tion of production cannot be regarded as a fixed concept, but covers facts which are themselves contingent and variable, in particular with regard to time.

4. Although it is true that the establishment of the Common Market is based in particular on the most rational distribution of production at the highest possible level of productivity, it in no way follows that the social objectives set out in Article 2 of the Treaty are always of secondary importance and can in no case constitute one of the decisive grounds for Community action.
   As the general objectives set out in Articles 2 and 3 of the ECSC Treaty cannot always be pursued simultaneously in their totality, the Community must continually reconcile any possible conflict which may be implied by these objectives when considered individually, and when such conflict arises must grant such priority to one or other of the general objectives as appears necessary having regard to the economic facts or circumstances in the light of which it adopts its decisions.
   Cf. Paragraph 4(b), summary, judgment in Case 8/57, Rec. 1958, p. 228.
5. The application of special rates and conditions in the interest of one or more undertakings does not necessarily imply individual measures and in no way excludes the introduction of measures adapted to a group of undertakings which are similarly placed.
6. As the application of special rates and conditions constitutes an altogether exceptional procedure, the Treaty only allows it to the extent to which it enables the undertakings in whose favour it operates to re-establish, within the appropriate time-limits, conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity.
   In order to ensure observance of the objectives of the Treaty, a time-limit must be attached to the temporary agreement given by the High Authority to the application of the special rates and conditions.
   Cf. paragraph 2, summary, judgment in Joined Cases 27, 28 and 29/58, Rec. 1960, p. 505.

In Case 28/66

GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS, represented by Professor W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs at The Hague, assisted by D. J. Veegens, advocate of The Hague, with an address for service in Luxembourg at the Netherlands Embassy, 8 rue Pierre-d'Aspelt,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, taking the place of the High Authority of the ECSC by virtue of Article 9 of the Treaty of 8 April 1965, represented by its Legal Advisers, R. Baeyens and H. Matthies, acting as Agents, assisted by C. R. C. Wijckerheld Bisdom, Advocate of The Hague, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application for the annulment of Decision No 14/66 of the High Authority of 20 July 1966, concerning the authorization of special rates and conditions intro-

duced by the Deutsche Bundesbahn (German Federal Railways) and applicable to the carriage of coal and steel to or from the Saarland,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and W. Strauß, Presidents of Chambers, A. Trabucchi, R. Monaco (Rapporteur), J. Mertens de Wilmars and P. Pescatore, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

By letters of various dates between 30 May 1964 and 14 March 1966, the Government of the Federal Republic of Germany informed the High Authority of the introduction by the Deutsche Bundesbahn (German Federal Railways) of special rates and conditions concerning the carriage of coal and steel to or from the Saarland.

By letter of 11 July 1966, supplemented by telex on 13 July 1966, the Federal German Government requested the High Authority to grant, to the extent necessary, the authorizations required by virtue of Article 70 and the other applicable provisions of the ECSC Treaty.

Having regard in particular to the 'change which has taken place in the conditions of competition to the detriment of the ECSC undertakings in the Saarland as a result of the canalization of the Main, the Neckar and the Moselle', the High Authority by Decision No 14/66 of 20 July 1966 (Official Journal No 141 of 2 August 1966) gave conditional approval to the introduction of special rates and conditions.

Article 4(2) of this decision specifies that the authorizations granted would be amended or withdrawn if the circumstances which gave rise to the grant no longer obtained, or if the conditions on which approval was granted were not satisfied within the time-limit laid down.

On 21 September 1966 the Government of the Kingdom of the Netherlands lodged an application against this decision at the Court Registry by virtue of the first paragraph of Article 33 of the ECSC Treaty.

II — Conclusions of the parties

The *applicant* claimed that the Court should:

'— annul Decision No 14/66 of the High Authority of 20 July 1966;
— order the High Authority to pay the costs.'

The *defendant* contended that the Court should:

'— dismiss the application brought by the Government of the Kingdom of the Netherlands as unfounded;
— order the applicant to pay the costs.'

III — Submissions and arguments of the parties

Admissibility

The *defendant* raises no objections to the admissibility of the application.

Substance

A — Infringement of the Treaty

The *applicant* alleges that the contested decision is not in accordance with the provisions of Articles 2 to 5 and Article 70 of the Treaty and puts forward several arguments on this point. Under the terms of the fourth paragraph of Article 70 of the Treaty, the application of special internal rates and conditions in the interest of one or more coal- or steel-producing undertakings is to require the prior agreement of the High Authority, which is required to verify that they are in accordance with the principles of the Treaty. Any authorization of special support tariffs adversely affects the principle of non-discrimination which is fundamental to the Treaty. According to the case-law of the Court such an authorization in favour of special rates and conditions which, as in this instance, do not derive from the method of transport, may only be granted in exceptional cases.

The judgment of the Court in Joined Cases 3 to 18, 25 and 26/58 cannot be relied upon in order to determine whether the special rates and conditions in dispute may be applied, since the purpose of the support tariffs referred to therein was to offset the disadvantages caused to the recipient undertakings not by economic factors but by specific political circumstances. Reference should rather be made to the judgment of the Court in Joined Cases 27, 28 and 29/58, which concerned special rates and conditions introduced for purely economic reasons. According to this judgment (Rec. 1960, p. 527), such support tariffs were only able to be authorized by virtue of the fourth paragraph of Article 70 of the Treaty if they enabled the undertakings in whose favour they were made to overcome exceptional and temporary difficulties which arose from unforeseeable circumstances and were likely to result in a situation in which the composition of the production costs no longer corresponded to the natural conditions to which those undertakings were subject. The support tariffs in dispute satisfy none of these three conditions. The change which took place in the conditions of competition to the detriment of the undertakings of the Saarland following the canalization of the Main, the Neckar and the Moselle, and to which the High Authority refers in the recitals to its decision, is necessarily of a permanent rather than a temporary nature.

Secondly, the improvement of the infrastructure of traffic routes by the public works authorities cannot be regarded as an unforeseeable circumstance. It is in fact one of the constant preoccupations of public authorities in all the Member States and the undertakings of the Saarland have for several years been able to foresee this normal development and to adjust their policies to the new situation.

Finally, the composition of the production costs of the undertakings of the Saarland, within the meaning of that judgment, was not changed as a result of these canalizations and the consequent reduction in rail tariffs. These canalizations merely reduced the production costs of the competing undertakings, which benefited directly thereby. Contrary to the view expressed by the High Authority in the final subparagraph of recital II(1) of the preamble to the decision, the changes in the infrastructure must be regarded as part of the 'natural conditions' in which each undertaking works, within the meaning given to this expression by the Court in the abovementioned judgment.

The applicant maintains that the contested decision is based upon a policy which is likely to produce results contrary to the aims of the Treaty as defined in Articles 2 to 5. The authorization of support tariffs to offset the difficulties suffered by certain undertakings as a result of changes in the infrastructure such as those in this instance risk perpetuating for ever the advantages and disadvantages of each place of establishment.

The applicant maintains that the recitals set out under II(3) of the contested decision (in which it was regarded as unnecessary to consider the basic operating conditions of each undertaking) clearly show that the arguments contained in the recitals under II(2) concerning the structural nature of the difficulties suffered by the coalfields of the Saarland and, to a more limited extent, the iron and steel industry of that region, constitute *inter alia* the fundamental grounds

for the grant of the authorization in dispute. This is also confirmed by Article 4(2) of the contested decision which shows that the High Authority was not in a position to fix the duration of the measures of support granted.

In addition, the applicant maintains that the High Authority failed to distinguish between the causes of the difficulties encountered by the undertakings of the Saarland. This is shown *inter alia* by recital II(2) of the contested decision which refers to the difficulties caused to these undertakings by the ever-increasing competition from other energy producers, without, however, considering that this competition is to a great extent structural and also affects the other coal industries of the ECSC.

Finally, the High Authority infringed the fourth paragraph of Article 70 of the Treaty in that, contrary to the provision referring to the application of special internal rates and conditions in the interest 'of one or more' undertakings, and to the principle laid down by the Court in its judgment in Joined Cases 3 to 18, 25 and 26/58 (Rec. 1960, p. 409), it authorized the rates and conditions in dispute without examining the basic operating conditions of each of the undertakings of the Saarland referred to. It cannot be accepted that the operating conditions of the undertakings of the Saarland are so similar that they all require aid in the form of special rates and conditions such as those in dispute, which enable them to obtain such aid in equal measure.

The applicant concludes that in this instance the High Authority clearly failed to observe the provisions of the Treaty, as in its evaluation of the situation resulting from economic facts or circumstances (second sentence of the first paragraph of Article 33) it is required to adhere to a correct interpretation of the Treaty.

The *defendant* replies first that the contested decision amplifies the same concept as the decisions of the High Authority of 9 February 1958, confirmed by the Court in its judgments in Joined Cases 3 to 18, 25 and 26/58 and Joined Cases 27, 28 and 29/58, but in relation to a different situation and in economic conditions which have changed considerably since 1958. There are *inter alia* two fundamental reasons for Decision No 14/66, which is based on the second paragraph of Article 2 of the ECSC Treaty.

The first reason concerns the measures taken by the public authorities in the field of the infrastructure of transport. The factual situation resulting in particular from the canalization of the Moselle were clearly unconnected with the factors which gave rise to these decisions of 9 February 1958 and the judgments of the Court in their regard.

The second equally important reason concerns the social problem which would be created by a sharp reduction in the production of the undertakings of the Saarland, even more so as the iron and steel and coal industries play a leading rôle in that area and are today meeting difficulties throughout the Community which were unforeseeable several years ago. The application to the present case of the fourth paragraph of Article 70 must be assessed in the light of this new situation and taking into account the fact that among the objectives of the Treaty set out in the second paragraph of Article 2 the social objectives are particularly important and the decisions of the High Authority of 9 February 1958 did not fail to refer to them.

The defendant then considers the various arguments put forward by the applicant. It observes, first, that the passage in the judgment in Joined Cases 27, 28 and 29/58 to which the applicant refers was not intended to make a general, exhaustive definition, applying to all possible cases, of the circumstances in which special rates and conditions of carriage may be authorized by virtue of the fourth paragraph of Article 70 of the Treaty. This passage is merely one element in the statement of reasons concerning the specific case which had been submitted to the Court and which dismisses the arguments put forward by one of the parties. As that case concerned long-established support tariffs governed by the seventh paragraph of Article 10 of the Convention on the Transitional Provisions, the situation examined by the Court at that time cannot be compared with the present position of the undertakings of the Saarland. The essential question is, therefore, whether the

contested decision is contrary to the second paragraph of Article 2 of the Treaty. The difficulties which must be faced by the undertakings of the Saarland are no less exceptional or temporary, nor may they be to a lesser extent be imputed to unforeseeable circumstances, than those encountered both in the past and at present by the undertakings established in Germany close to the frontier with the Soviet occupation zone. Moreover, the canalization of a certain number of important rivers cannot be regarded as part of the 'natural conditions' to which these undertakings are subject, since the aim of the development of the infrastructure was rather to modify certain existing natural conditions on the basis of certain requirements, principally of an economic nature.

Moreover, it is of no importance that in this instance the composition of the production costs of the undertakings of the Saarland was not modified, as the essential point is the set-back to their competitive position suffered by certain undertakings, in comparison to other undertakings, following measures taken by the public authorities.

The defendant further maintains that the applicant is mistaken about the significance of and the reasons for the contested decision when it draws attention to the structural nature of certain factors referred to in the statement of reasons for that decision. Although, taken as a whole, these factors created a difficult situation for the undertakings of the Saarland, they do not constitute the fundamental reason or reasons for the authorizations granted.

The defendant maintains, finally, that it was unnecessary for the High Authority to consider the basic operating conditions of each undertaking of the Saarland, since, as the competitors of these undertakings derive a general advantage from the improvement in the infrastructure, the same must apply to the advantage obtained by the undertakings of the Saarland. A measure adapted to the position of each undertaking considered individually would have modified without any justification the competitive situation of the undertakings of the Saarland, both in relation to each other and in relation to competing undertakings in other regions.

The *applicant* replies that it is incorrect to claim that the contested decision merely amplifies the same ideas as the decisions of 9 February 1958, although in relation to a different situation, and that in the abovementioned judgments of 10 March 1960 the Court concurred with all the recitals and those decisions. It follows from these judgments that the second paragraph of Article 2 of the Treaty clearly shows that the most important objectives of the Common Market is to ensure 'the most rational distribution of production at the highest possible level of productivity'.

A twofold secondary objective, also provided for in the second paragraph of Article 2 of the Treaty consists in 'safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States'. In the context of this objective, a temporary decline in employment and the closure of undertakings incapable of continuing without constant and considerable aid must be accepted. Moreover, according to the judgments referred to (and according to the judgment in Case 19/58), Member States may not take into account the advantages and disadvantages of the location of undertakings in fixing their rates and conditions.

The High Authority is alone empowered to ensure that the policy of a Member State with regard to rates and conditions does not depart from this principle and tend to assist certain national undertakings. On this point these judgments are of general application as a contrary conclusion cannot be drawn from their grounds of judgment.

The applicant then maintains that, according to the interpretation of the Court itself, the special difficulties which may be eliminated by the application of the fourth paragraph of Article 70 must be of a temporary nature. The High Authority has not complied with this requirement as, by granting the authorization in dispute, it is not encouraging the undertakings concerned to adapt themselves to the changes in the conditions of competition. Secondly, the series of conditions set out in Article 2 of the contested decision and the authorization granted by Decision No 15/66 (Official

Journal No 144 of 1966) in respect of the special tariffs applied by the SNCF for the carriage of coal from the collieries of Lorraine to Switzerland, illustrate the uncertain consequences of a system of subsidies based upon the grant of reduced tariffs. Moreover, according to the case-law of the Court, the concept of the 'natural conditions' of undertakings covers the physical and technical circumstances in which each of the various producers operate and which are subject to constant variations, including the factual situation resulting from the infrastructure of traffic routes as it exists naturally and as modified by man. Furthermore, the Commission of the EEC considers that, as regards its sphere of competence, the situation with regard to competition does not justify rates and conditions of the type in dispute in this case. Therefore, on the eve of the establishment of a single Council and a single Commission, the High Authority's action jeopardized the introduction of a common transport policy. Finally, the applicant concludes that if the Federal Government feared fundamental and persistent disturbances in its economy it could have invoked Article 37 of the Treaty in the case of a failure to act on the part of the High Authority.

The *defendant* replies by making a preliminary general statement of the reasons which led to the contested decision.

With the aid of a map it explains that, as regards coal and steel, the Saarland-Lorraine-Luxembourg region constitutes a natural geographical and geological unit. The competitive position of these three coalfields has been considerably changed by the canalization or the opening to navigation of the Main, the Neckar and the Moselle.

As a result, the conditions of competition of the undertakings of the Saarland have deteriorated both in relation to those of the majority of the undertakings established in the other coalfields of this triangle and in relation to those in the other regions of the Common Market, in particular in relation to the Ruhr (the High Authority offers numerical details of this deterioration in its rejoinder).

As the undertakings of the Saarland were unable to benefit from the more advantageous transport rates which resulted from the canalization, they requested that a canal be dug from the Saar to the Palatinate but the Federal Government preferred to authorize a certain number of special rates and conditions which have been introduced since June 1964, the date on which the canalized Moselle was opened to navigation.

Although it is correct that the Federal Government wished to justify these measures by the potential competition of the Saar-Palatinate canal, it is also true that the High Authority has always contested this concept and that, without further referring to the potential competition, the Federal Government sought the authorization required by virtue of the Treaty.

By authorizing in Decision No 14/66 the application of the rates and conditions in dispute, the High Authority found that those rates and conditions:

— do not conflict with the second paragraph of Article 2 of the Treaty, since the disadvantages caused to the undertakings of the Saarland by the infrastructure operations are the result of circumstances which bear no relation to the natural competitive position of those undertakings and which cannot be imputed to them;

— serve to attain other principles and objectives of the Treaty set out in Article 2 and, in particular, enable disturbing influences on employment and the standard of living to be avoided.

Moreover, the High Authority took care to avoid the application of these rates and conditions to a limited area leading to a distortion of competition, in particular by discrimination in favour of certain producers or consumers. To this end, the authorization granted in respect of the rates and conditions in dispute was made subject to the conditions set out in Article 2 of Decision No 14/66.

As a result of these conditions the authorization granted, far from discriminating in favour of the Saarland, enabled the distortions resulting from the change in the infrastructure to be mitigated and the aid granted to be partly neutralized.

The defendant the adds that the authorization in dispute was granted by the High

Authority in accordance with its powers. Contrary to what the applicant appears to fear, Decision No 14/66 does not exclude the possibility that, within the context of the EEC, these special rates and conditions may give rise to other measures or decisions. At all events, neither the High Authority nor the Commission of the EEC wished to acknowledge that the series of special rates and conditions introduced by the Deutsche Bundesbahn is justified by the (potential) competition of other modes of transport.

The Netherlands Government wrongly considers that, of the objectives defined in Articles 2 to 5 of the Treaty, 'the most rational distribution of production', etc. is the most important, whilst those intended to safeguard continuity of employment and to take care not to provoke fundamental and presistent disturbances in the economies of Member States are merely secondary.

As the objectives laid down in Articles 2 and 3 cannot all be wholly realized simultaneously, the decisions of the High Authority are in accordance with the Treaty where they lead to an adequate and reasonable implementation of these objectives, on the basis of the facts established and the possibilities of the case in point, and where they pursue the common interest referred to in the first paragraph of Article 3 (cf. judgments in Case 8/57 and Joined Cases 27, 28 and 29/58).

The Netherland Government is also mistaken in considering that the High Authority must maintain a neutral attitude in the field of transport.

It follows from the fourth paragraph of Article 70 that the application of special rates and conditions in the interest of one or more undertakings may be authorized when they are justified in relation to the Treaty.

Moreover, the fact that the second paragraph of Article 4 of the contested decision attaches no time-limit to the authorizations granted does not imply that the special rates and conditions were authorized for an unlimited period.

With the authorization, in particular, of the European Parliament, the High Authority has recently begun to replace authorizations which are often extended from year to year by such clauses as those found in the contested decision.

The provision in Article 4 establishes the temporary nature of the authorization in spite of the earlier failure to fix its terms of validity, since it recalls that it is based on specific and well-defined factors and may always be called in question, either at the request of an interested party or by the High Authority.

As regards the possible application to this case of Article 37 of the Treaty, it must not be forgotten that the consequences of the canalization of the Main, the Neckar and the Moselle for the undertakings of the Saarland are not the result of either action or a failure to act on the part of the High Authority.

Moreover, the Federal Government did not have recourse to this provision, but considered that any difficulties could be effectively remedied by the implementation of other measures in the transport sector, submitted for the prior agreement of the High Authority in accordance with the fourth paragraph of Article 70 of the Treaty.

Finally, as regards Decision No 15/66, the allegations made by the applicant are outside the context of the present action.

B — Infringement of an essential procedural requirement

While referring also to the considerations set out in the context of the above submission, the *applicant* maintains that there is an insufficient statement of reasons for the decision in dispute.

On this point it refers to the inadequacy of the reasons with regard to:

— the causal connexion between the canalization of the waterways referred to and the relatively unfavourable position, from the point of view of competition, of the undertakings of the Saarland, as well as the temporary nature of those difficulties;

— the direct and indirect effects of such canalization on both the coalfields and the steel-works established in the Saarland, as well as on each undertaking considered individually within these two branches of industry.

The applicant then maintains, in particular as regards the special rates and conditions concerning the steel-works and iron and steel industry of the Saarland, it does not appear from the contested decision (penultimate recital, No II, 1, and final recital, first section, No II, 2), that these rates and conditions involve no more than adequate aid for all the undertakings which will benefit from less onerous carriage charges.
According to the Court, full compensation for the damage suffered cannot be required.
Moreover, the Federal Government originally defended the rates and conditions in dispute as tariff rules which were justified by the potential competition of the Saar-Palatinate canal and it still holds this point of view.
It is not at first sight obvious that the consequences of such a policy are the same as the reasons accepted by the High Authority for granting aid to undertakings.
Those coalfields of the Saarland which deliver the larger part of their production of coke to the regional iron and steel industry have lower transport costs than the other coalfields of the region.
Moreover, the community of interests existing between certain undertakings of the Saarland and other undertakings situated outside this region exercise an influence over production and markets.
In its statement of defence the High Authority produced no document showing the special nature of the situation of these coal and steel undertakings of the Saarland and the value of the special rates and conditions.
The *defendant* replies that all the applicant's arguments concerning the absence of reasons for the contested decision arise from its mistaken view of the significance of that decision, with the result that to refute this view also involves refuting the present submission.

C — Misuse of powers

The *applicant* maintains that by approving the support tariffs in dispute the High Authority allowed itself to become involved in the exigencies of the regional policy of one Member State, although according to the case-law of the Court in the above-mentioned judgments of 10 May 1960 (Rec. 1960, pp. 406 and 527), the High Authority has no authority to adapt its activities to the requirements of such a policy.
Moreover, as the fourth paragraph of Article 70 of the Treaty constitutes a special provision the High Authority is prohibited from applying it if the Treaty offers other means of granting aid.
In this instance such means could have consisted in having recourse to Article 67(2) and (3) of the Treaty.
As regards the effects of the structural modifications of the energy market on coal, measures of support could have been adopted within the framework of the Protocol on Energy Problems of 21 April 1964 and Decision No 3/65 of the High Authority of 17 February 1965.
The *defendant* contests the allegation that in this instance the High Authority authorized the implementation of a regional policy.
Although the applicant considerd that the High Authority perhaps authorized the introduction of rates and conditions in the context of a regional policy, it must be stated that the High Authority has power to assess and, if necessary, to authorize such measures, provided that it bases that assessment on the 'principles of this Treaty' and disregards their designation as well as the reasons put forward in their support on a national level.
Furthermore, it is mistaken to claim that the fourth paragraph of Article 70 of the Treaty is a special provision which may not be applied in cases in which, by virtue of the Treaty, other means of granting the necessary aid are open to the High Authority.
Far from being a special provision it concerns precisely the application of special support tariffs in accordance with the Treaty.
As regards the 'other means' which, apart from those laid down by the provision in question, should or could have been applied, the applicant must not forget that:
— Article 67 of the Treaty confers certain powers on the High Authority when a Member State, acting within the limits of its own powers, takes measures which are liable to have appreciable repercussions on conditions of competition in

the coal or the steel industry, and that this article does not concern the State measures referred to by the other provisions of the Treaty;

— the Protocol of 21 April 1964 and Decision No 3/65 of 17 February 1965 cannot be invoked in this instance, in particular as they refer only to the coal sector and in no way relate to the problems of the iron and steel sector.

The *applicant* replies that the generic nature of the authorizations in dispute which were granted in favour of tariffs which concern all the ECSC undertakings of the Saarland clearly shows that the High Authority is attempting to implement a regional policy.

The change which took place in the conditions of competition to the detriment of certain undertakings of the Saarland resulted from measures taken by three governments in an area which is not governed by the Treaty but which remains within the jurisdiction of each national government.

The reference by the High Authority to the judgment given in Joined Cases 27, 28 and 29/58 is not therefore justified, since in that case the rates and conditions in question had been introduced as an independent subsidy in factual circumstances which had undergone no change, whilst in this instance changes in the infrastructure of transport have brought about changes in an existing situation.

If, contrary to the argument of the Government of the Kingdom of the Netherlands, it is disputed that the changes which took place in the infrastructure of transport may be regarded as part of the 'physical and technical conditions' to which each undertaking must always be able to adapt itself, the canalizations of the waterways must nevertheless be regarded as part of the measures envisaged by Article 67, with the result that the procedure established by that article should have been followed.

The details given by the High Authority regarding the scope of the Protocol of 21 April 1964 and of Decision No 3/65 do not bring out the reasons why the measures of assistance which, in its opinion, appear necessary in the coal sector, were not capable of being introduced on the basis of this Protocol.

The *defendant* considers, on the other hand, that it strictly observed the Treaty in authorizing the rates and conditions in dispute. It considered the industrial structure of the Saarland, in which the production of coal and steel plays a predominant role, only in order to avoid serious difficulties of a social nature and in the context of Article 56 of the Treaty.

Furthermore, although the development of lines of communication takes place gradually, economic conditions are subject to sudden changes.

In this instance, the undertakings of the Saarland were threatened, for this reason, with serious difficulties, and the situation was aggravated further by the undiversified industrial structure of the Saarland and by the decline, and even recession, in the output of coal and steel throughout the Community.

As the Deutsche Bundesbahn applied the special internal rates and conditions in the interest of one or more coal- or steel-producing undertakings', the High Authority was under an obligation to intervene, by virtue of this article, in order to examine whether such rates and conditions were in accordance with the Treaty.

It is impossible to see how the High Authority could, or even should, have applied the provisions of Article 67, since the 'detrimental repercussion' which the measures introduced by the German Government were likely to involve 'for the conditions of competition...' was in fact avoided by the application of the fourth paragraph of Article 70 of the Treaty.

The considerations set out above in relation to Article 67 apply equally to the iron and steel sector.

IV — Procedure

The procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without making any preparatory inquiry.

The parties presented oral argument at the hearing on 14 November 1967.

The Advocate-General delivered his opinion at the hearing on 12 December 1967.

Grounds of judgment

In support of its application the applicant maintains that, by means of the contested decision, the disputed authorizations were granted without satisfying the conditions which appear, in particular, in Articles 4(b) and 70 of the Treaty and to which the application of special internal rates and conditions is subject. It alleges that these conditions, which have previously been defined by the Court of Justice, prevent the authorization of the special rates and conditions referred to in the fourth paragraph of Article 70 of the Treaty, except where necessary to enable the undertakings in whose favour they operate to overcome exceptional and temporary difficulties resulting from unforeseeable circumstances which are likely to result in a situation in which the composition of the production costs no longer corresponds to the natural conditions in which these undertakings are placed. In this respect the applicant maintains, first, that the change which has taken place in the conditions of competition of the undertakings of the Saarland following the canalization of the Moselle, the Main and the Neckar is of a permanent rather than a temporary nature.

Secondly, the applicant maintains that, as the improvement in lines of communications carried out by public works authorities is one of the constant preoccupations of the public authorities in all the Member States, it cannot be regarded as an unforeseeable circumstance. It further maintains that the natural conditions in which the undertakings operate include the physical and technical conditions peculiar to each of the various producers, as they are constantly changing or, at least, are subject to constant variations, even though these variations are the result of human intervention. Among these natural conditions must be included the position of the undertakings in the light of the infrastructure of transport as it exists and as it may be changed at any time. For this reason it is contended that a modification in this infrastructure, like that which has taken place in this instance, cannot constitute a factor likely to cause the composition of production costs no longer to correspond to the natural operating conditions of the undertakings of the Saarland of which this modification forms an intergral part.

First, the material change in the conditions of competition of the undertakings of the Saarland, which took place as a result of the canalization of the Moselle, the Main and the Neckar must not be confused with the economic consequences which it involves and, more precisely, with the difficulties which result therefrom for these undertakings. Although this material change is of a permanent nature, it does not follow that the difficulties which result therefrom for certain undertakings must also be of permanent nature. On the contrary, it is possible that in future such difficulties may be surmounted, in particular through a readjustment in the production and distribution justifying appropriate temporary aid. The aim of the special rates and conditions in question is precisely to grant aid of this kind which is intended to facilitate such a readjustment.

Moreover, the unforeseeable nature of the circumstances justifying the grant of special rates and conditions must be assessed in the light of the facts of each case and according to a reasonable assessment of the situation. For the purposes of such an assessement a distinction must be made in the transport sector between the normal work of development of the infrastructure and other work, generally of greater importance, the execution of which brings about a change in the existing economic situation. In this instance the canalization of the Moselle, the Main and the Neckar cannot be regarded simply as the normal work of development of the infrastructure incumbent upon each Member State.

The applicant complains in addition that, in order to justify the measures of support in dispute, the High Authority based its decision on the changes in the infrastructure of inland waterways. It maintains that the purpose and effect of these measures is not to provide against external circumstances which change the natural conditions and, in this way, cause the composition of production costs no longer to correspond to those conditions, but, on the contrary, to correct the effects on competition of differences in the natural conditions in which the undertakings operate.

The concept set out in the second paragraph of Article 2 of the Treaty concerning conditions which will of themselves ensure the most rational distribution of production cannot be regarded as a fixed concept, but covers facts which are themselves contingent and variable, in particular with regard to time. For this reason, the execution of public works, which involves a change in the infrastructure of a region in which undertakings are established certainly constitutes, at the beginning, a sudden change in the existing environment, even though the new situation is destined after a certain time to become part of the conditions in which these undertakings will henceforth be called upon to carry out their activities. These complaints must therefore be rejected.

In addition, the applicant criticizes the High Authority on the ground that it attributed excessive importance to the pursuit of aims of a social nature in order to justify its decision and retain the rates and conditions in dispute. In support of this criticism it maintains that, among the objectives set out in Article 2 of the Treaty, the obligation to ensure continuity of employment is of secondary importance in comparison with the need to ensure the most rational distribution of production at the highest possible level of productivity. In accordance with the case-law of the Court, a temporary recession in employment and the closure of undertakings incapable of continuing without constant, adequate aid must be accepted.

Although it is true that the establishment of the Common Market is based in particular on the most rational distribution of production at the highest possible level of productivity, it in no way follows that the social objectives set out in Article 2 of the Treaty are always of secondary importance and can in no case constitute one of the decisive grounds for Community action. Although the general objectives

of the Treaty set out in Articles 2 and 3 cannot always be pursued simultaneously in their totality, the Community must continually reconcile these objectives when considered individually and, when conflict arises, must grant such priority to certain general objectives as appear necessary, having regard to the economic facts or circumstances in the light of which it adopts its decisions. If the difficulties from which certain undertakings suffer are likely to lead to widespread unemployment which will frustrate the pursuit of these general objectives of a social nature, the Community must introduce measures which will ensure observance of these objectives in particular. Recourse to the fourth paragraph of Article 70 of the Treaty, in order to enable the undertakings concerned to adjust themselves as soon as possible to the new conditions of competition rather than to grant them a permanent subsidy which would be contrary to the general objectives of the Treaty, may constitute an appropriate measure with which to meet difficulties of this type. For this reason this complaint cannot be accepted.

The applicant further maintains that the contested decision infringes the fourth paragraph of Article 70 of the Treaty, in that, contrary to the provision referring to special rates and conditions in the interest 'of one or more coal- or steel-producing undertakings', it authorized the rates and conditions in dispute without considering individually the basic operating conditions of each of the undertakings of the Saarland referred to. In particular, the applicant maintains that the contested decision supplies insufficient information concerning the direct and indirect effects of the abovementioned canalizations on the steel-works established in the Saarland and it does not make it possible to assess whether or not the rates and conditions in dispute involve excessive aid to the recipient undertakings.

To allow the application of special rates and conditions in the interest of one or more undertakings does not necessarily imply individual measures peculiar to each undertaking and in no way excludes the introduction of measures adapted to a group of undertakings which are similarly placed. Furthermore, the canalization of these rivers changed the conditions of competition in the transport sector between the undertakings of the Saarland governed by the ECSC Treaty and competing undertakings established in other industrial districts and in a position to use the new waterways. Thus, this canalization affects conditions of competition between the different industrial districts rather than between undertakings considered individually. Therefore, the advantage granted to the undertakings of the Saarland by the rates and conditions in dispute to enable them to overcome the difficulties which they face as a result of this canalization may also be of a general nature. As regards in particular the steel-works of the Saarland it has not been shown that this advantage involves more than appropriate aid to the undertakings in whose favour it is granted. The present complaint is, therefore, unfounded.

In addition, the applicant criticizes the High Authority for having authorized the special rates and conditions so as to enable the undertakings of the Saarland to cope

with structural difficulties and for having thus become involved in the regional policy of a Member State, although it was not authorized to adapt its activities to the exigencies of such a policy. The applicant maintains that, as the fourth paragraph of Article 70 of the Treaty is a special provision, the High Authority, if it wished to remedy the structural difficulties of the Saarland, could have resorted to other means of action, such as Articles 37 and 67 of the Treaty or the Protocol on Energy Problems of 21 April 1964 and Decision No 3/65 of the High Authority of 17 February 1965.

It may be seen from the statement of reasons for the contested decision, taken as a whole, that the change in the conditions of competition which resulted from these cananlizations worsened a situation which was already causing concern, but to the extent to which it may be regarded as temporary, it was this worsening situation alone which the High Authority intended to remedy by means of the contested decision. The fundamental reason for this decision is therefore to remedy these difficulties of readjustment. Even though, in the intention of the government which introduced them, the rates and conditions in dispute may form part of a regional policy, neither the statement of reasons for the contested decision nor the aim of the authorizations in dispute shows that the High Authority arrived at its decision for reasons foreign to the principles of the Treaty. The present complaint cannot therefore be accepted.

The applicant also maintains that the contested decision is illegal in that it did not fix any time-limit for the authorizations in dispute. It alleges that, contrary to the fourth paragraph of Article 70 of the Treaty, these authorizations are not of a temporary nature but grant advantages which are either permanent or of indefinite duration to the undertakings of the Saarland. The defendant refutes this by claiming that the temporary nature of the authorizations in dispute is confirmed by Article 4(2) of the contested decision which shows that these authorizations are based on a series of specific facts and may always be called in question either at the request of an interested party or by the High Authority of its own volition. In addition, it observes that, with the agreement of the European Parliament, it has recently begun to replace authorizations of this type, which are often extended from year to year, by authorizations containing clauses similar to that of Article 4(2) abovementioned.

The nature and the scope of the special internal rates and conditions provided for in the fourth paragraph of Article 70 are similar to the protective measures by which a Member State attempts to restore the balance to the competitive position of certain undertakings affected by temporary difficulties in the production or disposal of their products. The fourth paragraph of Article 70 requires the High Authority to verify that the special internal rates and conditions are in accordance with the principles of the Treaty. It follows from the preliminary provisions of the Treaty, in particular Articles 2 to 4 which set out the fundamental objectives of the

Community, that the application of measures of support such as those introduced in this instance is an altogether exceptional procedure. This procedure is emphasized by the fourth paragraph of Article 70 which confers on the High Authority the power to make its agreement temporary or conditional. These measures may, therefore, only be applied to the extent to which they make it possible to re-establish within the appropriate time-limits conditions which will of themselves ensure the distribution of production at the highest possible level of productivity. As no time-limit is attached to the authorization given by the High Authority, it is incapable of effectively stimulating the undertakings in whose favour it is given to adjust themselves to the new conditions of competition or of preventing them from regarding the measures as a permanent aid intended to offset the difficulties which they face.

In this instance the contested decision is based only on difficulties of an economic nature, affecting all the ECSC undertakings established in the Saarland.

Article 2 of this decision lays down conditions, the purpose of which is to prevent the application of the rates and conditions in dispute from leading to discrimination to the detriment of certain undertakings which compete with the undertakings of the Saarland; those conditions however are not calculated to stimulate the readjustment of the latter undertakings. This decision also fails to fix a time-limit for the duration of the authorizations in dispute. It follows from Article 4(2) thereof that the agreement of the High Authority may be revoked if the circumstances which gave rise to its grant no longer exist or are changed. By implying that this agreement may be maintained as long as the difficulties justifying it continue to exist, this provision fails to take into account the fact that, in this instance, the essential purpose of the agreement in question is precisely to enable the undertakings in whose favour it operates to overcome those difficulties and not simply to offset them for as long as they exist or remain unchanged. Thus, by the mere addition of a formal clause to the authorization, the decision does not guarantee that the aid accorded to the undertakings of the Saarland will be used in a manner which is compatible with the objectives of the Treaty. For this reason Article 4(2) of the contested decision does not satisfy the requirements of the fourth paragraph of Article 70 of the Treaty. The decision must therefore be annulled.

Costs

Under the terms of the first subparagraph of Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading. As the applicant has been successful in its application, the defendant must be ordered to bear the costs of the action.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;

Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 2 to 5, the first paragraph of Article 15, Articles 33, 67 and the fourth paragraph of Article 70 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:

1. **Annuls Decision No 14/66 of the High Authority and refers the matter back to the Commission;**

2. **Orders the defendant to bear the costs of the action.**

Lecourt Donner Strauß

Trabucchi Monaco Mertens de Wilmars Pescatore

Delivered in open court in Luxembourg on 8 February 1968.

A. Van Houtte R. Lecourt

Registrar **President**

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 12 DECEMBER 1967[1]

Mr President,
Members of the Court,

The application by the Government of the Kingdom of the Netherlands on which you have to give judgment concerns Decision No 14/66 of the High Authority of 20 July 1966 which, subject to certain conditions, authorizes the Deutsche Bundesbahn to apply special rates and conditions to the carriage of coal and steel to or from certain stations in the Saarland. It will give you the opportunity to state your position on the interpretation of the fourth paragraph of Article 70 of the Treaty of Paris concerning 'special internal rates and conditions', with which you have already dealt in 1960 in relation to the decisions of the High Authority taken within the context of paragraph 10 of the Convention on the Transitional Provisions.
Let me recall the terms and the content of the contested decision.
The rates and conditions in dispute, as indicated first of all in the recitals of the preamble to this decision, were introduced

1 — Translated from the French.