In Joined Cases

(1) 3/64

(a) CHAMBRE SYNDICALE DE LA SIDÉRURGIE FRANÇAISE, having its registered office at 5 bis, rue de Madrid, Paris 8, represented by its Chairman, Jacques Ferry;

(b) FORGES DE CHATILLON, COMMENTRY & NEUVES-MAISONS, S.A., having its registered office at 19, rue de la Rochefoucauld, Paris 9, represented by its General Manager, Claude Laplace;

(c) HAUTS FOURNEAUX DE LA CHIERS, S.A., having its registered office at Longwy-Bas (Meurthe-et-Moselle), represented by the Chairman of its Board of Directors, Arsène de Launoit;

(d) LORRAINE-ESCAUT, S.A., having its registered office at 7, Rond-Point Bugeaud, Paris 16, represented by its Chairman, Roland Labbe;

(e) MOSELLANE DE SIDÉRURGIE, S.A., having its registered office at 31, avenue Montaigne, Paris 8, represented by its Chairman, Marcel Petiet;

(f) ACIÉRIES & TRÉFILERIES DE NEUVES-MAISONS, Chatillon, S.A., having its registered office at 4, rue de la Tour-des-Dames, Paris 9, represented by its Chairman and General Manager, Paul Baseilhac;

(g) MÉTALLURGIQUE DE NORMANDIE, S.A., having its registered office at 16, boulevard Malesherbes, Paris 8, represented by the Chairman of its Board of Directors, Roger Roux;

(h) ACIÉRIES DE POMPEY, S.A., having its registered office at Pompey (Meurthe-et-Moselle), represented by its Chairman and General Manager, Robert de Gunzbourg;

(i) LAMINOIRS, HAUTS FOURNEAUX, FORGES, FONDERIES & USINES DE LA PROVIDENCE, S.A., having its registered office at Marchienne-au-Pont (Belgium), represented by its Director and General Manager, Jean Coudel;

(j) UNION SIDÉRURGIQUE LORRAINE (SIDÉLOR), S.A., having its registered office at 4, rue des Clercs, Metz (Moselle), represented by the Chairman of its Board of Directors, Roger Martin;

(k) UNION SIDÉRURGIQUE DU NORD DE LA FRANCE (USINOR), S.A., having its registered office at 14, rue d'Athènes, Paris 9, represented by its Director and General Manager, Maurice Borgeaud;

(1) DE WENDEL & CIE, S.A., having its registered office at 1, rue Paul-Baudry, Paris 8, represented by its Chairman, Emmanuel de Mitry;

and (2) 4/64

(a) CHAMBRE SYNDICALE DES PRODUCTEURS D'ACIERS FINS & SPÉCIAUX, having its registered office at 12, rue de Madrid, Paris 8, represented by its Chairman and General Manager, Robert Morizot;

(b) HAUTS FOURNEAUX DE LA CHIERS, S.A., having its registered office at Longwy-Bas (Meurthe-et-Moselle), represented by the Chairman of its Board of Directors, Arsène de Launoit;

(c) FORGES ET ATELIERS DU CREUSOT, S.A., having its registered office at 15, Rue Pasquier, Paris 8, represented by its Chairman and General Manager, Albert de Boissieu;

(d) ATELIERS ET FORGES DE LA LOIRE, S.A., having its registered office at 12, rue de la Rochefoucauld, Paris 9, represented by the Chairman of its Board of Directors, Marcel Macaux;

(e) ACIÉRIES DE POMPEY, S.A., having its registered office at Pompey (Meurthe-et-Moselle), represented by its Chairman and Managing Director, Robert de Gunzbourg;

all assisted by André Garnault, Advocate of the Cour d'Appel, Paris, with an address for service in Luxembourg at the office of the Chambre syndicale de la sidérurgie française, 49, boulevard Joseph-II.

applicants,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Guy Sautter, acting as Agent, assisted by Frédéric Chartier, Advocate of the Cour d'Appel, Paris, with an address for service in Luxembourg at its offices, 2, place de Metz,

defendant,

Application:

(a) (Application 3/64): for the annulment of Article 1 (2) and Articles 2 (Articles 7, 8 and 9) of Decision No 19/63, and of Article 1 (2) and (3), Article 2 (1) and (2) and Article 3 of Decision No 20/63;

(b) (Application 4/64): for the annulment of Article 1 (2) and Article 2 (Articles 7, 8 and 9) of Decision No 19/63 and of Article 1 (2) and (3), Article 2 and Article 3 of Decision No 21/63;

THE COURT

composed of: Ch. L. Hammes, President, A. M. Donner and R. Lecourt, Presidents of Chambers, L. Delvaux (Rapporteur), A. Trabucchi, W. Strauß and R. Monaco, Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The facts which form the basis of the dispute may be summarized as follows:

Chapter V of Title Three of the ECSC Treaty refers, on prices, to distribution by undertakings engaged in production within the meaning of Article 80 of the Treaty and to the activity of certain distributors.

Article 60 prohibits pricing practices contrary to Articles 2, 3 and 4 of the Treaty. In order to prevent producers from discriminating at the commercial level, Article 63 (2) provides that:

'. . . the High Authority may decide that:

(a) undertakings must frame their conditions of sale in such a way that their customers and commission agents acting on their behalf shall be under an obligation to comply with the rules made by the High Authority' in application of the previous Articles (first subparagraph of Article 63 (2)).

Furthermore,

'The High Authority may . . . decide that:

(b) undertakings shall be held responsible for infringements of this obligation by their direct agents or by commission agents acting on their behalf' (Article 63 (2) (b)).

Finally,

'In the event of an infringement of this obligation by a purchaser, the High Authority may restrict or . . . temporarily prohibit dealings with that purchaser by Community undertakings.' (Second subparagraph of Article 63 (2)).

Under Article 63 (3)

'The High Authority is empowered to make to the Member States concerned any appropriate recommendations to ensure that the rules laid down for the application of Article 60 (1) are duly observed by all distributive undertakings and agencies in the coal and steel sectors'.

These Articles thus provide that the

High Authority shall take implementing decisions to clarify and explain the various provisions of these Articles.
The first implementing decisions, taken in 1953 and 1954 by the High Authority, are the following:

1. *Decision* No 30/53 of 2 May 1953 amended by Decision No. 1/54 of 7 January 1954;
2. *Decision* No 31/53 of 2 May 1953 supplemented by Decision No 32/53 of 20 May 1953 and amended by Decision No 2/54 of 7 January 1954 and by Decision No 32/56 of 21 November 1956;
3. *Decision* No 37/54 of 29 July 1954 supplemented by Decision No 33/58 of 1 December 1958.

The first group of decisions defines the practices prohibited by Article 60 (1) of the Treaty, the second group fixes the forms in which the price lists and conditions of sale in the ordinary steel industry are to be published (Article 60 (2) (a) of the Treaty) and the third fixes the same rules for the special-steels industry.

The following rules arose from these decisions:

(a) All distributors were subjected to the same rules, without distinguishing between agents acting on their own behalf and middlemen acting for producer undertakings. Selling agencies were treated on a par with distributor undertakings, but were not defined.

(b) Distributor undertakings merely subject to the obligation not to discriminate among their customers remained free to apply whatever conditions they wished provided these were also applied to all comparable transactions. It was therefore possible for the published price lists to differ from those of the producer undertakings whose products the distributor undertakings sold.

On 20 December 1963, the High Authority published the following Decisions:

1. No 19/63 of 11 December 1963 (Official Journal, 1963, p. 2969) amending the text of Decisions Nos 30/53 and 1/54 (practices prohibited by Article 60 (1));
2. No 20/63 of 11 December 1963 (Official Journal, 1963, p. 2972) amending the text of Decisions Nos 31/53 supplemented or amended by Decisions Nos 32/53, 2/54, 32/56 (publication of price lists for ordinary steel);
3. No 21/63 of 11 December 1963 amending the text of Decision No 37/54 supplemented by Decision No 33/58 (publication of price lists for special steels).

These three decisions were taken by the High Authority to fill the gaps in the Decisions of 1953-1954, which in essence arose out of the lack of any distinction between distributors *inter se* and the distinction between producers and selling agencies.
Decision No 19/63 distinguished between selling agencies (risks and profits for the producer, but no freedom of action, taking on a function of the producer) to which should be added the obligations of undertakings (revised Article 7), acting as middlemen on behalf of producers (risks and profits for the producer, but with freedom of action) (new Article 8), and purchasers for resale (independent dealers) with freedom of action and risks and profits for themselves (new Article 9 retaining for purchase for resale alone the rules of the former Article 7).
Although on the one hand the position of independent dealers (purchasers for resale) remains unchanged (new Article 9 of Decision No 30/53), the undertakings, on the other hand, must require the middlemen acting on behalf of the producers to apply their price lists and conditions of sale (new Article 8).
According to the defendant, the pur-

pose of that provision is to prevent any possible discrimination by means of middlemen. In order to make this provision effective, the undertakings are obliged to put themselves in a position to furnish—and in fact to furnish to the High Authority at its request—information on the activity of these middlemen, in order to enable the High Authority to examine all records facilitating the appraisal of the transactions of the latter.

Decisions Nos 31/53 and 37/54 (former Articles 5 and 7) are amended in the same way as Decision No 30/53 by Decisions Nos 20/63 and 21/63.

With regard to the sales organizations, the new Article 7 of Decision No 30/53 (Article 2 of Decision No 19/63) provides that the producer undertakings must only sell their products through their selling agencies at the prices and conditions in their own lists. Generally, the three new decisions provide that the obligations also extend to transactions effected by their selling agencies.

According to the defendant, this new obligation is intended to make it impossible for producers to discriminate. But since, according to the defendant, it was possible to discriminate because the sales organizations in practice assumed a function normally pertaining to the producer, it was proper to limit the extension of the obligations only to those selling agencies which were in this position. According to the High Authority, that limitation was all the more indispensable since the term 'selling agency' takes on many varied forms, both in fact and in law. The Treaty required, however, that the selling agencies referred to by the decisions of December 1963 should be defined as exactly as their diversity of form allowed and as the necessity to cover all situations from which a breach in the system of Article 60 might arise demanded.

In fact we are concerned on the one hand with selling agencies common to several producer undertakings and on the other hand selling agencies created by or associated with a particular producer. For the first (Article 65 (2) of the Treaty) there is no problem of criteria. With regard to the latter it was right to take account both of the factual situation and the requirements of the Treaty.

Some instances are very simple, for example when a producer holds all the capital of a company engaged in distribution which exclusively sells the products of that producer and does so for all the products of that producer, but other instances are less clear, either when the holding does not represent 100% of the capital, or the organization does not sell all the products of a producer and does not restrict its business exclusively to those products.

The High Authority claims that it has tried to evolve criteria to clarify the connexions rendering a selling agency a distributor which must of necessity be subject to the obligations of Article 60 if the latter is to continue to fulfil its allotted function under the Treaty.

According to the defendant, Article 60 must be applied when three factors are present:

— dependent management: this presupposes a situation in which the selling agency's policy with regard to conditions of sales, to price and to the market can be determined by the producer because of legal or factual relationships existing between the latter and the selling agency;

— a permanent task entrusted to this organization: this excludes any temporary or intermittent arrangements and on the contrary presupposes a long-term task for the selling agency;

— a distributive activity essentially based on the products of the undertaking in question: failing this, the situation of the selling agency would approach that of a trading undertaking.

II — Conclusions of the parties

A. The *applicants* claim:

(a) In Application 3/64:

'Having regard to the provisions of the Treaty establishing the European Coal and Steel Community, especially Articles 2, 3, 4, 5, 33, 60, 63, 64, 80, 95 and 96, the applicants, offering moreover to produce all appropriate evidence in support of their request,
That the Court should
find for the admissibility of their application for the annulment of Article 1 (2) and Article 2 (Articles 7, 8 and 9) of Decision No 19/63 and of Article 1 (2) and (3), Article 2 (1) and (2) and Article 3 of Decision No 20/63;
And consequently pronounce the said annulments, after making any necessary enquiries, in particular with regard to the legal standpoints adopted by the High Authority in this matter;
Order the High Authority of the European Coal and Steel Community to pay the entire costs of the proceedings;'

(b) In Application 4/64:

'Having regard to the provisions of the Treaty establishing the European Coal and Steel Community, especially Articles 2, 3, 4, 5, 33, 60, 63, 64, 80, 95 and 96, the applicants offering moreover to produce all appropriate evidence in support of their request,
That the Court should
find for the admissibility of their application for the annulment of Article 1(2) and Article 2 (Articles 7, 8 and 9) of Decision 19/63 and of Article 1 (2) and (3), Article 2 (1) and (2) and Article 3 of Decision No 20/63;
And consequently pronounce the said annulment, after making any necessary enquiries, in particular with regard to the legal standpoints adopted by the High Authority in this matter;
Order the High Authority of the European Coal and Steel Community to pay the entire costs of the proceedings.'

B. The *defendant* contends that the Court should:

'Declare inadmissible the applications made by the Chambre Syndicale de la Sidérurgie française and other iron and steel undertakings,
And the Chambre Syndicale des Producteurs d'Aciers Fins et Spéciaux and other iron and steel undertakings,
for the annulment of Article 1 (2) and Article 2 (Articles 7, 8 and 9) of Decision No 19/63, of Article 1 (2) and (3), Article 2 (1) and (2) and of Article 3 of Decision No 20/63;
in any event reject them as unfounded, with all the consequences in law, especially with regard to the rules on costs and fees.'

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:
The applicants request the annulment of Articles 1 (2) and 2 of Decision No 19/63, of Articles 1 (2) and (3), 2 (1) and (2) and 3 of Decision No 20/63 and of Articles 1 (2) and (3), 2 and 3 of Decision No 21/63. The submissions and arguments therefore relate to all the Articles in the contested decisions which in the first place refer to the various obligations imposed on purchasers for resale and on middlemen, and which, in the second place, refer to the obligations of producers in relation to selling agencies and contain a definition of these selling agencies.
In support of their application, the applicants put forward the plea of misuse of power in two respects: first of all the High Authority took a decision when it was only empowered to make a recommendation (misuse of procedure) and in the second place the contested decisions involve a discrimination among the producers of the Community.

In support of these two pleas, the applicants further allege serious lack of care, amounting to a disregard of the purpose of the law, on the part of the defendant.

A — *Admissibility*

According to the *defendant,* the conditions for the admissibility of the applications are not present for the following reasons:

1. The submission that the High Authority acted by means of a decision and not by means of a recommendation is inadmissible in support of an application against misuse of powers in so far as it really constitutes a plea of lack of competence or of acting *ultra vires*;
2. Misuse of powers is not convincingly evidenced in so far as the plea of discrimination among producers of the Community is concerned;
3. The argument based on the serious lack of care amounting to a disregard for the purpose of the law is first of no intrinsic value to the extent that it is based on what it has to prove and secondly it is unconvincing to the extent that it is based on alleged uncertainties.

Finally, the defendant alleges that the applicants' reasoning is entirely directed towards the obligations of the producers in relation to the selling agencies; it observes that with regard to the request for the annulment of the other provisions misuse of powers is not even alleged.

As to (1) The submission with regard to acting by means of a decision and not by means of a recommendation

The *defendant* alleges that the applicants' arguments mean:

— either that the High Authority had no power to take a decision;
— or that the High Authority exceeded the limits of the powers which it had.

(a) According to the first hypothesis, the applicants allege the High Authority's lack of competence, and not a misuse of powers. In fact, a power can only be misused if it exists and confers something more than a mere fettered discretion.
(b) According to the second hypothesis, if the limits of a power which exists are exceeded, this constitutes an *ultra vires* act and not misuse of powers.
(c) If the applicants are arguing for a misuse of procedure, they must clarify their argument.
The *applicants'* reply is to allege that the High Authority has committed a misuse of powers, constituted in particular by a misuse of procedure. In fact, they state, in order to close the gap which it claims to have discovered, the High Authority could only proceed by way of a recommendation to Governments provided for in Article 63 (3) of the Treaty.
The *defendant* replies that the plea of misuse of procedure cannot be regarded as conclusively proved since it is based on mere allegations.

As to (2) The submission of discrimination as between Community producers

The defendant observes that this submission refers to the infringement of Articles 3 (b), 4 and 5 of the Treaty.
(a) With regard to Article 3 (b), referring to the equal access of all consumers to the sources of production the defendant alleges that the submissions do not indicate how the contested decisions compromised this access for the applicants. Moreover, according to the defendant, the infringement of Article 3 (b) at the most could only constitute a discrimination against the consumers and not against the producers whom it is not the purpose of this provision to protect.
(b) With regard to Article 5, referring to the conditions under which the High Authority must carry out its task, the defendant alleges that although the ap-

plicants claim that the contested decisions infringe that provision, they have failed to give any information with regard to this, either on the particular provisions which they consider were infringed or on how that infringement took place. Furthermore, the defendant claims that there is no connexion between the infringement of Article 5 and the complaint of discrimination.

(c) With regard to Article 4, the defendant admits that, since subparagraph (b) thereof refers to measures discriminating between producers, an infringement of that provision could support a plea of discrimination. But it adds that this infringement could not serve as a ground for a submission of misuse of powers. In fact it says that Article 4 contains prohibitions which leave no margin of discretion to the High Authority.

The *applicants* reply point by point to the arguments of the defendant.

(a) With regard to Article 3 (b), the distinction which the defendant makes between the position of consumers and that of producers is arbitrary because competition between producers emerges precisely at the stage when the consumer places an order. The fact that it is impossible for the consumers to have equal access to all the sources of production principally affects producer undertakings, whose customers may be alienated by the differences in the sale price to the consumer.

(b) With regard to Article 5 the question of misuse of powers arises from the fact that the contested decisions, far from being intended to guarantee 'the maintenance and observance of normal competitive conditions', seek to establish a system which has the effect of distorting the equilibrium in that these decisions subject middlemen, whose commercial function is identical, to a different system solely because of their different legal structure.

(c) With regard to Article 4, the applicants state that in Germany an agent (Direkthändler) has the status of a purchaser for resale, even when steel is sent directly from the forge to the consumer, and is not subject to supervision by the High Authority and that the large German iron and steel groups have commercial companies with the status of 'Direkthändler' and, consequently, of a middleman not subject to supervision. The French steel works are unable, owing to their position under internal law, to make such a system obligatory. According to the applicants, it follows that the contested decisions put them on an unequal footing in relation to the German sales networks.

The *defendant* replies that the point at issue is whether the applicants' claims that a misuse of power has been committed against them are relevant.

According to the defendant, the applicants as individual undertakings do not allege a direct attack on their individual interests, as the case-law of the Court requires. It is true that they allege an injury deriving from the different system created, on the one hand, for the agents and commission agents and, on the other hand, for the independent purchasers for resale, but they by no means establish the direct nature of the injury to their individual interests, since the said difference in the systems arises from the Treaty itself, and in no way from the contested decisions and that, on their own admission, if there is an injury, it is to the consumers and not to the producers at all. Moreover the consequences entailed by the contested measures and referred to in the statement in reply affect all the applicants to the same extent and indeed all producers who do not sell their products through dealers. Thus the applicants have failed to establish a direct injury to their individual interests.

The applicant associations for their part only allege a simple interest in the annulment of a decision which harms all their members in the same way. They do not establish that the decisions were

taken with the purpose of damaging the French iron and steel industry or indeed of affecting it.

In sum, according to the defendant, the applications are inadmissible because the claims do not have sufficient statements of reasons, misuse of powers has not been convincingly alleged and the plea that this alleged misuse of powers 'affected' the applicants is no more convincing.

As to (3) With regard to the allegation of serious lack of care amounting to a disregard for the purpose of the law

The *defendant* states that the serious lack of care alleged against it by the applicants arises:

— from the fact that the High Authority in this instance acted by means of a decision when it should have used the means of a recommendation;
— from the alleged discrimination;
— from the uncertainties deriving from the definition of the selling agencies in the sense of the contested decisions;
— from the uncertainties arising from an obscurity as to whether the High Authority intends to apply directly to the sales organizations the powers arising from Article 47 of the Treaty.

(a) The defendant observes in the first place that the serious lack of care cannot constitute an argument in favour of the two submissions of having acted by means of a decision and of committing a discrimination between producers in the Community. In fact, it states, these are precisely the two submissions which the applicants employ in support of their complaint of a grave lack of care.

(b) With regard to the alleged imprecision in defining selling agencies, the defendant contends that the terms employed in the contested decisions appear unequivocal. It states furthermore that any general law leads the persons concerned to wonder whether it applies to them or not, but such an 'uncertainty' cannot form the basis for the complaint of serious lack of care.

(c) With regard to the uncertainty over the application of Article 47 of the Treaty, which allows the High Authority to address itself directly to selling agencies, the defendant contends that a glance at the text of the contested decisions shows that they are not based on Article 47 of the Treaty, to which a formal reference would have been required, and the allegation of uncertainty is therefore unconvincing.

According to the defendant, the case-law of the Court (judgment in Case 8/55, Rec. 1955-1956, pp. 309 and 310) employed the term 'serious lack of care' in an instance where errors of fact had to be appraised and a ruling given whether they were such as to be reasonably explicable on the assumption that the legal aim had in fact been pursued. With regard to the 'uncertainties', it states that the applicants have alleged neither an error of appraisal, nor a contradiction of the purposes of the Treaty: their complaint is therefore unsubstantiated.

B — *The substance of the case*

1. First aspect of misuse of powers: the High Authority took a decision when it was only empowered to make a recommendation (misuse of procedure)

The *applicants* claim that under Article 63 (2) of the Treaty the powers of the High Authority by way of obligations imposed on the parties contracting with the producers is limited to two transactions. By extending its powers to selling agencies while retaining it over the other distributors previously subject to it, the High Authority is extending its powers to more than two transactions. This can be done only by means of a recommendation in accordance with Article 63 (3) and not by means of a decision under Article 63 (2).

The *defendant* replies that Article 63 (2) of the Treaty makes no mention either of stages or of the number of transactions.

The producers referred to by Article 80 are directly subject to Article 60. Article 63 (2) relates to the extension of the obligations of public law imposed on producers; a second obligation of public law is imposed on the latter: that of imposing an obligation in civil law.

On whom must that obligation be imposed? Article 63 (2) gives the answer: On all those who have a contractual connexion with the producer either by sales contracts (purchasers for resale), or agency contracts or commission contracts. In other words, it extends to all distributors who may come into direct contact with the producer.

Article 63 (3) provides additional means of action, with regard both to distributor undertakings which cannot be bound by means of Article 63 (2) and to other kinds of measures applicable to any distributor whether or not affected by Article 63 (2).

The contested decisions indeed apply to a situation coming under Articles 60 and 63 (2). This holds good with regard to the obligations of the producers. It also holds good with regard to the producers' opportunities of directly contacting the distributors referred to.

The defendant concludes from this that, since it was in a position to which Article 63 (2) was applicable, it had not committed a misuse of procedure.

The *applicants* reply that the defendant's allegation, with regard to the obligation imposed by Article 63 (2) on producers to require an obligation in civil law from all distributors whom they can directly contact, cannot justify the contested decisions.

In fact these decisions, by bringing in selling agencies, which, although enjoying legal independence, are assimilated to a department of the undertakings, mean that the obligations of these undertakings fall upon distributors, something which could not have happened under the previous system.

In order to bring this about, the High Authority was led artificially to contest the *de facto* independence of the sales organizations, despite their legal structure and by a description based on criteria of fact disputed by the applicants. All of these serious defects would have been avoided if the High Authority had employed the normal procedure, that is, the recommendations provided for by Article 63 (3); but it preferred to achieve its aim by means of a decision.

The *defendant* replies that by accusing the High Authority of committing a misuse of procedure the applicants have made no more than a mere allegation. Moreover they appear to attack the High Authority's purpose, which according to them is an extension of supervision, and the method used, that is to say, treating the selling agencies as distribution departments of the producers.

On the other hand the applicants' statements contain no factor which might support the submission of misuse of procedure in connexion with the situation created with regard to the agents and commission agents which is however referred to in the request for annulment.

(a) The contested decisions did not, and moreover could not, have as their purpose to settle the general problem of supervision. Article 8 (3) of the revised Decision No 30/53, as appears from the contested decisions, indeed provides that the producers shall furnish the High Authority with all particulars of the commercial operations of the middlemen who are either their employees or direct agents or their authorized agents. But this is not an obligation imposed under Article 47 or the fourth paragraph of Article 83 of the Treaty, but merely a corollary of Article 63 (2) (b), which provides that

undertakings shall be held responsible for infringements by their direct agents or by commission agents acting on their behalf. The obligations provided for in Article 8 (3) of Decision No 30/53 (as now amended) are simply intended to facilitate establishing these infringements. They are thus concerned with the implementation of Article 63 (2) (b).

The contested decisions were thus indisputably taken under Articles 60 and 63 (2). They explain 'the limit within which the rules laid down in implementation (of Article 60)' must be applied. To the extent that the communication of certain information is required they constitute a corollary of these provisions. In any case direct control is always limited to the producer undertaking; on the other hand the contested decisions do not concern the problem of supervision under Article 47 and the fourth paragraph of Article 86: the High Authority was therefore bound to proceed as it did, by means of a decision, in accordance with Article 63 (2).

(b) Article 1 (2) of Decision No 19/63 whose annulment is requested provides that in certain specified cases selling agencies shall be treated as distribution departments of the producers. The aim of this assimilation is to bring the legal position into line with facts, and to put all producers on the same footing with regard to the application of Article 60. The assimilation was effected under this Article. On this point the contested decision refers to distribution by the producers themselves.

2. Second aspect of the misuse of powers: the contested decisions entail a discrimination as between the producers of the Community

The *applicants* allege that the High Authority has created a new legal category, the selling agencies, and established the new system arising therefrom in such a way that in the distribution process, starting with the producer, the first transaction, between the producer and the selling agency, is not taken into account and the measures which in the normal case cover the first and second transactions are carried forward in the case of the 'selling agency' to the second and third transactions respectively.

Thus Article 2 of Decision No 19/63 (Art. 8), obliges 'undertakings and their selling agencies' to bind their agents to apply the rules and conditions of Community law to their transactions; this is therefore an obligation affecting the third transaction after the producer through a double commitment in private law. According to the applicants, this extension of the obligations which may be created in accordance with the rules in Article 63 is plainly contrary to the Treaty.

The applicants then criticize the redefinition of selling agencies in Article 1 of Decision No 19/63. They complain that it does not give a clear and proper definition of the distributors affected by that decision whose effects have repercussions throughout the successive distribution stages, thus leaving the undertakings concerned in a state of uncertainty.

The applicants observe that it emerges clearly from the last reason in paragraph 1 of the preamble to Decision No 19/63 that the High Authority had tried to establish a jurisdiction over the undertakings which it does not possess. In fact the Treaty has indeed provided by the expedient of a commitment in private law for the extension of the substantive law applicable to *one* transaction but not to two; it has certainly not provided that by this method the High Authority may exercise without authority the prerogatives of a public authority over the undertakings. This is the objective of Article 2 of Decision No 19/63 (Art. 8 (3)). The High

Authority could assume such powers by various methods, in particular by a revision of the Treaty, but not by the authoritarian method of a decision.

The applicants conclude from this that the defendant has failed to observe one of the fundamental purposes of the Treaty, which is to ensure legal equality (Art. 3 (b), Art. 4, Art. 5); in fact, the obligations of the persons concerned differ to an unjustifiable extent, depending on their being, or not being, in the position of a purchaser properly so-called.

The *defendant* replies by employing the arguments already set out during the consideration of the admissibility of this plea (see above A—Admissibility As to (2).

The *applicants* reply that the discrimination which they allege is founded on the disparity established by the contested decision with regard to the obligations and supervision between the trade and the selling agencies on the one hand and between the trade and the middlemen on the other.

The *defendant* replies that the applicants' line of reasoning is based on essentially wrong notions, the first being that the objective of the contested decisions was to settle the problem of supervising the practices prohibited by Article 60 of the Treaty. The second consists in reasoning as if the particular situation of the trade was the product not of the Treaty, but of the contested decisions.

(a) With regard to supervision the disparity between the situation of the trade and that of the selling agencies and of the commission agents derives from the particular situation of the trade under the Treaty.

(b) The difference in the situations of the selling agencies and the trade is to be explained by the different economic functions performed by these two forms of distribution. In the first instance, there is distribution by the undertakings themselves, in the second there are purchasers for resale independent of the producers and acting on their own behalf. In treating certain selling agencies in the same way as a distribution department of the producer undertakings, the High Authority has re-established proper observance of Article 60 by abolishing, as it is obliged to do, a discrimination between two categories of producers, the one continuing to carry out all functions of producers under one and the same name and the other separating the producers' functions of distribution from production properly so-called.

(c) The different system to which dealers as opposed to commission agents are subjected is also to be explained by the particular situation in which the trade is placed by the Treaty of Paris. The dual nature of the system of which the applicants complain was not created by the contested decisions. What the applicants describe as 'arbitrariness contrary to the essential purposes of the Treaty' arises directly from the latter.

3. The allegation of grave lack of care amounting to a disregard for the purpose of the law

The *applicants* allege, to repeat the term employed by the Court in its case-law, that the High Authority acted with 'a serious lack of care, amounting to a disregard for the purpose of the law' and this arises:

(a) from the fact that the High Authority acted by means of a decision where it ought to have employed the means of a recommendation;

(b) from the alleged discriminations;

(c) from the uncertainties deriving from the definition of selling agencies within the meaning of the contested decisions;

(d) from the uncertainties resulting from an obscurity as to whether the High Authority intends to apply directly to the selling agencies the

powers deriving from Article 47 of the Treaty.

The *defendant* replies to this argument by referring to the admissibility of the application (see above, A—Admissibility, As to (3)).

IV — Procedure

The statements of the parties were presented in the proper form and within the prescribed time, and the procedure followed the normal course.

Cases 3/64 and 4/64 were joined for the purposes of procedure and the judgment by an order made by the Court on 10 March 1964.

In the course of the hearing on 3 November 1964, on the preliminary report of the Judge-Rapporteur, the Court, having heard the Advocate-General, decided to open the oral procedure without any preparatory inquiry.

At the first hearing, on 9 February 1965, the parties presented their oral arguments on the question of the admissibility of the application.

At the request of the Court, on 26 February 1965 the defendant produced orders PR No 58/52 of 28 July 1952, on price reduction in the rolled products trade, and PR No 59/52 of 30 July 1952, on the decontrol of the prices of pig iron, of rolled and forged products in the iron and steel industry made by the Federal Minister of Economics of the Federal Republic of Germany.

The parties presented their oral explanations on the substance of the dispute at the second hearing on 6 May 1965.

The Advocate-General delivered his opinion at the hearing on 1 June 1965.

Grounds of judgment

I — Admissibility

Under the second paragraph of Article 33 of the Treaty, undertakings or associations of undertakings may institute proceedings for annulment against general decisions only if the latter are alleged to involve a misuse of powers affecting them.

The contested measures established a legislative principle, laying down conditions for its implementation and setting out the legal consequences resulting from them; they are therefore general decisions.

Furthermore, this general nature is not disputed in the action.

Consequently, for their applications to be admissible, the applicants must convincingly point to facts and circumstances indicating the probability that in this instance the High Authority, through want of foresight or serious lack of care amounting to disregard for the purpose of the law, has pursued other objectives than those for which the powers provided by the Treaty were conferred upon it.

The applicants have not fulfilled that requirement.

The first complaint made against the High Authority, that is, of having acted by means of a decision and not by means of a recommendation, is reduced to a submission of lack of competence based on an analysis of Article 63 of the Treaty.

This complaint, even if it could be justified, is not such as to lead to the conclusion that the High Authority in this case pursued objectives other than those for which the powers provided in Article 63 were conferred on it and that it thereby committed a misuse of powers against the applicants.

The second submission consists in alleging that the contested general decisions intended to establish a system distorting normal conditions of competition, subjecting middlemen, whose economic function is identical, to a different system solely on the footing of their differing legal structure.

This allegation amounts to accusing the High Authority of employing legal rather than economic criteria, which, if it were true, would be insufficient to constitute a misuse of powers.

Therefore the second submission is not relevant to the misuse of powers in question.

Finally, the third plea based on the allegation of a lack of care amounting to a disregard for the purposes of the law is based on a detailed criticism of published texts, with the aim of proving that the said texts contain a series of uncertainties and obsecurities which could harm the applicant's opportunities for competition.

However, the mere circumstance that the application of a text might be discriminatory or incomplete is insufficient to vitiate it, above all since the remedy against such a possibility lies in the vigilance of the persons concerned who, under Article 33, are enabled to contest the implementing measures concerning them on all the grounds set out in the said provision.

Thus the last plea also fails to establish misuse of powers.

It follows from this that Applications 3 and 4/64 must be dismissed as inadmissible.

II — Costs

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

In this case, since the applicants have failed in their action, they must bear 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 the Treaty establishing the European Coal and Steel Community, especially Articles 2, 3, 4, 5, 14, 15, 33, 47, 60, 63, 64, 65, 80, 86, 95 and 96;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;
Having regard to Decision Nos 30/53, 31/53, 32/53, 1/54, 2/54, 37/54, 32/56, 33/58, 19/63, 20/63, and 21/63 of the High Authority;

THE COURT

hereby:

1. **Dismisses Applications 3/64 and 4/64 as inadmissible;**
2. **Orders the applicants to pay the costs of the action.**

Hammes Donner Lecourt

Delvaux Trabucchi Strauß Monaco

Delivered in open court in Luxembourg on 8 July 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President