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.

for the publication or communication of scales, rates and tariff rules for the carriage of coal and steel. The Recommendation with a covering letter of the High Authority was addressed to the governments of all Member States — including the Government of the Kingdom of the Netherlands and the Government of the Italian Republic. In addition, it was published in the Official Journal of the European Communities of 9 March 1961 at page 469.

The applications are based on Article 33 of the Treaty. The Netherlands Government relies in the alternative on Article 88 of the Treaty. Both Governments seek the complete annulment of the entire Recommendation. The following parties have intervened in the proceedings brought by the Netherlands Government:

— Les Charbonnages de France,
— Les Houillères du Bassin du Nord et du Pas-de-Calais,
— Les Houillères du Bassin de Lorraine.

They support the conclusions of the High Authority so far as their objective is concerned but put forward some arguments which the High Authority expressly states do not completely correspond with its own views. At this juncture it should be emphasized that naturally when the interpretation of its statements is at issue the opinion of the High Authority prevails over that of the interveners.

The applicants' complaints may be summarized as follows:

— They relate to the procedure which has been adopted (inadmissibility of a recommendation; non-observance of the provisions of Article 88);
— They are directed against defects in the form of the Recommendation (lack of clarity, absence of any differentiation in the content, insufficient reasons);
— Finally, and above all, they relate to the content of the contested measure.

In the third group the arguments put forward are principally as follows:

— the Recommendation does not allow the governments any scope for exercising their discretion;
— the third paragraph of Article 70 cannot be used to implement the price provisions of the Treaty (Article 60);
— it is not the object of the third paragraph of Article 70 to ensure that preventive checks are applied with regard to the observance of the prohibition against discrimination;
— the third paragraph of Article 70 has no functional connexion with the introduction of through international tariffs and the harmonization of rates and conditions of carriage (Article 10 of the Convention on the Transitional Provisions);
— the third paragraph of Article 70 does not provide for the fixing of a general tariff of transport rates;
— the High Authority is wrong in ordering the governments of the Member States to introduce checks and sanctions;
— the fixing of a time limit by the High Authority is wrong;
— the High Authority is not entitled to make Member States communicate in advance the measures which they intend to take.

For detailed particulars of these arguments, permit me to refer to the detailed report of the Judge-Rapporteur and to the discussion in the legal examination.

Legal Consideration

I — On admissibility

The question of admissibility does not arise in this case. Therefore the legal examination of the substance of the case can proceed immediately.

II — The individual complaints

1. *The procedure followed*

(a) The Netherlands Government is of

the opinion that the High Authority in fact intended to make a decision under Article 88 without observing the conditions laid down in that Article.

It is therefore appropriate to consider before all other questions the legal nature of the contested measure, that is, to ascertain whether according to the manifest intention of the High Authority and the objective features of its mode of expression there is a criticism of the conduct of Member States within the meaning of Article 88 of the Treaty.

There is clearly no reference to Article 88 in the Recommendation but this does not rule out the possibility that it is in fact a decision made under Article 88.

Moreover it cannot be denied that certain parts of the measure are reminiscent of a decision under Article 88, for instance the finding in the statement of reasons for the Recommendation that measures for the implementation of the third paragraph of Article 70 have not been adopted by Member States or are incomplete, the express request that such implementing provisions be adopted and the fixing of a time limit for this purpose.

On the other hand the High Authority has expressly described this measure as a recommendation. It was therefore its declared intention to make use of this formal instrument. Moreover, the high standing of the Executive of the ECSC and the knowledge that it has hitherto scrupulously observed the decisions of the Court precludes the assumption that the High Authority, after the judgment of 15 July 1960 in which the facts and parties were the same, disregarded the findings of this judgment and again proceeded under Article 88, and in the same way, against the Member States. It must be noted that the High Authority defines the duties under the Treaty at issue in this case only with reference to the aims to be pursued. It confines itself to interpreting which objectives the third paragraph of Article 70 is intended to attain within the system of the Treaty.

On the other hand it says nothing about the choice of the necessary methods, that is to say, it does not attempt to specify or define the implementing measures which the States must take. It states in particular that national regulations are entitled to take into account the individual characteristics of the various modes of transport. These considerations show that the measure concerned is in fact a recommendation not only because of the manifest intention of the High Authority but also because of its principal objective characteristics.

This general analysis certainly does not answer the question whether every part of the measure falls within the limits of a recommendation. I will give my views on this point at a later stage.

(b) Should the High Authority have issued a recommendation? The Italian Government regards the Recommendation of the High Authority as an abuse of procedure. In its view after delivery of the judgment of 15 July 1960 proceedings under Article 88 should have been continued, for the Italian Government answered on 8 January 1959 the letter of the High Authority of 12 August 1958 and stated that it was prepared to take measures within the framework of the three possibilities specified by the High Authority. The latter should, the Italian Government says, have studied its answer and confirmed that there was no infringement of the Treaty. In my opinion in Cases 20/59 and 25/59 I took the view that the High Authority could resume proceedings under Article 88 provided that it complied with the necessary conditions. Today I hold the same view. But I am equally convinced that the High Authority was not *obliged* to proceed again under Article 88. For the High Authority the procedure under Article 88 was *one* attempt to achieve the realization of the aims of the third paragraph of Article 70. As the Court declared its efforts to be unlawful it was

obliged under Article 34 of the Treaty to take 'the necessary steps to comply with the judgment'.

With that we reach a point in the argument which is also of importance in connexion with the complaint of the Netherlands Government that the High Authority should not have issued the Recommendation without being expressly empowered so to do. The High Authority defends itself against these two objections, not surprisingly, by referring to the judgment in Cases 20/59 and 25/59 in which it is stated in the grounds of judgment:

'In cases where such a power to make regulations is not conferred upon it but is reserved to the Member States, the High Authority, if it wishes to remind States of their duties, can only resort to a recommendation and cannot simply proceed to impose upon them its own choice with regard to methods.'[1]

The question is whether this quotation covers the procedure adopted by the High Authority.

The objections to this could be:

— the quotation from the judgment lays stress on the prohibition against imposing on Member States the choice of specified measures of implementation ('methods');

— the judgment only considers the case of a simple reminder of obligations under the Treaty, that is to say an action which is legally unimportant, whereas a genuine recommendation within the meaning of Article 14 specifies aims, that is to say, creates legal consequences;

— the passage of the judgment quoted is merely an *obiter dictum* which is not legally binding. The decisive ground of the judgment is only the finding that there is no power to make regulations and not on the other hand the mention, by way of an example, of one course of action among others, which could be contemplated in place of the procedure to which exception is taken.

These objections are not valid. When the Court uses in its judgment the expression 'recommendation', it must be assumed that it is to be understood in its technical legal sense, that is, that it describes a measure which is intended to create definite legal effects. To this extent the argument of the Netherlands Government that a proper recommendation would have to be restricted to a repetition of the wording of the third paragraph of Article 70 must be rejected. The Italian Government told us in the course of the oral procedure that only those obligations which could be clearly extracted from the Treaty, avoiding any other objective or interpretation ascertained with the help of other provisions, could form the subject matter of a recommendation. But that would in fact be no more than a reminder of no legal importance, which has nothing in common with a recommendation under Article 14.

The question where, in judgments, the decisive grounds of judgment end and any *obiter dicta* begin seems to me in any case to be of secondary importance. In each case everything that is said in the text of the judgment expresses the will of the Court. If the Court in the immediately preceding case, on examining the methods at the disposal of the High Authority for implementing the Treaty obligations of the third paragraph of Article 70, rejects the issue of general decisions and suggests instead the choice of a recommendation, it must be assumed that the Court considers a recommendation to be admissible and suitable in precisely these circumstances. A recognition of this fact must be the basis of the legal examination in this case.

One observation seems to me at any rate to be indispensable in this context, an observation which refers to Article 88 of the Treaty. I am not however thinking of the arguments, which in my view are

1 — Rec. 1960.

wrong, that Article 88 is inapplicable if *all* Member States infringe the provisions of the Treaty (this being the view of the interveners) or that Article 88 only requires consideration if the aims of a provision of the Treaty have been defined with the help of recommendations. My objections are directed to another problem.

If the High Authority is allowed, on the failure by Member States to fulfil obligations arising directly under the Treaty, to remind them of their obligations by means of a recommendation and to specify the objectives to be kept in view when fulfilling them, there is a danger that the legal defences available to the Member States concerned will be adversely affected. If they want to prevent a recommendation from having the force of *res judicata* they are obliged to make within one month a normal application for annulment under Article 33, which will be decided under a procedure in which the Court's powers of examination are limited, whereas in proceedings under Article 88 the time limit for making the application is two months and the Court has unlimited jurisdiction. If at a later stage proceedings are commenced under Article 88 (if the High Authority is of the opinion that the recommendation has not been observed), then according to the existing case law of the Court the *content* of the preceding recommendation cannot any longer be the subject matter of scrutiny by the Court in these proceedings. (*Vide* judgment in Case 3/59, Rec. 1960, p. 133). In this judgment it is stated:

'The High Authority can establish a failure by a Member State to fulfil an obligation both in relation to a provision of the Treaty and to a decision which it has taken. It is thus necessary to distinguish on the one hand possible proceedings under Article 33 against a decision, of the non-observance of which the High Authority has subsequently complained, and on the other hand proceedings based on the second paragraph of Article 88 against the recording of a failure to fulfil an obligation in relation to that decision. In fact the object of the two actions is quite different. The object of the first is to establish the illegality of a decision taken outside the scope of Article 88, whereas the object of the second action can only be:

(a) To obtain the annulment of the recording of the failure to fulfil the obligation by adducing evidence to the effect that the Member State concerned has fulfilled its obligations under the decision which it is accused of failing to observe. *This precludes the possibility of challenging at the same time the legality of such decision* . . .

This result may therefore be inevitable whenever the Treaty expressly authorizes the High Authority to take decisions and make recommendations. If on the other hand recommendations are allowed without express authority for the purpose of issuing reminders of obligations arising directly under the Treaty, then the special rules of Articles 88, at least so far as the definition of the content of Treaty obligations is concerned, would divested of all their significance. There is only one way to prevent this, if the judgments in Cases 20/59 and 25/59 and their suggestions for making recommendations are not to be called in question: the Court should, in a given case, reconsider the opinion expressed in Judgment 3/59 and decide in proceedings under Article 88 to include in its examination with unlimited jurisdiction previous decisions and recommendations which the High Authority claims have not been observed. Subject to this all-important reservation the judgments in Cases 20/59 and 25/59 with their observations on the making of recommendations can be accepted as a legal foundation in the present case, without seriously disturbing the system of legal protection under the Treaty with its special privileges in favour of Member States.

2. *Defects in the form of the Recommendation*

The complaints which have been made concerning the clarity of the subject matter and the accuracy of the wording, the statement of reasons given and related questions are directed to procedural defects in their widest sense of that term.

(a) In the opinion of the Netherlands Government the reference in the Recommendation to the proper functioning of the Common Market, to Articles 2 to 5 of the Treaty, the aims of which, according to the finding of the Court, cannot all be realized at the same time and to the same extent, and the reference both to Article 60 and to the decisions of the High Authority for implementing Article 60 are not sufficiently accurate guide lines for the addressees of the Recommendation. It finds proof of lack of clarity in the request of the High Authority for prior communication of the proposed measures, which is intended to make it possible to guide the national governments in the right direction.

There can be no doubt that the binding parts of an administrative measure, including therefore the aims of a recommendation, must be completely clear and unambiguous. In this case the complaint of the applicant is concentrated on Article 1 (2) of the Recommendation of the High Authority, which reads:

'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.'

The relevant recital to the Recommendation in this connexion reads:

'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.'

These quotations show that the operative part of the Recommendation is not distinguished by any special precision and that the statement of reasons does not provide any additional explanation in depth.

But the following must not be forgotten. On the one hand the aims mentioned in the wording of the Treaty itself are not specified in detail. On the other hand the contested Recommendation does not represent the first measure of the High Authority in the field of transport policy, to be dispatched to the Member States without warning. It was preceded by years of negotiation in the Committee of Experts on Transport (see its Report of 21 January 1956) and also in the Council of Ministers on the basis of this report. These negotiations ended with the initiation by the High Authority of proceedings under Article 88 (*vide* the letters from the High Authority of 12 August 1968 addressed to the governments and the Decision of the High Authority of 18 February 1959) which gave rise to extensive discussions before the Court.

The interested parties have known for a long time what the High Authority intends to be understood in connexion with the third paragraph of Article 70 by 'the proper functioning of the Common Market' and by its reference to Articles 2 to 5 and 60 of the Treaty. The statement of reasons for the Decision of 18 February 1959, cited in the statement of the issues of fact in the judgment in Case 25/59 (Rec. 1960) is typical in this respect.

Having regard to this situation it might appear unreasonable to require that the contested Recommendation, which, as is known, is intended to continue in a proper manner the procedure for the achievement of the objectives of the third paragraph of Article 70, should include a detailed discussion which

repeats everything which has been in past years the consistent theme of the statements of the High Authority.

(b) The Italian Government objects that the High Authority addressed one and the same Recommendation to all Member States without taking account of particular circumstances of individual Member States. The proper course would have been to make distinctions accordingly and therefore the issue of an individual measure specially addressed to the Italian Government would have been appropriate.
This complaint to some extent contradicts another observation by the Italian Government that the High Authority did not give the Member States sufficient latitude for the implementation of the measures. It must not be forgotten that the third paragraph of Article 70, as the Court has confirmed contains a direct obligation, which applies to *all* Member States in the same way. If the High Authority endeavours to define the aim and purpose of this obligation, it can only do so in a general way. If it were to take into account the special situation of each State, it would immediately run the risk of exceeding the limits of a recommendation, which can only speak of *aims,* and express opinions on implementing measures, the choice whereof must be left to the Member States. As regards the legal possibilities connected with a recommendation, the High Authority acted correctly in declining to make distinctions.

(c) The complaint of a deficiency in the statement of reasons, of which the Netherlands Government gives particulars, to the extent that it describes the Recommendation as failing to give any indication of the legal basis of the measure taken, of its legal nature and of the procedure adopted by the High Authority, is to some degree identical with the complaint that the content of the Recommendation is stated with insufficient precision.
This complaint also does not seem to me to have any legal foundation. The Recommendation expressly mentions the Articles of the Treaty on which the High Authority relies. In addition it is obvious to the applicant that the Recommendation was published pursuant to the judgments in Cases 20/59 and 25/59 which expressly brought this method to the notice of the High Authority.

(d) Finally, I must deal with the objection of the Italian Government that the Recommendation does not give the Member States sufficient room for the exercise of their discretion and therefore disregards the requirements of Article 14. Symptomatic of this is the fact that the governments were called upon to communicate their proposed measures to the High Authority by 31 October 1961. In the event of a difference of opinion the High Authority has therefore reserved the right to itself to prescribe the necessary measures.
It is certainly not correct that the wording of the Recommendation gives no latitude in the choice of methods to the governments of the Member States. As I have already mentioned, the preamble to and the operative part of the Recommendation merely designate the obligations of Member States under the Treaty and specify the aims which must be observed when they are being implemented. In contrast to Decision No 18/59, which was annulled, there is no information concerning the procedure to be followed in particular cases. It is even expressly pointed out that States are entitled to adopt the measures to be taken by them by taking into account the individual characteristics of the various modes of transport.
Moreover there is no indication in the Recommendation that if the measures communicated were in its opinion insufficient, the High Authority intended to assume the power to prescribe with

binding force the necessary implementing measures. It was not in fact authorized to do so. The object of the invitation to inform the High Authority of the proposed steps was obviously to make it possible, by timely contacts made in the course of informal procedures before the adoption of legislative measures, for the Member States voluntarily to bring their proposals into line with the views of the High Authority. The invitation therefore helps towards effective cooperation between the Community and the Member States, facilitates a certain acceleration in the accomplishment of the aims of the Treaty, and above all is also a suitable means of avoiding the institution of formal proceedings under Article 88. This arrangement lays no burden on Member States but is in their interests. If it turns out that the differences of opinion are insurmountable, then the only avenue open to the High Authority is the procedure under Article 88 with all its safeguards for the States involved. There can accordingly be no question of an increase in the powers of the High Authority or of a diminution of the alternatives open to the Member States.

3. *Complaints relating to the subject matter of the Recommendation*

The applicants raise the general objection that, by stating the aims which are to be achieved under Article 70 with the help of government measures, the High Authority has laid down no obligations which are more far-reaching than those imposed upon Member States by the Treaty. The essence and purpose of the third paragraph of Article 70 is to enable the High Authority to check the observance of the prohibition of discrimination.

(a) Above all the High Authority wrongly requires that the publication or the law concerning prices under the Treaty.

It is clear that the Treaty narrowly defines the area for integration of national economies. But it is also recognized that it is necessary in the case of certain matters to encroach upon the sphere of that the judgments in Cases 20/59 and 25/59 in my view have not expressed an opinion on this question, contrary to the assumption of the applicants. We must take care not to draw far-reaching conclusions from certain passages in the judgments taken out of their context.

Indeed the problem is touched upon in the grounds of the judgment, which state the High Authority's argument that the provisions of Article 60 presuppose a publication of scales, rates and all other tariff rules of every kind applied to the carriage of coal and steel. In its subsequent reasoning the Court restricts itself to finding that a seller can be under no duty to publish transport costs as an element of his delivered price. Further, it is not the practice of the High Authority when making decisions with regard to Article 60, to provide for publication of transport costs by *producers*. When in conclusion the judgment states that there does not exist any organic and functional connexion between the duty to publish prices and the duty to publish transport costs, the only conclusion it draws is that:

'Nevertheless it cannot be inferred from this (principle of discrimination) that the latter (the High Authority) is entitled to exercise a power to make decisions authorizing checks in advance.'[1]

As the judgment was given exclusively in the context of the question whether it is possible to infer from the Treaty that the High Authority has a *power to make regulations* in the field covered by the third paragraph of Article 70, the Court had no cause to consider the question whether the obligations concerning transport imposed upon *States* are to be defined by reference to

1 — Rec. 1960.

communication of rates under the third paragraph of Article 70 be made available for the purposes of Community law on prices (Article 60).

This objection relates to the fundamental issue in this action.

To begin with I would like to emphasize sovereignty still vested in the Member States in order to safeguard partial integration, with its special rules, from external influences, with the help of exceptional powers of intervention possessed by the Community and of particular obligations imposed on Member States by the Treaty. So it was clear to all the parties concerned that the transport sector in particular is of great importance to the coal and steel market. The special provisions of Article 70, including its third paragraph which has to be interpreted in this case, are due to a recognition of this fact.

If a definition of the significance of the third paragraph of Article 70 must be attempted, it is naturally in theory possible to consider it only in its immediate context, that is to say Article 70, which forms a Chapter of the Treaty on its own. It is possible to base this interpretation on the principle that in fields reserved for national jurisdictions a narrow construction of each exceptional provision is appropriate. Whether it is mandatory and correct must however be judged by its repercussions on the whole scheme of the Treaty.

As regards the wording of Article 70, the High Authority and the interveners refer to the fifth paragraph, which with regard to national transport policies is not only subject to the provisions of Article 70 but generally to 'the other provisions of the Treaty'. If Article 70 were self-sufficient, and therefore the third paragraph only operated in the framework of the prohibition of discrimination, the reservation of powers which has been mentioned would be incomprehensible. The fifth paragraph of Article 70 accordingly exposes a serious flaw in the argument of the applicants.

As a result of this there can be no doubt that, in interpreting the third paragraph of Article 70, at least the fundamental principles of the Treaty which characterize the Community and its functions must be observed for it is impossible to accept that the parties to the Treaty are committed to principles and at the same time to permit government measures which can call them in question. The principles of the Treaty are set forth in Articles 2 to 5, of which the second paragraph of Article 2, Article 3 (a) (b) and (c), Article 4 (b) and (c) as well as Article 5 claim special interest in this case. Article 5, which imposes a duty on the Community to ensure the establishment, maintenance and observance of normal competitive conditions, calls for special attention. Article 60 is the vital cornerstone of the system of competition under the Treaty. In the case of prices it prohibits practices contrary to Articles 2, 3 and 4, in particular the practices of unfair competition and discrimination. In the interests of this prohibition, it provides, further, for the exact publication and observance of the price lists and conditions of sale applied within the Common Market, undertakings being to some extent free to choose the basing point and it permits departures from the published prices only if the conditions of alignment are fulfilled.

It cannot be denied that this system presupposes a certain knowledge of transport costs for the calculation of individual delivered prices at the basing point and at the place of delivery and also for the calculation of the delivered prices of competing undertakings. Without such knowledge Article 60 is impracticable and the price system of the Treaty cannot function. In particular the alignment of prices which according to the judgment of the Court in Case 1/54 (Rec. 1954-55) is 'a right granted to undertakings by the Treaty, not a mere possibility', can only be accurately

and therefore correctly carried out if the transport costs are known.

However if it is shown that publicity for rates is necessary for the efficient functioning of the Common Market, it must also be assumed that the authors of the Treaty had this aim in mind when they incorporated into the third paragraph of Article 70 the following obligation on the part of States: 'The scales, rates and all other tariff rules applied to the carriage of coal and steel within each Member State and between Member States shall be published or brought to the knowledge of the High Authority'. It was their intention to ensure the transparency of the transport market by imposing legal duties on States.

The concealment of special tariffs advocated by the Netherlands Government is in any case incompatible with this interpretation.

How publicity for rates is to be guaranteed in individual cases cannot be inferred from the Recommendation of the High Authority which merely specifies the aims. Neither does the Court have to deal with this problem. In particular the question whether the Treaty provides for the individual communication of each contract of carriage and the communication of its terms to the interested parties, that is transport users, can remain open. It cannot be denied that such a procedure could confront the governments and the High Authority with insoluble difficulties and, what is more, it would be of only slight value to transport users. A summary of individual data in the form of market price lists either by the governments or by the High Authority could therefore well be considered for the effecting in practical terms of publicity for transport rates.

In any case the assumption that the High Authority is endeavouring to impose a general tariff classification is incorrect. Even if the interveners consider that it is useful or even necessary, it must nevertheless be stated that no such aim can be inferred from the Recommendation. To this extent the arguments of the Italian Government, based on certain publications of an adviser to the High Authority which are unrelated to the contested Recommendation, are misconceived.

After these comments on questions of principle some of the special arguments must be considered. There is the question whether there can be sufficient publication of prices without the cooperation of the state. We have been credibly informed during the proceedings by the interveners that this is not the case at least in certain parts of the Common Market, because the information is only supplied when there is a demand for precisely specified transport services in individual cases. And even if such objective difficulties are disregarded and it is assumed that, with the aid of an effective information service, certain knowledge concerning rates and conditions of carriage could be obtained from reliable sources even in private undertakings, which certainly could not be achieved without effort and considerable expense, this possibility certainly does not exist for small and medium-sized undertakings. A decision not to call for cooperation from the States to ensure transparency of the market would thus of necessity entail discrimination in the market on the one hand between undertakings which have their registered offices in Member States which favour publicity and undertakings which operate in Member States having no publicity for rates and, on the other hand, according to the possibility of obtaining the information mentioned above, between large and small undertakings. That is however a result which is incompatible with the principles of the Treaty.

However, the legal discussion, with which we are alone concerned in this case, the contention that hitherto, even though there has not been complete publicity in the transport market, the functioning of the Common Market has scarcely

been adversely affected to any extent worth mentioning, must not lead to a false conclusion. The representative of the interveners emphasized in striking terms that the existence of a legal duty could not be made dependent upon the extent to which it is observed. If it is denied that Member States have a duty to ensure publicity for transport charges a development must be expected, the end result of which will be the domination of the transport market by secrecy. Apart from the fact that this development would be diametrically opposed to the efforts made within the framework of the transport policy of the EEC, no one can deny that it would make the implementation of the essential principles of the ECSC unattainable. It thus seems to be proved that the national cooperation required by the High Authority in the transport sector is indispensable for carrying out the provisions of Articles 5 and 60 which are so fundamental and significant for the Common Market. It is one of the functions of the third paragraph of Article 70 to ensure this cooperation.

After all this, there remain for consideration two objections of the Netherlands Government. It is of the opinion that the interpretation put forward by the High Authority eliminates in reality the alternative provided in the third paragraph of Article 70, because in each case provision is made for a communication of rates to the undertakings. The third paragraph of Article 70 leaves Member States the choice between publication of tariffs and communication of rates for exclusive use by the High Authority.

In my opinion this is not a valid conclusion. There is only a genuine alternative when the available possibilities are approximately equal in their effects, and not on the other hand when there is a confrontation between such extreme cases as the publication of tariffs and concealment of communicated rates. In the view of the High Authority there is such a genuine alternative, because for those concerned and interested (transport undertakings and transport users) there is all the difference between a governmental or private fixing of tariffs on the one hand and on the other hand the possibility of negotiating rates in individual cases subject to the obligation to communicate them to the High Authority.

The second objection of the Netherlands Government is a submission that the measures requested by the High Authority lead to a fundamental transformation of the Netherlands transport economy, the distinguishing characteristic of which is the principle of competition. This objection is also misconceived. It is in principle a criticism of the Treaty and of the spirit of the Treaty. Apart from the fifth paragraph of Article 70, according to which national transport policy must accept restrictions in the interest of the Community, it is not understood to what extent competition in the transport sector would be eliminated by publication of rates. Competition is also an essential necessity for the Treaty and the Community. As is shown by Article 60 the obligation to create transparency of the market does not exclude the achievement of genuine competition.

(b) The Netherlands Government finds another complaint concerning the content of the Recommendation in the idea that the High Authority requires a publication of tariffs or a communication of rates in such a manner that it as well as the users and producers can check in advance that the prohibition of discrimination under the first and second paragraphs of Article 70 is being observed; this, in the opinion of the Court (judgment in Case 25/59), is not permissible. Prior checking is only possible, if at all, by means of published tariffs, the compatibility of which with the first and second paragraphs of Article 70 is verified before their application, or where, before the conclusion of a specific

transport contract, its conditions are made available to the High Authority or to the public. It must however be stated that the Recommendation of the High Authority is not drafted in this way. It would otherwise in fact vary considerably the alternative provided by the Treaty (publication or communication to the High Authority). As the High Authority confines itself to reproducing the wording of the third paragraph of Article 70 and does not mention prior checking in the enumeration of the aims to be pursued, it must be assumed that it did not intend to exclude the possibility of subsequent checks, which result from the mere communication of applied rates. In fact the applicant's argument does not represent a valid objection but an unfounded fear.

(c) In a third comment on the content of the Recommendation both applicants emphasized that the third paragraph of Article 70 is not intended to facilitate the implementation of measures for establishing through international tariffs and for harmonization of rates and conditions of carriage. We are concerned here with matters which were mentioned exclusively in the Convention on the Transitional Provisions, since expired, and which could only be the subject matter of agreements between governments outside the Treaty.
It is correct that the introduction of through international tariffs and the harmonization of rates is not expressly mentioned in Article 70 but only in Article 10 of the Convention on the Transitional Provisions. It is equally certain that the sixth paragraph of Article 10 of the Convention refers to an agreement of the governments (accord des gouvernements) so that we are therefore concerned with measures which must be negotiated by the governments. Article 10 contains therefore a programme but not obligations of Member States arising directly under the Treaty.
Nevertheless the following must be noted: the first paragraph of Article 10 of the Convention on the Transitional Provisions, with reference to the tasks of the Committee of Experts, which include the study of proposals for the establishment of through international tariffs and for the harmonization of rates and conditions of carriage, mentions an activity serving the objectives of Article 70; it reads:
'A Committee of Experts .... shall be consulted to study the arrangements to be proposed to the Governments .... in order to attain the objectives set out in Article 70 of the Treaty'. That is the authentic interpretation of the relationship of Article 10 of the Convention to Article 70 of the Treaty. No one can maintain that with the expiration of the Convention on the Transitional Provisions those programmes, which were inseparably connected with the aims of the Treaty and therefore also with the aims of Article 70, were abandoned. Even if the States are under no direct obligation to adopt measures in this field, they are under a general duty to use their best endeavours to implement the programmes. The Recommendation only refers to this general duty and indeed, as the High Authority has stated in the proceedings, in the sense that wherever measures are taken in fulfilment of obligations arising directly under the Treaty nothing may be done which could impede or make much more difficult the implementation of the programmes. It is not clear to me how the obligation to establish a general fixing of rates is connected with this observation.
There can therefore be no objection to the reference to through international tariffs and the harmonization of tariffs in the Recommendation of the High Authority.

(d) In the opinion of the Netherlands Government the High Authority wrongly provides for the entry into force of

checks and sanctions, which amount to an unwarrantable interference with the sovereignty of the State.
According to Article 2 of the Recommendation '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 in 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'.
It is quite clear that Article 70 does not contain any reference to such measures. But although it is clear that the third paragraph of Article 70 is a directly applicable provision of the Treaty, as the Court in its judgment in Case 25/59 (Rec. 1960) expressly declared, it must also be admitted that a proper fulfilment of the Treaty requires *effective* measures. The adoption of a law or regulation in which the mandatory instruction of Article 70 is simply reproduced for use by subjects of that state would not suffice. It is generally thought that effective measures taken by the national administration must be combined with a system of checks and guaranteed by sanctions. In its Recommendation the High Authority has done no more than state what is, on the part of Member States, an obvious ancillary obligation which is necessarily connected with the obligation which the Treaty imposes upon them directly.

(e) According to the Netherlands Government the time-limit fixed by Article 4 of the Recommendation is also defective, because it is not based on Article 88 of the Treaty and because government measures must only be *initiated* within the time-limit laid down, which can lead to inequalities among the Member States.
To take the second part of the complaint first: there is no discrimination in the Recommendation itself, because all States can confine themselves to initiating the necessary measures. Further, having regard to the differences between the national systems of legislation, the *attainment* of aims cannot in every case be arranged within a relatively short time limit.
As regards the fixing of the time-limit itself, no obvious provision is made for it in the third paragraph of Article 70 and in the Convention on the Transitional Provisions. It follows from this however that, strictly speaking, the States are obliged to take the necessary implementing measures *forthwith* or to commence doing so within a reasonable time. At the most the question could be asked whether the *delay* in the implementation of the aims of the third paragraph of Article 10 involved in the fixing of a time-limit by the High Authority is contrary to the Treaty. As the time-limit fixed in each case comprises a reasonable minimum period the applicants cannot argue that it is in their interest that these limits should be revoked.

(f) Finally with regard to the content of the Recommendation both applicants object to the instruction to give prior notice of the proposed measures. The Treaty only acknowledges *a posteriori* checks (Article 88).
I have already explained, in connexion with the objections concerning form and procedure, that it was clearly in the interests of the Member States to make contact with the High Authority within the prescribed time. Such contact is to be regarded as nothing more than the expression of an effective cooperation between the High Authority and Member States, which Article 86 of the Treaty imposes upon them in general terms. There can be no question of an injury to legal rights.
There remains only the question of the time-limit. According to Article 4 (2) of the Recommendation the governments had to communicate to the High

Authority by 31 October 1961 at the latest the content of their proposed measures.

According to the submission made with regard to the preceding argument it is to be assumed that this date, calculated from the date when the Recommendation was made, is a reasonable time-limit. In any case it appears to be legitimate to expect the States to have prepared by that date possible measures, which disclose the most important features of their implementing provisions.

In this respect, too, I fail to find any infringement of the law.

III — Conclusion

After careful consideration of all the arguments I come to the following conclusion:

1. The Recommendation of the High Authority of 1 March 1961 is not deficient in substance and therefore complies with the Treaty.

2. The intervention of les Charbonnages de France, les Houillières du Bassin du Nord et du Pas-de-Calais and les Houillières du Bassin de Lorraine is admissible and well founded.

3. The applications of the Italian and Netherlands Governments are admissible but are unfounded.

4. The costs of the proceedings must be borne by the applicants, with the reservation that the cost of the intervention must be borne by the Netherlands Government.