JUDGMENT OF THE COURT
13 JULY 1965[1]

Société des Aciéries du Temple
v High Authority of the ECSC[2]

Case 39/64

Summary

1. Measures adopted by Community institutions — Validity — Conditions of essential procedural requirements — Provisions relating thereto — Prohibition on the extension of their application

2. Financial arrangements — Equalization of ferrous scrap — Discriminatory rules — Amendment — Absence of vested rights
(ECSC Treaty, Article 53)

1. Cf. paragraph 5, summary in Case 111/63.

2. Cf. paragraph 9, summary in Case 111/63.

In Case 39/64

SOCIÉTÉ DES ACIÉRIES DU TEMPLE, a company whose registered office is at Bilancourt (Seine), represented by its Director-General, Eugène de Sèze, assisted by Jean de Richemont, advocate at the Cour d'appel, Paris, with an address for service in Luxembourg at the chambers of Georges Margues, 20, rue Philippe-II.

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Advisers, Italo Telchini and Guiseppe Marchesini, acting as Agents, with an address for service in Luxembourg at its offices at 2, place de Metz,

defendant,

Application for the annulment of the decision of the High Authority of 22 July 1964 ordering the applicant to pay the sum of FF 476 963.76 under the imported ferrous scrap equalization scheme, by way of supplementary equalization contributions,

1 — Language of the Case: French.
2 — CMLR.

THE COURT

composed of: Ch. L. Hammes, President, A. M. Donner and R. Lecourt, Presidents of Chambers, A. Trabucchi and R. Monaco (Rapporteur), 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:

The High Authority, in pursuance of Decision No 7 of 1961 (Official Journal of 25 April 1961) and Article 6 of Decision No 7/63 (Official Journal of 6 April 1963) issued a statement of account in the case of the applicant in respect of equalization of imported ferrous scrap and of scrap treated as such made up to 31 May 1963 as follows:

— principle amount due: FF 1 624 471.27;
— interest due: FF 476 997.65.

On 8 April 1964 this statement of account was served on the applicant, which made its observations on it. Discussions took place between the parties on 20 May and 22 July 1963.

The applicant had paid the whole amount due by way of principal on 27 February 1964, but it contended that it was not liable for the whole of the sum attributable to interest.

By a decision of 22 July 1964, notice of which was given to the applicant on 3 August 1964, the High Authority ordered the applicant to pay the said interest, and stated that this decision was enforceable within the meaning of Article 92 of the Treaty.

It was against this decision that the applicant submitted the present application on 28 August 1964.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— 'upon the applicant's objection of illegality annul the following general decisions, at least as regards all their provisions concerning interest on credit and debit balances: No 21/58 of 30 October 1958, Nos 19/60 and 20/60 of 20 July 1960, No 7/61 of 19 April 1961 and No 7/63 of 3 April 1963;
— annul the individual decision of the High Authority dated 22 July 1964, notified to the applicant by a letter sent by registered post on 3 August 1964;
— declare that all the legal consequences follow;
— order the High Authority to bear the costs in their entirety.'

The *defendant* contends that the Court should:

— 'dismiss the application as unfounded;
— order the applicant to bear the costs of the proceedings.'

III — Submissions and arguments of the parties

Admissibility

The defendant does not object that the application is inadmissible.

Substance of the case

The application is directed against the decision of the High Authority of 22 July 1964 and, by raising the *objection of illegality*, also against the following general decisions:

— No 21/58 (Official Journal No 23, 1958);
— No 19/60 (Official Journal Nos 54 and 62, 1960);
— No 20/60 (Official Journal Nos 54 and 62, 1960);
— No 7/61 (Official Journal No 30, 1961);
— No 7/63 (Official Journal No 54, 1963).

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

A — Lack of competence, infringement of essential procedural requirements, infringement of the Treaty

The *applicant* first of all reminds the Court that according to Article 53 (b) of the Treaty the High Authority may, with the unanimous assent of the Council, make any such financial arrangements as are mentioned in Article 53 (a).

Likewise, according to the case-law of the Court (Joined Cases 32 and 33/58), any amendment to Decision No 2/57 (which amended and prolonged the decisions setting up the financial arrangements for the equalization of ferrous scrap) requires the unanimous assent of the Council.

It is then argued that the obligation to obtain this assent also applies to the decisions concerning rules governing interest, such as the decisions called in question by the present application. It is said that this is a matter of principle which follows from Article 53 of the Treaty and from the case-law of the Court, especially the judgment in Joined Cases 4 and 13/59.

This rule was not observed upon the adoption of any of the decisions contested by the present application. Only Decision No 16/58, which empowered the High Authority to lay down the rules for the settlement of interest on overdue payments, had previously received the Council's assent. However this decision was only of limited effect since it only applied for the period from 1 August to 31 October 1958.

It is argued that the assent of the Council was particularly necessary in the present case because the abovementioned decisions altered the basic structure of the equalization scheme, and they thus in fact repealed the earlier decisions concerning it.

In fact this scheme was substantially altered because:

— The basis of assessment to the equalization levy, instead of being simply the bought ferrous scrap itself, also covers the servicing of interest as well as interest on overdue payments, these henceforth being included, under the new rules, in the main contribution;
— subjective, empirical and contingent elements such as the greater or lesser delay with which the contributor undertakings pay their contributions, the diligence shown by the High Authority and the contributors, etc., became attached to the equalization scheme, whereas in the SNUPAT case the Court insisted that the levy was to be calculated on an objective basis.

The *defendant* objects that the only complaint which could in theory be advanced in this case is that of an infringement of an essential procedural requirement. On the one hand the complaint that the Treaty has been infringed is, in this case, included in the complaint that there has been an infringement of an essential procedural require-

ment. On the other hand it is absolutely indisputable that the High Authority was empowered to take the contested measures. This latter statement is confirmed by Article 53 of the Treaty, according to which the High Authority may, with the unanimous assent of the Council, 'make any financial arrangements'. Two conclusions follow from this provision. The first is that it is the High Authority alone which has the legislative authority necessary for setting up the financial arrangements provided for by the Treaty. Admittedly the Council takes part in the exercising of this power in granting its assent, but this assent is separate from and prior to the decision, which is taken by the High Authority and which is therefore not the joint expression of the will of the two institutions. The second conclusion is that the assent of the Council is only required for setting up (or prolonging) the abovementioned arrangements. It is not necessary where, as here, what is involved is making alterations in their administration or in non-essential details concerning their organization.

The case-law of the Court cited by the applicant does not contradict this opinion. For example, the judgment in Joined Cases 32 and 33/58 admittedly says that an alteration to Decision No 2/57 should only be made with the unanimous assent of the Council, but in doing so it is referring to an alteration concerned with the 'making' of financial arrangements for the equalization of ferrous scrap. As for the judgment in Joined Cases 4 and 13/59, it accepts the proposition that Article 53 of the Treaty gives the High Authority 'the power to impose pecuniary obligations on undertakings'.

In particular as regards Decision No 16/58, the assent of the Council was necessary and was obtained precisely because it dealt with the making of the financial arrangements, and not because of any idea that the assent of the Council was necessary for proceeding to charge interest. In any case there is nothing to prevent the High Authority from seeking the assent of the Council even in cases where this assent is not obligatory.

This having been said, it should be remarked that at all events the contested general decisions have been applied for a long time, and that the Court has already had occasion to examine them several times. Since the Court could of its own motion have raised the complaint which is raised here, that complaint should have brought about the annulling of the disputed general decisions when the previous cases were considered, if there had been any substance to it.

The *applicant* replies by stressing that it is the Council, and not the High Authority, in whose hands the Community's legislative power is vested. Thus in this case the High Authority should have obtained the unanimous assent of that institution. In omitting this formality the High Authority adopted a measure which it was not competent to adopt, and it thus encroached on the prerogatives of the legislature. Furthermore the infringement of the essential procedural requirement laid down in Article 53 (b) of the Treaty constitutes at the same time an infringement of this Article and, therefore, of the Treaty.

The applicant states that the contested decisions are not limited to altering the administration of the financial arrangements for the equalization of ferrous scrap or to setting up new rules as to details. They alter the very structure of these arrangements because they provide for a supplementary equalization levy whose basis of assessment is the servicing of interest, whereas by virtue of the basic decisions adopted with the unanimous assent of the Council, the basis of assessment under the financial arrangements is constituted by the quantities of ferrous scrap purchased. It is to no purpose that the High Authority

relies on the literal meaning of the word 'make' in order to assert that the assent of the Council is only compulsory when the proposed amendment is of a nature such as to 'make' financial arrangements and not when the amendment only deals with 'details concerning the organization of the equalization scheme'. Alterations which, as in this case, are intended to divest an organization of its substance or to add to it in such a way as to arrive at a contrary result or at least to produce an additional one, are alterations which have an effect on the basic structure of the organization and constitute a new organization.

The applicant also states that the principle based on the judgment in Cases 4 and 13/59 according to which the High Authority may, without necessarily seeking the consent of the Council, require sums improperly paid to be refunded is to be explained by the fact that such refunds follow logically from the system of equalization credits. Conversely it thus follows that the consent of the Council becomes necessary so soon as the payments demanded no longer form part of the equalization credits, that is to say are no longer part of the financial arrangements as approved by the Council.

The *defendant* replies that the unanimous assent of the Council was not essential since Decision No 7/61, whilst making indispensable alterations, is concerned to establish the means of ensuring equality of treatment between the undertakings consuming ferrous scrap, and leaves unchanged the basic elements of the equalization scheme, such as the undertakings liable to contribute, the basis of assessment, etc. In fact:

— considering the matter in general terms, if one understands the basis of assessment to a tax as meaning the thing subject to the tax and ascertained as regards quality and quantity, Decision No 7/61 cannot have added anything at all to the basis of assessment of the equalization levy, namely the amounts of bought ferrous scrap. The concept of a basis of assessment cannot be regarded as including the former interest on overdue payments in contributions in respect of principal, and sums required to service interest;

— on a practical level, the fact of having included the interest on overdue payments as part of the contribution due by way of principal constitutes an ancillary 'once and for all' operation which was carried out only to avoid useless transfers of money. Since the applicant did not pay in sums by way of interest on overdue payments at the time in question it is not directly concerned by this operation. Furthermore the total amount of the interest on overdue payments, which was included in the principal, is derisory compared with the total contributions.

As regards the 'dividing up amongst the contributor undertakings of the liability to pay the interest credited to some of their number' the defendant's conclusion is that the contested decision does not alter in any way the basis of assessment to the levy, and that its effects do not amount to the creation of new financial arrangements. Finally the defendant argues that the case-law to which the applicant refers is not relevant because it deals with the definition of ferrous scrap subject to the equalization scheme, and furthermore the contested decision is in accordance with the attitude consistently taken by the High Authority.

B — Misuse of powers, and discriminations

The *applicant* sets out a series of arguments in support of this submission. In particular it argues as follows:

(a) According to Article 5 of Decision No 7/61, the sums already paid by undertakings by way of interest on

overdue payments are considered as payments on account of contributions due by way of principal. The result is that since these contributions are divided amongst all the contributor undertakings, it follows that the interest on overdue payments is also divided amongst all the undertakings subject to the financial arrangements.

(b) According to Article 3 of Decision No 7/61 the interest due to undertakings which have paid in advance (interest credited to undertakings by Decision No 21/58) is charged to and divided amongst all the undertakings until the accounts are finally closed. Thus the contribution due from each undertaking varies in proportion to empirical and subjective factors such as the greater or lesser promptness of the undertakings in paying their contributions and the dispatch with which the High Authority finally closes the accounts.

(c) The High Authority has not laid down any rules to deal with payments wrongly or mistakenly made, or even made as a result of frauds perpetrated on it and the authorities at Brussels.

(d) Nor does the High Authority make it clear which undertakings are the beneficiaries of the equalization scheme and of the interest on credit balances as regards undertakings which have received ferrous scrap at reduced prices, in cases where the High Authority itself has taken over in whole or in part the importation of ferrous scrap.

(e) The High Authority gave what was in practice a 'bonus', for which the equalization arrangements did not provide, to a whole series of undertakings, by reason of the following circumstances:

— According to Article 1 of Decision No 7/61 interest at 5% is granted on earlier payments made in response to provisional demands, and this interest is payable from the day when the payment was made until the accounts are closed. The result is that since these payments have been made at different times since April 1954 and since the undertakings concerned have long since worked out their cost price and written the interest on overdue payments into their general overheads, the abovementioned interest at 5% puts extra amounts of money at the disposal of these undertakings.

— By Article 2 of Decision No 7/61 interest at 5% is to be paid on the bonuses due to certain undertakings by virtue of Decision No 26/55. The result is that since Decision No 7/61 was adopted six years after Decision No 26/55, and since no specific date for the payment of the interest has been laid down, the recipients of bonuses received an unforeseen 'windfall'.

— By Decision No 22/58 the High Authority allowed interest on sums due to certain undertakings with effect only from 30 October 1958, which was four years after the financial arrangements were made and after the balance sheets of these undertakings for those years had been completed. In this case too an unexpected benefit accrued.

(f) On the other hand, for the contributor undertakings called upon to pay the supplementary contribution, which replaces the interest on overdue payments and which is intended to offset these 'windfalls', the system thus described involves an additional charge and therefore very serious distortions. Furthermore it also involves discrimination contrary to the provisions of Article 4 (b) of the Treaty, and contrary to the fundamental principle contained in Article 2.

The *defendant* replies by describing the scope and content of the provisions contested by the applicant and by analysing the system of interest set up by Decision No 21/58 and supplemented by Decision No 7/61. On the basis of this analysis the defendant shows that the

'ratio' of the system consists in putting an end, by automatic and objective means, to the consequences resulting from late or part payments on the part of certain undertakings. This system is in fact based on entirely objective factors, namely the principle that money has an earning capacity, and the date when the contributions are paid. By virtue of this second factor, the more an undertaking has delayed in paying in its equalization contribution, the later will it qualify to benefit from interest credited, so that the payment of the supplementary contribution towards the servicing of the payment of interest puts it, as far as possible, on the same footing as the undertaking which has promptly paid its debts.

On the other hand no unforeseen 'windfall' has accrued to undertakings which have paid their contributions in due time and which thus benefit from the interest credited to them. This interest is in reality made up by the supplementary contributions for that purpose and furthermore it is generally accepted that any payment made early or any surplus payment must be compensated appropriately. However it is a mistake to assert that this system favours creditor undertakings compared with debtor undertakings: all it does is to strike a balance not previously established between the undertakings which have paid their contributions on time and the debtor undertakings.

It follows, therefore, that the complaint of discrimination is unfounded. Furthermore to justify a complaint that the High Authority is guilty of discrimination it must be shown that it has treated comparable situations differently; but Decision No 7/61 deals with situations which are not at all comparable *inter se,* but which are in contrast (creditor undertakings and debtor undertakings). It also follows that the complaint of misuse of powers too is unjustified, since the High Authority's motive was in accordance with the aims of the Treaty: the re-establishment of equality of treatment and of a proper balance between the undertakings subject to the equalization scheme.

In the reply the *applicant* continues to assert that the contested system is not objective, using several arguments. It points out in particular that at the basis of the system in question there is a factor which the High Authority has completely overlooked, namely the dividing up amongst all the contributor undertakings of interest on overdue payments, and of the credit interest. And it is the presence of this factor, amongst others, which justifies the complaint of unfair treatment.

Furthermore the High Authority has not replied to a whole series of complaints set out in the application, or has replied in a summary and incomplete way. In particular the applicant disputes the proposition that the supplementary contribution can automatically offset the credit interest and argues that the 'compensation' which, according to the High Authority, any payment made early or late calls for, cannot be treated as equivalent to the equalization levy itself, or be divided amongst all those contributor undertakings which are not responsible in any way for the early or late payments made by some of their number.

Finally the applicant emphasizes that when the High Authority speaks of 'contrasting situations' as regards creditor and debtor undertakings, it seems to forget that the interest on overdue payments treated as part of the levy and the credited interest, which depend on situations which are absolutely different, are divided amongst all the said contributors in proportion to their basis of assessment to contribution; this proportion again depends on completely different factors in each case. It is clear that such a system, introduced long after payment was in fact made, can only be to the advantage of the creditor undertakings which no longer reckoned

with it, as compared with the debtor undertakings and which did not have the time to include the supplementary levy when calculating their cost prices. This means that not only is there violation of the assent given by the Council to Decision No 2/54, which enjoins the institutions to avoid administrative complications and to respect Article 5 of the Treaty, but also a disregard of the principle of legal certainty.

All this clearly proves that the principal reasons behind the High Authority's decision consist of mistakes of law calculated to cause discrimination and to constitute a misuse of powers.

The *defendant* emphasizes in its rejoinder the technical nature of the solution adopted by Decision No 7/61 which, in its opinion, makes the system more practical and more simple, and makes it independent of fortuitous events and subjective matters. It then denies point by point that certain criticisms made by the applicant are well-founded.

To the argument that the contested system leads to discrimination in that: (a) the sums of interest already paid in respect of overdue payments affect, in accordance with Article 5 of Decision No 7/61, the amount of the contributions by way of principal, to the benefit of those undertakings which pay late; (b) all the undertakings subject to the scheme have to bear the consequences arising from the fact that some of their number make their payments late because of the fact that the supplementary contribution is divided amongst them all, the defendant replies:

— as to the first example of discrimination the amount of the contribution by way of principal is not affected by delay in making payments, and interest on overdue payments has been abolished;

— as to the second example of discrimination, it is true that all the contributor undertakings are liable to make a supplementary contribution to service the interest credited and it is this supplementary contribution which makes it possible to grant them this interest—as from the actual date of payment—on the sums which they paid. It is precisely this aspect of the disputed system that constitutes an objective factor which is not compatible with the complaint about unfair discrimination.

Finally the defendant states its views on the arguments raised by the applicant concerning: (a) the sums paid by the High Authority wrongly or mistakenly; (b) the unforeseen 'windfalls'; (c) the infringement of the provisions enjoining the High Authority to keep the number of its administrators down to a minimum, and only to intervene in so far as absolutely necessary.

C — Inadequate statement of reasons

The *applicant* emphasizes that both the recitals in the preamble to the contested decisions and the report of the High Authority on the verification of the origin of the ferrous scrap subjected to the equalization levy by the Equalization Fund, make it clear that the delay which has occurred in closing the accounts is due to several imprecisely worded passages in the provisions applicable and to the many frauds which have been committed.

Yet it is contrary to the general principles of the Treaty, especially Articles 2, 3 and 4, to make the undertakings pay for the consequences of these imprecisely worded passages and these frauds—in a word, for this delay. The attitude of the High Authority in this matter is all the more unacceptable in that it could rely on the third paragraph of Article 47 in order to impose fines or to start legal proceedings so as to compensate such loss as the undertakings might have suffered because of the delay which has occurred in the liquidation of the financial arrangements.

The *defendant* objects that in its ap-

plication the applicant does not offer the slightest argument in support of the submission advanced. Furthermore, after reminding the Court of the principles which it has laid down concerning how far reasons must be given for a measure (Cases 2/56, 18/57 and 14/61), it argues that the delay which has occurred in the liquidation of the financial arrangements is not due to the High Authority but to the behaviour of the debtor undertakings (such as the applicant), and this explains and justifies the granting of interest to the undertakings which have paid their debts in due time or even prior to the due date. The High Authority also states that it has already commenced civil actions for damages before national courts against those undertakings which have committed fraud in all cases possible. It also asks that arguments based upon the Treaty it could use which, according to the applicant, would enable it to obtain compensation from these undertakings or the payment of fines by them.

In the reply the *applicant* gives particulars of its submission by formulating two complaints, one of which goes to the failure to state reasons concerning the *substance* of the disputed measures, and the other to the *formal* inadequacy of the statement of reasons for Decision No 7/61.

(a) As to the first complaint the applicant reminds the Court that so soon as the enforceable decision was sent to it it paid the sum representing its contribution owing in respect of principal so that nothing can be said against its good faith. Having said this the applicant emphasizes that the High Authority has made a large number of mistakes in administering the financial arrangements (for example, the exemptions based on the notion of 'local integration') and that because of these mistakes the contested decisions cannot possibly be considered justified.

(b) As to the second complaint the applicant maintains that the statement of the reasons given for Decision No 7/61 neither renders the decision void nor confirms its validity because the said statement does not give reasons why the High Authority chose the contested system rather than some other, and does not mention the provisions under which the High Authority was supposedly empowered to adopt the contested system.

In its rejoinder the *defendant* analyses the text of Decision No 7/61 and in particular recitals 5 to 8 and concludes that, taking into account the previous judgments of the Court in Cases 18/57 and 14/61, abundantly sufficient reasons are given for the contested decision, since they are more than enough to enable the public and the Court to understand the main factors underlying it.

D — The illegality of the interest on overdue payments

The *applicant* maintains that the interest charged on overdue payments is illegal in this case, not only inasmuch as it has been introduced without the unanimous assent of the Council, but also because it runs counter to certain general principles of law. Thus:

(a) It is generally accepted law (cf. Article 1153, French Civil Code) that interest on overdue payments is only due as from the day when payment is demanded, except in those cases where the law causes it to run automatically. In the present case, since the Council, which alone was empowered to make a 'law', has not adopted any measure as regards this matter, it follows that the abovementioned interest cannot run automatically. It is only Decisions Nos 19/60 and 20/60 which make the interest run from the day when the notice of the statement of account is received; the other decisions make it run automatically.

(b) It is also generally accepted law that interest on overdue payments is only due on a failure to pay a sum which

is certain, liquidated and due. However the decisions of the High Authority which are the basis for the contested individual decision (an enforceable decision) make this interest run on the basis of provisional statements of account, and until the final closing of the accounts.

The *defendant* replies by stating, first of all, that in the system established by Decision No 7/61 there is no interest on overdue payments. It is only credited interest which is provided for by that decision. The supplementary contribution charged to all the contributor undertakings is not a penalty. It constitutes the means enabling the High Authority to service this interest.

Secondly the defendant asserts that without any doubt a decision of the High Authority has the force of a 'law' in the sense used by the applicant. Furthermore it is not accurate to say that Decisions Nos 19/60 and 20/60 made interest run from the day when the statement of account is notified. Under these decisions, the effect of the notification of the statement of account was that the main contributions due to the Equalization Fund were required to be paid within 25 days from the date of notification. But the interest was payable for so long as the undertaking was in arrears with its contributions.

In its reply the *applicant* reaffirms its argument that interest on overdue payments was maintained in the system under criticism. On the one hand Decision No 7/61 simply treated interest on overdue payments as equivalent to contributions by way of principal, which is tantamount to recognizing their existence in another form. On the other hand the credited interest is of precisely the same nature as the interest on overdue payments. Thus the interest could not be introduced—whether it be interest on overdue payments or credited interest—without the consent of the Council, nor could any such interest of either description be applied without a formal demand being made for a debt which was certain, liquidated and due.

The *defendant* replies in the rejoinder that the treating of interest on overdue payments as equivalent to contributions by way of principal is purely an accountancy operation which is justified both by the desire to avoid useless transfers and by the principle of balancing debits against credits. Furthermore it is useless to claim that the said interest was retained by relying on certain provisions of Decisions Nos 19/60 and 20/60, which introduced it, and laid down rules governing payment of the same, since by Article 6 of Decision No 7/61 these very provisions have been abolished.

E — The retroactive effects of the contested decisions

Finally the *applicant* stresses the fact that Decisions Nos 7/61 and 7/63 have retroactive effects. Thus:

(a) As to Decision No 7/61,

— Article 3 provides that the credited interest which the decision introduces is to be charged to all the undertakings subject to the scheme by a compensatory system. This provision takes effect for each of the accounting periods provided for by Decisions Nos 19/60 and 20/60, which of course precede the said Decision No 7/61;

— Article 5 has the effect of retroactively converting the payment of interest on overdue payments into a payment of principal.

(b) As to Decision No 7/63,

— Article 5 lays down the rates of contribution for the periods 1954 to 1958 and 1959, and provides that the interest on overdue payments due as from the first notification is also 'rectified'.

From the above the applicant draws the conclusion that all these provisions are illegal because they infringe the general principle that laws and administrative

measures must not take effect retroactively.

The *defendant* replies that

— the equalization scheme as introduced was provisional, a fact which the Court itself has recognized, and which the applicant could not but know. In these circumstances, it would be a mistake to claim that this scheme has created vested rights;
— the system under Decision No 7/61 does not result in any loss to undertakings which have already made their payments;
— moreover any operation involving the closure of accounts produces effects on the past.

The defendant emphasizes that the intention of Decision No 7/61 is to rectify the discriminatory situations resulting from the fact that under the previous system certain undertakings which had not paid in due time the contributions which they owed, enjoyed many unjustified advantages. Therefore the said decision attempts after the event to restore equality of treatment between all undertakings subject to the scheme, and thus to comply with a fundamental requirement of the Treaty, confirmed several times by the Court. Furthermore the rules governing the equalization of ferrous scrap fall within the province of public law and must therefore be observed at all costs—even at the expense of the principle, which moreover is not an absolute one, of the non-retroactivity of laws.

The *applicant* objects that no comparison is possible between the system introduced by Decision No 7/61 and the operation involved in closing the accounts. The present case is not in fact about the provisional liquidation of accounts but about the opening, with retroactive effect, of a new account on a new basis for which no provision is made in the original decisions.

The applicant examines the internal law of certain Member States and the case-law of the Court, particularly the judgment in Joined Cases 42 and 49/59, and arrives at the conclusion that the principle of the non-retroactivity of laws and administrative measures is absolute in nature, and that the Court has itself recognized that it is only possible to revoke a decision retroactively if it is illegal.

The *defendant* rejoins by stressing the fact that in its opinion the High Authority is endowed with a margin of discretionary power in adjudging, on the basis of concrete information in its possession, whether a body of rules requires amendment by reason of mistakes of fact or of law which they may contain. It says that the exercise of these powers was necessary in the present case. The defendant denies that the judgment in Joined Cases 42 and 49/59 may be relied on in this case in order to establish the existence of a vested right in the retention of the previous system. The truth is that not only does the problem examined in that judgment differ from the present issue, but that judgment also proves that the arguments advanced by the High Authority are well-founded. These arguments are:

— that the High Authority has the power to revoke or not to revoke its own decisions with retroactive effect;
— that all those concerned knew perfectly well that the statements of account were provisional, because this had been brought to their attention by the very wording of the High Authority's decisions and by previous cases decided by the Court;
— that there can be no question of vested rights when what is involved is putting right a situation which is unjust in law or in fact, or which comprises discriminatory situations.

IV — Procedure

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided that it was not necessary to undertake any preparatory inquiry.

The parties presented oral arguments at the hearing on 20 May 1965.

The Advocate-General delivered his opinion at the hearing on 24 June 1965.

Grounds of judgment

The admissibility of the application has not been disputed by the defendant, and no grounds exist for the Court to raise the matter of its own motion. Therefore the application is admissible.

The application is brought against the individual decision of 22 July 1964 whereby the High Authority called upon the applicant to pay certain sums due by way of interest. By raising the objection of illegality it also contests indirectly General Decisions Nos 21/58, 19/60, 20/60, 7/61 and 7/63 at least in so far as they lay down rules governing the question of interest forming part of the financial arrangements for the equalization of imported ferrous scrap.

A — The submissions of lack of competence, infringement of an essential procedural requirement and infringement of the Treaty

The applicant asserts that the general decisions called in question by the present application are illegal on the ground that they introduced rules on interest not covered by the decisions previously adopted with the assent of the Council in accordance with Article 53 (b) of the Treaty. It further argues that Decision No 7/61 also established a supplementary contribution for servicing interest credited, and that the effect of this was to alter the structure of the equalization scheme as approved by the Council by altering the basis of assessment to contribution.

It is relatively unimportant whether the High Authority should have obtained the assent of the Council in order to comply with the procedure followed for Decision No 16/58, which provides for the charging of interest on overdue payments. The real question is whether the obligation to obtain the assent of the Council stems from the Treaty itself.

According to Article 53 (b) of the Treaty the High Authority may 'with the unanimous assent of the Council, itself make any financial arrangements serving the same purposes'. Since this is a provision which lays down essential

procedural requirements for the validity of certain decisions, it must be strictly construed. It is apparent from Article 53 (b) of the Treaty that the assent of the Council was only necessary if the introduction of credited interest and the contested supplementary contribution affected or altered the basis of the financial arrangements for the equalization of imported ferrous scrap.

The system of crediting interest which was established in order to compensate the contributor undertakings concerned for having to tie up capital at different times, is to be seen as a necessary requirement in order to prevent such undertakings from suffering an unfair disadvantage when others are late in paying their contributions. This system does not alter the original basis of the financial arrangements for equalizing ferrous scrap, and was adopted so that the arrangements could function correctly and so that the objectives to which the Council had assented could be attained. Therefore it was not necessary to obtain the assent of the Council under Article 53 (b) of the Treaty before introducing the said system.

Moreover as regards the supplementary equalization contribution, the basis of assessment to contribution, which is ascertained according to the quantities of ferrous scrap purchased, constitutes one of the main elements of the equalization scheme as approved by the Council. The only reason for this supplementary contribution is to ensure the payment of credited interest. It is not intended to constitute a new equalization charge, or to alter the criteria relating to the levying of contributions. What is more, since the supplementary contribution is charged to undertakings proportionately according to the bases of their respective assessments to contribtution, it cannot possibly alter this basis of assessment which continues to depend on the amounts of ferrous scrap consumed. Furthermore it is intended, under the very system which was introduced by Decision No 7/61, to be applied, upon the final closure of accounts, in whole or in part in the payment of the credited interest. Therefore the said contribution does not modify or alter any essential element of the financial arrangements for the equalization of ferrous scrap in the form approved by the Council. Consequently the assent of the Council was not necessary in this case.

For all these reasons the present submissions must be rejected as unfounded.

B — The submission of misuse of powers and discrimination

The applicant maintains, furthermore, that Decision No 7/61 is defective by reason of misuse of powers because it discloses an illegal motive or a serious

lack of prudence tantamount to disregarding the legal objective and leading to instances of discrimination.

(a) In support of this submission the applicant relies first on Article 5 of Decision No 7/61, according to which sums already paid by undertakings by way of interest on overdue payments are to be treated as payments on account of the contributions by way of principal. The applicant thinks that it can deduce from this provision that the system of interest on overdue payments has been retained, and that this interest, which is owed by certain undertakings, has to be shared out as a charge on all the undertakings subject to the scheme. Thus these undertakings as a whole would be required to bear the consequences of the delay on the part of some of their competitors in paying their contributions.

This assumption is based on a mistaken interpretation of Decision No 7/61. The provision in Article 5 was shown to be necessary precisely because the said decision had to replace in its entirety the old system of interest on overdue payments by the present system. The new system requires all the undertakings subject to the scheme to make a supplementary contribution in order to service the interest. Therefore the old accounts relating to interest on overdue payments which certain undertakings had already paid had to be closed off so that these undertakings should not have to pay twice over. Accordingly, instead of being refunded the said interest on overdue payments was considered as a payment on account of the contributions still due.

It follows both from the abovementioned Article 5 and from the logic of the system that this allocation takes place on an individual basis by way of separate accounts and not by means of including the whole of the interest on overdue payments in the general statement of account showing the total of the sums due by way of contributions. Therefore when the old account for interest on overdue payments relating to one undertaking is closed off, this cannot have any harmful repercussions on the accounts of the other undertakings.

In these circumstances, this complaint of discrimination appears to be unfounded.

(b) The applicant also argues that the amount of the supplementary contribution for servicing interest necessarily depends on how promptly the undertakings pay their contributions, and how quickly the High Authority carries out the final closure of the accounts. Thus this system, it is argued, introduces subjective and empirical factors into the financial arrangements

for the equalization of ferrous scrap, and has the effect of making all the undertakings subject to the scheme bear the consequences of the delay on the part of the defaulting undertakings.

Under the old system of interest on overdue payments it became clear that it was often impossible to charge such interest, at least in respect of the whole of the contributions which were in fact due. It also became clear that the undertakings which did not pay their debts on time often enjoyed the same treatment as that given to the undertakings which had paid their contributions by the due date or even earlier. For this reason alone, this system was capable of altering the conditions of competition and could place in jeopardy the principle of equality of treatment. Furthermore the effect of this system was to make the undertakings which had paid their contributions on time suffer the consequences of the delay in winding up the financial arrangements.

On the other hand, Decision No 7/61 places all the undertakings subject to the equalization scheme in an identical situation, so that there can be no question of discrimination attributable to it. In reality it imposes on all undertakings a supplementary contribution, charged proportionately to their basis of assessment to contribution. Under this system, interest is credited to the undertakings which have paid their contributions for the period from the date of payment until the date of the final closure of the accounts. As regards the undertakings which have made their payments punctually the amount of this interest is equal to the supplementary contribution required to service the interest.

In the other cases the balance resulting from the difference between these two amounts, whether it be in favour of the undertaking or of the equalization scheme, enables the undertakings subject to the scheme to be compensated for having at various times had to tie up funds.

From this fact alone it must be concluded that the contested system is based on objective criteria which make it possible to ensure that all the undertakings are treated alike. Furthermore, although it is true that the amount of interest credited increases in direct proportion to the delay in arriving at a final closure of the accounts, this increase does not involve an unfair disadvantage for the debtor undertakings which have to bear it. These undertakings have continued to have at hand, by reason of their delay, whether in good or bad faith, in making their payments, sums for which they were accountable. Accordingly it is fair that they should bear the increased charge which arises from the need to prevent the creditor undertakings from being put at any disadvantage.

Thus the contested system seeks to make the undertakings which have benefited from the abovementioned delays bear the consequences of them whilst protecting the credits in favour of the other undertakings. It does so by sharing among those subject to the scheme the burden of contributing to the servicing of interest and by introducing credited interest. Therefore this system offers an objective solution which makes it possible to avoid the discrimination caused by the system of interest on overdue payments.

For all these reasons this complaint of discrimination does not appear to be justified.

(c) The applicant also maintains that the crediting of certain interest gives the recipient undertakings an unjustified advantage which places additional means of finance at their disposal, and favours them as compared with the debtor undertakings.

In fact however the granting of this interest is only intended to restore the balance which had been disturbed by the earlier system. The aim of equalization, which is to place all the undertakings subject to it in a comparable situation for each equalization period, could not possibly be achieved by any means other than the crediting of interest in cases where delay occurs in paying over sums due by certain undertakings. For these reasons no unfair advantage is given to certain undertakings by reason of the contested system. Therefore the complaint of discrimination must, in this case also, be rejected.

For all these reasons the submission of misuse of powers which has been alleged appears to be unfounded.

C — The submission that the statement of reasons was inadequate

The applicant states that the statement of the reasons for Decision No 7/61 is inconclusive, because it does not explain the reasons why it was impossible for the High Authority to eliminate the disadvantages which occurred under the old system of interest on overdue payments, and to choose some system other than the one contested.

Recitals 5 to 7 of the preamble to this decision clearly point out the disadvantages created by charging interest on the overdue payment of provisionally assessed contributions and also the necessity, in the case of all those subject to the scheme, to relate the payments to one particular reference date, when these payments had been spread over a period of time in different ways

by different undertakings to their advantage or disadvantage as the case may be. Recital No 8 of the preamble sets out the situation which results, in the opinion of the High Authority, from the application of the contested system, and which was the reason why it adopted this system.

This statement of reasons thus makes it possible to learn of the considerations which led the High Authority to adopt Decision No 7/61, and the grounds on which that decision is based. Thus, since the reasons given for the said decision are sufficient in law the present submission is rejected as unfounded.

D — The submission that the interest on overdue payments was illegal

The applicant states that the retention of interest on overdue payments, confirmed by Article 5 of Decision No 7/61, is contrary to the general principle of law according to which interest payable for delay in payment is only due on a debt which is certain, liquidated and due. Furthermore, such interest is only due from the day when the demand for payment is made.

In fact Decision No 7/61 refrained from penalizing delays in payment by charging interest in respect of the delay, and replaced this system by one providing for a supplementary contribution to service the interest credited to undertakings. It is clear that Article 5 of Decision No 7/61 is necessary precisely because the said decision replaced the old system of interest on overdue payments by the present system. Furthermore, Article 6 of this decision expressly revoked Article 5 of Decision No 19/60, and Article 6 of Decision No 20/60, both of which the applicant relies on in support of its argument. For all these reasons, since the contested decision does not provide for the interest on overdue payments to be retained, the present submission lacks any substance and must therefore be rejected.

E — The submission concerning the retroactive effects of Decision No 7/61

Finally the applicant argues that Decision No 7/61 is irregular, inasmuch as it produces, particularly by virtue of Articles 3 and 5 thereof, retroactive effects, and thus violates a fundamental principle of law.

In financial arrangements such as those in question, which are based on a close interdependence between each participant's contributions, it is necessary above all to ensure equality of treatment for those subject to the scheme by eliminating any possibility of discrimination among them. In these circum-

stances, the retention of a set of rules whose effect is to favour unduly certain undertakings at the expense of others, on the ground that such rules had created settled situations in law or vested rights, would run counter to the aims of the said financial arrangements. Thus it is appropriate, as part of these arrangements, to accept that the responsible authorities have the power to make the necessary alterations to such a set of rules in order to eliminate the possibility of any discrimination.

Furthermore as these financial arrangements are in the course of being wound up, and the contributions of each participant are accordingly assessed on a provisional basis, discrimination of this kind cannot possibly be rectified without affecting situations created by the previous set of rules which it was necessary to alter.

It is therefore necessary to conclude that the present submission is unfounded and must be rejected.

For the reasons set out above, the objection of illegality raised against General Decisions Nos 21/58, 19/60, 20/60, 7/61 and 7/63 has failed to establish that these decisions are unlawful. Therefore the applicant has failed also to establish that the contested individual decision was illegal, since its argument is based on the said objection.

Costs

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. The applicant has failed in all its submissions.

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 the Treaty establishing the European Coal and Steel Community, especially Articles 15, 33, 36 and 53;
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

Declares the present application admissible and:

1. **Dismisses the application as unfounded;**
2. **Orders the applicant to bear the costs of the proceedings.**

Hammes Donner Lecourt

Trabucchi Monaco

Delivered in open court in Luxembourg on 13 July 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 24 JUNE 1965[1]

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1 — Translated from the German.