In Case 67/63

SOCIÉTÉ RHÉNANE D'EXPLOITATION ET DE MANUTENTION 'SOREMA', a limited liability company having its registered office in Strasbourg (represented by its managers, assisted by Romain Gaston of the Strasbourg Bar), with an address for service in Luxembourg at the offices of Nicholas Wennmacher, huissier, 7 boulevard Royal,

applicant,

v

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

defendant,

Application for annulment of Decision No 8/63 of the High Authority of 30 April 1963 concerning membership on the part of the Oberrheinische Kohlenunion, Bettag, Puton & Co., Mannheim, of the Société Rhénane d'Exploitation et de Manutention, Strasbourg,

THE COURT

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

1. In 1953, when the Common Market was inaugurated, the Oberrheinische Kohlenunion Bettag, Puton & Co. (hereinafter referred to as the OKU) was an organization controlling almost exclusively the joint selling in South Germany of fuels from the mining companies of the basins of Aachen, the Ruhr, the Saar and Lorraine.

2. By agreements and resolutions of

16 April 1956 the OKU was converted into an organization concerned with the joint buying from the above-mentioned mining companies of fuels intended for sale in South Germany and was entrusted with this joint buying on behalf of the undertakings engaged in the coal trade which belonged to it as limited partners.

Among these undertakings are 15 wholesale merchants established in France and grouped in the Société Rhénane d'Exploitation et de Manutention (hereinafter referred to as SOREMA).

3. By Decision No 19/57 of 26 July 1957 (Official Journal, p. 352/57) the High Authority authorized the above-mentioned agreements 'save for any refusal, limitations or conditions' arising out of other provisions of the said Decision.

The Decision was to remain in force only until 31 March 1959 on which date it was to cease to have effect.

Nevertheless as regards the membership of the wholesale coal merchants listed in Annex II to the Decision as belonging to SOREMA it was to cease to have effect on 31 March 1958 unless under Article 10 (3) thereof:

— the High Authority should by a fresh decision fix a later expiry date;
— or unless on 31 March 1958 or such later date as might be fixed by the High Authority these merchants should prove that they fulfilled the conditions, laid down in the OKU's articles of association of 16 April 1956 for the admission of new members.

These conditions are set out in paragraph 19 of the articles which limit right of accession to the OKU to wholesale coal merchants who fulfil the conditions for admission as direct purchasers of fuel for sale in South Germany from one of the basins of Aachen, the Ruhr, the Saar or Lorraine.

Since however the wholesale coal merchants established in France and grouped in SOREMA do not fulfil the conditions of admission as direct purchasers, Decision No 19/57 granted them a transitional period to enable them to develop their own sales activities in the South German market 'so as to create in this way the conditions required to justify their being supplied directly as wholesale merchants at first hand under the conditions of sale applicable to mining companies and sales organizations and thus to ensure equality of treatment with wholesale merchants with businesses based in South Germany'.

4. By Decision No 4/58 of 2 April 1958 (Official Journal, p. 169/58) the High Authority took account of the fact that the organization of sales activities, which the traders belonging to SOREMA should have had an opportunity to develop in South Germany, had been delayed by reason of the measures which had to be taken in implementation of the Franco-German Treaty of 27 October 1956 on the Saar, and provisionally extended until 31 July 1958 the date on which Decision No 19/57 was to cease to have effect, as regards their membership of the OKU, 'unless at that date they show that they fulfil the conditions laid down in paragraph 19 of the articles of association of 16 April 1956 for the admission of new members to the OKU . . .'

5. By letter of 15 July 1958 (Official Journal, p. 286/58), the High Authority informed SOREMA that there was nothing to justify the undertakings which it represented from staying within the OKU, as their so doing was incompatible with the principles on which the conversion of the OKU and its authorization by Decision No 19/57 had been made and was authorized as an exceptional case for a transitional period of one year.

SOREMA was accordingly asked to take all necessary steps, by 30 September 1958 at the latest, for withdrawal from the OKU.

6. After 30 September 1958 membership of the OKU by the French mer-

chants belonging to SOREMA was not regulated in any way until Decision No 23/59 of 25 March 1959 (Official Journal, p. 420/59) whereby the High Authority, taking account in particular of the fact that evidence had not been furnished concerning the withdrawal of certain associated companies including the French merchants within SOREMA extended by two months up to 31 May 1959 the period of operation of the authorization for the joint buying of fuel by the OKU which by Decision No 19/57 had been limited to 31 March 1959.

This Decision did not specially mention, in its operative part, the merchants represented by SOREMA who were members of the OKU.

7. By Decision No 31/59 of 27 May 1959 (Official Journal, p. 697/59) the High Authority again extended the period of operation of Decision No 19/57, this time until 31 March 1962.

Decision No 31/59 states that the fifteen wholesale coal merchants established in France, who are listed in Annex II to Decision No 19/57 as belonging to SOREMA, must be removed from the OKU because they have not adduced evidence that they fulfil the conditions for direct supply from the selling agencies. As against this, it approved a transitional arrangement whereby SOREMA itself was authorized thenceforth to remain within the OKU, this time until 31 March 1960.

8. By Decision No 12/60 of 18 May (Official Journal, p. 813/60) the High Authority extended to 31 March 1962 the time-limit (31 March 1960) set for SOREMA's membership of the OKU by Decision No 31/59.

9. By Decision No 3/61 of 8 February 1961 (Official Journal, p. 413/61), the High Authority varied the trading rules of the Ruhr coal selling agencies and, in particular, the conditions which these agencies could impose on direct supply by wholesale coal merchants.

This Decision provided in particular that, by derogation from the general rules and as a transitional measure, wholesale coal merchants established in France would be allowed to draw their supplies direct, provided that during the coal industry's year 1960–61 they had sold in the Common Market at least 2500 metric tons of hard coal, hard-coal coke and hard-coal briquettes of the selling agency to which they were admitted, the normal requirement being a sale of 6000 metric tons.

10. By Decision No 3/62 of 28 March 1962 (Official Journal, p. 873/62), the High Authority extended the authority for joint buying by the OKU until 31 December 1967 and stipulated that for a transitional period, to which a time-limit would be set by a later decision, this authorization extended also to SOREMA's membership.

This Decision was based in particular on the consideration that it was not yet possible to form a precise conception of the final form of the transitional arrangement for direct access to the Ruhr coal selling agencies mentioned above or its effects on the French coal trade and this justified SOREMA's continued membership of the OKU on a provisional basis in the interests of an improvement in coal distribution and in supplies to the market.

11. Finally, by Decision No 8/63 of 30 April 1963, notified to SOREMA on 4 May 1963 and published in the Official Journal of 11 May 1963 (p. 1441/63), the High Authority decided that the authorization of SOREMA's membership of the OKU should cease to be effective on 30 June 1963.

This Decision, the subject of the present application, refers only to Decisions Nos 19/57 and 3/63; it contains in particular the following recitals:

'Whereas by its Decision No 3/62 of 28 March 1962 the High Authority authorized SOREMA's membership of the OKU for a transitional period, reserving to itself the right to set a time-limit to that period;

Whereas in granting the said authorization the High Authority considered that the French wholesale coal merchants affiliated to SOREMA and supplied in part from the Upper Rhine were only enabled to fulfil the conditions required for direct access to the coal selling agencies of the Ruhr by virtue of a transitional arrangement which entered into force on 1 April 1961 and that one year was insufficient to enable them to deploy their commercial activities to meet these conditions;

Whereas the High Authority now finds that a fresh period of one year provided a sufficient margin and that from 1 July 1963 the conditions for collective membership of the OKU on the part of the French wholesale coal merchants will no longer exist;.'

12. On 4 June 1963 SOREMA lodged an application at the Court Registry against Decision No 8/63 of the High Authority.

II — Conclusions of the parties

The *applicant* asks the Court:

— to annul the contested Decision;

— to order the High Authority to bear the costs.

The *High Authority* asks the Court:

— to dismiss the application as inadmissible on the ground that the applicant cannot be considered to be either an undertaking or an association of undertakings within the meaning of the Treaty, and in any event as unfounded;

— to order the applicant to bear the costs of the proceedings.

III — Submissions and arguments of the parties

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

A — *Admissibility*

From the applicant's statement that, as a mere fiduciary of its associates in the OKU, it is not an undertaking regularly engaged in distribution, the *defendant* deduces that the applicant has no capacity in which to bring an application for annulment of the contested Decision.

The *applicant* replies that the conditions for bringing an action are dependent upon its capacity as accepted by the High Authority and not its actual capacity.

To admit any other view would lead to conferring on the High Authority power to arrogate to itself the right to judge the scope of the Treaty's application.

When the High Authority, in implementation of Article 65, takes a decision concerning a person whom it classes as an undertaking, that person may apply to the Court which will examine whether Article 65 can be applied to the applicant, having regard to the definition of an undertaking contained in Article 80.

The *High Authority* replies that, apart from the exceptions set out in the Treaty, Articles 33 and 80 only allow those undertakings objectively answering the descriptions set out in Article 80 to bring an application for annulment. This view in no way leads to the High Authority's being left as judge of the scope of the Treaty's application; it must, on the one hand, draw the consequences of the dismissal of an application on grounds of inadmissibility and, on the other, if the occasion arises, make good losses arising out of wrongful conduct.

The *applicant* maintains that it is entitled to be heard since in any event it must be considered as an association of undertakings within the meaning of the Treaty; since it consists exclusively of wholesale coal merchants it is a legal grouping of natural and legal persons, having an existence separate from that of its members. Its application is admissible since it looks after the interests of its members, who as wholesale coal merchants fall within the provisions of

Article 65.
Moreover, under its articles of association, SOREMA has a duty to ensure 'directly or indirectly the control or management of each and every interest assisting in the fulfilment of its object', that is to say, of 'all business relating to the handling, storage, transport of and trading in solid fuels and other bulk goods in the areas supplied by the Upper Rhine and adjoining areas'.
The *High Authority*, whilst it considers that the arguments of the applicant based on the text of its articles of association are insufficient to give it the character of an association of undertakings, makes no attempt to deny that in the present case it has taken action to ensure that the collective interests of the traders affiliated to it are represented.
In these circumstances the question which arises is whether admissibility of an application is actually engaged; the High Authority leaves it to the Court to make this determination.

B — *Substance*

The *applicant* puts forward five grounds of complaint which it describes in a general way without giving detailed particulars, as infringement of an essential procedural requirement, overt infringement of the provisions of the Treaty and of the rules of law relating to its application and misuse of powers.
The *defendant* observes that none of the grounds of action is directed to the actual object of the contested Decision, which, in its view, is to fix a date for the end of the transitional arrangements made by Decision No 19/57 and ultimately extended by Decision No 3/62.

First ground of complaint: Infringement of Article 80

The *applicant* maintains that the contested Decision infringes Article 80 of the Treaty in that SOREMA, as it is not regularly engaged in distribution in the coal sector, is not an undertaking within the meaning of Article 80 and the prohibition contained in Article 65 cannot apply to it as a mere agent.
Its articles of association no doubt enable it to engage in distribution; but Article 80 refers to the actual situation and requires that the undertaking be regularly engaged in distribution; it is not enough that it might be so engaged.
The High Authority cannot therefore prohibit SOREMA from representing collectively the rights of its associates, the limited partners in the OKU.
The *defendant* replies that, if SOREMA's concept is correct, its application is inadmissible: if on the other hand, as appears from its articles of association, it cannot be regarded as engaged in distribution, its objection fails.
Finally, if SOREMA, as it maintains itself, safeguards the interests of its members, it does so for undertakings which for their part fall within the provisions of Article 65.
Moreover, the purpose of Article 65 is to prohibit all agreements restricting competition which are associated with membership, even financial, of a legal person.
To prohibit SOREMA's membership of the OKU is equivalent to prohibiting wholesale merchants grouped in SOREMA who do not satisfy the conditions of the articles of association of the OKU from taking part in joint buying agreements, made by the merchants doing business in South Germany, and put into effect by the OKU.

Second ground of complaint: Illegal revocation

The applicant maintains that the contested Decision revokes an authorization previously granted regardless of the requirements set out in the fourth subparagraph of Article 65 (2).
(a) The basic Decision No 19/57 is and can only be an authorizing decision, which admits that SOREMA's and its associates' membership of the OKU is in accordance with the Treaty.

In fact the High Authority is not empowered to grant a period of time for cancelling agreements and practices which do not accord with the Treaty; their revocation must take immediate effect.

As Decision No 19/57 is not a decision providing for revocation within a given period, it is an authorizing decision granted on definite conditions and for a limited period.

According to the applicant an analysis of subsequent decisions confirms this view.

(b) Moreover Decision No 19/57 and the contested Decision (No 8/63) do not cover the same subject and are not concerned with the same problems.

Decision No 19/57 validates the individual membership of the OKU by wholesale coal merchants established in France; on the other hand Decision No 8/63 revokes SOREMA's collective membership of the OKU.

The difference in subject matter is confirmed by the statement that Decision No 19/57 concerns joint buying of fuels from the four basins of Aachen, the Ruhr, the Saar and Lorraine whilst Decision No 8/63 relates only to agreements concerning purchases from the coal selling agencies of the Ruhr.

(c) Lastly, the contested Decision does not constitute the implementing decision announced in Decision No 3/62: it revokes the authorization previously granted, the length of the transitional period not having been fixed.

(d) The contested Decision should therefore indicate the change of circumstances which causes the collective membership of the French wholesale coal merchants within the OKU through the agency of SOREMA no longer to meet the requirements set out in the authorization or should show that the actual consequences of this agreement or the application thereof are contrary to the conditions for its approval (fourth subparagraph of Article 65 (2)).

This element is plainly lacking in the present case for the High Authority seeks to invoke *a posteriori* conditions which it did not impose on the applicant.

The *defendant* answers SOREMA's claims basically with the following arguments:

(a) The High Authority first applied Article 12 of the Convention on the Transitional Provisions which expressly provides for setting of time-limits for regularizing situations which do not comply with Article 65.

Moreover the strictly literal interpretation adopted by the applicant for the purposes of the case takes no account either of the hard economic facts or of the Treaty itself, which provides in the second paragraph of Article 2 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'. The applicant's reasoning, seeking to prove that Decision No 19/57 authorized SOREMA's membership of the OKU or that of its associates and so agreed that such membership conformed with the Treaty, cannot therefore be accepted.

In any event the Decisions which preceded the contested Decision, not having been the subject of proceedings instituted in good time, remained in full force and effect both as regards the substance and the wording assigned to them by the High Authority.

Moreover, the applicant's entire argument proceeds from an incorrect premise: the issue has always been one of a transitional arrangement of limited duration.

The French merchants affiliated to SOREMA do not fulfil the conditions for membership of the OKU; the High Authority however deemed it legitimate to allow them the necessary time to extend their business activities in South Germany on a scale which would meet the requirements for this membership. From the text of Decision No 19/57 and

later Decisions the issue has always appeared to be one of authorization given on a purely transitional basis.

(b) Decision No 19/57 and the contested Decision (No 8/63) must be considered together as they are directly linked.

When in 1959 the French merchants' direct and individual membership of the OKU was replaced by membership of SOREMA itself, this was intended to bring out still more clearly the transitional nature of an arrangement, the justification and significance of which have remained unchanged; the substitution of SOREMA for its associates in no way broke the chain of continuity between Decision No 19/57 and the contested Decision.

The authorization given to SOREMA too was essentially of a transitional nature.

As to the suggestion that the contested Decision concerned only joint buying of Ruhr coal, this proceeds from a complete misunderstanding of the scope of the decisions in question and in particular of the contested Decision.

The OKU's business is indeed joint buying in the four basins of Aachen, the Ruhr, the Saar and Lorraine. But inasmuch as it was the trading rules for the Ruhr coal sales which may have created difficulties for the French traders affiliated to SOREMA for several years in buying directly coal intended for sale in South Germany, the contested Decision refers to this problem alone.

(c) The contested Decision indeed constitutes the implementing Decision forecast by Decision No 3/62, that is, the Decision setting an end to the transitional period.

It is clear from the operative part of the contested Decision that it sets 30 June 1963 as the end of the transitional period which started to run again under Decision No 3/62.

If the High Authority did not set an end to the transitional period in Decision No 3/62 itself, this was because it did not consider itself to be in possession at that time of all the determining factors. For that very reason therefore it is to the implementing Decision forecast by Decision No 3/62, that is, to the contested Decision, that one must look for the clues justifying the date chosen for ending the transitional period.

(d) Finally the High Authority considers the applicant in error in its view that the contested Decision contains an improper revocation of an authorization previously granted.

Third complaint: Addition ex post facto of an additional condition for the validity of the authorization

The *applicant* maintains that the contested decision lays down retroactively a further condition for authorization not provided for in the authorizing Decision No 3/62.

Decision No 3/62 authorized SOREMA's provisional membership of the OKU on the grounds that, on the one hand, it is not contrary to the Treaty and, on the other, that it should help to improve coal distribution and the supply of the market.

The contested Decision could not therefore afford grounds for revoking this authorization by claiming that the French wholesale coal merchants had not been in a position to extend their business activities within the time allowed to meet the new conditions required for direct access to the Ruhr coal selling agencies.

The *High Authority* replies that the applicant's arguments are based in every respect on an incorrect understanding of the factual and legal position.

The contested Decision contains no revocation of a previous authorization and does not assert that a condition for authorization is unfulfilled.

It appears from the text itself of Decision No 19/57 that the authorization given relates to joint buying from the mining companies of the basins of Aachen, the

Ruhr, the Saar and Lorraine or their sales organizations of fuels for intended resale in South Germany.
Decision No 19/57 was justified by a concern, repeatedly shown in the series of decisions extending the transitional period, to give the merchants affiliated to SOREMA the opportunity to meet the requirements for direct access to the Ruhr coal selling agencies; this factor was always linked to a real extension of business activities in South Germany, even after the abolition of sales areas.
This was therefore the very object of the agreement, which the applicant classes as a condition added *ex post facto* by the contested Decision, and it is difficult to see how the applicant can persist in maintaining that the Decision is based on a new factor which does not appear in the previous Decisions.

Fourth complaint: Failure to state reasons establishing the existence of a restriction of competition

The *applicant* maintains that the High Authority, having stated in Decision No 3/62 that it was not in a position to make any precise assessment of the final shape of the rules for direct access to the selling agencies and of its effect on the French coal trade, could not then state in Decision No 8/63 that SOREMA's membership restricted or distorted normal competition without expressly indicating the factors causing the restriction or distortion.
In default of its so doing, the contested Decision is vitiated on the ground of an inadequate statement of reasons.
The *defendant* replies that the sole object of the contested Decision was to fix a final date for expiry of the transitional period granted by the previous Decisions, especially No 19/57; it was not therefore called upon either to make the statement in question or give reasons for it.
The complaint disputing that membership of the OKU falls within the provisions of Article 65 (1) is out of time and inadmissible as regards the contested Decision.
It is also ill-founded in that this Decision No 8/63 cannot be considered except in conjunction with Decision No 19/57; moreover, the latter states that agreements between wholesale coal merchants for joint buying fall within the prohibition contained in Article 65.

Fifth complaint: No restrictions on competition arise out of SOREMA's membership of the OKU

The *applicant* maintains that collective membership of the OKU on the part of the French wholesale coal merchants through SOREMA, a company not itself engaged in distribution at all, neither restricts nor distorts normal competition. The competitive position at the time of the contested Decision related to a period before SOREMA's membership of the OKU. When SOREMA was established in 1946 the French wholesale coal merchants were adapting themselves to a pre-existing situation and could not be the cause of a restriction or distortion of competition.
Moreover SOREMA's activity within the OKU is limited to the management of the financial interests of its members; membership of SOREMA is in no wise obligatory; therefore normal competition between French merchants cannot be distorted.
Finally the fact that the merchants affiliated to SOREMA were not effectively engaged in business activities in South Germany could not result in SOREMA's membership of the OKU adversely affecting free competition.
The *defendant* replies that it is the relationship between the French and the German merchants taking part in these agreements and their implementation that must be looked at.
As regards the provisions of Article 65 (1) it matters little whether the participation of the French merchants in the

decisions taken by the OKU takes the form of individual membership or of membership through an organization whose purpose is to represent their interests; in either case there exists a participation in agreements, decisions or practices falling within the provisions of Article 65 of the Treaty. Any other solution of the problem would enable the prohibition set out in the Treaty to be circumvented with ease and would end in its becoming totally ineffective.
The statement that SOREMA manages its members' shares in the OKU as agent runs counter to the applicant's articles of association; the applicant is an association of wholesale coal merchants importing coal in France by river transport, as purchasers the members of SOREMA are therefore competitors with the other members of the OKU. Any 'membership of SOREMA within the OKU', that is to say, any participation by the undertakings belonging to SOREMA in the joint buying agreements entered into by the members of the OKU restricts competition between all the wholesale merchants concerned and falls under the prohibition set out in Article 65 (1) of the Treaty.
Finally, these agreements are restricted to the joint buying of fuels intended for resale in South Germany. SOREMA's claim to take part in these agreements is incompatible with Article 65 because the traders it represents are not engaged in any business activity in South Germany.

IV—Procedure

The procedure followed the normal course.
By Order of the President of the Court dated 24 September, an application to suspend operation of the Decision, made by the applicant on 9 August 1963, was declared inadmissible as being out of time.
This order reserved the question of the costs of the application for the adoption of the interim measure.
The Court, upon hearing the report of the Judge-Rapporteur and upon hearing the Advocate-General, decided there was no case for a preparatory enquiry.
At the request of the Court the defendant has however produced certain documents for the record.
The parties were heard on 15 January 1964.
The Advocate-General gave his opinion at the hearing on 28 January 1964.

Grounds of judgment

I — Admissibility

In support of its application the applicant maintains that since it is not engaged in production or, regularly, in distribution it does not fall within the provisions of Article 65 of the Treaty, because it is not an undertaking within the meaning of Article 80.

The defendant avails itself of this argument to raise the objection that the applicant has no capacity to bring proceedings and that its application for annulment is therefore inadmissible under the second paragraph of Article 33 of the Treaty.

The High Authority is however unjustified in raising this plea of inadmissibility.

In fact, by taking a decision concerning the applicant, it has by implication recognized the applicant either as an undertaking or as an association of undertakings.

Under Article 33 the following may bring an application for annulment against the decisions and recommendations of the High Authority; on the one hand, the Member States and the Council and, on the other, undertakings within the meaning of Article 80 and the associations of undertakings referred to in Article 48.

Under the second paragraph of Article 2 of its articles of association the applicant 'may undertake directly or indirectly the control or management of any body, association or part interest serving the attainment' of its object, namely 'all business relating to the handling, storage, transport of and trading in solid fuels and other bulk goods in the areas supplied by the Upper Rhine and adjoining areas . . .'

Moreover, the coal undertakings belonging to SOREMA are legal persons whose objects as companies include regular engagement in coal distribution and who must, in accordance with Article 80, be considered as undertakings for the purposes of Article 65. Therefore, so far as the applicant represents and groups its members for the purposes set out above, it must be classed as an association of undertakings for the purposes of Article 48 of the Treaty.

As such it is qualified to take proceedings under Article 33 of the Treaty against the contested decision.

In this respect the application is admissible.

No other objection has been raised against the admissibility of the action and no grounds exist for the Court to raise the matter of its own motion.

II — The substance

A — *The first complaint*

The applicant objects that the contested Decision infringes the Treaty in applying to the applicant the prohibition on certain agreements between undertakings mentioned in Article 65, when this prohibition cannot apply to it, as it does not qualify as an undertaking within the meaning of Article 80.

It is accepted that the applicant is an association of undertakings and its constituent undertakings themselves fall within the provisions of Article 65.

The purpose of Article 65 is generally to prohibit all agreements, decisions, or practices tending to prevent, restrict or distort normal competition. It therefore applies also to associations to the extent that their own activity or that of their member undertakings tends to produce the effects referred to therein. This is confirmed by Article 48, which allows associations to engage in any activity not contrary to the provisions of the Treaty. To admit any other interpretation would be to deprive Article 65 of any practical effect.

As an association of undertakings the applicant therefore falls within the provisions of Article 65.

The first complaint is therefore unfounded.

B — *The second complaint*

The applicant maintains that the contested Decision amounts to an illegal revocation of an authorization previously granted on the ground that it does not fulfil the requirements of the fourth subparagraph of Article 65 (2).

It is necessary to examine whether such an authorization was granted to the applicant.

Decision No 19/57 of 26 July 1957, authorizing joint buying of fuels by wholesale coal merchants operating in South Germany and laying down conditions for membership of the OKU which was entrusted with this joint buying, stated that the French traders grouped in SOREMA did not satisfy these conditions. Their exclusion in principle was accompanied by the laying down of a transitional period intended to allow them to establish themselves in South Germany and get permission to draw their supplies directly from the selling agencies.

Decision No 19/57 cannot be considered, with regard to the French merchants grouped in SOREMA, as an authorization to take part in the agreement authorized.

By Decision No 31/59 of 27 May 1959 the High Authority decided that wholesale merchants established in France, having failed to prove that they satisfied the conditions laid down for membership of the OKU must be 'excluded from membership' of that organization.

Moreover this Decision states that 'on the other hand there is no objection to a transitional arrangement whereby the Société Rhénane d'Exploitation et de Manutention (SOREMA) S.A.R.L., Strasbourg, representing the interests of the French merchants who are also partly supplied by the area of the Upper Rhine, is authorized to join the "Oberrheinische Kohlenunion" until the end of the coal industry's year 1959/60'. The second paragraph of Article 2 of the said Decision No 31/59 provides that 'the authorization covers the membership of the Société Rhénane d'Exploitation et de Manutention (SOREMA) S.A.R.L., Strasbourg, but only until 31 March 1960'. It thus amounts to a change in the composition of the OKU in the sense that the wholesale merchants established in France and listed in Annex II to Decision No 19/57 were excluded from it and the applicant company entered it as a limited partner.

This change is confirmed by the amendment made on 29 July 1959, that is to say, two months after Decision No 31/59 was published, to paragraph 3 of the articles of association of the OKU whereby SOREMA was substituted as a limited partner for the fifteen wholesale merchants established in France.

Moreover Decision No 31/59, unlike Decision No 19/59, no longer sets a time-limit on the French merchants for withdrawal from the OKU but authorizes SOREMA's own membership of that body for a limited period.

Decision No 12/60 of 18 May 1960 amended Decision No 31/59 by removing the time-limit of 31 March 1960 from the authorization of SOREMA's membership of the OKU.

Decision No 12/60 is based on the following grounds:

'whereas by Decision No 31/59 of 27 May 1959 the High Authority authorized the Société Rhénane d'Exploitation et de Manutention (SOREMA) S.A.R.L. to be a member of the Oberrheinische Kohlenunion (OKU) until 31 March 1960 and whereas SOREMA has asked, in agreement with the Oberrheinische Kohlenunion, that its membership of that body be extended until 31 March 1962;

whereas the link provided for in Decision No 31/59 between the Oberrheinische Kohlenunion and the French merchants belonging to SOREMA and supplied in part by the area of the Upper Rhine was intended to be retained until the market situation had improved; and whereas for this reason a transitional arrangement was provisionally adopted until 31 March 1960; and whereas, having regard to the development of the market up to that date, the reasons for this transitional arrangement still exist; and whereas it

may therefore be extended until 31 March 1962, this being the date of expiry of the authorization granted for the Oberrheinische Kohlenunion and it is therefore permissible to proceed to an examination of the market situation and to a uniform adaptation of commercial arrangements, and for this examination SOREMA must submit evidence, on the basis of the experience gained meanwhile, showing whether, and, if so, to what extent, its membership of the OKU is contributing to a substantial improvement in distribution.'

It follows that so far as SOREMA is concerned Decisions Nos 31/59 and 12/60 amount to an amendment of Decision No 19/57 both as to its intent and its justification.

By decision No 3/62 of 28 March 1962 the authorization of SOREMA's membership of the OKU was renewed 'for a transitional period the duration of which shall be fixed by a subsequent Decision of the High Authority'. This Decision states, on the one hand, that the grounds preventing the merchants grouped in SOREMA from direct membership of the OKU, namely that 'it is impossible for them for a variety of reasons to draw coal supplies from the Ruhr', disappeared during 1961 owing to the institution of transitional arrangements for direct access to the coal selling agencies of the Ruhr and, on the other hand, that 'it is still not possible at the present time to form a clear conception of the final shape of these trading rules and their effects on French trade' and that 'for these reasons the High Authority considers that for the time being SOREMA's continued membership of the Oberrheinische Kohlenunion is justified in the interests of an improvement in coal distribution and market supplies'.

It follows from the above that Decision No 31/59 of the High Authority began a new phase in SOREMA's relationship with the OKU. By this and subsequent Decisions it no longer restricted itself to fixing or extending the time-limit allowed to the traders grouped in SOREMA for leaving the OKU but authorized SOREMA itself to belong to this body under certain conditions and for a limited period.

This is the only interpretation which accords with the Treaty.

Although during the transitional period the High Authority, applying Article 12 of the Convention on the Transitional Provisions, was able by Decision No 19/57 to fix a time-limit at the end of which the prohibition of the French merchants' membership of the OKU was to take effect, it no longer had this opportunity after the transitional period had expired.

As it had not at that time put an end to that membership it could take no

other course but to authorize it under Article 65. In the present case therefore there was an authorization granted subject to specified conditions and for a limited period within the meaning of the third subparagraph of Article 65 (2) of the Treaty.

The contested Decision states in its preamble that 'as from 1 July 1963 the conditions for group membership of the Oberrheinische Kohlenunion on the part of the French wholesale coal merchants will no longer exist' and provides that 'the authorization for SOREMA's membership of the Oberrheinische Kohlenunion shall cease to have effect on 30 June 1963'.

In the present case there is no occasion to consider whether the contested Decision should be categorized as a Decision refusing a renewal of an authorization previously granted under the third subparagraph of Article 65 (2) or, as the applicant maintains, as a decision of revocation for which provision is made in the fourth subparagraph of Article 65 (2). In either case, the High Authority has not sufficiently fulfilled its obligation to state the reasons on which its decisions are based as required by Article 15 of the Treaty.

Under the third subparagraph of Article 65 (2): 'the High Authority shall renew an authorization once or several times if it finds that the requirements of subparagraphs (a) to (c) are still met at the time of the renewal'. The High Authority, therefore, when it considers itself unable to renew its authorization must state its reasons and in particular indicate in what respects the conditions set out in Article 65 (2) (a) to (c) are no longer fulfilled. The contested Decision contains no such statement of reasons and the mere reference to Decision No 19/57 is no substitute for such a statement.

Decision No 19/57 authorizing the agreement for joint buying on the basis of Article 12 of the Convention on the Transitional Provisions cannot justify a decision taken on the basis of another provision, namely Article 65 (2) of the Treaty, having a different purpose and directed to clearly different ends.

Moreover under the fourth subparagraph of Article 65 (2), the High Authority may revoke an authorization previously granted 'if it finds that as a result of a change in circumstances the agreement no longer meets these requirements, or that the actual result of the agreement or of the application thereof are contrary to the requirements for its authorization'.

The contested Decision does not establish any change in circumstances which would result in the agreement's no longer meeting the requirements for its

authorization nor does it indicate what effects would be contrary to the requirements for its authorization.

There is no occasion to examine the other grounds of the application since these findings are already sufficient for the annulment of the contested Decision.

III — Costs

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

The defendant has failed in its submissions.

It must therefore be ordered to bear the costs in the main action.

The applicant has however failed in its request for suspension of the operation of the contested Decision.

It must be ordered to pay the costs of this action.

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 15, 33, 48, 65 and 80 of the Treaty establishing the European Coal and Steel Community and Article 12 of the Convention on the Transitional Provisions;
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;

THE COURT

hereby:

1. **Annuls Decision No 8/63 of 30 April 1963 of the High Authority of the European Coal and Steel Community concerning membership of the Oberrheinische Kohlenunion, Bettag,**

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

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

Donner Hammes Trabucchi

Delvaux Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 19 March 1964.

H. J. Eversen
Assistant Registrar
For the Registrar

A. M. Donner
President

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

Mr President,
Members of the Court,

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

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

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

1—Translated from the German.