JUDGMENT OF THE COURT
10 MAY 1960[1]

Government of the Federal Republic of Germany v High Authority of the European Coal and Steel Community

Case 19/58

Summary

1. Fundamental and persistent disturbances — Action by the High Authority — Concept (ECSC Treaty, Article 37)

2. Transport — Principle of non-discrimination — Concept of comparability (ECSC Treaty, Article 70)

3. Transport — Special internal rates and conditions — Criteria (ECSC Treaty, Article 70)

4. Transport — Special internal rates and conditions — Adverse effect — Absence — Authorization not justified (ECSC Treaty, Articles 2, 3, 70)

5. Transport — Special internal rates and conditions — Exceptional nature — Circumstances justifying approval (ECSC Treaty, Article 70)

1. Action on the part of the High Authority within the meaning of the first paragraph of Article 37 must be interpreted as referring only to an action which has already occurred and not a decision which the High Authority has the as yet unresolved intention of adopting.

2. Cf. Summary of Joined Cases 3 to 18, 25 and 26/58, No 2.

3. Special rates and conditions within the meaning of the fourth paragraph of Article 70 are not only those adopted in the interest of undertakings, but also those which are advantageous to them. Therefore even reasons for their adoption which are entirely foreign to the interests of an undertaking receiving an advantage cannot exclude or restrict the application of the abovementioned provision.

4. Cf. Summary of Joined Cases 3 to 18, 25 and 26/58, No 5.

5. Cf. Summary of Joined Cases 3 to 18, 25 and 26/58, No 6.

In Case 19/58

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

applicant,

1 – Language of the case: German.

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its legal Adviser, Walter Much, acting as agent, assisted by Hans Peter Ipsen, professor at the University of Hamburg, with an address for service in Luxembourg at its seat 2 place de Metz,

defendant,

Application for the annulment of certain parts of the decisions of the High Authority of 9 February 1958 (JO of 3. 3. 1958) notified by letters T/10.202 and T/10.203 of 12 February 1958,

THE COURT

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

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

gives the following

JUDGMENT

I — Conclusions of the parties

The *applicant* claims that the Court should:

(a) Annul Sections III, IV and V of the defendant's Decision T/10.202 of 12 February 1958, and Sections III and IV of the defendant's Decision T/10.203 of 12 February 1958, in so far as they state that the special rates and conditions in force are not in accordance with the ECSC Treaty and in so far as they require that measures be taken so as to abolish them;

(b) Order the defendant to bear the costs of the proceedings.

The *defendant* contends that the Court should:

Dismiss the application of the Government of the Federal Republic of Germany as unfounded with all legal consequences.

II — Facts

The facts may be summarized as follows:

After commencing its duties, the High Authority established a programme of work in preparation for a consideration of special rates and conditions in force in the Member States and in particular of those applicable to the carriage of mineral fuels and ores, which is one of its tasks under the provisions of the Treaty, and the adoption of the necessary measures.

Those concerned were given an opportunity of putting forward their point of view at meetings which took place with representatives of the German Government and of the Länder. Documents were exchanged. The High Authority undertook an inquiry into the general economic situation and into the situation of the iron and steel industry in the regions concerned.

The High Authority states that it took the

contested decisions at its meeting on 9 February 1958. It communicated them to the Federal Government by letter of 12 February 1958. The contested provisions of those decisions require the abolition or modification of the special rates and conditions in favour of certain German undertakings within fairly extended periods.

The High Authority bases its decisions in particular on two main reasons:

(a) The special rates and conditions constitute a discriminatory measure in favour of the undertakings compared with undertakings placed in comparable situations from the point of view of transport;

(b) The maintenance of the rates and conditions is not necessary for achieving the objectives set out in Articles 2 and 3 of the Treaty.

The High Authority also ordered that certain rates and conditions, described by the Federal Government as competitive rates, be abolished, on the ground that it did not consider them justified by competition from another means of transport. In the two decisions, the High Authority considers that the aforementioned rates and conditions are incompatible with the Treaty because they constitute a protective measure.

III – Submissions and arguments of the parties

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

1. *The submission as to lack of jurisdiction*

(a) The *applicant* points out that the transitional period laid down by the Convention on the Transitional Provisions expired on 10 February 1958, and it raises the question whether a decision allegedly taken by the High Authority at its meeting on 9 February but which was brought to its attention only by letter dated 12 February and which it received only on 14 February, can be considered as having been taken within that transitional period.

According to the applicant, the principle of legal certainty requires that individuals may not be subject, after the expiry of that period, to decisions which have been taken solely in application of the Convention. The applicant states that this question has already been discussed during the talks which preceded the contested decisions. At that time the applicant itself defended the proposition that these powers could be exercised even after the expiry of the transitional period, provided that the provisions of the Convention were observed, whereas according to the High Authority the exercise of these powers was limited to the duration of that period.

The *defendant* expressly states that the powers given under the seventh paragraph of Article 10 had to be exercised before the expiry of the transitional period, and it adds that in the present case it exercised its powers before that period came to an end. In fact it exercised them by adopting the decisions during its meeting of 9 February. It clearly appears from the two letters sent to the Federal Government on 12 February 1958 that they do not constitute decisions properly so-called but merely the formal communication of those decisions to the addressee. Such communication is relevant as regards the entry into force of the decisions (Article 15), but the moment of such entry into force matters but little in law in relation to the question whether a power conferred by the Treaty has been exercised in due time.

(b) In its application, the applicant alleges, moreover, that the High Authority's action within the applicant's territory exceeds the limits of its jurisdiction under the Treaty.

The *defendant* replies that the complaint of lack of jurisdiction thus put forward is not relevant. That it exceeded the 'legitimate aims' of the Treaty does not prove the alleged lack of jurisdiction. In order to define submissions, it is necessary to distinguish between the power to act and the purpose or objective of the action.

2. *The submission as to infringement of the Treaty*

A – The interpretation of Article 70 of the Treaty

The *applicant* considers that the High

Authority has interpreted Article 70 of the Treaty too restrictively.

(a) By virtue of the first paragraph of the above-mentioned article comparably placed consumers must be offered comparable rates for the carriage of coal and steel. The applicant says that it appears from the contested decisions that, in dealing with the question whether consumers are comparably placed, the High Authority has considered the matter exclusively with reference to 'comparable conditions from the point of view of transport' (cf Decision T/10.203 on the carriage of coal: III, A, 1, (b), second paragraph; II, second paragraph; III, second paragraph; IV, second paragraph; V, second paragraph; B, first paragraph; C, II, second paragraph; decision T/10.202 on the carriage of ore: III, 1, (a), first paragraph; 2, first paragraph; (b) second paragraph).

The applicant argues that the first paragraph of Article 70 cannot be interpreted so restrictively. According to the applicant, in order to establish a comparison between the undertakings, it is necessary to take into account all the circumstances in which they are placed: the distance between the place where undertakings engage in production and their sources of supply, profitability of ore deposits, the fact that the undertakings are located in less favoured areas from the economic point of view. On this subject the applicant refers to the judgments in Cases 7/54 and 9/54.

The *defendant* replies that so wide an interpretation of the first paragraph of Article 70 would render the fourth paragraph on special rates virtually meaningless in practice.

From the meaning to be given to the fourth paragraph of Article 70 it is clear that the particular situations of undertakings in the Community, apart from conditions of transport properly so-called, which are of an economic, technical or social nature must not be included in the general concept of discrimination contemplated in the first paragraph of Article 70. If they were, no place would remain for particular rules to cover special situations in accordance with the fourth paragraph of Article 70. Yet the purpose of that particular provision of the Treaty is to subject the application of special rates and conditions in respect to undertakings in the coal and steel industries to a special control by the High Authority and to specific material conditions.

(b) Furthermore, the *applicant* complains that in the contested decisions the High Authority interpreted the words 'special internal rates and conditions in the interest of one or more coal- or steelproducing undertakings' in the fourth paragraph of Article 70 in such a way that the only reason which it has accepted as justifying the authorization of special rates is the particular situation of each undertaking concerned. It has refused also to take into consideration conditions of a general character which could justify a special rate, such as the fact that it appears desirable to aid undertakings situated in depressed areas, and to do so not so much in the interest of the said undertakings as in the interest of those regions themselves.

As against this proposition, the *defendant* refers to the text of the Treaty. It also points out that it has indeed taken into account the conditions mentioned by the applicant (see for example the Decision on coal at III, B, 2), while it has, it is true, investigated in each individual case whether the fact that an undertaking is located in a given region could have an adverse effect on it.

(c) According to the *applicant* Article 70 cannot be considered in isolation. In order to apply it one must also look at the general objectives of the Treaty. On this point, the applicant refers in particular to the second paragraph of Article 2 and to Article 3 (d) of the Treaty.

The High Authority, according to the applicant, has not taken sufficient account of the following factors:

1. What is involved is the working of mineral deposits situated on the territory of the Common Market. Aid granted to undertakings working those deposits

cannot adversely affect other undertakings within the Community. Therefore there can be no question of discrimination.

2. The prohibition on special rates would jeopardize the existence of many undertakings, and this justifies fears that there would be a considerable fall in employment and that the standard of living of certain regions in the Community would be under threat.

3. In a certain number of cases, aid to undertakings situated near the frontier between West Germany and the Soviet zone is involved. Here again, it must be noted that the closure of such undertakings would have extremely serious repercussions on the whole region in which they are located, for those regions are already experiencing unfavourable economic conditions as a result of the existence of that frontier.

Upon reading the application and the reply, the *defendant* takes it that the applicant is saying that the protection of certain undertakings and the jobs that go with them is of such importance that the application of the fourth paragraph of Article 70 is justified by the sole reason that special rates can be useful for the pursuit of those objectives. The High Authority refutes this proposition, alleging that the principles of non-discrimination and the maintenance of natural conditions of competition are of such overriding importance that special rates may be granted only when they are *necessary* for the protection of undertakings placed in *special* conditions.

The High Authority adds that the applicant has not proved that the existence of those undertakings would be threatened by the prohibition of the special rates.

On this point, the *applicant* again suggests that the abolition of the rates would have profound consequences in sectors of the economy to which the ECSC Treaty does not apply. It refers to Articles 80 and 82 of the EEC Treaty and considers that the High Authority should take account of them.

The *defendant* replies that Article 232 of the EEC Treaty expressly preserves the powers of the institutions of the ECSC. The repercussions of the decisions in question on other sectors of the economy are the inevitable consequence of any measure of the High Authority.

(d) There is further argument between the parties on the question whether the High Authority has sufficiently taken into account the particular needs of undertakings in the region near the Soviet zone. This involves in particular the undertakings Maximilianshütte at Sulzbach-Rosenberg and Luitpoldhütte at Amberg in Bavaria.

The complaint is directed against the High Authority's view—on the basis of which it lowered the reduction provided for by rate 6 B 31 from 21% to 8%—that it was necessary to take into account the fact that those two undertakings enjoyed sizeable tariff reductions prior to the situation resulting from the war.

The *applicant* takes the view that even if the reduction of 13% previously granted was not based on reasons consonant with the Treaty, the question which should have been asked is whether the total reduction of 21% was not justified by reason of the consequences of the establishment of the frontier zone, that is in practice the setting apart of neighbouring regions. According to the applicant, these consequences have brought about a loss which greatly outweighs the advantage arising from the tariff reduction. It offers, if necessary, to produce evidence for this assertion by producing information which was available to the High Authority.

The *defendant* replies, first, that the fixing of the aid necessary for each undertaking in the form of special rates is a matter for the discretion of the High Authority, according to the fourth paragraph of Article 70. This discretion as to fact is not subject to review by the Court (first paragraph of Article 33, second sentence).

The defendant then points out that, according to statements made by the Federal Gov-

ernment before the decision was adopted, the two foundries of the Upper Palatinate have enjoyed considerable tariff reductions since 1905 on their purchases of mineral fuels.

Thus the complaint cannot be made that the High Authority exercised its discretion wrongly in taking into account the previous tariff reductions. Those reductions have been granted for more than 50 years for reasons which, according to information supplied by the Federal Government, are still entirely valid today. Thus at the present time the total tariff reduction of 21% is still composed of two independent and distinct protective measures.

Furthermore, the High Authority was well aware that in the light of further experience this division of the tariff reductions might be insufficient to take into account all the economic and social difficulties encountered by the two undertakings by reason of the political division of Germany. That is why it included in its decision a corrective margin of 4%.

(e) Since the present case relates to the application not only of Article 70 of the Treaty but also of the seventh paragraph of Article 10 of the Convention, the applicant complains that the High Authority has not sufficiently observed the duty which the latter provision imposes on it to allow such time for the modification of the rates in force when the High Authority is set up as may be necessary to avoid any serious economic disturbances. The applicant interprets this provision as meaning that special rates must be authorized when such disturbances would be inevitable notwithstanding the grant of such periods.

In answer to this complaint the *defendant* states that the seventh paragraph of Article 10 only says that in respect of certain special rates the High Authority 'shall allow such time for their modification as may be necessary to avoid any serious economic disturbance'. It is a logical precondition of this requirement upon the High Authority that the authors of the Treaty envisaged that serious economic disturbance might occur at the time of the modification or abolition of a number of pre-existing special rates. But, as may be deduced from the text, this consequence is not a reason for permitting the continued existence of those special rates.

(f) Finally, the *applicant* complains that the High Authority has not sufficiently observed the fifth paragraph of Article 70. In its opinion, the effect of that provision, which says that 'transport policy . . . shall continue to be governed by the laws or regulations of the individual Member States', is that the institutions of the Community, and in particular the High Authority, must in principle respect the policy of the Federal Railways as regards transport rates.

On yet another point, the applicant is of the opinion that the High Authority has had insufficient regard to the independence of national transport undertakings: this point concerns the text of the contested decisions relating to competitive rates. According to the applicant, the lowering of rates is admissible in cases where rates are coordinated with or adapted to competition 'where the undertaking considers that it must take a measure of this kind'.

The *defendant* opposes this way of thinking, saying that the Treaty prohibits subsidies. The defendant considers that the tariff policy of the Federal Railways constitutes a part of the economic policy of the Federal Government.

As regards competitive rates, the High Authority is of the opinion that it had a duty to examine whether each special rate was a protective rate or was a rate intended to meet competition from a particular quarter: in the latter case it did not oppose the rates. Accordingly, it denies having infringed the fifth paragraph of Article 70.

B – Infringement of other provisions of the Treaty

In parallel to the applicant's arguments set out above, another line of argument is to be found in the application and in the reply. It may be summarized as follows.

The Treaty only lays down rules for one aspect of economic activity. By virtue of the first paragraph of Article 2 of the Treaty the Community has the task of achieving its objectives 'in harmony with the general economy of the Member States'. The *applicant* is of the opinion that there are several provisions in the Treaty which contain 'guarantees' (Vertragsgarantien) (the applicant admits that it has itself created this term which does not appear in the Treaty) with a view to ensuring that the independence of the national economies is respected.

The applicant considers that those guarantees have been disregarded.

The *defendant's* answer to these arguments is that specific 'guarantees' are alien to the Treaty, but that it renders the powers which it has conferred upon the High Authority with a view to achieving the objectives of the Treaty subject to limits which the High Authority has observed in this case.

3. *The submission as to infringement of essential procedural requirements*

The *applicant* says that reasons are not given in relation to two important elements of the contested decisions:

First, the fact that it has been accepted that the partition arising for political reasons has involved the undertakings of the Bavarian Upper-Palatinate in a loss amounting to 8% instead of the 21% claimed and that the tariff reduction was fixed in consequence thereof;

Secondly, the fact that in the case of the Upper-Palatinate the location of the undertakings near to the Eastern zone was taken into consideration, which was not the case for the steel works at Peine and Salzgitter (Decision T/10.203, III, C).

On the first part of this complaint, the *defendant* quotes the part of the decision at issue which, it says, contains sufficient reasons.

As for the second part, the defendant points out that in considering the protective rates granted to the undertakings at Peine and Salzgitter, it was not their location near the zone which was decisive, but the fact that each of the undertakings needed assistance. It is argued that on this latter point the High Authority gave a sufficient reason in its finding that the economic survival of the undertakings did not depend on the protective rate. There was thus no need to mention their geographical location.

4. *The submissions as to misuse of powers and manifest failure to observe the Treaty*

In the part of the application already mentioned under III, 1 (b), the *applicant* argues that in so far as it is established that the legitimate objectives of the Treaty were exceeded by the repercussions (of the contested decisions) on the applicant's general economic situation, the decisions are vitiated by misuse of powers. Furthermore, the applicant sees in the said decisions a manifest failure to observe Articles 2, 3, 4 and 70 together with Articles 26 and 67 of the ECSC Treaty.

The *defendant* replies that it cannot examine this complaint as to misuse of powers by reason of the vagueness with which it is worded.

As a further point, in the reply, the *applicant* puts forward the submission of misuse of powers by reason of the fact that the High Authority applied not Article 67, but the procedure under the seventh paragraph of Article 10 of the Convention.

The *defendant* replies that this complaint, put forward in the reply, cannot be taken into consideration because it has been put forward too late.

As regards the submissions based on manifest failure to observe the provisions of the Treaty, the defendant replies that possible repercussions of the contested decisions on sectors of the economy other than that of coal and steel are the necessary consequence of the partial nature of the integration involved and that, therefore, the fact that those repercussions occur cannot prove that there has been a manifest failure to ob-

serve Articles 2, 3, 4 and 70 together with Articles 26 and 27 of the Treaty.

5. *Basis of the application; possibility of concurrent applications*

Finally, the *applicant* alleges that the contested decisions, although they are not expressly based on Article 88 of the Treaty, nevertheless so clearly resemble decisions covered by that article that it is possible for the Court to treat them as such decisions. For this reason alone, the Court could give judgment in the present case in exercise of its unlimited jurisdiction.

The applicant also claims that its application should equally be considered as an application under the third paragraph of Article 37 of the Treaty, since the contested decisions are of such a nature as to 'provoke a fundamental and persistent disturbance in the economy of the Federal Republic'.

The *defendant* challenges the admissibility of concurrent applications, as submitted by the applicant. The rules relating to applications under Articles 37 and 88 are so different from those governing applications under Article 33 that this reason alone suffices to render a plurality of applications impossible.

It adds that it did not take the contested decisions in application of Article 88 and, as for Article 37, that the applicant has failed to observe the requirements as to to form laid down in that article.

IV – Procedure

The procedure followed the normal course.

Grounds of judgment

The nature of the application

The applicant claims that its application is based on Article 37 and on the second paragraph of Article 88 as well as on Article 33 of the Treaty.

The contested decisions, being decisions adopted in application of the seventh paragraph of Article 10 of the Convention, cannot be considered as orders for compliance under Article 88. Therefore the application, in so far as it is based on that provision, is wholly unfounded.

It also appears from the content and from the history of the said decisions that they do not constitute findings that the applicant has failed to fulfil its obligations. In fact, it appears from a reading of the seventh paragraph of Article 10 of the Convention that special rates and conditions in force upon the establishment of the Community were to be considered as legal until such time as the High Authority had taken a decision concerning them. Therefore a decision under Article 88, involving a finding that the applicant government had failed to fulfil an obligation, was inconceivable during that initial period.

As regards the applicability of Article 37, the applicant has alleged and offered to prove that both before and after the adoption of the contested decisions it drew the attention of the High Authority to the fact that, in its opinion, the rules en-

visaged might provoke fundamental and persistent disturbances in the German economy.

However, it does not follow from this that the requirements as to the admissibility of an application based on Article 37 are fulfilled in the present case. For the observations which the applicant may have made to the High Authority *before* the contested decisions were adopted did not refer to an 'action' on the part of the High Authority within the meaning of the first paragraph of the said article, since that term must be interpreted as referring only to an action which has already occurred and not a decision which the High Authority has the as yet unresolved intention of adopting. Moreover, as regards the observations which the applicant may have made after the decisions were adopted, it should be noted that according to the first three paragraphs of Article 37 an application based on that article cannot be brought against a decision which is alleged by a State to have caused such disturbances, but only against any subsequent decision refusing to recognize the existence thereof.

Thus the application is to be considered as an application for annulment under Article 33. It has been lodged within due time and is therefore admissible.

Jurisdiction

The applicant, pointing out that the power conferred on the High Authority by the seventh paragraph of Article 10 of the Convention expired on 9 February 1958, has raised the question whether the decisions which were communicated by letter dated 12 February and received on 14 February 1958 were adopted within due time.

Although it is true that this complaint was not formally set out in the application or in the reply, it is appropriate to examine it.

It appears from the oral arguments and from the explanations furnished at the hearing that the decisions communicated by letter of 12 February were adopted on the evening of 9 February 1958 and that all the details of the decisions were fixed on that date, as is proved by the production of the drafts discussed at that meeting and by the minutes thereof.

It also appears from information produced by the parties that the fact that those decisions were adopted only on the last possible date is to be explained by a last-minute approach by the Federal Government, the applicant in this case, asking the High Authority to reconsider its position, which was already well known, and by the desire on the part of the High Authority not to fail in its duties in respect of that government, which led it to postpone the formal adoption of those decisions so as to be able to deliberate upon them afresh.

In order to enter into force, those decisions had to be notified to the Federal Government and, in accordance with the rules of good administration, notified as quickly as possible—which was done. Nevertheless, that does not in any way alter the fact that in this case the decisions were adopted during the transitional period.

Thus there is no doubt that the contested decisions were taken within due time.

The submission as to infringement of the Treaty

1. The applicant alleges that the High Authority, in applying the seventh paragraph of Article 10 of the Convention, has mis-interpreted Article 70 of the Treaty to which Article 10 refers.

In the first place, the applicant challenges the interpretation put by the High Authority upon the first paragraph of Article 70, which states that comparable rates and conditions are to be offered to comparably placed consumers. It alleges—contrary to the point of view of the High Authority, which only considered the criterion of comparability 'from the point of view of transport'—that comparison between undertakings must take into account all the circumstances in which they are placed, in particular the place of production, the profitability of deposits worked and the fact of being located in a less favoured region.

However, this argument must be rejected.

First of all, the abovementioned provision appears in the chapter headed 'Transport'. It is therefore necessary to interpret the phrase 'comparably placed' as referring, at least in principle, to the comparability of situations from the point of view of transport.

Moreover, the opinion that any comparison between several undertakings must take into account all the circumstances in which they are placed would lead to the result that an undertaking is only comparable with itself, and the concept 'comparably placed' and, therefore, that of 'discrimination' would thus become devoid of all meaning.

It appears from Article 4 of the Treaty that in Article 70 the intention of the authors of the Treaty was to eliminate distortions in the commom market by the harmonization of transport rates and conditions and thus to ensure that the common market would function according to the principles established by the Treaty.

In giving expression to that intention, they cannot have been unaware that the transport industry constitutes a branch of industry which is independent of that of the production of coal and of steel and that it has its own problems, needs and procedures. Nor can they have failed to understand that so long as that industry

has not been integrated into the common market, its distinct nature must be respected and that measures taken must be confined to those necessary to prevent it from jeopardizing the objectives of the Treaty by its actions.

Accordingly, as regards international transport, Article 70. whilst envisaging the ultimate harmonization of national rates and conditions, leaves tariff policy uncontrolled and confines itself to the requirement that within each national system any discrimination based on the point of departure or destination must be abolished.

Similarly—as is shown by the fifth paragraph—in respect of internal transport, Member States are free to practise their own commercial policy, subject to the provisions of the Treaty.

There can be no doubt that the States or transport undertakings would come into conflict with those provisions if, in setting their rates and conditions, they took into account the advantages and disadvantages of the location of undertakings producing coal and steel or of the quality of the deposits worked.

The Treaty requires rather than in drawing up their tariff provisions the States should consider transport conditions alone and, therefore, the comparability of the different routes and locations from the point of view of transport.

2. The fourth paragraph of Article 70 provides that the application of special internal rates and conditions in the interest of one or more coal- or steel-producing undertakings shall require the prior agreement of the High Authority.

Contrary to various opinions put forward during the course of the procedure, it is to be noted that the wording of this provision covers not only rates specially adopted in the interest of certain undertakings (a subjective criterion), but also all special rates which, whatever the reason for their introduction, are advantageous to one or more undertakings (an objective criterion). Thus the fact that a special rate has been adopted for reasons which are entirely foreign to the interests of the undertaking deriving an advantage cannot in any way exclude or restrict the application of the fourth paragraph.

Where the special rates and conditions are in accordance with the principles of the Treaty the High Authority cannot withhold its agreement.

Such conformity must, as the High Authority has correctly understood, be presumed in each case in so far as the special rate is justified by specific conditions relating to the transport market.

3. The applicant complains that the High Authority did not also take into account

considerations of general economic policy such as whether it was expedient to approve protective measures which might appear desirable in favour of critical areas and under-privileged regions. In support of its arguments it points to the provisions of the second paragraph of Article 2 and Article 3 (a), (d), (e) and (g).

The fifth paragraph of Article 70 does indeed ensure respect for the sovereignty of the Member States as regards their general policy on transport. However, the provisions of Article 4 and also the other paragraphs of Article 70 run directly counter to the idea that the Member States are free to include the coal and steel industry in any policy for the siting of industries or to continue the practice of subsidies in the form of the grant of special rates and conditions to undertakings producing coal and steel. For if this power remained available to the six Member States it could prevent the establishment of the common market, particularly since the principles of general transport policy adopted in the six countries are different.

The applicant has also referred to Article 2 of the Treaty, which provides that 'The Community 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'.

This provision, while expressing two reservations, clearly states the essential objective of the common market, according to which the general policy of the High Authority must be to promote—and this also applies in the application of Article 70—the progressive establishment of conditions which will of themselves ensure the most rational distribution of production.

The authors of the Treaty realized that this policy could have the result that certain undertakings might be forced to cease or change their activity. This appears in particular from the Convention on the Transitional Provisions, of which the seventh paragraph of Article 10 has been applied in the present case.

The Convention makes provision both for establishing the Common Market by putting an end to situations which are incompatible with the principles of the market and are of such a nature as to jeopardize the achievement of the objectives defined notably in Articles 2 and 3, and for remedying the disadvantageous consequences which the establishment of the common market could have in certain cases.

It expressly provides, in Article 23 in particular, for measures of readaptation, which can even take the form of the setting up of new undertakings not subject to the Treaty, and for assistance both to undertakings and to workers.

The fact that the contested decisions might result in a temporary reduction in employment and in the closure of some undertakings cannot render these decisions illegal on grounds of infringement of Articles 2 and 3. It could even be argued that, on the contrary, such measures are necessary in order to enable the common market to achieve its stated objectives, since the disappearance of undertakings which could not continue to exist by their own unaided efforts but only with the help of constant and massive subsidies, would strengthen its resistance to crises.

However, the figures and calculations submitted to the Court do not provide sufficient evidence at law for the proposition that full employment and the profitability of the undertakings are seriously threatened by the contested decisions. Moreover, nothing in those decisions stands in the way of a new request based directly on the fourth paragraph of Article 70 if, before the expiry of the periods laid down, the circumstances justify a new special rate.

It would in any case be contrary to the meaning of the Treaty to authorize existing special rates on the sole ground that it would be difficult or impossible for the undertakings concerned to adapt themselves to the common market.

If such were indeed the position, it would at the most have been open to the High Authority to lay down longer periods, but the applicant does not even set out any reasons for a complaint that the contested decisions set periods which were too short.

Therefore, neither Article 2 nor Article 3 of the Treaty may be relied upon in support of the proposition that, in applying the fourth paragraph of Article 70, the High Authority is required, as a general rule, to authorize special rates when the profitability of an undertaking might be adversely affected if such rates did not exist.

4. On the contrary, when economic conditions in the transport sector do not require or justify special rates (which is the case notably when competition from another means of transport must be counteracted), it is only in exceptional cases that a special rate can be considered to be in accordance with the principles of the Treaty.

The High Authority has recognized the existence of such an exceptional case as regards certain undertakings situated near the interzonal frontier.

In that case, the disadvantages are created by factors which are not of an economic nature, and in particular by political contingencies which have separated these undertakings from their natural market, with the result that they require support either to be able to adjust themselves to the new conditions, or to be able to overcome this accidental disadvantage.

However, the High Authority was right, in view of the exceptional nature of that assistance, to have examined closely, before giving its approval to those special rates, the question whether in that case the undertakings concerned did or did not need support and to have based its decisions on the results of that examination.

Therefore it is necessary to reject the offer made by the applicant to produce evidence establishing that the damage suffered in particular by the Maximilianshütte and Luitpoldhütte undertakings since the establishment of the interzonal frontier greatly outweighs the advantage received from the reductions in rates granted until the present and therefore exceeds by an even greater margin the advantage of the reduction granted to those undertakings by the contested decision.

For that offer to produce evidence is based on the belief that compensation should be forthcoming for the whole of the loss occasioned by the establishment of the interzonal frontier.

As has been explained above, that belief is erroneous because it fails to understand the exceptional character of the assistance which may be granted under the fourth paragraph of Article 70.

The applicant also alleges that the decisions taken in respect of the two undertakings mentioned above constitute an arbitrary measure in that the High Authority deducted from the 21% reduction previously granted the 13% reduction already in force before the last world war, which undeniably constituted a protective measure.

The Court is not of the opinion that this approach is irregular, in view of the facts, first, that other undertakings located in the same regions enjoy a reduction of about 8% and, secondly, that in its decisions the High Authority has made provision for a corrective margin of 4%.

The submission as to infringement of essential procedural requirements

The applicant alleges that insufficient reasons are given for the decisions in that, first, they set the tariff reduction for the undertakings of the Upper-Palatinate at 8% and that, secondly, they did not take into consideration the fact that the steel works at Peine and Salzgitter are situated near to the Eastern zone, a criterion which was applied in respect of the undertakings of the Upper-Palatinate.

These allegations cannot be accepted.

As regards the first point, sufficient reasons are given for the decision by the reference to the comparison established between the special rates in force before and after the war.

As regards the second point, the complaint appears to require that the High Authority, having accepted a reason for granting a special rate in an individual case, should explain, in any other case, why it has not accepted that reason.

That requirement cannot be justified from the point of view of the statement of sufficient reasons and it must therefore be rejected.

The submission as to misuse of powers

The applicant has also based its application on the submission that there has been a misuse of powers 'in so far as there has been a departure from the legitimate objectives of the Treaty'.

A complaint stated in such vague terms which is not based on any specific argument must be rejected at once.

In its reply, the applicant has, in addition, put forward a second complaint of misuse of powers, alleging that the High Authority should have applied Article 67 of the Treaty instead of the seventh paragraph of Article 10 of the Convention.

Since the submission of misuse of powers had already been raised, this second complaint could legitimately appear for the first time in the reply. However, it must be rejected for the same reasons as the first.

Therefore the application submitted against the decisions of 9 February 1958 must be dismissed.

Costs

The applicant has failed in all its submissions and must therefore bear all the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 2, 3, 4, 15, 33, 37, 67, 70 and 88 of the Treaty establishing the European Coal and Steel Community, and to Articles 1, 10 and 23 of the Convention on the Transitional Provisions annexed to that Treaty;
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 Coal and Steel Community, and to the rules of that Court on costs,

THE COURT

hereby:

1. **Dismisses the application as unfounded;**

2. **Orders the applicant to bear the costs.**

Donner Delvaux Rossi
Riese Hammes

Delivered in open court in Luxembourg on 10 May 1960.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE
(See Joined Cases Nos 3/58 to 18/58, 25/58 and 26/58, page 393)