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.

by the Deutsche Bundesbahn between 1 June 1964 and 15 July 1966 without the prior agreement of the High Authority and without its having verified that they were in accordance with the Treaty, although its obligation to do so, even *a posteriori*, is in no way affected thereby. You are aware of the reasons for this situation: the Government of the Federal Republic considered these rates and conditions to be justified by the potential competition of a Saar-Palatinate canal, the cutting of which was referred to in a letter from the Federal Ministry for Economic Affairs of 30 May 1964 as 'planned'; the High Authority never accepted this point of view and always based its actions solely on the fourth paragraph of Article 70 of the Treaty. The High Authority considers in this instance that the special rates and conditions are in accordance with the principles of the Treaty, in particular with the provisions of the second paragraph of Article 2 which oblige the Community to safeguard continuity of employment and to take care not to provoke fundamental and persistent disturbances in the economies of Member States. In this connexion, the change which took place in the conditions of competition to the detriment of the undertakings of the Saarland, as regards both disposal of goods and supply, is the result of measures taken by the public authorities concerning the transport infrastructure, that is, of the canalization of the Main, the Neckar and the Moselle. This development is made even more serious by reason of the particular industrial structure of the Saarland, in which the production of coal and steel plays a leading role. Finally, if these reasons justify the conformity of the special rates and conditions introduced by the Bundesbahn with the principles of the Treaty, they apply to all the coal- and steel-producing undertakings established in the Saarland and, therefore, render unnecessary an examination of the operating conditions of each such undertaking considered individually.

However—and this is the other aspect of the question—the limitation of the scope of certain of these special rates and conditions is likely to affect the functioning of the Common Market to the detriment of certain undertakings established outside the Saarland, whose situation is comparable. Therefore, these rates and conditions are only capable of being authorized if they are extended to those undertakings.

The contested decision takes this into account and in Article 1 thereof authorizes eleven special rates and conditions to the extent to which they apply to ECSC products. Article 2 orders the extension of certain of these rates and conditions within a given time-limit to certain consignments to or from Lorraine, the Grand Duchy of Luxembourg, Belgium or the Netherlands. Finally, although the duration of the authorizations is not specified, Article 4 indicates that they will be modified or withdrawn if the circumstances on which they are based are themselves changed or no longer exist.

It is this decision in its entirety which is criticized by the Government of the Netherlands, on the grounds of infringement of the Treaty, infringement of an essential procedural requirement and misuse of powers. In fact, as we shall see, the three submissions overlap to a large extent, in that they all concern the interpretation and application of Article 70 of the Treaty and in particular the fourth paragraph thereof, together with Articles 2 to 5.

I

1. It is first necessary to look at this provision in the context of the Treaty:

Article 4 states that:

'The following are recognized as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:

.....

(b) measures or practices which *discriminate* between producers, between purchasers or between consumers, especially in prices and delivery terms or *transport rates and conditions*...;

(c) *subsidies or aids* granted by States, or special charges imposed by States, in any form whatsoever...

According to your case-law (Joined Cases 7 and 9/54, Rec. 1955–1956, p. 91) these

provisions are self-sufficient and are directly applicable where they are not further defined in any other part of the Treaty; on the other hand, where the provisions of Article 4 are referred to, further defined or regulated by rules contained in other parts of the Treaty, all the passages referring to the same provision must be considered as a whole and applied simultaneously.

This is the case as regards transport rates and conditions which, apart from paragraph 10 of the Convention on the Transitional Provisions, are governed by Article 70, the first paragraph of which provides as follows:

'It is recognized that the establishment of the common market necessitates the application of such rates and conditions for the carriage of coal and steel as will afford comparable price conditions to comparably placed consumers'. There is thus aprohibition on discrimination, the definition of which is based upon the criterion of comparability and the scope of which is defined in the second paragraph. It is clear, and your judgment in Case 3/58 has confirmed this (Rec. 1960, p. 402), that this provision does not merely provide for a programme but lays down a specific rule which is binding in itself.

This general prohibition on discrimination finds a specific application in the fourth paragraph of the same article, which requires the prior agreement of the High Authority for the application of special internal rates and conditions in the interest of one or more coal- or steel-producing undertakings. This paragraph specifies that the High Authority shall verify that these measures are in accordance with the principles of the Treaty and that it may make its agreement temporary or conditional.

Finally, subject to the provisions of Article 70 and the other provisions of the Treaty, commercial policy in matters of transport remains within the competence of Member States. This is the result of the partial nature of the integration achieved by the ECSC and the fact that the transport industry is an independent branch of the coal- and steel-producing industry. Unlike the provision in Article 74 of the EEC Treaty, the ECSC has no common transport policy. All the authors of the Treaty of Paris intended to do was to prevent the distortions which the introduction of the rates and conditions could create in the common market for coal and steel.

2. The applicant Government criticizes the contested decision on the ground that it infringes the fourth paragraph of Article 70 of the Treaty and its arguments are almost entirely based upon your case-law of 1960, in particular upon one of your judgments given at that time, as you were then dealing with various applications. In Joined Cases 3 to 18, 25 and 26/58 (*Barbara Erzbergbau AG and others*, judgment of 10 May 1960, Rec. 1960, p. 365), you acknowledged the legality of the agreement given to special rates and conditions in favour of certain German undertakings situated close to the interzonal frontier on the ground of the disadvantages created by factors of a non-economic nature 'and in particular by political contingencies which have separated these undertakings from their natural market, with the result that they require support either to be able to adjust themselves to the new conditions or to be able to overcome this accidental disadvantage'. However, by a judgment given on the same day (Joined Cases 27, 28 and 29/58, *Compagnie des hauts fourneaux de Givors and Others*, Rec. 1960, p. 501), you dismissed a claim by certain undertakings established in the South of France to retain the support tariffs from which they benefited before the entry into force of the Treaty.

You stated that the agreement referred to in the fourth paragraph of Article 70 could only be given 'to the extent to which the support tariffs authorized enable the undertakings in whose favour they operate to overcome exceptional and temporary difficulties which are the result of unforeseeable circumstances likely to produce changes in the composition of production costs resulting from the natural conditions in which they operate'.

Contrary to the view which the Netherlands Government appears to hold, I do not consider that I can base my opinion merely upon the latter judgment and can set aside the former: each one deals with a different situation and meets the various arguments put forward at that period. An interpretation of the provision in dispute which may

be applied to a consideration of the contested decision must be drawn from all your judgments, given in the light of very different factual situations. Having said that, I shall consider first whether, contrary to the view held by the applicant, the three conditions laid down by the judgment in Joined Cases 27, 28 and 29/58 to which I have referred are satisfied in this instance.

First, the applicant maintains that the change which took place in the conditions of competition to the detriment of the undertakings of the Saarland as a result of the canalization of the Main, the Neckar and the Moselle cannot be temporary but is necessarily of a permanent nature. It may be replied here that this argument confuses the fact of the canalization with the difficulties which result therefrom for the undertakings of the Saarland, which may themselves be of a temporary nature. The present disadvantages may disappear, either if the Saar-Palatinate canal is actually cut, or if the undertakings succeed in adjusting themselves to the new situation or in finding other markets. Moreover, to interpret the phrase which you used in 1960 too narrowly would no doubt be to strain its meaning. Without putting too much emphasis on this point, it may be added that as regards the agreements given in favour of the undertakings situated close to the interzonal frontier, you took into account a situation which, when judgment was given, had lasted for 15 years and has not changed since.

The same reply may be made to the second of the applicant's arguments. In order to justify this argument it is insufficient to claim that the improvement in the transport infrastructure carried out by public works is one of the constant preoccupations of public authorities in all the Member States (the Government of the Netherlands is perhaps giving too much credit to the other States when it assumes that they all have this preoccupation to the same degree). Such a statement is too general and places the normal work of development upon which undertakings may count on the same plane as other, more expensive and more important projects which, as long as no formal decision has been taken, may be regarded as unforeseeable. The canalization of the Moselle, for example, appeared for a long time to be incapable of being justified from a purely commercial point of view and it was necessary to draw up an agreement between the three Member States in order to decide on its construction on grounds which were not purely economic.

Finally, the canalization in question did not change the method by which the production costs of the undertakings of the Saarland are spread out, but merely reduced these costs for the competing undertakings which directly benefited thereby. It does not require too great an effort to accept the view of the High Authority that the factor to be taken into consideration is the set-back suffered by the competitive position of certain undertakings as compared with that of other undertakings following the measures taken by the authorities. Whether the effect of these measures was to increase the production costs of one group of competing undertakings or to reduce those of another group makes no difference in the final analysis.

However, one point is rather more difficult. The composition of production costs referred to in the judgment in *Compagnie des hauts fourneaux de Givors and Others* results from the *natural conditions* of the undertakings. In the opinion of the applicant, which refers on this point to the judgment in Joined Cases 7 and 9/54 (*Groupement des Industries Sidérurgiques Luxembourgeoises* v *High Authority of the ECSC*, Rec. 1955–1956, p. 92), this phrase must be interpreted to refer to the physical and technical conditions of each of the various producers and the position of the transport sector must also be included in these conditions. For the applicant, the initiatives taken by the public authorities as regards the transport infrastructure, in particular the canalization of the Moselle, are a factor which not only does not alter the 'natural and undistorted conditions of production' but which itself forms an integral part of those conditions. This point was developed by counsel for the applicant during the oral procedure, when he stated that for the High Authority, on the other hand, any improvement in communications by road or by water—even the opening of the Mont-Blanc Tunnel—ought to lead to reductions in the rates and con-

ditions attaching to existing means of public transport and, by degrees, to the freezing of coal and steel production in conditions which would no longer be in accordance with the second paragraph of Article 2 of the Treaty.

It is true that transport is a 'factor' which forms part of the natural and physical conditions of production. However, when the authorities of a State carry out important canalization work, does this not modify these natural conditions externally and in an artificial way? It is not also necessary to think that, in this case and at least within certain limits, the High Authority may give its agreement to special rates and conditions without infringing the principles of the Treaty? In my opinion this is quite possible.

3. I shall now turn to a further series of criticisms against the reasons given by the High Authority in support of its decision, which the applicant contends cannot lawfully be employed to justify it, as well as against certain aspects of that decision.

(a) First, as is shown in the preamble to the decision, the High Authority has always maintained that the social problem which would arise if production in the coal and steel industry of the Saarland were sharply reduced was one of the fundamental reasons for the decision. It points out that among the objectives set out in the second paragraph of Article 2 of the Treaty are social objectives which are particularly important today by virtue of the difficulties which these sectors of industry are facing throughout the Community.

The applicant Government recalls the terms of the second paragraph of Article 2 of the Treaty which are as follows: 'The Community shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking are not to provoke fundamental and persistent disturbances in the economies of Member States'. At the hearing the applicant referred to your judgments of 1960 and maintained that, as the most important objective was the most rational distribution of production by means of the free play of economic forces, any unfavourable repercussions such as disturbances in the continuity of employment were, in the light of your case-law, a matter of 'secondary importance' from a Community point of view, and for this reason clearly could never justify the introduction of special rates and conditions.

Unless I have misread your judgments, the qualification 'secondary' is not found therein. It is true—as is shown by the very passage to which I have referred—that the *fundamental* aim of the Common Market is a rational distribution of production. As is stated in the judgments in *Barbara Erzbergbau AG* and *Givors*, the authors of the Treaty envisaged that this policy might render it necessary for certain undertakings to cease their operations, and this is also shown by the Convention on the Transitional Provisions. You added that such closures might even be necessary to enable the Common Market to achieve its objectives, since the disappearance of undertakings which could only continue in existence by means of constant and massive subsidies strengthened its resistance to crises.

These statements must be considered in the context of the actions with which you were dealing at that time and of the arguments developed before you. What did they concern? Undertakings which before the setting up of the Common Market only subsisted with the aid of support tariffs and which expected to continue this system under the Treaty. Such an expectation could clearly not be fulfilled and the purpose of the Convention on the Transitional Provisions to which your judgments refer was to enable a situation which was *ex hypothesi* desperate to be dealt with without too sudden changes.

This in no way implies, however, that the social objectives referred to in Article 2 are always and in all circumstances of secondary importance and can never be decisive when a decision is to be made. The rule to be applied here is that accepted in those judgments which states that, as the aims of Articles 2 and 3 cannot be all wholly realized at the same time, 'to ensure the legality of the decision taken by the High Authority in this field, it is sufficient for these objectives to have been reasonably observed in the question and to have been pursued for the

purposes of the common interest referred to in the first paragraph of Article 3'. In certain given situations, therefore, I consider the possibility of widespread unemployment to be sufficient to justify the agreement given to special rates and conditions, at least when the other conditions on which its legality depends are satisfied. Such a measure cannot, however, be employed to prolong indefinitely the existence of undertakings which are no longer viable.

(b) The High Authority is further criticized on the basis of one of the recitals in the preamble to the contested decision, which refers in particular to the industrial structure of the Saarland in which the production of coal and steel plays a predominant rôle in the economy of the country, the inability of the regional labour force to adapt itself and other factors which, by reason of their structural and therefore permanent nature, might perhaps justify certain aid in other fields, but not recourse to special tariff measures.

If these factors constitute the existing context in which the High Authority was obliged to take action, it is sufficient to re-read the summary of the statement of reasons for the decision to see that these factors do not constitute the fundamental reason for it and that the decision itself does not claim to remove the handicap which these factors may constitute for the undertakings of the Saarland. The change in the conditions of competition which resulted from the canalization of the Moselle worsened a situation which was already causing concern, but, to the extent to which it may be regarded as temporary, it is this worsening situation alone which the High Authority attempts to remedy by means of the contested measure.

It is true that the applicant refuses to regard the canalization of the rivers and waterways as a fundamental cause, or even as an important aspect, of the difficult situation in the Saarland. In support of its argument it referred at great length at the hearing to a recent work by Professor Heinz Müller, entitled 'Probleme der Wirtschaftsstruktur des Saarlandes', from which it quoted certain information regarding the unfavourable position of the coal and steel industry of this Land. As regards transport, the applicant quoted the information that present rail tariffs for both coal and steel give the Saarland an advantage over the Ruhr with regard to the market in Southern Germany. I have also read this well-documented work which, although it appears in a collection published under the auspices of the High Authority, was produced by an independent expert and its content is therefore binding only upon him; I did not draw the same conclusions from it as did the applicant. Although this work refers to the advantage of the Saarland as regards rail tariffs for deliveries to Southern Germany, it also mentions the advantage of the Ruhr as regards transport by inland waterways.

(c) The applicant adds that the structural nature of the factors on the basis of which the High Authority gave its agreement is clearly shown by Article 4(2) of the contested decision which does not fix in advance the duration of the measures of support. At the most it provides for a reservation of the right to amend or withdraw those measures if the factors on which they are based should also change. Thus, contrary to the principle laid down by the Court, according to which the special difficulties which may give rise to the application of the fourth paragraph of Article 70 must be of temporary nature, the High Authority is binding itself for an indefinite period.

However, the conclusions which the applicant draws cannot be deduced from the fact that this decision refers to no time-limit which is already fixed. This type of clause was adopted at the suggestion of the European Parliament. It is of a temporary nature in that it recalls that the decision is based upon a series of specific facts, set out in detail in the recitals, and that it may be called in question either by the High Authority or at the request of certain interested parties should the factors on which it is based disappear. I should add further that the decision taken in 1950 regarding the support tariff in favour of the Maximilianshütte confirmed by your judgment in Joined Cases 3 to 18, 25 and 26/58 was drawn up in rather similar terms.

(d) The final complaint concerns the agreement which was given to the rates and conditions in dispute without any individual

consideration of the operating conditions of each of the undertakings of the Saarland which benefit therefrom, as required both by the fourth paragraph of Article 70 and the application which you have made of this Article. This complaint only represents one aspect of the more general problem of the validity of the decision. In the preamble thereto, the High Authority explained its attitude by the fact that the reasons for which the special rates and conditions were introduced concerned all the undertakings of the Saarland governed by the Treaty; as the advantage obtained by the competitors of the undertakings of the Saarland as a result of the improvement in the infrastructure is of a general nature, and did not affect the competitive positions of the undertakings concerned as compared with one another, the same must apply to the advantage obtained by the undertakings of the Saarland.

At this point we are clearly very far from the principles with which you have to deal and to which the applicant refers, but if, as I have suggested, you accept as the point of departure the change in the competitive position resulting from the artificial modification in the infrastructure, it follows logically that only a general consideration of the advantages and disadvantages of the situation is possible. If, therefore, you accept my opinion you will set aside this complaint.

II

With regard to the second submission concerning the infringement of an essential procedural requirement I shall be very brief, since, as it admits, the Netherlands Government is merely setting out in a different form the complaints which it has already formulated in respect of the submission based on infringement of the Treaty. If you accept, as I have done, the substantial legality of the contested decision, you are logically led to set aside the complaint of infringement of a procedural requirement.

III

There remains the misuse of powers for which the High Authority is criticized on the grounds of certain attitudes which are described in a rather vague manner: it became 'involved' in the requirements of the regional policy of a Member State and it was tending to 'conduct a regional policy' in favour of all the coal and steel undertakings of the Saarland, as is shown by the generic nature of the authorization granted.

This complaint is wholly founded upon your judgment in the *Givors* case. The applicants therein maintained that the agreement referred to in the fourth paragraph of Article 70 could be given while taking into account the requirements of a regional policy and they referred to the principles set out in Article 80(2) of the EEC Treaty, according to which the Commission's examinations of the rates and conditions of transport must be made in particular in the light of the 'requirements of an appropriate regional economic policy'. You replied that as the integration referred to by the ECSC Treaty was only partial, the High Authority was not in a position to assess all the factors which conditioned a regional policy and was not authorized to shape its action to the requirements of such a policy.

In what way should this last, rather ambiguous, statement be interpreted? Must it merely be understood to mean that the High Authority cannot conduct its own regional policy? That is obvious. Or is it that it must not align itself with the policy of a Member State, by carrying out that policy? This is quite normal as each of the two powers must act within its own sphere in accordance with its own responsibilities. This, however, implies that the High Authority is competent to assess and to authorize, where necessary, the rates and conditions provided for in the fourth paragraph of Article 70, on condition that it bases this assessment on the principles of the Treaty and that the measures are in accordance with such principles even if a Member State is forced into this area by regional policy preoccupations. It must merely disregard the reasons put forward to support these measures and their designation in a national context. In my opinion, it does not follow either from its decision or from the preamble thereto that the High Authority sought to justify its decision by the requirements of a regional policy, even less that it

took the initiative for such a policy and actually implemented it. I consider therefore that this complaint must be rejected. Finally, let me say that I consider mistaken the applicant's argument to the effect that the fourth paragraph of Article 70 prevents its application by the High Authority if other means of action are offered by the Treaty. This article is precisely the provision applicable in transport matters.

In suggesting to you that you dismiss the application by the Netherlands Government, I do not consider myself to be in conflict either with the Treaty or with your judgments given in 1960. Case-law must be looked at in its context: at that time you were dealing with rates and conditions which came into force before the Treaty and which were incompatible with the Common Market. It was, therefore, necessary to set the situation in order so as to enable the Common Market to be established. Today you are dealing with undertakings which operated normally under the Treaty until they encountered difficulties which, it is to be hoped, are not insurmountable. It might be said, however, that there is a certain change of emphasis in my analysis but the Treaties are living documents which may not be applied entirely without regard to the passage of time or the evolution of economic phonomena. Is it not true to say that, in a related field, your judgment in the case of *Comptoirs de Vente des Charbons de la Ruhr* marked a certain modification in the concept of competition in relation to your earlier judgments? And would it be inconceivable that the same should apply to transport matters? It is because I believe this evolution to be possible and advisable that I am of the opinion that:

— the application brought by the Netherlands Government should be dismissed;

— the costs of the action should be borne by the applicant.