views. In its reasoning, however, the High Authority inclines towards a very formal definition of what the Treaty means by power to determine prices — 'pouvoir de déterminer les prix'. This definition of the concept is further removed from the real market situation by the fact that the High Authority feels able to include in the concept of power within the meaning of Article 65(2)(c) 'the opposite concept to that of power, namely the fixing of prices resulting from a position on the market which is clearly weak and threatened in the long term'.

The *defendant* replies that the only criterion contained in Article 65(2)(c) is that of the 'substantial part', and that the applicants are following Börner in reading into subparagraph (c) a 'qualitative' criterion and giving it a certain precedence. An examination of this criterion would be confused, whereas it is simple and practical to examine whether the agreement affects a 'substantial part' of the products in question.

The quotation from the Eighth General Report (p. 38) is incomplete, and refers in fact to the energy policy to be put into effect. The energy policy to be followed is a matter for the competent national and supranational agencies; the Treaty has not entrusted its direction to the cartels.

As for the criticism directed more particularly at the market to be taken into consideration, it should be remembered that the High Authority made its examination of the 'Common Market', within the meaning of the

Treaty. The intervener forgets that this case is concerned not with problems related to energy policy and its co-ordination, nor with those raised by the amendment of the Treaty, but solely with the judicial examination of Decision 16/60, on the basis of the text of the Treaty.

(ii) The concept of 'marketing control'

The *applicants* maintain that the High Authority had no very clear understanding of the concept of marketing control. A concrete indication of such control lies in the influence exerted on the market by supply. The High Authority, however, overlooked the qualitative element of market control, as well as failing, in evaluating the quantitative element, to recognize the fact that total reserves, the volume of which is fixed at the discretion of the mining companies, are not controlled by the joint-selling agency.

The *defendant* observes that the applicants criticize the finding with regard to marketing control by using the same arguments as they employed in relation to the power to determine prices.

It is not true to say that the High Authority completely overlooked the 'quantitative' element (second paragraph of Recital No 13 in the statement of reasons for the contested Decision). By ensuring that they control a 'substantial part' of the coal and coke in the Common Market the undertakings concerned acquire the power to determine not only prices but also tonnages, regions and buyers; this they consider necessary in order to prevent the encroachment of competitors upon their main sales areas.

The cartel agreement contains, as has been remarked above, a definition of reserved stocks as well as the rules and conditions which must be obeyed by the undertakings in order to sell these stocks.

The sales organization thus quite definitely extends its control to all sales of stocks and its price and sales policy is the only relevant one.

(iii) The concept of a 'substantial part' of the products in question

The *applicants* refer to the fact that the High Authority makes use of output figures when considering the applicants' share of the market (as for example in Recitals 10 and 12 of the preamble to the contested Decision). The use of these figures is illogical: calculation of the quantitative element referred to in Article 65(2)(c) should be based upon quantities actually sold on the market rather than upon quantities produced. The High Authority should have left out of its calculation of the tonnage put on to the market not only that portion consumed by the mines themselves for their own purposes, concessionery coal allowed to employees and free supplies, tonnages conveyed to coking plants and to briquette factories belonging to the mines, unrestricted sales and sales effected outside the Common Market, but also other reserved tonnages, that is, deliveries to associated undertakings or to other divisions of the same undertaking. These movements of goods do not affect the market since the associated undertakings have themselves to use the tonnages they receive for their own internal consumption.

Furthermore, the 'products in question' should be taken to mean all primary energy available for sale in the Common Market. Reference is made in this connexion and as regards the statistical data, to what has been said as to the insufficiency of the statement of reasons.

In the *defendant's* view the applicants have construed subparagraph (c) in a way which is incompatible with its actual wording, since in their interpretation:

— the expression 'substantial part' is denied any significance;

— the words 'the products in question

within the Common Market' are improperly extended to a supposed power market, whereas in fact they can only apply to the coal and steel market;

— 'market domination' is substituted for the criteria set out in subparagraph (c), whereas the former expression was well-known to the authors of the Treaty, as is shown by Article 66(7), and was consciously omitted here;

— the first part of subparagraph (c) would become superfluous, given the wording of the second part;

— it amounts to saying that there is no longer a common market for coal.

(iv) The concept of the 'Common Market'

The *applicants* take the view that an investigation confined to the German coal market (Recitals 12(a) and (c) of the preamble to the contested Decision) does not comply with Article 65(2)(c). Unlike Article 66, Article 65 of the Treaty concerns the whole of the Common Market.

The *defendant* replies that the market, that is the area of actual competition, should be delineated in accordance with the elements of competition, having regard, therefore, to the competing products and to the geographical extent of the area in which this competition occurs. The High Authority does not consider that the political frontiers of a Member State must necessarily coincide with the limits of the competitive market under consideration.

(c) Manifest failure to observe the Treaty

The *applicants* state that, quite apart from all the errors of law contained in the contested Decision, the High Authority's 'general evaluation' of the situation is so distorted by the latter's fragmentary examination of the state of competition in respect of each product, no account having been taken of the pressure exerted by all the competing products, that it amounts to a patent infringement of the provisions of the Treaty.

The *intervener* points to the inaccuracy of the High Authority's description of the coal market. This market exists within a partially integrated system, which invalidates the use of factual and legal criteria similar to those applied to a study of a totally integrated market, such as the American market. Thus the power to determine prices in the Common Market does not at all correspond to that power within the meaning of Article 65 of the ECSC Treaty.

The *defendant* replies that the evaluation under Article 65(2) is a general evaluation in the sense of the second sentence of the first paragraph of Article 33 of the Treaty. This explains the applicants' constant efforts to establish the existence of a manifest failure to observe the Treaty which the characterize, for example, as 'a lack of logic'. They contest certain facts as being inaccurate and state that facts which were omitted should have been taken into account, but they do not succeed in showing that the general evaluation would consequently have been different.

Furthermore, the application to intervene contains no valid statement of reasons to support the complaint of a manifest failure to observe the Treaty, and above all no indication of the kind of market upon which the High Authority should have based its evaluation.

(d) Exceptional circumstances

The *intervener* takes the view that the High Authority failed to take account of a principle of law of general application in applying Article 65: the duty incumbent upon all executive bodies to take exceptional circumstances into consideration when applying the law. This principle is applied in all Member

States of the Community in one form or another and has been particularly well defined in decisions of the Conseil d'État and in French administrative law.

The High Authority did not take account of this principle in exercising its jurisdiction and discretionary power in the present case. It is, however, conversant with this principle, having already applied it in two cases, namely the reorganization of the Belgian coal industry and the settlement of the ATIC case.

The *defendant* replies that the existence of 'exceptional' circumstances is doubtful and that a precise definition of the 'nature and legal consequences' of the principle invoked is required. The intervener appears to expect the administration to take a decision contrary to a written rule of law, that is, to authorize cartels and thereby infringe the Treaty. According to French legal writers the principle can normally be applied only by short-term emergency measures. Furthermore, the comparisons raised are not pertinent.

3. *Misuse of power*

The *applicants* raise this submission in their application but expressly withdraw it in their reply.

IV — Procedure

The written procedure in the main action and the application to intervene followed the normal course. However, following receipt of the application, letters were exchanged between the Registrar and the applicants concerning the evidence stated in the application to be available. At the request of the parties the President of the Court extended the time limit for the submission of certain pleadings.

On 19 October 1961 the Court decided to put a number of questions to the parties to the main action, to which they replied during the oral procedure.

At the request of the parties, the President of the Court, by a ruling of 26 October 1961, adjourned the opening of the oral procedure, originally set down for 7 November 1961, to a date to be fixed. The President of the Court then fixed the opening of the oral procedure for 1 February 1962.

The Advocate-General, Mr K. Roemer, in his opinion of 2 March 1962, submitted that the Court should annul the contested Decision.

Grounds of judgment

Admissibility

No objection has been raised as to the admissibility of application 13/60, and no grounds exist for the Court to raise the matter of its own motion.

Decision No 16/60, the annulment of which is requested, is an individual decision. Since it arose out of a request made by the applicants, it is a matter which is of concern to them.

The intervention of the Land of North Rhine-Westphalia was allowed by an Order of the Court of 3 May 1961, and satisfies the requirements of Article 34 of the Protocol on the Statute of the Court of Justice.

For these reasons Application 13/60 and the intervention arising from it are admissible.

On the substance

1. *The submissions of the parties*

The applicants request the annulment of Decision No 16/60 on the grounds of insufficiency of reasons, erroneous findings of fact, misinterpretation and misapplication of the Treaty and misuse of powers.

In the reply they stated that 'it is no longer necessary to pursue the submission of a misuse of power'. It will therefore not be dealt with in this judgment.

The first submission comes under the head of 'infringement of an essential procedural requirement' and the second and third submissions under that of 'infringement of this Treaty or of any rule of law relating to its application'. In this judgment they will be dealt with separately under these two heads but in reverse order to that given above.

2. *Respective positions of the High Authority and of the Court with regard to Article 65 of the Treaty*

Article 65(2) stipulates that the High Authority may authorize certain agreements if it finds that they fulfil the conditions laid down in the Treaty. This wording strictly limits the subject matter of the present action concerning essentially the validity, with regard to the Treaty, of the reasons which led the High Authority to find that the authorization of a joint-selling agency, as sought by the applicants on 20 May 1960, could not be granted. These reasons are set out in Decision No 16/60 of 22 June 1960.

3. *Infringement of the Treaty*

Under this heading the applicants put forward two complaints: first, inaccurate interpretation and application of the Treaty; second, inaccuracies in the findings of fact. Under the first heading they maintain that there has been an evident misinterpretation of the Treaty's provisions.

A — Misinterpretation and misapplication of the Treaty

The applicants complain that the High Authority 'interpreted and applied in a manner that was wrong in law':

(a) the concept of 'the power to detemine prices';
(b) the concept of 'the control of marketing';
(c) the concept of 'a substantial part of the products in question within the Common Market'.

(a) *The concept of 'the power to determine prices'*

Both the applicants and the intervener state that in the particular circumstances of time and place in which the problem before the Court must be seen, there exists a profound difference between the power to fix and the power to determine prices. This assertion is expressed above all in the application in the following form:

'A person who merely formulates the effects of movements of the market on price levels does in fact fix prices, but cannot determine them. It is not this fixing of prices in the formal sense which Article 65(2)(c) prohibits, but rather the effective power which allows determination of prices independently of movements of the market'.

From the applicants' point of view, even if the single sales organization, referred to in this case, has the power to fix prices, it cannot have the power to determine them if it is obliged to align its prices policy on the prices of competing products, notably, in this case, the prices of coal imported from third countries and of fuel oils.

The High Authority considers, on the contrary, that a joint-selling organization gives the parties concerned the power to determine prices. This difference of interpretation is at the basis of the present litigation. In order to assess the comparative merits of the opposing contentions it is necessary to make some elaboration of the subtle distinction, in which the applicants' principal argument resides, between the 'power to fix prices' and the 'power to determine prices'. Such a distinction is nowhere explained in the Treaty or in the documents published at the time of its ratification.

An examination of the meaning of the words 'fixer' (fix) and 'determiner' (determine) furnishes no decisive grounds for this distinction. Although Article 65(1) prohibits all agreements tending *to fix or determine* prices, Article 65(2) permits the High Authority to authorize, in some circumstances, certain agreements, provided in particular that they are not liable to give the undertakings the power *to determine* prices. The difference in wording between Article 65(1) and (2) requires an explanation, which the distinction asserted by the applicants is able to provide.

Although clearly the Treaty establishing the European Economic Community cannot provide a decisive answer in the present case, it does give some indirect support to the applicants' argument, in so far as Article 85(3) of that Treaty, which deals with matters analogous to those governed by Article 65 of the Treaty establishing the European Coal and Steel Community, does not require that agreements capable of qualifying for authorization must not confer on undertakings the power to determine prices, but provides that they must not afford them the possibility of eliminating competition in respect of a substantial part of the products in question'.

If it is accepted that a common intention inspired the drafting of Article 65 of the ECSC Treaty and Article 85 of the EEC Treaty, the power to determine prices would be more or less equivalent to the power enjoyed by undertakings under a system where competition had been eliminated. This is clearly the applicants' argument.

This interpretation of the expression 'power to determine prices' is supported by Article 2 of the Treaty, which requires that the Community shall 'progressively bring about conditions which will *of themselves* ensure the most rational distribution of production at the highest possible level of productivity.' It is again supported in Article 5, where the Community is enjoined to 'ensure the establishment, maintenance and observance of normal competitive conditions'.

In the light of these considerations, the applicants appear to be justified in their arguments in favour of a distinction in principle between 'power to fix prices' and 'power to determine prices'. For the undertaking which is in a position to exercise it, the power to fix prices is an objective fact arising out of an easily perceptible organizational structure. The power to determine prices, however, resides in a power, given to the undertaking in a position to exercise it, to establish prices at a level appreciably different from that which would be established by the effect of competition alone. Thus, to show the existence of a power to determine prices, it is necessary to establish that the actual prices are, or could be, different from what they would have been in the absence of any power to fix prices. Such a proposition involves a subtle comparison between the actual and the potential, of a kind which must rest to a considerable extent on informed speculation.

The High Authority made such a comparison when considering the applicants' request for authorization of 20 May 1960, and in the Preamble to Decision No 16/60 it stated the reasons which caused it to find that the power to fix prices resulting from the existence of the joint-selling organization,

with which the present application is concerned, was equivalent to a power to determine prices.

It is, therefore, appropriate to examine the validity of these reasons in the light of the Treaty.

It is not disputed that a joint selling organization enables those who control it to exercise a limited influence upon prices and to ward off the danger of destructive competition (request of 20 May 1960, p. 25), by means of imposing upon all the undertakings under their control, subject to certain reservations, a uniform list of prices.

This is stated more precisely in the application (paragraph 39):

'A joint selling organization has, of course, by its very nature the duty to substitute itself for the individual members of the cartel . . . in order to prevent competition between the prices charged by members of the cartel.'

The same contention is stressed in the applicants' reply (paragraph 86):

'Naturally it is true that after the amalgamation into a joint-selling agency . . . price competition *between* members of the cartel disappears.'

(The word 'between' is underlined in the text.)

This elimination of competition between members of the cartel is the internal effect of the agreement. Through the elimination of competition between its members, prices within the cartel are freed not only from 'destructive' competition but also from the pressure of competition which would otherwise have been exerted by those producers with the lowest production costs against those who have, for whatever reason, higher production costs.

On this point the Court accepts the opinion of the High Authority to the effect that the joint-selling agreement,

'according to the very terms used by the applicants both in their request and in their application . . . gives them the opportunity to fix or to maintain, in their principal sales area, list prices which differ from what they would have been in the absence of a cartel agreement, . . . and which guarantee protection of their prices to the undertakings concerned in order that they may be free to carry out re-adaptation measures.' (Statement of defence, paragraph 19).

The use of this power is obviously subject to external competition, to be examined later, but, with that reservation, it involves a certain power to determine prices. Such power will be effective in so far as it eliminates the competitive pressure which would have reduced list prices — that is to say, therefore, in so far as the procedure of joint selling makes it possible to neutralize the effect which would have been exerted by offers from those member producers of the joint-selling agency who enjoy the lowest production costs.

Subject to the results of an examination of the effects of external competition just mentioned, it cannot be denied that the internal effect of the joint-selling organization involves a certain power to determine prices, and that the extent of such a power naturally depends upon the volume of production under its control. To obtain some idea of this volume it is sufficient to note, without here making the distinction between quantities produced and quantities sold (this distinction will be made in paragraph (c) below), that the Ruhr Valley produced, in 1960, 115 441 000 metric tons of coal (The High Authority's Statistical Bulletin, 9th year, No 4 Oct./Dec. 1961, Table C, pp. 4 and 5). This was produced almost entirely by the thirty-eight mining companies which are members of the joint-selling organization. These figures show the extent of internal competition eliminated by this joint-selling organization in the Ruhr Valley.

The foregoing is enough to show that the High Authority was justified in finding that this organization, by fixing, subject to certain conditions, the list prices applied by the undertakings under its control, had to some extent the power to determine prices.

However, such a power would remain purely potential if the competition from coal from other coalfields within the Community, coal from third countries and from fuel-oil, obliged the joint-selling organization to fix its list prices below the lowest level at which they would have been fixed under the ordinary mutual competition between Ruhr Valley undertakings, if this competition had not been eliminated by the joint-selling organization.

It is, therefore, appropriate to examine the effects of this external competition. This was done by the High Authority in paragraphs (b) (c) and (d) of its Decision No 16/60. In paragraph (b) of Recital No 12 of the preamble to that Decision, the High Authority lists the reasons for which it found that the power of the joint-selling organization to determine prices was not excluded by competition from other undertakings within the Community.

This conclusion is corroborated by the very structure of the Ruhr Valley coalfield. In fact, all undertakings producing heavy goods enjoy, in principle

and subject to certain reservations with regard to competition from goods which are lighter or less costly to produce, a margin of geographic protection within which they have the power to determine prices. The proximity between producers and consumers of fuel in the Ruhr Valley gives to the former an appreciable protection against many other producers in the Community.

The argument of the High Authority, according to which

'it would not appear that so far the undertakings of the Ruhr coalfield have followed the price fluctuations of other undertakings within the Community for the purpose of fixing their price levels, but that on the contrary it can be shown that the prices of Ruhr Valley coal have an appreciable effect upon calculation of prices in the neighbouring coalfields of the Community,'

raises a presumption in favour of the existence of a power to determine prices.

The argument of the applicants, that if the price lists of the Ruhr have not been reduced or aligned on the price levels of competing products

'this is because they are virtually without exception the lowest prices in the Common Market'

(Application, paragraph 35), if correct, gives rise to the presumption that, whatever the cause, the products of the Ruhr are not in immediate danger from competition from the other coalfields of the Community. This conclusion is confirmed by the volume of sales of Ruhr coal in its principal sales area. In 1959 these amounted to 88.4 million metric tons of coal or coal equivalents, including amounts supplied for the needs of the collieries themselves, out of 120.9 million metric tons, which is the total coal consumption of the Federal Republic of Germany — in all 73.1%. The unquestioned fact that the Ruhr Valley undertakings have scarcely made any use of their power to align their prices on those of other undertakings in the Community lends force to the preceding argument.

In paragraph (c) of Recital No 12 of the preamble to Decision No 16/60, the High Authority states the reasons which led it to find that the competition from coal from third countries, however appreciable, does not constitute an immovable barrier depriving the joint-selling organization of the Ruhr coalmining companies of a measure of flexibility in its price policy.

Although there is some difference of opinion between the parties as to the calculation of the ratio between tonnages imported from third countries

into the applicants' principal sales area, that is to say the Federal Republic of Germany, and the tonnages of coal produced by the applicants — according to the High Authority 6.3%, as against more than 15% according to the applicants — just as there is disagreement as to the basis to be used for assessing the significance of these figures, nonetheless it is clear that these figures do not support the view that coal imported from third countries has an irresistible effect upon the markets for Ruhr coal within its principal sales areas.

This situation is due both to the geographic protection which the majority of these sales areas afford to the Ruhr as opposed to most of the sources of production in third countries, and to the customs duties imposed by the Government of the Federal Republic on coal imported from third countries. The High Authority rightly observes that, in so far as any systematic price policy practised by producers in third countries did not take account of the market situation and the situation with regard to production costs, such dangers could be countered by measures of commercial policy.

Even before a customs duty on coal originating in third countries was introduced by the Federal Republic of Germany, the selling prices of Ruhr coal had not been directly determined by those of comparable imported coal. This shows that the power to align prices on those of products imported from third countries gives the joint-selling organization, with which the present application is concerned, the means to defend its position without altering its price lists throughout its entire sales area.

The equalization, within a powerful joint-selling organization, of diminishing returns as a result of price alignments and other competitive measures, multiplies the opportunities provided by these measures of directing competition, since it allows the selection in each case of the mine most favourably placed for making the delivery from the point of view of type of coal and transport costs.

For all these reasons the High Authority was justified in finding that the joint-selling agreement gives the parties to it such extensive opportunities for directing competition, that the existence of competition from producers in third countries does not deprive the joint-selling organization of the opportunity of determining prices in its principal sales areas (cf. Decision No 16/60, *Official Journal* No 47, p. 1024/60, first column, last paragraph).

In paragraph (d) of Recital No 12 of the preamble to Decision No 16/60 the High Authority states the reasons which led it to find that competition from

fuel-oil, although strong and increasing, does not deprive the joint-selling organization of some measure of freedom in selecting its list prices.

There is no doubt that competition from fuel-oil affects the different categories and types of coal in varying degrees, and that the least affected are precisely those which form the greater part of the applicants' output. Similarly, in so far as coal is supplied for burning, the position of fuel-oil in relation to coal varies in strength according to the use to which it is put. The line dividing the spheres of influence of fuel-oil and coal shifts in proportion to the relation between their prices. Consequently, as regards the competition from fuel-oil, there exists a range of prices within which the joint-selling body may choose, if not freely at least with a degree of freedom, its sales policy and, within certain limits, its list prices. The power to determine prices resulting from this is extended and strengthened by the introduction of a fuel-oil tax in the applicants' principal sales area. The conclusions to be drawn from these remarks are in fact confirmed by the difference in price alterations in the various categories and types of coal according to the extent to which they are in competition with fuel-oil.

The above considerations lead to the view that the joint-selling organization would have some power to determine prices. This conclusion is the opposite of that of the applicants who state that

'a person who merely formulates the effects of movements of the market on price levels does in fact fix prices, but cannot determine them'; (application, paragraph 26)

and that if a cartel controlling a substantial part of products on the market is

'made to bring its price policy into line with competing products, one cannot speak of the cartel as controlling the market'; (application, paragraph 22)

and again, that

'a cartel can exert a decisive influence on the market only when it is in no way subject to the law of supply and demand,'

that is to say, when it dominates the market (application, paragraph 24).

From these quotations it appears that if the applicants' view that the joint-selling organization does in fact create a power to fix prices it still does not give the power to determine them since, as it does not dominate the market, it would be unable to fix prices at levels appreciably different from those

imposed by the laws of supply and demand. Thus in 'fixing' list prices the joint-selling organization would have no other course than to ascertain market prices, these being 'determined' by the law of supply and demand, and more specifically, within the framework of that law, by the prices at which products of other mining areas of the Community, coal from third countries and fuel-oil are offered on the market.

This conception inevitably recalls the atomistic markets described by liberal economics, where each participant was confronted by a market price which he could in no way affect by his own policies. This was a state of perfect competition where, clearly, no supplier had the power to 'determine' a price, but was faced simply with the option to sell or not to sell at the market price, or to vary the volume of his supply in terms of market prices when his production costs varied with the quantity produced.

To see the coal or energy markets as perfectly competitive atomistic markets would be to ignore realities. They are not formed by a swarm of individual producers, unable to affect market conditions by the weight of their individual supplies, but are made up rather of a limited number of undertakings, whose production is almost always substantial. It is the nature of things which makes of the energy market a market in which large units confront one another.

In such a market the producers are not spared competition from their rivals but they do exert by their very size a considerable influence upon market prices and are by this very fact forced into a genuine sales policy.

The applicants themselves describe their behaviour thus:

'A considerable proportion of Ruhr coal is sold according to price lists, with special rebates (long-standing custom and quantity rebates). These rebates, which benefit all consumers who fulfil the required conditions, are a form of reduction of list prices adapted to meet the competitive situation. This alteration of list prices affects a considerable proportion of the total tonnage sold by the joint-selling agency. Further, to retain traditional markets, dispose quickly of current stock and if possible to reduce the high level of stocks, the Ruhr took advantage of the possibility of aligning its prices on those of third countries, in the first place, and, to a lesser degree, on those of other coalfields of the Coal and Steel Community. To this may be added buying-in operations carried out on the basis of a mutual aid programme and other policies effected to a large extent within the framework of the so-called "Erhard Plan"; in this connexion it may be observed that the High Authority itself referred to this buying-in as "*a posteriori* alignments",' (application, paragraph 35).

The applicants claim still more strongly that the coal prices of third countries are not market prices but artificial prices which are fixed strategically to conquer markets. The application goes on to claim that

'it is not possible when fixing price lists for Ruhr coal to take into account political dumping prices, as practised by the states of the Eastern bloc, or the prices of coal imported from third countries where transport charges cover only 60% of the costs or (as, for example, English coal) when the export prices are considerably below those of the (English) home market' (application, paragraph 35).

The applicants also state that the prices of fuel-oil are specially fixed so as to supplant coal from its sales areas, and thus are determined according to coal prices in these areas; they say in particular that

'the oil industry practises substitution competition (generally below cost price)';

that already

'the fact that the prices of fuel-oil, as distinct from the list prices of Community coal, are completely individual and variable, naturally makes it impossible to compete with fuel-oil by a general lowering of list prices. It is interesting to note here the view expressed by the Coal Committee of the O.E.E.C. in its Fourth Report (The Coal Industry in Europe, 1960, headings 5 and 31). The Committee remarks that the competitive advantage of petroleum producers over coal producers is that the former keep their prices flexible, are able, according to the state of the market, to discriminate between different consumers, and can, according to circumstances, sacrifice their prices in order to conquer to any extent the market' (application, paragraph 35).

More generally the applicants assert that

'it is impossible to state *in abstracto* whether or not there is any domination of the market. Such a question depends more on the actual state of the market, and particularly upon the structure of competition in the energy market.' (application, paragraph 32).

These quotations show clearly that within the energy market none of the sellers is confronted with unchangeable prices but each seeks to 'determine' them and to a large extent, although this varies according to circumstances, succeeds.

Thus it can be seen from the foregoing analysis that the competition which in fact exists in the energy market is unlike that of the atomistic markets,

where each participant is faced with a market price which it cannot influence by its own behaviour, but is a competition between large units, each endowed with a certain power over prices and the ability consciously to adapt their market behaviour to that of their partners. Such a market is characteristic of a state of oligopoly, which is also one of imperfect competition. The theory of imperfect competition has now passed into doctrine, which sees in oligopoly a system within which each seller, when making his economic calculations, takes into account the probable market behaviour which his competitors will adopt in response to his own decisions, for the simple reason that what they do is a direct reaction to what he does. The contrast of this with a state of pure competition is fundamental in this matter. A noted author defines this oligopolistic market as a market in which 'prices can be fixed by the different undertakings themselves, and thus become a part of their market strategy'. He adds that 'it is particularly important that the Community's policy with regard to competition should aim to limit the strategic scope which any such oligopolies may have in the market'. (Bulletin of the European Economic Community, No 7-8, July-August 1961, pp. 21 and 22).

These analyses apply exactly to the coal market and even to the energy market as the applicants themselves have described it. In such markets the power to fix prices is not faced, as it would be in the case of pure competition, with the immovable barrier of market prices, but has an ill-defined area of manoeuvre within which the authority fixing the prices may choose the level at which it establishes them. The fixing of prices within this ill-defined area is a product of the strategy of the large units which confront each other in the market, not the result of a simple ascertainment by them of a market price, which is itself dependent on their decisions.

If the fuel market is indeed an oligopoly, offering to its participants the opportunity of a real economic strategy, it must necessarily confer a certain power to determine prices.

The Treaty establishing the European Coal and Steel Community takes into account the technical and commercial evolution which constantly augments the size of economic units, increasingly giving the coal and steel markets the character of an oligopoly.

The provisions of Article 65(2) and Article 66(2) evidence the intention of the authors of the Treaty not to restrict this evolution, provided that it serves the objectives of the Treaty and particularly that it enables the necessary measure of competition between the large units to exist, in order to safeguard the basic requirement of Article 2, namely, that the Community shall

'progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States.'

This insistence upon the safeguarding of a certain measure of competition within a system of imperfect competition, such as that of the coal and steel market, has clearly inspired one of the conditions imposed by Article 65(2) upon joint-selling agreements qualifying for authorization, namely, that they should not give the undertakings concerned the power to determine the prices of a substantial part of the products in question within the Common Market.

The Treaty goes even further than Article 65 in its concern not to stand in the way of necessary evolution since it goes so far as to acknowledge in Article 95 that 'fundamental economic or technical changes' could 'make it necessary to adapt the rules for the High Authority's exercise of its powers'. On 20 July 1961, the High Authority and the special Council of Ministers of the European Coal and Steel Community sought the opinion of the Court pursuant to Article 95 on a draft amendment to the Treaty, designed to counter fundamental and persistent changes in marketing conditions in the coal and steel industries.

The Court noted in its Opinion 1/61 of 13 December 1961 that

'in principle, Article 95 does not prevent an adaptation of the rules relating to the powers conferred by Article 65 upon the High Authority by a modification of Article 65(2), with a view to giving the High Authority power to authorize either agreements of a different nature from those provided for in the present paragraph, but with a similar objective, or agreements of the same nature as those provided for in the paragraph presently in force but with a different objective, or, finally, agreements differing both in nature and objective',

and that

'amendments to the first part of the first subparagraph of paragraph (2) which allow the authorization of types of agreement not provided for by the paragraph now in force and of Article 65(2)(a), concerning the objectives of agreements qualifying for authorization, may constitute an adaptation of the rules relating to the High Authority's exercise of its powers of authoriza-

tion, but on the other hand the deletion of Article 65(2)(c) would go beyond the bounds of any adaptation.'

Thus the Court has shown that it intends, in accordance with the applicants' wishes, to

'interpret and apply the rules of law, bearing in mind the new economic situation (and) . . . the new burden imposed by the dynamics of economic life', (reply, paragraph 53)

but that it cannot accept the elimination of the basic requirements of Article 65(2)(c), designed as they are to safeguard, in the oligopolistic market in coal and steel, the measure of competition which is indispensable in order that the basic requirements set forth in Articles 2, 3, 4 and 5 of the Treaty may be observed and in particular that 'the maintenance and observance of normal competitive conditions' may continue to be ensured.

The High Authority considered that this indispensable measure of competition was adequately ensured by the three joint-selling agencies authorized in its Decisions Nos 5/56, 6/56 and 7/56 of 15 February 1956, but not by the continued existence of the common machinery authorized by Decision No 8/56 of 15 February 1956 or by the joint-selling organization prohibited by Decision No 16/60 of 22 June 1960.

The Court sees no reason for accepting that, by insisting upon maintaining this minimum measure of competition within the Ruhr coalfield, the High Authority has failed to observe the letter and the spirit of the Treaty, and particularly the obligations imposed upon it by Articles 2, 3, 4 and 5.

Once it has been found that the joint-selling organization held a certain power to determine prices, the issue in the present application is reduced in the last analysis to the question whether this power applies to a substantial part of the products in question within the Common Market. This question will be examined in paragraph (c) below.

(b) *The concept of 'the control of marketing'*

In Recital No 13 of the preamble to Decision No 16/60, the High Authority finds that, in transferring to the joint-selling organization the sole rights over the marketing of their products (except for the reserved tonnages), the undertakings concerned give to such an organization the power to direct, according to the requirements of its own sales policy, the tonnages transferred to it for sale.

This finding is enough to show that by securing control of a part of the coal and coke in the Common Market, the undertakings concerned acquire the power to determine the quantities, areas and buyers which they consider essential in order to prevent the penetration of competitors into their main sales area.

The control exercised by the sales agency on the policy of price alignment also gives the agency the opportunity, by directing supplies at will even in comparatively small amounts in relation to its total sales, of affecting profoundly the marketing of its competitors, and thereby reinforces the control of its own marketing.

It is impossible not to see in this power to regulate marketing, which is vested in the joint-selling agency, a certain power of control over marketing within the meaning of Article 65(2)(c).

The complaints formulated by the applicants, which raise the issue of the inclusion of the reserved quantities are not of such a nature as to alter this qualitative conclusion of the Court, as will be shown in paragraph (c) below.

(c) *The concept of 'a substantial part of the products in question within the Common market'*

The finding that a joint-selling agreement gives the undertakings concerned a power to determine prices or to control marketing is not sufficient in itself to enable the High Authority to refuse authorization. It must further be shown that this power applies to a substantial part of the goods in question within the Common Market.

It is, therefore, necessary to examine whether this is the case with regard to the power to determine prices and to control marketing which the joint-selling organization in this case has been shown to have.

The Treaty does not lay down the criteria for establishing whether a substantial part of the products in question is subject to the control of the joint-selling organization. The provisions of the Treaty taken as a whole point to the view that a power to determine prices or to control marketing applies to a substantial part of the products in question within the Common Market when the full extent of the effects which it exerts is not of secondary or minor importance but is such as to jeopardize, within the Common Market, the measure of competition intended by the Treaty, and the task which Articles 2, 3, 4 and 5 assign to the Community.

It has been shown already that there are no grounds for claiming that the Treaty intended to prohibit the existence or creation of the large production or sales units which are a characteristic feature of the coal and steel market. It would be unrealistic and contrary to the requirements of technical development to wish to reestablish an atomistic market which would be quite unthinkable in the case of the products at issue here.

The problem to be resolved in this section is: at what point does the volume of offers for sale under the control of a cartel constitute a sufficiently substantial part of the products in question within the Common Market for it to render the competition existing within the market imperfect, thereby jeopardizing the aims of the Treaty?

The High Authority gave, at Recital No 9 of the preamble to Decision No 16/60, a table specifying for the year 1959 the proportion of tonnages of coal, briquettes and coke sold on the Common Market by the applicants. These proportions vary between 26.1% and 43.7%.

The applicants contest these figures on the grounds in particular that certain reserved tonnages and supplies to associated undertakings have been wrongly included in the calculations.

The Court cannot uphold the applicants on this issue. It was correct to include these factors in the statement of quantities sold, since no other basis of calculation would have given an accurate picture of the part played by the applicants in the market as a whole. Even if it were to be conceded that a substantial part of the reserved tonnages is not involved in essentially commercial transactions, such a concession would not invalidate the accuracy of the High Authority's calculations. In fact, tonnages in the same category deriving from other producers in the Common Market should in this case equally be excluded from consideration and this would alter the absolute value of the figures, but would only alter to a negligible extent the proportion of tonnages sold which is the sole important factor in this case.

In any case the Court cannot accept the applicants' argument which would exclude from their calculations deliveries to associated undertakings. In fact, as the High Authority has rightly held in the contested Decision and throughout these proceedings, the question concerns quantities the prices of which are fixed, whether directly or indirectly, by the joint-selling organization.

Whatever importance is attached to criticisms of the figures submitted by the High Authority, the results show clearly, even if certain corrections were to be made to them, that the quantities sold by the joint-selling

organization concentrate under the direct or indirect influence of this organization a substantial fraction of the products in question sold in the Common Market and that therefore the powers vested in this organization extend to a substantial part of the products in question in the market.

However, in the competition of large industrial units, such as characterize the common market in coal, the influence of a sales organization depends not so much upon the volume of products it controls as upon the volumes controlled by the rival organizations which confront it on the market.

It is appropriate to note in this respect that Article 66(2) provides that, in order to measure the effects of a concentration, either as a barrier to effective competition or as a means of evading the rules of competition instituted under the Treaty, the High Authority shall

'take account of the size of like undertakings in the Community, to the extent it considers justified in order to avoid or correct disadvantages resulting from unequal competitive conditions'.

This obligation demonstrates the importance which the Treaty attaches to the relative size of undertakings in the structure of competition.

The fact, however, that the High Authority scarcely touched upon this point in the recitals of the preamble to its Decision No 16/60 is of little consequence. It is in fact well known that, for example, the coal production of the undertakings grouped together in the sales organization in question is roughly four times as great as that of any other coalfield in the Common Market and is more than twice the total production of Charbonnages de France, the only organization of comparable size.

The above-mentioned orders of magnitude, whatever correction of detail might be necessary, leave no doubt that the 'size' of the Ruhr coalfield, taken as a whole, is in marked disproportion to that of other fields within the Community. Such disproportion cannot but bestow great influence upon the sales organization which causes it in the competition between the large units which confront each other within the Common Market.

Decision No 16/60, refusing authorization for the association of the three joint-selling agencies of the Ruhr coalfield into a single sales organization, had the effect of restoring the Ruhr sales organizations to a size which no doubt differs from that of the largest sales organizations in the Community outside the Ruhr coalfield, but is of the same order of magnitude.

These findings constitute a more than adequate basis for holding that, irrespective of any statistical subtleties, the sales organization which was the subject of Decision No 16/60 controls a substantial part of the products in question within the Common Market.

B — Erroneous findings of fact

The applicants submit that the High Authority's Decision was founded on inaccurate or incomplete findings of fact.

It has stated its view in paragraph (c) above, with regard to the most important of them, namely those relating to the inclusion of certain reserved tonnages and deliveries to associated companies in the calculation of quantities sold by the sales organization.

Other submissions, for example those which refer to the influence of prices of coal from other coalfields, of imported coal, of anthracite and fuel-oil on the Ruhr prices, belong to the realm of the evaluation and interpretation of economic circumstances rather than of findings of fact.

Others, such as that relating to the difference between the figure of 47% and that of 53% as the percentage of Community coal sold within the Federal Republic, raise discrepancies too trifling to call for any alteration in the conclusions which have been reached on the basis of the contested figures.

Finally, others such as that referring to the High Authority's failure to consider the 'trend' of economic development, might possibly be of relevance to the question of insufficiency of the statement of reasons for the Decision, but not to that of an erroneous finding of fact. Moreover, this argument could not have altered the Decision since in 1960 the trend of economic development was contrary to what it had been in 1959 (rejoinder, paragraph 41). In any case no conclusion can be drawn from this area of disagreement.

The applicants themselves remark, having accused the High Authority of errors in ascertaining the proportion of coal imported from third countries that

'the level of the import quota is not of decisive importance . . . and in fact the amount of imports under the quota does not fully reflect the influence exerted upon the market by coal from third countries' (application, paragraph 35).

The Court fully accepts this view but gives it a wider application. It also agrees with the applicants when they consider

'that a purely quantitative view is incompatible with the spirit of Article 65(2)(c) as it appears in the light of the objectives of the Treaty' (reply, paragraph 50).

It has been shown that what Article 65(2)(c) describes as a 'substantial part' is not a purely quantitative criterion, but a reference to the whole competitive structure of the Community.

Such errors and omissions in the findings of fact as are referred to by the applicants do not in fact or in law affect Decision No 16/60, and cannot therefore constitute grounds for its annulment.

C — Manifest failure to observe the provisions of the Treaty

The applicants submit that there has been a manifest failure to observe the provisions of the Treaty in the failure by the High Authority to consider the interdependence of various factors affecting Ruhr coal, which they describe as a 'manifest violation of an elementary economic principle'. This reveals a 'clear failure to observe the provisions of the ECSC Treaty' (application, paragraph 35(4)(d)) in the 'gross violation of the principles of logic' represented by the general appreciation set out in Recital No 12(c) of the preamble to Decision No 16/60.

The Court has not been able to find in the part of the preamble referred to above the infringements of the Treaty which the applicants claim to have discovered, nor can it find therein the result of a manifest failure to observe the Treaty. Accordingly, it cannot on these grounds order the annulment sought by the applicants.

4. *Infringement of an essential procedural requirement*

The applicants submit under this head that insufficient reasons were stated for the Decision. The Court has stated in sections 2(a) (b) and (c) of this judgment that the grounds set out in the preamble to Decision No 16/60 adequately justified in law the conclusions based upon them. The Court is unable to find in the preamble to Decision No 16/60 the contradictions which the applicants claim to have discovered. The Court considers the statement of reasons in Decision No 16/60 to be decisive. All other considerations, including those which the applicants regard as contradictory or inadequate, must be considered as superfluous and cannot therefore justify the annulment of that Decision.

For all these reasons the application must be dismissed.

Costs

The applicant and the intervener, having failed in all their submissions, must, pursuant to Article 69(2) of the Rules of Procedure of the Court, be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 2, 3, 4, 5, 33, 65 and 66 of the Treaty establishing the European Coal and Steel Community, Article 24 of the Protocol on the Statute of the Court annexed to that Treaty, Article 85 of the Treaty establishing the European Economic Community and Articles 69 and 93 of the Rules of Procedure of the Court;

THE COURT

hereby:

1. **Dismisses Application 13/60 as being unfounded;**

2. **Orders the applicants and the intervener to pay the costs of the action.**

Donner Riese Rueff
Hammes Rossi

Delivered in open court in Luxembourg on 18 May 1962.

A. Van Houtte
Registrar

A. M. Donner
President