JUDGMENT OF THE COURT
14 JUNE 1967[1]

Koninklijke Nederlandsche Hoogovens en Staalfabrieken NV v High Authority of the ECSC

Case 26/66

1. *Measures adopted by an institution — Decision of the High Authority — Statement of reasons — Criteria*
   (ECSC Treaty, Article 15)

2. *Common financial arrangements — Equalization of ferrous scrap — Own resources of scrap — Concept*
   (ECSC Treaty, Article 53)

3. *Costs — Payment of own costs — Exceptional circumstances*
   (Rules of Procedure, Article 69 (3))

1. The statement of reasons for a decision must contain the essential elements of the High Authority's reasoning in such a way that the Court and all persons concerned may check that the legal provisions in question have been correctly applied.
   Cf. paragraph 1, summary, Case 36/64, Rec. 1965, p. 426.

2. Ferrous scrap which has not been acquired for a consideration and which is re-used by the undertaking on whose behalf the production activity which created it was carried out constitutes an undertaking's own resources.
   Cf. paragraph 2, summary, Case 50/65, Rec. 1966, p. 210.

3. If the defective drafting of a measure for which the defendant is responsible has given rise to an application, this amounts to an exceptional circumstance allowing the Court to order that the parties bear their own costs.
   Cf. paragraph 4, summary, Case 14/63, Rec. 1963, p. 723.

In Case 26/66

KONINKLIJKE NEDERLANDSCHE HOOGOVENS EN STAALFABRIEKEN NV, a limited company having its registered office at IJmuiden (Velsen), represented by P. R. Bentz van den Berg, a member of the Board of Directors, assisted by J. Mertens de Wilmars, Advocate of the Antwerp Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 6 rue Willy-Goergen,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, repre-

1 — Language of the Case: Dutch.

sented by its Legal Adviser, Bastiaan van der Esch, acting as Agent, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application for the annulment of the decision of the High Authority of 20 July 1966 requiring the applicant to pay a sum of 589 912.42 guilders as its contribution to the imported ferrous scrap equalization scheme,

THE COURT

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

Advocate-General : K. Roemer
Registrar : A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The facts may be summarized as follows:

The disputed amount relates to steel received from third parties either by the Breedband company or the Netherlands Verkoopkantoor voor Walserijprodukten (hereinafter referred to as the 'NVW') to be made into rolled coils as contract work. This calls for two successive operations: rolling the ingots into slabs and then rolling the slabs into coils.

The Breedband company carries out only the second operation whilst the first is carried out by the applicant. The contracts, concluded between Breedband or the NVW and the undertakings on whose behalf the rolling is carried out, provide that scrap arising in the course of carrying out those contracts becomes the property of Breedband or of NVW respectively, on payment of the current price on the internal Netherlands market, or else it is acquired at the price obtaining on the European market. Own arisings obtained in Hoogovens' rolling mill and deriving from processing the steel into ingots were re-used by this company. The amount for which the applicant was assessed by the decision of 20 July 1966 for equalization charges relates to this scrap.

The applicant made the present application against this decision which considers the ferrous scrap in question as bought scrap.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'Annul the decision of 20 July 1966 addressed to the applicant by letter of

1 August 1966, received on 3 August 1966;
take note of its offer to prove its arguments by all legal means;
in any event order the High Authority to bear the costs.'

The *defendant* contends that the Court should:

'Dismiss Hoogovens' application for the annulment of the individual decision of 20 July 1966 referring to that company; order Hoogovens to bear the costs of the proceedings.'

III — Submissions and arguments of the parties

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

A — *Admissibility*

The defendant does not dispute the admissibility of the application.

B — *The substance of the case*

In support of its application, the applicant relies successively on the ground of infringement of an essential procedural requirement and the grounds of infringement of the Treaty and of the basic decisions relating to the equalization scheme.

1. The submission of infringement of an essential procedural requirement

The *applicant* alleges that the contested decision failed to specify the contracts for rolling concluded between Breedband or the NVW and third parties. Furthermore, the decision gave no information on the contractual provisions whereby the ownership of the ferrous scrap in question was transferred to Hoogovens. Information on this matter is necessary to understand the High Authority's reasoning on the transfer of the ownership of the ferrous scrap which it claims took place.

There is also a complete lack of information as regards the view that the decision does not have a discriminatory effect with regard to the applicant, in comparison with other categories of ferrous scrap derived from products manufactured by third parties and exempted from the equalization charges.

The *defendant* replies that it was not obligatory to specify in the decision the contracts for rolling in question, since the applicant itself, in its letter of 20 December 1963, had notified the said contracts to the High Authority. Nor was it obligatory to supply information on the contractual provisions relating to the disputed scrap and the identity of the seller etc., as the sole decisive factor for levying equalization charges is that the applicant has retained the disputed scrap at its premises for a consideration. The obligation to pay the contribution arises from this fact alone. The decision therefore did not have to mention other irrelevant facts.

The applicant replies that entirely new reasons were put forward in the statement of defence, namely:

(a) the disputed scrap was group scrap;
(b) between Hoogovens and Breedband there was a relationship with regard to rolling steel on contract on which the foregoing reason is also based.

Assuming that these reasons carried some weight, they ought to have appeared in the contested decision.

That the statement of reasons for the contested decision was inaccurate is also clear from the fact that, in its statement of defence, the High Authority abandoned the argument derived from the recitals in the preamble to this decision, according to which only ferrous scrap originating from steels produced by the undertaking itself could be regarded as own resources.

The *defendant* on the other hand maintains that all the arguments employed by it in the course of the proceedings conform to the original statement of reasons, even when their purpose is to

refute the applicant's new assertions. It denies moreover that it has abandoned its arguments. It has restricted itself to correcting a mistaken interpretation placed by the applicant on a passage in the contested decision.

2. The submission of infringement of the basic decisions of the equalization scheme

At the base of the various arguments which have been invoked by the parties in connexion with this submission, is a fundamental difference between the parties on the importance which the production of ferrous scrap by the undertaking rolling steel on contract and its re-use by the same undertaking can play in defining the concept of own resources. The *applicant* claims that this scrap should be exempt as own resources, in particular for the following reasons:

(a) The definition of own resources refers essentially to ferrous scrap which is the actual product of the undertaking's own activity, the result of its own work, as has been stated in the judgment in the *Espérance-Longdoz* case.

Hoogovens' organization is such as to facilitate, by re-using in its own production cycle ferrous scrap which it produces itself, an improvement in the productivity of the undertaking within the meaning of the judgment of the Court in Joined Cases Nos 32 and 33/58 (*SNUPAT*).

The applicant's use of the disputed scrap is in fact identical from the economic point of view to an undertaking's use of ferrous scrap emanating from the rolling of steel manufactured by the undertaking itself or purchased by it.

Moreover, from the legal point of view, applying the defendant's concept, the acquisition of ferrous scrap deriving from rolling is identical in both cases. In fact the High Authority claims that when an undertaking purchases steel ingots and rolls them, the purchase price of the steel includes the price of ferrous scrap produced in the course of that process. However, this means that, even if the applicant's undertaking produced the ferrous scrap emanating from the processing of steel purchased by it, the High Authority considers that the destination of this scrap is contractually governed by an implied clause relating to the transfer for a consideration of the ferrous scrap produced.

Since this concept is identical with that put forward by the defendant concerning the ferrous scrap in dispute, it is illogical to treat both cases differently.

(b) The importance of technical and economic factors characterizing the position of the ferrous scrap is not lessened by the existence of contractual relations governed by private law, to which the case-law of the Court denies any conclusive value in the context of the equalization scheme.

Relationships governed by private law would only be conclusive in this sphere if the organization of production which makes it possible for 'own resources' to be distinguished did not exist. On the other hand, when this organization does exist, as in the present case, it is the sole determining factor for categorizing the ferrous scrap, and in this case relationships under private law cannot transform own resources into bought scrap.

(c) In any case, even on the supposition that relationships under private law could in this case be a conclusive factor, it does not therefore mean that the disputed scrap is bought scrap. In fact this scrap cannot constitute the subject-matter of legal relationships and thus of measures disposing of it before it has been produced. However, once it was produced, it became the property of Hoogovens and remained so until consumed by that undertaking. Consequently, the statement in the contested decision that the disputed scrap was transferred to Hoogovens contradicts both facts and law.

The applicant moreover maintains that

the undertaking which rolls steel on contract is carrying on its business, and thus producing ferrous scrap from the rolling on its own behalf and at its own risk, since the price of the rolling is fixed in advance and thus cannot take account of possible alterations in the amount of the expenses previously provided for.

The *defendant* on the other hand considers that these technical and economic factors must be considered in the context of the legal relationships existing when the ferrous scrap was produced and particularly in relation to the activity whereby they were produced, and the manner in which the roller acquires them. In the present case, the applicant can only avoid returning to its customers the ferrous scrap obtained from rolling by an agreement, express or implied, and on the payment of a price. This is sufficient for the disputed scrap to be regarded as bought scrap.

The defendant further maintains that:

(a) The internal economic function of the re-use of ferrous scrap in the manufacturing cycle is not the sole factor to be borne in mind in deciding whether the ferrous scrap is own resources or bought scrap. The Court based the *ratio legis* for the exemption of ferrous scrap on the need to avoid fresh equalization contributions on ferrous scrap derived from other arisings, for which the same consumer has previously paid the contribution.

It is logical that ferrous scrap recovered when bought ingots are processed should be exempt, as the purchase price of the ingots includes the price of the ferrous scrap used to manufacture them, increased by the equalization contribution. It would therefore be inequitable to assess once more the ferrous scrap produced by the buyer of the ingots. On the other hand, the price agreed for rolling steel on contract is not normally connected with the cost price of the ingots to be rolled; also, the equalization contribution is not normally levied on the rolling contractors, so that with regard to the equalization contribution, there is a clear distinction between processing bought steel ingots and rolling steel on contract.

In other words, for the purposes of exemption it is essential that the concept of productivity should relate to ferrous scrap for which the contribution has already been paid. The industrial criterion of the recovery of ferrous scrap within the consumer's plant cannot prevail over this *ratio legis,* which is a conclusive factor in the exemption of own resources.

(b) The fact that the Court has ruled that relationships governed by private law are not such as to modify the 'actual situation' with regard to ferrous scrap does not mean that no relationships under private law are of any importance in ascertaining the actual situation with regard to ferrous scrap. When it ruled that in certain cases relationships under private law have no conclusive validity, the Court only intended to prevent the undertakings liable for equalization from evading their obligations by legal subterfuges.

Nor must it be forgotten that, for the purposes of the equalization scheme, the concept of 'bought scrap' is the rule and the concept of 'own resources' is the exception. Consequently, it is impossible to make the classification of bought scrap dependent on the absence of any of the characteristics of own resources.

(c) The fact that the disputed scrap did not exist when the rolling contracts were signed does not preclude it from forming the subject of a legal transaction disposing of something which has yet to come into being.

The defendant observes moreover that the applicant employed the expression 'on its own behalf' in a sense entirely different from that attributed to it by the Court. In fact, once the price has been fixed, the rolling contractor carried on his activity on the behalf of the

person who placed the order.

The *applicant* replies that it did not pay for the ferrous scrap nor did it provide any consideration for it 'under the contractual obligations referred to by the High Authority'. It denies in particular that there was a contract for rolling between Hoogovens and Breedband and that Hoogovens was a party to the contracts for rolling concluded between Breedband or the NVW on the one hand and the customers on the other. It states that it is for the defendant to prove the contrary.

But, according to the *defendant,* no further proof is necessary for the disputed scrap to be regarded as Hoogovens' bought scrap, since it was found by its inspectors in the course of an examination of the periodic accounts between Hoogovens and Breedband that this scrap stood to the credit of Breedband. The defendant observes that the applicant has never disputed the existence of this entry. This fact is sufficient to prove the existence and the content of the agreement whereby the ferrous scrap in question remained with Hoogovens. Moreover, the Hoogovens company, in its letter of 25 April 1966 to the High Authority, mentioned 'legal relationships which existed and contractual obligations to other undertakings'.

The defendant moreover states that, whether it is admitted that this scrap remained with Hoogovens under an agreement with Breedband or the NVW, or whether Hoogovens' participation in carrying out contracts for rolling concluded by Breedband or the NVW with third parties can be regarded as an act which subsequently made the applicant a party to those contracts, the scrap was at all events bought scrap, since the identity of the seller has no conclusive importance in this matter. The point at which the property in the ferrous scrap passed to the applicant may be similarly ascertained.

With reference to the different treatment accorded by the defendant to situations economically and technically the same, the *applicant* alleges that the High Authority considered as the conclusive factor in the definition of own resources legal relationships under private law, and especially, the ownership of the ferrous scrap arising from these legal relationships.

The *defendant* replies that ferrous scrap deriving from bought steel or from an undertaking's own resources are to be considered own resources not because there is a right of ownership in the steel, but because from the point of view of the principles of the equalization scheme there were no grounds not to consider them as such.

Similarly, the scrap deriving from contract rolling is assessed to levy, not because of the ownership of the steel, but because this scrap is held, for a consideration, in the plant of the rolling contractor. The *applicant* complains moreover that the contested decision ignored the decision of the Joint Bureau of Ferrous Scrap Consumers (hereinafter referred to by its French initials as the 'OCCF') of 9 December 1957 from which it is apparent that scrap deriving from rolling under contract is exempted from the equalization levy as the rolling contractor's own resources. If the contractor and his customer had agreed that the contractor should retain the ferrous scrap deriving from his own activity, the customer could not avail himself of the right referred to in Article 4 of basic Decision No 2/57. Contrary to this decision, the High Authority considers that the scrap from contract-rolling is assessable and authorizes the customer to deduct the value of this scrap from the equalization levy which he has to pay on his bought scrap under Article 4 of basic Decision No 2/57. This amounts to granting an exemption to the customer although he neither produces nor re-uses the scrap, whereas although the contractor fulfils completely both of the conditions required for exemption from the equaliza-

tion levy, that is to say, production of the ferrous scrap and its re-use in his own undertaking, he is subject to these charges. Such consequences are incompatible with the equalization system.

The *defendant* replies that the rules issued by the OCCF were prescribed solely for cases where contracts for rolling had been concluded between two undertakings consuming ferrous scrap in order to harmonize their declarations with regard to ferrous scrap.

In this case, the contracts for rolling do not oblige the person placing the order to pay the contribution. Since neither Breedband nor the NVW was required to make declarations to the OCCF, this decision does not apply to them.

The *applicant* replies that the provision in question by no means refers to undertakings consuming ferrous scrap; and moreover if the High Authority was justified in believing that there was a contract for rolling between the applicant and Breedband, the application of this provision would result in exempting the scrap in dispute from all charges.

The applicant goes on to say that it is not for the undertakings but for the High Authority and its agencies in each case to ascertain the position of the undertakings with regard to the equalization scheme. If this were not the case then not only the liability to the charges, but also the exemptions from them would thus be made dependent on relationships under private law.

The *defendant* rejoins that the rules of the OCCF concerning declarations of ferrous scrap are by their nature only applicable to undertakings consuming ferrous scrap, and that exemption may only be granted to the rolling contractor if the customer renounced his right to deduct from the basis of assessment of his own contribution the quantities of scrap assigned to the former. There is nothing unusual in leaving to two undertakings subject to the levy the power to decide which of them shall pay the contribution. According to the defendant, all that is essential is to prevent any bought scrap from escaping the contribution.

In its reply, the *applicant* complains that, in its statement of defence, the defendant maintained that the ferrous scrap in dispute was part of Breedband's 'group scrap'.

The *defendant* replies that it merely doubted Hoogovens' argument to the contrary; it might in fact be suspected that Hoogovens had acted as Breedband's sub-contractor, that is to say that in fact it acted as rolling contractor for that company. Nevertheless since the act in question may be treated as equivalent to purchase, this point is of secondary importance.

3. The submission of infringement of Articles 3 (b), (c), (d), 4 (b) and 5 of the Treaty

The *applicant* maintains that the contested decision infringes, at Hoogovens' expense, the principle of equal access to the sources of production and neither promotes the fixing of the lowest prices, nor the maintenance of conditions encouraging undertakings to expand and improve their production potential.

In support of this submission, the applicant puts forward arguments analogous to those set out in the preceding submission.

The applicant maintains that the contested decision has discriminatory effects as it accords arbitrary and unequal treatment to the ferrous scrap deriving from processing within an undertaking of products which it has bought from third parties and the ferrous scrap coming from similar products which an undertaking has received from third parties for processing on contract.

The differences in the legal, economic and industrial position of undertakings using bought scrap, and undertakings processing steel on contract, are irrelevant in establishing the position of those undertakings for the purpose of equal-

ization levies on the ferrous scrap deriving from those activities.

If the ferrous scrap in dispute had been returned to the customer placing the order for rolling, the High Authority would consider that scrap as exempt from the levy, although, according to such an argument, unlike the present case, the re-use of ferrous scrap produced in a different undertaking could not be considered as an internal measure of economy justifying the exemption. This circumstance highlights the discriminatory nature of the High Authority's concept.

The discriminatory effects of this concept also result from the fact that, in the example quoted above, the High Authority exempts from the levy ferrous scrap which does not differ significantly from the said group scrap and ferrous scrap which is returned under a reservation of rights of ownership. In fact in those two cases the ferrous scrap is produced and re-used in two different undertakings—which cannot be regarded as an internal measure of economy by an undertaking.

The *defendant* observes that with regard to the different treatment accorded to ferrous scrap returned to the customer and ferrous scrap re-used by the rolling contractor, ample proof has been supplied in connexion with the submission of infringement of the basic decisions.

Where group scrap is concerned, rolling cannot be regarded as a production activity of the steelworks belonging to the group, as the rolling programme is decided by the management of the rolling mill and not by that of the said works.

As regards the ferrous scrap returned on the basis of a reservation of rights of ownership, it was obtained in the course of rolling and is entirely excluded from the control of the producer of blooms or of ingots. This justifies the difference in treatment, criticized by the applicant, between this scrap and the other returned to the rolling contractor.

The *applicant* replies that the case of group scrap and scrap returned under a clause reserving rights of ownership is identical to that of scrap returned to the customer in that, precisely because a contract for rolling is concerned, the producer of ingots can no more control the rolling process producing the ferrous scrap than in the case of the sale of steel with a reservation of the rights of ownership in the ferrous scrap, or in the case of group scrap. With regard to this latter case in particular, the applicant states that the rolling process is controlled not by the management of the rolling mill, but by an authority co-ordinating the schedules of the steelworks and of the rolling mill.

The *defendant* replies, with regard to the ferrous scrap derived from contract-rolling returned to the customer, that the latter does not pay for the equivalent of the ferrous scrap; on the contrary, an undertaking supplying steel ingots under a contract reserving the rights of ownership of the ferrous scrap pays for the equivalent of the ferrous scrap returned. This difference which is indeed sufficient, in the context of the equalization scheme, to justify the difference in treatment, is emphasized still more by the fact that when ingots are sold subject to a reservation of the rights of ownership in the scrap, the buyer of the ingots is completely free to organize his production as he thinks fit, whereas in the case of rolling contracts, the rolling is defined in the terms of the contract.

With regard to group scrap the defendant observes that in the context of the relations within the group, the rolling schedule, as the applicant admits, is not established by the steelworks, which means that no comparison can be made with the position of the person placing an order for rolling steel under contract.

C — *Costs*

The *applicant* maintains, by way of a secondary submission, that the defend-

ant should be ordered to pay the costs even if the application is dismissed, because, owing to the uncertainty which the High Authority has caused with regard to the legal position of the ferrous scrap in dispute, the applicant would have been obliged in any event to obtain a decision from the Court to discover which of the basic decisions successively applied by the High Authority is to be considered as applicable.

Moreover, the point of view presently put forward by the defendant is based on arguments which very often differ as to essentials from those on which the High Authority relied during the negotiations with the applicant.

On the other hand the *defendant* maintains that it has given no cause for any doubt to remain with regard to its opinion and that it has made clear and constant reference to the concepts and criteria provided for the operation of the equalization scheme, together with the case-law of the Court.

In its reply, the *applicant* gives details of the changes in the defendant's attitude of which it complains.

In its rejoinder, the *defendant* denies that this criticism is well-founded and alleges that the applicant has often interpreted the High Authority's point of view incorrectly or incompletely.

IV — Procedure

The procedure followed the normal course.

At the hearing on 15 March 1967, the Court, having regard to the report of the Judge-Rapporteur and having heard the Advocate-General, decided to request the applicant to explain in writing, before 10 April 1967, what commercial relationships governed the ingots produced and supplied by third parties which it rolled into slabs in its plant.

This information was supplied.

The parties presented their oral submissions at the hearing on 18 April 1967.

The Advocate-General delivered his opinion at the hearing on 2 May 1967.

Grounds of judgment

A — Admissibility

The admissibility of the application is not disputed by the defendant and there are no grounds for the Court to raise the matter of its own motion. The application is therefore admissible.

B — Substance

1. *The submission of infringement of an essential procedural requirement*

The applicant maintains that the contested decision does not adequately state the reasons on which it is based. In particular, this decision only gives very superficial consideration to the applicant's actual position and only refers in general terms to the contracts concluded between Breedband or the NVW and those placing the order for contract-rolling. Moreover, it completely fails to specify the provisions of the contract under which it is alleged that the ownership of the disputed scrap passed to the applicant. Finally, it wholly fails to show that there are no discriminatory effects with regard to the applicant.

According to the defendant's reasoning, the precise determination and description of the legal relationships connecting Hoogovens to Breedband and the NVM or possibly to those placing the orders for contract-rolling, are irrelevant for fixing the position of the disputed scrap within the framework of the equalization system. On this view, and without prejudice to any decision as to whether the High Authority's concept is well-founded, it was unnecessary to state in any greater detail the nature, subject-matter and content of the above-mentioned contracts.

The contested decision does not show clearly the legal title whereby the applicant acquired the ownership of the ferrous scrap. However this lack of clarity is explicable in the context of the legal point of view propounded by the High Authority, which is that there is no significance in the type of legal relationships whereby the acquisition was made where the acquisition in question is for a consideration.

Finally, in giving reasons for its view that there are no discriminatory effects, the decision stated that the legal, economic and technical position of a steel undertaking which carries out contract-rolling is different from that of an undertaking which on its own account rolls ingots which it owns. Although this justification cannot be considered as exhaustive, it does set forth the essential elements of the High Authority's reasoning in such a way that the Court and all persons concerned may check that the legal provisions in question have been correctly applied.

Consequently, the complaints which the applicant puts forward against the statement of reasons for the contested decision are unfounded.

2. *The complaints of infringement of the basic decisions*

Opposing the contested decision which regards the ferrous scrap in dispute as bought scrap, the applicant submits that there has been an infringement of the basic decisions of the equalization scheme. In support of this submission it points out in particular that it has itself produced the ferrous scrap in question at its own premises and it claims that, according to Netherlands law, the ferrous scrap belonged to it from the moment when it was produced and that it gave no consideration for this scrap under the contractual relationships referred to by the High Authority.

Exemption from the equalization charges on ferrous scrap consumed within the Community constitutes an exception to the compulsory equalization system and the notion of own resources must therefore be strictly interpreted. This

concept must not run contrary to the need for the uniform application of the equalization scheme throughout the entire Community. In this connexion, it is impossible strictly to relate this concept to the concepts of national law governing the relationships in civil law between undertakings consuming ferrous scrap. Any differences existing between the national laws of the Member States might in fact make impossible the uniform application of Community provisions throughout the Common Market as a whole. In order to avoid such a danger, the application of the equalization scheme, to which common legal concepts apply, independently of concepts of purchase and of ownership, is essentially based on the acquisition of ferrous scrap for a consideration.

In this context, own resources may be defined *a contrario* from the broad concept of bought scrap. Nevertheless a purely negative concept, even though uniform, is insufficient to satisfy other basic requirements of the equalization scheme. In fact this scheme must first and foremost prevent ferrous scrap from unjustifiably escaping equalization charges by the use of purely formal criteria. It is moreover necessary to prevent exemptions from distorting competition in the Common Market. This would be so if the effect of this concept were to confer an advantage on certain undertakings at the cost of other undertakings in a comparable situation with regard to the production and consumption of ferrous scrap and consequently the organization of their production.

In defining own resources, there must be added to the negative criterion that there has been no acquisition for a consideration a positive, economic criterion, based on the organization of the undertakings consuming ferrous scrap. According to this criterion ferrous scrap can only be regarded as own resources if it is re-used either by the actual undertaking which produced it or by the undertaking on whose behalf the production activity which created it was carried out.

In this case it is not disputed that the customers placing the orders for contract-rolling had agreed with Breedbank or the NVW that the ferrous scrap produced in carrying out the contracts in question should be retained by Breedband or the NVW against the payment, by way of set-off, of the prevailing price for ferrous scrap in the Netherlands. The right to dispose of the ferrous scrap is thus dependent on the payment of the price for it and the customers received the agreed price for this ferrous scrap. Furthermore, it is clear from the information supplied by the defendant in the course of the oral proceedings, which the applicant has not disputed, that the customers deducted from the basis of their assessment to contribution the tonnages of ferrous scrap sold to third parties.

Even if the credit notes relating to the ferrous scrap in dispute in the relationships between the applicant and Breedband were not such as to prove the payment of a price by Hoogovens to Breedband, the applicant's explanations regarding its 'maatschap' (association) with the Breedband company show that Hoogovens was at least indirectly bound to bear part of the compensation owed to the customers for the arisings in question. Consequently in this case there is a failure to meet the negative criterion that the ferrous scrap shall not have been acquired for a consideration. Furthermore, this scrap constitutes waste deriving from rolling carried out by the applicant on behalf of other undertakings. According to the criteria stated above, if this ferrous scrap had been used by the customer, it would have been exempt from equalization as the own resources of that customer. Therefore, when the same ferrous scrap is used by the rolling contractor, it cannot constitute his own resources. This conclusion may be justified by taking account of the fact that although the production of this ferrous scrap was indeed carried out at the applicant's premises, it forms part of a production activity economically connected with the customers who placed the order, and is thus outside the process of producing steel from ferrous scrap arising within the organization of the applicant's own production.

The rules laid down by the OCCF on 9 December 1957 concerning the position with regard to the equalization scheme of ferrous scrap deriving from rolling, might, it is true, give rise to misunderstandings. Nevertheless the competent departments of the High Authority have always adopted a different interpretation from that of Hoogovens which would give the OCCF's circular a meaning contradictory to the basic decisions of the equalization scheme. In any event the above-mentioned rules laid down by the OCCF cannot prevail over the principles and criteria arising directly from the basic decisions.

There is thus no foundation in the applicant's claim that the exclusion of the ferrous scrap in question from the category of own resources contradicts the general basic decisions of the equalization scheme.

3. *The complaint of discrimination*

The applicant complains that the contested decision has discriminatory effects as regards the applicant both in comparison with the undertakings which roll bought steel and with those who place orders for contract-rolling and obtain exemption in respect of the scrap returned to them. The consumption of ferrous scrap by the owner of the steel from which it arose, in the context of a production activity carried out either directly by himself or on his behalf is clearly distinct, both legally and economically, from the applicant's consump-

tion of the ferrous scrap in dispute. This is because in both of the first two the ferrous scrap was not as such acquired for a consideration. Furthermore this ferrous scrap has always remained within the limits of the production cycle organized by the owner of the steel, and on a technical level it is of little importance whether this activity was carried on directly by him or through third parties working on his behalf. These differences are such as to provide objective justification for the different treatment given, under the equalization scheme, to scrap coming within the first two of the above-mentioned cases on the one hand and the ferrous scrap in dispute on the other.

Consequently the complaint of discrimination is unfounded.

C — Costs

The applicant has failed in all its submissions.

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. The applicant has however requested that, in any event, the defendant should be ordered to pay the costs of the proceedings, because of the uncertainty which the High Authority has created with regard to the legal position of the ferrous scrap in question.

The wording of the rules contained in the OCCF's circular of 9 December 1957 may lend itself to misinterpretation.

Under the first paragraph of Article 69 (3) of the Rules of Procedure, when the circumstances are exceptional the Court may order that the parties bear their own costs in whole or in part. In the present case it is appropriate to order the parties to bear their own costs in part.

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 3, 4, 5, 15, 33 and 53 of the Treaty establishing the European Coal and Steel Community;
Having regard to the decisions of the High Authority concerning the ferrous scrap equalization scheme;

Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69 (2) and (3);

THE COURT

hereby :

1. **Dismisses Application 26/66 as unfounded;**
2. **Orders the applicant to bear two-thirds of the costs of the proceedings and the defendant to bear one-third thereof.**

Hammes Trabucchi Monaco

Delvaux Donner Lecourt Strauß

Delivered in open court in Luxembourg on 14 June 1967.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 2 MAY 1967[1]

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1 — Translated from the German.