OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 2 FEBRUARY 1971[1]

Mr President,
Members of the Court,

By deed of 25 February 1966 the applicant in these proceedings took over the undertaking Riva & C., S.a.s.; it is therefore responsible for the latter's obligations. This is important in the sense that, as a steel producer and, consequently, a consumer of scrap, the Riva undertaking had to pay to the well-known ferrous scrap equalization scheme the contributions due thereunder and, in the opinion of the Commission (the successor in title of the High Authority), a certain part of the debt is still owing. The dispute between the parties concerns particularly the date when the obligation to contribute to the equalization scheme arose (as we know, this date depends upon the date when the debtor undertaking commenced production). What is in any case certain is that the undertaking Riva & C., which was obliged to notify the tonnages of scrap assessable to equalization which it had consumed in its production of steel during the period from 1 April 1954 to 30 November 1958, declared that it had consumed only 15 037 metric tons of bought scrap during the period from January 1958 to November 1958. When in July 1958 and July 1960 the competent Community authorities wished to check the accuracy of these declarations, as they did in the case of other undertakings, the Riva undertaking was unable to produce the accounting documents required of it, which are specified in the contested decision; it was only able to produce a summary showing total purchases of 16 192 metric tons of scrap. The High Authority was therefore obliged to have an estimate made of the amount of scrap consumed by this undertaking. In a letter of 27 November 1961, the Market Directorate asked the Riva undertaking to send it all the invoices for electric power relating to production for the period from April 1954 to November 1958 inclusive. This the undertaking did on 8 March 1962: it declared the quantities of electric power consumed during the period from January to November 1958 and in addition, as requested, it gave the assurance that these invoices accounted for all the electric power consumed in its steel production during the period from 1 April 1954 to 30 November 1958. On this basis, the High Authority estimated that from January to November 1958 25 721 metric tons of scrap had been consumed and in a letter from the Directorate-General for Steel of 10 July 1962 it informed the undertaking of the result of its investigations. In this letter the High Authority did however emphasize expressly that this figure had been determined subject to the possibility of further checks and that it was in particular still necessary to verify the date when the addressee undertaking had commenced production. Subsequently, on 8 April 1963, the Riva undertaking received a detailed account made up to 31 May 1963 and drawn up under general Decision No 7/63 of the High Authority (Official Journal No 54 of 6 April 1963). This detailed account was based on the figures previously quoted and, taking account of the payments already made and of the provisional amendment of 19 June 1963, which is irrelevant to this case, the balance owed by the Riva undertaking to the High Authority under the equalization scheme was fixed at Lit. 33 190 021. Since the undertaking did not pay the sums owing, on 18 December 1963 the High Authority took two decisions with regard to it. The first decision fixed at 25 721 metric tons of

1 — Translated from the French version.

scrap the tonnage serving as the basis for the undertaking's contributions from January to November 1958, calculated on the basis of the consumption of electric power and having regard to the undertaking's production capacity (this tonnage was spread over the various accounting periods in proportion to the consumption of electric power during those same periods). The second decision fixed at Lit. 33 190 021 the amount owed by the undertaking as at 31 May 1963 on the basis of the provisional contribution rates applicable at that date, in accordance with the abovementioned letter. Neither of these two decisions was contested and it seems, moreover, that these decisions also were not complied with at least in so far as they contained a formal request for payment.

As it had previously announced, in September 1964 the High Authority re-examined the problem concerning the date when the Riva undertaking had commenced production. By letter of 10 September 1974 the Directorate-General for Steel informed the applicant that it seemed to it to be advisable to have the problem of the duration of the running-in period of the electric furnaces examined by an expert. In addition, it asked it to request its suppliers of electric power for a declaration certifying that the first invoice for the electric power supply was that relating to the consumption in January 1958 and that there had been no electric power supplied for consumption in the furnaces before that date. During the same month, September 1964, an expert carried out the inquiry in question for the purpose of verifying the particular technical characteristics of the undertaking's plant. It would seem that this expert inquiry discovered indications that the electric furnaces were in production in 1957. Furthermore, the High Authority considered that it could deduce from data relating to the consumption of electric power in the furnaces of the Riva undertaking during the period from 10 March 1957 to 31 December 1957 which were supplied to it by the Italian authorities in April 1965, that the undertaking had started production before the date which it had indicated. On the basis of this data, the High Authority assessed at 22 548 metric tons the consumption of scrap assessable to equalization contributions for the period from 10 March 1957 to 31 December 1957. By letter of 23 December 1965, the Directorate-General for Steel informed the applicant of these results and of the various principles which it had taken into account in their calculation. The sum owed by the undertaking Riva & C. as its contribution to the equalization scheme amounted on 31 December 1965 to Lit. 256 071 350. In reply to this letter, the undertaking merely sent a letter on 9 February 1966 to the High Authority disputing the accuracy of the figures obtained by estimate: it maintained that during 1957 it had only tested its production plant and also claimed that the debt was time-barred. However, the High Authority did not consider it necessary to change its estimate. Therefore, on 4 December 1969, it issued another two decisions revoking and at the same time replacing the two decisions of 1963. The first determined, for the period from March 1957 to November 1958, the tonnages of bought scrap in respect of which the applicant had to contribute to the equalization scheme (namely 45 740 metric tons). In this connexion, the High Authority assured the undertaking that its estimate had allowed for a three-month running-in period for the firm's electric furnaces and for arisings from steel-works on the production of ingots, factors of which it had not taken account in the decision of 1963. The second decision determined, in accordance with the final rates of contribution laid down by Decision No 19/65 of the High Authority (OJ No 224 of 30 December 1965) the contribution payable by the undertaking to the scrap equalization scheme as at 31 December 1968 and laid down, in addi-

tion, that this debt, namely the sum of Lit. 275 005 963 should bear interest as from 1 January 1969. This second decision contained, more particularly, the detailed account of contributions (including interest) owed on 31 May 1963, the detailed account on 31 December 1965 (less the payments made by the undertaking as interim contributions, Lit. 57 094 027, and less interest paid on those payments but with the addition of outstanding interest owed, calculated in accordance with Decision No 19/65 for the period from 31 May 1963 to 31 December 1965) and, in addition, the data relating to the calculation of the sums owed on 31 December 1968 (including outstanding interest, capitalized annually and deducting sums corresponding to payments made by the undertaking and sums due to it on the basis of periodical distributions of refunds on the collection of equalization amounts).

These are the two decisions which the undertaking 'Acciaierie e Ferriere Riva' has contested in its application which was received at the Court Registry on 14 January 1970. The applicant seeks their annulment for various reasons which I shall deal with presently.

A request that the Court should suspend the operation of the decisions of 4 December 1969, which was made in the originating application and which, despite the request to that effect made by the Registrar of the Court, was not repeated in the necessary form by a separate document, was clearly abandoned in the reply (perhaps because the Commission declared that it would not seek to enforce the decisions before the outcome of the proceedings). There is therefore no need to pursue this point at present.

1. Let us now deal with the other aspects of the proceedings; the first point which must be examined is the objection raised by the Commission that the applicant is inadmissible in so far as it seeks the annulment of the provisions of the decisions relating to tonnages of scrap for the period from January to November 1958 and to the corresponding contributions. According to the Commission, the contested decisions simply replaced those of 1963 which were not contested at the time and cannot therefore now be questioned. Even though they amended the contents of the previous decisions, such amendment was *to the advantage* of the applicant since the fact that account was taken of the arisings from steel production caused a reduction in the tonnage of scrap constituting the basis of contributions and, consequently, of the sums which it owed.

It seemed at first that the applicant accepted this line of argument. In fact, it declared in its reply that it no longer had any interest in pursuing the request for annulment to the extent to which the decisions of 1969 replaced those of 1963. In its opinion, the dispute therefore concerned only the contributions owed for the period from March to November 1957, which are first dealt with in the decisions of 1969. However, it has not expressly amended its submissions to that effect. In reply to a request by the Registrar of the Court it even formally refused to amend its application thus and declared that it wished to maintain the requests put forward in its application, in other words those requests for the *complete* annulment of the 1969 decisions. I must therefore in fact examine the admissibility of the submissions worded to that effect and, consequently, see whether the objection raised by the Commission is well founded.

Allow me to anticipate straight away the result of my examination and to say that I consider it necessary to agree with the Commission on this point. In fact, it must first of all be remembered that the complete annulment of the contested decisions would also entail the annulment of the provisions prescribing the revocation and replacement of the 1963 decisions. This would mean that the 1963 decisions would once more come into force, in other words measures which are less favourable to the appli-

cant than the corresponding provisions of the contested decisions both as regards the tonnages serving as the basis for contributions and the sums owing on this account. Such a result cannot be in the applicant's interest.

Secondly, we must not lose sight either of the fact that a decision possesses an authority of its own ('Rechtskraft'). As I have already said, the 1963 decisions were not appealed against. In consequence, their contents can no longer today be the subject of judicial review. In so far as the decisions of 1969 have repeated the provisions of the previous decisions they are in fact purely confirmatory measures and cannot revive a right of appeal which has already lapsed. It is not important in this connexion that the tonnage of scrap which constitutes the basis for the contributions payable by the applicant and, consequently, the contribution itself, has been re-examined and amended, since it emerges from the decisions that the tonnages determined at the outset have remained unchanged. The High Authority has merely made a slight reduction in favour of the applicant because it was necessary to take into account the arisings from steel production. As for the fact that the calculation of interest on the sums owing for the year 1958 constitutes a new factor which only appeared in the decisions of 1969, neither does this in any way alter the result which I have reached; in fact, the applicant has not developed particular submissions on this point—namely with regard to purely ancillary claims—nor moreover on the rates of contribution to the equalization scheme, which in addition were lower than those resulting from Decision No 7/63.

It can therefore be stated that the applicant has no interest in obtaining the annulment of the decisions of 1969 in so far as they relate to the tonnages of scrap constituting the basis for contributions to the scrap equalization scheme for the year 1958 and to the corresponding sums which it owes. As the Commission has submitted, this part of the application must be considered inadmissible and my examination can therefore be limited to the problems relating to the period from March to December 1957.

2. The applicant invokes first the principle of the authority of *res judicata*. Let us note, by the way, that this submission was made only in the application and was not developed at any later stage. The applicant asserts that the High Authority, and therefore its successor, the Commission, had already fixed in the decisions of 1963 the tonnages of scrap subject to the equalization scheme and the contribution to be paid on this account. Since these decisions were not contested, it maintains, they have become final and the High Authority no longer had the power to carry out further checks and to amend its estimates in consequence of such checks.

It is clear that the applicant cannot succeed with this argument. In fact, the principle of *res judicata* in relation to administrative decisions which can be raised against the administrative authorities which make those decisions does not exist in the manner which the applicant claims. What is more, it is generally recognized that despite the expiry of the period for lodging an appeal, the administrative authorities can in any case re-examine and, if necessary, revoke their decisions, for example when public policy requires it. This principle is of particular importance in the field of equalization of scrap since, as you know, its proper functioning depended on the extent to which undertakings fulfilled the duty of cooperation devolving upon them. Moreover, it was necessary that amendments could be made in case of error or where information was found to be inaccurate. Several judgments of the Court have confirmed the legality of repeated corrections made up to the closure of the final account (judgment of 21 January 1965, *Officine Elettromeccaniche Ing. A. Merlini* v *High Authority of the European Coal and Steel Com-*

munity, Case 108/63, [1965] ECR 1 and judgment of 13 July 1965, *Lemmerz-Werke GmbH* v *High Authority of the ECSC*, Case 111/63, [1965] ECR 677). In Joined Cases 14, 16, 17, 20, 24, 26 and 27/60 and 1/61 (Judgment of 13 July 1961, *Meroni & Co. and others* v *High Authority*, Rec. 1961, p. 321) the Court in particular admitted that an assessment could be rectified even though such rectification entailed an increase in the sums owed as contributions. The legality of such amendments is therefore certainly not open to any doubt where the undertaking concerned has made false declarations (cf. Joined Cases 42 and 49/59, judgment of 22 March 1961, *SNUPAT* v *High Authority of the ECSC*, Rec. 1961). Contrary to the opinion of the applicant, the principle of distributive justice therefore prevails over the principle of legal certainty as regards the equalization of scrap (as emerges clearly from the judgment of the Court of 13 July 1961). These considerations also play an important role in this case and not only because, despite its express assurances, the applicant supplied false information in March 1962 with regard to its consumption of electric power. It must be emphasized, in addition, that the High Authority always insisted in the applicant's case on the provisional nature of the accounts and on the need for supplementary checks. In this connexion, I shall merely remind the Court of the letters of the High Authority of 1962 and 1964 and of the communication of 23 December 1965.

That suffices to show that the applicant cannot obtain the annulment of part of the contested decisions by invoking the final nature of the decisions of 1963.

3. The principal argument of the Riva undertaking is that its debt is time-barred (this argument is moreover the only one which is still put forward in the reply and also the only one examined at the oral hearing). While admitting that the general decisions of the High Authority on the equalization of scrap make no such provisions, it considers that it is however possible to infer from national legal systems a general principle which is also applicable to the matter under consideration. In its opinion, the period of limitation necessarily began to run when the debt relating to the equalization contributions arose, in other words at the time when the scrap was used or, at the latest, at the end of each accounting period, and all other circumstances, such as for example the time when the High Authority had precise knowledge of all the data for calculating the equalization contribution, are irrelevant in this case. As regards the relevant period of limitation, the applicant considers it natural to think of applying by analogy other periods prescribed by Community law. In this connexion, it cites in particular general Decision No 5/65 of 17 March 1965 (OJ English Special Edition 1965-1966, p. 38) on the barring by time of claims in respect of general levies applied by the High Authority, which prescribes a period of limitation of three years, on the ground that the equalization contribution applicable to the consumption of scrap is calculated and levied in a very similar manner to the ECSC general levies. In its opinion, at the very least, the longest limitation period under Community law must be applied, namely that prescribed by Article 40 on the Protocol on the Statute of the Court of Justice of the ECSC, which is a period of five years. The applicant considers the application of the same period is justified not only by a concern for 'legal symmetry' (freeing the administration from its responsibility means also freeing, within the same period, the individual from his obligations towards the administration), but is also justified by general Decision No 14/64 of 8 July 1964 (Official Journal, English Special Edition 1963-1964, p. 162) according to which undertakings only have to keep their business books and accounting documents for five years. The applicant considers that it may infer from this that the High Authority

(now the Commission) is not entitled to enforce claims based on facts to which documents which may have been destroyed relate, in particular because these documents may also have contained evidence in favour of the undertakings concerned. The applicant maintains that it must therefore be admitted that the debts which arose in 1957 and in 1958 were time-barred whatever the circumstances, well before the High Authority enacted the decisions which are at present the subject of dispute.

Examining this argument, I am forced to declare first of all that Community law has no special provisions on the period of limitation for claims relating to the equalization of scrap. Since such provisions exist in respect of the general levies imposed by the ECSC, as I have shown, I might be tempted to conclude that the Community legislature deliberately left out a period of limitation in respect of the equalization of scrap. However, I am not entirely convinced that this attitude was dictated by the particular characteristics of equalization, although it must be admitted that these claims are not in favour of the equalization scheme or of the bodies administering that scheme, but claims in favour of undertakings and that if some of them do not pay, the result is clearly an increase in the charge to be borne by other undertakings which duly discharge their obligations, which is incompatible with the fundamental principle of equality of treatment. The complete exclusion of the period of limitation for the equalization of scrap would in fact disregard entirely the principle of legal certainty and the possibility of ensuring compensation for undertakings which have correctly fulfilled their obligations to contribute through administrative proceedings brought against the bodies administering the equalization scheme where the latter have negligently allowed claims to become time-barred (these proceedings moreover enable the injustice inherent in the double levying of contributions, which I have already spoken of above, to be remedied). I therefore understand without any doubt, and this facilitates my examination, the reasons why case-law has already clearly accepted the principle of limitation of actions with regard to the equalization of scrap. I will simply recall in this connexion your judgment in Case 111/63 to which the two parties in these proceedings have referred. I find it difficult to accept that this principle has in the meantime been defeated by the judgment in Case 45/69, also cited, in which the Court rejected the submission relating to the period of limitation because of the absence of express provisions on that matter. In fact, this more recent judgment clearly concerns a completely different matter: the period of limitation for infringements of competition law in respect of which, moreover, analogies cannot be drawn from any other field of *Community* law.

As judgment 111/63 accepted the principle of limitation of actions in the field of the equalization of scrap it only remains for me to determine the *beginning* of the period of limitation and to estimate its *length*. The first question will not delay me long since, here too, there is already an established line of case-law. As you know, the judgment in Case 111/63, cited above, has established expressly that 'the limitation period can only run from the date when the accounts are finally closed' (cf. [1965] ECR at p. 693). Although the applicant has protested formally against this opinion, I consider it however difficult to agree with its arguments because of the particular characteristics of the equalization of scrap (the obligation for undertakings to cooperate, lengthy examination of complex questions, etc.). I can therefore state that the period of limitation in respect of debts relating to contributions began to run at the earliest on 15 December 1965, for it was only at that date that general Decision No 19/65 on the final determination of rates of contribution and the drawing-up of final accounts in respect of the equalization

of scrap (Official Journal 1965, p. 3290) came into force. It may however appear more difficult to determine the length of the period of limitation in particular where one tries to do so by referring to the various regulations on this matter existing in the Member States. However, it is not necessary to proceed in this manner since the question may be resolved by analogy with other rules of Community law which facilitates considerably the solution of the problem. Having said that, I clearly do not propose to have recourse to general Decision No 14/64 of the High Authority upon which the applicant relied. In fact, this decision clearly concerns another matter (that of ensuring the observance of price regulations laid down in the ECSC Treaty) and where it provides for this purpose that the undertaking's documents must be kept only for a certain period, its aim is only to exclude the application of the punitive sanctions provided by the ECSC Treaty. I cannot therefore accept that it is of general application, which would mean that after a certain time undertakings could set up against Community authorities their right to destroy documents, whatever their nature, and, in addition, that facts to which these documents refer must be regarded as no longer having any importance in relation to Community law. It seems to me to be appropriate, on the other hand, to consider applying by analogy Decision No 5/65 (cf. Official Journal, English Special Edition 1965-1966, p. 38), in other words the period of limitation relating to general levies in force in the ECSC even though there exist, here too, essential differences in relation to the aim pursued. One must clearly not lose sight of the fact that this decision provides not only a period of limitation of three years for normal cases, where accurate declarations are made, but that it also recognizes a period of *six years* where declarations are incomplete or inaccurate, whether intentionally or through negligence. I believe it is precisely this latter period which must be applied in this case, since, as I already stated when I set out the facts of the case, it is clear that the applicant made an incomplete declaration of the scrap which it consumed during the whole period of its production under the scrap equalization scheme, in other words, during the period from March 1957 to November 1958. If the period of limitation is made to run from the date indicated above, the necessary conclusion is that in any case no claims could have been time-barred before the entry into force of the contested decisions. The conclusion would moreover be the same if the period of limitation of five years provided for by Article 40 of the Protocol on the Statute of the Court of Justice of the ECSC were adopted, in other words, the period of limitation applicable in actions against the administration. This is a period of limitation in relation to which the case-law of this Court has established that, in its proper sphere of application, it begins to run only from the closure of final accounts (cf. Joined Cases Nos 46 and 47/59, judgment of 14 December 1962, *Meroni and Co. and Others* v *High Authority*, [1962] ECR 411). Even on this hypothesis it is clearly not possible to conclude that the period of limitation expired before the contested decisions were enacted and notified to their addressee.

I can therefore state that the applicant cannot succeed either by pleading the expiry of the limitation period without needing to deal in detail with other problems arising in this field (such as interruption).

4. Finally, the applicant also denies the accuracy of the tonnage of scrap consumed by it, as determined by the Commission on the basis of its consumption of electric power during the period from 10 March 1957 to 31 December 1957. It maintains that it was not in full production during this period, that it merely tested its electric furnaces, and that these tests yielded almost no production. In its opinion, the Commission is wrong in calculating a running-in period for

the electric furnaces of only three months.

With regard to this argument, which was only put forward in the application and which was not subsequently pleaded, the Commission asserts that the expert inquiries carried out in 1964 took account in all respects of the technical criteria peculiar to the applicant undertaking and that, furthermore, it applied the general criteria which must be considered for the running-in period of electric furnaces. As regards the coefficients (consumption of electric power/consumption of scrap) applicable for the period of normal operation, the experts consider that they chose a scale which would also compensate for low production during the period in which an electric furnace is being put into operation. In addition, the Commission declares that it took special account of the difficulties caused by the running-in period by applying coefficients which were higher still. In its opinion, it appears therefore that it took sufficient account of the particular characteristics of the period when the undertaking started production. The accuracy of the figures on which it based its calculations is again confirmed, in its opinion, by the size of the figures for the consumption of electric power in 1957 which were communicated to it; and, moreover, to consider the running-in period as including all the production of the applicant in 1957, as the applicant requests, would be to disregard entirely the principles of technology and of the economics of production.

I am convinced of the validity of this argument. To oppose it the applicant should have invoked more than the few insubstantial observations which it put forward in its application. Since it did not do so I can only declare that the third argument of the application is not such as to bring about the annulment of the contested decisions.

5. The result of my examination may therefore be summarized as follows:

The requests must be dismissed as inadmissible in so far as they seek the annulment of parts of the decisions relating to 1958 and moreover as unfounded. The costs must therefore be borne by the applicant.