THE COURT

hereby:

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

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

Donner Delvaux Rossi
Riese Hammes

Delivered in open court in Luxembourg on 15 July 1960.

A. Van Houtte
Registrar

A. M. Donner
President

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

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1 — Translated from the German.

Mr President,
Members of the Court,

My opinion is concerned with the action by the Government of the Italian Republic contesting the decision of the High Authority of 18 February 1959 published in the Official Journal of the European Communities on 7 March 1959.

A — Introduction

Various cases which the Court has dealt with recently related to questions of discrimination in railway goods traffic and the finding of the High Authority under Article 88 of the ECSC Treaty that a Member State has failed to fulfil its obligations under the Treaty in this connexion. The action with which we are concerned here likewise has its origin in the recording of such a failure by the High Authority under Article 88. This recording of failure relates to road transport and the publication of transport tariffs. May I here for the sake of brevity refer to the wording of the decision.

Background of the decision and facts

The Committee of Experts convened under Article 10 of Chapter II of the Convention on the Transitional Provisions investigated the practice of road transport in the six countries and in particular the tariffs or rates and conditions of carriage. At the beginning of 1956 it prepared a report in which the majority expressed the view that there was an obligation to publish the scales, rates and conditions of carriage or to inform the High Authority of them and that they should be published or notified before being applied. Unanimity on the basic questions could not, however, be achieved. The High Authority submitted this report to the Council of Ministers to enable a uniform regulation to be found within its framework. A special committee was formed in the Council of Ministers and both the Council and the committee negotiated at length on the question without reaching unanimity in all respects. At the conference of the Council of Ministers on 22 July 1958 the Vice-President of the High Authority referred to the fact that the coal and steel industry in the Federal Republic of Germany had asked the High Authority in a letter dated 10 July 1958 to introduce a regulation for the carriage by road of steel in the Community in relation to the publication of scales, rates and all other tariff rules before contracts of carriage are concluded and the coal and steel industry applied in accordance with Article 35 of the ECSC Treaty for an appropriate decision on the basis of Article 88. Since the High Authority could not rely on a unanimous view in the Council of Ministers and could not smooth over the differences in the Council it sent a letter in similar terms on 12 August 1958 to the governments of the Member States of the Community. May I refer to what the letter sent to the Italian Government said. I cite only the concluding Article III which is as follows:

'The High Authority therefore requests the Italian Government to inform it before 1 December 1958 of the measures which have then been adopted in respect of carriage by road for hire or reward to fulfil, having regard to the aforementioned particulars, the provisions of the Treaty and in particular Articles 2, 3, 4, 5, 60 and 70, or to inform it by the same date of the observations which the Italian Government wishes to make under the second sentence of the first paragraph of Article 88 of the Treaty'.

The Italian Government obtained an extension to 10 January 1959 of the period set by the High Authority and in a letter dated 8 January 1959 set out its views on the question of the publication or notification of the rates and conditions of carriage.

May I likewise refer to the Italian Government's letter to the High Authority.

Without having had further discussions with the governments, the High Authority on 18 February 1959 adopted the contested decision.

B — Legal discussion

In considering the matter from the legal point of view it is necessary to compare the substance of the letter of the High Authority dated 12 August 1958 with the decision

dated 18 February 1959, for the letter dated 12 August 1958 is according to the High Authority a preparatory measure leading logically according to the procedural and substantive rules to the contested decision.

I — *Admissibility of the action under Article 88*

From the formal point of view the contested decision relies on Article 88 of the Treaty. This provision can be applied only if there is found to be an infringement of an obligation under the Treaty. It does not give the High Authority a power to issue regulations to deal with problems relating to the objectives of the Common Market. It will therefore be necessary to consider whether the Member States have direct obligations under the Treaty in respect of the publication of tariffs without it being necessary here to determine these obligations in detail. If it appears that the Treaty contains no directly applicable legal principles in this sphere but only indications of a programme or provisions for a further treaty then the High Authority cannot act under Article 88.

1. Article10 of Chapter II of the Convention on the Transitional Provisions

Reference was made in this connexion to the provisions of Article 10 of Chapter II of the Convention on the Transitional Provisions which reserve a number of questions in the transport sector to settlement by agreement between governments. The first paragraph of Article 10 of Chapter II of the Convention on the Transitional Provisions provides that a committee of experts shall be convened by the High Authority 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 of the Treaty. This provision is not however in the nature of a general clause which might be assumed by considering paragraph 1 on its own. What subjects are to be dealt with in treaties between governments appears from the provisions of Article 10 taken as a whole and in particular from paragraph 6, namely the introduction of direct international tariffs and the harmonization of the rates and conditions of every kind. These are difficult and complex questions simultaneously concerning several States. By their nature they cannot be dealt with by measures of individual governments. In this connexion, however. the problem of the publication of tariffs is not mentioned at all. It cannot therefore be argued that Article 10 of Chapter II requires that this question be dealt with by agreement and *for this reason* there is no direct obligation on the States under the Treaty. Although the question of the publication of rates was discussed by the Committee of Experts along with all transport problems, this was because it was desirable that this problem should be dealt with by agreement and a harmonious solution arrived at as far as possible, but not because it was considered *necessary*. When these efforts obviously failed the High Authority considered it its duty to refer to the obligations of the Member States under the Treaty.

2. Third paragraph of Article 70

Whether there are obligations under the Treaty with regard to the publication of tariffs and if so to what extent must appear from the third paragraph of Article 70 in which it is stated:

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

It is not only provisions which use the words 'bind themselves' which have an imperative and binding effect. The binding intention can be clearly expressed in another way. It needs only a glance at the Convention on the Transitional Provisions to observe that often only the indicative is used

to express undoubted legal obligations. We also saw a little while ago that the Court classified the first paragraph of Article 70 as a legal rule although legal obligations and prohibitions are generally expressed in another manner.

In drafting the Treaty it soon became apparent that the coal and steel market could be effectly integrated only if the Treaty extended in certain sectors beyond this sphere and permitted the protection of part of the market against the influence of other economic branches. In particular the importance was clear of the transport system for the coal and steel market – transport charges representing a large part of the production costs – and the consequent necessity to include in the Treaty provisions indirectly or directly regulating the transport sector. The importance for the system of the Treaty of publicity in the transport sector makes it appear scarcely conceivable that the parties to the Treaty would have limited themselves in this question to simple declarations of readiness and of intent. Rather may it be assumed that on such an important point they would have clearly expressed possible reservations and would have referred the matter to the Convention on the Transitional Provisions if they had thought a further treaty necessary to implement harmonization or the introduction of direct international tariffs.

The reference to Article 60 of the Treaty, which recognizes certain guarantees – not contained in Article 70 – with regard to the extent and manner of publication of matters relating to prices (consultation with the Consultative Committee), is mistaken because the third paragraph of Article 70 gives the High Authority no legislative power.

3. Conclusion

I thus take the view that the third paragraph of Article 70 contains a directly applicable legal rule and not simply the announcement of a programme. This provision is so worded, moreover, that it is capable of legal implementation without any further implementing treaty. Since the Treaty does not directly cover undertakings outside the coal and steel sector, the requirement in the third paragraph can only be regarded as directed to the governments of the Member States.

Thus it is shown that the High Authority on principle rightly brought the procedure under Article 88 to secure fulfilment of the obligations under Article 70 of the Treaty.

II – *Observation of the procedural provisions of Article 88*

Article 88 contains certain *procedural rules* which must be observed before taking a decision. In particular it is required that the State must first be given the opportunity to submits its comments.

1. Meaning and objective of Article 88

Before I deal with compliance with these rules allow me to make some observations on the meaning and objective of Article 88 in the context of the system of the Treaty. It appears to me that the objective, *inter alia,* of this provision is to ensure a uniform and authentic interpretation of the Treaty. If there is any uncertainty or dispute about the provisions of the Treaty relating to the conduct of Member States the Court has to resolve the uncertainty or dispute by determining authoritatively what is right. Some external initiative, which may vary according to the procedure in question, is required to set the Court in motion. The executive may give an interpretation of the disputed questions in a decision which the State concerned can contest before the Court or the executive may itself bring the matter before the Court. The first solution is that adopted by the ECSC Treaty, the second, in line with the limitation of the administrative powers of the Commission, is the system of the EEC. The basic aim is the same in both cases: it is necessary to clarify the Treaty obligations of the Member States which the executive regard as already existing before the procedure is instituted for a declaration and which do not have their *origin* in an act of the executive in the context of this procedure. The role of the High Authority and of the Commission is to make an authoritative decision about certain facts (the conduct of

a State) to which the rules of the Treaty apply and thus make it possible to have the matter and the interpretation of the Treaty reviewed by the Court.

In the proceedings the detailed description of the Treaty obligations in the contested decision was censured. Article 88 refers to the High Authority recording a failure to fulfil an obligation under the Treaty in a decision. It is possible to conceive of recording only what Treaty provisions have not been observed. The High Authority rightly says that recording in this fashion would help no-one. Therefore Article 88 properly requires expressly that the High Authority should record the failure in a *reasoned* decision. Thus the Treaty imposes on the High Authority the obligation to state clearly what the infringement of the Treaty is which implies a detailed interpretation of the rules of the Treaty. According to the relevant provision the interpretation can relate to quite precise conduct of the States or only the more or less extensive determination of the scope within which the State can itself determine its conduct.

The objective of the treaties in prescribing that the States concerned may submit their comments before the executive reaches the finding which gives rise to the legal proceedings is twofold. First it is intended that the State concerned should have the opportunity to negotiate and possibly to justify the matter, for it is not ruled out that its view of the law has better arguments to support it and may even convince the High Authority or that special circumstances of which the High Authority may not or not be entirely aware justify the conduct of the State. In these circumstances the question of interpretation may be settled without the Court's being involved. Secondly it is intended that the State should have the possibility of fulfilling its Treaty obligations, thus making legal proceedings sanctions unnecessary. This is the other objective of the provisions of Article 88, namely to encourage a recalcitrant State to adopt a particular attitude and not to punish it for past conduct. Article 88 replaces execution, which applies to undertakings but not to the relationship between the High Authority and the States, by a politically effective legal declaration that the conduct of a State is contrary to the Treaty.

2. The various phases of the procedure on the present case

It is above all with regard to the second objective of the provision guaranteeing the right to be heard that the procedure adopted by the High Authority must first of all be considered.

It is true that it was only in the oral procedure that the Italian Government expressly and at length brought up the non-compliance with the procedural provisions of Article 88. I think, however, that this complaint merits attention. The Court has already ruled on several occasions that it may of its own motion examine whether basic formalities have been observed including basic provisions on procedure (Case 1/54, *Government of the French Republic* v *High Authority,* Recueil 1954, p. 9; Case 6/54, *Government of the Netherlands* v *High Authority,* Recueil 1954, p. 203). This applies in particular to the procedure of 'pleine jurisdiction', that is, the procedure under Article 88 of the Treaty in which the Court has unlimited powers of review and it also follows from the principle of special respect for the rights of the contracting States.

For the purposes of the said examination it is necessary to go into the details of the High Authority's letter of 12 August 1958, the answer from the Italian Government dated 8 January 1959 and the contested decision. It is immediately clear that the High Authority based its approach on a different interpretation of the third paragraph of Article 70 in its letter of 12 August from that in the decision of 18 February 1959. The letter dated 12 August lists three ways of fulfilling the obligation of publication:

(a) The competent authority shall publish a transport tariff and require that it be respected by transport undertakings.

(b) The competent authority shall require carriers adequately to publish or to send to the High Authority the transport

tariffs which they have laid down and which apply to their undertaking.

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

On the other hand the decision of 18 February contains only two possibilities, the choice of which is left to the States in fulfilling their Treaty obligations:

(a) The governments shall publish scales, rates and tariff rules and require observation of them by undertakings;

(b) The governments shall require that undertakings publish the scales, rates and tariff rules which the undertakings themselves have resolved or notify them to the High Authority. The High Authority shall make available to producers, buyers and consumers the scales so notified.

The Italian Government replied to the High Authority's letter of 12 August on 8 January 1959 that the current rules in Italy were in accord with what was prescribed in the Treaty. The Italian Government was, however, prepared to instruct the Italian Chambers of Commerce to draw up schedules of road transport rates on main tariff routes in relation to journeys of more than 200 km and of loads of more than 5 metric tons. These schedules could be notified each month to the High Authority via the Italian Embassy.

3. Has the Italian Government declared itself prepared to implement one of the three possibilities put to it by the High Authority?

It is quite obvious that the Italian Government has not expressed readinesss in this letter to implement one of the three possibilities offered it on 12 August 1958. In particular, it is a long way from adopting the solution contemplated by the Netherlands Government. Basically the Italian Government contests that there is an obligation under the Treaty as the High Authority interprets it. As distinct from the Netherlands case, it cannot therefore be said that the dispute in its original form between the High Authority and the Italian Government with regard to interpretation has been *settled* without a decision by the High Authority being necessary. If the High Authority had held in a decision that with this answer the Italian Government had not performed its obligations under the Treaty and that it had not chosen any of the possibilities mentioned in the letter of 12 August, no objection could have been made to the action of the High Authority from the procedural point of view.

4. Infringement of the right to be heard

The High Authority, however, has altered its interpretation of the Treaty and ruled in the contested decision that the Italian Government was not fulfilling its obligations under the Treaty so long as it did not implement one of the first two possibilities mentioned in the letter of 12 August. Such a change in the legal view of the High Authority is not ruled out, for disputes within the meaning of Article 88 are concerned only with legal views and interpretation and not administrative measures of the High Authority to implement or define provisions of the Treaty.

It may be asked what influence this change in the legal view has on the procedure and in particular whether it requires that the Italian Government should be heard anew. I would answer this question unhesitatingly in the affirmative if the Italian Government has resolved to implement one of the three original possibilities, as did the Netherlands Government. Then it could have been said that the Italian Government had no cause to discuss the lawfulness of the other two possibilities and in particular to maintain the arguments in law that it had not yet had any cause to use its opportunity to submit comments on the two other possibilities.

Since, however, the Italian Government rejected all three of the possibilities submitted

to it by the High Authority for comments as conceivable ways of fulfilling the Treaty, it must be assumed that it examined all three possibilities and commented on them all.

In view of these circumstances was it necessary to hear further comments in relation to the legal view subsequently adopted by the High Authority? The meaning of the procedural provisions of Article 88 can scarcely require this. Article 88 does not provide that a decision may be adopted by the High Authority only where the Government concerned has previously had the opportunity to submit its comments on the *wording* contained in the decision itself. The principle guaranteeing the right to be heard is intended only to guarantee that opportunity should be given to submit comments on the *problems* dealt with in the decision.

The alteration of the legal position of the High Authority consists in the present case not in the introduction of completely new points of view but in a *limitation* of the original view by leaving out one of the possibilities originally provided for. The decision of the High Authority thus kept within the terms laid down by its letter of 12 August; the Italian Government was not confronted in the decision with a legal question new to it.

As regards the question generally the Italian Government explained in its observations of 8 January 1959 how far the obligations of the States in the transport sector extended in its view. The views were accordingly clearly delimited after the exchange of letters. In view of this it would be only meaningless formality if the High Authority were compelled once again to notify this government of the alteration in its viewpoint before taking a definite decision. For the clear and unambiguous opinion voiced by the Italian Government on the more extensive possibilities originally proposed by the High Authority could not give rise to any expectation that the matter might be settled by the subsequent more limited possibilities.

Perhaps what the High Authority did was not quite correct. Since, however, the objective of the procedural provisions of Article 88 has been fulfilled and thus the rights of the Italian Government have been curtailed, in my view the Court should not regard the slightly incorrect application of the provisions as non-compliance with basic formalities which could justify annulment.

III — *Insufficient statement of reasons*

A further question arises in the sphere of procedural rules which likewise has also not been expressly mentioned but which the Court must deal with of its own motion. This question arises if the letter of 12 August is compared with the reasons for the contested decision.

At the end of the first-mentioned letter the High Authority observes that it would follow closely the subsequent notification to ascertain whether the objectives of the Treaty were in this way being achieved in a satisfactory manner. In the grounds of the decision, according to which subsequent notification does not accord with the Treaty, it is simply observed that none of the governments has applied any of the three possibilities or stated that it was prepared to apply them fully. Mention is then made of the Netherlands and French comments — nothing is said about the answer of the Italian Government — and the observation is made:

'In these circumstances the Member States have not fulfilled one of their obligations under the Treaty establishing the European Coal and Steel Community.

To fulfil this obligation the governments must apply one of the first two solutions as set out under 3 (a) and (b).'

In my opinion there is a certain illogicality here on the part of the High Authority which, on the one hand, says that the States have not fulfilled an obligation under the Treaty as a result of not applying one of the three possibilities which were contained in the letter of 12 August 1958 and, on the other hand, states that the governments were obliged to adopt one of the first two solutions if they wished in future to satisfy

their obligations under the Treaty. Under Article 88 of the Treaty the duty, the non-fulfilment of which is complained of in respect of the past, cannot differ from the duty which is required to be fulfilled in the future. In fact this does not seem to be the view of the High Authority. The latter is reluctant, however, to say expressly that it has considerably changed its view of the States' obligations under the Treaty in the transport sector; it gives no reasons justifying its change of view.

The reasons which it sets out in support of its altered view of the law in Decision No 18/59 basically agree with the reasons which are contained in the letter of 12 August 1958 to support the wider interpretation of the third paragraph of Article 70. In both it is said that the obligation to publish tariffs must be fulfilled so that the functioninig of the Common Market may be ensured; in both cases it is stressed that the functioning of the Common Market requires the checking on discrimination to be tightened and makes necessary certain measures on prices. Finally, in both cases it is stressed that for the said objectives it is necessary for producers and consumers to be informed of scales, rates and tariff rules.

May this fact, that is, the omission of particular reasons for the changed legal point of view, be regarded as a fundamental defect in form? The obligation on the High Authority to give reasons for its decisions, which obligation is expressly stressed and repeated in Article 88, can certainly not mean that all conceivable objections and points of view must be discussed. The reasons must be sufficient to make the fundamental grounds of the decision of the High Authority apparent and capable of being checked. It should not be overlooked, however, that a decision under Article 88 is not an isolated measure of the High Authority but the result of a multifarious procedure which was started in the present case by the letter of the High Authority of 12 August and continued with the hearing of the States concerned. It is therefore proper to require the High Authority in its final decision to discuss the fundamental comments of the States concerned. In particular in my view the High Authority is required to give reasons for a change in its legal position which may occur in the course of the procedure. In a procedure which is very important and possibly has serious consequences for the States concerned the High Authority is required to give careful and particularly detailed reasons for its legal view. What have previously been given as reasons for a substantially wider interpretation can in no way be regarded as sufficient reasons for a much narrower view to the prejudice of the States. The High Authority is required to give the reasons for which it has changed its view and why in its opinion what was originally regarded as acceptable fulfilment of the Treaty is no longer so and whether this is due to purely legal reasons or to the results of a long period of observation. The fact that none of the States in question has accepted the original proposal of the High Authority cannot in itself be justification for abandoning a view previously given officially by the High Authority.

I therefore conclude that insufficient reasons are given for the decision of the High Authority in so far as it limits the original view. This observation has direct relevance to Article 2 of the decision. Since however the other provisions of the decision cannot stand on their own, the defect in form can lead only to an annulment of the decision in its entirety.

C – General conclusion

I propose that there should be a finding in favour of the Italian Government and that the decision of the High Authority should be declared null and void for not complying with fundamental formalities. The High Authority should bear the costs of the action.