In Case 1/58

FRIEDRICH STORK & Co., Kohlengroghandlung, of Bünde (Westphalia) represented by Mr Krengel, Mr Hollmann and Mr Stock, of Bielefeld, with an address for service in Luxembourg at the office of Felicien Jansen, Huissier, 21 rue Aldringer,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Robert Krawielicki, acting as Agent, assisted by Philipp Mohring, Advocate of the Bundesgerichtshof, Karlsruhe, with an address for service in Luxembourg at the offices of the [Commission], 2 place de Metz,

defendant,

Application for the annulment of the decision of the [Commission] of 27 November 1957, notified to the applicant on 6 December 1957,

THE COURT

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

Advocate-General: M. Lagrange
Registrar: A. Van Houtte

gives the following

JUDGMENT

Law

1. In its principal conclusions the application contests the decision of the [Commission] of 27 November 1957 which, in answer to a decision to stay the proceedings adopted by the Landgericht Essen, had found that the prohibition contained in Article 65(1) of the Treaty did not apply to the decisions adopted on 5 February 1953 by the six joint selling agencies for Ruhr coal. Under the second subparagraph of Article 65(4) an application against such a decision of the [Commission] may be brought before the Court, which therefore has jurisdiction in the present action.

2. Since the application is brought within the context of Article 65 of the Treaty, the applicant is entitled under Article 80 to appear before the Court, even though it is engaged in the distribution rather than the production of coal. The right of action of undertakings engaged in distribution is not limited to cases in which they are parties to the agreement in question but extends to cases such as the present in which a decision based on Article 65 directly affects the interests of the applicant distributive undertaking.

In this instance the Court is not called upon to decide whether an application based on Article 65(4) must also satisfy all the conditions laid down in Article 33 for an application for annulment, since there is no doubt that they are satisfied here. The application relates to an individual decision which concerns the applicant; on 6. December 1957 it was notified to the applicant company, which brought proceedings against it on 4 January, that is to say, within the period of one month fixed by the third paragraph of Article 33; the contested decision is individual in character, since it rules on the legal validity of actual decisions taken by clearly defined groups of undertakings; it concerns the applicant, since it was adopted within the context of an action between that company and another party and it may exert an influence on the outcome of that action.

3. Under Article 65(4) the [Commission] has jurisdiction to rule whether any agreements or decisions adopted by such groups of undertakings are compatible with the provisions of that article. That rule must be interpreted to mean that the [Commission] is also entitled to rule whether the Article in principle is applicable to such agreements or decisions by virtue of other provisions of the Treaty or of the Convention on the Transitional Provisions. Therefore, no objection can be made to the fact that in this instance the [Commission] did not reply directly to the question raised by the Landgericht Essen, in its decision to stay the proceedings, whether the decisions of 5 February 1953 are in breach of the prohibition contained in Article 65(1) of the Treaty but found that the prohibitions contained in Article 65 did not apply to those decisions until the entry into force of Decisions Nos 5 to 7/56.

The foregoing cannot alter the fact that the Court is required to deal with an application for annulment based upon Article 65 (4) of the Treaty. On the grounds set out under Nos 1 and 2 above the Court has jurisdiction to hear the action and the applicant has the right to institute proceedings.

4. The applicant considers that a misuse of powers or an infringement of the Treaty sufficient to justify the annulment of the contested decision is to be found in that the [Commission] wrongly failed to take account of the fact that the decisions in question had to be assessed from the point of view of German law, by virtue of which they were void. That argument is unfounded.

(a) Under Article 8 of the Treaty the [Commission] is only required to apply [Union] law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law. Consequently, the [Commission] is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law (in particular Articles 2 and 12 of the Basic Law).

(b)It is for the [Commission] to consider all the agreements and decisions which are covered by the terms of Article 65 of the Treaty and are intended to apply to the common market in order to rule on their compatibility with the provisions of that article, without regard for their validity under national law. An agreement which is valid under national law may well run counter to the prohibition in Article 65(1). In such a case it is void under [Union] law (Article 65(4)). On the other hand, even if an agreement is void under national law, it may still be intended to apply to the common market and may have repercussions there which are incompatible with the Treaty. In order to avoid such a situation the [Commission] must also consider whether an agreement which is allegedly void under national law is compatible with the Treaty.

In this instance the decisions adopted on 5 February 1953 were intended to come into force at the beginning of the new coal-marketing year that is, as from 1 April 1953. It was therefore the intention of the parties concerned that they should be applied at a time when the common market was already in existence. The [Commission] was therefore obliged to consider them in the manner described above, that is, without reference to their validity under national law. It had to do so on the basis of [Union] law which, according to the terms of the final subparagraph of Article 2(2), Article 2(3), Article 1(4)

and subparagraph (a) of the second paragraph of Article 8 of the Convention on the Transitional Provisions, was the only law applicable to coal after 10 February 1953 (the day on which the common market was established).

The legal position described above was in no way modified by the fact that the prohibitions contained in Article 65 did not take effect on the establishment of the common market, that is to say, on 10 February 1953, but, in accordance with Article 12 of the Convention and Decision No 37/53 of the [Commission] which was adopted in implementation t hereof, only on 31 August 1953 or even later.

5. Since the Court cannot base its judgment on legal arguments whose validity is not established, it considers it necessary to make a preliminary examination of the question whether Article 65 was applicable not only on the establishment of the common market in coal (10 February 1953) but already on the entry into force of the Treaty establishing the European Coal and Steel Community (on 25 July 1952).

It does not, of course, emerge directly from the wording of Article 12 of the Convention that the principle laid down by Article 1(5) of the Convention that the provisions of the Treaty shall be applicable from its entry into force shall be modified by special regulations as regards the rules on agreements and concentrations in Article 65. The second paragraph of Article 12 merely states that, where the [Commission] does not grant the authorization provided for in Article 65(2), the prohibition on agreements contained in that article shall take effect on the expiry of a reasonable time-limit fixed for that purpose. Although, notwithstanding their possible subsequent authorization ('prohibition subject to authorization'), the agreements entered into after the establishment of the common market fall immediately under the terms of the prohibition in Article 65, the 'existing' agreements remain in force provision ally until their authorization is refused and the time-limit set by the [Commission] has expired. Until such time they enjoy 'authorization subject to subsequent prohibition'. However, the second paragraph of Article 12 of the Convention does not state whether those agreements drawn up since the entry into force of the Treaty must alone be regarded as 'existing' agreements or whether those drawn up between that date and the establishment of the common market must also benefit from the transitional rules.

There are, therefore, no express provisions stipulating that, as an exception to the principles laid down in Article 1(5) of the Convention, the

prohibitions contained in Article 65 of the Treaty do not apply to agreements from the entry into force of that Treaty, but only from the establishment of the common market and that, in the meantime, the special rules contained in Article 12(2) of the Convention shall apply. That principle must, however, be deduced from the tenor and purpose of the transitional provisions.

As is stated in Article 1(1), the Convention was annexed to the Treaty so as to 'provide for the measures required in order to establish the common market and enable production to be progressively adapted to the new conditions, while helping to eliminate disequilibria arising out of the former conditions'. Article 12 of the Convention must be interpreted in the light of that principle.

The system established by Article 65 of the Treaty is based not only upon the prohibition of agreements laid down in paragraph (1),of that article but at the same time on the possibility of authorizing useful and necessary agreements contained in paragraph (2). That possibility of authorization is of considerable importance since, despite the restrictions set on agreements by the Treaty, it provides for and recognizes the procedure for the joint sale of coal, which has long been employed in all the countries of the [Union] producing coal in large quantities.

If the agreements drawn up between the entry into force of the Treaty (25 July 1952) and the establishment of the common market (10 February 1953) were subject to Article 65 of the Treaty, the result would be that, with the exception of the rule prohibiting agreements, the complete system provided for by that article could not have been implemented during the six months following the entry into force of the Treaty, since, during that period, there was no organization in existence with power to grant the authorizations. On the one hand, the [Commission] was only in a position to do so after the establishment of the common market (fourth sub- paragraph of Article 2(2) of the Convention); on the other hand, the governments of the Member States were not empowered to apply [Union] law and to grant the authorizations provided for in Article 65(2) themselves. Under Article 2(3) of the Convention, they were only entitled to continue to exercise the powers conferred on them by national law ('the relevant powers *shall continue* to be exercised by Member States') and could not act in place of the [Commission] in exercising the powers conferred on that body by the Treaty.

It is inconceivable that the Contracting Parties accepted a situation whereby, for a period of uncertain duration following the entry into force of the Treaty (it in fact came to an end after six months), the prohibition in Article

65(1) was applicable, whilst the power of authorization provided for in paragraph (2) of that article and closely connected with the prohibition was inapplicable.

On the basis of the aim of the Convention, which is set out above and referred to in Article 1(1) thereof, Article 12 must be interpreted to mean that the second paragraph is also applicable to agreements drawn up between the entry into force of the Treaty and the establishment of the common market. That interpretation alone avoids the unsatisfactory situation described above, that is to say, the arbitrary separation of the various connected elements of Article 65 into those which are immediately applicable and those which would only become applicable after an indefinite period.

The different regulations applying to the prohibitions contained in Article 4(a) to (c) and the much clearer transitional provisions contained in Article 13 of the Convention governing the implementation of Article 66 of the Treaty on concentrations between undertakings do not conflict with the above interpretation, since they concern circumstances of another type which had for good reasons to be subject to another system. Paragraph 13 in particular is based on quite different premises, since transactions bringing about concentrations effected before a certain date entirely avoid the application of the Treaty, whilst Article 65 was sooner or later to apply to all agreements regardless of the date on which they were made.

Agreements made before 10 February 1953 therefore enjoy the protection of the second paragraph of Article 12 of the Convention.

6 (a) It emerges from the second paragraph of Article 12 of the Convention, together with Articles 1, 2 and 3 of Decision No 7/53 of the [Commission] of 11 July 1953 (JO 1953, p. 153), that the 'existing' agreements concluded before 10 February 1953 did not become invalid on the establishment of the common market (10 February 1953) but were regarded as authorized subject to subsequent prohibition and, in the absence of any special decision adopted by the [Commission], only fell under the prohibition in Article 65 and became invalid as from 31 August 1953. If a request for authorization has been submitted before that date the said agreement remained in force as long as the [Commission] adopted no decision rejecting it.

(b) If the legal principles set out above are applied to this case it appears that, when it adopted the contested decision, the [Commission] rightly ruled that the prohibitions in Article 65(1) of the Treaty were not applicable to the

decisions of 5 February 1953 until the entry into force of Decisions Nos 5 to 7/56, since such decisions, adopted five days before the establishment of the common market, constituted 'existing' agreements in respect of which a request for authorization had been submitted before 31 August 1953 and was only rejected by Decisions Nos 5 to 7/56.

The objections put forward by the applicant in this respect are therefore unfounded.

(i) The applicant has alleged that the decisions of 5 February 1953 were in fact not 'existing' agreements but that they had been adopted *ad hoc* only a few days before the establishment of the common market, that is, in order to avoid the immediate application of the prohibitions in Article 65(1) of the Treaty.

Even if such an intention had encouraged the parties concerned to adopt the decisions of 5 February 1953, which the Court considers to be possible but unproved, it would not be sufficient to prevent the application of Articles 1 to 3 of Decision No 37/5 3 of the [Commission]. Order No 20 of the Council of the Allied High Commission of 9 September 1952 had compelled the joint selling agencies for Ruhr coal to reorganize the sale of coal before 31 March 1953. That measure encouraged the agencies concerned to take steps at the same time to limit the ability of wholesalers to place direct orders, *a fortiori* since Order No 2 had expressly referred to such dealers several times. Although there was, therefore, a legal obligation on the joint selling agencies for Ruhr coal to adopt agreements on their reorganization, it is not sufficiently established in law that the decisions of 5 February 1953 were only adopted in order to avoid the application of Article 65 of the Treaty.

According to Article 1 of Decision No 37/53 of the [Commission], the decisive question is whether the agreements, decisions or concerted practices were already in existence when the common market was established (10 February 1953). That question may be answered in the affirmative as regards the decisions of 5 February 1953.

(ii) The applicant also maintains that since the decisions of 5 February 1953 have never been authorized they are covered by the absolute prohibition in Article 65 and are therefore void. That argument is u9founded.

The [Commission] in fact refused to authorize the decisions of 5 February 1953. That refusal has never been expressly stated but it was clearly implied in the authorization of the regulations on sales given by Decisions Nos 5 to

The Court therefore considers the defendant to be justified in its view that the authorization given to the new regulations by Decisions Nos 5 to 7/56 amounted in law to a formal refusal to authorize the earlier regulations and that, for the reasons set out under point 6, paragraph (a) and (b) above, the date set for the entry into force of the new regulations (22 February 1956) had to be considered as the date on which, in accordance with Article 3 of Decision No 37/53, the prohibitions in Article 65 were to apply to the earlier regulations.

Furthermore, the applicant's view that from the differences between the agreements which were finally authorized and the decisions of 5 February 1953 it may be concluded that the former did not form the subject of a request for authorization submitted within the required time cannot be accepted, since the agreements authorized by Decisions Nos 5 to 7/56 were submitted for authorization by parties other than those who adopted the decisions of 5 February 1953 and the content of those authorizations does not coincide with the terms of the decisions.

After examining the regulations governing the sale of Ruhr coal which were submitted to it for examination an which included the decisions of 5 February 1953, the [Commission] let it be understood that it could not authorize the regulations existing earlier. It had, however, to avoid a situation in which the previous legal organization governing the sale of Ruhr coal became ineffective without being replaced by new regulations compatible with the Treaty. To 'wait until the coalmines of the Ruhr submitted new regulations which could be authorized before formally rejecting the earlier regulations corresponded to the desire, which was based on the general aims of the Treaty and in particular on Article 3(a) thereof, to avoid that situation. All the efforts towards the adoption of regulations governing the sale of Ruhr coal form a single entity, beginning with the requests for the authorization of the decisions of 5 February 1953 and ending with the authorization given to the agreements finally adapted to the requirements of the [Commission] and referred to in Decisions Nos 5 to 7/56. It is impossible for that continuous development to be artificially divided and for the first request for authorization which was presented within the required time to be thereby deprived of the suspensory effect provided for in Decision No 37/53.

(c) There is therefore no error of law in the finding made by the contested decision that the prohibitions in Article 65(1) of the Treaty were not applicable to the decisions of 5 February 1953 until the entry into force of

Decisions Nos 5 to 7/56 on 22 February 1956. Such a finding does not prejudge the question, which the Landgericht Essen did not raise in its decision to stay proceedings, what law to apply to those decisions during the period from 5 to 10 February and whether or not they were valid according to that law.

(d) It is true, as the applicant has observed, that the contested decision is mainly based on the fact that the [Commission] took no steps against the commercial regulations in question until Decisions Nos 5 to 7/56 were adopted. Article 12 of the Convention sets no specific period within which action must be taken against the 'existing' agreements, with the result that the [Commission] is entitled to use its discretion. The fact that it took three years to make a thorough examination of the organization of the sale of Ruhr coal and to introduce a new method of organization cannot be regarded as an abuse of its discretionary power in the light of the complexity and great economic and social importance of the reorganization in question.

If the applicant considered that the [Commission] should have taken separate and earlier action against the commercial regulations in dispute, it was entitled to refer the matter to it in accordance with Article 35 of the Treaty and to bring an action for failure to act if the [Commission] adopted no decision or recommendation. As no such proceedings were instituted by the applicant the [Commission] is deemed not to have infringed the Treaty by taking no action at that period.

7. The applicant's conclusions based on the alleged illegality of Decisions Nos 5 to 7/56 of the [Commission] are no better founded.

(a) The Court of Justice of the ECSC has already ruled that an applicant could put forward the illegality of a general decision on which an individual decision was based as a ground for an action against such individual decision. Since Decisions Nos 5 to 7/56 do not form the basis of the contested decision, the Court is not required in this instance to settle the question whether the same applies where the individual decision at issue is based upon another individual decision which is alleged to be illegal. That is already clear from the fact that, as a result of the above interpretation of Article 12 of the Convention and Decision No 37/53, the contested decision had to follow the same pattern if when adopting Decision No 5 to 7/56 the [Commission] started with the idea that the commercial regulations existing before the adoption of the decisions of 5 February 1953 were alone compatible with Article 65. The adoption of Decisions Nos 5 to 7/56 is only decisive for the purposes of fixing the date from which the prohibitions contained in Article 65 applied to the 'existing' agreements and decisions.

There is therefore no real link between the contested decision and Decisions Nos 5 to 7/56.

(b) In so far as the applicant contests the regularity of Decisions Nos 5 to 7/56 and, in its alternative conclusions (which, furthermore, are inadmissible since they were only put forward in the reply and therefore out of time for the purposes of Article 22 of the Protocol on the Statute of the Court and Article 29 of the Rules of Procedure of the Court, apparently seeks their annulment, the application is inadmissible, since it refers to decisions other than that which is contested. The applicant did not contest Decisions Nos 5 to 7/56 within the period provided for by Article 33 of the Treaty. It cannot, therefore, contest them *incident er* in the present case. The same applies to Decisions Nos 10 to 12/57 and 16 to 18/57 which merely amend and supplement Decisions Nos 5 to 7/56.

The applicant's contention that it was unable to contest Decisions Nos 5 to 7/56 when they were adopted since it did not satisfy the conditions laid down therein is unfounded. From their adoption the decisions had concerned the applicant since they had excluded it from making direct purchases. The applicant could, therefore, have contested them within the prescribed period and have obtained the legal examination of its allegations concerning the repercussions-which it considers to be both serious and incompatible with the spirit of the Treaty-of the regulations in question on the existence of many long-established first-hand wholesalers. It is, however, unnecessary to consider the question in this instance, since the action only concerns the decision of the [Commission] of 27 November 1957 which is in no way connected with it.

8. The application must therefore be dismissed on those grounds and, in accordance with Article 60(1) of the Rules of Procedure of the Court, the applicant must be ordered to pay the costs.

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 3, 4, 8, 31, 33, 35, 65 and 80 of the Treaty establishing the European Coal and Steel Community, as well as Articles 1, 2, 8, 12 and 13 of the Convention on the Transitional Provisions;
Having regard to the Protocol on the Statute of the Court of Justice of the European [Union];
Having regard to the Rules of Procedure of the Court of Justice of the European [Union];

Having regard to Decisions Nos 1/53 and 37/53 of the [Commission] and the letters of the [Commission] of 7 and 10 February 1953 addressed to the Governments of the Member States,

THE COURT

hereby:

1. Dismisses the application for the annulment of the decision of the [Commission] of 27 November 1957, notified to the applicant on 6 December 1957;

2. Orders the applicant to pay the costs of the action.

Donner Riese Rueff

Delvaux Hammes Rossi Catalano

Delivered in open court in Luxembourg on 4 February 1959.

A. Van Houtte
Registrar

A. M. Donner
President