3. Article 88 does not give the High Authority legislative power similar to the power with regard to the general law of the Treaty. The High Authority cannot therefore rely on this provision to take decisions creating obligations on the part of Member States. The only object of the reasoned decision referred to in Article 88 is the recording of failure to fulfil obligations arising either from an imperative provision of the Treaty or a decision or recommendation prior to the application of this article.

4. Article 88 opens means of implementation and is the *ultima ratio* enabling the Community interests enshrined in the Treaty to prevail over the inertia and resistance of Member States. Nevertheless Article 88 must be strictly interpreted.

5. The recording of a failure on the part of a Member State to fulfil an obligation imposed by the Treaty cannot, in a matter such as the publication of transport charges where the High Authority has no legislative power, relate to the means indicated by the High Authority to attain the proposed objective but only to the failure to attain this objective.

In Case 20/59

GOVERNMENT OF THE ITALIAN REPUBLIC, represented by Professor Riccardo Monaco, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Pietro Peronaci, Sostituto Avvocato Generale dello Stato, with an address for service at the Italian Embassy in Luxembourg,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Mario Berri, acting as Agent, assisted by Professor Arturo Carlo Jemolo, Advocate at the Italian Corte di Cassazione, with an address for service at its offices, 2 place de Metz, Luxembourg,

defendant,

Application for the annulment of Decision No 18/59 of 18 February 1959 published in the Journal Officiel of 7 March 1959 (p. 287 *et seq.*) on the publication or notification to the High Authority of the scales, rates and all other tariff rules of every kind applied to the carriage by road of coal and steel within the Community for hire or reward,

THE COURT

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

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows: On 21 February 1956 the Committee of Experts on Transport, set up under Article 10 of the Convention on the Transitional Provisions, submitted its report relating *inter alia* to the publication of road transport rates and conditions.

On 12 June 1956 Messrs René Mayer, Etzel and Giacchero, the President, Vice-President and a member of the High Authority respectively, and Messrs Cortese, Italian Minister for Industry and Trade, and Angelini, Italian Minister of Transport, met in Rome for an exchange of views on the publication in Italy of road transport rates and conditions for products subject to the common market for coal and steel.

The report of the Committee of Experts on Transport was transmitted on 12 July 1956 by the High Authority to the Governments of the Member States. On the basis of this report negotiations took place within the special Council of Ministers with a view to implementing measures to be considered together for the application of the provisions of the Treaty in the sphere of carriage by road within the Community for hire or reward. These negotiations did not lead to any agreement.

By letter dated 12 August 1958 the High Authority requested the governments of the six Member States to take the necessary measures to fulfil the obligation of publishing the transport scales and rates in accordance with the third paragraph of Article 70 of the Treaty, that is to say, subject to conditions meeting the requirements of the functioning of the Common Market. In this letter the High Authority stated in particular:

'3. The High Authority leaves it to the government . . . to determine the appropriate means for achieving the abovementioned objectives. There are three ways in which this can be done:

(a) The competent authority may publish a transport tariff and ensure that transport undertakings comply with it.

(b) The competent authority may require carriers to publish in a satisfactory form or to communicate to the High Authority the transport tariffs which they have themselves laid down and which they apply in carrying on their business.

(c) In the absence of such tariffs or when they include minimum and maximum rates, the transport rates and conditions may be notified to the High Authority immediately after the conclusion of each contract of carriage.

In this event the necessary steps must be taken to send to the High Authority immediately after the conclusion of each contract of carriage:

either a duplicate or certified copy of the consignment note or contract of carriage;

or a document signed by the consignor and the carrier and containing the essential information relating to the transport rates and conditions.

These documents must contain the following minimum information:

place and date of execution of the document;

name and address of the consignor,

name and address of the carrier,

place of acceptance of delivery and place of delivery of the goods,

name and address of the consignee,

description of the goods,

gross weight of the goods or quantity expressed in other terms,

transport rate and other charges,

distance travelled in kilometres,

where appropriate: frontier crossing points.'

. . .

'5. Where the Government . . . does no more than require the immediate notification of contracts of carriage already concluded (paragraph) 3 (c) above), the High Authority will follow the application of this method closely in order to determine whether it enables the abovementioned objectives of the Treaty to be satisfactorily attained. If it should appear after a period not exceeding four months that this is not the case, the High Authority will consider whether and, if so, what other measures appear to be necessary.'

The High Authority concluded the letter by requesting the Italian Government:

'to inform it before 1 December 1958 of the measures which have been adopted at that date relating to carriage by road for hire or reward to fulfil, having regard to the foregoing particulars, the provisions of the Treaty and in particular Articles 2, 3, 4, 5, 60 and 70, or to send it by the same date the comments which the Italian Government proposes to submit under the second sentence of the first paragraph of Article 88 of the Treaty'.

After requesting in its letter No 1502 of 29 November 1958 an extension until 10 January 1959 of the period which had been given it to submit its observations on the content of the letter of 12 August 1958, the Italian Government expressed the opinion in its letter No 000038 of 8 January 1959 that the current regulations in the road transport sector in the national territory already met the obligations laid down in the Treaty. It added that in accordance with the spirit of collaboration which Article 70 of the Treaty postulated it was prepared to anticipate any initiative on the part of the High Authority by instructing the various Italian Chambers of Commerce to draw up the schedules of road transport rates on main traffic routes in relation to journeys of more than 200 km and of loads of more than 5 metric tons; these schedules could be notified each month to the High Authority via the Italian Embassy in Luxembourg.

The Italian Government considered that these measures would come within paragraph (c) of the High Authority's letter of 12 August 1958.

Following this reply Decision No 18/59 was taken on 18 February 1959 'on the publication or notification to the High Authority of the scales, rates and all other tariff rules of every kind applied to the carriage by road of coal and steel within the Community'.

This decision was based on the following considerations in particular:

'Whereas this obligation must be fulfilled in such a way as to ensure the functioning of the Common Market as provided for by the other provisions of the Treaty and in particular Articles 4, 5, 60 and 70.

'Whereas the functioning of the Common Market requires in particular:

(a) that there should be control over any discriminatory scales, rates and other tariff rules applied to transport within

the Common Market;

(b) that producers should be able to draw up their price-lists with full knowledge of the delivery prices of their own products even in cases where the contract of carriage is concluded with the consignee;

(c) that producers should be able to draw up their price-lists with full knowledge of the delivery prices of the products of producers in competition with them;

(d) that producers should be able to align their delivery prices on those of other producers.

'Whereas these conditions can be fulfilled only if the producers and consumers of the Common Market can acquire knowledge of the scales, rates and all other tariff rules of every kind applied to the carriage by road of coal and steel within the Community for hire or reward whether these scales, rates and other tariff rules were fixed or standardized by the State or drawn up in conjunction with it, or freely determined by the transport undertakings without any intervention on the part of the State.'

To these recitals the High Authority added a long history leading up to the decision.

Decision No 18/59 was based on Articles 2, 3, 4, 5, 15, 60, 70, 81, 86 and 88 of the Treaty.

In the statement of reasons for the decision the High Authority considers the attitude adopted by the Netherlands Government and the French Government with regard to the recommendation in paragraph (c) but mentions nothing of the statements supplied on this subject by the Italian Government in its letter No 000038 of 8 January 1959 (twelfth recital).

The High Authority reaches the general conclusion that none of the Governments 'has adopted or declared itself prepared to adopt in their entirety the measures necessary to implement one or other of the courses of action suggested by the High Authority and that, although certain Governments have announced the adoption of other measures . . . . , none of these measures is capable of satisfying the conditions and requirements defined above' (thirteenth recital).

This leads the High Authority to find that all the Member States, including the Italian State, have failed 'to fulfil an obligation imposed on them under the European Coal and Steel Treaty' (fourteenth recital).

According to the same statement of reasons, this obligation consisted of the adoption of one of the first two courses of action recommended to the Italian Government in the letter of 12 August 1958 with certain adjustments with regard to the flexibility of tariffs and the temporary exclusion from these rules of certain categories of vehicles and certain short-distance transport.

The time-limit for implementation was 30 June 1960.

On 4 April 1959 the present action for the annulment of the abovementioned decision 'on the basis of Article 33 or Article 88 of the Treaty' was entered at the Registry of the Court of Justice of the European Communities.

II — Conclusions of the parties

The applicant claims that Decision No 18/59 of the High Authority of 18 February 1959 on road transport should be annulled and that the High Authority should be ordered to bear the costs.

The defendant contends that the action should be dismissed and the Italian Government be ordered to bear the costs.

III — Submissions and arguments of the parties

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

A — *Infringement of the Treaty*

1. Infringement of the last paragraph of Article 70 of the Treaty

The *applicant* infers from the last paragraph of Article 70 that with regard to transport the national regulations are the rule and the Community regulations the exception.

Disagreement between the Governments of the Member States who alone had power to take measures in this matter does not in any way constitute a valid legal basis for the intervention of the High Authority which cannot substitute itself for these Governments.

Moreover, Article 5 of the contested decision requires the Italian Government to make the non-observation of the provisions which it is allegedly required to take subject to sanctions; such sanctions cannot under Italian law be imposed other than by the law or equivalent rules.

The *defendant* maintains that this reasoning undermines the purpose of the provisions of Article 70 and the measures taken by the High Authority to implement those provisions. These measures do not become unlawful because they have some repercussion on the economic policy of the various States. The legislative freedom of each of the Member States cannot extend to amending or annulling the provisions of Article 70 and the other provisions of the Treaty. It is not only particular provisions which limit this freedom: everything that is incompatible with the achievement of the objectives of the Treaty is *ipso facto* contrary to it.

Moreover, the principle that the Member States are free to determine their own transport policy is not undermined by the obligation to publish transport rates, nor is the freedom in transport rates itself.

The Italian Government's refusal to comply is in fact a refusal to fulfil its 'international obligations'.

Finally, the High Authority stresses the similarity between Article 70 and Article 60 on prices and says that this applies generally. It states that the court declared in Case 1/54 that publication was provided for by the Treaty to prevent prohibited practices and to enable purchasers to obtain information; these objectives can be attained only if there are rules on transport rates similar to those laid down for the prices of coal and steel.

2. Infringement of the third paragraph of Article 70 of the Treaty

The *applicant* states that in contrast to the second and last paragraphs of Article 70, the third paragraph refers to 'the scales, rates and all other tariff rules of every kind applied to the carriage of coal and steel ...' which rules out the publication or notification to the High Authority of road transport rates and conditions which are not associated with tariffs. The contested decision requires the Italian Government to draw up tariffs for road transport and to require road transport undertakings to publish in advance the transport rates and conditions even where they are not subject to tariffs.

The *defendant* does not see how it would be possible with such a system to prevent discrimination and to ensure that the objectives of the Treaty are achieved.

The conclusions which the applicant draws from a too literal interpretation of Article 70 are not well founded. In particular the comparison between the third and fifth paragraphs of Article 70 seems invalid: rates must not be confused with publishing; although the scale is only an indication of the rate and the tariff only a means of determining the actual rate in the various cases, the economic factor is the rate.

The last paragraph of the article mentioned only the factor taken into account by economists, namely the rate and not the instruments determining it in the actual case.

Further, it is not possible to base an argument on the participle 'applied' used in the third paragraph of Article 70 to conclude that only existing tariffs must be published nor can the noun 'rates' be disregarded and it be overlooked that there will always be a 'rate applied' whether known or not.

The High Authority refers to the judgment

of the court in Case 1/54 in which wording similar to that in Article 60 (2) (b) has already been interpreted.

From the systematic point of view and according to a logical interpretation, it is not possible not to take account of the first paragraph of Article 70 which anticipates that consumers must have particulars of the tariffs to enable them to make comparisons of the rates. It follows that if this preliminary indication of the rates, which is done by applying the tariffs published, does not exist it should be put in hand.

The defendant concludes that the High Authority can only, as the history of the case shows, apply the legal rule strictly, since the limited intervention which was attempted at first by means of negotiations has failed.

In reply the *applicant* states that the citation of the judgment of the Court in Case 1/54 is 'inappropriate' and that the reference to this judgment is arbitrary, since the matters dealt with are quite different.

3. Infringement of Article 5 of the Treaty

The *applicant* states that the High Authority has infringed Article 5 of the Treaty, which provides that the Community shall carry out its task in accordance with the Treaty with a limited measure of intervention, and that the contested decision 'openly infringes' it by both its content and its scope.

The *defendant* in answer says that if Article 70 allows the contested decision to be taken the submission is 'groundless'. After attempted negotiations the High Authority could do only what was 'strictly necessary to make the rules of the Treaty effective'.

4. Infringement of Article 88 of the Treaty

The *applicant* states that following the reply by the Italian Government to the letter from the High Authority of 12 August 1958, which letter and reply came within the procedure provided for by the first paragraph of Article 88, all that the High Authority could do was to take a purely 'declaratory' decision.

Further, according to the applicant, there is no provision in Article 88 providing a 'power of substitution' enabling the High Authority under cover of a complex decision to impose on a State 'particular obligations of a legislative nature'.

The *defendant* on the contrary takes the view that, where the Treaty provides that the High Authority shall record in a reasoned decision a failure by a State to fulfil an obligation and shall set a time-limit for the fulfilment of the obligation, the High Authority must establish what amounts to the infringement on which it relies. It is necessary in a new matter to specify what has to be done to fulfil the obligation and how it is to be accomplished.

Any other interpretation of Article 88 would amount to playing with words.

In the oral procedure the *applicant* cited another infringement of Article 88: Decision No 18/59 contains no more than two possibilities of fulfilling the alleged obligation contained in Article 17, whereas the letter of 12 August 1958 which was the subject of observations by the States contained three; the possibility contained in paragraph (c) is not included in Decision No 18/59.

In answer the *defendant* says first of all that this argument is belated; it then maintains that the answers by the Governments to the letter of 12 August 1958 showed that the said possibility was not sufficient; this shows that it has taken account of the observations of the Member States.

5. Infringement of Article 47 of the Treaty

The *applicant* considers that it follows from the contested decision that the information on rates and conditions of carriage, when notified to the High Authority, will be made available to producers, purchasers and consumers in the Common Market. Under the second paragraph of Article 47 of the Treaty the High Authority must not disclose information of the kind covered by the obligation of professional secrecy, in particular 'information about undertakings, their business relations or their cost compo-

nents'. The professional secrecy in question has its own value in the Treaty: it covers all undertakings which would be prejudiced by having their industrial or commercial secrets revealed. This interpretation is confirmed by the Teitgen Report on the powers of control of the Common Assembly (Document No 5 of the 1954/1955 session of the Common Assembly).

Thus the contested decision obviously infringes Article 47.

In answer the *defendant* says in particular that professional secrecy must be understood as meaning that secrecy covers factors which are not dealt with by particular provisions of the Treaty and 'which do not have to be published to attain the objectives of the Treaty'. Transport cost represents only one factor in prices. Moreover the first and third paragraphs of Article 70 obviously exclude transport charges from the protection of secrecy.

6. Infringement of the provisions of the Treaty in relation to the prices of coal and steel and in particular Articles 3, 4, 5 and 60

(a) Infringement of Article 3 (c)

The *applicant* observes that Article 3 (c) requires that institutions should ensure the establishment of the lowest prices in an economically healthy system. Tariffs leading to fixing maximum or average rates prevent producers from benefiting from lower rates of carriage which they might obtain in a system of free negotiation and such tariffs necessarily influence the price of the product carried.

The *defendant* in answer says that such 'abstract considerations of economic policy' would make it impossible to apply Article 70 of the Treaty and to take measures against discrimination.

(b) Infringement of Article 4 (b)

The *applicant* states that obligatory tariffs would prevent road transport rates being freely negotiated, for by means of average rates the tariffs allow particular transport costs to be transferred from one consumer to another; the additional rate which has to be paid by the user of particular transport, the cost price of which is higher than that of comparable transport, is spread among all consumers, for the tariff is calculated on the basis of an average. This is the possibility to which Article 4 refers when it includes among the number of measures or practices likely to give rise to discrimination interfering with the purchaser's free choice of supplier only transport rates and not the rates freely agreed between those concerned in each particular case.

The *defendant* in answer says that the possibilities of transferring the costs relating to a particular transport from one consumer to another are greater when there is no tariff and when the carriers fix rate as they please in each particular case.

(c) Infringement of Article 5

The *applicant* maintains that the contested decision impedes the maintenance of normal competitive conditions which already exist on the Italian transport market by reason of the fact that some 60000 motor transport undertakings are involved in the market. This large number of undertakings of generally very small size operating without restriction ensures for each particular transaction rates and conditions in accordance with the technical and economic characteristics of the transactions and the commercial situation of the market. As a result, the contested decision infringes Article 5 of the Treaty which *inter alia* gives the Community the task of ensuring the establishment, maintenance and observance of normal competitive conditions.

In answer the *defendant* says that normal competitive conditions do not imply secrecy about rates and that there has never been any question of applying fixed rates to road transport.

(d) Infringement of Article 60

The *applicant* considers that the publication in advance of road transport rates gives only

a very approximate and indirect indication of the possible rate for the carriage of goods. The undertakings concerned are in a position to obtain their own indication by other means and with a similar approximation.

Several arguments are advanced to support this contention:

1. The road transport rate is not the only or the most important factor in transport cost;

2. The rates of competing means of transport are not known in advance in spite of the relatively greater volume of trade done by them;

3. The rule relating to publication in advance of transport rates cannot be imposed on carriers from third countries nor can it apply to carriage over the territory of such countries;

4. Prior publication of road transport rates is not necessary, for consignors are in a position to know the rates ruling on the routes which concern them;

5. A tariff in respect of carriage for hire or reward provides only a very indirect accounting factor in the transport costs of a consignor using his own vehicles.

The applicant concludes that Article 60 of the Treaty is infringed in so far as publication in advance (or prior notification to the High Authority) of road transport rates does not constitute a necessary and sufficient condition allowing producers of coal and steel to determine correctly either their scale rates or their sale prices in different localities on the basis of the reference places determining their scales or finally their possibilities for alignment.

The *defendant* in answer says:

the applicant is making unsubstantiated assertions;

it is sought to place on a legal level what is only a disputable economic argument by claiming to substitute the Court for the competent institution to ascertain what are the most appropriate means of attaining a certain objective 'and the Court does not have this power even where it has unlimited jurisdiction';

the fact that a decision may not attain all its objectives does not make it irregular;

in the absence of publication neither purchasers nor producers of other Member States have any possibility of knowing the rates of Italian undertakings;

Article 60, which is of a fundamental nature, must provide the guide, if there be need of one, for the interpretation of Article 70; this article does not limit the application of Article 60.

B — *Patent disregard of the facts (Manifesta ingiustizia del merito della decisione impugnata)*

The *applicant,* as explained in the oral procedure, includes in this submission the facts which the Court should take into account having regard to the fact that the action under Article 88 is one in which the Court has unlimited jurisdiction.

The applicant stresses that the majority of the 60000 road transport undertakings in Italy are small undertakings, that they enjoy a completely free system of competition and are not subject to any special condition in the way in which they are run, for there is no obligation in Italy that each consignment should be accompanied by a consignment note.

The applicant states that:

consumers have never complained of the system in force;

the contested decision would introduce into the road transport sector a bureaucratic factor alien to the policy pursued by the Italian Government;

any attempt to list the transport rates by lorry conflicts with the capacity of this means of transport to adapt to the circumstances

and would involve the application of average rates, if not maximum rates;

the new rules would not be in line with the traditional Italian rules in relation to prices;

Decision No 18/59 imposes onerous obligations on road transport undertakings and on the authorities which will be required to check them;

finally, this decision could lead to the establishment of artificial rates (cf. the Kapteyn Report of November 1957 to the common Assembly).

The *defendant* in answer says that Decision No 18/59 involves no 'disturbance' in the 'position of equality' existing between the Italian road carriers and 'other carriers'.

Consignments of less than 5 metric tons, which are small-scale business consignments, would not be subject to the new rules.

Moreover, reference should be made to the decision itself which leaves great freedom of action both to road carriers and to the Governments of Member States.

Finally, the inevitable burdens which would result from the decision will contribute to the welfare of all.

The *applicant* in its reply refers to the ambiguity of speaking of 'other carriers' without stating who those carriers are.

It insists that the Court should consider the question whether there is any disparity in treatment between carriers and should dismiss the above considerations which the High authority has advanced.

C — *Misuse of powers*

1. The *applicant* states that the facts cited in the submission that the last paragraph of Article 70 of the Treaty has been infringed show that, in following an unlawful objective, the High Authority is misusing the powers which have been given to it when it imposes obligations on the Italian government in a sphere 'which is within the Government's own jurisdiction'.

The *defendant* dismisses this submission with the same arguments as those used against the first submission of infringement of the Treaty.

2. The *applicant* maintains that the facts cited in the submission that Article 88 of the Treaty has been infringed likewise constitute a misuse of powers. In claiming to rely on Article 88 the High Authority is attempting to attain an unlawful objective by interfering in a sphere of powers which obviously come exclusively within the internal jurisdiction of the State concerned.

The *defendant* answers this submission with the same arguments as those used against the fourth submission of infringement of the Treaty.

3. The *applicant* considers, and again takes up the submission that Article 60 of the Treaty is infringed, that the fact of considering advance publication of road transport rates as a necessary condition of correctly applying Article 60 of the Treaty constitutes a misuse of powers in so far as this article is relied on to attain an objective — the advance publication of road transport rates — which is not one which the Treaty ascribes to it.

The statement of defence shows, according to the applicant, that the problem has not been considered as a whole and this 'constitutes clear proof of a serious misuse of powers'.

The *defendant* adheres to the arguments already used by it in opposing the corresponding submission of infringement of the Treaty.

IV — Procedure

The action has been brought in due form and within the prescribed period.

The procedure followed the normal course.

Grounds of judgment

I. Before proceeding with the matter consideration must be given to (1) the legal basis of the decision and (2) the procedure which led to its being taken.

(1) The legal basis of the decision appears from its title which states that it is 'on the publication or notification to the High Authority of scales, rates and all other tariff rules of every kind applied to the carriage of coal and steel within the Community for hire or reward' thus reproducing the wording of the third paragraph of Article 70 of the Treaty establishing the European Coal and Steel Community for which the intention is to lay down implementing rules.

The grounds likewise state that the objective of the decision is to implement that article.

(2) The decision takes the form of an application of the first paragraph of Article 88, and states that it is a reasoned decision by which the High Authority in accordance with this provision is empowered to record that a State has failed to fulfil an obligation under the Treaty.

II. Stripped, however, of ancillary submissions made variously by the parties, the central question raised by the action for annulment of Decision No 18/59 is: (A) with regard to substance, what are the legislative powers which the High Authority can claim on the basis of the third paragraph of Article 70 with regard to transport; (B) with regard to form, whether Article 88 chosen by the High Authority for the excercise of such powers may be legally used for such purposes and (C) if appropriate, whether this article has been applied according to the rules laid down.

A. Although the Treaty establishing the European Coal and Steel Community contains rules capable, like rules laid down by the national legislature, of being directly implemented in the Member States such implementation taking place *ipso iure* as a result of their acceptance into the law of the Member States by the ratification of the Treaty, other provisions of the Treaty on the other hand require implementing measures before they are applied.

This is the case with regard to the third paragraph of Article 70 of the Treaty which, although it establishes a concrete rule with regard to transport valid both for the Member States and for the High Authority, requires implementing measures for it to be applied to the subjects of the European Coal and Steel Community.

With regard to such implementing measures it is necessary to inquire whether the Treaty gives the High Authority power to make regulations either (1) expressly or (2) by implication.

1. The third paragraph of Article 70 provides that 'The scales, rates and all other tariff rules of every kind applied to the carriage of coal and steel within each Member State and between Member States shall be published or brought to the knowledge of the High Authority'.

It must be observed that these provisions are silent with regard to the conditions of their application and the implementation measures which they assume and certainly they do not give the High Authority any power to take decisions in this respect.

Moreover, a comparison between the third paragraph of Article 70 and the provisions of Article 60 (2) (a) shows that in a similar matter the Treaty has made the obligation to publish provided for in Article 60 subject to the power of the High Authority to provide for its application by providing that this publication must take place 'to the extent and in the manner prescribed by the High Authority after consulting the Consultative Committee'.

The fact that for the publication of the price-lists and conditions of sale applied within the Commom Market the Treaty has expressly given the High Authority a legislative power, providing even for review by the Consultative Committee, shows the importance which it attributes in this matter to its regulation by the High Authority.

The absence of any provision in this respect in Article 70 shows on the other hand that in the transport sector the wording of the Treaty denies the High Authority any power to take implementing decisions.

2. Having regard to the different attitude adopted by the Treaty in respect of two similar situations it is proper to inquire whether a legislative power on the part of the High Authority does not arise by implication from (a) other provisions of the Treaty or (b) its general structure.

Writers and case-law agree in recognizing that the rules established by a treaty imply the principles without which these rules cannot effectively or reasonably be applied.

(a) In the present case the High Authority maintains first that since the provisions of Article 60 (2) (a) require the publication of the price-lists and conditions of sale of products coming within the European Coal and Steel Community, they require by implication the publication of the scales, rates and other tariff rules applied to the carriage of the same products.

According to the High Authority if the latter are not published the publication of the prices would lose their purpose and be of no use to those concerned.

In order for those concerned to be able to align their prices and maintain healthy competition they cannot remain ignorant of the important factor constituted by the transport rates in the formation of their quotations on the Common Market.

According to this argument, the corollary of the obligation to publish prices is the publication of transport tariffs and this obligation follows by implication from the concepts of 'price-lists' and 'conditions of sale' referred to in Article 60.

It is wrong both in law and in fact to say that the expressions 'price-lists' and 'conditions of sale' cover both those in respect of goods and those in respect of transport.

The seller can be required to publish only his own prices and not the rates applied by a transport undertaking.

In so far as the seller is required to pay the carrier's charges they represent an element of the seller's cost price.

The seller is not required to publish the details of his cost price.

The High Authority's argument that it is necessary to publish the transport rates in order to know the prices is contradicted by its own attitude with regard to Article 60 (2) (a).

If the view which it is now advocating were correct, that is to say, if the sale prices included transport rates, on laying down the rules for the scope and forms for the publication of the price-lists and conditions of sale it could have provided in the relevant decisions (Nos 3/53, 30/53, 31/53 and 1 to 3/54) for the transport costs as a price factor.

It did not, however, do so.

Although it is true that in the 'Communications' which it sent out after certain of the abovementioned decisions on the publication of prices the High Authority refers to transport costs, it does so however only to align the steel prices on the delivery price of another undertaking and even in this case it takes into account the price actually paid which does not require any previous publication but is subject only to checking afterwards.

(b) From another point of view it is not possible to infer a structural and functional correlation between the obligation to publish the prices of products and the obligation to publish transport costs from the basic principle of the Treaty which

although guaranteeing economic freedom in the sphere of competition is nevertheless aimed at restraining abuse by prohibiting any discrimination, the checking of which is for the High Authority.

Although it is true that by virtue of the general principle, applied to transport by Article 70, checking discrimination and taking action against it is for the High Authority, it is not however possible to infer from this principle a power for the High Authority to take decisions concerned with prior control by laying down the publication of scales or rates, since such a power is exceptional and subject to renunciation by the Member States which in the present case the Treaty does not provide for either expressly or by implication.

The High Authority thus has no power to implement the provisions of the third paragraph of Article 70 by means of decisions.

B. Although the third paragraph of Article 70 does not give the High Authority a power of decision to implement its provisions either expressly or by implication it is necessary to inquire whether Article 88 of the Treaty, to which it has had resource, could legally do so.

Article 14 of the Treaty provides 'In order to carry out the tasks assigned to it the High Authority shall ... take decisions, make recommendations ...'.

The forms of excercise of its excutive power are thus defined and circumscribed by this provision in that the excercise of the power to make regulations, where the High Authority has any such, is done by decisions which are 'binding in their entirety', but in cases where such a power to make regulations is not conferred upon it but is reversed to the Member States the High Authority, if it wishes to remind States of their duties, can only resort to a recommendation and cannot simply proceed to impose upon them its own choice with regard to methods.

Neither the wording nor the general structure of Article 88 allow the High Authority to rely on its provisions to exercise a power to make regulations similar to the general powers arising from the Treaty which have to be exercised in the forms provided by Article 14.

(a) Article 88 gives the High Authority only a power to record that a State has failed to fulfil an obligation under the Treaty.

This obligation must arise either from an imperative provision or a decision or recommendation prior to the application of this article.

The 'reasoned decision' referred to in the first paragraph of Article 88 may simply record a failure and may not have a legislative content.

To maintain the contrary would amount to recognizing that the High Authority has an excessive legislative power as against Member States arising from the general law.

The reasons required by the first paragraph of Article 88 must justify the recording of the failure and the time-limit referred to therein defines the period in which a pre-existing obligation must be fulfilled and not one created by the decision taken under this article.

If it were possible to equate the 'decision' referred to in Article 88 with a decision within the meaning of Article 14 by which the High Authority carries out the tasks assigned to it, it would be difficult to explain why a rule laid down under Article 88 would be subject to an action in which the court has unlimited jurisdiction allowing any submission to be made based not only on legality but on any reasons justifying failure to act, whereas decisions taken in the form provided for by Article 14 are subject to the rules and time-limits for bringing actions under Article 33.

(b) Article 88 opens means of implementation and is the *ultima ratio* enabling the Community interests enshrined in the Treaty to prevail over the inertia and resistance of Member States.

It is a procedure far exceeding the rules heretofore recognized in classical international law to ensure that obligations of States are fulfilled.

However, Article 88 must be strictly interpreted.

Although with regard to decisions and recommendations of the High Authority the governments must follow the means of redress laid down by the Treaty according to the forms and within the time-limits prescribed and cannot subsequently allege that these measures are irregular or null and void when the High Authority takes steps under Article 88, the High Authority for its part must adhere to the forms available to it under Article 14 of the Treaty in the exercise of its 'legislative' power.

It never has the choice between this 'legislative' power and the procedure for recording and declaring a failure for which Article 88 has been enacted.

In no way can it use this article for purposes the direct achievement of which by means of decision the Treaty denies it.

(c) The High Authority cannot, moreover, claim that the contested decision only records a failure on the part of the Italian State under Article 88, since the ob-

ligations which the contested decision maintains have not been fulfilled are already specified in the letter of 12 August 1958 addressed to that State.

The title of the contested decision contradicts this assertion and clearly establishes that its objective is the issue of a regulation for which the third paragraph of Article 70 provides no basis.

A comparison between Article 1 and the following articles of the contested decision likewise show that the present case could not be only the recording of a failure to fulfil an obligation.

The contested decision could not regard the obligations formulated in the letter of 12 August 1958 as disregarded since they are not the same as those contained in the decision itself.

Thus the High Authority wrongly relied on Article 88 to lay down provisions for the implementation of the third paragraph of Article 70, thereby not only misconstruing Article 88 but also misusing the procedure provided for there as a means of implementation to accomplish a task of drawing up regulations which it did not have.

C. Although the wording of Article 70 and the wording and general structure of Article 88 give the High Authority no direct power to make regulations implementing the provisions of the third paragraph of Article 70, it is necessary to inquire whether the contested decision may, as the High Authority maintains, be regarded not as an independent regulation, but as a 'reasoned decision' recording a failure.

On this basis it was the letter of 12 August 1958 which required the Member States in general and the applicant in particular to submit their observations with regard to the obligation which the contested decision recorded as not being fulfilled.

Consideration of the letter sent on 12 August 1958 by the High Authority to the Italian Government shows that the High Authority is laying down requirements with regard to the regulations which have to be adopted by the Governments in respect of road transport. These requirements were intended to be binding with regard to the objective which they lay down, namely the obligation arising, according to the High Authority, from the third paragraph of Article 70 to publish the scales, rates and all other tariff rules of every kind applied to road transport.

In a letter of 8 January 1959 the Italian Government declared itself ready to anticipate any initiative on the part of the High Authority by instructing the Italian Chambers of Commerce to make a list of the rates of the main road transport undertakings and to send them each month to the High Authority.

Since the High Authority's letter of 12 August 1958 contained an admonitory reference to the first paragraph of Article 88 of the Treaty and the High Authority did not consider that the letter of 8 January 1959 satisfied the requirements of the third paragraph of Article 70 of the Treaty, it reacted to the observations made by the Italian Government in respect of the recommendation by taking Decision No 18/59 of 18 February 1959 'on the publication or notification to the High Authority of the scales, rates and all other tariff rules of every kind applied to the carriage by road of coal and steel within the Community for hire or reward' on the basis of the first paragraph of Article 88.

In the decision it records that all the Member States are failing to fulfil their obligations towards the Community by not unconditionally accepting one of the three 'possibilities' which it had allowed.

(a) For the form of this recording to be valid the High Authority ought as a preliminary step to have given the Italian Government an opportunity to submit its 'comments' in accordance with the first paragraph of Article 88.

It considers that it has satisfied this condition by treating the letter from the Italian Government of 8 January 1959 as representing such 'comments' on the ground that the recommendation of 12 August 1958 contained a reference at the end to the second sentence of the first paragraph of Article 88 of the Treaty.

The Court cannot, however, regard this exchange of letters as constituting the final comments prior to the serious measure of recording a failure to fulfil agreed obligations on the part of a State, especially since the position adopted by the Italian Government did not constitute a peremptory refusal to attain the objective laid down in Article 70 referred to by the High Authority.

It is not sufficient that an imperative proposition contains a reference to the first paragraph of Article 88 for it to be said that any contrary opinion expressed by a Government which takes a view different from that of the High Authority on the proper means to attain the objectives which the latter is pursuing must be immediately regarded as constituting the comments referred to in the first paragraph of Article 88 and as exhausting that Government's arguments on the determination of the obligations which it has in fact or is alleged to have under the Treaty.

This applies particularly in the present case where fundamentally the High Authority could refer only to the objective assigned to the State and had to leave the choice of means to the discretion of the Italian Government.

It would indeed be inconceivable that the different attitude of the Italian Government, which answered the 'possibilities' submitted by the High Authority

with a concrete solution which could not be regarded as a refusal in respect of the objective of the third paragraph of Article 70, could have been in the nature of comments on a precise failure, or one at least sufficiently specified in law.

Since the High Authority has not given the Italian Government an opportunity to submit its comments as required by Article 88, the applicant rightly argues that the decision is null and void as being defective in form in so far as it purports to record a failure by the Italian State to fulfil an obligation which it has under the Treaty establishing the European Coal and Steel Community.

(b) The contested decision further infringes the Treaty by its erroneous application in law of Article 88.

The recording of the failure on the part of the applicant State to fulfil an obligation could relate only to its obligation to pursue the objective referred to in the third paragraph of Article 70.

The decision however infers the alleged failure from the finding that the measures taken by the Italian Government were not capable of achieving the objective of the third paragraph of Article 70 on the sole ground that they did not unconditionally adopt one of the three 'possibilities' regarded as alone being suitable by the High Authority.

In doing this the High Authority only recorded the failure to employ the means which it suggested whereas legally it should have recorded whether in the circumstances there was a failure to attain the proposed objective.

Thus it infringed both Article 88 and Article 70 of the Treaty.

III. In these circumstances and without its being necessary to consider the other arguments presented by the applicant it is right to annul Decision No 18/59 of the High Authority.

IV. Under Article 69 (2) of the Rules of Procedure the High Authority must bear the costs.

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 4, 14, 60, 70 and 88 of the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby:

Annuls Decision No 18/59 of the High Authority of 18 February 1959 published in the Journal Officiel of 7 March 1959 on the publication or notification to the High Authority of the scales, rates and all other tariff rules of every kind applied to the carriage by road of coal and steel within the Community for hire or reward.

Orders the High Authority of the European Coal and Steel Community to bear the costs.

Donner Delvaux Rossi
Riese Hammes

Delivered in open court in Luxembourg on 15 July 1960.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 20 JUNE 1960[1]

Summary

1 — Translated from the German.