THE COURT

hereby:

1. **Dismisses the application;**
2. **Orders the applicant to bear the costs.**

Hammes Donner Lecourt

Delvaux Monaco

Delivered in open court in Luxembourg on 16 December 1965.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 2 FEBRUARY 1965[1]

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1 – Translated from the German.

Mr President,
Members of the Court,

The present proceedings are a continuation of Case 1/63, a fact which enables me to dispense with a detailed statement of the facts.

As you know, the dispute arises from the fact that for many years the applicant, an undertaking within the meaning of the ECSC Treaty, has not complied with its obligation to pay the general levy. This omission on the part of the applicant caused the High Authority to issue a first enforceable decision (which I shall hereinafter call decision 59), which called upon the firm Macchiorlati to pay the amount of the levies due up to 5 November 1958 (16 060 945 lire) and the surcharges for delay which had accrued up to that date (5 408 598 lire). The decision also provided that for each month's delay from 5 November 1958 surcharges for delay amounting to 1% of the outstanding levies were to be paid by Macchiorlati. This decision was the subject of an application to the Court for annulment in Case 22/59 which was not concluded by a judgment but by discontinuance. In fact in the course of those proceedings negotiations took place between the parties with the object of settling the dispute out of court. The exact terms of settlement are disputed. There is however no doubt that the negotiations culminated in an agreement to pay the outstanding levies by instalments, an agreement which has clearly been substantially performed. As far as the surcharges for delay are concerned the applicant corresponded with the High Authority with the result that the surcharges due for the period from January 1953 to December 1960 were remitted to the extent to which they exceeded the sum of 7 million lire. As the unremitted amount of the surcharges for delay was still due from the applicant, the High Authority demanded payment by a decision of 14 November 1962 (which I shall hereinafter call decision 62). The legality of this decision was disputed in Case 1/63. The result in this case was the annulment of the disputed decision by a judgment of 16 December 1963: it was the view of the Court that the reasons upon which the demand for payment was based were inadequate.

After this judgment the High Authority, according to its own statement, re-examined the position of the firm Macchiorlati. On 4 February 1964 it sent the undertaking a letter inviting it to submit comments pursuant to Article 36 of the Treaty. They were submitted on 18 February 1964 and in them the applicant relied chiefly on an agreement alleged to have been made between the High Authority and itself on 21 April 1960 and claimed that under this agreement it was entitled to remission of the whole of the surcharges for delay.

Finally on 8 April 1964 the High Authority made a second decision (which I shall hereinafter call decision 64), which once more called upon the firm Macchiorlati to pay, within 30 days of notification, the amount of 7 million lire by way of surcharges for delayed payment of the levies. It is this decision which is now the subject matter of the present proceedings.

The applicant has submitted that the Court should:

1. Annul the decision of 8 April 1964;

2. By way of ancillary relief:
after the annulment of the said decision declare that the surcharges for delay which the applicant has been called upon to pay are to be remitted;

3. Alternatively:
vary the contested decision by reducing the amount of the surcharges for delay by an appropriate amount.

The High Authority on the other hand submits that the Court should dismiss all the submissions of the applicant as

being inadmissible or unfounded. To the extent to which the alternative submissions fall within the unlimited jurisdiction of the Court they should in the opinion of the High Authority be dismissed as irrelevant.

Legal consideration

The distinguishing characteristic of the legal consideration of the issues in this case is the fact that we have to deal basically with the same problems as those in Case 1/63. This is due to the fact that the Court in that case decided one of the submissions—which was not the most important—without answering the substantiative questions of law. If I make this observation at the beginning of my opinion, it follows that I give notice at the same time that I abide by the main arguments which I developed in Case 1/63. This of course does not mean that in the present case any new aspects which have arisen will be disregarded or will not be dealt with impartially.

As I did in Case 1/63 in my examination of the facts I shall look first of all at the submissions which relate directly to the contested decision. It is only when I have done this that I shall give my views on those submissions which refer to other individual and general decisions, and it is during this second part of my examination that the questions of admissibility, which Case 1/63 brought to our notice, will arise.

I — Submissions directly relating to contested decision 64

1. *Inadequate statement of reasons upon which the decision was based*

We are confronted first in the present dispute with the complaint of infringement of an essential procedural requirement, although the applicant in this case does not argue that the statement of reasons is inadequate because the scope of the individual statements is too restricted, but calls attention to the contradictory and absurd nature of the statement of the reasons upon which the decision is based and also, in addition, to the failure to make any comments on the applicant's application of 18 February 1964 for remission of the surcharges.

The last complaint is certainly unfounded. The said letter of the applicant deals mainly with three points; the High Authority has given its view on two of them—although with a brevity corresponding to that of the applicant in submitting its own arguments—that is to say, on the alleged remission of the surcharges for delay during the discussions on 21 April 1960 and on the actual economic and administrative position of the applicant's business. With regard to the general reference by the applicant to its argument in Case 1/63 it must be said that it would be an excessive extension of the duty to give the reasons upon which a decision is based to require the High Authority, in reply to such a general reference, to give as a statement of reasons a detailed statement, in the nature of a pleading, of the content of Case 1/63. There can therefore be no question of an incomplete statement of the reasons upon which decision 64 was based.

But the complaint that the statement of the reasons for the decision is contradictory and absurd, a complaint which can probably, having regard to the decisions of the Court, be dealt with under the head of infringement of an essential procedural requirement (Cf. Case 24/62, [1963] E.C.R. 63), does not appear to me to be well-founded either. It can readily be inferred from the decision that the applicant is not eight years in arrears of payment of the entire sum mentioned. The complaint against the applicant is simply that until 1960 it did not fulfil its obligations to pay any of the levies, which had be-

come payable from 1953 in proportion to its monthly production. Further it does not appear to be 'absurd' that, with reference to the discussions on 21 April 1960, the decision states that there was an agreement concerning payment by monthly instalments of the principal sum owing in respect of the levies to become due up to December 1960, because in April 1960 an estimate of the amount of the future payments of the levies based on the production figures to that date was definitely possible. Finally it is perfectly clear that the High Authority was entitled to decide on a partial rather than a complete remission of the surcharges for delay. The partial remission was announced in June 1962 after payment of the arrears of the principal debt and moreover on the ground that the payment plan laid down in the agreement of 21 April 1960 had in the main been adhered to by the applicant. Complete remission of the surcharges for delay was not granted, because the applicant until 1960 in spite of repeated reminders had still failed to make any payment and also because after 1960—apart from carrying out the said payment plan—it manifestly did not properly comply with its obligations under the general decisions relating to the levies. That the High Authority for these reasons was only prepared to make a limited concession is in my opinion to be clearly inferred from the contested decision.

Consequently the complaint that the statement of the reasons upon which the decision is based is contradictory and 'absurd' does not stand up to close examination so that this complaint must also be dismissed.

2. The complaint is made that the High Authority committed a procedural mistake in that on receiving the comments of the applicant on 18 February 1964 it immediately took an enforceable decision without having first made a non-binding preliminary statement concerning them.

It is perfectly clear from the text of the Treaty that this complaint has no foundation. According to Article 36 the High Authority is only required before imposing a pecuniary sanction or ordering a periodic penalty payment to give the party concerned the opportunity to submit its comments. If this has been done there is nothing to prevent the immediate issue of an enforceable decision, at least, if, on the specific facts, it does not appear necessary to obtain additional clarification in administrative proceedings, with the participation of the interested parties, of the questions in dispute. As however in this case the comments of the applicant in the light of past events in fact produced nothing new for the purposes of the assessment of its case, no complaint can be made against the High Authority concerning the way in which it proceeded.

3. As far as the content of the decision is concerned the applicant makes two submissions which also had to be examined in Case 1/63.

(a) First it complains that the High Authority has misused its powers, because it insists on payment of the surcharges for delay, although the applicant was given an assurance during the discussions on 21 April 1960 that they would be remitted.

No features which differ from those in Case 1/63 have arisen, so that in the main I can refer to my arguments in that case. In particular I still hold the opinion that the officials of the High Authority who took part in the discussions in question were not authorized to grant any remission of the surcharges for delay or to give any binding assurance to that effect. The power to take such a step is in principle retained by the High Authority itself. In particular the authority granted to the representatives *'ad litem'* of the High Authority cannot be regarded as a delegation of the power to remit surcharges, because the authority only authorizes the defence of legal rights and not their surrender.

For this reason it appears to me unnecessary in order to deal with the present argument to hear oral evidence on the substance of the discussions of 21 April 1960. The documents before us (letters of the applicant and of the High Authority) which I went into in detail in Case 1/63 confirm beyond doubt that such a step is unnecessary. From them we learn that the applicant very soon dropped the claim put forward in its first letter of 30 April 1960 that the High Authority had waived the surcharges for delay, and was content to apply for a discretionary remission based on its later conduct in paying the levy and also on the economic difficulties of its undertaking. Further they show that the applicant clearly found it difficult to produce evidence in support of its chief argument in Case 22/59 concerning the estimate of its production during a specific period in 1958 and that in the end it was for this reason that it discontinued its application.—Finally the view cannot be accepted that on this assessment of the facts the willingness of the applicant to agree upon a compromise is unintelligible, because granting the applicant the opportunity to pay the outstanding levies by instalments instead of enforcing immediately by action payment of the entire sum, which the High Authority was entitled to do, constitutes, as I have already stated in Case 1/63, a benefit for the applicant in the sense that it is a genuine compromise.

It appears to me therefore, as it did in Case 1/63, impossible to annul the contested decision on the ground that there was a binding assurance that the surcharges for delay would be remitted.

(b) With direct reference also to decision 64 the complaint of infringement of Article 6 of general Decision No 3/52 is made on the ground that the High Authority has in calculating the surcharges for delay rounded up the figures so that altogether the authorized rate of 1% has been exceeded.

With regard to this complaint the High Authority in the first place showed that the case of rounding up put forward by the applicant (surcharges for delay for January 1960) is explained by a clerical error, which had no effect on the calculation as a whole. Apart from this the rounding up and down of individual surcharges for delay in fact only involved fractions of a lira resulting in an increase of 0.83 lire in the applicant's total debt. This statement, which has not been disputed, shows us that, having regard to the total amount of the debt, there has not in fact been any such infringement as would justify admitting that the applicant has any valid interest in complaining against it. As was shown in Case 1/63 the foundation of every argument in support of this complaint was destroyed by the partial remission of about 2 million lire granted in June 1962, because in this way possible increases over the authorized rate of 1% were in each case cancelled out. An infringement of Article 6 of Decision No 3/52 has not therefore been proved.

Altogether we find, therefore, that none of the submissions directly relating to decision 64 is well-founded.

II — Submissions relating to decision 59

The submissions which we have dealt with so far are not the end of the matter. In these proceedings the applicant seeks to bring into discussion questions of law which were the subject of decision 59, namely the method of estimating its production for the months March to October 1958. These questions only relate directly to the fixing of the debt in respect of the levy, that is to say the principal debt (for this is calculated according to the volume of production), but they obviously are in addition relevant for the calculation of the surcharges for delay which depends

upon the amount of the debt in respect of the levy.

I also gave my detailed views on this part of the action in Case 1/63 and I must frankly state that having taken note of all the arguments put forward in the present case I see no reason to change them. I will not now repeat all the details of my opinion. I will only stress the main points.

What in my opinion is conclusive is that the decision which is now disputed is not connected in a relevant way under Article 36 of the Treaty with decision 59, that is to say, in a way which makes it possible to contest decision 59. This would perhaps be the case if decision 64 imposed sanctions for non-compliance with obligations arising out of decision 59, if decision 59 had in fact determined the levies and decision 64 had fixed the surcharges for delay payable for their non-payment. That is not what happened. Decision 59 fixed the debt due in respect of levies up to and including October 1958 *as well as* the surcharges for delay due in respect of that debt. In other words the purpose of decision 59 is to specify the debt due in respect of the levy and *at the same time* to lay down the sanctions for failure to pay them. Therefore decision 59 and not decision 64 is the determinative decision imposing sanctions for the debts in respect of the levies to October 1958. Just like decision 62, which has in the meantime been annulled, decision 64 confines itself to extracting part of decision 59 by simply reproducing a specific passage without further examination. Decision 64 consists to that extent merely of a repetition (following the discontinuance of the action) of a decision which has become final and for this reason cannot be judicially reviewed. If, however, it is legally inadmissible to include in the legal arguments that part of decision 64 which deals with the surcharges for delay in connexion with the debt due in respect of levies up to October 1958, it is also inadmissible to discuss, by reference back to a previous decision, questions which relate to the fixing of the determinative basis of the surcharges for delay, that is to say, the levies which the applicant was liable to pay for this period.

Therefore I abide by my conclusion in Case 1/63: all arguments concerning the estimation of the levies which the applicant was liable to pay during the period from March to October 1958 must be dismissed as being inadmissible, because they are contrary to the legal force of *res judicata* which attaches to decision 59.

III — Submissions directed against general decisions on the levies

1. The conclusion at which I have just arrived contains in substance all that need be said about the admissibility of the objection that certain *general* decisions concerning the levies are illegal, because naturally the inadmissibility of calling in issue individual decision 59 carries with it the inadmissibility of calling in issue the general decisions concerning the levies upon which this decision is based. Therefore all arguments must be disregarded which were put forward concerning the determination of the rate of the levy (application of the levies for certain purposes alleged to be contrary to the Treaty) and the procedure for fixing the rate of the levies (consulting the Council), at any rate—one can hardly say more at the moment—so far as the levies up to October 1958 inclusive which the applicant was liable to pay are at issue.

2. The objection of illegality nevertheless goes further. As has already been explained in Case 1/63 its admissibility could be considered to the extent to which it refers to general decisions governing the obligation to pay the levies for the period after October 1958. To this extent it appears from the

wording and main purpose of Article 36 of the Treaty that this Article is applicable, that is to say, when fixing pecuniary sanctions, which must include surcharges for delay, the legality of those general decisions, non-compliance with which must lead to sanctions, may in principle be called in question. The objection that they have the force of *res judicata* falls to the ground, because the content of the determinative decisions concerning the levy for the period after October 1958 has not yet become crystallized in an individual decision which has not been challenged or against which an action has been brought but discontinued.

This is certainly not a final judgment on the admissibility of the objection of illegality understood in this way. There are, on the contrary, as I have also stated in Case 1/63, relevant procedural doubts on the question of extinction of rights of action through acquiescence, so far as the objection is aimed at the complaint concerning the fixing of the rate of the levy and the application of the levy funds. I cannot confirm that these procedural doubts have been removed by the new detailed explanation of the applicant's point of view: I therefore set out again the written conclusions I submitted on this point in Case 1/63:

'The debt in respect of levy for the period November 1958 until the end of the period of default in payment (December 1960) is determined by the Decisions concerning the levy of which the essential particulars (rate of the levy, procedure for the determination of the rate of the levy) have been unchanged since Decision No 13/57 of 17 April 1957.

The High Authority, in a letter to the applicant of 17 March 1958, stated for the first time the aggregate arrears of levy. After this date the applicant in several letters and conversations discussed the matter with the High Authority without criticizing the rate of the levy or the procedure for its determination. Its only complaints related obviously to the calculation of the chargeable value of its production. Even in Case 22/59, the subject matter of which was in fact an individual decision relating to the levy, no arguments were put forward concerning the rate of the levy. Finally, since May 1960 to the present, the applicant has paid the levy for all the periods of assessment without challenging *directly* the correctness of the rate and the procedure for its determination. Having regard to these facts the question may justifiably be asked whether the conduct of the applicant in matters connected with the levy, which has covered many years and is characterized by exhaustive arguments with the High Authority in administrative and Court proceedings, has not deprived it of the right to criticize *indirectly* the system of the levy, when contesting a decision imposing sanctions.'

I see that my view is supported by the applicant's observations during the written procedure, in which it states its willingness to pay the levy contributions in 1960 and thereafter. It is to be inferred from them (page 15 of the French translation) that the applicant's complaints are not directed against the relatively low rate of the levy, which had been applied from the financial year 1957/58 and against the even lower rate applied from the financial year 1961/62, but only against the very much higher rate of the levy during the *first years* of the Common Market, that is to say the years during which most of the guarantee fund was collected. To that extent however—as I have shown—the force of *res judicata* attaching to decision 59 prevents any direct or indirect criticism of the High Authority's policy with regard to the levy.

I therefore submit once again that the Court should dismiss all the applicant's arguments concerning the fixing of the rate and the procedure adopted for that purpose not only with reference to the period covered by decision 59 but also

to the obligations to pay the levy which arose after October 1958.

3. On the other hand it seems to me that the plea of extinction of rights through acquiescence cannot be applied to that part of the general decisions concerning the levy upon which the fixing of the surcharges for delay is based. To this extent the objection of illegality must still be examined.

There are under this head several complaints to be considered:

(a) The applicant's first complaint is that the rate of the surcharges for delay was fixed in a general way and the principle established that surcharges for delay for non-compliance with the obligation to pay the levies are payable as from a specific date, which deprives the persons concerned of the right to submit their comments beforehand. Further the applicant made an additional complaint in the oral procedure that the monthly calculation of the surcharges for delay infringes Article 50 (3).

(b) In addition contrary to the provisions of the Treaty the High Authority failed to consult the Council of Ministers before the rate was fixed or at any rate to mention any such consultation in the decision.

On (a):

With reference to the first of these complaints I may also refer to my opinion in Case 1/63. In it I conceded that the way in which Decisions Nos 3/52 and 29/55 were drawn up does not correspond with the requirements of Article 36 of the Treaty. But I thought I must stress that: 'The defect which possibly attaches to Decision No 3/52 would however only be of importance in evaluating this case if it left its mark upon the individual decision, that is to say, if the procedure which led to the contested individual decision was incompatible with Article 36 of the Treaty'. That was nevertheless not the situation in Case 1/63 and certainly does not apply to the present proceedings, as is proved by the High Authority's request of February 1964 for the submission of comments pursuant to Article 36.

Therefore I still maintain that no interest in challenging the said general decisions can be recognized, because no definite mistake rendering them defective emerged from the procedure which led to the issue of the individual decision.

With regard to the complaint made during the oral procedure that Article 50 (3) only permits a quarterly calculation of the surcharges for delay, it should be noted that such a limitation is not inevitably to be inferred from the meaning and purpose of the said provision. In my opinion the principal object of Article 50 (3) is to fix a maximum limit for the amount of the surcharges for delay expressed as a percentage of the principal debt, but not to lay down the applicable periods of delay. Apart from this the complaint in the present case would however only have made sense, if it had been proved that the monthly calculation had been prejudicial to the applicant. This did not happen and could indeed not have happened having regard to the reduction of the surcharges for delay in June 1962.

On (b):

As far as consulting the Council of Ministers is concerned, which in fact is not mentioned in Decision No 3/52, according to the wording of Article 50 of the Treaty the view could be put forward that it only applies to paragraph (2) and not to paragraph (3) of this Article, in which the right to impose surcharges for delay is granted subject to a limit which the High Authority observed in Decision No 3/52 and *a fortiori* in the contested individual decision.

If on the other hand the view is put forward, which I do not regard as conclusive, that details concerning the fix-

ing of the surcharges for delay in fact actually fall within 'the mode of assessment and collection of the levies' within the meaning of Article 50 (2), it would at least have to be conceded that the High Authority has proved that the Council of Ministers was consulted. This emerges from documents, which were previously produced in Case 1/63, in particular from the statement of the Secretary of the Council of Ministers of 3 January 1953 that the consultation pursuant to Article 50 (2) took place at the meeting of the Council of Ministers of 3 January 1953. Whether the levy regulations in their final form as adopted by the High Authority were placed before the Council of Ministers is not on the other hand conclusive, provided that the whole of the circumstances applicable to this case was brought to its notice and it had the opportunity to express its opinion on them.

In addition the fact that consulting the Council is not mentioned in Decision No 3/52 may lead to certain objections, provided that consulting the Council is at all regarded as being necessary. I would nevertheless not regard this circumstance as an infringement of an *essential* procedural requirement.

Therefore the application cannot succeed either to the extent to which the admissible submissions relate to the general decisions concerning the levy. Altogether this leads me to the conclusion that the applicant's claim for annulment must fail.

IV — The claim for reduction of the surcharges for delay

There are still, in addition to the arguments put forward, some observations to be made on the applicant's alternative claim concerning the reduction of the surcharges for delay under Article 36 of the Treaty.

On the question of its admissibility I refer to my statement in Case 1/63 on the nature of surcharges for delay. I should like also to emphasize that for the reasons given in that case the Court should at least allow this claim in part.

I consider that only a few additional observations are necessary in connexion with some new submissions of the parties in the present case.

It appears that, with reference to my observations on the High Authority's responsibility for the delayed recovery of the outstanding levies, it has now pointed out that after a visit by its inspectors it sent the applicant four letters in 1956 calling upon it to pay the levies owing. This may be correct. Yet the fact remains that the High Authority, although as a result of the visits of its inspectors it had a clear picture of the volume of the applicant's production, only issued an enforceable decision for the first time in 1959, that is to say six years after the first levy payment fell due. Without according a decisive importance to the principle of *the limitation of actions* in relation to demands for payment of taxes, I should like, having regard to the way relations between the High Authority and the applicant developed, which has been described, to maintain the view that the High Authority is at least partially responsible and to suggest that the court recognize this by reducing the surcharges for delay.

Furthermore it might be appropriate in the present context to examine the conduct of the officials of the High Authority during the discussions of 21 April 1960, which did not culminate in an effective remission of the surcharges for delay, from the point of view of good faith, a principle by which the High Authority is also bound. This can be done without having to attempt to ascertain the exact content of those discussions by hearing the oral evidence of witnesses. From the documents before us we learn in fact that at least some hope of a remission of the surcharges

for delay was given to the applicant's representatives. It appears to me that this view is supported by the letter of the High Authority of 6 May 1960, in which the following passage appears in the French translation:

'On vous a seulement dit qu'après le paiement intégral de la somme due au titre du prélèvement, la Société Macchiorlati aurait eu la possibilité de *demander la rémission* du montant dû au titre d'astreintes journalières et que la bonne conduite démontrée au cours d'une régularisation qu'elle aurait demandée aurait *certainement eu son influence sur la concession de la mesure demandée*' ('We only told you that, after payment of the whole of the amount due in respect of the levy, the firm Macchiorlati would have the opportunity of *requesting a remission* of the amount due by way of surcharges for delay and that satisfactory behaviour in effecting the settlement which it requested would *certainly have some influence when the grant of the measure for which it applied was considered*'). The salient fact in this letter is that the representative of the High Authority spoke of 'rémission', that is to say cancellation, and not only of 'réduction' of the surcharges for delay.

All these arguments considered together as well as the reference made in the oral procedure to the existing economic situation in Italy lead me to suggest now that the Court should reduce the surcharges for delay fixed by the contested decision by such an amount over and above the reduction already made as it may in its discretion determine.

V — Summary and conclusion

Bearing in mind the arguments which I have put forward, my opinion is as follows: The application of the firm Macchiorlati is admissible to the extent to which it is directed to the annulment of the decision of 8 April 1964 including the claims for a declaration that those general decisions which relate to the fixing of the surcharges for delay are illegal. On the other hand the conclusions which seek a declaration of the illegality of decision 59 and the general decisions concerning the levy relating to the determination of the rate of the levies are inadmissible. In each case the claim for annulment is unfounded.

The claim of Macchiorlati for reduction of the surcharges for delay which have been imposed should be allowed in the amount which the Court considers in its discretion to be appropriate.

In accordance with my proposals for the determination of the issues of this case the applicant should bear the larger proportion of the costs and the High Authority the smaller proportion.