JUDGMENT OF THE COURT
16 DECEMBER 1963[1]

Forges de Clabecq
v High Authority of the European Coal and Steel Community[2]

Case 14/63

Summary

1. Application for annulment — Legal interest in taking proceedings — Assessment

2. Common Market — Ferrous scrap — Equalization — Effects — Common criterion to be adopted for the commencement of those effects

3. Ferrous scrap — Equalization within the meaning of Decision No 22/54 — Bought ferrous scrap — Concept — Community allocation as criterion

4. Costs — Payment of own costs — Exceptional circumstances (Rules of Procedure, Article 69 (2))

1. A legal interest in making an application for annulment is assessed at the day on which the application is made.
2. It is necessary to adopt a common criterion to determine the commencement of the effects of the equalization system, both for the application of the levy on bought ferrous scrap and for the allocation of grants for imported ferrous scrap.
3. The ferrous scrap subjected to the equalization levy by Decision No 22/54 is the ferrous scrap purchased for use in Community production; this allocation to Community use is not determined until the time of receipt by undertakings.
4. If the defective drafting of a measure adopted by an institution has been the decisive factor in the making of an application, this amounts to an exceptional circumstance allowing the Court to order that the parties bear their own costs.

In Case 14/63

FORGES DE CLABECQ, a limited company governed by Belgian law with its registered office at Clabecq, represented by its Board of Directors and assisted by Marcel Grégoire, advocate of the Brussels Cour d'appel, with an address

1 — Language of the Case: French.
2 — CMLR.

for service in Luxembourg at the Chambers of Tony Biever, avocat-avoué, 83 Boulevard Grande-Duchesse Charlotte,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Dr Italo Telchini, acting as Agent, assisted by Paul Orianne, advocate at the Brussels Cour d'appel, with an address for service in Luxembourg at its offices, 2 Place de Metz,

defendant,

Application for annulment of an individual Decision of the High Authority of 5 December 1962, notified to the applicant on 23 January 1963, including in the tonnages used as the basis for the assessment of the contribution 20 682 metric tons of ferrous scrap which the applicant claims to have bought before 1 April 1954, the date of the entry into force of Decision No 22/54 of 26 March 1954, but which it received after that date;

THE COURT

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Conclusions of the parties

A — The *applicant* claims that the Court should:

(a) In its application:

'Annul, as being vitiated by reason of infringement of the Treaty and/or of any rule of law relating to its application, the individual decision of the High Authority taken at its meeting on 5 December 1962 and notified to the applicant by letter of 23 January 1963, by which the High Authority decided upon the inclusion of the disputed 20 682 metric tons in the tonnages used as the basis of assessment of the contribution of the applicant;

order the High Authority to pay the costs.'

(b) In its statement in reply:

'Declare the application and the offers of proof contained in it to be admissible;
declare the application well-founded;
in consequence, annul the disputed Decision;
order the High Authority to pay the costs.'

B — The *defendant* contends that the Court should:

'Dismiss the application as inadmissible or, alternatively, as unfounded;
order the applicant to pay the costs.'

II — Summary of the facts

The facts may be summarized as follows:

Decision No 22/54 of the High Authority of 26 March 1954, which came into force on 1 April 1954, provided in Article 3 thereof that 'the amount of (equalization) contributions shall be calculated in proportion to the tonnages of ferrous scrap bought by each undertaking during the period for which this Decision remains in force . . .'

According to the applicant company it had *received after* 1 April 1954 20 682 metric tons of ferrous scrap in execution of contracts *concluded before* that date. It therefore considered that these 20 682 metric tons could not appear among the tonnages forming the basis for the payment of the contributions provided for by Article 3 of Decision No 22/54.

After an exchange of letters with the applicant, the Directorate-General of Steel of the High Authority informed Forges de Clabecq on 23 January 1963 that 'the High Authority at its meeting on 5 December 1962 decided in the light of the decisions of the Court to include the disputed 20 682 metric tons in the amount serving as the basis of assessment for your undertaking'.

The applicant asks in the present application for the annulment of this Decision on the ground that it infringes Decision No 22/54.

III — Submissions and arguments of the parties

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

A — Admissibility

The defendant disputes the admissibility of the application on the basis of the three following heads—the statement of the grounds on which the application is based, the offers of proof and the applicant's legal interest in taking proceedings.

1. The statement of grounds

The *defendant* points out that, under the terms of Article 38(1) of the Rules of Procedure, the application must include a brief statement of the grounds on which it is based. In the present case the application declares the disputed Decision to be 'vitiated by reason of infringement of the Treaty and/or any rules of law relating to its implementation'. But the only submission put forward relates to infringement of Decision No 22/54 of 26 March 1954 and is couched in vague and laconic terms. The applicant confines itself in fact to stating on the one hand that Decision No 22/54 does not apply to ferrous scrap bought before 1 April 1954 and, on the other, that such is the case with the disputed 20 682 metric tons since the contracts concerned were made before that date. The defendant argues that it is not possible, on reading the application, to tell whether the submission is one of fact, of law, or of a mixture of both.

The *applicant* replies that it has adhered strictly to the requirements of Article 38(1) of the Rules of Procedure and that the defendant cannot reasonably have any doubt as to the subject matter of the action or the matters of complaint alleged. In fact, the applicant states that the application makes it clear that it is the Decision communicated by the letter of 23 January 1963 which it seeks to have annulled, that the rule of law which it states is infringed is Decision No 22/54 of 25 March 1954 and that the application is just as clear in explaining why the Decision of 23 January 1963 is inconsistent with Decision No 22/54 of 26 March 1954. Furthermore the detailed discussion by the defendant in its statement of defence of the submissions made shows that it has fully understood the applicant's point of view. It is quite clear, in addition, from the actual terms of the disputed Decision which was notified by the letter of 23 January 1963 from the defendant that the latter:

(i) Knew perfectly well the interpretation placed by the applicant from the beginning on Article 3 of Decision No 22/54, that is to say, that only the tonnages bought as from 1 April 1954 could be taken into account as part of the basis of contribution;

(ii) has never questioned the fact that the 20 682 metric tons in dispute, which were received by the applicant after 1 April 1954, had been bought by it before that date;

(iii) has never advanced any reason for the inclusion of the disputed tonnage as part of the basis of contribution other than its own interpretation of Article 3 of Decision No 22/54, that is to say that 'tonnages bought' should be understood as meaning 'tonnages received'.

The *defendant* replies that it is to the application and not to the grounds of the disputed Decision or the statement of defence that the Court, any interveners and the defendant itself must look to find the exact terms of the legal dispute. The applicant is required to include in its statement of claim sufficiently precise subject matter for it to be irrevocably bound by the purpose of its application. It is for this reason that Article 42(2) prohibits the raising of fresh issues in the course of proceedings unless they are based on matters of law or of fact which come to light in the course of the written procedure.
In addition, the defendant disputes the assertion of the applicant 'that it always admitted that the disputed amount had been bought before 1 April 1954'.

2. Offers of proof

The *defendant* states that, although the application offers to prove the conclusion before 1 April 1954 of 'contracts relating to the disputed ferrous scrap with firm prices and conclusive indications that delivery was to be effected, it nevertheless failed to annex to the application a file containing the documents relied on in accordance with Article 37(4) of the Rules of Procedure. The application further fails to indicate the methods of proof to which recourse might be had in the absence of such documentary evidence. The defendant points out that the Court has stated that it is appropriate for the Court of its own motion to consider questions relating to the form of applications (Judgment of 15 December 1961, Rec. 1961, p. 588).
The *applicant* replies that, although in its application it limited itself to offering 'as far as necessary' proof that the disputed tonnage had been bought before 1 April 1954, it is because the fact was never disputed by the High Authority and that even the disputed Decision expresses no reservations on the point. In reply to the objection of the defendant, which it regards as 'unexpected', the applicant produces (schedules 3 to 33 to

the statement in reply) 31 orders with dates from 10 April 1953 to 31 March 1954 in respect of 34 150 metric tons. It explains that although this total exceeds the disputed amount, which is 20 682 metric tons, it is because certain contracts were not only concluded but also partly executed before 1 April 1954.

The *defendant* replies that the production of orders at the procedural stage of the reply is out of time, since it is a matter of evidence in support of, and implicitly referred to in, the application. Furthermore, as an offer of proof such production is also inadmissible because the applicant has failed to justify the delay in its preparation (Rules of Procedure, Article 42(1)).

The defendant states that only in its reply did the applicant maintain that, the facts not being disputed, it was pointless to prove them and that the proceedings dealt only with the interpretation of Decision No 22/54. In this connection, it cites a sentence from the application: 'The contracts had been concluded before this date with firm prices and conclusive indications that delivery was to take place, which the applicant offers to prove so far as necessary.'

The defendant points out that the verification of the date of purchase of the disputed tonnage was of no concern to it before the application was made, since it has always maintained that the date of the making of contracts of purchase could not be taken into consideration in making the equalization calculations. But, as from the time when the applicant disputed this principle and the decision taken in application of it before the Court, it is required to justify its claims both in fact and in law and the defendant is entitled to contest them.

The defendant goes on to deny that in its letter of 23 January 1963 it regarded the facts as settled: this letter mentioned only *ordered* ferrous scrap, whereas the point of fact to be verified is whether the disputed ferrous scrap was *bought* before 1 April 1954, and the date of these *purchases* has not been the subject of any justification either before proceedings were started or at the time the application was lodged.

3. Legal interest necessary for taking proceedings

The *defendant* alleges that the applicant is the only undertaking in the Community which has refused to accept the High Authority's construction of 'bought ferrous scrap'; it follows that, if the applicant were to succeed in its application, it would be necessary to revise all the equalization accounts of all the Community undertakings for the period from 1 April 1954 to 1 April 1955. Consequently, since the total levy is fixed and the tonnages subject to levy would decrease for all undertakings, the rate of levy per metric ton would increase proportionately, thus nullifying any benefit which might accrue to the applicant through the exemption of the disputed 20 682 metric tons. Further if it were agreed that the High Authority must apply the equalization system to ferrous scrap bought but not delivered during the period under consideration, the applicant would on this basis be liable to pay a supplementary contribution in respect of its purchases before 1 April 1955. The defendant infers from this that the applicant has not the legal interest necessary for taking proceedings.

The *applicant* replies that its interest in bringing the proceedings is clear: if it succeeds it will have no contribution to make for the disputed 20 682 metric tons. As to the argument that the revision of the basis of contribution would nullify the gain resulting from the exemption of the 20 682 metric tons in dispute, it cannot be accepted for the following reasons:

— the existence of a sufficient interest should be determined as at the date

of the application and should not be made to depend upon calculations of the consequences of acts which are future and uncertain;

— the defendant has not shown that the revision would nullify the advantage which would accrue to the applicant from a favourable decision of the Court;

— the applicant is entitled to require that the calculation of its contribution be made in accordance with the existing law and not in accordance with rules of law which may possibly be developed later.

As to the argument that the applicant, should its case be accepted, would have to pay a supplementary contribution for the tonnages bought by it during the period for which Decision No 22/54 remained in force, but received after Decision No 14/55 had come into force, this should be rejected because the same tonnage cannot twice be made the subject of a contribution, and the very object of equalization excludes such an assumption.

The *defendant* replies that the applicant's real object was to be the only undertaking to withdraw ferrous scrap ordered before 1 April 1954 from the levy and thus to enjoy an advantage over all the other undertakings, which had declared such scrap: this would constitute a real abuse and the applicant cannot therefore be said to have a legitimate interest in bringing the proceedings.

With regard to the argument of the applicant that the principle prohibiting a double levy does not allow tonnages purchased during the period for which Decision No 22/54 remained in force and received when Decision No 14/55 had come into force to be the subject of a supplementary contribution, the defendant states that the applicant's system, based on a literal construction of Decision No 22/54, would have the effect of imposing a double levy, and that it is not possible to see how the undertakings could escape this by reference to logic, common sense and the general scheme of the equalization system. Moreover, the defendant adds, still from the same standpoint, that if it is agreed that the same tonnage cannot twice be the subject of a levy it would be the second imposition and not the first which should be prohibited. The applicant thus contradicts itself in claiming to exempt from equalization both the tonnage *bought before and received after the beginning* of the period during which Decision No 22/54 remained in force and the tonnage *bought during and received after the end of* the period for which that same Decision remained in force. It concludes that the system recommended by the applicant would cause it to pay supplementary charges, the inevitable counterparts of the benefits which it hopes to obtain.

B — *On the substance of the Case*

The applicant asks for the annulment of the Decision contained in the letter of 23 January 1963, basing its case on the submission that it infringes a rule of law relating to the application of the Treaty, that is Decision No 22/54 of 26 March 1954.

In their statements the parties explain their arguments under the following subheads:

(1) Article 3 of Decision No 22/54;

(2) the background to Article 3;

(3) the application of national law;

(4) the general scheme of the Decision;

(5) practice and usage;

(6) the date of purchase of the disputed 20 682 metric tons.

1. Article 3 of Decision No 22/54

The first subparagraph of Article 3 of Decision No 22/54 is worded as follows:

'The amount of the contributions shall be calculated in proportion to the ton-

nages of scrap *bought* by each undertaking during the period for which this Decision remains in force, whether within the Community or by importation from third countries.'

The *applicant* states that the text of Article 3 is clear and well drafted. It states, in fact, in the clearest manner that what should be taken into account for the calculation of the contributions are the tonnages *bought* during the period for which the Decision remained in force and hence bought after 1 April 1954. It follows necessarily from this that those which have been bought *before* this date cannot be taken into account.

It is not possible to maintain that in reality Article 3 would have said 'the tonnages of ferrous scrap bought during the period' to describe the tonnages of ferrous scrap bought (received) during the period for which the Decision remained in force. It is inconceivable, in fact, that in its anxiety to simplify the sentence, the High Authority would have made it express something completely different from that which it wished to say, especially as this simplification would have consisted in the saving of a single word 'received' which was fundamental and indispensible if it had wished to express what precisely it did not say. If the High Authority had wished to allude to the tonnages received it would have mentioned 'tonnages received' and not 'tonnages bought'.

The applicant alleges that this opinion is confirmed by Decision No 14/55 of 26 March 1955, which came into force on 1 April 1955. The first subparagraph of Article 3 of this Decision is worded as follows:

'The amount of the contributions shall be calculated proportionately to the tonnages of bought ferrous scrap *received* by each undertaking during the period for which this Decision remains in force, less its own sales. In those cases where the undertakings process ferrous scrap on contract, the tonnages received in this connection shall be taken into account.'

Decision No 14/55 enacts in Article 11 that 'Decision No 22/54 extended by Decision No 2/55 shall cease to be applicable *as from 1 April 1955*' and that Decision No 14/55 'shall enter into force within the Community on 1 April 1955.'

Decision No 14/55, and particularly Article 3 thereof, does not appear therefore as an interpretative provision intended to clarify the meaning and the scope of Decision No 22/54. It sets up a new system which it specifies will succeed the old one as from 1 April 1955. For the application of equalization, it selects a new criterion, to apply from then on—the time of reception—which will replace purchase, but only as from the same date.

Decision No 14/55 thus confirms three points: in the first place that the High Authority has chosen two different criteria—'purchase' first, 'receipt' thereafter—in order to organize equalization; in the second place that, when the criterion chosen is 'receipt', the High Authority speaks of 'tonnages received', which intimates necessarily that when it speaks of 'tonnages bought', the criterion to be applied is different; and lastly that the two systems, far from being merged, were successive and followed each time from the precise and correct meaning of the different words used by the High Authority to describe them.

The *defendant* replies first of all by explanations of the concept of equalization.

To equalize means to apportion charges equitably, to adjust values to one another.

In the present case, since it is a matter of adjusting all the ferrous scrap bought to the same price, it is obvious that the concept of purchase must be applied in a uniform manner to all categories of ferrous scrap whether imported or originating from the internal market.

Logically there is a need for equalization only when the conditions under which disparity between the users can be established are present: the time when the ferrous scrap, has been received from the Community or from outside, and payment is due. It is only at this moment that the inequality between consumers, which equalization is intended to abolish, comes into being and can be established. It is really a matter of an economic transaction and not of a legal system; it is necessary to make provision for compensation between actual payments which have taken place and not between obligations which, at the moment they come into existence, do not result in any immediate economic charge.

How does the wording of Decision No 22/54 achieve the system which was clearly desired by its authors?

Article 2 puts it in a clear and logical manner: it is necessary to make the undertakings which are *consumers of ferrous scrap* pay the contributions necessary for the equalization of prices of ferrous scrap *imported* during the relevant period.

Thus, very logically, an undertaking which receives ferrous scrap from the Community will pay contributions for the benefit of an undertaking which receives imported ferrous scrap.

It is importation which sets in motion the equalization scheme as between consumers. It is necessary therefore that this importation should take place during the period under consideration.

Article 3 is less happily drafted.

As for the calculation of the amount of the equalization contributions, it is necessary, according to the French wording, to take into account the 'tonnages of ferrous scrap bought' during the relevant period 'by each undertaking, whether within the Community or by imports from third countries.' The German text speaks however of 'innerhalb der Gemeinschaft *gekaufte* oder aus dritten Ländern eingeführte Schrottmenge . . .' ('quantities of scrap *bought* within the Community or imported from third countries . . .')

Where does the expression 'purchase', which had not previously been used in the Decision, come from? It originates from the fact that one of the problems encountered, and which moreover will give rise later on to much litigation, was that of arisings of ferrous scrap used by undertakings. These it was considered, were not to be taken into account for equalization. Equalization was to apply only to *bought ferrous scrap*. It was necessary to take account therefore only of the 'Zukaufschrott', which is literally *additional* (zu) ferrous scrap (Schrott) obtained by purchase (Kauf).

In the French, the concept expressed in German by the word *zu* was regarded as subordinate and only the concept of 'bought ferrous scrap' as opposed to 'arisings' was retained.

The result was however practically the same.

But, in order to simplify the sentence, Decision No 22/54, instead of speaking of 'bought ferrous scrap received during the period for which this Decision remains in force' (as was later said in Decision No 14/55 of 26 March 1955 and in subsequent decisions), simply made mention of 'tonnages of ferrous scrap bought during the period for which this Decision remains in force . . .'

The applicant then seized upon the drafting of this provision to claim that the dates of its purchases of the disputed 20 682 metric tons ought to be taken into consideration in applying equalization. These dates, according to the applicant, were distinct from those of the receipt of the goods and the invoices. In Belgian law, in fact, sale is a consensual contract which is made by the consensus of wills of the parties, and not a real contract which does not come into existence until the delivery of the subject matter.

The problem, in law, consequently

comes down to this: does the expression *bought* which appears in the text, correspond to the legal concept of *purchase* within the meaning of national law, and particularly of Belgian law, or is it a matter of a concept intended to explain the economic fact, which, in conformity with the intentions of the authors of the Decision, according to its scheme and following an established practice, can and must give rise to the use of the equalization scheme in relation to ferrous scrap obtained by undertakings otherwise than from their own resources?

The High Authority considered that the expression 'ferrous scrap bought during the period' means bought ferrous scrap received during that period.

The defendant replies next to the claim of the applicant that Decision No 14/55 implicitly confirms its interpretation of Decision No 22/54. By substituting the words 'tonnages of bought ferrous scrap received' for the words 'ferrous scrap bought', the High Authority showed its intention to substitute a new criterion for the old, since it was a question of two systems applied successively.

The applicant might be right if that were the only difference between the wording of Decisions Nos 22/54 and 14/55. But there are many others, some of them essential ones (see particularly Articles 2 and 5 and the system of premiums set up in 1955).

It is not possible, therefore, to claim that the novelty of the system is to be found just in the slight modification of the wording of Article 3, by which the expression 'tonnages of ferrous scrap bought' was replaced by 'tonnages of bought ferrous scrap received.' It was, quite simply, a matter of removing all uncertainty in view of a possible dispute concerning the construction of the provision.

The defendant observes that the applicant's system consists of trying to establish an antithesis between the expressions 'ferrous scrap bought' and 'bought ferrous scrap received.' Even if it is true that in the legal machinery of national law the fact of purchase carries no implication of receipt, it is nonetheless impossible, from the economic point of view, to separate the two. In the economic transaction, what matters is the carrying out of the legal transaction. Receipt is nothing other than the carrying out of the purchase; it might even be called its accomplishment. Thus, when in respect of an economic transaction or fact, there is a question of goods bought, this refers necessarily to goods which have been subject to a transfer which has actually been carried out, that is to say to delivery and receipt.

The only problem is therefore whether, in the present case, the High Authority intended to refer simply to the 'concluded' purchase, the legal act, or on the other hand to refer to the 'executed' purchase, the purchase followed by delivery and receipt.

The defendant states that indecision cannot be allowed when, as in the present case, it is a matter of setting up a scheme of an economic nature.

2. The background to Article 3

Article 2 of Decision No 22/54 is worded as follows: 'The undertakings referred to in Article 80 of the Treaty, as consumers of ferrous scrap, shall be obliged to make payment of contributions necessary for the equalization transactions affecting ferrous scrap imported from third countries or treated as such; this obligation shall apply to imports effected during the period for which that Decision remains in force.'

According to the *applicant*, Decision No 22/54 provides for compulsory participation thenceforth in the equalization scheme and it is this compulsory aspect which Article 2 is intended to state and emphasize in its first sentence, as well as in its second which merely explains the first.

In this Decision No 22/54 the principle is enunciated by Article 1; Article 2 indicates the undertakings which are liable; whilst Article 3, which lays down the basis of contribution, makes provision in its turn for the transactions giving rise to the application of the levy.

The precision given to Article 3 was necessary because, although it is true that importation suggests the crossing of a frontier by the ferrous scrap, this crossing in no way implies receipt of that ferrous scrap; hence the necessity for the precise directions given by Article 3: the amount of the contributions is to be calculated from the total tonnage of ferrous scrap bought.

The defendant replies that Article 3 of Decision No 22/54 amounts in fact to a measure implementing Article 2, which lays down the principle of payment of contributions to be paid by and for the benefit of undertakings *consuming* ferrous scrap, in relation to *imports effected* during the period for which the decision remained in force.

According to the defendant, it follows from this Article that it is the receipt of ferrous scrap, following a purchase on the domestic market or by importation, which results in the application of equalization. The date of the making of a contract of purchase is not taken into account, because it is in itself unimportant and, moreover, difficult to verify both in respect of the tonnages actually delivered, which necessarily differ from those ordered, and in respect of the existence of supporting documents. Article 3 is confined to detailing the precise methods of calculating the contribution instituted by the preceding Article. It is not possible therefore to ascribe to it a meaning or a purpose in contradiction with the system contemplated.

If it were necessary here to give to the expression 'ferrous scrap bought' a meaning different from that of 'bought ferrous scrap received', there would be a contradiction between Article 2 and Article 3. For it would no longer be the recipient undertakings but the 'purchasers' of ferrous scrap which would *as such* be subject to payment. It would suffice during the period in question to have made a contract of purchase, even including a condition of delivery a year later, to be obliged to contribute for the benefit of those who, at the same time, had imported ferrous scrap. Such a system would be absurd and in express contradiction with the purpose intended by the authors of the Decision.

The defendant then criticizes the construction of Article 2 maintained by the applicant. In fact the High Authority states that:

— this reasoning fails seriously to recognize the scope of Article 2 which is not only to impose the obligations of the equalization system upon undertakings consuming ferrous scrap but also to limit this imposition to imports effected during the relevant period;

— it ignores the wording of Article 3 the object of which, according to the text, is not at all to give content to the obligation prescribed by Article 2, but simply to define the method of calculating the amount of the contributions;

— lastly, if, as the applicant states, the expression 'importation' is not in *theory* equivalent to receipt by a consumer-purchaser, it is the same with the expression 'purchase': thus, instead of giving to Article 2 the necessary precision, there would be substituted for an inadequate expression an expression just as inadequate; in addition and still more serious, as a reference point there would be substituted for the date of a commercial transaction that of the conclusion of a legal act independently of its execution.

3. The application of national law

The *applicant* states that the meaning which it gives to the expression 'purchase' in Article 3 of Decision No 22/54 is based on the exact and uniform meaning which this legal term has in the national laws of all the Member States of the Community. By using this term without any reservation Decision No 22/54 refers necessarily to the corresponding legal concept common to all the national laws. In each of these, 'purchase' means the making of the contract; in none does 'to purchase' mean 'to receive'.

The Court, by deciding in its judgments of 17 July 1962 (Rec. 1962, pp. 646 and 705) that

'Purchase need not *necessarily* fulfil all the conditions required by the appropriate national civil law for the validity and effectiveness of a *contract of sale*',

emphasized particularly that in principle the expression 'purchase' relates to the concept of contract in civil law. It wished the concept of purchase to be widened rather than narrowed. Lastly, the Court by no means stated that the expression 'purchase' had the same meaning as the expression 'receipt': it is only too clear that one may have 'purchased' goods before having 'received' them. That is what actually happened in this case.

The *defendant* replies that the question is whether, in mentioning bought ferrous scrap, Decision No 22/54 was influenced by a legal criterion, namely the contract of sale, at the moment of its conclusion, as it is defined by national law. The fact that the national laws of the six countries are relatively harmonious on this matter is not decisive. Does equalization come into play as a consequence of the fact of the legal transaction of purchase, and at the moment when it takes place, or as a consequence of the fact of importation and receipt of the bought ferrous scrap? That is the problem. With regard to the first hypothesis one would have to agree that there is a radical change between the scheme of Article 2 and that of Article 3. The High Authority maintains that this radical change can all the less be presumed to exist where one is faced with a provision of Community economic law issuing from an authority which is not *a priori* bound by definitions of national law. Thus the High Authority normally uses certain expressions without attributing to them all the features accorded to them by national law. It was thus justifiable entitled in the present case to allude beyond the word to the economic fact and not to the legal transaction, or more precisely to consider the legal transaction at the stage of its completion, that is to say at the time of its execution.

4. The general structure of Decision No 22/54

The *applicant* states that there is no point in going, after the event, into the respective merits and disadvantages of the various criteria which might have been chosen in Decision No 22/54 for the calculation of the amount of equalization contributions. The question is simply which one Decision No 22/54 has selected: it is that of purchase.

This criterion displays no disadvantages, particularly in respect of the proof of the date of purchase. In fact, written confirmation practically always exists, because the parties take care to keep for themselves proof of the conclusion of the contract. In the present case, in any event, the applicant has long since proved the date of purchase of the disputed tonnages.

The *defendant* replies that when, as in the present case, it is a matter of things described only as to type, the transfer of ownership is not possible until the goods have been appropriated to the contract. Further, in the ferrous scrap trade it is only at the time of delivery that the exact quantity of goods delivered can be

determined. In fact there are always discrepancies between the weight of ferrous scrap 'ordered' and the weight of ferrous scrap received. These discrepancies are accepted within certain limits, but they influence the price of the bargain and—as far as the scheme in question is concerned—equalization.

In addition from the point of view of proof, it may be difficult to decide the date on which the parties agreed to a commercial contract. In the present case one may ask how the applicant can adduce incontrovertible evidence that it actually made the purchase of the disputed tonnage before 1 April 1954.

The defendant next puts forward the point that the case law of the Court (Rec. 1962, pp. 646 and 705) has recognized that the criterion of purchase by undertakings must be broadly interpreted: 'Purchase need not necessarily fulfil all the conditions required by the appropriate national civil law for the validity and effectiveness of a contract of sale but must rather be applied to every transfer effected by the undertaking consuming it when that undertaking receives scrap from an outside source at a price to be fixed' (Judgments of 17 July 1962 in Joined Cases 17 and 20/61 and in Case 19/61).

5. Practice and usage

The *applicant* states that it is not possible to argue from this that other undertakings, finding themselves in similar circumstances to those of the applicant, would have agreed that quantities bought by them before 1 April 1954 were subject to equalization. Their attitude, which may have been influenced by the most diverse reasons, cannot have the effect of preventing the applicant itself from relying on the law.

Neither is it possible to adduce any argument from the system of voluntary equalization which existed before Decision No 22/54. The wording of this shows precisely that the High Authority intended to set up a new system and to break with the old one.

As the applicant has already emphasized, the same tonnage cannot twice be made subject to the contribution. Consequently the tonnages bought when Decision No 22/54 was applicable, but received when Decision No 14/55 had come into force, ought to be declared either as 'tonnages bought' or 'tonnages received', but not as both. One does not see moreover why the legality of Decision No 14/55 of 26 March 1955 could have been disputed, because as from 1 April 1955 it substituted the criterion of receipt for that of purchase, which had been adopted by Decision No 22/54, but which was rescinded as from exactly the same date.

Lastly the applicant asserts that the Court in its judgments of 13 July 1962 (Rec. 1962, pp. 646 and 705) did not cast any doubt on this change of criterion. It emerges from this judgment that the equalization systems introduced by Decisions Nos 22/54 and 14/55 were actuated by the common concept of 'bought ferrous scrap', as opposed to 'own resources'. But the Court did not state that the facts giving rise to contribution were identical.

The *defendant* replies that all the undertakings of the Community with the sole exception of the applicant included in their declarations the quantities *received* during the period for which Decision No 22/54 remained in force, without ever referring to the dates of the contracts of purchase.

It then asserts that there is no distinction to be made, in respect of the facts which give rise to contribution, between Decision No 22/54 and Decisions Nos 14/55, 2/57 and 16/58: they form a logical sequence from one to the next and they apply to the same transactions.

The High Authority cites in support the Court's judgment in Joined Cases 17 and 20/61 (Rec. 1962, pp. 623 and 624). 'By Decisions Nos 22/54, 14/55, 2/57

and 16/58 the High Authority established a compulsory equalization scheme to prevent Community prices for ferrous scrap from being aligned with the higher prices for scrap imported from third countries. The Office commun des consommateurs de ferraille (OCCF) (The Joint Bureau of Ferrous Scrap Consumers) and the Caisse de pérequation des ferrailles importées (CPFI) (The Imported Ferrous Scrap Equalization Fund) were responsible for managing it.

'Under this scheme, the undertakings referred to in Article 80 of the ECSC Treaty were liable to pay the required contributions, the amount whereof was calculated *pro rata* on the tonnages of *bought scrap* consumed by each undertaking over a prescribed period, whilst the consumption of "own resources" was not subject to this levy (Decision No 2/57, Articles 3 and 4).'

The High Authority further cites, to the same effect, the opinion of Mr Advocate-General Lagrange in Case 20/58 (Rec. 1958/1959, p. 207).

It points out, lastly, that contrary to the allegations of the applicant, Decision No 22/54 was not rescinded as from 1 April 1955; Article 11 of Decision No 14/55 states that Decision No 22/54, as extended by Decision No 2/55, *'shall cease to be applicable'* as from 1 April 1955: it obviously does not follow that the effects of Decision No 22/54, which occurred prior to 1 April 1955, no longer exist.

6. The date of purchase of the disputed 20 682 metric tons

The *applicant* states that the High Authority had never questioned that the disputed 20 682 metric tons had been bought before the entry into force of Decision No 22/54.

The applicant asserts that, by producing as a schedule to its statement in reply the orders and confirmations of orders, it has established incontestably that it had bought the disputed tonnages before 1 April 1954.

The *defendant* replies first of all that the applicant certainly produced 31 orders, but no confirmations of orders. The defendant states that no contract exists if there has been no exchange of consent, and agreement cannot in principle be presumed. No proof that the suppliers expressed their agreement before 1 April 1954 is produced and it is not, therefore, possible to claim that the purchase was concluded before 1 April 1954.

In addition, the defendant states that six orders for a total of 16 100 metric tons (these orders are appended to the reply under numbers 3, 4, 5, 7 and 15) were to be carried out before 1 April 1954. If they were carried out within the time limit laid down they are not proof of delivery effected after 1 April 1954. If, on the other hand, they were not carried out within the time limit laid down, it must be deduced from this either that the supplier did not indicate his agreement with the time-limits fixed, or that a new agreement modifying the time-limits was reached.

The defendant points out moreover that the ferrous scrap in dispute constitutes goods sold by weight; it is accordingly governed by the provisions of Article 1585 of the Code Napoléon, applicable in Belgium, according to which, when goods are sold by weight, number or measure, the sale is not completed until they are weighed counted or measured.

The defendant raises the objection lastly that in 7 orders (appended to the reply under numbers 6, 8, 12, 13, 14, 21 and 28) the subject-matter of the order was not definitively specified, a certain amount of freedom being left to the suppliers in respect of the quality to be supplied, and it was probably not until the time of delivery that the purchaser was able to ascertain the exact quantities supplied and the definitive subject-matter of the contract.

The defendant contends that, even if the applicant were right in principle—which the defendant denies—, its case should nevertheless be dismissed as it has failed to prove the accomplishment in fact of the conditions necessary for the application of the rule on wh ich it relies.

IV — Procedure

The procedure may be summarized as follows:

The statements setting out the cases of the parties were presented within the proper time-limits.

In respect of the form of the application, the defendant has pleaded that this was not in conformity with the rules set out in Articles 37 and 38 of the Rules of Procedure, and has argued upon this basis that the application is inadmissible (cf. III above Submissions and Arguments of the parties, A, Admissibility).

Otherwise, the written procedure followed the normal course.

During the hearing of 15 July 1963, upon receiving the preliminary report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry, but nevertheless asked the applicant to produce certain documents. These documents were lodged at the Registry on 2 October 1963.

At the hearing of 16 October 1963 the Judge-Rapporteur put a question to the defendant and asked the applicant to produce certain documents which it had used during its oral arguments. The defendant replied at the hearing. As for the applicant, it lodged seven documents at the Registry on 24 October 1963.

At the end of the oral procedure the parties, at the request of the President of the Court, agreed to confine the subject of the proceedings to the reasoning of the disputed Decision, which is based on the construction of Article 3 of General Decision No 22/54 of 26 March 1954.

Grounds of judgment

Admissibility

The parties have not questioned that the disputed Decision was actually taken by the High Authority as a body; they have raised no objection in respect of the regularity of the notification of the said Decision and no objection need be raised by the Court of its own motion.

The defendant alleges that the only submission advanced by the applicant, the breach of Decision No 22/54, is expressed in vague and laconic terms and that as a result the applicant does not conform to Article 38(1) of the Rules of Procedure, according to which the application must include a brief statement of the grounds on which it is based.

The application contains conclusions and submissions in support of the action and, although it is true that the applicant has stated them briefly, it has nevertheless done so in a clear and accurate manner.

The first objection of inadmissibility must be dismissed.

The defendant alleges in the second place that the applicant in its application merely tendered proof, as far as necessary, that the tonnage of disputed ferrous scrap had been bought before 1 April 1954, the date upon which Decision No 22/54 entered into force, without appending to it the file of documents as provided by Article 37(4) of the Rules of Procedure.

The disputed Decisions was confined to settling a point of law, by interpreting Decision No 22/54.

The second objection of inadmissibility must be dismissed.

The defendant alleges in the third place that the annulment of the disputed Decision would entail a revision of the equalization calculations and, consequently, a heavier burden on the applicant than the reduction obtained.

A legal interest in making an application for annulment is assessed at the day on which the application is made, and at that time the exemption of the disputed tonnage offered the applicant a certain advantage.

The third objection of inadmissibility must be dismissed.

For the above-mentioned reasons the application is admissible.

On the substance of the case

According to the applicant's statement, Article 3 of Decision No 22/54 of the High Authority setting up the system of compulsory equalization provides that the amount of the contributions is to be calculated proportionately to the tonnages of ferrous scrap *bought* during the period for which the Decision remained in force, that is to say from 1 April 1954 to 31 March 1955.

The applicant alleges that the disputed ferrous scrap received by it after 1 April 1954 had been bought before that date and that, in consequence this, scrap is not subject to equalization contributions.

In the disputed Decision the High Authority has interpreted Article 3 of Decision No 22/54 in such a way that the expression 'tonnages of ferrous scrap bought' means 'tonnages of bought ferrous scrap received'.

It is necessary to adopt a common criterion to determine the commencement of the results of the equalization system, both for the application of the levy on bought ferrous scrap and for the allocation of grants for imported ferrous scrap.

A mistake in correlation in this respect would lead in fact to the ridiculous consequence that a quantity of ferrous scrap imported from a third country, bought by an undertaking before 1 April 1954 but imported after that date, would benefit from equalization without being subject to the payment of any contribution.

Decision No 22/54, which provided for the creation of 'a permanent scheme allowing equalization of ferrous scrap imported from third countries', could not have had as its aim or effect the institution of contributions on conflicting bases, both within the framework of Article 3 alone and in the relationship between Article 3 and Article 2.

Article 3 makes provision in the same sentence for the calculation of contributions on the basis of 'tonnages of ferrous scrap bought . . . whether within the Community, or on importation from third countries.'

The said Article therefore was meant to bring the two categories of bought ferrous scrap under the same rules.

It would consequently be illogical to maintain different legal criteria for construing the concept of bought ferrous scrap according to whether it originates from within the Community or from third countries.

The expression 'tonnages of ferrous scrap bought' must accordingly have the same meaning in both cases.

The interpretation of this expression in respect of imports is given by Article 2 which throws light upon and completes the concept of bought ferrous scrap by regarding as such scrap the import of which is 'effected' during the period in which the Decision remained in force.

If such is the meaning placed upon the expression, 'tonnages . . . bought' in the case of importation, the unity of interpretation of this expression implies the impossibility, because of this context, of giving it a purely literal interpretation.

In order to satisfy the necessity of giving the expression 'tonnages . . . bought' one meaning applicable to both the cases envisaged in Article 3, it is necessary to interpret it in the light of Article 2 and in both cases to give it a meaning consonant with that Article. This interpretation of Articles 2 and 3 is consistent with the aims of the system of equalization set out in Decision No 22/54.

It appears from the preamble to this Decision that the imposition of contributions, like the payment of grants, is aimed at maintaining the price of ferrous scrap at a reasonable level and at ensuring always that the needs of the Community are covered, by making possible the importation of the necessary quantities originating in third countries at prices comparable to those in force within the Community.

It would not be in conformity with these aims to submit to the equalization levy all ferrous scrap bought for whatever reason by companies which are undertakings for the purposes of Article 80 of the Treaty, but it is necessary to provide for ferrous scrap bought for use in Community production.

In fact it has already been held that 'it is not participation in the ferrous scrap market which gives rise to the equalization levy, but the consumption of ferrous scrap'.

It is evident from the logic of the system described above and confirmed by successive decisions on equalization that an unexecuted contract of purchase cannot be subject to equalization.

The allocation of ferrous scrap to Community use is not determined until the time of receipt by undertakings.

This point of view is confirmed by practice and case-law which, in case of uncertainty concerning the tonnage of ferrous scrap liable to equalization levies, have referred regularly to the criterion of consumption of scrap by the undertakings referred to in Article 80 of the Treaty.

Although it is true that Decision No 22/54 refers to purchase, this reference is explicable particularly by the necessity not to levy contributions on ferrous scrap produced by the consumer undertaking itself.

The objects of the equalization system thus confirm, despite the faulty drafting of the Decision, the necessity to give the expression 'bought scrap', a single interpretation in the light of Article 2.

Consequently, to decide the starting point for the application of the system, it is necessary to refer to delivery which indicates the passing of the ferrous scrap under the effective control of the consumer undertaking.

Costs

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

Nevertheless, paragraph (3) of the same Article allows the Court, where the circumstances are exceptional, to order that the parties bear their own costs.

In the present case the defective drafting of Article 3 of Decision No 22/54 was the decisive factor in the making of the application.

It follows from this that there is an exceptional circumstance in which the parties may be ordered to bear their own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 14, 15, 33 and 53 of the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. **Dismisses application No 14/63 as unfounded;**
2. **Orders each party to bear its own costs.**

Donner Hammes Trabucchi Delvaux
Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 16 December 1963.

A. Van Houtte
Registrar

A. M. Donner
President