OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 22 MARCH 1966[1]

Mr President,
Members of the Court,

The Ferriere e Acciaierie Napoletane company, which produces pig-iron and ordinary steels, was the subject of checks carried out by the Société Fiduciaire Suisse in 1958 and 1962. Although it did little to assist in the first check, the company showed itself more cooperative in 1962, but was nevertheless only able to supply a somewhat incomplete file of documents.

Although it had declared the purchase of 17 003 metric tons of ferrous scrap for the period from April 1955 to November 1958, the assessable tonnage was first calculated at 41 343 metric tons for the whole period of the equalization scheme, and then reduced to 40 034 metric tons; it was finally fixed at 34 300 metric tons by the Decision of 19 May 1965 which forms the subject of the undertaking's application.

The dispute turns exclusively on the liability to the contribution of a certain tonnage of ferrous scrap which the company claims is alloy scrap, this classification is rejected by the High Authority. It relates to 8 344 metric tons declared for the period from April 1955 to November 1958, to which are added 2 621 metric tons relating to the period from April 1954 to December 1954. The undertaking asks you to rule that the 10 965 metric tons in dispute have been wrongly included in the assessable tonnage. It moreover requests you to order the High Authority to pay compensation for the loss caused to it by that decision, but this last claim is quite lacking in a statement of reasons and cannot be admitted.

In support of its decision, the High Authority states that, although it had been possible to accept 864 metric tons as being alloy scrap, either on the basis of the invoices found in the works which mention the percentage content in alloying products or on the basis of an analysis carried out at the request of the supplier, the company was nevertheless not in a position to show that the 8 344 metric tons were in fact alloy scrap. The decision states that this quantity must be regarded as ordinary scrap for the following reasons: the nature of the undertaking's production does not require the admixture of alloying elements, the price paid for the ferrous scrap in dispute is that of ordinary scrap and it was used as such and, finally, no mention of the content in alloying elements appears in the invoices.

The applicant makes a double criticism of that decision. By obliging it to *prove* the nature of the alloy scrap, that is to say to prove the correctness of its declarations, the High Authority failed to observe the rules applicable to the equalization scheme, and especially Decision No 2/57. The latter certainly obliges the undertakings to declare movements of ferrous scrap—and the company complied with this obligation by distinguishing between ordinary scrap and alloy scrap—but does not oblige them to furnish documents in support of their declarations. At least, if the High Authority wished to correct or check the declarations produced, it ought to have required this evidence when the declarations were produced and not ten years later, when it is no longer possible to obtain the documents. Its claim is vitiated by misuse of powers to the extent that it results in the undertaking's becoming liable to a higher contribution on the sole ground that it failed to append to its declaration documents which were not required.

In the second place the company disputes the relevance of the reasons put forward by the contested decision for considering the ferrous scrap in dispute as ordinary scrap. Neither the fact that the undertaking's type of production did not require the admixture of alloying elements, nor the fact that the disputed product was used as ordinary scrap is conclusive, since the High Authority did not have regard to them in connexion with the 864 metric tons which it agreed to exempt. Although the prices were indeed those of ordinary scrap, this is because there was no separate demand on the market in Naples, as appears from a certificate by the Chamber of Commerce of that city. Finally, mention in the invoices of

1 — Translated from the French.

the content in alloying elements was only required after 1 May 1958, the date of the entry into force of Resolution No 17 of the Caisse de Péréquation des Ferrailles Importées (The Imported Ferrous Scrap Equalization Fund). The strength of the evidence of the sellers' certificates must therefore be admitted, especially those of the Bonada company and of Stabilimenti Meccanici di Pozzuoli, which state that the ferrous scrap supplied by them comprised alloy steels, either in accordance with the analyses carried out, or by reason of the fact that they knew its origin.

All this may be finally reduced to the question on what conditions of proof the exemption of alloy scrap depends. Is it sufficient that the undertaking concerned declares it to be alloy scrap? Or is the High Authority justified in requiring evidence from the undertaking, and if so, what evidence?

With regard to the first point, without in any way doubting the honesty of the undertakings, the High Authority cannot be compelled to accept mere declarations on their part. Since the quantities of ferrous scrap declared are partly liable to the charges of the equalization scheme and partly excluded from it, the competent authority may require that this latter portion should be proved on the basis of definite facts, failing which it is justified in having recourse to an estimated assessment. This is the ruling in, for example, your Judgment of 8 February 1966 in the Pugliesi Case (8/65) relating to the ferrous scrap used in an integrated iron foundry.

To qualify for the exemption, it is therefore necessary to prove the nature of the alloy scrap. The High Authority is correct in pointing out in this connexion that it is insufficient that ferrous scrap contains other metals in the form of an indeterminate proportion of alloys for it to be considered as alloy scrap; the content in other metals must attain specified percentages which vary according to the metal. The different composition of ferrous scrap moreover involves consequences on the economic and technical levels: its price is normally higher and it is used for special products. If, in this instance, the applicant nevertheless used it to produce ordinary steels, although its use was not only unnecessary but might prove to be more expensive than the use of ordinary scrap, this was because the prices of the various types of ferrous scrap were the same for geographic reasons; exemption from the contribution made the operation advantageous.

The Resolution No 17 of the C.P.F.I. of 24 April 1958 shows the percentages necessary for recognition as alloy scrap, but by and large it merely reproduces what appears in Questionnaire No 2/50 of the ECSC, in use since December 1954, which was produced by the defendant. At the time when the equalization scheme was established there was thus a definition, a general concept of alloy scrap which has since remained constant. The parties are agreed on this point, although they draw opposing conclusions from it.

The resolution of 1958 however contains a new provision, since it provides that the price of the alloying elements shall be shown separately in the invoice together with an indication of the average content. Thus at any rate runs the official French text produced by the High Authority, but the Italian text notified by Campsider to the undertakings concerned simply mentions that the invoices shall show clearly whether they relate to alloy scrap. Be that rather curious divergence of the texts as it may, the provision which I have just described is not itself applicable to the prior purchases which are the subject of the present dispute. It will be seen that the Italian text—the only one with which the undertakings are acquainted—is rather general since it is satisfied with an entry in the invoices which, without clearly setting out the content in alloying elements, is by implication limited to stating that it is at least equal to that required by the regulations in force.

In these circumstances, it is impossible to see how one could be more stringent with regard to operations completed before the resolution of 1958 came into being. Proof of the nature of alloy scrap cannot be made to depend on any sacrosanct requirement; each case must be considered on its merits in the light of available evidence or on the basis of presumptions.

In this case, the applicant relies upon several

factors in support of its argument. It recalls that its declarations regarding the tonnages of alloy scrap corresponded to the entries made each time from 1955 in its books of account as the Société Fiduciaire Suisse found in the course of the investigation carried out in 1962. Above all it relies on the certificates which it produced as a result of the first investigation in 1958. Its suppliers, Stabilimenti Meccanici di Pozzuoli, Società Elettrochimica Vesuviana and Società Bonada certified in September 1958 that they had sold it alloy scrap, referring to clearly specified invoices, tonnages and periods. These certificates come after the notification of the Fund's resolution; it must therefore be admitted that by 'alloy scrap' they meant ferrous scrap containing at least the minimum percentage of alloying elements provided for by that resolution and which were moreover by implication required previously. In any event, states the applicant, if there were doubts as to the validity or the strength as evidence of these certificates, they should have endeavoured to resolve them by checks carried out on the certifiers. The High Authority which failed to dispute them at the time, or even in 1962, cannot properly require of the undertaking additional evidence which it can no longer obtain.

In this connexion the reply quotes a letter of 21 December 1962; in it, although the High Authority recognizes that the suppliers' certificates were of such a nature as 'probably to admit to the category of alloy scrap' the disputed tonnage, it however refuses to take account of them for the reasons which are repeated in the contested decision: lack of analysis of the product; the content in alloying elements did not emerge from the invoices or the declarations; the price did not vary substantially from that of ordinary scrap; the undertaking did not produce alloy steels.

That letter poses perfectly the question to be settled, although the solution is anything but clear. The strict attitude adopted by the High Authority however gives rise to the following objections: although the content in alloying elements is not indicated, the declarations of necessity imply that this content is at least equal to that required to confer entitlement to the exemption. Since the defendant does not appear to dispute the statement of the Chamber of Commerce that in the area there was only one price for ferrous scrap, of whatever type, the argument which it bases upon this seems to me irrelevant, as is that which it bases upon the absence of alloy steel production. In the end the question is whether analysis of the product could be required, since the indication of its content in the invoices, which satisfies the High Authority, is inconclusive when unsupported by an analysis.

In short, I think that such a requirement is excessive or in any case cannot be generally imposed; as Resolution No 17 states with regard to declarations previous to its entry into force, the position must be considered 'case by case'. In this case, if the High Authority considered as insufficient the evidence supplied by the applicant: books of account, suppliers' certificates, it could have required additional clarification, but it should have done so at the time of the first check. To delay until 1962 or 1963 the decision to render the exemption dependent upon showing the exact content in alloying elements by analysis is to require evidence which it is impossible in this case to supply. This is what leads me to reject the High Authority's argument and to accept that the applicant has adduced sufficient evidence that the tonnage declared by it as 'alloy scrap' falls within that definition. It must be emphasized that the solution is not clear, but if doubt remains, that is sufficient to preclude imposing the levy on the undertaking.

Although the claims for damages are inadmissible, the applicant has succeeded in the main part of its application; I think that the expenses should be borne by the High Authority.

I am then of the opinion that:

— the decision of 19 May 1965 should be annulled;

— the claim for the award of damages should be rejected as inadmissible;

— the costs should be borne by the High Authority.