JUDGMENT OF THE COURT
13 JULY 1965[1]

Mannesmann AG
v High Authority of the ECSC

Case 37/64

Summary

1. *Measures adopted by Community institutions—Decision of the High Authority taken with the unanimous assent of the Council—Amendment—Powers of the High Authority*

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

3. *Common financial arrangements—Equalization of ferrous scrap—Unit of account—Function*
   (*ECSC Treaty, Article 53*)

4. *Common financial arrangements—Equalization of ferrous scrap—Contributions—Calculation in units of account—Rate of exchange applicable during accounting periods*
   (*ECSC Treaty, Article 53*)

5. *Common financial arrangements—Equalization of ferrous scrap—Discriminatory rules—Amendment—Absence of vested rights.*

1. Cf. paragraph 4, summary, judgment in Case 111/63.
2. Cf. paragraph 5, summary, judgment in Case 111/63.
3. Cf. paragraph 7, summary, judgment in Case 111/63.
4. Cf. paragraph 8, summary, judgment in Case 111/63.
5. Cf. paragraph 9, summary, judgment in Case 111/63.

In Case 37/64

MANNESMANN AG, Mannesmannufer 1b, Düsseldorf, represented by its Board of Directors, assisted by Werner von Simson, advocate at Bertrange (Luxembourg), with an address for service in Luxembourg at his Chambers,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Dr Bastiaan van der Esch, acting as Agent,

1 — Language of the Case: German.

assisted by Dr Hans Peter Ipsen, Professor at the University of Hamburg, with an address for service in Luxembourg at its offices, 2, place de Metz,

defendant,

Application for the annulment of Article 1 of the decision of 8 July 1964 relating to the financial obligations of the applicant under the ferrous scrap equalization scheme,

THE COURT

composed of: Ch. L. Hammes, President, R. Lecourt, President of Chamber, L. Delvaux, A. Trabucchi (Rapporteur) and W. Strauß, Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:

By *Decision* No 21/60 of 20 July 1960 (Official Journal of 24 August 1960, page 1177 *et seq.*) the High Authority fixed the currency parities for the calculation of the equalization accounts for imported ferrous scrap and scrap treated as such on the basis of Decisions Nos 18-20/60.

The recitals of these decisions state, *inter alia*:

'— Whereas the provisional equalization accounts for the period 1 April 1954 to 30 April 1959 inclusive, as provided by Decisions Nos 18/60, 19/60 and 20/60, shall be drawn up in EPU (European Payments Union) or EMA (European Monetary Agreement) units of account;

— Whereas for the purposes of the ferous scrap equalization scheme the unit of account is merely a method of accounting intended to facilitate the calculation of accounts in aggregate and does not in any way operate as a guarantee against fluctuations in the exchange rate;

— Whereas the EPU and the EMA have fixed the parity of national currencies of the countries of the Community with reference to the unit of account;

— Whereas this parity has not changed during the period mentioned above in relation to the German mark, the Belgian franc, the Italian lire, the Luxembourg franc and the Dutch guilder; therefore as far as the Federal Republic of Germany, Belgium, Italy, Luxembourg and the Netherlands are concerned the

aggregate of the equalization accounts will continue to be calculated on the basis of the unit of account;'.

On the other hand, having regard to the fact that the parity of the French franc with reference to the unit of account had been subject to fluctuations during the period in question the High Authority stated in this decision:

'— . . . it is necessary to draw up the statements of account in respect of the French undertakings in French francs and to prescribe rules for the conversion of the unit of account into French francs, which are consistent with the object of the financial arrangements for the equalization of ferrous scrap;

— Whereas the object of the equalization scheme is to approximate the price of imported ferrous scrap and scrap treated as such to the prices prevailing inside the Community and to apportion the equalization charges among the undertakings subject to the equalization scheme; and whereas this operation must not be carried out in such a way that as a result of the conversion into national currency some undertakings obtain an unjustified benefit whilst others suffer an unjustified loss;'.

On the basis of these recitals Article 2 of the Decision fixed, for the amounts expressed in units of account to be credited to the German undertakings and paid by them, a parity of DM 4.20 for each EMA unit of account, that is to say, the parity in force during the period from 1 April 1954 to 30 April 1959.

Further, by Decision No 7/61 of 19 April 1961 (Official Journal, 25 April 1961, p. 653) the High Authority laid down new rules for the calculation of interest based on the following principles:

1. The contributions actually paid into the Fund shall bear interest to the credit of the undertakings from the date of payment to the date when the accounts are closed (Article 1).
2. The amount of the bonuses payable by the Fund shall bear interest to the credit of the undertakings entitled thereto (Article 2).
3. The payment of the interest thereby charged to the equalization scheme shall be guaranteed by a special contribution apportioned among all the undertakings and calculated on the basis of their assessment to contributions (Article 3).

That particular innovation in these rules compared with the system applied until then lies in the first principle.

In the recitals to the said decision the substitution of the new system for the old was in particular justified having regard to the fact that it 'arranges for the payment of interest on provisional amounts due by way of principal, because they are liable to be amended later, either by an adjustment of the statements of account or as a result of verification of the particulars provided by the undertakings of tonnages liable to contributions, or as a result of judgments delivered by the Court of Justice; whereas this uncertainty means that the interest is not proportionate to the principal; whereas it is therefore necessary to substitute for the system of charging interest on overdue payments another system having the same object but not affected by the variable factors mentioned above;'.

By decision of 8 July 1964 the High Authority fixed at DM 865 704.86 and DM 4 906 959.66 the amounts which the applicant company had to pay to the High Authority under the financial arrangements for the equalization of imported ferrous scrap.

By the present application the applicant contests this individual decision and in addition argues, by way of objection, under the second paragraph of Article 36 of the ECSC Treaty, that general Decisions Nos 21/60 and 7/61 are illegal.

II — Conclusions of the parties

In its originating application the *applicant,* referring to the decision of the High Authority mentioned above of 8 July 1964, claims that the Court should:

'1. annul Article 1 of the decision;
2. order the defendant to pay the costs.'

The *defendant* in its statement of defence contends that the Court should:

'dismiss the application as unfounded, and order the applicant to pay the costs.'

III — Submissions and arguments of the parties

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

A — *The problem of the parity of currencies*

1. Illegality of the contested decision with reference to general Decision 21/60

The *applicant* maintains that the High Authority adopted the individual decision in dispute without being legally entitled to do so, because this decision is not covered by general Decision No 21/60 and has no legal foundation either in the Treaty itself or in any rule of law relating to its application. According to the applicant it is clear from the statement of reasons given for Decision No 21/60, that the additional words 'to the extent and so long as this is the official rate of exchange' must be added by implication to Article 2 thereof, which provides that the amounts credited to the German undertakings expressed in units of account should be converted on the basis of the parity of DM 4.20 for one unit of account. In fact the High Authority should, in its enforceable decisions, base its calculations on the parity of currencies at the date of payment or the date when the enforceable decision is issued. As the statement of reasons in Decision No 21/60 declares, the reference to the unit of account does not in any way operate as a guarantee against fluctuations in the exchange rate for the purposes of equalization: however, fixing a parity different from the one in force at the date of payment would, according to the applicant, have precisely the effect of guaranteeing that parity against fluctuations.

The *defendant's* answer to this argument is that by Article 2 of Decision 21/60, a provision which in itself is complete and clear, it endeavoured to carry out the objectives of the equalization scheme while it remained in force. For this purpose and in order to avoid any discrimination the debits and credits of undertakings relating to earlier periods must be calculated on the basis of the parities existing during those periods. It is true that the unit of account provides no guarantee against fluctuations, because otherwise the Fund would be able to demand from its debtors, and the creditors from the Fund, payment in dollars—as the dollar is the only real equivalence of the EMA unit of account—even if following a devaluation or revaluation such payment in dollars would have necessitated a relatively small or large expenditure of national currency.

In its reply the *applicant,* while stating that it agrees that the respective exchange rates in force during a particular accounting period are to be taken into account when calculating the equalization prices and consequently the equalization amounts, is of the opinion that it is illogical to conclude that for this reason the *contributions* themselves must also be calculated according to the parity in force during this period, as there is no link between the first two

factors and the last one. The position is in fact as follows.

1. The contributions are intended to cover various expenses of the Fund which have nothing to do with the respective parities of the currencies of Member States.
2. The rate of contribution of the undertakings of one Member State is not calculated on the expenses payable by the Fund in that Member State but on the total expenses of the Fund in the Community.
3. Moreover the absence of any quantitative connexion between equalization payments received in one Member State during a particular period and the contributions payable by undertakings consuming ferrous scrap in that State is in itself a sufficient reason why adjustments of these payments could not be offset by corresponding adjustments of the contributions. Frequently the undertakings benefiting from equalization were not the undertakings which had to pay the contributions.

The *defendant* states on the other hand that the connexion mentioned above does in fact exist. To prove its point it quotes an example with figures from which it concludes that the application of the parity of the day of payment would lead to an unequal charge in national currency.

2. Infringement of an essential procedural requirement

In case the Court should take the view that Decision No 21/60 covers the individual decision the *applicant* submits that the latter should be annulled because Decision No 21/60 is illegal.

In support of this objection of illegality the applicant puts forward the following arguments:

(a) Decision No 21/60 should have been taken with the unanimous assent of the Council of Ministers, since it implies that the object and functioning of the Equalization Fund had been altered and departs at the same time from the principles which had until then governed the operation of the Fund. In fact it could not be inferred either from a literal interpretation or the general intention of the basic Decisions Nos 22/54, 14/55, 2/57 and 16/58 that the equalization scheme was also intended to offset variations in the parity of the currency of one Member State with reference to the EMA units of account at the date when the contributions were paid, which was conversely what Decision No 21/60 set out to achieve. On the other hand, it was necessary in order that the Fund could be operated to reduce the various national currencies to a common denominator which was the EMA unit of account. The result was that Decision No 21/60 altered the aim and operation of the Equalization Fund by converting national currencies on the basis of a parity different from that in force on the date of payment.

(b) If the parity: one EMA unit of account = DM 4.20, fixed by Decision No 21/60, was also to be applied after the equalization scheme had ceased to function, the decision would be illegal, so far as it concerns German undertakings, for lack of a statement of reasons, since all the considerations of fact and of law contained in it relate solely to France.

Moreover these considerations are based on unsound reasoning. If the statement of the reasons on which Decision No 21/60 is based is read together with the statement of reasons upon which the individual contested decision is based it is clear that, according to the High Authority, the changes of parity also affect the amounts of the equalization contributions and, therefore, that the application of the parity in force at the date of payment instead of the parity in force during the relevant months for

the purposes of equalization would lead to discrimination against the undertakings which had imported scrap compared with undertakings which had bought Community scrap. The applicant criticizes this argument of the High Authority for failing to appreciate that equalization contributions are uniformly apportioned between scrap which has been subject to equalization and that which has not, and that, as a result, since the same charge is imposed on both categories of scrap, the parity adopted for calculating the contributions is of no importance whatever.

As to (*a*): The *defendant* argues on the other hand that Decision No 21/60 in no way modifies the aim or operation of the Equalization Fund. It emphasizes that 'the equalization of ferrous scrap is essentially a retroactive determination of rights and obligations for a fixed period'. It follows that the only way of obtaining a result which cannot be legally contested is to apply the parities corresponding to the periods for which the average Community price (the equalization price) is calculated. In fact 'this would be a manifest interference with the necessity to compare the many factors which arise in fixing the equalization price and in calculating the equalization contributions based on it, if a *later* currency parity was allowed to have a retroactive effect on some of these calculations'. It is of special importance that these three essential factors, the equalization price, the amount of equalization to be paid to the Fund and the contributions payable to cover these payments be removed from the retroactive effect of possible currency fluctuations. In this way it is possible to guarantee equality of treatment to undertakings consuming scrap during an 'equalization month', that is to say, during the period to which reference is made in order to determine the difference between the prices of ferrous scrap.

By adopting a fixed currency parity for calculating the financial claims and obligations of the undertakings whose national currency has not been subject to fluctuations during the continuance of the equalization scheme and, on the other hand, by adopting for French undertakings the parities in force during the periods to which the calculation refers, Decision No 21/60 did no more than to prescribe the technical rules in accordance with the objectives of the equalization scheme, rules falling within the compass of the implementing provisions which only the High Authority is authorized to issue, and this is apparent if reference is made to subparagraphs (a) and (b) and to the second paragraph of Article 53 of the ECSC Treaty, to Decision No 22/54 and also to the second paragraph of Article 1 of Decision No 16/58.

The defendant refers in addition to the judgment of the Court in Case 8/55 (*Fédération charbonnière de Belgique* v *High Authority*).

The *applicant* replies that the grounds of this judgment deal with the powers of the High Authority from a substantive point of view and do not consider the question to what extent the exercise by it of these powers requires the collaboration of the Council of Ministers.

As to (*b*): The *defendant* raises the objection that, as the financial requirements of the Fund have been calculated on the basis of fixed parities and as this amount has to be apportioned among all the Community undertakings, the application of another currency parity would entail 'for the undertakings in the countries in question a financial obligation during the equalization period different from the one required by the principle of equality of treatment'. Even if, as the applicant has done, one takes only one of the calculations which have to be taken into account in order to bring about equality of treatment between undertakings, namely the amount of the contributions to be paid into the fund, the application of the currency

parity in force at the date of payment would lead to different results depending on whether an undertaking paid before or after a change of parity.

The *applicant* states in its reply that, even if the alteration of the equalization scheme by the High Authority, of which it complains, had not taken place, the Fund would have been able to obtain from the amounts which it received in national currencies the amounts it requires, which represents the equivalence in national currencies of the units of account which it has to pay out.

The *defendant's* answer to this argument is that the object of an equalization fund is not simply to proceed in such a way that, even if the applicant's debt in DM was calculated and paid at the existing parity, the Fund has in the end no outstanding debit or credit balance; it is not particularly important to know whether the Fund receives now, if DM 1 is paid into it, the same sum in other currencies as it formally received when DM 1.05 was paid into it. It is very much more important that the applicant, *compared with the other debtors,* bears its proportionate share of the charges.

The *applicant* maintains in addition that in any case fixing a parity for the purpose of calculating contributions with reference to the accounting period can never offset any gain or loss whatever on conversion, which occurred when the amounts of equalization were calculated. What is more these adjustments can only be incorporated in the aggregate calculation and taken into account altogether when the rate of equalization is determined in units of account.

The *defendant* acknowledges that this argument is correct but says that it is not relevant to the problem, because once it is established that there is in the nature of things no system of international payments in various currencies which can remain entirely unaffected by changes in currency parities, it is still necessary to know what parity to adopt for the calculation and payment of a debt which originated in the past. On this point the defendant refers to the arguments which it has already put forward.

3. Infringement of the Treaty and of rules of law relating to its application

(a) *Violation of the principle of non-discrimination*

Proceeding on the assumption that since the Common Market came into being the High Authority has only used the unit of account for calculating the general levy and the levy on ferrous scrap, and that the equalization contributions can only be expressed in units of account, the *applicant* maintains that by reason of the contested individual decision, which does not take into account the revaluation of the German mark, it has to pay a higher proportion of the expenses of the Fund than the undertakings of the other Member States of the Community. For when the High Authority calls upon the applicant to pay DM 4.20 for one unit of account, it is demanding payment of a higher share of the expenses in units of account than the applicant would have had to pay if its share were in fact calculated on its chargeable tonnage of ferrous scrap. The applicant emphasizes, moreover, that the High Authority allowed the French undertakings to discharge their delegations to the Fund by paying amounts which fell short of the value of the units of account payable. This modification of the key principle of apportionment based exclusively on the scrap consumed by undertakings discriminated unfairly against German undertakings and therefore against the applicant.

The *defendant* maintains on the other hand that debts originate in national currencies and must be discharged in national currencies. Therefore the prohibition on discrimination must be ap-

plied to these payments in national currencies. However, according to the contested decision the applicant has to pay the exact amount in DM which it should have paid out if the statements of account had already been correctly drawn up during the period when the equalization scheme was in operation. If this sum payable by the applicant were reduced, there would be discrimination against undertakings which paid punctually before the revaluation.

As the parity between the unit of account and the various national currencies affects the calculation of the equalization amounts, the treatment of undertakings on a basis of equality would be destroyed if the same parity were not applied in each case for each particular accounting period. Equality of treatment must be extended to equalization prices, to the difference between the relevant cost prices and equalization prices and to equalization contributions.

The *applicant* replies that there is no connexion between the basis of calculation of the first two prices mentioned above and the contributions. Not only is no such link provided by the basic decision but its adoption would be impracticable.

According to the applicant the system adopted by the Fund was designed to reduce the whole of the expenditure to a common denominator, the unit of account, then to apportion it in units of account per metric ton among all the undertakings consuming scrap. By modifying the basis for apportionment applicable in this case the High Authority violated the principle of equality of treatment by which it must be guided. In fact it demands payment from German undertakings of a larger number and from French undertakings of a smaller number of units of account compared with the number that would have been necessary if the apportionment had been calculated on the correct basis.

The applicant denies that its argument would enable German undertakings to benefit from the exchange rate. In fact a payment made according to the exchange rate in force during a particular accounting period represents exactly the same purchasing powers as a payment made later according to the exchange rate applicable at that time. The question whether all the undertakings subject to the equalization scheme are placed in a similar situation, which the High Authority makes every effort to ensure, must be considered separately as far as the expenses and receipts are concerned. With regard to the former a disbursement in national currency had to be covered: consumers of imported scrap and consumers of Community scrap were then comparably placed *so far as the purchase price is concerned.* With regard to receipts a payment reduced to the common denominator, the unit of account, had to be covered; the High Authority was then under a duty to make certain that the undertakings liable to pay contributions were comparably placed by charging them with a contribution for each metric ton of scrap which they consumed, the amount whereof, expressed in units of account, was the same for all undertakings.

The *defendant* maintains on the other hand that it is precisely because it has to guarantee equality of treatment between individual undertakings, without taking into account their nationality or the origin of the bought scrap, that it is impossible to use one parity for the receipts of the Fund and a different one for its expenses. The fact that a benefit arising out of exchange rates implies a straightforward monetary gain means that the applicant would make such a profit if it were able to pay a sum in DM lower than the amount of its debt.

(b) *Violation of the principle that taxation should not be retroactive*

According to the *applicant* Decision No

21/60 states for the first time, without giving any detailed reasons, that the unit of account is only a method of accounting for the purpose of equalization, a method moreover quite different from the practice adopted hitherto and originating in Decisions Nos 23/53, 56/55, 9/56, 19/58, 20/58, 18/60, 19/60 and also in Decision No 3/59 (Official Journal of 27 January 1959), which was adopted with the unanimous assent of the Council and which fixed the equivalent value in gold of the EMA unit of account. By reason of Decision No 21/60 the applicant is therefore charged retroactively with payment of a sum higher than the amount corresponding to its consumption of scrap, which in law is inadmissible.

The *defendant* denies that Decision No 21/60 changes the practice adopted until then, as the undertakings had always received the amount of equalization to which they were entitled in national currencies and the amount of their contributions was also debited to their accounts in national currencies. The applicant is only charged with payment in DM of the exact amounts which it would have had to pay if the accounts had been correctly drawn up during the period when the equalization scheme was in operation. As it was a debt in DM which had arisen in the past, it has to be discharged by paying the original amount, even at the new parity.

(c) *Interference with the monetary sovereignty of the Federal Republic of Germany*

The *applicant* states that it is Member States which have the right to fix the parities of the respective national currencies and not the High Authority, which must abide by the parities resulting from the implementation of the European Monetary Agreement.

If the High Authority thought that variations in the parity of the German mark and the French franc have had appreciable repercussions on conditions of competition in the coal and steel industries, it could put this right by exercising the powers granted to it under Article 67 of the ECSC Treaty. Devaluation and revaluation are methods of adjusting parities available to each State for the purpose of restoring what it believes to be a fair balance between them. The High Authority must be bound by this adjustment, otherwise revaluation or devaluation of national currencies would not be able to take effect as a measure of general application and affect equally undertakings which are creditors and those which are debtors.

The *defendant* replies that the fact that a debt arising during the years 1954-1959 and expressed in national currency must be calculated in exactly the same way and on the basis of the same parity as if the calculation had been made during the period mentioned above has nothing to do with the monetary sovereignty of Member States. The High Authority in this case has no need to refer directly or indirectly to Article 67.

4. Lack of competence

The *applicant* is of the opinion that the measures criticized fail to take into account the division of powers between the European Executives and the Member States. This is corroborated by the procedure adopted in the European Communities in the matter of financial obligations.

The *defendant* replies that the equalization of scrap is governed by its own laws and as a result it serves no useful purpose to invoke the practice followed in other fields by the EEC. The only thing which it is necessary to know is whether the decisions of the High Authority are compatible with the ECSC Treaty. It refers back on this question to the arguments set out in paragraph 3 above.

B — *The arrangements with regard to interest*

The dispute about the arrangements with regard to interest originates in the modification effected by Decision No 7/61 and adopted by the High Authority on 19 April 1961 of the system for charging interest on overdue payments, which had been applied since the entry into force of the rules governing the equalization of scrap.

The *applicant* criticizes the High Authority for having modified retroactively a system which was perfectly lawful, had been implemented since the Fund came into being, which conferred greater benefits on it than the new system and upon which it had based its financial planning. The new system, which in its effects closely resembles a system for charging interest from the date when payment of the principal sum falls due, independently of the questions whether the debt is for a fixed amount, whether a formal demand for payment has been made and whether the debtor is liable, would, according to the applicant, result in its being placed in the same economic situation as it would have been if it had from the beginning defaulted in payment of its contributions in respect of group scrap.

The *defendant*, on the other hand justifies the modification of the system for charging interest as laid down by Decision No 7/61 with special reference to the fact that the old system permitted discrimination between undertakings because debtors whose payments were irregular were treated more favourably in comparison with those who paid punctually and who, because of the former, had to pay higher contributions. The precise reason why it was essential to introduce the new system was the restoration *a posteriori* of the principle of equality of treatment, which should have been observed from the beginning of the equalization scheme.

The two parties disagree in particular on the question whether it was really necessary to introduce the new system in order to remove the disadvantages of the old system. The *applicant* maintains that the difficulties arising from the provisional nature of the amounts on which interest was charged could have been avoided, while at the same time retaining the system for charging interest on overdue payments by adopting a rule permitting the removal, when the final statement of account is drawn up, of discrepancies which came to light when the interest was calculated because of the provisional nature of the principal sum. The *defendant* argues on the other hand that by using this method the separation of interest from principal, to which Decision No 7/61 refers, would not have been eliminated. The discrimination which existed between undertakings which have paid their contributions and those which have not would have remained.

1. Infringement of an essential procedural requirement

(a) *Absence of the assent of the Council of Ministers*

The *applicant* states that Decision No 7/61, which modified the system for charging interest employed until then and referred to in Decision No 16/58 and was adopted with the unanimous assent of the Council of Ministers, also altered the basic structure of equalization. The High Authority should have obtained beforehand the unanimous assent of the Council of Ministers to this alteration.

On this ground also the applicant raises the objection of lack of competence. On the other hand the *defendant* takes the view that regulations relating to the system for charging interest are to be treated in the same way as implementing provisions, for which the High Authority does not have to seek the assent of the Council of Ministers.

(b) *Inadequacy of the statement of the reasons upon which the decision was based*

The *applicant* points out that according to the statement of the reasons upon which Decision No 7/61 is based the High Authority regards the system for charging interest on overdue payments as unsuitable simply because it would lead to interest being charged on principal sums of a provisional nature. However, it does not explain why, in order to avoid this, it was necessary to introduce new arrangements with regard to interest, which do not take into account the date when payment of the fixed contributions can be demanded or the existence of any liability in the case of delayed payment. Further the statement of the reasons for the contested individual decision is not conclusive and has no logical connexion with the rules laid down by general Decision No 7/61, as the High Authority based its claim for payment of interest on the ground that it was only fair to the other undertakings and on the ground of 'non-discrimination in time', without however defining this concept. The applicant states that the High Authority could have complied with these two principles even if it retained the system for charging interest on overdue payments.

The *defendant* points out that on this issue it is also faced with a problem, which has no counterpart on the national level, because this problem originates in the system of provisional statements of account, which leads to continual changes in the financial claims and obligations of undertakings. The system of charging interest introduced by Decision No 7/61 originates in the need to remove the inequality in the treatment of undertakings resulting, in the case of a previous accounting period, from the non-payment of certain contributions. The result of the discrepancy between interest and principal, which Decision No 7/61 found had existed during the continuance of the old system of charging interest, was that undertakings such as the applicant, which had not paid all their contributions by the due date, were able to retain for quite a long time, without any set-off, not only the principal sums, which should have been paid into the Fund, but also the income from these sums; this meant that in the end the undertakings which had paid punctually were charged with a supplementary payment to extinguish the outstanding interest payable, because other undertakings had not paid the whole of their contributions punctually. The recitals of the decision which is criticized contained on this point a perfectly clear statement of the facts for the purpose of explaining the disadvantages of the scheme and the way in which to eliminate them.

With regard to the reasons for the contested individual decision the defendant states that the concept of non-discrimination in time is in itself perfectly clear and is in addition explained by a reference in the same context 'to the advantages and disadvantages of these provisional statements of account' and by the necessity to remedy these unjustified advantages and disadvantages.

2. Infringement of the Treaty and of the rules of law relating to its application

(a) *Infringement of the earlier decisions adopted or approved by the High Authority*

The *applicant* argues that in accordance with the principle of legal certainty the system chosen by the High Authority from the various systems which it was legally possible to adopt is binding on the undertakings and the High Authority itself.

The *defendant* retorts that the change in the system of charging interest is not a fundamental alteration of the system but simply an improvement.

It refers in addition to the principle confirmed by the Court in Case 19/61 that an administrative authority is not always bound by its previous acts.

The *applicant* replies that the previous behaviour of the High Authority to which Court referred in the said case had nothing to do with the scheme for the equalization of ferrous scrap and this is the only reason why the High Authority was not obliged to abide by the equalization scheme.

(b) *Infringement of the principle that taxation should not be retroactive*

The *applicant* takes the view that during the continuation of the equalization scheme it was entitled to assume that only delay could justify the payment of interest. It had paid within the time-limits laid down the contributions relating to group scrap which the High Authority called upon it to pay *a posteriori*. However, the rules introduced by Decision No 7/61, based on facts which had occurred in the past, place the applicant in virtually the same situation in which it would have been if it had not paid those contributions within the prescribed time. For this reason the applicant has been taxed retroactively. The applicant refers to the principles laid down by the Court in the matter of the revocation of administrative measures which confirmed benefits. It also invokes the legal principles in force in Member States in support of its argument that the High Authority could only have replaced the earlier system by crediting interest, if the former were vitiated by illegality, which was not in fact the case. It is not necessary for the equalization scheme to include the arrangements in dispute with regard to interest as can be seen from the other equalization schemes which operate the normal system for charging interest on overdue payments. In order to avoid any discrimination against undertakings, which are not responsible for any delay which may have occurred in their payment, the loss flowing from the delay must be borne by the equalization scheme by reason of the generally accepted principle that only those debtors who have defaulted in payment must pay interest on overdue payments.

The *defendant*, after calling attention to the fact that the equalization scheme is based primarily on non-discrimination between, and on the joint and several liability of, the participating undertakings (it refers in this connexion to the judgments in Joined Cases 42 and 49/59 SNUPAT and also the Case of Meroni and others 14 etc. /60 and 1/61), raises the objection that what the applicant submits as a retroactive revocation is in fact the annulment of an unjustified advantage, and also includes the removal of unjustified disadvantages. Moreover, the old rules were not in any way designed to put the applicant as an individual undertaking in an advantageous position. The principle of legal certainty does not create an obligation to protect unjustified benefits; all the more so as all the undertakings were aware of the provisional nature of the implementing provisions of the equalization scheme.

The *defendant* submits in addition that it is entitled and under a duty to improve rules which are proved by experience to be defective, without its freedom to effect improvements being limited exclusively to any occasion when it might have issued illegal rules. A system for charging interest different from the one used in other equalization schemes is justified by the complexity of the scheme for the equalization of ferrous scrap.

So far as the complaint of discrimination is concerned the defendant submits that the necessary equality of treatment of undertakings can only be achieved by ascertaining, in the case of those undertakings which have paid too little or not at all, whether there has been any

delay or not, and then exempting undertakings which have paid punctually from payment of any interest.

The *applicant* puts forward the additional argument that, since under national law the revocation with retroactive effect of an administrative measure is only possible in the case of measures which are illegal (and not merely inexpedient or mistaken), the High Authority was not entitled to infringe the principle that taxation should not be retroactive merely on the ground that the system for charging interest on overdue payments was 'too unjust' and 'impracticable'. Hitherto the Court has only allowed the retroactive revocation of rules which were illegal and even in these cases the Court has laid down that the principle of legal certainty must be applied together with the principle of legality. However there was no reason why the High Authority should violate the principle of legal certainty in order to abandon a system which was perfectly legal. It was only the statements of account drawn up by the Fund and not the implementing provisions which were provisional.

The *defendant* replies that a retroactive charge is admissible if it goes some way to offsetting a benefit which is objectively unjustifiable, and this is what happened in the case of the applicant which had retained for many years sums of money which, considered *objectively,* were owed by it to the High Authority. The principle under national law prohibiting the retroactive revocation of legal measures cannot be applied to the equalization of scrap, where the legal situation of each undertaking has a direct effect on the rights and obligations of the other undertakings subject to the Treaty.

(c) *Violation of the principles laid down by the Court*

The *applicant* relies on the principle of legal certainty on the basis of which the Court in Case 19/61 held that actions under the scheme having discriminatory effects on the competitive situation of the applicant itself were lawful. However, the High Authority had no right to contravene the principle of legal certainty when it might, for once, be for the benefit of the applicant, all the more so because the discrepancies which the new arrangements with regard to interest seek to offset were much less important than those which the Court permitted to remain in being for reasons derived from the principle of legal certainty. Even if it is accepted that the previous system for charging interest was illegal, it could only have been revoked if the public interest in upholding the rule of law took precedence over the beneficiaries' interest in the maintenance of a situation which could be regarded in law as permanent having regard to the principle laid down by the Court in Joined Cases 42 and 49/59.

The *defendant* is of the opinion that the reference to principles which must be observed in order to preserve a balance between the interests concerned is not relevant in this case, where there has not been a retroactive revocation of an exemption from payment of interest on overdue payments but where the applicant has been made subject to rules of general application which are also applicable to other undertakings liable to pay contributions. With regard to the question whether the principle of legal certainty was observed, the creation of maximum legal certainty *for all the undertakings* is precisely one of the principal aims of Decision No 7/61, which replaced a set of rules which was to some extent arbitrary.

IV — Procedure

The procedure followed the normal course. On 16 February 1965, after hearing the preliminary report of the

Judge-Rapporteur and upon hearing the Advocate-General, the Court decided to order the oral procedure without ordering any measures of inquiry.
The parties presented oral argument at the hearing on 9 March 1965. The Advocate-General delivered his opinion at the hearing of 1 April 1965 and submitted that the application be dismissed as unfounded. On 30 June, pursuant to Article 45 (2) of the Rules of Procedure, the Court heard the parties in order to obtain additional technical information.

Grounds of judgment

Admissibility

The defendant has not called in question the admissibility of the application and no grounds exist for the Court to raise the matter of its own motion.

The application is therefore admissible.

The substance of the case

The arguments upon which the applicant has based its application may be reduced to three fundamental propositions: first, that the liabilities of undertakings by way of contributions are to be fixed in units of account and not in national currencies; further, that there is no logical connexion between the basis used for calculating equalization prices and payments and the basis used for calculating equalization contributions; finally, that the contributions are therefore to be calculated at the currency parity in force either at the date of their payment or at the date when the High Authority issues the enforceable decision.

The argument that general Decision No 21/60 did not authorize the High Authority to adopt the contested decision is based on the assumption that the amount of the contribution must be calculated in principle in national currency according to the currency parity in force at the date of payment or at least at a date after the equalization accounting period for which the contribution in question is payable.

The applicant claims first of all in support of its submission that the High Authority has infringed an essential procedural requirement the fact that general Decision No 21/60, which altered the aim and operation of the equalization scheme, should have been adopted with the unanimous assent of the special Council of Ministers. Further it claims that the reasons given for both general Decision No 21/60 and the contested decision wrongly stated that the same currency parities should be adopted to calculate equalization prices and payments as well as equalization contributions. Finally in support of the submission of infringment of the Treaty the applicant uses the same arguments as complaints of violation of the principle of non-discrimination,

of the principle that taxation should not be retroactive, of interference in the monetary sovereignty of Member States and of lack of competence.

It is therefore necessary to determine whether these three submissions mentioned above are well founded.

The question whether the liabilities of undertakings by way of contributions are to be determined in units of account or in national currencies poses false alternatives. Within the framework of the ferrous scrap equalization scheme the unit of account is not a currency different from national currencies but is only an accounting device intended to facilitate the fixing of a general equalization price and the uniform and expeditious calculation of the accounts for equalization payments and contributions. With regard to the various undertakings the use of the unit of account is only intended to indicate the method of calculating in their national currencies the amounts which they owe or are owed. These amounts, calculated in units of account, are immediately converted into national currencies. Therefore, the undertakings' contributions, even if they were calculated in units of accounts, are in fact only determined in national currencies.

The question then arises at what time the calculation of both the amounts of the equalization contributions and payments and the resulting conversion into national currencies of the amounts calculated in units of account must be effected.

The parties both agree that, according to the principles and nature of the equalization scheme, the determination of equalization prices and the amounts of the equalization payments must be based on the date when the scrap was purchased. The applicant, on the other hand, does not agree that this must necessarily be the date for the calculation of contributions and concludes on this point that, following the practice adopted by the majority of Member States, the date must either be the date when the contributions are finally determined or when they are in fact paid.

However these conclusions cannot be accepted. In order to achieve an equal distribution of the charges arising out of the importation of ferrous scrap from third countries, the equalization scheme operated on the basis of accounting periods, usually of one month, so that one equalization price was adopted for each period and the equalization payments made during this period were calculated on the basis of this equalization price. When this had been done the charge resulting from the said payments, which varied considerably from one accounting period to another, was levied on all undertakings subject to the levy, in proportion to the volume of their purchases whether imported from outside or originating within the Common Market.

In this way in each accounting period it was arranged that the cost price of imported ferrous scrap for all undertakings was the same as the average purchase price of scrap bought on the internal market. As the contribution per metric ton of scrap varies from one accounting period to another, it is necessary to fix the contributions to be paid on the basis of the parity of the unit of account in force during the said periods.

As the equalization scheme consists basically on the one hand of a charge on the difference between the price of imported ferrous scrap and the price inside the Common Market and on the other hand of the equal distribution of this charge among undertakings consuming scrap in proportion to their consumption, it would be wrong to adopt a rate of exchange for the calculations necessary for the first stage of the operation different from the one adopted for the calculations required for the second stage.

In this respect, general Decision No 21/60 does not therefore alter the aim and operation of the Fund, but appears on the contrary to define with accuracy the consequences of the system already adopted in the event of a possible change in currency parities occurring during the period covered by these two operations. Therefore the arguments upon which the applicant seeks to base the necessity for the unanimous assent of the special Council of Ministers cannot be upheld. The allegation that the statements of the reasons upon which Decision No 21/60 and the contested decision are based are inadequate must also be rejected.

The method adopted does not infringe the prohibition on discrimination. An equal apportionment of the charges presupposes the avoidance of variations in currency parities by the adoption for all undertakings of the same period of reference during which their debits and credits calculated in units of account are converted at the same time into national currencies. The adoption of a system based on the date of payment or on the date on which the enforceable nature of the claim was established would lead to the danger that the parity applicable could vary according to the conduct of the undertakings concerned or of the High Authority and that there would be discrimination against undertakings of the same country, which had paid their contribution either earlier or later. Therefore the method adopted by the decisions in question appears to be not only appropriate but to conform to the equalization scheme.

Nor is it possible to object that general Decision No 21/60 infringes the principle that taxes and similar charges must not be retroactive. This complaint is based partly on the false presumption that, on the one hand, under the present system the unit of account constitutes a kind of currency and, on the other hand, on the equally false presumption that the conversion of the unit of account into national currency only takes place at the date of payment

It is also on the basis of these two false presumptions that the complaints were made without justification that the High Authority interfered with the monetary sovereignty of Member States and acted *ultra vires*.

This submission must therefore be dismissed as unfounded.

A — *The submissions regarding the system relating to interest*

The applicant states that the general decisions contested by this application are illegal, because they introduced a system with regard to interest which is not covered by the decisions made earlier with the assent of the Council, in accordance with Article 53 (b) of the Treaty.

The first question to be answered is whether the obligation to obtain the assent of the Council in this case arises under the Treaty.

Under Article 53 (b) of the Treaty the High Authority may 'with the unanimous assent of the Council, itself make any financial arrangements serving the same purposes'. As this is a provision which lays down essential procedural requirements for the validity of certain decisions it must be strictly construed. The effect of Article 53 (b) of the Treaty is that the unanimous assent of the Council was only necessary if the introduction of a system of crediting interest affected or modified the very basis of the imported ferrous scrap equalization scheme.

A system for crediting interest, established in order to compensate undertakings subject to the scheme for periods during which they had to lock up capital required to meet their obligations, appears to be necessary in order to ensure that those undertakings are not unjustifiably prejudiced by delays in payments made by other undertakings. This system which does not modify the essential structure of the financial arrangements for equalization was adopted to enable it to function properly and to attain the objectives approved by the Council.

The second question to be answered is whether the fact that Article 13 of Decision No 16/58, adopted with the unanimous assent of the Council, provided for the application of a system with regard to interest, meant that the High Authority had to obtain once more the unanimous assent of the Council to any amending decision.

There is no justification for the conclusion that the decisions of the High Authority taken with the unanimous assent of the Council could only be

amended, even in the case of amendments not affecting the basis of such decisions, by a new decision also taken with the unanimous assent of the Council.

Therefore the complaint based on the absence of the unanimous assent of the Council is unfounded.

The applicant states that the statement of the reasons upon which Decision No 7/61 is based is inconclusive and does not give the reasons why it would have been impossible for the High Authority to remove the disadvantages of the former system for charging interest for delay in payment and to adopt a system other than the one which is contested.

Recitals 5 to 8 of this decision underline clearly the disadvantages caused by charging interest for delay in payment on provisional contributions, and that it is necessary to calculate the amount of the contributions of all the undertakings liable to pay them by reference to the same date, as these contributions are often spread over varying periods for different undertakings which are thereby either benefited or prejudiced by them. Recital 8 describes the situation which in the opinion of the High Authority results from the application of the contested system and which is the reason why it adopted this system.

This statement of reasons discloses the considerations which led the High Authority to adopt the disputed Decision No 7/61 and the reasons upon which that decision is based. Since the statement of the reasons upon which the decision is based is adequate in law this submission must be rejected as unfounded.

The applicant maintains that the new system for charging interest adopted by Decision No 7/61 discriminates against undertakings which are not responsible for the delay in their payments.

In fact the system introduced by Decision No 7/61 dispensed with the imposition of pecuniary sanctions in the form of interest payable for delayed payment. However, experience showed that for various reasons for which the undertakings could often not be made responsible the exact amounts of the contributions could only be determined after delays which were at times considerable.

There was therefore the danger that the former system might lead to both an intricate and complicated investigation into all the circumstances relating to the responsibility for delay, and to the unsatisfactory situation that the charge

under the equalization scheme was in fact imposed unequally on the various undertakings. Thus the undertakings, which exact contributions could only be determined after some delay, retained the use for a certain time of sums which should have been available to the Fund. The result was that the other undertakings had to bear additional charges without any set-off. These undertakings were therefore in a doubly unfavourable position compared with the undertakings whose payments were delayed. These disparities which arose out of the former system were of a kind likely to have direct effects in the field of competition.

Such a result would clearly be contrary to the requirements and objectives of the equalization scheme, in particular to the principle that the contributions to be paid by the chargeable undertakings should be apportioned as equally as possible. For this reason the High Authority could not continue the former system but had to replace it with another which did not have the disadvantages mentioned above. Whilst it is true that for this purpose it treated on a footing of equality all undertakings which were for any reason in arrears with their payments, without considering the question of blame or liability, this is explained by the injustices and uncertainties which a more conventional system would have introduced into the working of the equalization scheme.

It is clear moreover that the system adopted by Decision No 7/61 eliminates as far as possible the objective inequalities caused by the delays in the liquidation of the equalization scheme.

Therefore this complaint is unfounded.

Finally, the applicant submits that Decision No 7/61 is defective because it has retroactive effect and therefore infringes a fundamental legal principle.

In a financial scheme such as the one in question, based on a close interdependence between the contributions of each of the participants, it is above all necessary to ensure equality of treatment between those subject thereto, by eliminating all possibility of discriminating between them. In these circumstances the continuance of rules which would have the effect of conferring unjustified benefits on certain undertakings compared with others, on the pretext that they established legal situations or vested rights, would jeopardize the objectives of the said scheme.

It is therefore necessary within the framework of such a scheme to acknowledge that the responsible bodies have the power to make the necessary amendments to such rules in order to eliminate any possible discrimination.

Further, since this financial scheme is being liquidated and the contributions of each participant are therefore being dealt with on a provisional basis, it is impossible to eliminate any such discrimination without altering situations created by the previous rules, which had to be amended. It is therefore necessary to conclude that this submission is unfounded and must be rejected.

Therefore the application must be dismissed as unfounded.

B — *Costs*

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. The applicant has failed in its submissions and must be ordered to 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 the Treaty establishing the European Coal and Steel Community, especially Articles 15, 33 and 53;
Having regard to the Protocol on the Statute of the Court of Justice annexed to the Treaty establishing 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;

THE COURT

hereby:

1. **Dismisses the application as unfounded;**
2. **Orders the applicant to pay the costs.**

Hammes Lecourt

Delvaux Trabucchi Strauß

Delivered in open court in Luxembourg on 13 July 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President