In Case 30/59

DE GEZAMENLIJKE STEENKOLENMIJNEN IN LIMBURG, an association of undertakings within the meaning of Article 48 of the Treaty, of 16, Dr Poelstraat, Heerlen (Netherlands), represented by H. H. Wemmers, President, and P. A. A. Wirtz, appointed by the annual meeting of members of the association, assisted by W. L. Haardt, Advocate at the High Court of the Netherlands, lecturer at the University of Leyden and W. C. L. van der Grinten, Professor at the Catholic University of Nijmegen, with an address for service in Luxembourg at 83, boulevard GrandeDuchesse Charlotte.

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by F. van Houten, Legal Adviser to the [Commission], acting as Agent, assisted by C. R. C. Wyckerheld Bisdom, Advocate at the High Court of the Netherlands, with an address for service in Luxembourg at the offices of the [Commission] at 2, place de Metz,

defendant,

supported by

THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, represented by Professor Ludwig Erhard, Federal Minister for Economic Affairs, assisted by Konrad Zweigert, Resident Professor of the Faculty of Law of the University of Hamburg, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany at 3, boulevard Royal,

intervener,

Application for

(a) annulment of the decision adopted by the [Commission] in its letter of 30 April 1959 rejecting the request submitted by the

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applicant in its letter of 9 March 1959 that the [Commission] should record by a decision that, in financing the 'Bergmannsprämie' out of public funds, the Federal Republic of Germany has failed to fulfil one of its obligations under the Treaty;

(b) a declaration by the [Commission] that, in deciding so to finance it, the Federal Republic of Germany has failed to fulfil its obligations under the Treaty;

THE COURT

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

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

gives the following

JUDGMENT

Grounds of judgment

A - Admissibility

1. *Correctness of the procedure*

By letter of 9 March 1959, the applicant raised with the [Commission] under Article 35 of the Treaty establishing the European Coal and Steel Community the need for it to record by a decision that, in financing the miner's bonus out of public funds, the Federal Republic of Germany had failed to fulfill one of its obligations under the Treaty.

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By letter dated 30 April 1959 but postmarked 8 May 1959, the [Commission] informed the applicant that it could not see its way to acceding to its request. The communication notifies the applicant of the [Commission]'s decision not to take the decision requested of it.

Application No 30/59 seeks the annulment of this decision of rejection, and, accordingly, constitutes an action to have a decision declared void under Article 33 of the Treaty.

Since the application was entered at the Court Registry on 5 June 1959, the timelimit of one month contained in the last paragraph of Article 33 has been complied with when account is taken of the date of despatch of the [Commission]'s reply as shown by the postmark.

2. *Applicant's right of action*

The contested decision is that in which the [Commission] refused to take the decision which, according to the applicant, it was under a duty to take under Article 88.

The decision of rejection is, as required under Article 33, of the same character as the positive decision refused by the [Commission] would have had.

> The [Commission] explains its decision of rejection by stating that the situation created by the introduction by the Government of the Federal Republic of the miner's bonus is not incompatible with the Treaty, so long as the conditions laid down by the [Commission] in its letter of 21 June 1957 are satisfied.
>
> Thus, the decision which, according to the applicant, the [Commission] was under a duty to take would, if it had been taken, have referred to a particular measure adopted by a particular Member State and would, accordingly have been a decision which was individual in character.
>
> The decision in which the [Commission] refuses to take this decision, which is individual in character, is itself a

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decision individual in character.

The applicant claims that the [Commission]'s decision of rejection concerns it.

For an application for annulment of a decision which is individual in character, submitted by an undertaking, to be admissible it is enough that the applicant claims that the decision concerns it and supports its claim by an appropriate statement explaining the interest which it has in having the decision declared void.

The applicant contends that:

> 'Netherlands prices for coal are usually based on German prices;
>
> the artificial reduction of the German prices for coal by means of State subsidies places the Netherlands undertakings which do not receive such a subsidy in a difficult position;
>
> there is fierce competition from German coal on the Netherlands market; the Netherlands have to protect their coal exports to Germany;
> the introduction of the miner's bonus in Germany caused labour from the neighbouring Netherlands undertakings to emigrate to Germany;
>
> this effect on labour was enhanced by the fact that the miner's bonus was exempt from social insurance contributions and income tax;
>
> the mass resignation of miners experienced in the Netherlands collieries obliged the latter to embark on their own campaign of incentives, especially by raising wages.'

These statements appear to be relevant but their precise meaning can only be decided by going into the

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substance of the case. Contrary to the contention of the defendant, to enable an undertaking to institute proceedings against a decision concerning it which is individual in character, it is not necessary that it should be the only, or almost the only, party concerned by the decision.

Since the contested decision is a decision affecting the applicant which is individual in character, the applicant has the right to institute proceedings.

3. *The conclusions of the applicant*

The applicant not only claims that the Court should annul the contested decision but also requests it to:

'declare that the [Commission] shall record by a decision that, by financing out of public funds a tax-free bonus granted to miners working underground, the Federal Republic of Germany has failed to fulfil its obligations under the Treaty and that it must accordingly annul this measure.'

Under Article 34 of the Treaty, 'If the Court declares a decision or recommendation void, it shall refer the matter back to the [Commission]' and the latter 'shall take the necessary steps to comply with the judgment'.

If the Court entertains the application, it may not dictate to the [Commission] the decisions which should be consequent upon the judgment annulling the decision but the Court must confine itself to referring the matter back to the [Commission]. In the circumstances, the second and third heads of the applicant's conclusions are inadmissible.

On the other hand, the first and fourth heads of the applicant's conclusions come within the ambit of proceedings for annulment and are therefore admissible.

4. *Submissions and arguments of the Government of the Federal Republic of Germany, as intervener*

The application to intervene of the Government of the Federal

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Republic of Germany was declared to have been allowed by Order of the Court dated 18 February 1960.

Although, in its statement as intervener, the Government of the Federal Republic of Germany broadly supports the conclusions of the defendant, it uses arguments which conflict with those of the defendant and with which the latter has expressly disagreed.

The applicant contends that, since Article 93(5) of the Rules of Procedure compel an intervener to accept the case as he finds it at the time of his intervention, from the time when, after delivery of the rejoinder, the intervener intervened, it is no longer free to raise a fundamental argument which conflicts with those of the party which it is supposed to support.

However, in order not to prevent the Court from considering the argument set out in the application, the applicant waives the right to invoke Article 93(5) of the Rules of Procedure.

The question must, therefore, receive consideration by the Court.

Under Article 34 of the Protocol on the Statute of the Court of Justice, submissions made in an application to intervene shall be limited to supporting or requesting the rejection of the submissions of one of the parties.

In its intervention the Government of the Federal Republic of Germany supports the submissions of the defendant and maintains that, although the arguments which it advances differ from those of the defendant, they seek rejection of the applicant's submissions. The intervention procedure would be deprived of all meaning if the intervener were to be denied the use of any argument which had not been used by the party which it supported.

In the circumstances, the arguments submitted by the Government of the Federal Republic of Germany as intervener are admissible.

B -Substance

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I -Infringement of the Treaty

The applicant and the defendant are agreed that the shift bonus, viewed on its own, is a subsidy which was abolished and prohibited by Article 4 (c) of the Treaty, whereas the intervener regards it as compatible with the provisions of the Treaty. In the applicant's view, the fact that the Federal Government offset the shift bonus by abolishing, with effect from 1April 1958, its responsibility for 6·5% of the employers' contributions to the miners' pension insurance does not take away from the shift bonus its character of a subsidy abolished and prohibited by Article 4 (c) of . the Treaty, whereas the defendant and the intervener are agreed that this offsetting of one against the other makes the bonus nevertheless compatible with the provisions of the Treaty. These two contentions make it necessary for separate consideration to be given to the question of the character, under the Treaty, of the shift bonus and of the manner in which this character is affected by the machinery for offsetting it.

1. *Viewed on its own, namely without regard to any offsetting arrangements, is the shift bonus a subsidy which was abolished and prohibited by Article 4 (c) of the Treaty?*

(a) The concept of subsidy under the ECSC Treaty. Article 4 of the Treaty reads as follows:

'The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the [Union], as provided in this Treaty: ... (c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever.'

The Treaty contains no express definition of the concept of subsidy or aid referred to under Article 4 (c). A subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which,

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in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.

Since these definitions are not contained in the Treaty, they are acceptable only if they are substantially borne out by the provisions of the Treaty or by the objects which it pursues.

Among the declared aims of the [Union], in Article 2 of the Treaty, is that it 'shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States'.

A subsidy or aid, within the meaning of the definition given above in itself constitutes an obstacle to the most rational distribution of production at the highest possible level of productivity inasmuch as, being a payment made by someone other than the purchaser or consumer, it makes it possible to fix or maintain selling prices which are not directly related to production costs and thereby to establish, maintain and develop economic activity which does not represent the most rational distribution of production at the highest possible level of productivity.

Judged on this basis and in the sense in which they are normally defined, subsidies or aids granted by the States are incompatible with the common market because they constitute an obstacle to one of its essential aims.

In view of this, it must be recognized that subsidies and aids, in .the sense in which they have traditionally been and are usually understood, are what Article 4(c) recognizes as incompatible with the common market and accordingly declares abolished and prohibited.

This conclusion is confirmed by the third indent of the second

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paragraph of Article 5, which lays down the Communities' principal task as being to 'ensure the establishment, maintenance and observance of normal competitive conditions', since payment of a proportion of the costs of production by someone other than the purchaser or consumer manifestly obstructs the establishment of normal competitive conditions.

The above interpretation is confirmed by the fifth paragraph of Article 54 of the Treaty, which reads: 'If the [Commission] finds that the financing of a programme or the operation of the installations therein planned would involve subsidies, aids, protection or discrimination contrary to this Treaty, the adverse opinion delivered by it on these grounds shall have the force of a decision within the meaning of Article 14 and the effect of prohibiting the undertaking concerned from drawing on resources other than its own funds to carry out the programme'.

(b) Is Article 67 an implementing regulation of Article 4(c)?

In its statement as intervener, the Federal Government contends that the admissibility of certain subsidies from the State may be inferred from Article 67 and that, in consequence, that article qualifies the prohibition contained in Article 4(c) of the Treaty.

Since this contention, being in general terms, covers the various subparagraphs of Article 4 it could, if accepted, lead to the conclusion that, in certain circumstances, the Treaty authorizes the restoration of import and export duties or charges having equivalent effect, and even quantitative restrictions on the movement of products. It must therefore be considered with particular care.

If the authors of the Treaty wished to make substantial inroads into the prohibitions laid down in Article 4, it would scarcely accord with the preciseness of the Treaty as a whole to refer to them under different descriptions both in the title of Chapter VII ('Interference with Conditions of Competition') and in the wording of Article 67. Although, however, it is true that the words 'special charges' appear both in Article 4(c) and in Article 67(3), in the latter article they refer to charges which may be imposed on coal and steel undertakings compared with other industries in the same country, and this qualification draws a connexion between the said special charges and

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the general economic policy of the State concerned. It is hard to believe that the authors of the Treaty intended not only to weaken but, in certain circumstances, to annul the abolitions and prohibitions laid down with particular force in Article 4 without referring to the article whose effect they intended to limit.

Although Article 4 contains various prohibitions, it specifies that they are laid down 'as provided in this Treaty'. Article 67(3) covers action by a Member State which confers a special advantage or imposes special charges on the coal or steel undertakings within its jurisdiction, in comparison with the other industries in the same country, and implicitly recognizes the legality of these advantages or charges by empowering the [Commission] to make the necessary recommendations to the State concerned. Article 67 comes immediately after Articles 60 to 66, which lay down the conditions for application of some of the prohibitions contained in Article 4. Its position in the Treaty might have the effect of conferring on Article 67 a significance similar to that of Article 60 to 66 and of making it a kind of implementing regulation for the prohibition contained in Article 4(c).

If this interpretation of Article 67 is correct, the abolitions and prohibitions contained in Article 4(c) are covered and governed by Article 67 and both articles must be viewed as a whole and simultaneously applied.

Such an interpretation would substantially modify the effect of the prohibition contained in Article 4(c).

This makes it necessary to consider whether this interpretation is possible.

Article 4(c) prohibits subsidies or aids granted by States 'in any form whatsoever'. This description does not appear in subparagraphs (a) (b) and (d) of Article 4.
This gives an unusually wide meaning to the prohibition which it describes. Without sufficient proof to the contrary, it is inconceivable that the authors of the Treaty declared in Article 4(c) that subsidies and aids granted by States in any form whatsoever should be abolished and prohibited and then declared in Article 67 that, without even having been authorized by the [Commission],

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they could be allowed subject to the measures recommended by the [Commission] to mitigate or remedy the effects thereof.

Such an interpretation would be conceivable only if it were demonstrated that the interference with the conditions of competition within the meaning of Article 67 referred to the measures or practices set out in Article 4, especially Article 4(c).

Although Article 4 and Article 67 have basically the same objects, because they endeavour to 'ensure the establishment, maintenance and observance of normal competitive conditions', when their contents are analysed, as is done hereunder, it is clear that they make different fields subject to different procedures.

Article 4 refers to action taken 'within the [Union]', namely within the field covered by the Treaty which established it.

Under Article 1 of the Treaty the [Union] is founded upon a common market, common objectives and common institutions.

In the [Union] field, namely in respect of everything that pertains to the pursuit of the common objectives within the common market, the institutions of the [Union] have been endowed with exclusive authority.

Although financial assistance may be allocated to coal- and steel-producing undertakings this can only be done by the [Commission] or on express authorization by it, as is clear from Articles 55(2) and 58(2) and from Article 11 of the Convention on the Transitional Provisions.

On the other hand, Article 4(c) refers to subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever and declares them to be incompatible with the common market.

This difference highlights the intention of the Treaty to reserve to the [Union] institutions and withhold from the States the right to grant, within the [Union], subsidies or aids and to impose special charges in any form whatsoever.

The strict wording of Article 4 itself emphasizes the exclusive character of the [Union]'s jurisdiction within the [Union].

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Article 67 refers exclusively to action by a Member State which is liable to have appreciable repercussions on conditions of competition in the coal or the steel industry.

It contains no provision for the abolition or the direct prohibition of such action but provides only for it to be counterbalanced by an appropriate aid or for its harmful effects to be mitigated by the [Commission] making the 'necessary recommendations' to the State concerned (paragraph 3) or by such measures as that State 'may consider most compatible with its own economic equilibrium' (third subparagraph of paragraph 2).

Clearly, action taken under such provisions cannot be what, in any form whatsoever, Article 4 declares to be incompatible with the common market for coal and steel and abolished and prohibited.

Under the Treaty, those sectors of the economy of the Member States which do not come within the province of the [Union] are not subject to the decisions of the [Commission].

For example, under the Treaty, the affairs of distributing undertakings, excluded under Article 80, and, more generally, all economic activity which the Treaty has not brought within the province of the [Union] have been left outside it.

Article 2 confirms this interpretation by stating that the [Union] 'shall have as its task' to carry out the responsibilities entrusted to it 'in harmony with the general economy of the Member States'.

Article 26 of the Treaty makes it clear that the Treaty has not relieved Member States of responsibility for their general economic policy, since it enjoins the Council 'to harmonize the action of the [Commission] and that of the Governments, which are responsible for the general economic policies of their countries'.

These provisions illustrate the partial nature of the integration effected by the Treaty since the Governments of the Member States remain responsible for all aspects of their economic policy which have not, under the Treaty, been expressly placed within the province of the [Union].

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Thus, in accordance with Article 68(1), they remain in full control of their social policy.

Clearly, the same applies over a wide area of their fiscal policy.

Through the exercise of these residual powers, action by the Member States is liable 'to have appreciable repercussions on conditions of competition in the coal or the steel industry'.

The existence of the common market sought in Article 2 of the Treaty under the conditions laid down in Article 4 could have been prejudiced by this interference with competition against which no protection was provided under Article 4.

Since the causes of this interference with competition did not come within the province of the [Commission] it was essential, in order to safeguard the existence of the common market, for the [Commission] to be placed in a position to correct or mitigate its effects." It is, in fact, this basic requirement which is fulfilled by Article 67.

The difference between the fields in which, respectively, Articles 4 and 67 operate is illustrated and confirmed by the difference of the means made available to the [Commission] for their application.

If Article 67 is treated as an implementing regulation for Article 4(c), it would be impossible to explain why, when action by a Member State 'is having harmful effects on the coal or steel undertakings within the jurisdiction of other Member States', the [Commission] is empowered only to make 'a recommendation to that State with a view · to remedying these effects by such measures as that State may consider most compatible with its own economic equilibrium' and has no power to order the immediate abolition of aids or subsidies which conflict with the Treaty.

On the other hand, the restrictions imposed in the third paragraph of Article 67(2) and the similar one contained in Article 67(3) are easy to understand in the light of the interpretation placed above on the wording of Articles 4 and 67 and also on the structure of the Treaty.

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Integration was only partly established by the Treaty and, owing to the power retained by the Member States, the coal and steel undertakings established in their respective territories remain subject to different legislation and regulations the provisions of which are liable to operate to the advantage or the disadvantage of the coal or steel industry of a Member State in comparison with the same industry coming under the jurisdiction of the other Member States or with other industries in the same State.

Although these situations conflict with the general purpose of the Treaty, they are the inevitable and legitimate outcome of the partial integration which the Treaty seeks to attain.

This means that, although it is incumbent on the [Commission] to remind Member States of the objectives which they accept on entering the [Union], it obviously cannot dictate the methods whereby they can be achieved since these methods involve the use of powers which do not fall within the jurisdiction of the [Union] or of powers which the States have not transferred to the [Commission] by the Treaty.

The fact that the third subparagraph of Article 67(2) and Article 67(3) endow the [Commission] with only a limited power of recommendation is evidence that the article does not refer to application of the automatic abolition and prohibitions in Article 4 but is designed to enable the jurisdiction of the [Union] to impinge on national sovereignty in cases where, because of the power retained by the Member States, this is necessary to prevent the effectiveness of the Treaty from being considerably weakened and its purpose from being seriously compromised.

Regard must also be paid to Article 11 of the Convention on the Transitional Provisions which brings into effect the prohibition of subsidies, aids or special charges established before the [Commission] took office.

The wording of this provision makes it possible to ascertain the intention of the authors of the Treaty in this field.

Article 11 of the Convention on the Transitional Provisions

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provides as follows:

> '... Unless the [Commission] agrees to the continuance of such aids, subsidies or special charges and to the terms on which they are to be continued, they shall be withdrawn, when and in the manner -which the [Commission] shall determine after consulting the Council, though it shall not be mandatory to withdraw them until the opening date of the transitional period for the products in question'.

Article 67, which confers a power of recommendation on the [Commission] only in cases of serious disequilibrium provoked by substantially increasing differences in production costs is appreciably less strict than Article 11 of the Convention on the Transitional Provisions.

Had the authors of the Treaty intended Article 67 to serve as the definitive implementing regulation for Article 4(c), the conclusion would be inescapable that they intended to treat subsidies and aids which were in existence when the Treaty entered into force with greater severity than those granted after its entry into force.

Such a conclusion would conflict not only with common sense but also with a logical application of the Treaty.

The foregoing analysis leads to the conclusion that Article 4(c) and Article 67 cover two different fields: the first article abolishes and prohibits certain actions by Member States in the field which, under the Treaty, comes within the jurisdiction of the [Union], the second is intended to prevent the distortion of competition which exercise of the residual powers of the Member States inevitably entails.

(c) Shift bonus in relation to the provisions of Article 4(c)

In the light of the foregoing considerations, it must now be established whether the shift bonus is a subsidy or aid abolished and prohibited by Article 4(c) of the Treaty.

It is clear and common ground that the shift bonus makes the public funds of the Federal Republic responsible for paying a

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portion of the production costs of German coal and, in so doing, relieves mining undertakings, purchaser and consumer from paying it.

The nature of the shift bonus is specified in the letter dated 4 February 1956 of the Federal Minister for Economic Affairs (III D 2 70230/56, Doc. No 1231/56 f) in which the following paragraphs appear:

> 'The [Commission] has received an application from the Unternehmensverband Ruhrbergbau for coal prices to be increased by an average of DM 3. The application is based on the fact that, as a result of negotiations between the Unternehmensverband Ruhrbergbau and the Industriegewerkschaft Bergbau, miners' wages are to be increased by, on average, 9% with effect from 15 February, in order to meet the threatened departures of mineworkers to other industries. The Unternehmensverband Ruhrbergbau has, in addition, stated that a further increase in price of about DM 3 per metric ton is required to wipe out a long-standing deficit.
>
> I am afraid that such a change in the price of coal may have unfortunate effects on the price structure as a whole, especially in the Federal Republic, but also in other countries of the [Union] whose consumers depend on coal from the Ruhr. In the course of discussions in depth with those concerned, I have endeavoured to find ways of improving the profitability of the coal mines and, in particular, of reducing their overheads so that this increase in price can be kept within comparatively narrow limits.
>
> The following measures are contemplated:
>
> (1) Amendment of the pricing instructions
> (2) Reduction in the turnover tax
> (3) Retirement pensions under the miners' insurance fund

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In addition, it must be borne in mind that the coal industry, where wages and salaries are equivalent to nearly 50% of turnover, is one of those industries where wages and salaries are proportionately the largest item of expenditure, with the result that outgoings on social security are a notable factor in increasing costs.

This is why consideration is being given to making part of the workers' contributions, up to a maximum of 6 ·5%, payable directly by the State into the provident funds. Its assumption of responsibility for 6 ·5% will be equivalent to a reduction of DM 1.77 per metric ton in the cost of commercial coal-mining. The measure proposed would apply not only to coal-mining but also to other sections of the mining industry, among them those which do not come under the jurisdiction of the [Commission].

The measure under consideration involves a change in the financing of social security pursuant to the second subparagraph of Article 68 *(5)* of the Treaty which, however, would not cause any disturbances within the meaning of Article 67 (2) and (3) of the Treaty since this relief will likewise do no more than partly offset the effect of a rise in the price of coal.

(4) Award of a tax-free shift bonus

It is proposed to grant all who work underground in the mines, for each full shift worked, a tax-free shift bonus to be paid by the undertakings by deduction from tax paid on wages. For workers paid by the day the shift bonus will amount to DM l ·25 and to DM 2·50 for pickmen and piece-workers.

It is true that this measure would not involve any direct financial concession for the undertakings but it seems calculated to make underground work specially attractive and thus to offset threatened departures and at the same time give a fillip to the badly needed recruitment of new workers. It therefore accords with the objectives and the tasks of the [Union] referred to in Articles 2 and 3 (a) and (g) of the Treaty.

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The last paragraph states that the shift bonus 'would not involve any direct financial concession for the undertakings' but this contradicts the first paragraph of the letters in which two increases are declared to be necessary: 'An increase of, on average, 9% in miners' wages with effect from 15 February, in order to meet the threatened departures of mineworkers to other industries, and an increase in price of about DM 3 per metric ton in order to wipe out a long-standing deficit'.

The Federal Government expresses the fear·'that such an increase in the price of coal may have unfortunate effects on the price structure as a whole, especially in the Federal Republic, but also in other countries of the [Union] whose consumers depend on coal from the Ruhr'.

The above mentioned letter of 4 February 1956 makes it abundantly clear that the introduction of the shift bonus makes it possible to avoid an increase in the price of coal which would otherwise be inevitable. The same letter makes it clear that while involving no 'financial concession for the undertakings', the shift bonus relieves them of an addition to their costs which the undertakings would otherwise have to bear and that, although it does not reduce the present costs, the miners' bonus reduces costs which they would inevitably incur.

Moreover, the letter of the Federal Minister for Economic Affairs to the [Commission] dated 12 March 1956 (III D 2 70672/56, Doc. No 2426/56 f) states, *inter alia,* that:

> '... these bonuses, including the miner's bonus, are also intended to prevent underground workers from leaving the mine for other employment, which gives rise to concern, to forestall serious fluctuations in the labour force in the mines, and to make a career in mining once more attractive for young men'.

The letter of the Federal Minister for Economic Affairs to the [Commission] of 23 March 1956 (III D 2 70765/56, Doc. No 2781/56 f) states:

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'... I am also enclosing other documents concerning the measures described in my letter of 1 March 1956 for the abolition of certain costs peculiar to the coal industry'.

The letter from the Minister of Finance for Nord Rhein-Westfalen to the associations of coal undertakings, dated 6 March 1956 (Ref. S 2034-2812/VB-2/H 2030-2507 II B 2), states:

'A law under which miners will be granted bonuses is being prepared in order to cope effectively with the threatened departure of underground workers from the mines.'

The letter of the Federal Ministry for Economic Affairs to the [Commission] of 22 October 1956 (Ref. III D 2 71933/56) states:

'... It was stated in that letter that the Federal Government has set itself the aim of improving the profitability of the coalfields by reducing the special charges which, in contrast with other industries, this section of the economy has had to bear . . .'

However, the letter quoted immediately above contains a paragraph in which it is added as follows:

'... As a purely precautionary measure, I must point out that, even if payment of the miners' bonus substantially widened differences in production costs, this would be quite lawful since it would be the outcome of a change in productivity. As the [Commission] will be aware, the output of the German coal industry can be considerably enhanced without fresh investment if the number of underground workers can be increased, because the reason why existing capacity cannot be fully used is the shortage of miners. It follows that an increase in the number working underground, referred to above in paragraph II, had undoubtedly led to greater productivity.'

This straightforward quotation confirms that the German coal industry believes that its output and productivity will be enhanced by an increase in the number of underground workers as a result of the increase in miners' pay produced by the shift bonus.

This increase in pay is undoubtedly an element in production costs.

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If it is separated from it (as it is, in fact, by the financing of the shift bonus out of public funds), the coal industry pockets the saving without bearing the cost of a measure which increases both its output and its productivity.

This means that production costs are not the true costs of the coal which it has actually mined.

This artificial reduction in accountable production costs places the coal industry which benefits from it in a privileged competitive position compared with that of coal industries which have to pay for the whole of their production costs on their own.

In its letter of 22 October 1956 (III D 2 71933/56), quoted earlier, the Government of the Federal Republic recalled the wording of the statement of grounds for the draft law on the miner's bonus (Document No 2351 of the Bundestag dated 3 May 1956) and reiterated that:

> '... Latterly, it has become more and more noticeable that this professional pride on the part of miners has vanished in face of the attraction offered by other trades where work is easier and the pay is higher'.

This general idea was expressed in greater detail at the hearing, when the representative of the Government of the Federal Republic stated that the shift bonus was a kind of tribute to a very demanding calling, that it had not perhaps taken the form of a medal, because it was necessary for the tribute always to be and remain tangible and concrete to prevent its attraction from losing its value, and that the law on the miner's bonus was not intended to grant a subsidy to the mining undertakings but rather to create a privilege for the miner, and more particularly for the underground miner.

According to this explanation the shift bonus can, in the final analysis, only be regarded as supplementary pay.

Although such supplementary pay would, if paid by the coal industry, not be caught by the Treaty, it cannot fail to constitute a subsidy in circumstances where it represents a pay increase

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financed out of public funds by the Government of the Federal Republic.

Nevertheless it remains to be determined whether the subsidy or aid which the shift bonus appears to constitute satisfies some of the requirements laid down in Article 2 of the Treaty, namely, that it should safeguard continuity of employment and take care not to provoke fundamental and persistant disturbances in the economies of Member States.

In the part of its letter, quoted above, of 12 March 1956 (III D 2 70672/56, Doc. No 2426/56 f), the Federal Government itself specified that the shift bonus is also 'intended to prevent underground mine-workers from leaving the mine for other employment'. This statement makes it abundantly clear that the miner's bonus cannot be regarded as helping to safeguard continuity of employment or to prevent unemployment since, on the contrary, it was introduced at a time when abandonment of a career in mining was a 'source of concern' to the Federal Government. Finally, no steps were taken to apply the special procedure under Article 37 covering the possibility of fundamental and persistent disturbances.

The intervener has contended that the shift bonus comes under Article 67 of the Treaty and constitutes an 'aid' within the meaning of the second subparagraph of Article 67 (2). This contention cannot, in any event, be justified solely by the fact that Article 67 makes the granting of the aid referred to in the second subparagraph of paragraph (2) thereof subject to prior authorization by the [Commission] (which is obliged to consult the Consultative Committee and the Council of Ministers) and lays down that the amount of the aid, as well as its [...] conditions and duration, shall be determined in agreement with the [Commission]. In the present case there has been no question of consultation with the Consultative Committee or the Council of Ministers, or of authorization by the [Commission], or of the agreement provided for under the second subparagraph of Article 67 (2). The fact is that, on the contrary, the [Commission] refrained from taking any action.

For the foregoing reasons, viewed in itself, the miner's bonus, financed out of public funds, constitutes a subsidy or aid granted by

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the Government of the Federal Republic to the German coal-mining industry and there is no valid reason, based on the Treaty, which could invalidate this description. In consequence, it must, viewed in isolation, be held to be incompatible with the common market in coal and steel, and, as such, prohibited by the Treaty.

2. *Does the countervailing effect of the abolition, with effect from 1 April 1958, of the assumption by the Federal Government of responsibility for a proportion of the employers' contribution to the miners' pension insurance take away from the shift bonus its character of a subsidy or aid prohibited under Article 4 (c) of the Treaty?*

The Government of the Federal Republic revoked, with effect from 1 April 1958, its decision of February 1956 to assume responsibility for a proportion, amounting to 6·5% of total pay, of the employers' contribution to miners' pension insurance.

In its statement of defence, the defendant declares that, although a payment considered in isolation may appear to be a prohibited subsidy because it 'reduces production costs and affects the natural conditions of competition',. the elimination of these effects suffices 'for there to be no longer any breach of the Treaty'. In these circumstances 'there would really be no longer any question of a subsidy which is prohibited under the Treaty in the interests of fair competition'.

While maintaining that 'the grant of the miners' bonus does not conflict with Article 4 (c) of the Treaty' the Government of the Federal Republic contends that there can no longer be any conflict because 'with effect from 1 April 1958, the Federal Republic stopped paying 6 ·5% of the wage bill as part payment of the employers' contribution to miners' pension insurance, which it had made on behalf of the coalmining undertakings since 15 February 1956'.

The defendant and the intervener state that the additional payment thereby imposed on mining undertakings is equal to or greater than the amount of the miner's bonus.

These two statements make it necessary to decide whether the fact that the Federal Government stopped paying a contribution of

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6·5% of the total wage bill into the miners' pension fund is such as to take away from the shift bonus its character as a subsidy or aid prohibited under Article 4 (c) of the Treaty.

The repayment by the coal producer to the Federal Government of the exact amount paid to the miners in the form of a shift bonus and of the tax payable on that amount under fiscal law resulted in eliminating, as far as the coal producers were concerned, all economic effects of the shift bonus without, however, depriving them of the psychological benefits which the Federal Government declares that it was seeking by the establishment of the said bonus. The question arises whether such a repayment changes the character of the shift bonus as a subsidy prohibited under Article 4 (c) of the Treaty.

However, it is not necessary in this case to find an answer to this question because the compensation procedure, permitted by the defendant and relied upon by the intervener, does not in any respect constitute a repayment which is at all times equivalent to the amount of expenditure to be reimbursed. If the Federal Government had wished, with absolute precision, to eliminate the economic effects of the shift bonus, it is not clear why coal-mining undertakings were not called upon to make such repayments. Because of the complicated nature of the assistance given by the Federal Government during the material period in connection with the costs and charges of miners' pension insurance, the procedure followed establishes only a vague and unconvincing connection between the subsidy and the increase in expenditure intended to compensate for it.

Since the abolition and prohibition contained in Article 4 (c) are general and absolute in character, they cannot in any case be annulled by application of a vague and ill-defined procedure for compensation. For these reasons, the abolition, with effect from 1 April 1958, of the assumption by the Federal Government of responsibility for paying a contribution amounting to 6 ·5% of the total wage bill to the miners' pension fund does not take away from the shift bonus its character of a subsidy or aid prohibited under Article 4 (c) of the Treaty.

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II -Misuse of powers

In support of its application for annulment of the rejection of its request, the applicant relies on the submission of misuse of powers.

As the finding that the shift bonus is a subsidy prohibited under Article 4 (c) of the Treaty is sufficient to entail annulment of the contested decision, a decision is not necessary on this submission.

For all the other reasons set out above, the decision of rejection, set out in the letter from the [Commission] to the applicant dated 30 April 1959, must be declared to be void.

Costs

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

The defendant and the intervener have failed in their submissions.

Accordingly, they must be ordered to pay the costs, the intervener paying its own costs and those consequent upon its intervention.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 2, 3, 4, *5* , 14, 26, 33, 34, 35, 54, *5 5* , 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 80 and 88 of the Treaty establishing the European Coal and Steel Community;
Having regard to Article 11 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], especially Article 69 (2),

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THE COURT

hereby:

1. **Declares that the first and fourth heads of the conclusions of the association of undertakings De Gezamenlijke Steenkolenmijnen in Limburg for annulment of the contested decision and for an order that the [Commission] shall pay the costs are admissible; that the second and third heads for a declaration that the [Commission] shall record by a decision that, in financing out of public funds a tax free bonus granted to underground mineworkers, the Federal Republic of Germany has failed to carry out its obligations under the Treaty; for annulment of that measure; and for any further order which the Court may consider necessary are inadmissable;**

2. **Annuls the decision of rejection set out in the letter from the [Commission] to the applicant dated 30 April 1959;**

3. **Refers the matter back to the [Commission];**

4. **Orders the defendant and the intervener to pay the costs, the latter bearing its own costs and those consequent upon its intervention.**

Donner Hammes Catalano Riese
Delvaux Rueff Rossi

Delivered in open court in Luxembourg on 23 February 1961.

A. Van Boutte
Registrar

A. M. Donner
President

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