the period within which proceedings must be initiated. It is clear from the third paragraph of that provision that such a rule could not be in the interest of the Member States.

In Case 3/59

GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, represented by Werner von Simson and Professor Philipp Möhring, with an address for service in Luxembourg at the Chambers of Werner von Simson, Bertrange,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Walter Much, acting as Agent, assisted by Professor Hans Peter Ipsen, with an address for service in Luxembourg at its seat, 2 place de Metz,

defendant,

Application for the annulment of the decision of the High Authority of 1 December 1958, notified to the applicant on 5 December 1958, reference No 35172,

THE COURT

composed of: A. M. Donner (Rapporteur), President, L. Delvaux and R. Rossi, Presidents of Chambers, O. Riese and N. Catalano, Jufges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Conclusions of the parties

The *applicant* claims that the court should:

1. Annul the decision of the High Authority of 1 December 1958, reference No 35172;

2. Order the defendant to bear the costs.

The *defendant* contends that the Court should:

1. Dismiss the application;
2. Order the applicant to bear the costs.

II — Facts

The facts may be summarized as follows:

In its two letters of 12 February 1958 the High Authority, pursuant to Article 70 of the Treaty and the seventh paragraph of Article 10 of the Convention, drew the attention of the Government of the Federal Republic of Germany to the rates and conditions applied to the carriage by rail on the one hand of ores and on the other of mineral fuels for the iron and steel industry which the High Authority considered to be illegal special rates and conditions. In those letters the High Authority laid down periods within which those rates and conditions were to be altered or discontinued. The first such period expired on 1 July 1958.

During the month of July the High Authority took note that no action had been taken in respect of its two letters mentioned above, wherupon it called upon the Federal Government to explain itself. The Federal Government replied that in its opinion it was not necessary to act upon the decisions contained in the letters of the High Authority until such time as the court of Justice had delivered judgment in the proceedings which the Federal Government had brought against those decisions.

The High Authority thereupon adopted its decision of 1 December 1958, setting a further time-limit; it recorded that the Federal government had failed to fulfil an obligation under the Treaty, and set 31 January 1959 as the last date for fulfilling its obligation.

III — Submissions and arguments of the parties

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

1. Admissibility

The parties agree that the application is admissible.

2. Substance

The *applicant* first draws attention to the fact that it contested the decisions of 9 February 1958 in its Application 19/58.

Since it takes the view that the Treaty does not require it to alter the rates and conditions in question and, therefore, that the High Authority has no power to require any such alteration, it bases its action against the decision of 1 December 1958 on the same submissions as those which it made in support of Application 19/58, challenging the validity of the decisions of February 1958.

The *defendant* argues that the present case cannot be concerned with the validity of the decisions of February 1958, but only with the question whether the applicant was required to observe them. The decision of 1 December 1958 covers this latter question alone; the present case is only concerned with the legality of that decision.

According to the defendant, the mere existence of the decisions of February 1958 means—by virtue of the first paragraph of Article 86 of the Treaty—that the applicant is required to implement them.

To this the applicant replies:

(a) That the very point which the court, in exercise of its unlimited jurisdiction, should examine is the question whether the decisions of February 1958 imposed on the applicant a duty which it must perform. In support of the proposition that a decision may still be contested in proceedings brought against a later decision, the applicant refers to the case-law of the court of Justice, which allows the objection of illegality to be raised against general decisions when measures implementing them are contested (particularly the judgment in case 9/56, Rec. volume IV, p. 26).

(b) That the contested passages of the decisions of February 1958 must be interpreted as restrictive conditions relating to an authorization given under the fourth paragraph of Article 70. Those passages merely express the idea that the High Authority intends to refuse—whenever appropriate—all other requests for authorization. The question arises whether this express refusal

places the applicant under a duty to alter tariff provisions which have not been authorized. This question is not dealt with in the decisions of February 1958. It would indeed have been impossible for them to deal with it, because the answer to the question can only be given by way of the procedure set out in Article 88.

The *defendant* maintains its assertion that the legality of the decisions of February 1958 is not at issue in the present case, and that the text of the Treaty does not allow an applicant to bring the same facts and same questions of law before the Court in two different actions with a view, in the first instance, to a limited inquiry and, in the second, to an inquiry based on unlimited jurisdiction. The defendant also stresses that the judgment in Case 9/56 has no bearing on the present case.

B

The *applicant* alleges that it also based its application 19/58 on the second paragraph of Article 88 of the Treaty. For this reason it is of the opinion that the defendant is acting in disregard of the third paragraph of the aforesaid article in taking steps, while the first application is *sub judice,* with a view to compelling the Member State concerned to fulfil obligations the legality of which is contested.

According to the applicant, the mere fact that the first application has been made suspends the time-limits set in the decisions of 1958.

According to the applicant the text of the Treaty is open to the interpretation (and perhaps even suggests) that any decision taken in application of the fourth paragraph of Article 70 of the Treaty or of the seventh paragraph of Article 10 of the convention constitutes at the same time and automatically a decision within the meaning of the first paragraph of Article 88. The applicant reaches this conclusion from the hypothesis that all the current time-limits are suspended by reason of the lodging of its first application, which is based, *inter alia,* on the second paragraph of Article 88.

It considers that the requirement that it must fulfil its obligations before 31 January 1959, as required by the decision of 1 December 1958, is contrary to the third paragraph of Article 88.

The *defendant* replies:

(a) That it matters little whether the applicant, in its Application 19/58, intended to bring proceedings under the second paragraph of Article 88. What matters is whether the two decisions of February 1958 constituted decisions within the meaning of the first paragraph of Article 88. If that is not the position, proceedings based on the second paragraph of that article are inconceivable.

(b) That Application 19/58—which is primarily based on Article 33 of the Treaty—cannot be considered, since this is of itself a sufficient basis for an action, as an application based on the second paragraph of Article 88 (prohibition of concurrent actions).

(c) That even if it is accepted that the applicant has, in Application 19/58, brought a valid application under the second paragraph of Article 88, this fact does not in any way imply that the said application suspends all the obligations incumbent on the applicant. The third paragraph of Article 88 merely states that the two penalties for which it provides may be imposed only after an action, if any, has been rejected. The decisions of February 1958 and of 1 December 1958 do not contain these penalties and cannot be regarded as being analogous thereto. Therefore those decisions are not contrary to the third paragraph of Article 88.

The *applicant* replies, first, that the decision of 1 December 1958 can indeed not be regarded as one of the measures for which the third paragraph of Article 88 makes provision. The very fact that the said Article 88 makes provision for particular measures

tacitly excludes any other measure. Therefore the very fact that the contested decision, which was taken under Article 88, does not correspond to one of the measures for which that article makes provision, means that the decision is contrary to that article.

Furthermore, the applicant casts doubt on the very basis of the legal validity and the effects at law of decisions taken by the High Authority in respect of Member States or of their Governments.

In its reply, the applicant argues that the implementation of decisions concerning Member States and, therefore, the implementation of the decisions of February 1958 is governed by the rules contained in Article 88.

Where there is a difference of view between the high Authority and the Member States on the legality of such decisions, their implementation can only be required by means of a decision taken in application of the first paragraph of Article 88.

According to the applicant, the authors of the Treaty intended to lay down special provisions with a view to settling possible differences on the interpretation of the Treaty between the High Authority and the Member States. Although it is doubtful whether measures of enforcement could be taken against a Member State, it is certain that in disputes of such a kind the High Authority could not be judge in its own cause: the State concerned must have the right to make an application to the Court calling upon it, in exercise of its unlimited jurisdiction, to pass judgment on the question whether there exists a duty under the Treaty. According to the applicant, it is the preservation of this right which is involved in the present case.

The defendant denies the existence of an absolute right to use the procedure under Article 88. Legal protection in the Community is based on a system of types of action which differ from each other according to the subject-matter, procedural conditions, capacity to institute proceedings and the rules of procedure. So far as Governments are concerned the treaty lays down several distinct legal remedies. In this context, apart from Article 88, the defendant mentions Articles 33, 35, 37, 38 and 40.

According to the defendant, the applicant's argument would amount to accepting the proposition that the decisions of the High Authority, in so far as they are addressed to a government, are provisionally devoid of effect. The applicant thus fails to discern the distinction between the binding force of a decision and the conditions required for enforcing a decision.

The defendant also points out on this point that the existence of a duty under the Treaty is a necessary condition for the application of Article 88, which deals with infringements of the Treaty. The defendant wonders whether the applicant's argument does not acknowledge by implication that the decisions of February 1958 have binding force, quite apart from the question of their legality.

Finally, the defendant rejects the applicant's argument that it would still be open to the latter to dispute the same questions of law in proceedings based on Article 88, even if the Court of Justice had rejected Application 19/58 in whole or in part.

C

The applicant considers that the period laid down in the contested decision of 1 December 1958 is contrary to the Treaty in that it requires the applicant to act prior to the expiry of the period for instituting proceedings against the said decision. The applicant asserts that it received notice of the decision of 11 December 1958. Therefore the period for instituting proceedings expired on 11 February. In these circumstances, it is unacceptable that the time-limit for implementation should be set at no later than 31 January.

The applicant also stresses that the fixing of too short a period under the first paragraph of Article 88 reduces the benefit of the period of two months laid down by the second

paragraph of that article. To set such a time-limit is, therefore, contrary to the spirit of the Treaty.

The *defendant* notes that nowhere does the Treaty state that the period mentioned in the first paragraph of Article 88 must be at least two months.

In any event there is no reason to fear precipitate action on the part of the High Authority.

IV — Procedure

The procedure followed the normal course.

Grounds of judgment

Substance

1. The applicant alleges, in the first place, that the contested passages of Decisions Nos T-10.202 and T-10.203 of the High Authority of 12 February 1958, which are contested in Application 19/58, do not impose any unequivocal duty on the Federal Government because, viewed objectively, they merely constitute a statement of conditions restricting an authorization given under the fourth paragraph of Article 70 of the ECSC Treaty.

This argument must be rejected.

In fact, pursuant to the seventh paragraph of Article 10 of the Convention on the Transitional Provisions, the said contested passages of those decisions expressly set time-limits for the modification of a certain number of special rates and conditions notified to the High Authority in accordance with that provision. It follows that the abovementioned decisions placed the applicant under a duty to modify the rates in question within the prescribed period.

2. Secondly, the applicant alleges that even supposing that the decisions of 12 February 1958 did place the Federal Government under an obligation, there has not yet been any failure to fulfil that obligation because the time-limit set for modifying the rates and conditions was suspended by the lodging of Application 19/58, which is based, *inter alia,* on Article 88 of the Treaty, and must therefore benefit from the suspensory effect provided for by the third paragraph of that article.

Ths argument cannot be accepted, quite apart from the question whether Application 19/58 may or must be considered as an application under Article 88, which question the Court does not intend to examine at present.

The reality, contrary to the opinion of the applicant, is that the third paragraph of Article 88 merely states that the measures set out under (a) and (b) cannot be taken while the action is *sub judice.*

It cannot be argued that the authors of the Treaty intended to give a suspensory

effect to actions under Article 88, for such a derogation from the general principle of Article 39 cannot be presumed from the silence of the text.

Moreover, the particular scope of Article 88 runs counter to the proposition that an action under the second paragraph of that article can have suspensory effect. Since the decision taken by the High Authority under the first paragraph of that article was declaratory in nature, to accept that Application 19/58 has such effect would mean suspending not the execution of the said decision, but the binding effect either of the relevant provisions of the Treaty or of previous decisions of the High Authority, execution of which is concerned in the present case.

3. During its oral arguments, the applicant alleged that, generally, decisions creating rights only produce their full effects after expiry of the period during which an appeal may be brought against them or after judgment has been given in proceedings brought in respect of them, and that therefore the suspensory effect of Application 19/58 must be presumed automatically.

This argument, which is valid as regards certain areas of private law, cannot be accepted as regards administrative matters, where the rule is that decisions become effective either at the time when they are adopted, or on the date of their notification or publication.

Article 14 of the Treaty provides that decisions of the High Authority shall be binding in their entirety, and under Article 39 of the Treaty and Article 33 of the Statute actions brought before the Court do not have suspensory effect except where the Court, or the President thereof, orders otherwise. Since the applicant has not submitted a request that execution of the said decisions be suspended, the latter have remained in force whatever the nature and effect of Application 19/58.

4. The applicant also alleges that there is no legal basis for the contested decision because the decisions of 12 February 1958 are not valid. The applicant is thus raising against that decision the submissions already directed against the decisions of 12 February 1958 in application 19/58, taking the view that Article 88 gives Member States a special right of action, which is distinct from the right given by Article 33 and which entitles then to institute proceedings in which the Court has unlimited jurisdiction and which allows it to examine the legality of the basic decisions.

This line of reasoning cannot be accepted.

It cannot be argued that the States have a right to contest, as a matter for the unlimited jurisdiction of the Court, not only decisions adopted by the High Authority pursuant to Article 88, but also decisions adopted by it in the exercise of the general powers conferred on it by the Treaty.

Article 33, which gives Member States and undertakings a right to bring an action for annulment, and not an action in which the Court has unlimited jurisdiction, does not admit of the interpretation put forward by the applicant. If a Member State, without having obtained the annulment of a decision of the High Authority, or a suspension of the time-limit for the execution of that decision, does not comply with the same, it is thereby guilty, as appears from the first paragraph of Article 86, of a failure to fulfil its obligations, and the High Authority is required to record such failure pursuant to the first paragraph of Article 88.

In the present case, the High Authority has complied with that requirement by means of the contested decision. Therefore the true construction to be put on the said decision is that it limits itself to recording that there has been a failure as to form, without reopening the questions of substance dealt with by the decisions of February 1958.

The applicant claims that such an interpretation negates the purpose of proceedings in which the Court has unlimited jurisdiction, and for which Article 88 makes provision, but this is an argument which cannot be accepted.

The purpose of the action which may be brought under the second paragraph of Article 88 is to subject the High Authority's finding that a Member State has to fulfil an obligation, and the measures consequent upon that finding, to review by the Court.

It is otherwise with decisions taken by the High Authority in the exercise of its powers and in cases other than those where Article 88 is applicable. An action under Article 33 may—as a general rule—be brought against such decisions.

The High Authority can establish a failure by a Member State to fulfil an obligation both in relation to a provision of the Treaty and to a decision which it has taken.

It is thus necessary to distinguish on the one hand possible proceedings under Article 33 against a decision, of the non-observance of which the High Authority has subsequently complained, and on the other hand proceedings based in the second paragraph of Article 88 against the recording of a failure to fulfil an obligation in relation to that decision.

In fact the object of the two actions is quite different. The object of the first is to establish the illegality of a decision taken outside the scope of Article 88, whereas the object of the second action can only be:

(a) To obtain the annulment of the recording of the failure to fulfil the obligation by adducing evidence to the effect that the Member State concerned has fulfilled its obligations under the decision which it is accused of failing to observe. This precludes the possibility of challenging, at the same time, the legality of such a decision;

(b) To obtain the annulment or the modification of measures consequent upon the recording of the failure to fulfil an obligation.

It is appropriate to note that if the applicant's interpretation were to be adopted, it would follow that Member States could ignore decisions taken against them by the High Authority and wait until proceedings under Article 88 were initiated against them, and then in their turn bring proceedings against the said decisions every time it appeared to them expedient to do so.

Moreover, while Article 88 does not permit disputes concerning previous decisions, as is stated above, nevertheless Article 37 offers Member States the possibility of disputing decisions in the special circumstances mentioned therein.

The applicant bases its interpretation on the judgment of the court in case 9/56, but in doing so fails to understand the meaning and scope of it. That judgment did not interpret the third paragraph of Article 36 as meaning that applicants may contest not only the legality of general decisions and recommendations, but also the legality of decisions and recommendations addressed to them and which they are alleged not to have observed.

Moreover, such an interpretation would be in manifest contradiction with a fundamental principle of law, confirmed by the last paragraph of Article 33. The limitation period for bringing an action fulfils a generally recognized need, namely the need to prevent the legality of administrative decisions from being called in question indefinitely, and this means that there is a prohibition on reopening a question after the limitation period has expired.

Since even Article 36 does not permit the legality of an individual decision of the High Authority to be discussed afresh after the limitation period has expired, there is still less reason to accept the proposition that it is permitted by Article 88 in the absence of any provision on the subject.

In the present case the court has no jurisdiction to examine the complaints put forward by the applicant against the decisions of 12 February 1958, since proceedings may be initiated against those decisions under Article 33, and since, moreover, as the parties accept, the applicant has initiated such proceedings within due time.

5. Finally, the applicant alleges that the period set by the contested decision is shorter than the period within which proceedings must be initiated under Article 88.

This submission is unfounded. It does not appear from the wording of Article 88 that the period set for fulfilling an obligation must be at least as long as the period

within which proceedings must be initiated. Such a requirement could not be in the interest of the Member States, for it clearly appears from the third paragraph of Article 88 that, even supposing that the High Authority were to take the measures set out at (a) and (b) of the said third paragraph prior to the expiry of the period within which proceedings must be initiated, such action would be rendered nugatory by a subsequent action brought within the prescribed period.

Therefore the application against the decision of 1 December 1958 must be dismissed.

Costs

The applicant has failed in its submissions and must, therefore, bear the costs in their entirety.

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 14, 33, 36, 37, 39, 70, 86 and 88 of the Treaty establishing the European Coal and Steel Community, and to Article 10 of the Convention on the Transitional Provisions annexed to the said Treaty;
Having regard to the Rules of Procedure of the Court of Justice of the European Coal and Steel Community, and to the rules of the Court concerning costs;
Having regard to the decision of the High Authority of 1 December 1958, reference No 35172,

THE COURT

hereby:

1. **Dismisses the application;**
2. **Orders the applicant to bear the costs.**

Delivered in open court in Luxembourg on 8 March 1960.

Donner Delvaux Rossi

Riese Catalano

A. Van Houtte
Registrar

A. M. Donner
President