# OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 29 APRIL 1964[1]

*Mr President,*
*Members of the Court,*

In the oral procedure on 17 April 1964 the parties, at the suggestion of the Court, limited their submissions to the issue of admissibility and to the questions directly related thereto, and this accordingly also prescribes the limits of the subject matter of my opinion.

The facts of this case — so far as they concern us today — are quite simple: in the course of the liquidation of the equalization scheme for ferrous scrap, which has so frequently engaged the attention of the Court, the High Authority adopted on 3 April 1963 Decision No 7/63 (published in the Official Journal of the European Communities of 6 April 1963, No 54, page 1091). Its aim is to arrive as closely as possible at the final statement of account of the equalization scheme. Its content, apart from fixing certain equalization prices, consists chiefly of the determination of the equalization contributions for the various equalization periods between April 1954 and March 1959. Pursuant to that Decision letters dated 8 April 1963 in identical language were sent to the applicants requesting payment of certain sums by way of equalization before 31 May 1963.

As the undertakings concerned for various reasons called in question the accuracy of the statements of account they decided to institute proceedings for

— annulment of Decision No 7/63
— annulment of the statements of account contained in the letters of 8 April 1963 drawn up in application of this Decision.

Alternatively they asked the Court

— to find that the mistakes which it was the intention of Decision No 7/63 to correct were, in whole or in part, wrongful acts or omissions within the meaning of Article 40 of the ECSC Treaty,
— to order the High Authority to pay appropriate damages.

It should be noted that in Case 57/63, which differs from the others in this respect, there is no alternative claim for damages but only notice of an intention to make such a claim. Instead there is in this case an additional claim that the Court should find that the calculation of the amount of ferrous scrap on which the applicant is liable to pay the levy, based on the total amount of scrap in the tables annexed to Decision No 7/63, is unlawful as regards its form and does not correspond to the facts.

The High Authority takes the view that the applications are inadmissible. In particular it states, relying on the judgments in Cases 23, 24, 28 and 52 to 54/63 (of 5 December 1963), that the disputed letters of 8 April 1963 are not decisions which can be contested before the Court. Decision No 7/63 on the other hand must be regarded as a general decision, which can only be contested by pleading successfully a misuse of powers affecting the applicants. No such plea is contained in the applications.

That explains the arguments concerning the admissibility of the applications, to which I will now turn without any further introduction. In so doing I will follow the order of the conclusions, in other words I will deal first with those which seek the annulment of Decision No 7/63.

1—Translated from the German.

*Legal Consideration*

I — Conclusions seeking the annulment of Decision No 7/63

1. How is Decision No 7/63 to be classified under the ECSC Treaty? Is it a general decision or is it an individual decision, because — in the view of the applicants — it constitutes a mere collection of a number of individual decisions applicable to all undertakings using ferrous scrap?

As the High Authority emphasizes, and as we know, the preliminary question of classification is important, because the answer to it determines which grounds can be pleaded, that is to say, if it is a general decision only the ground of 'a misuse of powers affecting' the undertaking is admissible, whereas if it is an individual decision all the other grounds are admissible.

I had the opportunity on a previous occasion, namely in Cases 53 and 54/63, to deal with the question which has arisen. I then came to the conclusion that Decision No 7/63 must be regarded as a general decision, because its purpose is only to provide a basis for the final preparation of the individual statements of accounts for each of the various undertakings. However I will not this time restrict myself to a reference to my arguments in that case, which moreover are not repeated in the Court's judgment (in passing, it should be said that the Court merely pointed out that the applicants were not affected individually by Decision No 7/63). It is clear that in the present case the question of the classification of Decision No 7/63 has been treated in much greater detail and — it must be freely admitted — with very impressive arguments, which merit without any doubt a more searching examination. It will be seen later whether these arguments make it necessary to revise the view which I expressed before.

The essence of the applicant's argument is that a general decision must be legislative in character, that is to say it must, like a substantive rule of law, aim at the abstract regulation of situations which may arise in the future. Decision No 7/63 departs from this pattern. Its aim is solely to regulate events which have already taken place and which took the form of purchases of ferrous scrap. It has therefore the same function as a document leading to the winding up of a company (and on this point the applicants have not failed to refer to the original equalization scheme, which came into operation in the form of a Belgian commercial partnership). The application of Decision No 7/63 to this particular case resembles a straightforward accounting operation; its structure does not allow any opportunity for legal reflexion in the sense of an implementing measure, because it directly regulates the legal situation of each undertaking using scrap. This explains the short period of time between the making of the Decision and the despatch of the letters of 8 April 1963, from which it is to be inferred that the Decision was applied before its publication so it is not intended to refer to the future.

To begin with, one of the points made in the foregoing argument is certainly true, namely that rules of law, measures having a legislative character, must be regarded as general decisions within the meaning of the Treaty. The previous decisions of the Court offer in this connexion a number of examples.[1] It is in my view equally certain that Decision No 7/63 is not a legislative measure within the pure meaning of that expression, as repeated in the definition supplied by the applicants, for the very reason that it is concerned with the regulation of past events whose number can be conclusively ascertained and,

1—Cases 8/55, Rec. 1955–1956, p. 199; 13/57, Rec. 1958 (janvier-juillet), p. 261; 36 to 38 and 40 and 41/58, Rec. 1958–1959, p. 337.

unlike many legislative measures which have retroactive effect, in addition is of importance as regards the future, that is to say, in relation to matters which may occur in the future. To this extent it is not inappropriate when examining Decision No 7/63 to be reminded of the concept of a general administrative order applicable to a class of persons ascertainable at the date of its issue ('Allgemeinverfügung') within the meaning of German administrative law, that is to say of a legal measure, which is therefore equivalent to an administrative measure, because its sole purpose is to regulate a fixed number of events in the past (cf. Forsthoff, Lehrbuch des Verwaltungsrechtes, Vol I, 8th Edition, page 184).

It appears to me nevertheless wrong to draw firm conclusions for determining this case from this first impression. In my opinion the applicants make a mistake to the extent that they do not correctly understand the function of Decision No 7/63. It is not in fact the task of Decision No 7/63 to regulate directly and exhaustively the legal fate of each undertaking consuming scrap. That the decision to liquidate the scheme could be in this form is indeed conceivable, that is to say, the High Authority could in a single decision corresponding in that case to a winding-up resolution under commercial law, bring the entire equalization scheme to an end by establishing the credits and debits of each undertaking. However it is clear not only from the arguments of the High Authority but also from the contested measures themselves that this stage of the liquidation has not yet been reached. The High Authority has stated that it does not have accurate information of all the equalization cases, and in particular it does not yet know definitely which undertakings and what amounts of scrap have to be considered. As we know, a whole series of cases have been brought to decide whether scrap from certain sources is to be included in equalization; in addition the correctness of the amount of scrap declared is disputed. Therefore in Decision No 7/63 only a further step towards the final statement of account was possible. For this purpose the High Authority had to base itself on the known, and in part disputed, values and at least establish a provisional rate for contributions, which is now to be applied in making out the final statements of account. This is explained in the tables annexed to Decision No 7/63. It would however be wrong to infer from them that the Decision itself is intended to be the last word on the quantities of scrap subject to equalization. According to the High Authority any points in dispute were rather meant to be settled during the administrative procedure when Decision No 7/63 was actually applied. This administrative procedure was initiated with the letters of 8 April 1963. It might happen during the course of this procedure — and there are well known examples of this — that the High Authority does not confirm the figures mentioned in the letters of 8 April 1963, because it finds that the objections of the undertakings concerned are convincing. In any case when undertakings make objections the only legally binding way of applying Decision No 7/63 is an individual enforceable decision made by the High Authority itself acting as a body and not by one of its departments as happened in the case of the letters of 8 April 1963. That this course of procedure not only corresponds with the intention of the High Authority but also with an objective rule laid down beforehand emerges from the various announcements of the High Authority. Article 5 of Decision No 7/63 shows that this Decision does not go so far as to lay down a basis for assessment which is binding, otherwise there would not be in this provision the words: 'The basis for the assessment of the contributions shall be the declarations of individual undertakings, which shall be corrected

according to the stage for the time being reached in evaluating the results of checking operations'. It is to be inferred from the letters of 8 April 1963 together with the enclosed explanatory notes that they do not disclose a binding statement of the High Authority concerning the basis of assessment and the resulting contributions but only initiate an administrative procedure in which the views of all those concerned may be given.

Therefore — and this is important — it is necessary to revise substantially the applicants' conception of the function of Decision No 7/63, which could itself have caused them to assume erroneously that it is a general administrative order ('Allgemeinverfügung'). In addition the fact remains that Decision No 7/63, like such an order, clearly only refers back to the past; but with regard to these past events it does no more than determine a value equally applicable to all undertakings consuming scrap (the rate of the contributions), whereas all other legal details concerning the situation of undertakings consuming scrap are on the basis of this value to be dealt with by implementing decisions which have unequivocally individual characteristics.

Having regard to this I have to ask myself whether Decision No 7/63 does not have a general character merely because it is not a purely legal provision, or whether its practical function in the liquidation of the equalization scheme for ferrous scrap enables it to be treated as the equivalent of a legislative measure. It is only possible to give a sensible answer to this question if we consider what function the difference between general and individual measures performs in the system of legal protection under the Treaty. Looked at in this way it cannot in my opinion be proved that general decisions are only to be discovered in legislative measures. I would like to recall the arguments which my colleague Lagrange and I put forward during the hearing of the first cases under the ECSC Treaty concerning the definition of general decisions. At that time Mr Lagrange[1] correctly pointed out that Article 33 must be interpreted essentially by applying the concept of 'interest'. In this connexion I may mention from German administrative law, in which the difficulties of definition referred to are also not unknown, the view of Forsthoff that when the classification of the legal nature of a disputed measure is not free from doubt the requirements of legal protection can provide a guideline. According to Forsthoff it is necessary to ascertain whether a measure immediately impinges upon the rights of an individual or whether this only arises when the implementing measure taken pursuant to the disputed measure is issued. (Forsthoff loc. cit, p. 187.)

If this proposition is applied to the ECSC Treaty, the following view appears to me to be correct; a direct right of action against such measures which apply in the same way to a large number of undertakings is denied to coal and steel undertakings. This being the case, whether we are in fact dealing with a legal rule within the strict meaning of the word is not conclusive, if it is clear that the content of a measure consists only of the regulation of common factors without taking into consideration the particular facts of individual cases, and that it is plainly intended to be applied according to the circumstances of individual undertakings by means of individual decisions. I consider such an interpretation to be tenable, because it fully satisfies the requirements of the system of legal protection under the Treaty, even if, from the point of view of strict legal theory, it makes it more difficult to distinguish between general and individual decisions. In particular there is no need to fear any encroach-

1 — Case 8/55, Rec. 1955–1956, p. 248.

ment upon the legal protection of individuals, because all differences can be fully dealt with when the implementing decisions are made, including those which derive directly from the general decision (objection of illegality).

I therefore adhere to the opinion which I previously expressed that Decision No 7/63 is a general decision and can only be contested within the restricted limits of Article 33 of the Treaty.

2. This of course means that the only ground which can be admitted is the complaint of 'misuse of powers affecting them'.

In fact the applicants plead that the High Authority has committed a 'misuse of powers affecting them'. However, this — as we know — does not by itself satisfy the requirement of the Treaty.

The applicants now proceed on the basis of a conception of misuse of powers which does not correspond with the Court's definition of misuse of powers as such or with 'détournement de pouvoir à leur égard' — 'misuse of powers affecting them'. Although, in a definition which is still valid today, the Court has already laid down, in Case 8/55 (Rec. 1955–1956, p. 250), that there is only a 'détournement de pouvoir à leur égard' if the undertaking is the object or at least the victim of the misuse of powers which it alleges, the applicants would like to claim that every defect which affects the legality of a discretionary decision and transforms that decision — whether consciously or unconsciously — into a decision other than the one intended by the author is a misuse of powers. This cannot be right, because, if it were, any limitation of the concept of infringement of the Treaty would become impossible and in particular because the concept of 'détournement de pouvoir à leur égard' would lose its separate identity which differentiates it from a single misuse of powers.

Looking at the problem from another angle we have to ask whether the applicants in their application do more than formally plead this ground, for the Court has repeatedly held that the admissibility of an action against general decisions depends upon a convincing statement, that is to say a fully substantiated statement, of the misuse of powers with particulars of the reasons for the alleged surrender of specific interests by the applicant (Case 9/55, Rec. 1955–1956, p. 323). It seems to me that on this point as well the applications fall short of the prescribed requirements. The essence of their arguments is that the statement of the reasons upon which Decision No 7/63 is based is inadequate (which is regarded as *prima facie* evidence of misuse of powers), that it upsets the system of the Treaty relating to the publication of price lists and that it has a negative impact on the conditions of competition of iron and steel undertakings, because for a long time after the commencement of the liquidation of the equalization scheme no new structural changes were to be expected. Moreover in some (but not all) of the applications (namely not in Cases 55 and 63/63) there are also detailed particulars of the effects on the situation of the applicants which in fact result from the inductive method used to determine the consumption of scrap (by means of particulars of the consumption of electricity). The applicants intend to use these particulars to show that the High Authority has overestimated their consumption of scrap or has not yet determined with certainty the consumption of scrap by individual undertakings. According to the proper understanding of the concept 'détournement de pouvoir à leur égard' all these observations do not amount to a convincing basis for this complaint but can at most be used to support other complaints (infringement of essential procedural requirements, infringement of the Treaties). In particular they are irrelevant in so far as they relate to the basis of assessment, because Decision No 7/63 mentions nothing definite or binding on this point. In that

Decision certain data relating to the consumption of scrap only serve to determine the provisional rate for the contributions. Even if in so doing the High Authority had made a mistake by taking into account quantities not subject to equalization, it would not afford the applicants grounds for any complaint, since the higher the consumption of scrap which in the High Authority's view was subject to the equalization scheme, the lower must be the rate of contribution.

As we cannot therefore confirm that misuse of powers has been adequately presented this submission must be left out of consideration. In my opinion this fact makes it necessary for procedural reasons that the application, to the extent to which it is directed against Decision No 7/63, be dismissed as being inadmissible and not as being unfounded, because the adequacy of the presentation of a submission in an application properly belongs to the field of admissibility.

3. Solely in the interests of a full treatment of this subject I would also like to call attention to the fact that rejection of my proposed suggestion for the classification of Decision No 7/63 would not produce a different result. In any case it is clear from the structure of this decision that it does not aim at a direct and final regulation of the legal position of each undertaking consuming scrap. Its only purpose is to fix a general rate for the contributions and in particular to leave the determination of the basis of the assessment for the subsequent administrative procedure, initiated by the letters of 8 April 1963 and which can be completed by the issue of an enforceable individual decision, if the High Authority and the undertakings concerned cannot resolve any possible differences. To come to any other decision and permit a discussion of the differences which have arisen immediately after the adoption of Decision No 7/63 would destroy the practical value of the administrative procedure, which in my opinion is an extremely sensible administrative arrangement. Individual undertakings have not from any point of view a sufficiently pronounced need for legal protection to allow them to take action against Decision No 7/63, which is another reason for dismissing the applications on the ground of inadmissibility.

## II — Annulment of the individual statements of account contained in the letters of 8 April 1963

In the second head of their conclusions — annulment of the letters of 8 April 1963 — the applicants themselves concede that these letters do not have the characteristics of decisions which can be challenged separately under Article 33 of the Treaty. However they concede that the letters, being measures by which Decision No 7/63 is implemented, qualify as decisions against which proceedings can be conditionally instituted, because in their opinion their function is to make known and carry out in greater detail individual decisions which, as individual decisions, are already with others incorporated by implication in Decision No 7/63.

Having said this I need not go once again into the question of the legal classification of the letters containing the statements of account, which was exhaustively discussed in Cases 23, 24, 28, 52, 53 and 54/63. As has been laid down by the judgments of the Court, which on this point followed my opinion and whose findings have not in the meantime been upset by other arguments, the letters containing the statements of account cannot be regarded as decisions against which proceedings can be instituted, above all because they were not issued by the High Authority sitting as a body.

But this finding in effect also passes judgment on the various ways of chal-

lenging the Decisions which have emerged in these cases. An evaluation of Decision No 7/63 has shown that it was not the intention of the High Authority to determine once and for all and in such a way as to bind them the legal position of the individual undertakings. Decision No 7/63 only intended, by fixing the rate of contribution, to lay down a basis for the subsequent individual statements of account, which were to be discussed first in administrative proceedings, before any binding individual decisions were issued. It cannot therefore be said that Decision No 7/63 already contains all the individual decisions covering the various undertakings consuming scrap. There is therefore no doubt that the purpose of the letters of 8 April 1963 cannot be regarded as the publication of individual decisions which, together with Decision No 7/63, can be made the subject of legal proceedings. The second part of the conclusions must therefore also be dismissed on the ground of inadmissibility.

## III — Alternative conclusions

The alternative conclusions which seek a declaration from the Court that there have been certain wrongful acts and omissions on the part of the High Authority and should order it to pay appropriate damages must in my opinion, having regard to the submissions in the applications looked at as a whole, be understood to mean that they can only be treated as being still on the record, if the Court recognizes the legality of Decision No 7/63, that is to say, if it decides the main head of the conclusions (see on this point the pleadings in the German version 'if the Court however confirms the legality of Decision No 7/63 . . . then in the alternative the very important question arises whether these mistakes must not be regarded as wrongful acts or omissions which create a right to compensation'). In fact the applicants only have a right to claim compensation if the measures which are directly challenged are not annulled.

As however the conditions laid down by the applicants have not arisen (because for the time being the main issue of the application cannot be decided), it is unnecessary to give further consideration to the subject matter of the alternative conclusions. In these circumstances it is my opinion not even necessary that they should be expressly mentioned and dismissed in the operative part of the judgment.

## IV — Costs

In the present proceedings the applicants have also put forward the claim that in the event of their applications' being dismissed the High Authority should nevertheless bear the costs, because it is the manner in which it drew up the contested measures which has caused the applications to be brought.

This claim can in principle be dealt with in the same way as the claim for costs in Cases 53 and 54/63. It must in this connexion be acknowledged that the High Authority, because of the manner in which it worded the letters of 8 April 1963, has given the impression that they were binding and enforceable decisions. With regard to the applications against Decision No 7/63 it must be admitted that the applicants have put forward perfectly reasonable arguments in support of their view that the Decision is an individual decision, a point of view which can be used in their favour to establish in law a case of special difficulty so as to bring into operation Article 69 (3) of the Rules of Procedure. Moreover it cannot be denied that by the wording of Decision No 7/63, in particular of Article 6, the High Authority has also to some extent helped to create in the mind of the applicant the false impression that this Decision could be contested as an individual decision.

In the present case it must moreover be borne in mind that, in the course of the written procedure, and indeed just after the final pleadings of the applicants were lodged (18 October 1963), a clarification of the right of action emerged from the judgment of the Court of 5 December 1963 in the related cases 23, 24, 28 and 52 to 54/63. After this date the further prosecution of the applicants' claims for annulment of the letters of 8 April 1963 and of Decision No 7/63 held out little prospect of success. It might therefore be legitimate to conclude from the fact that the applicants did not abandon their proceedings at that time that in law they should bear a greater proportion of the costs than the applicants in Cases 23, 24, 28, 52, 53 and 54/63 and for example should share the costs.

## V—Conclusion

To sum up I submit that the applications be dismissed in their entirety as being inadmissible and that each party should bear its own costs.