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]

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1 — Translated from the German.

Mr President,
Members of the Court,

My opinion concerns proceedings brought by the Government of the Kingdom of the Netherlands against a decision of the High Authority. The application is supported by five Netherlands undertakings which have intervened.

A — Introduction

The disputes which were recently brought before the Court were concerned with questions of discrimination in connexion with charges for the carriage of goods by rail and the recording by the High Authority that a Member State had failed to fulfil its obligations under the Treaty in the application of charges for carriage of goods by rail (Article 88). The origin of the proceedings with which we are concerned today is a recording by the High Authority which was addressed in identical terms to the Governments of the Member States, and consequently to the applicant, relating to the carriage of goods by road and to the publication of the rates applied. In order to save time, I hope you will allow me to refer to the wording of Decision No 18/59.

I — *Historical background of the decision and the surrounding circumstances*

The Committee of Experts set up in accordance with Article 10 of the Convention on the Transitional Provisions studied the position in regard to the carriage of goods by road in the six countries and, in particular, the tariffs or rates and conditions of carriage applied. Early in 1956, the Committee drew up a report in which a majority declared that there was an obligation to publish or to notify the High Authority of scales, rates and tariff rules and for them to be published or notified before they were applied. However, it was not possible to reach agreement on the fundamental issues. The report was forwarded by the High Authority to the Council of Ministers, the level at which efforts had to be made in order to reach agreement on a uniform set of regulations. The Council of Ministers, decided to set up a special committee which took the place of the Council itself in numerous negotiations on the question without being able to reach agreement on all aspects of the problem. At the meeting of the Council of Ministers on 22 July 1958, the Vice-President of the High Authority reported that the Wirtschaftsvereinigung Eisen- und Stahlindustrie of the Federal Republic had, by letter of 10 July 1958, asked the High Authority to introduce for the carriage of goods by road and in advance of the conclusion of transport contracts a set of regulations relating to the publication of scales, rates and tariff rules and that the Wirtschaftsvereinigung had, in accordance with Article 35 of the ECSC Treaty, requested, the adoption of a decision to this effect within the meaning of Article 88 of the Treaty. As the High Authority could not act no the basis of a unanimous opinion of the Council of Ministers and could not reconcile the conflicting points of view expressed in the Council, it sent a letter in identical terms on 12 August 1958 to the Governments of the Member States of the Community. I should like to refer to the contents of the letter, which was addressed to the Netherlands Government. I quote only from final Article II:

'In consequence, the High Authority requests the Netherlands Government to notify it not later than 1 December 1958 of the measures which have been at that date adopted in connexion with the carriage by road for hire or reward with a view to satisfying, having regard to the foregoing information, the requirements of the Treaty and, in particular, Articles 2 to 5, 60 and 70 thereof or, by the same date to let it have the comments which it wishes to submit pursuant to the second sentence of the first paragraph of Article 88 of the Treaty.'

The Netherlands Government replied to the High Authority by letter of 29 November 1958 in which it described its plans. In December 1958 it adopted regulations which were put into force and which, according to the said Government, constitute the application of one of the three possibilities the choice of which was, in the High Authority's letter of 12 August 1958 (point II, 3 (c)), left to its descretion.

On 18 February 1959 the High Authority took the decision impugned in the present dispute without having had talks with the Governments. The decision specifically concerns the Netherlands Government.

II — *Conclusions; submissions of the applicant and of the defence*

The Netherlands Government and the interveners contest the decision and seek annulment of it in its entirety. I do not consider it necessary at this point to outline for the Court the submissions of the applicant and those of the defence relied upon by the High Authority. The main assertion made by the applicant and the interveners is that, in proceedings in which the Court has unlimited jurisdiction, there has been an infringement of an essential procedural requirement, the High Authority has no competence, and several vital provisions of the Treaty have been infringed.

B — Legal consideration

In considering this case it is essential to compare the contents of the High Authority's letter of 12 August 1958 with the decision of 18 February 1959 because the letter of 12 August 1958 is, in the High Authority's view, a preparatory measure of which, from both a procedural and substantive viewpoint, the contested decision was the logical conclusion.

I — *Admissibility of the proceedings under Article 88*

The contested decision is formally based on Article 88 of the Treaty. This provision does not empower the High Authority to make regulations which make it possible to resolve problems which assume importance in the light of the objectives of the Common Market. Consideration must therefore be given to the question whether, as regards the publication of rates, there is a direct obligation on the Member States, without however, at this juncture, inquiring what these obligations consist of. If the Treaty is found not to contain any directly applicable legal requirement in this respect but merely a programme or an outline for subsequent arrangements, the procedure in Article 88 will not, of course, be available to the High Authority.

1. Article 10 of the Convention

In this connexion reference has been made to Article 10 of the Convention on the Transitional Provisions under which a number of questions relating to the transport industry are left to be dealt with by regulations agreed between the Governments. Under the first paragraph of Article 10 of the Convention on the Transitional Provisions, a Committee of Experts was convened to study the arrangements to be proposed to the Governments for the carriage of coal and steel in order to attain the objectives set out in Article 70. This provision does not, however, have the effect of a general clause, as becomes clear if the first paragraph is taken in isolation. The questions which are to be settled by agreement between the Governments emerge from all the requirements of Article 10 and, in particular, from the sixth paragraph thereof; they are concerned with the introduction of through international tariffs and the harmonization of freight rates and conditions of every kind. These are difficult and complex questions affecting several States at one and the same time. The nature of the subject-matter does not allow of regulation by means of isolated measures by the Governments. Nor at this point is any reference made to the question of the publication date. Consequently, it is quite impossible to hold that Article 10 of the Convention on the Transitional Provisions requires the matter to be dealt with by agreed regulations and that *on that ground* the Treaty does not impose any direct obligation on the States. If the question of the publication of rates was the subject of discussion in the Committee of Experts at the same time as all other transport questions, this was only because uniform regulations and the most generally acceptable solution of the problems was considered to be desirable, but not essential. When it became clear that these attempts had failed, the High Authority felt obliged to remind the Member States of their obligations.

2. Third paragraph of Article 70

The answer to the question whether the Treaty imposes certain obligations in respect of the publication of rates and, if so, to what extent, is mainly to be found in the third paragraph of Article 70, which reads as follows:

'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 is worthy of note that the third paragraph of Article 70 uses the expression ('... shall be published or brought to the knowledge of the High Authority'), whereas in other provisions in the Treaty where a legal duty is imposed there is an express reference to obligations of the States.

But it is not only provisions containing the term 'undertake' ('s'engagent') which are mandatory and have the effect of an obligation. The desire to create an obligation can be clearly expressed in another way. It is sufficient to peruse the Convention on the Transitional Provisions to realize that the Convention often uses only the indicative in order to lay down what are undoubtedly obligations. Moreover, we have just seen that the Court has expressly described the first paragraph of Article 70 as a legal rule although obligations and prohibitions are usually expressed in another way.

When the Treaty was being drawn up it was soon realized that the integration of the market in coal and steel would not be able to function unless the Treaty provided for intervention also in certain fields outside this sector and the protection of the partial market from being influenced by other industries. In particular, there was recognition of the importance of transport to the coal and steel market (transport costs forming a high proportion of production costs) and of the need, in consequence, for the Treaty to include provisions directly or indirectly regulating the transport sector. The important role played by publication on the subject of transport under the system set up by the Treaty hardly justifies the assumption that the Member States would be content with mere declarations of principle or of intention on the subject. On the the contrary, it justifies the assumption that they would have expressed their reservations on such an important point in clear terms and that they would have asked that it be dealt with under the Convention on the Transitional Provisions if they had thought that an implementing Convention was necessary for harmonization or for the introduction of through international tariffs.

The reference to Article 60, which provides certain safeguards (opinion on the Consultative Committee), which do not appear in Article 70, relating to the fixing of the scope and form of the obligation to publish prices, is ill-conceived because the third paragraph of Article 70 confers no power on the High Authority to make regulations.

3. Conclusions

I am therefore of the opinion that the third paragraph of Article 70 embodies a directly applicable rule of law and not merely a declaration of intent. Moreover, that provision is expressed in a way which permits its direct implementation without any fresh implementing convention. Since the Treaty does not directly cover undertakings outside the coal and steel industry, the only construction which can be placed on the third paragraph is that it is a directive enjoining Member States.

This means that the High Authority was correct in setting in motion the procedure in Article 88 in order to ensure that the obligations arising under Article 70 were fulfilled.

II – *Compliance with the procedural rules in Article 88*

Article 88 of the Treaty contains certain *procedural rules* which must be complied with before a decision is adopted. They require, in particular, that the States shall be given the opportunity to submit its comments.

The Netherlands Government alleges that this provision was not complied with. It asserts that, in order to comply with its obligations, it declared its willingness and intention to follow one of the courses of action listed in the High Authority's letter of 12 August 1958. It alleges that, subsequently, the High Authority considerably altered its first interpretation of the Treaty and, without giving the States a fresh hearing, on the basis of this new interpretation took its decision of 18 February 1959 recording that the Member States, including the Netherlands, had failed to fulfil their obligations. This recording was couched in general and identical terms despite the fact that the Netherlands was, as far as procedure was concerned, in a different position from the other States.

1. Meaning and purpose of Article 88

Before considering the submission I should like to make some comments on the meaning and purpose of Article 88 as part of the structure of the Treaty. It seems to me that one of the purposes of this article is to ensure a uniform and correct interpretation of the Treaty. In the case of uncertainty or conflict concerning the provisions of the Treaty in relation to the conduct of the Member States, the Court is called upon to resolve this uncertainty or conflict in a conclusive declaration of the law. Action by the Court is dependent upon the initiative of others, which may vary according to the procedure. Either the Executive supplies an interpretation of the issue in dispute in a decision which the State concerned may contest before the Court or the Executive itself institutes proceedings before the Court. The first procedure is the system enshrined in the ECSC Treaty and the second (wholly in line with the limitation of the Commission's powers) was adopted for the EEC. In both cases the basic question is to define the obligations of the Member States which, in the Executive's opinion, existed before the opening of the recording procedure and which have not been laid down in an act of the Executive under that procedure. The role of the High Authority and of the Commission under that procedure, is, in the light of the rules of the Treaty, to define a given situation (conduct of a State) in a decision which is binding on that State and thus to bring the definition or interpretation of the Treaty within the purview of the Court.

It is for a dual purpose that the Treaties require the States concerned to be given the opportunity to submit their comments before the recording by the Executive which immediately precedes adversary proceedings. First, the State concerned must be able to negotiate and to justify its point of view since it is possible that its position is based on better arguments which the High Authority may itself find convincing or that special considerations, unknown or only partly known to the High Authority, justify the State's attitude. In those circumstances, the conflict of view over interpretation is settled without the need for proceedings before the Court. Secondly, the State must be given the chance to comply with its obligations and so make adversary proceedings or the adoption of penalties unnecessary. The other purpose of Article 88 is to encourage a certain line of conduct by a defaulting State and not to punish past conduct. In place of enforcement proceedings against undertakings, but which does not exist in the relationships between the High Authority and the States, Article 88 substitutes the political effects of a recording that the conduct of a State is contrary to the Treaty.

2. The various stages of the procedure in the present case

It is the latter of the two purposes which must be taken into particular account in considering the complaint of the Netherlands Government. At this juncture, consideration must be given to the details of the High Authority's letter of 12 August 1958 and the reply of the Netherlands Government on 29 November 1958 as well as to the contested decision. It is at once apparent that the High Authority's letter of 12 August is based on an interpretation of the third paragraph of Article 70 which is different from that embodied in the decision of 18 February 1959. The letter of 12 August sets out three ways in which the obligation to publish can be carried out:

(a) The competent national authority publishes a transport tariff and compels undertakings to abide by it;

(b) The competent national authority enjoins carriers to publish the rates which they have decided upon and to notify them to the High Authority;

(c) In default of these rates, or when they embody minimum or maximum prices, transport charges and conditions are notified to the High Authority immediately after the conclusion of each transport contract.

On the other hand, the decision of 18 February 1959 refers to only two possibilities which, according to the High Authority, are available to the States in order to comply with their obligations:

(a) The Governments must publish the scales, rates and tariff rules and enjoin carriers to abide by them:

(b) The Governments must enjoin carriers to publish or to notify to the High Authority the scales, rates and tariff rules which they have decided to apply. The High Authority holds the scales notified at the disposal of producers, purchasers and consumers.

In its reply of 12 August 1958 to the High Authority's letter, the Netherlands Government declared that it was prepared to ensure that the ECSC Treaty was implemented in respect of carriage by road of coal and steel for hire or reward; on being concluded, contracts for the carriage of goods the rates wherein are required to be published by the ECSC Treaty had to be notified to the High Authority through the Netherlands authorities. To implement this declaration, a Royal Decree supplementing the order of 16 January 1954 was adopted on 24 December 1958, and it provided as follows:

Licensees (namely the carriers) must communicate the required information, including financial details concerning transport of certain goods to the Minister or to the Departments authorized by him. The officials concerned must treat the information as confidential.

3. Has the Netherlands Government declared its readiness to adopt one of the three courses of action left to its choice by the High Authority?

As regards the positive measures adopted by the Netherlands Government, the High Authority contends that because of the reservations of the said Government, especially concerning the confidential nature of the contracts communicated, the adoption of one of the three courses of action set out in the letter of 12 August is out of the question, but the applicant points out that it did not make any express reservation regarding secrecy and that, moreover, there is nothing in the High Authority's letter of 12 August which rules out secrecy.

In my opinion these are most important questions. If the truth appears to be that the Netherlands Government made it clear that it had the considered intention of falling in with the substance of the High Authority's viewpoint—never mind the details—the basic difference, in its original form, between the High Authority and the said Government on the question of interpretation was *settled* in terms of the second part of the first sentence of Article 88, without any need of a decision by the High Authority.

If the difference is resolved, that is to say, after agreement on one of the solutions which the High Authority regarded as in accordance with the Treaty, it can, of course, abandon the viewpoint which it had successfully urged, since disputes under Article 88 refer only to viewpoints or interpretations and not to measures adopted by the High Authority for implementation or definition of the requirements of the Treaty. But the High Authority cannot ignore such agreement and, in order to follow the procedure, take a stand on interpretations other than those which it has put forward and offered. In other words, it cannot retroactively go back on an interpretation which it and the Government had hitherto considered to be valid. If, as in the present case, it changes its point of view, it must take up the disagreement on the subject of interpretation by making known its new and more restricted point of view in accordance with

the circumstances and the procedural requirements. It cannot go forward from a stage of procedure which is over and which was concerned with a different issue. In particular, the High Authority must once more give the State concerned the opportunity to submit its comments and to fulfil its obligations because until then the said Government had no reason to think in terms of the High Authority's new line of thought, to give its explanations in the light of it and take the necessary steps to implement it.

In the present case it is clear that the situation was as follows. Although the second course of action in Article 2 (a) of the decision of 18 February 1959 clearly states that the scales, rates and tariff rules notifed will be placed at the disposal of producers, this information does not appear in item 3 (c) of the High Authority's letter of 12 August 1958, which in this case is the relevant one, listing the various possibilities open in applying the Treaty. It is true that, at the beginning of its letter, the High Authority makes it clear that the obligation in the third paragraph of Article 70 must be fulfilled in such a way as to ensure the functioning of the common market as that functioning is provided for under the other provisions of the Treaty and, in particular, by Articles 4, 5, 60 and the first and second paragraphs of Article 70. It emphasizes that it must be possible for producers and consumers to find out the scales, rates and tariff rules, and that this information is necessary to keep a check on discrimination and for reasons which arise from the provisions of the Treaty relating to prices (fixing of selling prices and alignment within the meaning of Article 60 (2) (b)). The High Authority can thus be said to have made it known that, in its opinion, it is incompatible with the provisions of the Treaty to keep tariff information confidential. It is impossible to refer to anything, particularly the later decision of 18 February 1959, as being perfectly clear.

In its reply of 29 November 1958, the Netherlands Government, after expressing its willingness in principle to fulfil its obligations in accordance with one of the three courses of action indicated by the High Authority, expressly states:

'To avoid any misunderstanding, the Netherlands Government expresses its belief that it can rely on the High Authority to keep the information supplied confidential as in the case of the contracts for carriage by rail which are submitted to it.'

In view of the situation as regards the facts at this juncture in the negotiations, it is impossible to read into those words any reservation on the part of the Netherlands Government excluding an agreement in principle between the parties. The comment of the Netherlands Government does not refer to its own conduct, which was necessarily subject to a response it awaited from the High Authority but to an attitude which it expected from the High Authority after communication of the required information. It was for the High Authority and not, as part of its obligations, for the Netherlands Government to make a statement regarding this attitude.

The words 'the Netherlands Government expresses the belief' ... means that it expects a decision from the addressee of the letter, the High Authority, or at least tacit consent. The attempt of the Netherlands Government to make an agreement is very clear from its reference to the regulations adopted, in agreement with the High Authority, on the subject of carriage by rail (communication to the High Authority of transport contracts upon various conditions). Finally, in the last paragraph of this letter, the Netherlands Government expresses its willingness to take part in talks with the High Authority concerning the changes which it regarded as desirable in the method of communicating transport rates and conditions.

In these circumstances, it is clear that the Netherlands Government was at that time prepared to settle the difference by adopting one of the measures recommended by the High Authority; the concept subsequently contended for during the proceedings by the said Government regarding the interpretation of the Treaty must be kept apart

from consideration of this procedural question. As the Netherlands Government was entitled to assume, the use of the procedure in Article 88, in particular the adoption of a decision recording an infringement of the Treaty, was thus avoided.

4. Infringement of the right to be heard

As far as the Netherlands Government was concerned, there was no question of considering or criticizing the adoption of the other measures which were referred to in the letter of 12 August and which were the only ones repeated later in the decision of 18 February 1959; once it had made its choice there was no longer any reason for complying with the other measures.

Although, after that date, the High Authority, without getting in touch with the Governments, under pressure from one of those Governments and a private association and as the result of re-consideration on its own part, abandoned the earlier interpretation which the Netherlands Government was prepared to accept and on the basis of its new standpoint took a decision on the legal position within the meaning of Article 88, there is justification for the complaint that it failed to fulfil procedural requirements: contrary to its obligations, it neglected to give the Netherlands Government the opportunity to comment on the High Authority's new concept. However unfortunate the consequences (repetition of the procedure and loss of time) may be for the High Authority and for the Community and however formalistic this solution may appear in view of the explanations given during the proceedings, there is no other course open to the Court, as the custodian of the law and of the procedural rules, than to find that there has been this infringement.

C — Final outcome

Thus, the decision is in every respect without foundation.

There is, in consequence, no need to consider the other arguments of the parties or to decide whether the interpretation of the Treaty which the High Authority considers to be necessary is well founded. I am fully aware that this does not in any way resolve the important legal and economic question whether, in order to comply with the provisions of the Treaty on the subject of prices (Article 60 (2) (b)), the States are bound to apply tariffs to the carriage of goods by road and publish them.

If the High Authority considers that the regulations which it proposes ought to be applied, it can utilize the procedure in Article 88 in accordance with the rules to which I have referred.

Finally, I recommend that the Court should uphold the application of the Government of the Kingdom of the Netherlands, declare the High Authority's decision null and void, and order the latter to bear the costs, including the costs of the interveners.

ORDER OF THE COURT
19 FEBRUARY 1960[1]

In Case 25/59

GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS

applicant,

1 — Language of the Case: Dutch.