to take account of every difference which may exist in the organization of economic units subject to the action of the High Authority for fear of fettering that action and rendering it ineffective.

3. An undertaking is constituted by a single organization of personal, tangible and intangible elements, united in an autonomous legal entity, pursuing a given long-term economic aim.
4. The creation of every legal entity in the field of economic organization involves the establishment of a separate undertaking; a particular economic activity cannot be considered as forming a single unit in law when the legal effects of that activity must be separately attributed to several distinct legal entities. This principle also applies in the case of a group of undertakings controlled by a parent company and having a closely integrated production cycle in which account is taken of the output of the group as a whole and not that of the individual subsidiaries, for it must be recognized in law that the activity of the group takes place between legal persons who in law are parties to the economic exchanges.
5. Purchase as a criterion for the levy within the framework of the equalization scheme for scrap must be interpreted in a broad sense. In fact purchase must be identified with every transfer which takes place when the undertaking consuming the scrap receives it from an outside source in return for the fixing of a price. The fact of this transfer cannot be avoided by a clause retaining ownership for the purpose of scrap to be subsequently recovered.
6. For the High Authority to be accused of discrimination, it must be shown to have treated like cases differently, thereby subjecting some to disadvantages as opposed to others without such differentiation being justified by the existence of substantial objective differences.

In Joined Cases 17/61

KLÖCKNER-WERKE AG, having its registered office at Duisburg, represented by its Board of Directors, assisted by Messrs Etzel, Erich Weber I, Grosshans, Striepen and Altenburg, advocates of the Duisburg Bar, with an address for service in Luxembourg at the Chambers of Mr Woopen, 2 rue du Fort-Elisabeth,

and 20/61

HOESCH AG, having its registered office at Dortmund, represented by its Board of Directors, assisted by Bernhard Aubin, professor of law at the University of the Saarland, Saarbrücken, with an address for service at the Chambers of Werner von Simson, advocate of the Düsseldorf Bar, Bertrange-Luxembourg,

applicants,

V

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Bastiaan van der Esch, acting as Agent, assisted by Wolfgang Schneider, advocate of the Frankfurt Bar, with an address for service in Luxembourg at its offices, 2 Place de Metz,

defendant,

Application for annulment of:

1. The Decision of the High Authority of 14 June 1961, notified to the applicant on 30 June 1961 (Case 17/61);

2. The Decision of the High Authority of 5 July 1961, notified to the applicant on 25 July 1961 (Case 20/61);

rejecting applications for exemption for the equalization contribution,

THE COURT

composed of: A. M. Donner, President, O. Riese (President of Chamber), L. Delvaux, Ch. L. Hammes and A. Trabucchi (Rapporteur), Judges,

Advocate-General: M. Lagrange
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Conclusions of the parties

1. *In Case 17/61*

The applicant claims that the Court should:

— annul the Decision of 14 June 1961 of the High Authority, notified to the applicant on 30 June 1961, dismissing its application for exemption from the levy on ferrous scrap;

— order the High Authority to pay the costs.

The defendant contends that, in so far as the application is admissible, the Court should dismiss it as unfounded with all legal consequences, in particular as regards costs.

2. *In Case 20/61*

The applicant claims that the Court should:

— annul the Decision of the High Authority of 5 July 1961, notified to the applicant on 25 July 1961;

— order the defendant to pay the costs, even in the event of the applications being dismissed.

The defendant contends that, in so far as the application is admissible, the Court should dismiss it as unfounded with all legal consequences, in particular as regards costs.

II — Facts

The facts may be summarized as follows:

1. By Decisions Nos 22/54, 14/55, 2/57 and 16/58 the High Authority established a compulsory equalization scheme to prevent Community prices for ferrous scrap from being aligned with the higher prices for scrap imported from third countries. The Office commun des consommateurs de ferraille (OCCF) (The Joint Bureau of Ferrous Scrap Consumers) and the Caisse de péréquation des ferrailles importées (CPFI) (The Imported Ferrous Scrap Equalization Fund) were responsible for managing it. Under this scheme, the undertakings referred to in Article 80 of the ECSC Treaty were liable to pay the required contributions, the amount whereof was calculated *pro rata* on the tonnages of ***bought scrap*** consumed by each undertaking over a prescribed period, whilst the consumption of 'own resources' was not subject to this levy (Decision No 2/57, Articles 3 and 4).

2. At the time when this equalization scheme was in force, the applicants were parent companies responsible for managing the business of several factories in the nature of subsidiary companies.

Before the implementation of the decartelization measures introduced by the Allies, these factories constituted operational divisions which were under the legal control of Klöckner-Werke AG and Hoesch AG. After the factories became separate companies in law, the applicants retained a 100% interest in them. Subsequently, in 1959 under the German Law of 12 November 1956, each of the applicants incorporated these subsidiaries into a single legal person under its own name.

3. In the meantime the applicants had interpreted the term 'own resources' as meaning 'scrap not bought' and as a result had recorded all the tonnages received by them from their subsidiaries as 'own resources'.

In Application 23/58, the applicants in that case, together with other undertakings similar in structure, had objected to the letter of 18 December 1957 (Official Journal of the ECSC of 1 February 1958), in which the High Authority, replying to an enquiry from the OCCF whether group scrap should or should not be considered as 'own resources', stated that there was already a well-established view that the concept of 'own resources' was allied to the legal concept of 'ownership'. The Court of Justice dismissed this application as inadmissible because the letter objected to was not a decision within the meaning of the Treaty.

4. By letter of 15 April 1958 addressed to the Office commun des consommateurs de ferraille in Brussels the applicant Klöckner-Werke AG maintained the argument that it constituted with the aforesaid subsidiary companies an economic entity within which no commercial dealing, and therefore no purchase of scrap, took place.

Alternatively it sought a decision exempting it from the equalization contribution.

By Decision of 14 June 1961, contested by Application 17/61, the High Authority refused this request.

By letters of 17 March 1958 and 24 September 1959 addressed to the High Authority, Hoesch-Werke AG maintained that scrap moving between its subsidiary companies represented 'own

resources' of the subsidiary company known as Hoesch Westfalenhütte AG which consumes it and, as such, was not subject to the levy. Alternatively, it sought a decision exempting it from the equalization contribution. By letter of 11 June 1958 addressed to the OCCF, the company known as Mannesmann AG made a similar request in the name of Hoesch-Werke AG.
By Decision of 5 July 1961, contested in Application 20/61, the High Authority refused this request.

III — Submissions and arguments of the parties

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

A — Admissibility

No formal objection has been raised as to the admissibility of either Application 17/61 or Application 20/61.

B — *On the substance of the case*

The applicant in Case 17/61 puts forward submissions against the individual Decision which it contests, of infringement of the rules of law relating to the implementation of the Treaty and of misuse of powers; alternatively, it raises a preliminary objection of illegality against the basic general Decisions on the ground of infringement of the Treaty.
The applicant in Case 20/61 puts forward the submission of infringement of the Treaty or of a rule of law relating to its implementation; alternatively, it raises an objection of illegality against the basic general Decisions on the grounds of infringement of an essential procedural requirement and lack of competence.

1. Infringement of the Treaty and of the rules of law relating to its implementation.

The applicants in both cases maintain that the contested Decision is incompatible with general Decisions Nos 22/54, 14/55, 2/57 and 16/58 of the High Authority. In accordance with these Decisions in fact, the levy is to be collected only on bought scrap. Moreover, according to the applicants, scrap moving between their former subsidiary companies cannot be considered as bought scrap within the meaning of the aforesaid Decisions.

(a) *As to the nature of the 'Konzern' as an undertaking in the opinion of the applicant Klöckner-Werke AG*

In support of this opinion, the applicant in *Case 17/61* maintains that at the relevant time, as a parent company, it constituted with its subsidiary companies a single undertaking for the purposes of the Treaty. On this point the applicant stresses that the entire financial control and the financing in connexion with stocks and sales for all the subsidiaries were the responsibility of the parent company; the investment policy of the subsidiaries was centralized under its control; thus production in the various factories was dependant solely on its instructions. The management of the parent company was responsible for investigation of all matters of importance and principle concerning purchase and sale, advertising and legal and tax questions, etc.; the managements of the subsidiaries were linked by a close personal relationship with the management of the parent company. And, finally, the integration of the subsidiaries into the parent company was clearly evidenced outwardly by a uniform trade mark and by the drawing up each year of a consolidated balance sheet and a consolidated profit and loss account as well as a single report by the management of the parent company and all the subsidiaries. The applicant moreover refers to the existence of contracts entered into between the parent company and its subsidiaries excluding either profit or loss for the subsidiaries and to the

fact that, on the basis of these contracts, the German taxation authorities regarded the applicant and its subsidiaries as forming a single undertaking for the purposes of corporation tax, trade tax and turnover tax.

This argument is further confirmed by its articles of association of 3 December 1954, in particular in paragraph 2, subparagraph 1, setting out the objects of the undertaking.

The High Authority itself always regarded Klöckner-Werke AG and its subsidiaries as a single undertaking, as can be seen particularly in the fact that declarations in connexion with the levy and those concerning investment were made by the parent company for the whole group. The applicant maintains that, although, when effecting a transfer of moneys to the High Authority, it allocated the amount as between the subsidiary companies by means of a numbering system, such allocations were made simply for accounting purposes and did not imply any concept of agency on its part. The applicant also refers to the letter addressed to it from the High Authority on 19 December 1956 in which the latter expressly referred to Decision No 27/55 of 20 July 1955 on information to be supplied by 'undertakings concerning their investments'. Moreover in Case 23/58 neither the Court of Justice nor the High Authority raised any objection as to its capacity to act, a fact indicating implied recognition of it as a Community undertaking.

Having regard to this attitude on the part of the High Authority, the applicant maintains that even if at the relevant time the applicant and its subsidiaries could not be regarded as constituting a single undertaking, they should nevertheless be treated as such because the High Authority cannot be allowed to go back on its own action (*venire contra factum proprium*).

According to the applicant, the principles laid down by the Court in Joined Cases 32 and 33/58, Case 42/58 and Joined Cases 42 and 49/59 do not invalidate its argument because they do not refer to this particular case. Moreover the concept of an undertaking cannot be identified with that of a natural or legal person because a private company possessing more of these attributes is just as much an undertaking. The definition of an undertaking must not therefore be limited to considering matters of form; economic considerations must also be taken into account. Moreover if the High Authority's argument be accepted that only subsidiaries independent in law are undertakings for the purposes of the Treaty and not the parent companies, then any arrangement between two parent companies would be permissible. It refers to a number of authors and to German legislation (especially paragraph 22, subparagraph 5 of the Law against restriction of competition) to show that not only undertakings independent in law but also the 'Konzern' itself as an economic entity should be regarded as undertakings. Further, it stresses that the 'Klöckner-Werke AG' group has always been regarded both in Germany and abroad as a single undertaking in quarters associated with it.

(b) *As to the nature of the parent company as an undertaking, in the opinion of the applicant Hoesch AG*

The applicant in Case 20/61 maintains that, at the time when the equalization system was in force, it alone and not its subsidiaries had the status of an undertaking. In fact in it alone were combined the constituent elements of an undertaking for the purposes of the Treaty, especially the power of decision on production methods, production programmes, the supply of raw materials, distribution and utilization of profits, whilst the subsidiary companies had no freedom to act independently even in the simple matter of production.

The continuity of conditions of production in relation to the situation before the different factories of the firm of Hoesch AG were split up into several subsidiaries was ensured by affiliation agreements supplemented by special directives.

Moreover it was the parent company which bore the risk. In the circumstances it alone must be regarded as having been engaged in the production of coal and steel. It was therefore the parent company which produced the scrap and at the same time consumed it. As with Klöckner, the other applicant, it refers to German doctrine and legislation to show that the 'Konzern' must itself be considered as an undertaking.

The applicant goes on, as does Klöckner the other applicant, to refer, in addition to the judgment of the Court in Case 23/58, to the previous attitude of the High Authority, from which it emerges that the latter had always regarded the Hoesch company as an 'undertaking' and maintains that, even though the Court were unwilling to regard the applicant as an undertaking for the purposes of the Treaty, the contested Decision should equally be annulled as being incompatible with the previous attitude of the High Authority. This conduct on the part of the High Authority has deprived the applicant of the opportunity to take any steps to overcome the resultant difficulties within a reasonable time by modification of its legal constitution. The High Authority has thereby contravened the principles of good administration.

The applicant denies that its letter of 17 January 1957 quoted by the High Authority is at variance with its argument because, in observing that it was not engaged in production, it was referring only to the actual production process since this was actually carried out by its subsidiaries. The applicant stresses moreover that it has clearly enunciated its legal standpoint on the nature of the parent company as an undertaking in the letter of 17 March 1958 to the OCCF. It contests the defendant's assertion that its former subsidiaries had had 'considerable autonomy' and on this point refers to paragraph 2, subparagraph 1, of the affiliation agreement laying down the obligation of the subsidiaries to act 'in accordance with the directives and instructions of the parent company as the latter's agents'. Point IV of the directives indicates the exact opposite of what the defendant maintains, Paragraph 6 of this agreement in no way altered the subordinate status of the subsidiaries because it conferred no fresh powers on them.

The applicant further maintains that the judgments of the Court on group scrap do not preclude the Hoesch company from being regarded, at the time when the equalization system was in force, as a producer undertaking for the purposes of the Treaty, because these judgments are concerned with group undertakings stripped of those attributes which give to Hoesch the character of an undertaking. In fact neither Breda nor Hoogovens is under the complete authority and control of a parent company with its own separate legal personality in the same way as these subsidiaries. SNUPAT was admittedly a subsidiary of Renault, but Renault's principal object is car manufacture and not steel production.

(c) *Arguments of the defendant*

The defendant, opposing the two applicants, first observes that in the light of the Court's decisions the concept of an undertaking is no longer of primary importance in deciding what scrap is liable to the contribution. In principle the basic Decisions on the equalization of ferrous scrap charge the contributions on scrap bought by the various consumers. The Court has already decided that scrap supplied by one legally independent undertaking to another legally independent undertaking form-

ing part of the same group is also bought scrap and therefore liable to equalization.

Despite the affiliation agreements, the companies already affiliated to the applicant have considerable autonomy in their external relations and in their relations with third parties, because their trading divisions continue to exist, they act in their own name and also incur liability for all their trading commitments. Moreover the managements of the affiliated companies are not short-circuited, even though their general problems are handled according to the same principles, and certain types of activity are reserved exclusively to the parent companies. In the defendant's view it is common knowledge that in cases of this kind parent companies generally restrict themselves to coordinating the business of their subsidiaries by means of general directives.

The concept of an undertaking put forward by the applicants moreover would raise insoluble problems, having regard to the enormous diversity within the Community in the nature of relationships between undertakings. To find an effectual and fair criterion the external legal form must be considered. The defendant asserts that it has always maintained this principle and in this respect refers, *inter alia*, to the answer given by the Office commun to the letter of the Luxembourg Group of Iron and Steel Industries of 26 April 1953 and to the questionnaire on ferrous scrap addressed to the regional office in May 1953, in which the criterion of legal personality is expressly mentioned.

The administrative practice followed in the past by the High Authority permits no conclusions being drawn to the contrary.

As regards the equalization contribution for scrap, although correspondence was undertaken and payments were met by the parent company, this was clearly done on behalf of the affiliated companies which alone were charged. The declarations on proposed investments did not present a uniform picture, the High Authority having taken a purely pragmatic attitude from case to case, from which no legal conclusions can be drawn.

As regards authorizations granted to the applicants for forming a concentration, the defendant observes that under the terms of Article 66 only one of the undertakings concerned needs to fall within Article 80 for the concentration to become subject to authorization by the High Authority. Thus undertakings not subject to the ECSC are also required to seek the authorization of the High Authority when they contemplate acquiring an ECSC undertaking. Moreover the fact that the High Authority did not object to the applicants' appearing in Case 23/58 was not due to any alleged recognition of the different applicant parent companies in that case as undertakings by the High Authority, but was rather to ascertain their views on the problem of equalization of scrap. For its part the Court did not need to go further into this aspect, as the application was already inadmissible on other grounds.

In reply to the applicant Hoesch in particular, the defendant denies having arbitrarily adopted first one and then another concept of an undertaking. In fact the decisions on scrap had already been taken before the authorization for concentration on which the applicant relies. From these decision it is clear that the equalization charges fell upon the scrap consumers considered as separate entities.

The defendant quotes a letter of 17 January 1957 from Hoesch to the High Authority in which that company declared that, as a mere holding company, it was not engaged in production in any way and maintained that consequently it did not fall within Article 80 of the ECSC Treaty. The defendant refers in addition to directives concerning the affiliation agreement of

26 September 1952, especially Point IV, from which it appears that the rôle of the parent company was restricted to problems beyond the scope of the individual undertakings and that the affiliated companies themselves remained responsible for all decisions on day to day business. Finally, under paragraph 6 of the affiliation contract, the parent company for its part took responsibility for certain obligations which were incompatible with an unconditionally subordinate relationship of the affiliated companies.

(d) *The interpretation of the basic Decisions*

The applicant in Case 17/61 asserts that it is wrong to try to elucidate Decisions Nos 22/54 and 14/55 on the strength of wording contained in the later Decisions Nos 2/57 and 16/58; only the reverse process would be justified. After observing that the first two Decisions mentioned above refer solely to bought scrap without mention of the term 'own resources', the applicant asserts that, even after Decisions Nos 2/57 and 16/58, the fact that the levy was calculated on the basis of bought scrap and not the consumption of scrap after reduction of own resources, remains the decisive factor in all the decisions. It is therefore wrong to regard the exemption of own resources as constituting an exception to the rule and so to interpret the concept in a restrictive way. On the contrary, the concept of bought scrap, as constituting the basis of the levy, ought to be given a restrictive interpretation in the interests of legal certainty and practical justice. The opposing argument based by the defendant on Annex II to the Treaty is invalid because that Annex refers only to a quite special case.

According to the applicant the High Authority's intention in taking the basic Decisions on the voluntary equalization scheme was to subject only scrap bought in the open market to the levy, in conformity with the purpose of the scheme, which was to keep the *market* price for scrap at the lowest possible level.

If, after the compulsory equalization scheme came into force, the High Authority had wished to put a different interpretation on the concept of bought scrap, it should have said so expressly.

The applicants in both cases consider moreover that the concept of 'own resources' should not necessarily be linked to the concept of ownership in civil law. According to the *applicant Hoesch* the concept of own resources extends to the whole field of planning and control of the undertaking. The concept of own resources based on ownership may fit the cases, already decided by the Court, of group scrap but not the case of an undertaking which entrusts executive business to dependant subsidiaries. The applicant refers to the principle of exemption of scrap re-used in the 'production cycle' of the same undertaking, thus involving an increase in output. The simple criterion of 'group scrap' is too superficial because it does not allow account to be taken of even very wide variations in the functional structure of the groups. In the case of the Hoesch company, this economic structure has none of the variable and arbitrary features which the Court found in the structure of the group of the applicants in Joined Cases 32 and 33/58.

In support of this assertion, the applicant adduces a series of factors, economic in character, bearing on the functional and structural requirements of industrial groups engaged in production and processing in the steel sector, as in the applicant's case. It stresses in particular that in an undertaking of this nature separate calculations are not made for each production unit but according to the 'combined accounting' system, because production units which might not be profitable with just one steel-works may yield a return at the processing

stage thus showing a profit on production as a whole.

The applicant Klöckner maintains moreover that, for the disputed scrap to be excluded from the category of bought scrap, it makes no difference whether or not there has been a change of ownership, since German law, which alone is applicable on German territory for the purpose of determining the effect of legal transactions relating to the title to property, draws a sharp distinction between purchase which is a mere contractual obligation and the transfer of property. The applicant refers to the judgment of the Court in Joined Cases 42 and 49/59, which requires that a purchase must be supported by a contract of purchase or its equivalent, and asserts that in its own case the supplying and receiving factories were not bound by any contract but were simply exchanging goods. The book values simply served to calculate cost price and had nothing to do with market prices.

The defendant raises the objection that from the outset the exemption of own resources was regarded by all interested parties as an exception, as was indeed the position in Annex II to the Treaty.

According to the judgment of the Court in Joined Cases 42 and 49/59, there is a purchase for the purposes of equalization even when the steel-works send the supplier of the scrap a credit note for the sole purpose of calculating the cost of production.

In opposition to the concept of bought scrap put forward by the applicant Klöckner, the defendant refers to the Court's judgment in Joined Cases 32 and 33/58 which refused to restrict bought scrap to tonnages purchased on the market.

The applicant's assertion that, at the time when the Caisse facultative de compensation (Voluntary Compensation Fund) was in existence, the levy had been charged only on ferrous scrap purchased on the market is refuted by the statement in the 'Deuxième Rapport général sur l'activité de la Communauté' (Second General Report on the Activity of the Community) (p. 104), in which it is stated that the equalization charge also fell on 'a certain proportion of ferrous scrap forming part of the consumers' own resources'. Subsequently, when the Compulsory Compensation Fund was set up, there was an express abandonment of the levy on own resources, this being a further indication of the intention of the authors of the equalization scheme to go no further in exempting even group scrap. On the other hand, the applicant Hoesch, shortly after the letter, addressed to the regional offices by the OCCF in May 1953, indicating that purchases included 'deliveries by factories not belonging to the same undertaking', introduced reservations concerning the ownership of the scrap. This fact allows the conclusion to be drawn that the applicant was fully aware of the views of the Office commun. Moreover the fact that the great majority of undertakings in the Community considered, as was already clear by 1957, that group scrap was subject to the levy shows there was no doubt as to the legal position.

The applicant Klöckner states that, if the Court does not accept its interpretation of the basic Decisions, its request for exemption already made as an alternative in its letter of 15 April 1958 should be acceded to because 'the spirit and purpose of the equalization system imply that the High Authority should allow exemptions when the undertakings concerned are clearly at a disadvantage'.

The applicant refers in this connexion to the principle of material justice laid down by the Court in Joined Cases 32 and 33/58 and in Case 42/58. Moreover in Case 14/59, the Court rejected the formal criterion of 'legal structure' and in the judgment in Joined Cases 14, 16, 17, 20, 24, 26 and 27/60 and 1/61 it gave preference to the principle of justice for the individual over that of

legal certainty. The applicant refers to German fiscal law which provides for exemptions on equitable grounds where a strict application of the law goes against material justice.

According to the applicant these principles are opposed to the application of strict legal criteria to determine whether the scrap in dispute is liable to the levy.

The defendant's claim that the applicant is begging the question is unfounded, because the applicant relies on certain facts to deduce that a disadvantage exists and then goes on to state that because of this clear disadvantage it should be given the benefit of an exemption.

The defendant denies that in Case 14/59 the Court rejected in general terms the criterion of the legal form of an undertaking. This judgment refers to a very special case and thus the principle enunciated is not applicable in the present dispute where a wholly different question has to be decided. The same applies as regards the reference to the judgment in Joined Cases 14, 16, 17, 20, 24, 26 and 27/60 and 1/61. The defendant moreover objects that the above-mentioned applicant is not only begging the question in stating that it has been injured without offering any proof whatever but is also in error in maintaining that the High Authority has a duty to grant an exemption in favour of undertakings particularly affected; this is contrary to the Court's ruling in Joined Cases 42 and 49/59; 'the power to grant exemptions must not be presumed'.

Lastly, the remission of taxes in German fiscal law on equitable grounds can only be permitted if it is justified in the case of an individual undertaking by a threat to its economic existence, which is not the case where the applicants are concerned.

(e) *The complaint of discrimination*

Both applicants maintain that, since their legal structure, when the equalization system for scrap was in force, was purely fortuitous, this should not result in their being put in a worse position than comprising different branches, but with of which is that of a single legal person comprising different brances, but with just the same economic organization.

On this point, the *applicant Hoesch* points out that according to the judgment of the Court in Case 8/57, differences in treatment can be justified only if there is a corresponding difference in the position of the parties concerned.

Both applicants maintain that this difference in treatment in relation to their competitors is contrary moreover to the principle laid down by the Court, whereby any intervention by the High Authority which might substantially increase the disparity in production costs in the absence of any corresponding changes in productivity and so have a noticeably adverse effect on the competitive position of the undertakings concerned, must in principle be deemed discriminatory and therefore prohibited by the Treaty.

The applicant Klöckner observes as to this that for every metric ton of scrap recovered and re-used in its factories it had to pay a levy of 35 DM on average which could go up to as much as 60 DM; this undoubtedly gave rise to a distortion of competition between it and those undertakings which, simply by reason of a difference in form which is insignificant from the economic and practical point of view are exempted from the contribution.

This discrimination is all the more inequitable in that the applicants had not been free to choose their legal structure which was imposed from above and the effects of which could not be removed until 1959.

The applicant Hoesch contests the defendant's preliminary objection that the complaint concerning discrimination is inadmissible. It maintains that, even if the parent company could not be regarded as an undertaking, it follows

'by analogy from the facts of the case' that the subsidiary consuming the ferrous scrap (Westfalenhütte) must then be considered as the undertaking which is subject to discrimination. Moreover, according to the Treaty, discrimination must be regarded as a 'ground for objective nullity' even when it is invoked by an applicant not itself the victim of it.

Having referred to the principle of the protection of third parties laid down by the Court in Case 15/57, the applicant maintains that the Court imposes additional restrictions on the High Authority's actions in the matter of safeguarding the special interests of those under its authority. In this respect the applicant refers to the judgment in Case 14/59 prohibiting the High Authority from adversely affecting to a substantial degree the competitive position of those under its control.

The defendant first contests the admissibility of the complaint of discrimination, observing that it was the affiliated steel-producing companies which were subject to the contribution, not the applicant parent companies, and therefore only the position of the subsidiaries can be taken into account in determining whether or not there is discrimination. As the applicants are not raising the complaint of discrimination as regards the subsidiary companies, the Court cannot go into this question.

As to the justification for this complaint, the defendant maintains that the effects complained of by the applicants do not result from the Decisions of the High Authority but are rather the consequence of resolutions, made by the applicants themselves before the Common Market came into operation, with a view to keeping intact their group structure following the deconcentration measures implemented by the Allies. The applicants could have taken steps to re-establish their legal entity when the equalization scheme was still in force and if they did not do so this was doubtless because they thought it preferable for good reasons, such as problems of valuation, costs of conversion, etc., to retain the form of a group. On that account the applicants may be treated as falling within the Court's dictum whereby interested parties who choose a given legal form, in this case voluntary retention of the group structure, have no grounds for demanding that this legal form should not be taken into account whenever its application is capable of operating to their disadvantage.

The defendant observes that the criterion of the legal person, used to determine the scrap assessable and accepted by the Court and by the High Authority alike, is clear and objective, so that in law all undertakings consuming scrap are treated on the same footing.

Moreover, according to the defendant, the principle of equality cannot be carried to extremes; on the contrary it is quite proper, as the Court has already decided, to accept the inequality of the effects of a reasonable and objective criterion, because otherwise a prudent and efficient management would not be practicable and that could not be considered as infringing the principle of equality (Rec. 1958, pp. 187-189; 1958-1959, pp. 477 et seq.). The Court's ruling whereby the cost of production of steel, following an intervention by the High Authority, cannot be made dependent upon the legal, administrative or financial structure of groups does not indicate that exemption of its own arisings is contrary to the Treaty and that account cannot be taken, within clear limits, of differences resulting from the fact that not all undertakings have at their disposal in like measure their own means of processing. The Court opposes rather the defining of a vague and nebulous limitation based on the legal, administrative and financial structure of industrial groups.

The defendant considers that, when a general measure taken by the High Authority is at issue, the prohibition of

discrimination shows that the measure must not be arbitrary and must not adversely affect conditions of competition. The criterion of the legal person applied by the High Authority is not arbitrary because arbitrariness means acting from motives alien to the matter in hand. Moreover none of the applicants has even made any such claim. This criterion is not such as to distort competition. In fact, as the Court has ruled in Case 14/59, for there to be a distortion of competition, the competitive position of the applicant must have been effectively worsened. This however does not appear to be so in the present case because the applicants are in a highly satisfactory financial position.

2. Misuse of powers

In the event of the Court's considering that the High Authority has applied the general basic Decisions correctly as regards form and wording, *the applicant in Case 17/61* complains that the High Authority was guilty of a misuse of powers by rejecting the applicant's request for exemption on the basis of purely formal legal considerations.
The defendant contests the admissibility of this submission, as there is no reason to suppose that in taking this decision the High Authority was pursuing any other aim than applying fundamental decisions in accordance with the Treaty.

3. Infringement of the Treaty by the basic Decisions

Alternatively, if the Court considers that the disputed Decision is compatible with the general basic Decisions, the Klöckner company raises an objection of illegality against these Decisions in so far as they impose the levy on deliveries of scrap within the Klöckner-Werke AG complex.
In this event, these Decisions are in fact incompatible with Articles 3 (b) and 4 (b) of the Treaty because they allow a discrimination which operates to the disadvantage of the applicant in relation to undertakings whose internal deliveries of ferrous scrap are exempt from the levy by reason of their structure as a single legal entity. The additional charges thus imposed on the applicant amount to 6 150 000 DM, according to the figure given by the High Authority and accepted without prejudice by the applicant.
A similar objection was also raised by the applicant Hoesch in its rejoinder.

4. Infringement of an essential procedural requirement and lack of competence

Alternatively, if the Decision must be regarded as conforming to the basic Decisions, *the applicant in Case 20/61* maintains that in that event the basic Decisions on the compulsory equalization scheme did not receive the unanimous assent of the Council as required by Article 53 (b), because the Council could only proceed on the basis that the words 'undertaking' and 'bought scrap' must be taken to mean what the High Authority had hitherto taken them to mean. Thus these Decisions were taken without regard either to the essential rules of form of Article 15 or the rules relating to competence which are a condition for the legality of actions of the High Authority.
The defendant contends that these objections are inadmissible because the Treaty recognizes no cause of action based on hypothetical errors of form. The applicant has not adduced the slightest proof to support its claim.

5. Ownership of the scrap

The applicant in Case 20/61 refers to a letter of 29 August 1953, according to which the ownership of scrap produced in the various subsidiaries remains vested in Westfalenhütte AG, that is to say, the subsidiary company consuming the scrap. Consequently for this reason too no transfer of ownership of the scrap within the Hoesch group is possible.

The applicant observes that the disputed Decision has not involved the feasibility or the legal effectiveness of the clause regarding retention of ownership according to German law and thus the defendant cannot now advance this argument at law because this would mean substituting, in the course of the proceedings, a new ground for the contested Decision incompatible with the previous ground.
The applicant contests for all purposes the theory of repurchase on the ground that an agreement purely for accounting purposes cannot influence the actual legal status of the object under discussion.
It asserts moreover that on the premise, as appearing from the abovementioned clause with regard to retention of ownership, that the owner of the principal thing was Westfalenhütte AG, then under German civil law the scrap belongs to that company as soon as it is produced (§953 BGB). There can thus be no question of a retention of ownership, in the technical sense, of the arisings at issue.
Yet even if scrap from own arisings must be considered as something processed within the meaning of paragraph 950 BGB, it still does not become the property of the processing company by reason of its smaller value in relation to the raw material produced by the rolling-mills. There was thus no need for an agreement retaining the ownership of the scrap because Westfalenhütte was already its direct owner *ex lege*.
The argument of the defendant that the applicant can by a retention of ownership evade the general basic Decisions is irrelevant because, in view of the fact that these decisions refer to the concept of ownership in civil law by the criterion of 'own resources', the consequences of such a reference must also be accepted.
Therefore an agreement allowed under civil law concerning the ownership of scrap cannot be regarded as being in contradiction to the equalization scheme.
The defendant raises the objection that, under the clause regarding retention of ownership to which the applicant refers, the conclusion can be drawn that under the cover of retention of ownership continuous repurchase can be made and paid for. The text reads as follows: 'The arisings from the processing of these products, which you cannot use, and all other residues are not sold to you; they therefore remain our property and when final account is taken of all deliveries of semi-finished products we will credit you with the appropriate amount, calculated on the price of the scrap, as soon as the tonnages returnable to us are ascertained'.
The defendant maintains moreover that, since own resources are determined on the basis of the concept of ownership, it does not necessarily follow that any kind of reservation clause must likewise be recognized; for the definition of 'own resources' is a question of interpretation of the legal rule whilst examination of the reservation clauses raises the question of the legal import of clauses in a contract.
In any event, under German law the reservation in question, limited to scrap subsequently recovered, is not valid in law because one and the same thing, in the present case the steel ingot, cannot be the subject of different rights of ownership and because under the contract the ingot has changed ownership immediately it was handed over. The limitation of the retention of ownership to a still unascertained part of the raw material is not valid in German law under paragraph 93 BGB.
Finally it is contrary to the logic of any scheme of equalization for scrap to allow undertakings freely to class as own resources their entire group scrap, for otherwise they would have a means of evading the general Decisions establishing that scheme.

6. Costs

The applicant in Case 20/61 states that the High Authority has by its contradictory attitude caused the case to be brought and

it is proper for it to bear the costs even if the applicant is unsuccessful.
The defendant opposes this claim and, in refuting it, refers to the arguments already expounded.

IV — Procedure

The procedure followed the normal course.
By a statement lodged on 21 February 1962, the defendant asked that Cases 17/61, 19/61 and 20/61 be joined. After hearing the opinion of the Advocate-General and in accordance with the observations of the applicants in these three cases the Court, by Order dated 19 March 1962, decided to allow only Cases 17/61 and 20/61 to be joined for the purposes of procedure and judgment.
Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory enquiry.

Grounds of judgment

Admissibility

The admissibility of the applications has not been formally contested and the Court has no criticism to raise of its own motion. The applications are therefore admissible.

On the substance of the case

I — *Submission based on infringement of the Treaty or of the rules of law relating to its application*

1. The concepts of 'undertaking' and 'purchase' for the purposes of the application of the equalization scheme for scrap

The applicants maintain that scrap moving between their respective subsidiaries is own resources, within the meaning of the basic Decisions, of one and the same undertaking, constituted, as regards the applicant Klöckner, by the group entity of the parent company and its subsidiaries and, as regards the applicant Hoesch, by the parent company which engaged in production through the intermediary of its subsidiaries, these being stripped of the essential characteristics of an undertaking.

In support of their argument, the applicants emphasize the very wide powers enjoyed by the parent company in relation to its subsidiaries, which are stripped of all autonomy. The national law of Member States in certain circumstances treats groups constituted by the parent company and its

subsidiaries as analogous to undertakings; this is especially so in the case of German fiscal law. In the present case moreover there were contracts whereby the profits and losses on the activities of the subsidiaries were taken over *in toto* by the parent company. On this point the applicants invoke certain passages, taken out of context from the judgments of the Court in Joined Cases 32 and 33/58 (Rec. 1958-1959, pp. 300 et seq.), Case 42/58 (Rec. 1958-1959, pp. 399 et seq.) and Joined Cases 42 and 49/59 (Rec. 1961, pp. 141 et seq) and maintain that the illegality of the exemption of group scrap laid down by those judgments does not apply to them because they referred to 'Konzerne' (concerns) which were not completely integrated.

It must first be observed that the High Authority, in working out and applying the financial arrangements which it has established to safeguard the stability of the market, has indeed a duty to take account of the actual economic circumstances in which these arrangements have to be applied, so that the aims pursued may be attained under the most favourable conditions and with the smallest possible sacrifices by the undertakings affected. This principle of justice however must always be harmonized with the principle of legal certainty which likewise is based on the requirements of justice and economy.

These two principles must be so reconciled as to entail the minimum of sacrifice by Community members as a whole.

By reason of the varied and changing nature of economic life, clear and objective criteria of general application and presenting certain common fundamental characteristics must be used in the establishment and functioning of the financial arrangements for safeguarding the stability of the Common Market. It is thus impossible to take account of every difference that may exist in the organization of economic units subject to the action of the High Authority for fear of fettering that action and rendering it ineffective.

To define scrap subject to the equalization levy the High Authority, in its Decisions Nos 22/54 et seq., took as its criterion the purchase of the scrap by the undertaking consuming it.

As the Court recognized in its judgment in Joined Cases 42 and 49/59 (Rec. 1961, p. 155), this criterion must be broadly interpreted. Purchase need not necessarily fulfil all the conditions required by the appropriate national civil law for the validity and effectiveness of a contract of sale but must rather be applied to every transfer effected by the undertaking consuming it when that undertaking receives scrap from an outside source at a price to be fixed.

To define the scope of this criterion the concept of an undertaking must be studied more closely.

An undertaking is constituted by a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim.

According to this concept the creation of every legal entity in the field of economic organization involves the establishment of a separate undertaking; a particular economic activity cannot be regarded as forming a single unit in law when the legal effects of that activity must be separately attributed to several distinct legal entities.

It follows from the very fact of the creation of a distinct legal person that the law recognizes in that person a formal autonomy and responsibility of its own, so that the granting of legal personality to the different subsidiaries has had as its object and effect in law the granting to each of them of control over its activities and responsibility for the risks involved therein.

Such a change in the legal position arises solely from granting a legal personality, without regard to the permanence of the economic situation existing before the change.

In this light it cannot be denied that the conditions for the existence of a legally autonomous undertaking are also fulfilled in the case of a legal person whose interests are closely bound up with those of other such persons whose purposes are determined by directives from outside.

It follows that even in the case of a group of undertakings controlled by a parent company and having a closely integrated production cycle in which the output of the group as a whole and not that of the individual subsidiaries is taken into account it must be recognized in law that the activity of the group takes place between legal persons who in law are parties to economic exchanges.

In these circumstances, the allegations of the applicants which seek to show that differences exist between their groups and other sorts of 'Konzerne' (concerns) are of no avail.

The abovementioned concept of an undertaking, as applied here for the purposes of the equalization scheme, constitutes a legally justified criterion which should serve to determine the legal persons upon whom charges under public law fall.

It follows that, in order to determine the movements of scrap subject to equalization, it is not the group as a whole which must be looked at but each of the several legal persons individually constituting the undertakings.

This conclusion does not run counter to the fact that German fiscal law has adopted different criteria.

The explanation for this difference is that the sole purpose of fiscal law is to bring in revenue to the State budget by taxing the increased wealth presumed to arise from the movement of goods, whilst the equalization scheme is intended to maintain stability in the scrap market and to this end it imposes a levy directly on every movement of scrap between different undertakings even when from the economic standpoint such movement does not constitute a true transfer of wealth.

In the circumstances the applicants' pleas concerning the concept of an undertaking must be rejected.

2. The concept of an undertaking and the attitude of the High Authority

The applicants go on to refer to the past attitude of the High Authority which led both of them to believe that the High Authority shared their idea of the concept of an undertaking. They observe moreover that the High Authority adopted the same attitude towards them and maintain that, even if the Court were to be unable to accept their arguments, the High Authority cannot be allowed to go back on its own action (*'venire contra factum proprium'*).

It must be stated at the outset that the attitude to which the applicants refer related to matters such as declarations concerning investments or the general levy none of which had anything to do with the functioning of the equalization scheme for scrap. Therefore, quite apart from the question whether the attitude of the High Authority might have given grounds for thinking that in other respects it considered the parent companies as undertakings for the purposes of Article 80 of the ECSC Treaty, the applicants were not justified in interpreting these basic Decisions in the light of the attitude of the High Authority on matters outside the application of the equalization scheme.

Moreover the administrative authority is not always bound by its previous actions in its public activities by virtue of a rule which, in relations between the same parties, forbids them to *venire contra factum proprium*.

In these circumstances this plea of the applicants must be rejected.

3. On the question whether the disputed scrap can be considered as 'bought scrap'

The applicants maintain that the disputed scrap was not the subject of a contract of sale or similar transaction within the meaning of the judgment in Joined Cases 42 and 49/59 and that there was therefore no 'purchase' within the meaning of the basic Decisions and of the case law of the Court. In the case of Klöckner there were simply exchanges of materials between its subsidiaries in compliance with the directives of the parent company, whilst the applicant Hoesch invokes the clause of the contract whereby the ownership of the scrap was vested in the subsidiary consuming it.

However it is to be observed that in the case of both applicants a price was always fixed when scrap was transferred from one subsidiary to another. Even if it were to be admitted, as Klöckner claims, that these prices were simply book figures for calculating cost prices, the very fact that each subsidiary fixes a book figure for its transfers of scrap to other subsidiaries indicates that there is a transfer of ownership.

Further, there is no need to consider whether, under the relevant civil law, movements of the disputed scrap between the subsidiaries of each of the applicants took place in pursuance of an actual contract of sale; in fact these transfers of scrap from one undertaking to another are subjected as such to the levy.

Furthermore, as appears from what has been said above, the use by a subsidiary of scrap produced by another subsidiary which, although under the control of the same parent company and belonging to the same group, has a separate legal personality, cannot be regarded as implying an increase in the productivity of the undertaking consuming the scrap looked at as an entity, in the meaning specified by the Court in its judgments in Joined Cases 32 and 33/58 and Case 42/58 (Rec. 1958-1959, p. 306 and p. 406).

It follows that to exempt this scrap would confer unfair advantages on that undertaking and so distort competition. Therefore the arguments adduced by the applicants on this point must likewise be rejected.

Finally, as regards the clause dealing with the retention of ownership of the scrap, which is referred to by the applicant Hoesch, it must at once be observed that this clause is contained not in an agreement between the parties concerned but in a unilateral deed of Westfalenhütte. Even if it

were to be regarded as a clause in a contract it cannot be relevant in the present case. In fact, it is implicit in the very clause, referred to by the applicant to prove the existence of a retention of ownership over that part of the raw material subsequently recovered in the form of scrap, that it provided for transfer of the ownership of the other part, that is to say, the steel to be processed.

In order effectively to establish retention of ownership of the disputed scrap, the clause in question ought to cover not the obligatory contractual effects of declaring that the scrap is not sold but rather the immediate transfer of ownership with retention of the right of ownership by Westfalenhütte of part of the steel passed over by it to other subsidiaries.

In any event the retention of ownership of a constituent part of a thing, a part the quality and quantity of which are undetermined, is not permissible under paragraph 93 of the German Civil Code relating to the ownership of things situated in the Federal Republic. Moreover such a clause is incompatible with the fundamental principles finding expression in the concept of accession which presupposes that special rights of ownership over a constituent and indeterminate part of the same thing are exluded.

4. The complaint of discrimination

The applicants accuse the defendant of having infringed Articles 3 (b) and 4 (b) of the Treaty on the ground that the formal concept of an undertaking used by the High Authority for the purposes of equalization led to discrimination against them by putting them in an unfavourable position in relation to competing undertakings.

The defendant raises a preliminary objection to the admissibility of this complaint because the applicants have not invoked it in relation to the subsidiary companies, whilst it was precisely these, and not the applicant parent company, which produced the steel and were therefore charged with the contribution.

It is to be observed however that the applicants succeeded to all the legal relationships of their former subsidiaries.

Therefore, whilst the applicants have not expressly invoked the complaint of discrimination in respect of their former subsidiaries — which would have gone against their argument on the concept of an undertaking — they nevertheless substantially represent the position in which the subsidiary companies themselves were interested.

In these circumstances the objection of inadmissibility is based on the simple issue of the formulation of the complaint and should therefore be dismissed.

It is appropriate therefore to turn to an examination of the substance of the case.

The applicants maintain that at the time when the equalization scheme was in force they were in an identical situation, as regards their production, to that of competing undertakings in the form of a single legal person comprising different branches.

However, even if this assertion is factually correct and if it be admitted that the difference in treatment claimed brought not inconsiderable disadvantages to the applicants in relation to those of their competitors not subject to equalization charges, that of itself is not a sufficient ground for admitting the existence of a form of discrimination prohibited by the Treaty.

For the High Authority to be accused of discrimination it must be shown to have treated like cases differently, thereby subjecting some to disadvantages as opposed to others, without such differentiation being justified by the existence of substantial objective differences.

On the other hand, in this case, in spite of identical circumstances as regards production, the applicants by reason of their legal structure incorporating several undertakings were not in a similar position to that of their competitors who formed a single legal entity. This difference is of importance in law and is therefore capable of justifying different treatment.

Thus the arguments advanced by the applicants stressing the close ties between the parent company and its subsidiaries, in particular by reason of 'Organschaft' (inter-group) contracts, with a view to demonstrating the similarities to companies the different branches of which were combined in a single legal person, are of no significance in the present cases because they can in no way eliminate the fundamental difference which has been declared to exist between a group of undertakings and an undertaking considered as a single entity.

The principle recognized by the Court in Joined Cases 32 and 33/58 (Rec. 1958-1959, p. 307) that any intervention by the High Authority which made the cost of production of steel dependent upon the legal, administrative or financial structure of industrial groups would be illegal, so far from supporting

the applicants' arguments, as they claim, conflicts with them. In fact, the abovementioned decision of the Court, confirming the validity of the criterion of the legal person and declaring that the particular structures of economic groups are of no consequence, has settled, clearly and in a way which leaves no room for exceptions, the question whether group scrap could be equated with own resources of one and the same undertaking.

This conclusion flows logically from the concept of an undertaking used for the purposes of the equalization scheme and is also justified by the practical advantages of a simple and clear criterion. It is true that some undertakings might have found the use of a different criterion, taking account of the differences between the various types of industrial groups, more favourable to them. However, in view of the infinite variations, actual and possible, in group relations and the difficulties which would arise in many cases in making a hard and fast classification of groups in different categories, it must be admitted that a system of this kind might have given rise in practice to serious uncertainties, would have hindered the smooth working of the equalization scheme and would have provided a source of possible discrimination.

Moreover, in establishing financial arrangements to safeguard the stability of the market, it rests with the High Authority to choose the system which it deems most likely to serve the common interests. It is open to the Court to censure this choice only if it appears that the High Authority has exceeded the objective limits to its activity outlined by the Treaty. This is not so in the present case.

In the circumstances the applicants have not proved that the criterion adopted in the basic Decisions is either irrelevant or purely arbitrary or that in itself it involves discrimination.

Therefore the complaint of discrimination stated by the applicants should be dismissed.

II — *Submission of misuse of powers*

The applicant Klöckner complains that the defendant is guilty of a misuse of powers by dismissing the applicant's request for exemption on the basis of purely formal legal considerations.

In support of this submission it relies on arguments already put forward in support of the submission that the Treaty was infringed.

However, these arguments in no way prove that in taking the disputed decision the High Authority sought to do other than apply the basic Decisions correctly in accordance with the Treaty.

Therefore the submission of misuse of powers invoked by the applicant must be dismissed.

III — *Objections of illegality raised against the basic Decisions*

In its application the Klöckner company raised the objection of illegality on the grounds of infringement of Articles 3 (b) and 4 (b) against the basic Decisions in so far as these put the applicant in an unfavourable position in relation to its competitors similarly placed by subjecting to the levy deliveries of ferrous scrap within the Klöckner-Werke AG group.

A similar objection was also raised by the applicant Hoesch for the first time in its rejoinder. Hoesch has therefore raised its objection too late and it is accordingly inadmissible.

Moreover what has been said at I, 4 suffices to show that the objection raised by Klöckner is unfounded and it must therefore be dismissed.

The applicant Hoesch contends that the basic Decisions were taken without regard to the mandatory rules of form in Article 15 of the Treaty or the rules on competence on which the legality of the action of the High Authority depends.

However, the applicant has not shown that its allegation is justified. It has in fact limited itself to asserting in general terms that the wishes of the Council of Ministers and the content of the basic Decisions were divergent.

Moreover the Court finds nothing to justify the argument of the applicant. This objection must therefore also be dismissed as unfounded.

IV — *Costs*

Under the terms of Article 69 (2) of the Rules of Procedure of the Court of Justice of the European Communities the unsuccessful party shall be ordered to pay the costs.

The applicants have failed in their applications.

The applicant Hoesch has claimed that the defendant should be ordered to pay costs, even if its application be dismissed, on the ground that the High Authority brought about this dispute by its contradictory and inconsistent attitude.

In this connexion it is to be observed that this application was made after the Court in its judgment in Joined Cases 32 and 33/58, Case 42/58 and Joined Cases 42 and 49/59 had already answered the questions forming the fundamental points in dispute in the present cases. The applicant Hoesch is therefore unjustified in its request.

The applicants must therefore bear the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 2, 3, 4, 15, 33, 36, 53 and 80 of the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to Decisions Nos 22/54, 14/55, 2/57 and 16/58 of the High Authority;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. **Dismisses the applications in Joined Cases 17 and 20/61 as unfounded;**

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

Donner Riese Delvaux
Hammes Trabucchi

Delivered in open court in Luxembourg on 13 July 1962.

A. Van Houtte
Registrar

A. M. Donner
President