

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

OPINION OF MR ADVOCATE-GENERAL LAGRANGE¹

*Mr President,
Members of the Court,*

In order for my opinion to be as clear as possible, I ask your permission to give a brief preliminary sketch of the essential points of the facts and the procedure.

The applicant company is a wholesale coal dealer at Bünde (Westphalia). It satisfied the conditions for obtaining supplies direct from the mines fixed by the organizations for the joint sale of Ruhr coal – the Deutscher Kohlenverkauf or DKV – which was still active on the entry into force of the Treaty, that is, it had an annual turnover exceeding 6 000 metric tons; it was, therefore, a ‘first-hand dealer.’ However, it subsequently found itself unable to reach the turnover of 48 000 metric tons required thereafter under the rules adopted on 5 February 1953 by GEORG, the new organization set up by the coal companies of the Ruhr in implementation of the legislation of the Occupying Powers.

Therefore, on 23 April 1953 the applicant brought an action for damages against GEORG before the Landgericht Essen in respect of the loss suffered as a result of the fact that after 1 April 1953, the date on which the new system came into force, it was no longer supplied directly as a first-hand wholesaler.

By a judgment of 6 November 1953, the

Commercial Division of the Landgericht Essen made the following order:

‘The proceedings are stayed until the High Authority of the European Coal and Steel Community has given a ruling under Article 65(4) of the Treaty establishing the European Coal and Steel Community, on the question whether the joint decisions adopted by the members of the defendant and the six joint selling agencies for Ruhr coal which provide that as from 1 April 1953 the agencies will no longer deliver directly to wholesale coal dealers selling less than 48 000 metric tons of fuel per year are contrary to the terms of the prohibition contained in Article 65(1) of the abovementioned Treaty.’

The Court is aware that under the terms of Article 65(4) ‘The High Authority shall have sole jurisdiction, subject to the right to bring actions before the Court, to rule whether any . . . agreement or decision’ prohibited by paragraph (1) ‘is compatible with this Article’. Any such prohibited agreements or decisions’ shall be automatically void and may not be relied upon before any court or tribunal in the Member States’.

The High Authority only adopted its decision on 27 November 1957. The operative part of that decision is as follows:

¹ – Translated from the French.

'Article 1

Until the date of entry into force of Decisions Nos 5/56, 6/56 and 7/56 of the High Authority of 15 February 1956, that is, until 22 February 1956, the prohibitions contained in Article 65(1) of the Treaty were not applicable to the decisions adopted by the members of the defendant and the six joint selling agencies for Ruhr Coal, mbH.

Article 2

This decision shall enter into force on the date of its notification to the Landgericht Essen and to the parties concerned.'

It is against that decision that the action was brought by Friedrich Stork & Co.

It can be seen, therefore, that after a delay of more than four years the High Authority has not settled the question raised by the Landgericht Essen of the compatibility with Article 65(1) of the decisions of 5 February 1953 concerning direct wholesalers. Its reply is based on a procedural ground: the prohibitions contained in Article 65 were not applicable to the decisions in question.

Why was that reply given and why did it take so long? Let me deal first of all with the reason for such a reply.

It was given because, according to the High Authority, the period of application of the decisions of 5 February 1953 (which might be called the GEORG system), from 1 April 1953 to 22 February 1956, was governed entirely by Article 12 of the Convention on the Transitional Provisions and Decision No 37/53 of 11 July 1953 which was adopted in implementation thereof. That decision interprets Article 12 (the aim of which is to maintain existing agreements and organizations in force on a temporary basis as referring to agreements and organizations in existence *on the establishment of the common market* which is, as regards coal, on 10 February 1953 (rather than on the date of entry into force of the Treaty, that is, 25 July 1952). In accordance with that interpretation, therefore, the GEORG decisions are governed by the transitional provisions since they were adopted on 5 February 1953. Under Article 3 of Decision No 37/53 they shall remain in force until the request

for their authorization has been rejected, provided that such a request was submitted before 31 August 1953, which is the case in this instance.

Secondly, why did the High Authority delay so long in giving its reply? At least until the adoption of Decisions Nos 5, 6 and 7/56 on 15 February 1956 the delay may be explained by the desire of the High Authority to give a detailed reply. In fact, if the authorizations requested by GEORG had been granted, the question would thereby have been settled. If they had simply been refused, Article 3(2) of Decision No 37/53 would have required the decision of refusal to fix the date on which the prohibitions contained in Article 65 took effect. In this instance the refusal is implied in the authorization which was given, subject to a series of conditions, not to GEORG but to a very different organization: the three joint selling agencies and the joint office currently in existence. It is for this reason that the validity of the decisions adopted by GEORG expired on 22 February 1956, the date of entry into force of the new and properly authorized system.

From a logical point of view the first question to be settled should be which legal system (the permanent system of Article 65 or the temporary system of Article 12 of the Convention) governs agreements or decisions adopted *after* the entry into force of the Treaty but *before* the establishment of the common market. If Article 12 is not applicable, the decisions at issue in this instance are automatically void and, since they have never been authorized, have never taken effect. This question is not, of course, at issue in this instance, since both parties consider that legally, in accordance with Decision No 37/53, Article 12 applies to the agreements or decisions entered into before the establishment of the common market. However, as the Court will remember, the question was expressly raised by the Judge-Rapporteur at the hearing and I think it necessary to deal with it in case the Court should consider it necessary to raise the question of its own motion.

The problem is, of course, a difficult one

since, unlike Article 13 which deals with concentrations and fixes precisely the dates of implementation of the various provisions of Article 66, Article 12 which deals with agreements is much more general.

The High Authority's argument that the date to be considered is the date of establishment of the common market rather than the entry into force of the Treaty is based (as the Court will remember from the statements made in court on this point by its Agent) on the combined provisions of Articles 1 and 8 of the Convention, in conjunction with the combined provisions of Articles 4 and 65 of the Treaty.

The High Authority accepts that Article 1(5) of the Convention is applying a general principle of interpretation when it provides that *'Upon the entry into force of the Treaty . . . , the provisions thereof shall apply subject to the derogations allowed by this Convention and without prejudice to the supplementary provisions contained in this Convention for the ends set out above.'* However, the first paragraph of Article 1 states that *'The purpose of this Convention . . . is to provide [in particular] for the measures required in order to establish the common market . . .'* Under the terms of Article 8, *'The common market will be established as effect is given to Article 4 of the Treaty.'* Among the methods of giving effect to that article is the abolition of 'restrictive practices which tend towards the sharing or exploiting of markets' (Article 4(d)), which covers Article 65. Thus, as regards each of the products in question, the implementation of the latter article can only take place as from the date of establishment of the common market and it follows that the 'existing' agreements which benefit from the application of the temporary system established by Article 12 constitute agreements entered into before the date in question, even if they were in fact made after the date of entry into force of the Treaty.

In my opinion that interpretation is far from convincing and a comparison of Articles 1 and 8 of the Convention leads rather to the contrary conclusion.

In fact, I consider that a careful distinction

must be made between, *first, the date from which the circumstances provided for by the treaty are subject to the rules which it lays down and, secondly, that date after which the High Authority may exercise its powers.*

As regards the first point the general rule contained in Article 1(15) of the Convention applies: in the absence of any provision in the Convention to the contrary, the provisions of the Treaty shall be applicable from its entry into force. A contrary provision relating to concentrations is to be found in Article 13 but no such provision exists in Article 12 in relation to agreements.

As regards the second point, Article 2 of the Convention provides precise answers. The High Authority shall exercise forthwith the information and study functions assigned to it by the Treaty. On the other hand, apart from certain exceptions (such as apportionment in case of shortage) it shall not exercise its functions until 'the opening date of the transitional period for each of the products in question'. That system is consistent. During the so-called preparatory period, which extends from the entry into force of the Treaty to the opening date of the so-called transitional period—all the measures 'preparatory' to the establishment of the common market must be adopted. In fact, with the exception of certain situations resulting from the transitional provisions, whose effect may last for a maximum of five years, the common market *must be a reality from the first day of its existence.* That emerges clearly from Article 8 of the Convention which I have already quoted and which provides that *'The common market will be established as effect is given'* (in particular by means of the information gathered during the period properly described as 'preparatory') *'to Article 4 of the Treaty.'* The second paragraph follows on immediately: *'This shall be done'* (that is, Article 4 shall be implemented) *'without prejudice to the special provisions contained in this Convention' at dates which are set out therein.* As regards coal, the date in question is that on which the equalization machinery provided for in particular for the benefit of Belgian coal has been set up.

There is, in fact, a necessary correlation between the aid granted to the Belgian coal-fields and the *real* establishment of the common market in coal, without which the former is not justified.

Therefore, in the absence of any express provision to the contrary, at the date fixed for the opening of the common market the measures and practices which that article claims to be incompatible with the common market *must actually have disappeared*.

If one refers to the list in Article 4 one sees that they were abolished in the following way. First, the customs duties and quota restrictions (Article 4(a)) were abolished. The common market opened on 10 February and the High Authority straightaway adopted immediately applicable decisions on discriminatory practices in prices (Article 4(b)) (decision of 12 February 1953 on the publication of price scales for coal). The common market in steel opened on 1 May and the corresponding decision was taken on 2 May. As regards subsidies or aids granted by States (Article 4(c)), Article 11 of the Convention sets the date for their abolition, so that no legal difficulty arises.

There remain the 'restrictive practices which tend towards the sharing or exploiting of markets' (Article 4(d)), that is, the agreements and concentrations which form the subject of Articles 65 and 66 of the Treaty and of Articles 12 and 13 of the Convention. As regards Article 66, Article 13 provides for an exception to each of the two rules: first, as regards the transactions which are subject to the Treaty, it declares that it is not applicable to existing concentrations other than those effected during a sort of 'suspect period' between the signature and the entry into force of the Treaty; secondly, it provides for the exercise of the High Authority's powers to be staggered as from the entry into force of the Treaty.

Finally, as regards Article 65, logic leads one to take the view that in the absence of any contrary provision in the Convention:

(a) The automatic invalidity provided for by Article 65 applies without restriction to the

agreements concluded and arrangements made after the entry into force of the Treaty, since the provisions of Article 12 of the Convention are only applicable to agreements and arrangements existing before its entry into force.

(b) In accordance with the third subparagraph of Article 2(2) of the Convention the High Authority can only exercise its powers in that area, whether to grant authorizations or to establish the nullity of agreements, as from the date of opening of the common market. As the Judge-Rapporteur recalled in connexion with the question raised at the hearing, that is the argument put forward, at least as regards the first point, by Paul Reuter on p. 285 of his work.

That system appears to be in accordance with the common law of the Convention: the preparatory period is used in order to gather information concerning existing agreements and arrangements, so that *from the opening of the common market* the High Authority may exercise its powers in their regard by granting or refusing the authorizations requested and, if appropriate, by establishing the invalidity of others. In that way it will be possible for the terms of Article 4(d) to be implemented immediately. It is clear that the position will not be the same if the High Authority is compelled to wait for the eve of the opening of the common market before beginning or completing its studies of agreements or arrangements which only come into existence at the end of the preparatory period. Furthermore, it is quite usual for the benefit of the transitional provisions to be limited to those agreements and arrangements in existence before the entry into force of the Treaty, that is, at a time when they were not covered by the Treaty, and, on the other hand, for them not to be applied to those which came into existence at a period when the Treaty was properly ratified and incorporated into the national legislation of the Member States and bound the nationals of those States. That solution certainly applies to other matters such as the subsidies, aids or special charges granted or imposed by

States (Article 4(c)), which are dealt with in Article 11 of the Convention and for which no contrary provisions exist. One would not imagine that the temporary continuance of such aids or charges might apply to those introduced by a State after the entry into force of the Treaty, since their introduction is prohibited.

I felt it necessary to make the foregoing remarks, if only to show the difficult nature of the question. However, I do not believe that it is necessary for the Court to raise the question of its own motion for the two following reasons.

First, it was expressly settled – in a direction which is, moreover, contrary to the observations which I have just made – by Decision No 37/53 of 11 July 1953 which, as regards the point before us, constitutes a decision interpreting Article 12 of the Convention. That decision has never been contested before the Court. One might, of course, imagine an action being brought against an implementing decision to test its legality, as the Court recognized in its judgments in the ‘Chasse’ and ‘Meroni’ cases. In this instance, however, no objection of illegality has been raised, since the two parties agree that the decision is legal. For my part I am not certain that the decision is legal. For my part I am not certain that the Court may pronounce it illegal of its own motion.

Secondly and more importantly, the question was settled by the Court’s judgment in Case 6/54 (*Government of the Kingdom of the Netherlands v High Authority of the European Coal and Steel Community*, Rec. 1954-1955, p. 222). It is true that the relevant passage in the judgment is not very explicit but the outcome is clear, since the organization claimed by the applicant Government to be illegal was in fact GEORG and the Court was clearly aware that it was established after the entry into force of the Treaty. Furthermore, in his supporting opinion, my colleague Mr Roemer had considered the question in detail and no further doubt can exist.

I must now consider the grounds of complaint put forward by the applicant.

It appears that the purpose of all the arguments put forward is to show that the decisions of 5 February 1953 are not covered by the transitional provisions contained in Article 12 of the Convention.

(a) The applicant considers, first, that the validity of the decisions in question ought to have been considered solely on the basis of the provisions in force in Germany at the time the decisions were adopted. On 5 February 1953 the common market in coal was not yet established and the High Authority had no power to adopt a decision under Article 65. Even if reference is made to the date on which the decisions took effect (1 April 1953) rather than to the date on which they were adopted, the result is the same since, according to Decision No 37/53, Article 65 only became applicable on 31 August 1953.

According to Order No 78 of the British Military Government and the implementing provisions drawn up in respect thereof, the decisions of 5 February 1953 are void. The transitional provisions of the Treaty cannot be extended to cover agreements which are invalid under the legislation of the country in which they are concluded.

Since, as I have already said, the provisions of the Treaty apply not only to future agreements but also to those at present in existence, the only question to be considered is which ones are covered by the transitional provisions. Whatever the date on which Article 65 became applicable (with or without the benefit of the transitional provisions), it is clear that the decisions of 5 February 1953 were intended to take effect after that date. In any event, therefore, the High Authority had to give its opinion on an agreement which was intended to take effect after the common market came into existence. Moreover, it is clear that the High Authority had no power to rule on the validity of the agreement from the point of view of national legislation (that is, national legislation *per se* or the legislation of the Occupying Powers) under which it had been set up. The possible illegality from that point of view of the agreements which it was required to consider is, in my opinion, un-

important since for the purposes of Article 65 it is the factual situation which must be considered, that is to say, agreements or decisions (whether regular or not) and even mere 'practices'. Thus, for the High Authority to have no need to consider the question it must be faced with an agreement which is not only absolutely void but which has never been applied. That is not the case here: the decisions of 5 February 1953 are based upon Regulation No 20 amending Regulation No 17 of the Allied High Commission, which was adopted in implementation of Law No 27 on the reorganization of the German coal and iron and steel industries. The fact that those provisions are not always completely in harmony with the provisions of the Treaty, in particular as regards the interaction in time of the two legal systems, that difficult conflicts of law may arise as regards the application to the same facts of the two systems of legislation or, finally, that the arrangement and decisions adopted by GEORG infringe Law No 27 and Regulation No 20 to a greater or lesser degree cannot relieve the High Authority of the duty to exercise its powers with regard to an arrangement which exists and is intended to operate under the system established by the Treaty.

(b) Secondly, the applicant maintains (and his counsel emphasized that aspect of the problem at the hearing) that Decision No 37/53 is not applicable in this instance since, although the contested decisions were adopted five days before the common market entered into force, they were only to be applied after it entered into force, with the result that their anteriority is purely fictional. They are *ad hoc* decisions which were adopted at the last moment solely in order to allow the persons to whom they apply to benefit from the advantageous terms of Article 12 and Decision No 37/53. One must consider the situation existing on the eve of the entry into force of the common market. The earlier arrangement, that based on a turnover of 6 000 metric tons, was still in force as regards the applicant and it was only intended to come to an end on 31 March 1953. That situation alone merited

the protection of the transitional provisions. It is clear that the foregoing observations are not irrelevant but that they can only be recognized as valid in law if Decision No 37/53 is accepted as being legal. As soon as one agrees with the terms of that decision that the transitional provisions in Article 12 of the Convention are applicable to the agreements, decisions and practices existing at the date of establishment of the common market (that is, as regards coal on 10 February 1953, one must also accept that by continuing to conclude agreements, adopt decisions or participate in concerted practices up to the eve of the expiry of the preparatory period the undertakings only acted as they were entitled to do, in the knowledge that they would thus benefit from the transitional provisions. Unlike concentrations, there is no 'suspect period' for such measures. Furthermore, as regards agreements entered into on the eve of 25 July 1952, the date on which the Treaty entered into force, the position would be no different under the other system which we have just considered (that which refers to the date of entry into force of the Treaty).

(c) The final ground of complaint concerns Decisions Nos 5 to 7/56 of 15 February 1956 which granted the authorization and are alleged to have established a system which is discriminatory as regards certain wholesalers.

I shall not go into this ground of complaint, which concerns decisions which are quite distinct from that forming the subject of the action. Decisions Nos 5 to 7/56 authorize the new agreements concluded for the joint sales of fuel from the Ruhr coalfield. They refer to earlier agreements (while amending and supplementing them) and have formed the subject of requests for authorization which have themselves been amended and supplemented. As I recalled at the beginning of my opinion, the decisions authorizing the new system of sales thereby put an end to the previous system established by GEORG which was covered by the transitional provisions. Is the new system in accordance with Article 65 or not? Since it has been authorized an action against the authoriza-

tion could have brought the question before the Court but it cannot be discussed in the course of an action which, according to the judgment of the Landgericht Essen, only concerns the validity of the decisions of 5 February 1953.

I am therefore of the opinion that:

the application should be dismissed;

the costs of the action should be borne by Friedrich Stork & Co.