the attainment of the aims of Article 70 but also for ensuring their implementation.

2. The High Authority is not empowered to ensure that the provisions of the third paragraph of Article 70 are observed save by way of a recommendation addressed to Member States, specifying their obligations under the Treaty; such recommendation cannot however impose upon them new obligations which have no basis in the Treaty.

3. Article 4 of the ECSC Treaty, which prohibits all discrimination in general and expressly mentions transport, is the basic principle for the purposes of the first and second paragraphs of Article 70. The reference to this principle is therefore entirely justified.

4. The third paragraph of Article 10 of the Convention on Transitional Provisions is provisional only as regards the procedure for its implementation. The principles which it establishes have permanent effect.

5. The third paragraph of Article 70, far from being of restricted and limited application, must be applied to transport within the framework of the general scheme of the Treaty and of the functioning of the common market for coal and steel as set forth in particular in Articles 2 to 5 of the Treaty.

6. The High Authority is entitled to make the attainment of the objectives of Article 60 of the ECSC Treaty the aim of a recommendation addressed to Member States relating to publicity for transport costs. It is in fact entitled to take the view that the obligation to guarantee appropriate publicity for transport rates is part of its general task to ensure the attainment of the objects laid down by the Treaty and it has the right to require Member States to facilitate the accomplishment of this task.

In Case 9/61

GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS, represented by Professor W. Biphagen, Legal Adviser to the Ministry of Foreign Affairs, assisted by Professor W. L. Haardt, advocate at the Hoge Raad of the Netherlands, with an address for service in Luxembourg at the Netherlands Embassy,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser R. Baeyens, acting as Agent, assisted by C. R. C. Wijckerheld Bisdom, advocate at the Hoge Raad of the Netherlands, with an address for service in Luxembourg at its offices at 2 Place de Metz,

defendant,

supported by:

— LES CHARBONNAGES DE FRANCE, a public industrial and commercial body having its office in Paris, represented by its general manager, P. Baseilhac,

— LES HOUILLÈRES DU BASSIN DU NORD ET DU PAS-DE-CALAIS, a public industrial and commercial body having its office at Douai (France), represented by its general manager, J. Aurel,

— LES HOUILLÈRES DU BASSIN DE LORRAINE, a public industrial and commercial body having its office at Merlebach (France), represented by its general manager, P. Signard, assisted by Roger L'Eleu, advocate at the Cour d'Appel, Paris, with an address for service in Luxembourg at the offices of Les Charbonnages de France, 103 Grand' rue,

interveners,

Application for the annulment of Recommendation No 1/61 of the High Authority of 1 March 1961 to the Governments of the Member States relating to the publication or communication of the scales, rates and tariff rules applied to the carriage of coal and steel, published in the Official Journal of the European Communities of 9 March 1961 (pp. 469 et seq.) and notified to the Kingdom of the Netherlands by letter dated 4 March 1961;

THE COURT

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

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:

1. On 12 July 1956, the High Authority sent out to the Governments of Member States the report drawn up on 21 February 1956 by the Committee of Experts on Transport, set up pursuant to Article 10 of the Convention on the Transitional Provisions.

2. On the basis of this report, negotiations took place within the special Council of Ministers, with a view to implementing common measures for the application of the provisions of the Treaty relating to road transport for the account of third parties within the Common Market. These negotiations did not lead to an agreement.

3. By letter of 12 August 1958 the High Authority requested the Governments of the six Member States to take the necessary steps to comply with the obligation to publish transport scales and rates, as provided by the third paragraph of Article 70 of the Treaty, that is to say publication accompanied by conditions which comply with the requirements for the functioning of the Common Market.

4. By letter of 29 November 1958 addressed to the High Authority, the Netherlands Minister of Transport and Waterways stated that he was ready to take the necessary measures for communicating the rates and conditions of carriage to the High Authority after the conclusion of transport agreements.
In the same letter the Minister emphasized that, so far as road transport was concerned, the Netherlands Government was of the opinion that it had no obligations other than those the object of which was to 'allow the High Authority to decide whether or not there exists discrimination within the meaning of the first and second paragraphs of Article 70', and refused to admit that specific obligations in connexion with transport could arise under Article 60 of the Treaty.
He asked, finally, that the information supplied to the High Authority should be kept secret, and offered to consider any possible modifications of the proposed method of communicating rates and conditions of carriage by road.

5. On 18 February 1959, the High Authority took Decision No 18/59 'relating to the publication or communication to the High Authority of scales, rates and tariff rules of every kind applied to the carriage by road of coal and steel for the account of third parties within the Community'.
By this Decision, taken under Article 88 of the Treaty, the High Authority stated that all Member States, including the Netherlands, had failed to fulfil an obligation imposed upon them by the ECSC Treaty.

6. On 24 April 1959, the Government of the Kingdom of the Netherlands, in conjunction with five Netherlands undertakings, lodged at the Court Registry an Application registered under No 25/59, for the annulment of Decision No 18/59 of the High Authority.
By its judgment in Case 25/59 of 15 July 1960, (Rec. 1960, pp. 723 et seq.), the Court annulled Decision No 18/59 and ordered the High Authority to pay the costs, including those of the interveners.

7. On 1 March 1961, the High Authority considered and adopted Recommendation No 1/61 to the Governments of the Member States, 'concerning the publication or communication of the scales, rates and tariff rules applied to the carriage of coal and steel'. This Recommendation covers all

types of transport within the Community. It was notified to the Netherlands Government by letter of 4 March 1961 and published in the Official Journal of the European Communities of 9 March 1961 (pp. 469 et seq.).

8. Recommendation No 1/61 is based in particular on the following considerations:

'Whereas this provision is a rule of law binding both on Member States of the Community and on the High Authority; whereas, however, in order that the provision may be given effect, in particular in relation to the various types of transport undertaking, it is necessary that the Member States should adopt implementing provisions;

Whereas provisions of this kind are either non-existent or incomplete and the High Authority is therefore obliged to formulate a recommendation calling on Member States to adopt the appropriate implementing provisions.

Whereas the implementing measures to be taken by Member States must, in nature, scope and form, be such as to make it possible for the aims envisaged in the publication or communication of scales, rates and tariff rules to be effectively achieved; whereas in this respect Member States should bear it in mind that the principle of publication or communication expressed in the third paragraph of Article 70 is not an end in itself;

Whereas publication or communication as such is merely a means of attaining other objectives of the Treaty; whereas in this instance primary importance attaches to the provisions of the Treaty concerning transport, with which those concerned, and in particular transport undertakings, must be effectively obliged to comply; whereas the relevant provisions are the following:

— Article 4 (b) of the Treaty, which taken in conjunction with the first paragraph of Article 70 provides that comparably placed consumers must be afforded comparable price conditions for transport;
— the second paragraph of Article 70 of the Treaty, which prohibits in particular discrimination in rates and conditions of carriage based on the country of origin or of destination of products;
— the third paragraph of Article 10 of the Convention on the Transitional Provisions, which provides for the establishment of through international tariffs, and for the harmonization of rates and conditions of carriage as far as may be necessary for the proper functioning of the Common Market;

Whereas, further, the measures adopted by Member States must be such as will promote the proper functioning of the common market for coal and steel as laid down in the provisions of the Treaty, particularly in Articles 2 to 5 and 60, and in the decisions of the High Authority implementing those Articles;

Whereas Member States are bound, in execution of their basic obligation under the first paragraph of Article 86, to implement this Recommendation in such a way as to facilitate the attainment of the Community's objectives;

Whereas the provisions to be adopted by Member States will attain the objectives of this Recommendation only if all necessary measures have been taken to ensure that transport undertakings comply with those provisions; whereas the Treaty does not give the High Authority the power to take action itself to check compliance by those undertakings, nor to take action in the case of any breach, and Member States must therefore themselves be responsible for drawing up their provisions in such a way that an effective check may be kept on transport undertakings and appropriate sanctions applied in cases of breach;

Whereas the relevant provisions of the Treaty cover all modes of transport within the Community; whereas

Member States are therefore bound to extend the implementing measures adopted by them pursuant to this Recommendation to all modes of transport; whereas in so doing they are entitled to take into account the individual characteristics of the various modes of transport;

Whereas the present position in the transport sector makes it necessary that Member States should comply as soon as possible with the directions given in this Recommendation; whereas 31 December 1961 accordingly appears suitable as the final date, either for direct promulgation of the necessary laws and regulations or, if lengthy procedures such as the enactment of legislation prove necessary for this purpose, for the initiation of such procedures.'

The operative part of the Recommendation provides as follows:

Article 1

1. The Governments of the Member States shall adopt all appropriate general or special measures to ensure that 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 the Member States are published or brought to the knowledge of the High Authority to such extent and in such manner and form as to:

(a) ensure that transport undertakings apply scales, rates and all other tariff rules of every kind which afford comparable price conditions to comparably placed consumers (Article 4 (b) and the first and second paragraphs of Article 70 of the Treaty);

(b) permit the implementation of measures adopted for the purpose of establishing through international tariffs and harmonizing rates and conditions of carriage (first paragraph of Article 70 of the Treaty and third paragraph of Article 10 of the Convention on the Transitional Provisions).

2. The measures adopted pursuant to paragraph (1) shall be such as to promote the proper functioning of the Common Market as laid down in the Treaty, particularly in Articles 2 to 5 and 60, and in the Decisions of the High Authority implementing those Articles.

Article 2

The Governments of the Member States shall adopt all such general or special measures as may be appropriate in order to ensure that a check be kept on compliance with existing laws and regulations and with those which may be adopted in pursuance of the objectives set out in Article 1, and that sanctions be applied in cases of breach.

Article 3

The measures adopted pursuant to Articles 1 and 2 shall cover all modes of transport. However, account may be taken of the individual characteristics of the various modes of transport.

Article 4

1. The Governments of the Member States shall adopt the measures referred to in Articles 1 and 2 by 31 December 1961 at the latest. Should it be necessary under any national law to enact legislation, or to adopt some other lengthy procedure, in order to put these measures into effect such procedures shall be initiated by that same date at the latest.

2. The Governments of Member States shall communicate to the High Authority by 31 October 1961 at the latest the content of their proposed measures.'

9. On 6 April 1961 the Government of the Kingdom of the Netherlands lodged at the Court Registry an application for the annulment of Recommendation No 1/61 under Article 33 or

alternatively, under Article 88 of the Treaty establishing the European Coal and Steel Community.

10. On 19 July 1961, Les Charbonnages de France, Les Houillières du Bassin du Nord et du Pas-de-Calais and Les Houillières du Bassin de Lorraine lodged at the Court Registry an application for leave to intervene with the object of supporting the conclusions of the defendant High Authority; this application for leave to intervene was declared to be admissible by Order of the Court of 26 September 1961.

II — Conclusions of the parties

1. The *applicant* claims that Recommendation No 1/61 of 1 March 1961 should be annulled and that the High Authority should be ordered to pay the costs.

2. The *defendant* contends that the Court should dismiss as unfounded the application of the Government of the Kingdom of the Netherlands and order the applicant to pay the costs.

The *interveners* contend that the Court should dismiss the conclusions in the application made by the Government of the Kingdom of the Netherlands and order the latter to pay the costs.

III — Submissions and arguments of the parties

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

The Government of the Kingdom of the Netherlands bases its application on four submissions: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty and misuse of powers.

It develops its arguments under two main heads:

— the procedure followed by the High Authority;

— the content of the contested Recommendation.

A — *The procedure followed*

1. The *applicant* is of the opinion that the High Authority is not entitled to address a recommendation to Member States when, as in the case of transport, the Treaty does not expressly provide for such action.

(a) In fact according to the *applicant* both recommendations and decisions of the High Authority create binding rules. The High Authority can only exercise this power, whatever form it may take, if it is conferred upon it by an express provision of the Treaty.

However, none of the Articles referred to in the Recommendation, not even Articles 8 and 14, expressly grants such power.

On the other hand, the first paragraph of Article 95, which deals with '. . . cases not provided for in this Treaty where it becomes apparent that a decision or recommendation of the High Authority is necessary . . .', provides that the decision may only be taken or the recommendation made with the unanimous assent of the Council and after the Consultative Committee has been consulted, which was not done in this case.

The *interveners* comment on this last point that in their opinion the words 'cases not provided for in this Treaty' in the first paragraph of Article 95 refer to matters which do not come under the Treaty and cannot be interpreted, as the applicant interprets them as meaning 'in all cases where the Treaty does not provide for a decision or a recommendation of the High Authority'; transport cannot be considered as one of the 'cases not provided for in the Treaty' within the meaning of Article 95.

(b) The *applicant* also claims that the Treaty does not confer upon the High Authority a general power to make recommendations which are only intended to remind the governments of Member States of their obligations under the Treaty.

It maintains that it cannot be inferred

from the judgments delivered on 15 July 1960 in Cases 20/59 *(Italian Government v The High Authority)* and 25/59 *(Netherlands Government and Others v The High Authority)* (Rec. 1960, pp. 662 and 723) that in the Court's opinion the recommendation is the only method at the disposal of the High Authority of reminding Member States of their obligations under the Treaty or that this procedure is possible, still less appropriate, in the case of transport where the Treaty makes no reference to the possibility of such a recommendation.

The *interveners* assert that, where recommendations are concerned, two different types of cases must be distinguished; those cases where the Treaty does not imply any duty to make regulations and those where the Treaty lays down binding rules, which are thus directly applicable to the States and undertakings.

In the first category of cases an express authority is necessary to empower the High Authority to make a recommendation; this does not apply to those cases where the Treaty provides for transfer of State powers to Community institutions or a sharing of powers between them and Member States.

According to the fifth paragraph of Article 70, transport only continues to be governed by the laws or regulations of the individual Member States 'subject to the provisions of this Article and to the other provisions of this Treaty'. The High Authority is therefore entitled, without express authority, to address recommendations to Member States concerning the obligations imposed upon them in connexion with transport.

The *applicant* replies that the distinction made by the interveners is not supported by the Treaty.

Their argument confuses cause with effect. The deciding factor is whether certain powers have been vested in the High Authority. Does the Treaty provide that the High Authority may, in the case of transport, address to Member States recommendations compelling them to attain the objectives which they lay down?

The effect of the interveners' interpretation would be that the High Authority, which has accurately defined powers in its own sphere of coal and steel, the exercise of which is accompanied by procedural safeguards, would have more extensive powers over transport.

(c) To sum up, the *applicant* is of the opinion that, as regards the implementing measures to be taken by Member States for putting into effect the third paragraph of Article 70, the High Authority does not have the power to make a recommendation, even if it is restricted to a reminder of their obligations under the Treaty. Therefore the contested Recommendation considered in the light of the procedure which was followed is void by reason of lack of competence and infringement of the Treaty.

The *defendant* in reply quotes extensive passages from the judgments delivered by the Court in Cases 20/59 and 25/59 and maintains that it made a recommendation within the meaning of Articles 14 and 15 of the Treaty precisely in order to comply strictly with the requirements therein contained.

In its opinion there is no doubt that these judgments lay down that a recommendation under Article 14 must be made for the purposes of the application of the third paragraph of Article 70.

The High Authority was not entitled to choose which procedure to follow; this was prescribed for it by a material ground of the judgments in Cases 20/59 and 25/59 and it was bound to comply with the rules with regard to powers which are clearly stated in them.

Having regard to this explicit, clear and unambiguous wording the observations of the applicant on the alleged incorrectness of this view and on the possibility that the Court intended a different meaning are wrong.

The defendant observes in this con-

nexion that the applicant's submission with regard to a procedural mistake relates in fact to the meaning of certain grounds of a judgment bringing earlier proceedings between the same parties to an end. The Netherlands Government therefore could and should have made use of the procedure specifically provided to settle a dispute of this kind, that is to say the procedure for construction of a judgment laid down in Article 37 of the Protocol on the Statute of the Court of Justice of the ECSC; it cannot use the normal annulment proceedings or make an application in respect of which the Court has unlimited jurisdiction.

The defendant even asks whether an argument put forward by the applicant to obtain a re-examination by the Court of a point of law, which has already been settled by a judgment in a case between the same parties, is admissible.

The *applicant's* answer to this objection is that the procedure for construction of judgments cannot be used to ask the Court to make a new decision in fresh proceedings. In this case new issues are in fact involved because their subject matter is different from those which were settled by judgments 20/59 and 25/59.

Moreover the applicant considers that in this case the Court is not prevented from stating or explaining, if necessary, its previous reasons or even deleting them and replacing them by others after examining them more closely.

2. The *applicant* argues in the second place that a recommendation which is only a simple reminder of existing obligations imposed by the Treaty and does not set any new objectives has no effect and is, moreover, incompatible with Article 88, because it can only be the subject matter of an application based on Article 33, whereas, in the case of a difference of opinion between Member States and the High Authority on the objectives of the Treaty, Article 88 provides for the institution of proceedings in which the Court has unlimited jurisdiction. Further, the applicant considers that it follows clearly from the content and general scheme of the contested recommendation that the High Authority is of the opinion that Member States have failed to fulfil an obligation imposed on them by the Treaty, that it wishes to put this omission on record and to set the Member States a time limit for the fulfilment of their obligations.

The High Authority should therefore have taken a 'reasoned decision' within the meaning of Article 88. By making a recommendation it deprives the Member States affected of certain safeguards, in particular, of the right to be given the opportunity of submitting its comments in advance and afterwards of instituting proceedings in which the Court has unlimited jurisdiction.

By adopting the procedure of a recommendation the High Authority has thus:

— failed to appreciate the limits of its powers;

— committed a misuse of powers by using a power for a purpose other than the one for which it was conferred;

— infringed the Treaty, in particular Articles 14, 15, 70 and 88;

— infringed essential procedural requirements, in particular Article 88.

The *defendant* replies that a recommendation under Article 14 is particularly appropriate for transport. In this case the one form of procedure referred to in Article 88 is neither sufficient nor appropriate.

When dealing with transport it is desirable to proceed by stages. First of all it is necessary to state, with regard to the various provisions of the Treaty dealing with the publication of scales, rates and tariff rules, the objectives

which the governments must take into account when determining the measures which they are invited to take.

It is the recommendation which in fact brings together within a specific context the provisions of the Treaty and the corresponding objectives, thereby determining in a way which is binding on the Member States — and on the High Authority — the framework within which the Member States can select the necessary measures for the application of the Treaty.

According to the *applicant* it follows from the argument of the High Authority that, by its Recommendation, it wishes to achieve more than was intended by the Court, namely to remind the Member States of their obligations.

In fact in taking note of the aims 'which first of all it is necessary to state' and which the governments must 'take into account' when they adopt the measures which they are 'invited' to take; in maintaining that it is necessary to 'proceed by stages'; even in its intention to 'determine in a way which is binding on the Member States – and moreover on the High Authority — the framework within which the Member States can select the necessary measures for the application of the Treaty', the High Authority is establishing a connexion, not laid down in the Treaty, between the third paragraph of Article 70 and certain other provisions of the Treaty which it calls 'objectives'; it is thus fixing binding objectives which go beyond the duty imposed by the Treaty on Member States to exercise their exclusive powers to make regulations in the field of transport. The High Authority is therefore exceeding the limits of its powers, whose nature the Court has pointed out.

Furthermore, by referring only to the publication of the scales, rates and tariff rules, when the third paragraph of Article 70 provides as an alternative their communication to the High Authority, it is laying down in an arbitrary and restrictive manner a criterion for achieving the objective of the Treaty.

It is the applicant's view, therefore, that the real aims of the recommendation are, on the one hand, to extend the obligations of Member States beyond the limits within which they are expressly confined by the third paragraph of Article 70 and, on the other hand, to limit in fact the choice of methods which this provision leaves to the Member States.

The *defendant* replies in the first place that the applicant is the victim of a confusion of terminology, since it employs the words 'publication' and 'publicity' without distinguishing them.

The third paragraph of Article 70 refers to the question of publicity for scales, rates and tariff rules applied to transport and, in this respect, account must be taken of the alternatives of publication and communication; the contested recommendation in no way affects the alternative.

The defendant then notes that, when such a delicate matter as the problem of transport within the Community is at issue, the application of a 'penal' procedure recording a failure under Article 88 of the Treaty to fulfil an obligation under the Treaty, this being the procedure which appears to be wholeheartedly favoured by the Netherlands Government, is pointless so long as a constructive solution is possible.

However, the recommendation procedure, whereby the obligation to be performed by Member States, defined in the third paragraph of Article 70 of the Treaty, is combined with the objectives arising from the Treaty which the Member States must take into consideration, enables the High Authority to fulfil in a positive manner the general task assigned to it by Article 8 of the Treaty, that is to say, the fulfilment of the aims of the Treaty.

In addition this non-contentious procedure leaves Member States, within

the general mandatory framework laid down in the recommendation, free to choose the measures, which, having regard to the particular situation in each country, may gradually lead to the better and more complete performance of the said obligations of the Treaty.

The *interveners* for their part maintain that by the contested Recommendation the High Authority has effectively reminded Member States of their obligations without adding any aims which are not already set out in the Treaty.

A decision which only confirms pre-existing rules cannot be annulled because it does not give rise to any ground for complaint.

The absence of any ground for complaint does not mean that the measure is lacking in legal interest. The reminder, in this case, proved to be necessary and it had to be in the form of a mandatory instruction. The recommendation was therefore the only available procedure, because an opinion is not binding.

The interveners also dispute that the only procedure which the High Authority could adopt in this case was the procedure under Article 88.

On the one hand, an administrative authority cannot be denied the opportunity of reminding the persons concerned of the existence and nature of their obligations before resorting to litigation. As the recommendation does not establish any new obligation the governments retain all their rights and safeguards for these rights.

On the other hand, the procedure used by the High Authority was in fact completely justified having regard to the circumstances of the case.

3. The *applicant,* which has no doubt that in this case the procedure of Article 88 must be followed, raises the question whether by the contested Recommendation the High Authority has not in fact, whether it intended to or not, taken a reasoned decision within the meaning of Article 88 of the Treaty. If this view is correct, it asks the Court to treat its application in its entirety as an application instituting proceedings in which the Court has unlimited jurisdiction under Article 88 of the Treaty.

According to the applicant the contested 'Recommendation', wrongly described as such, is void. In fact in many respects, it is incompatible with Article 88, in particular because it does not give the Member States, in this case the Government of the Netherlands, the opportunity to submit their comments.

The *defendant* replies that the contested Recommendation is indeed a recommendation under Article 14 and that there is no question in this case of initiating the procedure laid down in Article 88.

Therefore the application made by the Netherlands Government can only be an application for annulment and not an application in respect of which the Court has unlimited jurisdiction under the second paragraph of Article 88. For the same reason there is no question in this case of recording a failure by one of the Member States pursuant to the first paragraph of Article 88.

At the present stage of the action taken by the High Authority there is thus no reason to apply the procedure laid down by the said Article.

B — *The contests of the recommendation*

1. The *applicant,* relying on the third paragraph of Article 14 of the Treaty, takes the view that a recommendation of the High Authority lays down binding rules, although to a lesser extent than a decision, and that the wording of the specified aims and their definition and the appropriate methods of achieving these aims must therefore be stated clearly.

The applicant maintains that the contested Recommendation does not satisfy these requirements.

In fact while the third recital gives the impression that the object of the Recommendation is to invite Member States

to take appropriate measures in implementation of the third paragraph of Article 70, the other recitals and the operative part itself deal with quite different objectives, which are to be considered as determining the scope, nature and form of the implementing measures to be taken.

However, the wording of these objectives is so vague that it makes the Recommendation worthless as such.

The same objection can be raised against the statement of the reasons for the Recommendation; the legal basis of the action taken by the High Authority is not clearly defined.

By not specifying the aims to be attained the High Authority has misused its powers and the contested Recommendation is void on the grounds of lack of competence, infringement of the Treaty, in particular of Articles 14 and 15, and, as regards the failure to state reasons, of infringement of an essential procedural requirement.

The *defendant* replies that the complaint of lack of clarity refers in fact to the absence of any details concerning the measures to be implemented by Member States.

In its view this absence of details, far from being a ground for annulment, proves that it is making every effort to carry out scrupulously the procedure for recommendations advocated in the judgments of the Court.

As the Member States are free to choose the methods to be used, the measures which have to be implemented to achieve the objectives set forth in the Recommendation are neither detailed nor prescribed.

As regards the objectives which Member States must take into account in order to comply with the obligations imposed upon them by the Treaty in connexion with transport, they are set forth and the reasons for them stated with sufficient clarity in the Recommendation.

The *applicant* replies that the important factor is that the determination of the objectives laid down and the terms 'objectives' and 'methods for achieving them' are not clearly expressed in the contested Recommendation.

To be valid these two ideas should be clearly expressed: in fact, under the third paragraph of Article 14 of the Treaty, the aims of but not the methods specified in a recommendation are binding.

The applicant maintains that the contested Recommendation does not make it possible to distinguish the aims, which are binding on it, from the appropriate methods for achieving these aims, which it is free to choose.

This lack of clarity could mean that a Member State would find it impossible to ascertain the implementation measures which it has to take; the freedom to choose methods, which a recommendation must leave to a Member State, therefore becomes illusory.

If the High Authority, in breach of Articles 14 and 15, has not stated the aims of the Recommendation, it is because it intends to determine them later according to the implementing measures chosen. This is prohibited by the Treaty. It intends moreover to do it in such a way that the aims will bear only an indirect relation or indeed none at all to the question of observing obligations under the Treaty.

The *defendant* is, on the contrary, of the opinion that there is no reason in this case to define the aims and methods.

In fact the Recommendation does not include any indication at all of the methods, which are left to the free choice of Member States.

As regards the aims, the defendant confirms that the other Member States have understood without great difficulty their practical significance.

The *interveners* note that, as the Recommendation only deals with the objectives, there is therefore no question of 'a restriction of the choice of methods'.

There is moreover no ambiguity about the objectives; if they were imprecise

in any respect, it could only be to the extent to which the Treaty does not require a precise recommendation and where it is itself lacking in precision.

2. The *applicant* maintains that the contested Recommendation must be annulled, because it was not really intended to invite Member States to take the necessary measures to implement the third paragraph of Article 70, but, in breach of the Treaty, to determine unilaterally the aims to be achieved by publication or communication of scales, rates and tariff rules.

The High Authority is thus imposing on Member States and undertakings obligations which exceed those devolving upon them under the Treaty, is intervening again in a field where, as the Court decided in Cases 20/59 and 25/59 referred to above, the power to make regulations belongs only to the Member States, and is infringing the provision whereby a recommendation must leave to the Member States the choice of methods for achieving the aims therein laid down.

Finally the contested Recommendation lays down rules which not only do not arise out of the Treaty but are even incompatible with it, because they affect the freedom which the Treaty leaves to Member States and transport undertakings.

The applicant is of the opinion, therefore, that, even if the procedure adopted by the High Authority in this case were to be regarded as in order, the Recommendation must still be annulled because the High Authority exceeded its powers in giving it such content and scope and because it infringes the Treaty and in particular Articles 2 to 5 inclusive, 8, 14, 15, 60, 70, 86 and 88.

The *defendant* and the *interveners* on the other hand, are of the opinion that the contested Recommendation sets out, with regard to the implementation required by the third paragraph of Article 70, the aims arising out of the various relevant provisions of the Treaty and is thus indeed intended as a reminder of existing obligations laid down by the Treaty.

It does not adversely affect the alternative provided by the third paragraph of Article 70.

It leaves Member States the freedom to choose the methods of attaining the aims laid down. Neither the preamble nor above all the operative words contain an indication of the measures by which the Member States must acquire or maintain that knowledge of rates and conditions of carriage which is necessary for the proper functioning of the Common Market.

The fears expressed by the Netherlands Government are thus neither real nor justified.

3. The following arguments concerning the subject matter of the contested Recommendation are put forward by each of the parties in support of these views:

Article 1 (1)

The *applicant* maintains:

(a) that Article 1 (1) (a) of the Recommendation requires that the publication or the communication of the scales, rates and tariff rules be done in such a manner as to allow the High Authority and the producers and consumers of coal and steel to confirm by checking beforehand whether the provisions of the first and second paragraphs of Article 70 prohibiting discriminatory tariffs have been observed; in so doing, the Recommendation infringes the Treaty.

(b) that Article 1 (1) (b) of the Recommendation to the extent that it compels Member States to take implementing measures which by their nature, scope and form make possible the attainment of objectives not referred to in the third paragraph of Article 70, establishes a

connexion which is not mentioned in the Treaty.

The *defendant* replies that Article 1 (1) of the Recommendation, to which in particular recitals 4 and 5 refer, reminds Member States of the duty imposed upon them to publish or communicate to the High Authority the scales, rates and tariff rules applied to the carriage of coal and steel. It uses for this purpose the very terms which appear in the Treaty.

The Article then specifies the aims to be achieved by methods which Member States are free to choose. These aims are concerned with the implementation of specific provisions laid down in the Treaty concerning transport and in particular:

— the prohibition of discrimination (Articles 4 (b) and the first and second paragraphs of Article 70);
— the establishment of through international tariffs (third paragraph of Article 10 of the Convention on the Transitional Provisions);
— harmonization of rates and conditions of carriage (third paragraph of Article 10 of the Convention).

The specific objectives concerning transport, which Article 1 of the Recommendation makes obligatory, thus derive directly from the Treaty. The governments of the Member States are required, having regard to these objectives, to ensure the implementation of the provisions of the third paragraph of Article 70 by taking appropriate measures.

The *applicant* replies that the third paragraph of Article 70 of the Treaty, which creates a procedure for the supervision by the High Authority of compliance with the prohibition of discrimination in the sector of transport, is a system on its own, which takes full account of the requirements of the High Authority.

The High Authority has an exact knowledge of the scales, rates and tariff rules whether they are published or simply brought to its knowledge. It is therefore in a position to check whether they have any discriminatory effects.

The third paragraph of Article 70 also takes acccount of the requirements of transport policy in the various Member States. It recognizes that there can be unpublished as well as published rates.

It was at the express request of the Netherlands Government, which wished to secure the necessary safeguards for the implementation of its transport policy, based fundamentally on free competition, that this latter alternative was inserted in the Treaty. Moreover communication also enables strict supervision to be maintained.

The applicant points out moreover that in its judgment in Case 25/59 referred to above the Court decided that although the supervision of discrimination devolves upon the High Authority it cannot derive from this power the right of anticipatory supervision.

As for the argument of the High Authority based on the parallel nature of the rules of substantive law under Article 70 and the programme of measures to be taken for their implementation laid down in Article 10 of the Convention on the Transitional Provisions, the applicant challenges whether the measures referred to in the Convention can simply be considered as one of the objectives of Article 70. The contrary would rather appear to be true.

It then argues that the High Authority is not taking account of the consequences of the fact that the fixing of through international tariffs and the harmonization of rates and conditions of transport presupposed any agreement between Member States.

Finally it comments that the High Authority does not indicate how the Convention on the Transitional Provisions, which moreover has now expired, can itself determine the methods of implementing the third paragraph of Article 70. In particular it does not state why Member States could not ensure compliance with the obligations under

this paragraph by means of a multilateral agreement such as the Convention relating to the fixing of through international railway tariffs of 21 March 1955.

The *defendant* in reply emphasizes that the contested Recommendation does not abolish the alternative provided by the third paragraph of Article 70. It only implies — independently of the system chosen: publication or communication —that, with regard to the aims set forth, the normal functioning of the Common Market necessitates a certain knowledge, that is to say publicity, of rates applied to transport.

As regards the drafting of the present text of Article 70 the High Authority states that it does not understand what significance should be attached in law to the fact that the alternative provided by the third paragraph of Article 70 was included at the instance of the Netherlands Government.

The applicant moreover has not explained clearly or in a convincing manner why keeping the costs of carriage completely secret necessarily favours free competition between carriers and would prevent discriminatory practices.

The defendant emphasizes that, although, by its Recommendation, it has called upon Member States to fulfil the obligations laid down by the third paragraph of Article 70, it has also, in application of the general principle of co-operation contained in the first paragraph of Article 86, reminded them that they must make their choice of methods in such a way as to make possible the ultimate attainment of the objectives of the Treaty as they emerge from the various provisions concerning transport, in particular from the third paragraph of Article 10 of the Convention on the Transitional Provisions, which could be considered to have lapsed.

The defendant finally comments that Article 1 (1) (b) of the Recommendation by no means implies that harmonization could in the end be achieved independently of an agreement to be made between the Governments of the Member States. Its object is only to make sure that the measures chosen by the Member States for the fulfilment of the third paragraph of Article 70 do not prevent or interfere with the conclusion of this agreement.

Article 1 (2)

The *applicant* maintains that the reference in Article 1 (2) of the contested Recommendation to Articles 2 to 5 inclusive and 60 of the Treaty and to the Decisions of the High Authority implementing this last Article proves that the defendant persists in regarding, wrongly, the publication or communication in question under the third paragraph of Article 70 as a method, which must enable it not only to check whether the provisions of the first and second paragraphs of the said Article are observed, but also to attain other objectives, in particular reciprocal alignment of price lists of producers provided by Article 60.

To the extent to which the Recommendation lays down that the nature, scope and form of the implementing measures to be taken by Member States must assist the achievement of these aims, it is vitiated by lack of competence and infringes the Treaty.

According to the *defendant,* transport is included in the Common Market for coal and steel because of and to the extent of its importance to the functioning of this market. It is therefore natural that it should also take into account the objectives laid down by the other provisions of the Treaty which aim at maintaining the proper functioning of the Common Market. This relationship between, on the one hand, the provisions and specific objectives relating to transport and, on the other hand, the provisions and objectives governing the Common Market is moreover expressly emphasized in the fifth paragraph of

Article 70 by the words 'Subject to the provisions of this Article and to the other provisions of this Treaty, transport policy . . . shall continue to be governed by the laws or regulations of the individual Member States'.

Article 1 (2) of the Recommendation takes account of the complementary character of the rules of the Treaty relating to transport and of the proper functioning of the Common Market as more particularly provided by Articles 2 to 5 inclusive and Article 60.

So far as Article 60 in particular is concerned, it seems obvious to the defendant that a certain knowledge of scales, rates and tariff rules applied to carriage of coal and steel is important for the application of this Article, in particular to enable undertakings:

— to establish their price lists (ex works or point of parity) having regard to the delivered prices at the point of delivery, because it is these delivered prices which determine their competitive position in the market;
— to take account, for the purpose of calculating the prices applicable to different transactions, of the cost of carriage to various points of delivery;
— to align their delivered prices on the lowest delivered prices of other undertakings.

But it is only with regard to the concrete measures actually announced or implemented by the Member States that the High Authority can confirm whether they satisfy those requirements of the Treaty which are stated to be objectives in the contested Recommendation. Any other way of proceeding would have meant that the High Authority intended unlawfully to limit the choice of methods available to Member States.

The *applicant* is of the opinion that the obligations of Member States in the field of transport are laid down clearly and exhaustively and must only be strictly interpreted, as the Court has decided in its judgments.

In particular, as far as Article 60 is concerned the contested Recommendation disregards the judgment delivered by the Court in Case 25/59, which denies that there is any organic and functional correlation between the obligation to publish the prices of products and the obligation to publish transport costs. The High Authority once again is trying to arrogate to itself indirectly the power to make regulations which the Court has denied it.

Although it is undoubtedly 'important' for producers to have a 'certain knowledge' of scales, rates and conditions of carriage, there is no indication that Member States have any legal obligation in this connexion.

The *defendant* replies that the judgment in Case 25/59 — bearing in mind the circumstances in which enquiry was made as to whether the High Authority had the power to make regulations — could not examine in depth, still less decide, the question whether Member States have the right to implement the third paragraph of Article 70 in a way which would not promote the proper functioning of the Common Market.

The *interveners* state that the provisions of the Treaty must be considered as a whole, in a consistent way and not in isolation without taking account of the other provisions.

In particular Articles 2 to 5 inclusive must always be observed, even if they are not specially referred to. There can be no exception to this principle in applying the third paragraph of Article 70.

Further, the provisions laid down by Article 70 for the observance of the principle of non-discrimination in transport are necessarily connected by way of Article 4 with those provisions under Article 60 relating to prices and conditions of sale.

In practice the normal application of the provisions of Article 60 and of the Decisions of the High Authority imple-

menting them is impossible, unless the High Authority and undertakings have prior knowledge of transport rates and conditions.

It is certain first of all that the High Authority cannot detect cases of discrimination unless it is provided with basic terms of reference for appraising transport rates offered to consumers and not merely information supplied *ex post facto* concerning transport which has already been carried out.

As far as undertakings are concerned there is discrimination and the conditions of competition are distorted if an undertaking or a category of undertakings is in a position to establish its price list with full knowledge of the delivered prices of their competitors, whilst others cannot do so. On the other hand the whole machinery for alignment is based on a knowledge of the possible transport costs for products offered by competing undertakings.

The distinction between publication and communication, to which the contested Recommendation is not in any way opposed, in no way implies that the High Authority is prevented from giving third parties information with the help of particulars which have been brought to its knowledge. Quite the reverse is true. The general principles applicable in the case of transport are those which characterize the whole of the Treaty: publicity and non-discrimination.

The *applicant* claims that the arguments of the interveners, which have the merit of being frank, prove clearly that the Recommendation does more than remind States of their existing obligations. The essential question is, therefore, whether the High Authority can, contrary to the opinion of the applicant, impose upon Member States by way of a binding recommendation its own view of the scope of the obligations which devolve upon them and of the connexion between the third paragraph of Article 70 and certain other provisions of the Treaty.

The applicant points out that these 'other provisions' in the view of the High Authority are decisive for the purpose of the application of the third paragraph of Article 70 and that the contested Recommendation limits in this respect the number of possible solutions because it eliminates some of them.

It holds the view that the Treaty does not provide that information communicated to the High Authority may be brought to the knowledge of third parties. Finally it argues that neither an appropriate fixing of prices nor appropriate operation of alignments depends in fact upon the publication and fixing of transport costs. It is never impossible for a producer to ascertain current prices.

Article 2

The *applicant* maintains that Article 2 of the Recommendation, which obliges Member States to adopt general and special measures in respect of checks and sanctions, is an interference, prohibited by the Treaty, with the sovereignty of Member States, who in this field have retained their power to make regulations.

The *defendant* is of the opinion that the legal foundation of Article 2 of the Recommendation is the first paragraph of Article 86 of the Treaty.

The High Authority has no power to check and, if necessary, apply sanctions against transport undertakings whose practices tend to frustrate the efforts made to achieve the objectives of the Treaty. That is why it has asked Member States to make provision, in the laws and regulations to be adopted in order to attain the aims stated in the Recommendation, for the possibility of checks and the imposition of sanctions without which such measures would be a dead letter.

Article 2 does not in any way adversely affect the sovereignty of Member States. On the contrary the objection could be

raised that it is superfluous: it is assumed that Member States wish to fulfil their obligations effectively and to ensure that they are observed.
In any case it is impossible to conclude that this Article is illegal without having first established the illegality of Article 1, compliance with which it is intended to guarantee.

Article 4

The *applicant:*

(a) draws the following conclusions from the fact that Article 4 (1) grants the governments of Member States a time limit within which to adopt the measures referred to in Articles 1 and 2:

— either Articles 1 and 2 of the Recommendation are not restricted to reminders of existing obligations and, for this reason, are void and therefore Article 4 (1), which fixes the time limit, is also void;

— or Articles 1 and 2 are restricted to such reminders and in that case Article 4 (1), which fixed the time limit for the fulfilment of obligations under the Treaty, is void because the High Authority should have made use of the procedure under Article 88;

(b) maintains that Article 4 (2) of the Recommendation also infringes the Treaty in that it obliges the governments of Member States to communicate to the High Authority the content of the proposed measures to enable it, as the final recital of the statement of reasons discloses, to carry out checks in advance whereas the Treaty only provides for *a posteriori* checks under Article 88.

The *defendant* replies that it is normal and logical that, when it calls upon the Governments of the six Member States to adopt the measures necessary for implementing certain provisions of the Treaty, it should fix time limits in order to facilitate common and concerted action. A time limit prescribed in these circumstances is only an administrative measure without any legal effect of its own. It cannot be detrimental to the interests of Member States. On the contrary it prevents the High Authority from initiating, before its expiration, the procedure under Article 88.
The communication of the content of the measures proposed by the governments is only laid down so as to enable the High Authority to submit any comments it may have to the governments before the measures concerned come into force.
The object of Article 4 therefore is to help the governments. It is prompted by considerations of efficiency and a desire for economy of effort in the action which the governments are called upon to take. It is better in fact to examine and possibly criticize the measures during their preparatory stage rather than after their adoption.
In addition the defendant is of the opinion that Article 4 is in no way prejudicial to the rights of the applicant, who therefore has no interest in its annulment.

IV — Procedure

The procedure both in the original case and in the intervention proceedings took the normal course.

Grounds of judgment

The admissibility of the application by the Netherlands Government and the intervention by Les Charbonnages de France and others has not been challenged by the parties and there are no reasons for the Court to raise the matter of its own motion. The original application and the application to intervene are therefore admissible.

I — The procedure followed by the High Authority

1. It is appropriate to consider whether the provisions of Article 70 of the Treaty lay down for Member States obligations with which the High Authority has to ensure compliance or whether this Article is only a declaration of principle which does not imply any duty on the part of either the Community institutions or the Member States.

A

(a) It emerges from the clear wording of Article 70 of the Treaty that the High Contracting Parties recognize in the case of transport:

(1) 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';

(2) that this necessity implies more particularly the prohibition of the types of discrimination which are more fully set out in the second paragraph, a prohibition moreover which is strengthened by the exception in the fourth paragraph;

(3) that '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';

This paragraph is a concrete and binding provision.

(b) The fourth indent of the second paragraph of Article 5 imposes on the High Authority the duty to ensure the observance of the rules laid down in the Treaty.

This obligation moreover is confirmed by Article 8 of the Treaty.

The High Authority has therefore the power to require States to fulfil their obligations under Article 70.

B

1. Article 14 places at the disposal of the High Authority 'in order to carry out the tasks assigned to it' two courses of action, which it must use 'in accordance with the provisions of this Treaty'.

The question therefore is whether the High Authority, which has to ensure that Article 70 is observed, could 'in accordance with provisions of the Treaty' take action by way of a recommendation.

The provisions of Article 70, and in particular the first and second paragraphs thereof, are addressed first to the Member States who hold the power to make regulations in this field. This view is confirmed by the fifth paragraph of the said Article 70, according to which transport policy shall continue to be governed by the laws or regulations of the individual Member States, subject to the provisions of that Article and to the other provisions of the Treaty. With this reservation, transport undertakings are not subject to the power to make regulations vested in the High Authority, which is only empowered to require of Member States that they ensure the observance of Community rules by means of their national powers. Furthermore, this view is confirmed by the fact that the third paragraph of Article 70 does not provide either expressly or by implication for a power on the part of the High Authority to apply sanctions against transport undertakings.

From these premises the conclusion to be drawn is that the absence in Article 70 of any provision for the High Authority to legislate directly shows that, subject to the reservation expressed at the beginning of the fifth paragraph of the said Article, the Treaty does not confer upon it in the field of transport any direct executive power.

It follows from the above considerations that the only manner in which the High Authority is empowered to ensure that the provisions of the third paragraph of Article 70 are observed is by way of a recommendation addressed to the Member States, a recommendation which specifies their obligations under the Treaty but which cannot impose on the said Member States new obligations which have no basis in the Treaty.

This means that the disputed Recommendation has been made and addressed to Member States by virtue of a power duly vested in the High Authority.

2. There is therefore no need to dwell any longer on the applicant's submission that, in the absence of an express authorization in the Treaty, the High Authority could only derive power to make regulations in this case under the first paragraph of Article 95 which applies to 'cases not provided for in this Treaty where it becomes apparent that a decision or recommendation of the High Authority is necessary to attain . . . one of the objectives of the Community. . .'

The only object of the first paragraph of Article 95 is to institute special rules for departing from the Treaty with the object of empowering the High Authority to meet an unforeseen situation.

The circumstances in this case are different because, as has just been shown, no such departure from the Treaty is involved since the High Authority has applied the Treaty in circumstances covered by its provisions.

II — The nature of the contested measure

The contested Recommendation does not imply, as the applicant claims, a finding that the Netherlands Government has failed to comply with an obligation directly arising under the Treaty, but represents only an instruction defining and clarifying the extent of the duty of Member States under the third paragraph of Article 70.

In ensuring compliance with Article 70 within the limits of its powers by specifying the aims implied by that Article and the duty of Member States to provide for its implementation, the High Authority did not make any finding of a failure to act capable of setting in motion the procedure under Article 88.

Consequently the method of a recommendation adopted in this case by the High Authority cannot deprive the applicant of the right to institute proceedings, for which provision is made under that Article and in which the

Court has unlimited jurisdiction nor can its actions amount to an abuse of procedure.

The criticisms made of the Recommendation in this respect are therefore unfounded.

III — The content of the Recommendation

A — *General*

As far as the content of the regulation is concerned, the applicant complains that both the statement of reasons and the operative part are not sufficiently clear; that the High Authority did not confine itself to dealing with the aims but by implication fixed the methods in the Recommendation, thus depriving the applicant of the possibility of choosing them, and that as a result in the present case there is not a recommendation but an actual decision.

The contested Recommendation does not imply any obligation with regard to the methods to be adopted in connexion with the aims of the Treaty. It only mentions the obligation to achieve certain aims by requiring Member States to ensure that the third paragraph of Article 70 is appropriately implemented.

The States are completely free in the choice of measures left to their discretion provided that such measures conform to the stated aims.

Further, the applicant has failed to define in what respects the High Authority has limited the choice of methods. As a result the contested Recommendation, far from amounting to a decision, satisfies the principles of the third paragraph of Article 14 of the Treaty and does not justify the complaint of misuse of powers.

B — *Particular provisions of the Recommendation*

1. The applicant makes two different complaints with regard to Article 1 of the Recommendation:

(a) First, it raises the objection that paragraph (1), contrary to the Treaty, transferred to Governments on the basis of the third paragraph of Article 70 the duty of adopting all general or special measures to enable producers and consumers of coal and steel to carry out 'checks in advance' in order to determine whether the provisions of the first and second paragraphs of the same Article are observed in the case of the carriage of coal and steel.

This submission is misconceived, as the Recommendation confines itself to requiring Member States to provide within the meaning of the third paragraph referred to above that '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'.

(b) Secondly, the applicant maintains that the aims attributed by the contested Recommendation to the provisions of the third paragraph of Article 70 of the Treaty go further than the objectives expressly and, in its view, definitively set forth in the first and second paragraphs of this Article. In particular, by including the aims stated in the third paragraph of Article 10 of the Convention of the Transitional Provisions and those aims specified in Articles 2 to 5 and Article 60 of the Treaty, the Recommendation, by virtue of its nature and scope, goes beyond the area of application of Article 70.

It is appropriate to examine separately the complaints concerning Article 1 (1) and (2) respectively of the Recommendation:

(i) So far as Article 1 (1) of the Recommendation and more particularly subparagraph (a) of this provision is concerned, Article 4 (b) of the Treaty, which prohibits all discrimination in general and expressly mentions transport, is the basic principle for the purpose of the first and second paragraphs of Article 70. The reference to this provision of principle is therefore entirely justified.

It was proper for the Recommendation to mention the aims laid down in the third paragraph of Article 10 of the Convention on the Transitional Provisions. This Convention is provisional only as regards the procedure for its implementation but the principles which it establishes have permanent effect.

(ii) So far as concerns the reference in Article 1 (2) of the Recommendation to Articles 2 to 5 of the Treaty, there is no justification for finding in the third paragraph of Article 70 a self-contained system serving solely the aims referred to in the first and second paragraphs, that is to say the application to the carriage of coal and steel of comparable prices for comparably placed consumers in order to prevent discrimination in this field.

There is nothing in the wording of the third paragraph of Article 70 to show that this provision only refers to the supervision of the fulfilment of obligations imposed by the first and second paragraphs of this Article. The first three paragraphs of this Article lay down three complementary obligations which are intended, each dealing with a different aspect, to eliminate certain obstacles to the Common Market and to guarantee its functioning according to the principles established by the Treaty. It is a recognized principle of law and one which has been confirmed in the previous decisions of the court

that the provisions of the Treaty must be read together. They complement and supplement each other.

It must be inferred from these findings that the third paragraph of Article 70, far from being of restricted and limited application, must be applied to transport within the framework of the general scheme of the Treaty and of the functioning of the Common Market for coal and steel as set forth in particular in Article 2 to 5 of the Treaty.

The applicant complains in particular that Article 1 (2) of the Recommendation assigned to it a task in connexion with implementing, in particular, Article 60 of the Treaty and thereby imposed upon it an obligation to cooperate, which has no justification in the text of the Treaty. This complaint cannot be upheld.

In fact the contested provision is based on the first paragraph of Article 86 of the Treaty which requires Member States to facilitate the performance of the Community's tasks. Far from imposing new duties on Member States Article 1 (2) of the Recommendation is therefore only intended to facilitate the performance of the High Authority's tasks, in particular within the framework of Article 60 of the Treaty. Member States cannot obstruct the performance of this task by the manner in which they adopt the measures referred to in Article 1 (1) of the Recommendation.

Furthermore, it follows from the fifth paragraph of Article 70 that, although transport policy continues to be governed by the power of individual Member States to make laws and regulations, this general jurisdiction is subject to the restrictions which arise not only from the obligations specified in Article 70 but also from the 'other provisions' of the Treaty. Although it is true that the price lists which must be published according to Article 60 (2) (a) of the Treaty do not include transport costs as a constituent element in fixing prices, a knowledge of such costs is necessary in order to exercise the right, reserved to undertakings by Article 60 (2) (b), to align their delivered prices on the lower delivered prices of other undertakings.

In fact the secret nature of exceptions from published tariffs which have been granted to certain undertakings divests these tariffs of any practical value and may falsify calculations made by competitors based on tariffs which they could normally assume are effective and applied in practice. The High Authority is therefore entitled to take the view that the obligation to guarantee appropriate publicity for transport rates is part of its general task to ensure the attainment of the objects laid down by the Treaty and it has

the right to require Member States to have regard to this task by taking the measures referred to in Article 1 (1) of the Recommendation.

The High Authority was thus entitled to make the attainment of the objectives of Article 60 the aim of the contested Recommendation.

It follows from this that the same considerations apply to the implementing decisions taken by the High Authority on the basis of this Article.

2. The applicant complains that Article 2 of the Recommendation disregards the sovereignty of Member States by obliging them to adopt all appropriate measures by establishing a system of checks and sanctions to ensure compliance with the legislation at present in force or to be enacted for the purpose of achieving the aims set out in Article 1.

However there is the risk that the measures to be adopted by Member States in order to fulfil their obligations under Article 70 of the Treaty and referred to in Article 1 of the Recommendation might have no effect in the absence of any checks on their implementation or compulsory powers. The taking of these measures is therefore the obvious and inevitable complement of the obligations imposed upon governments which are entirely responsible not only for providing for the attainment of the aims of Article 70 but also for ensuring their implementation.

3. The applicant maintains that the fixing of the time limit imposed upon governments by Article 4 (1) of the Recommendation:

(a) either implies that Articles 1 and 2 of the Recommendation impose upon Member States new obligations, which are void because they have no legal foundation and would therefore entail the nullity of Article 4 (1);

(b) or are only intended to refer to the carrying out of pre-existing obligations, non-compliance with which could only be determined under Article 88.

With regard to (a), this argument confuses the creation of a new obligation with giving concrete form to a pre-existing obligation. The latter applies in this case, and it is logical that it should involve also the fixing of a time limit.

With regard to (b), the fixing of a time limit does not put the contested Recommendation on the same footing as the phase initiating the procedure under Article 88. The procedure set out in this Article is not initiated automatically by the expiration of a time limit but presupposes that an examination of the situation has led the High Authority to 'consider' that there has been a failure to fulfil an obligation under the Treaty. Any finding that

such a failure exists is precluded in this case, to the benefit of governments, so long as the period fixed for the fulfilment of this obligation has not expired.

4. The applicant is of the opinion that the fact that Article 4 (2) of the Recommendation requires the governments of the Member States to communicate to the High Authority by 31 October 1961 the content of measures which they propose to adopt in order to implement the contested Recommendation is an infringement of the Treaty.

This provision is only intended to enable the High Authority and the Member States to present their views one to another on a non-contentious basis. As the intention of this procedure is to secure cooperation between the parties, it cannot provide the applicant with any grounds for complaint and therefore does not give the Court any grounds for criticism.

The submissions concerning Article 4 are not justified.

Costs

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

The Government of the Kingdom of the Netherlands has failed in all its submissions and must therefore bear the costs.

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, 3, 4, 5, 8, 14, 15, 33, 60, 70, 86, 88 and 95 of the Treaty establishing the European Coal and Steel Community;
Having regard to Article 10 of the Convention on the Transitional Provisions;
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. Dismisses the application;

2. Orders the applicant to pay the costs of the action.

Donner Riese Rossi

Delvaux Hammes Trabucchi Lecourt

Delivered in open court in Luxembourg on 12 July 1962.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 7 JUNE 1962[1]

(Cases 9/61 and 11/61[2])

Mr President,
Members of the Court,

Although the proceedings brought by the Dutch and Italian Governments are not joined cases, I should nevertheless like to combine my views on both cases and give one single opinion. The identity of the matters in dispute, the similarity of the interests being defended and the large measure of common ground in the arguments put forward permit such a procedure in my view, and indeed make it appear desirable for the purpose of an effective discussion of the problems in dispute. It goes without saying that, having regard in particular to the status of the applicants, I will make it my business to carry out an exhaustive evaluation of all the issues which have arisen, for a neglect of individual arguments as a result of the joint treatment of both applications could naturally not be contemplated.

The proceedings are concerned with the repeated efforts of the High Authority to require Member States of the Community by binding measures to bring about in the field of transport a situation which in its opinion is prescribed by the Treaty. They follow the proceedings in which, pursuant to applications also made by the Dutch and Italian Governments, the attempts of the High Authority to activate Member States by its Decisions of 18 February 1959, which had their legal basis in Article 88, were declared inadmissible.

After publication of the judgments in Cases 20/59 and 25/59 the High Authority issued the now contested Recommendation No 1/61 by which it intended to induce the governments of the Member States to take implementing measures

1 — Translated from the German.
2 — Government of the Italian Republic v High Authority of the European Coal and Steel Community.