Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 14, 33, 35 and 88 of the Treaty;
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 Coal and Steel Community and the rule concerning costs.

THE COURT

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicant to pay the costs.**

Donner Riese Rueff

Delvaux Hammes Rossi Catalano

Delivered in open court in Luxembourg on 4 February 1959.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 27 NOVEMBER 1958[1]

Mr President,
Members of the Court,

The applicant association, which is an association under Netherlands law and a coal producers' association within the meaning of Article 48 of the Treaty of 18 April 1951, asks you to declare void on the ground both of infringement of the Treaty and of misuse of powers (and here I quote the application) 'the decision of the High Authority concerning the tax-free bonus granted to underground miners and known as the Bergmannsprämie (miner's bonus) and also as Schichtprämie (shift bonus) which coal-mining undertakings of Western Germany have been paying to their underground miners since 15 February 1956 and which is financed out of public funds by the Federal Republic of Germany'. 'The decision', the application adds, 'has not been published by the High Authority'.
The conclusions of the application claim that, in addition to declaring the contested decision void, the Court should

> 'declare that the High Authority shall record in a decision that, by financing out of public funds a tax-free bonus granted to miners working underground, the Federal Republic of Germany has failed

to fulfil its obligations under the Treaty and that it must accordingly annul this measure'.

As the Court will be aware, the High Authority has, in the alternative, set forth its case on the substance but contends on various grounds for the inadmissibility of the application, one of them being that there is no decision. It is this question which first falls for consideration.

This must be done first in the light of Article 33 (positive decisions) and then of Article 35 (proceedings for failure to act).

I – The first question to be answered is whether a decision was taken by the High Authority within the meaning of Article 14 of the Treaty and which the applicant may impugn by instituting proceedings under Article 33?

No such decision was put in. As we have seen it was, according to the applicant Association, an unpublished decision. Its existence was, according to the applicant, in any case established by the letter addressed by the Vice-President of the High Authority to the Association on 7 August 1957 in reply to a request of the preceding 11 July which must be regarded as a notification enabling proceedings to be instituted before the Court in pursuance of the third paragraph of Article 33. The text of the decision itself was never made known to the applicant, despite the request made to this end to the High Authority on 22 August 1957 and which has remained unanswered. Incidentally, this proves that, contrary to the applicant's assertions, there has been no notification, but this is of little importance since it has a bearing only on the period for instituting proceedings.

As far as the applicant is concerned, therefore, there is in existence a decision the substance of which is known but the wording and date of which the applicant did not know when it lodged its application. In its reply, however, the applicant, having become aware of the correspondence exchanged between the German Government and the High Authority, which was put in by the latter, considers the decision to be contained in a letter of 21 June 1957 addressed by the President of the High Authority to the Minister for Economic Affairs of the Federal Republic and in which the High Authority's views concerning the legality of the shift bonus are expressed in clear terms.

As far as the High Authority is concerned, no decision was ever taken. This view is confirmed by a letter which it sent on 7 October 1957 to the Netherlands Government which, too, had requested the High Authority 'for a copy of the final decision' taken regarding the underground miners' shift bonus paid by the Federal Government. The letter states ... *'Since no decision has been taken,* it is impossible to provide the Netherlands Government with a copy of it'.

I do not propose to go over the facts, of which you are very well aware and on which the parties are agreed. They have been established beyond any possible dispute by the exchange of correspondence on the file between the Federal Government and the High Authority and between the latter and the applicant. In this connexion it is important to differentiate between, on the one hand, the legal attitude of each of the parties concerned and, on the other, the procedure which each of these attitudes must, under the provisions of the Treaty, involve.

The position in law as regards the legality of the shift bonus is threefold. In the case of the *Federal Government,* which is not a party, or even an intervener, in the present dispute, the question must be considered only in the light of Article 67 of the Treaty (adverse effect on conditions of competition) and not of Article 4. There is in fact no question of an aid prohibited under Article 4 and the conditions laid down in Article 67 for action by the High Authority are not satisfied. It was in a conciliatory spirit that, after 18 June 1957, the German Government, without abandoning its legal standpoint, adopted the idea of imposing a charge on the mining industry which offset the advantage which it obtained through the financing of the shift bonus out of public funds.

As far as the High Authority is concerned, the shift bonus constitutes an aid prohibited under Article 4 of the Treaty unless it is offset by an equivalent and appropriate charge, borne by the mining industry, in which case there is no longer any infringement of the Treaty. Finally, *in the applicant's view,* the shift bonus is *per se* illegal and no offsetting can make it compatible with the Treaty.

On the question of procedure the parties appear to be agreed: if, in the High Authority's view, the measures adopted by the German Government create a situation which conflicts with the Treaty, the High Authority can only avail itself of the procedure in Article 88.

This is in fact the procedure which it set in motion. Article 88 provides as follows:

> 'If the High Authority considers that a State has failed to fulfil an obligation under this Treaty, it shall record this failure in a reasoned decision after giving the State concerned the opportunity to submit its comment.'

This formal requirement was fulfilled on 2 May 1956. The time-limit set for the Federal Government to submit its comments, originally fixed as being the end of June 1956, was extended on several occasions; the question then ceased to arise while letters were exchanged with a view to reaching a mutually acceptable settlement. This brings us to the two essential documents:

1. The letter of 18 June 1957 from the Federal Minister for Economic Affairs in which, without abandoning his Government's legal standpoint concerning the validity of the shift bonus, he, as we have seen, for the first time adumbrates a solution in the form of the imposition of a countervailing charge on the mining industry, such as the discontinuance of the repayment of the employer's contributions to the miners' old-age insurance used by the mining undertakings.

2. The High Authority's letter of 21 June 1957 which confirmed this position and declared that, in its view, the contemplated discontinuance constituted an offsetting which made it possible for the shift bonus to be maintained, subject, however, to a statement listing the circumstances in which the shift bonus must continue to be regarded as illegal.

Subsequently, as the Court will be aware, the exchange of correspondence continued and we do not know whether it has been concluded.

There can therefore be no doubt, and the applicant recognizes this, that the procedure under Article 88 has not gone further than the first stage, which consists in giving the State concerned the opportunity to submit its comments and which, at the time when proceedings were instituted, had not resulted in a decision recording a failure; in fact no such decision has at this moment been taken.

In consequence, the only remaining question is whether the High Authority's letter of 21 June 1957 constitutes a 'decision' within the meaning of Article 14 of the Treaty, which can be the subject of proceedings instituted under Article 33.

The answer must, in my opinion, be in the negative.

Not, of course, on the basis of procedural requirements. I should regard too great an insistence on formality in this case as undesirable and I generally share the opinion expressed by several authorities who have written on this subject, in particular Steindorff in 'Die Nichtigkeitsklage im Recht der EGKS', 1952, page 20 *et seq.*, and Heinrich Matthies in 'La décision de la Haute Autorité en tant qu'objet du recours en annulation', a paper submitted to the Stresa Congress. Measures adopted by the High Authority can take a number of forms: regulation of general decisions, adopted by the Board of the High Authority and published in the Official Journal of the Community over the signature of the President stating that he is acting 'for the High Authority'; ordinary letters addressed by the President of the High Authority in its name to their addresses, which are also published in the Journal Officiel of the Community

and the contents, if not the drafting, of which must also be the subject of decision by the Board; and individual authorizations which are merely notified, etc. The terminology of the Treaty is itself not always consistent; for example, the word 'delibération' appears alongside the word 'décision'. Finally, there is the delicate subject of decisions adopted by proxy or by virtue of grant of regulatory powers, for example in connexion with the Staff Regulations of Officials.

I am myself inclined to share the view of Steindorff (op. cit. page 25), according to whom:

> 'Apart from purely material acts which fall into the category of contestable measures it would appear that any measure taken by the High Authority *which has widespread legal repercussions in the world at large and involves the exercise of power by a public authority* can be the subject of proceedings for annulment. Such a measure must rank as a decision or recommendation within the meaning of the Treaty.'

The decision or recommendation must be seen to *constitute the legal method laid down by the Treaty to enable the High Authority to exercise the powers conferred upon it by the Treaty.* These powers must be exercised in accordance with certain procedural requirements, which act as a safeguard for those concerned and for third parties (prior notice by the Consultative Committee or by the Council, publication in certain circumstances, etc.) and they must also be exercised in accordance with the basic conditions, namely in the circumstances and within the limits laid down by the provisions of the Treaty.

This applies in particular when a case, like the present one, involves *a measure of intervention* by the High Authority. One of its tasks is to keep a constant watch on the observance of the prohibitions laid down by the Treaty, such as those in Article 4. Another is the power conferred upon it to take economic action to change the condition of the market: it then enjoys a power of appraisal, often discretionary, which however is kept within set limits. The present case provides an example of the first of these tasks: does the situation created by the measures of the Federal Government conflict with the Treaty, particularly in the light of the prohibitions in Article 4? That is the question which should occupy the minds of the High Authority. If it considers that the outcome of this investigation is in the negative, it does nothing; perhaps it is wrong, and then the machinery of proceedings for failure to act comes into play. I shall come back to this point in a minute. If the opposite is true, it takes action with a view to bringing to an end the situation which it judges to be illegal, but it can do so only on the conditions laid down in the Treaty, namely by means of a decision or a recommendation based on an expressly conferred power and in accordance with the formal requirements laid down in a provision of the Treaty, and if this power did not exist it would be necessary to create it on the basis of the procedure laid down in the first paragraph of Article 95. Accordingly, there are really only two alternatives in such circumstances: to do nothing or to take action.

From this it is clear that a mere expression of view, whether communicated by a letter, a declaration to the Common Assembly or in any other way and in which the High Authority tries to explain the reasons why such and such a situation under such and such conditions does not, in its view, conflict with the Treaty is not a 'measure which has widespread legal repercussions in the world at large and involves the exercise of power by a public authority' to use Steindorff's phrase; it is not a decision within the meaning of Articles 14 and 33.

I cite by way of comparison with national law the two judgments of the French Conseil d'État in *Merveilleux*, 26 May 1944, Recueil page 155, and *Cerciat* of 27 April 1953, Recueil page 195.

Apart from this, no one can fail to appreciate the complications which a wider concept would involve. The issues which arise from the application of the Treaty are often of extreme delicacy and, as we have

seen in the present case, the repercussions of any intervention measure may be grave indeed. It would be disastrous if any expression of a legal point of view by the High Authority made it possible for the question to be placed before the Court at any moment in time simply because of an unpublished letter and in respect of which, therefore, time does not begin to run. Such a threat that, at any moment, proceedings might be brought would seriously handicap negotiations, which are often delicate, nor is it necessary for the legal protection which must be given to those concerned.

Before leaving this point, I should like to answer the argument which the applicant based on a passage in the judgment of the Court of Justice of the ECSC of 16 July 1956 in Case 8/55, *Fédération Charbonnière de Belgique*[1] in which a statement contained in a letter from the High Authority to the Belgian Government and threatening to withdraw the privilege of equalization if certain conditions were not fulfilled was held to be a decision which could be the subject of proceedings. The essential difference between that case and the present one is that, in *Fedechar there was an intervention by the High Authority,* which was clear both from a formal decision and from a number of passages in a letter which were in fact part and parcel of the decision and which the Court held to be *also* a decision, despite its informality and the legal disadvantages of such a finding. The passage in question referred to one of the methods of intervention adopted by the High Authority in exercise of the powers conferred on it by the Convention for the purposes of adjusting the equalization of Belgian coal.

In the present case, on the other hand, there was, as we have seen, no intervention and therefore no positive decision.

II — But (and this brings us to the second question) was there not *refusal to intervene* in circumstances which would make it possible to regard the action as one for failure to act under Article 35?

In the present case, the relevant provision is the first paragraph of Article 35 which applies 'Wherever the High Authority is required by this Treaty, or by rules laid down for the implementation thereof, to take a decision or make a recommendation and fails to fulfil this obligation . . .'. According to the applicant, the introduction of the shift bonus or, to be more precise, the financing of it by the Federal Republic out of public funds constitutes an aid or subsidy prohibited by Article 4 of the Treaty and the High Authority is *bound* to take a decision putting an end to the situation which, as we have seen, can be done only by following the procedure in Article 88. The decision which the High Authority is bound to take must, therefore, be one under Article 88.

From this point of view the circumstances of this case bear comparison with those in Joined Cases 7 and 9/54, *Groupement des Industries Sidérurgiques Luxembourgeoises,* which gave rise to the judgment of 23 April 1956. In that case, too, the applicant contended that a certain situation, which in that case had arisen as a result of action by a Luxembourg public authority, was contrary to the Treaty and that the High Authority was under a duty to bring it to an end by recording in a reasoned decision within the meaning of Article 88 that, by failing to take the necessary steps to stop these illegal actions, the Luxembourg Government had failed to fulfil an obligation under the Treaty. The only difference is in fact that, in the present case, the alleged failure was the result of a measure taken by the Government itself.

The judgment of 23 April 1956 is highly relevant because it supports the opinion which I expressed concerning the meaning of a decision which can be the subject of proceedings within the meaning of the Treaty. As the Court will be aware, in that case proceedings had first been instituted under the third paragraph of Article 35 against the implied decision which was to be inferred from the High Authority's two months' silence concerning the request which the applicant group had submitted to the High Authority asking it to bring to an

1 — Recueil, Vol. II, p. 225

end the situation which the group considered to be illegal; but, after the institution of proceedings, the High Authority had on this occasion expressly refused, in regard to one of the points in dispute, to take the decision for which the applicant was pressing. The Court held that this express refusal made no difference to the legal position created by the existence of an implied decision of refusal already inferred on the expiry of the two months' period since the matter was raised, and that there was no need for a decision in the second proceedings which *ex cautela abundanti* the applicant had instituted against the express refusal. On this point the crucial part of the judgment is the following (Recueil, page 89):

> 'Having regard, moreover, to the fact that the subject of the proceedings is not the silence of the High Authority but its refusal to take a decision within the meaning of Article 14 of the Treaty which, according to the applicant, it was under a duty to take.'

All that need be said is that the decisions of the High Authority in such circumstances can only be positive intervention decisions (Article 33) or negative decisions refusing to intervene (Article 35); in the latter case it does not matter whether the refusal was express or implied.

On the other hand it must be duly established in accordance with the procedure laid down in Article 35, namely after the matter has been raised with the High Authority. In this respect the wording of Article 35 leaves no room for doubt:

> 'Wherever the High Authority is required by this Treaty, or by rules laid down for the implementation thereof, to take a decision or make a recommendation and fails to fulfil this obligation, *it shall be for States, the Council, undertakings or associations, as the case may be, to raise the matter with the High Authority.*'

This requirement is of the greatest importance not only because it is from the approach made to the High Authority that, if the High Authority does not take a decision, the three months' period laid down for instituting proceedings before the Court begins to run, but also because of the seriousness of the step which calls into question the High Authority's failure to act and, by letting it know that proceedings are due to be instituted immediately afterwards, compels it to express within a comparatively short time its views on the legality or otherwise of such failure. The object of the procedure in Article 35 is in that particular case to protect the general rule requiring preliminary administrative action.

In the present case, this vital requirement was not fulfilled.

It certainly was not fulfilled by the letter of 11 July 1957 from the applicant to the High Authority and which concludes with the following sentence:

> 'So that we may know where we stand on this question, we should be grateful if you would be good enough to inform us of the decision which you have taken in this matter.'

This bears no resemblance to a request addressed to the High Authority to take a decision under Article 88 concerning the Government of the Federal Republic with the object of bringing to an end a situation considered to be illegal. The applicant does not even express the view that the situation is illegal.

In its letter of 22 August 1957, the applicant states that it is 'contemplating' instituting proceedings before the Court of Justice against the decision which believes the High Authority to have taken concerning the shift bonus. But, if the Court accepts what I said earlier, it will find that there was no decision on the part of the High Authority which could be the subject of proceedings. Nor, moreover, is this letter, any more than the earlier one, a formal request that the High Authority should take action within the meaning of Article 88.

It is only *in its application* that the applicant can be considered to have submitted such a request for the first time. It does so in the part of the conclusions which I have already quoted:

> 'that the Court should:
> annul the contested decision;

declare that the High Authority *shall record in a decision* that the Federal Republic of Germany had failed to fulfil an obligation under the Treaty etc.'.

But these are conclusions submitted before the Court, which, in my opinion and for the reasons I have just explained, are not a valid substitute for the 'preliminary' procedural requirement laid down in Article 35.

The foregoing considerations, which lead to the conclusion that the application is inadmissible, may well seem somewhat technical. Notwithstanding this, I am of the opinion that a clear decision of the Court on this issue will in the future be of great value to all concerned; nor would the applicant have any cause for complaint on grounds of natural justice because no decision has yet been taken under Article 88, no period of time has begun to run and it is still possible for the procedure under Article 35 to be set in due motion. Perhaps the intervening period will make it possible to reach an agreed solution which satisfies the various interests involved.

My recommendation is:

that the application be dismissed; and

that the applicant be ordered to pay the costs.