OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 19 JANUARY 1966[1]

Mr President,
Members of the Court,

The partnership Ferriera Ernesto Preo e Figli, whose sole partners are the four brothers Preo, asks you to annul two decisions of the High Authority of 13 November 1964, the first of which fixes at 34 058 metric tons, for the period from 1 October 1956 to 30 November 1958, the quantity of bought scrap liable to the equalization levy, and the second of which charges it in this connexion with the payment of a sum of 55 700153 lire.

Its application highlights the difficulties to which, in the absence of accounting documents, an estimated assessment on the basis of the consumption of electricity may give rise.

The applicant undertaking produced steel in an electric furnace of 6 to 8 metric tons cold charge, which went into operation on 1 October 1956. It was twice the subject of a check on the spot by the Société Anonyme Fiduciaire Suisse. The first inspection, which took place in 1958, covered the period from 1 October 1956 to 31 December 1957. By letter of 6 July 1959, the 'Market' Directorate of the ECSC communicated to the undertaking an extract from the calculation carried out by the investigators based in particular on the consumption of electricity, and which showed that, during the period checked, the undertaking had failed to declare approximately 1 500 metric tons of ferrous scrap. The undertaking Preo e Figli was requested to signify its agreement with the results of the check carried out, which it did on 18 July of that year.

The second inspection took place in February 1961 and related to the whole period from 1 October 1956 to 30 November 1958, thus including the period covered by the first inspection. On the basis of these results, the ECSC's departments informed the undertaking on 8 January 1963 that comparison of the consumption of electricity and the declarations regarding the consumption of the bought scrap showed that the latter was lower than would correspond to the maximum unit consumption in kilowatt-hours adopted by the High Authority as criteria for electric furnaces. To this letter, which referred for the first time to the opinion of a committee of experts which met on 13 February 1962 to calculate the consumption of electricity in arcfurnaces, taking account of the different furnace capacities, there was appended a calculation made on different bases from those of 1958 and giving as the result, for the period as a whole, a failure to declare 10 743 metric tons. I should like to note here that by reason of the alteration in the bases of the calculation, the amount of the undeclared material, which had already been ascertained and agreed at the time of the foregoing check, was stated to have been considerably increased.

As a result of this the ECSC's departments on 8 April 1963 requested the undertaking to pay the sum of 55 576196 lire, which was subsequently made up to 55 700153 lire. Preo restricted itself to replying on 6 May of that year that if that letter contradicted what had already been agreed, it was not a decision within the meaning of Article 15 of the Treaty. The undertaking therefore awaited such a decision in order to dispute before the Court a debt which it did not admit. The application is therefore against the two decisions of the High Authority of 13 November 1964. In its reply, the applicant asks that there be allowed proof by witnesses of certain circumstances calculated to demonstrate the inaccuracy of the lump-sum assessment, so far as it relates to the undertaking, made by the High Authority and puts forward the names of a number of persons of whom some are the undertaking's employees whilst the others have no connexion with it.

In support of its application, Preo e Figli rely on three submissions which are only, in fact, three variations on the same theme, the principle and the conditions of the High

— Translated from the French.

Authority's estimated assessment, so that it is difficult to consider them separately.

It maintains that the High Authority infringed Article 5 of the Treaty which provides that the institutions of the Community shall carry out their activities 'in close cooperation with the parties concerned', since the calculations which led to the contested decisions were made without affording the applicant any actual opportunity of defending itself. Furthermore, Article 3 of Decision No 22/54 of 26 March 1954 establishing the scheme for the equalization of imported ferrous scrap provides that 'the amount of the contributions shall be calculated in proportion to the tonnage of scrap purchased'. The contested measures, however, assess these quantities allegedly purchased on the basis of theoretical calculations founded on presumed figures which do not correspond to the facts.

Preo e Figli do not wish to dispute the High Authority's power, under Article 2 of Decision No 13/58, to make an estimated assessment 'if the undertakings fail to declare figures for the calculation of their contributions', but it objects that, since Italian law does not require it to keep books of account, 'the very basis for the estimated assessment is lacking', and the assessment must be based on the actual facts checked by the SAFS at the time of its first inspection, and the consumption of electricity must not constitute the sole criterion to be borne in mind.

In any event the High Authority may not replace a first assessment already agreed by another, increasing by a considerable margin the amount of the chargeable tonnage without first establishing a change in the facts of the case. It is unsufficient that it claims, as in the present case, to invoke the opinion of 'experts' in order to adopt new criteria more in accord with the exigencies of the assessment, the more so when an agreement had already been reached between the parties for the period from 1 October 1956 to 31 December 1957; and as this agreement related to the methods of assessment, its validity must extend to the earlier period, in the absence of an actual change in the facts of the case.

Finally, under the headings of misuse of powers and failure to state reasons, the applicant disputes more precisely the criteria adopted by the contested decisions, complaining that they are mistaken and do not take account of the real circumstances obtaining at its works: the commissioning period of the furnace, technical errors and the need to train staff—all of which factors entailed a low output for many months.

Thus summarized, this line of argument is of very uneven merit.

First, it is certain that although Article 2 of General Decision No 13/58 empowers the High Authority to make an estimated assessment if the undertaking fails to declare the necessary information for calculating its contributions, this power is inherent in the very operation of the scheme and must be exercised throughout the entire period of the operation.

Secondly, although Article 5 of the Treaty requires the institutions to carry out their activity in close cooperation with the parties concerned, the High Authority does not err in emphasizing that this cooperation cannot be unilateral, or in complaining that the applicant undertaking has not acted conscientiously in this matter. After being requested in April 1963 to pay the sum which was subsequently the subject of the second decision of 13 November 1964, the Preo undertaking, while disputing the debt and taking refuge in the fact that it had not been fixed by an actual decision pursuant to Article 15 of the Treaty, did not explain the reasons why it disagreed. Nor did a letter of 29 May 1963, whereby the High Authority confirmed its position 'until the contrary is proved' cause the applicant to give any further explanation of the particular features which would entail the rejection of the inductive assessment as it had been drawn up. Finally, the oral proceedings have given you a sufficient insight into its refusal—the reasons for which need not be sought at this point— to accept the investigator which the High Authority was always ready to send it. It is moreover of little importance whether Italian law requires partnerships to keep the usual books of account—which is disputed by the parties. The undertaking cannot seriously maintain that it did not have a minimum administrative organization, with documents which it refrained from communicating to the High Authority's depart-

ments. The latter was thus justified, with regard to the applicant, as in the case of the other undertakings in the same situation, in employing an estimated assessment. For this purpose it was entitled to proceed on the basis of the consumption of electricity, at this was the sole factor at its disposal, subject always to the undertaking's right to prove that the assessment thus drawn up was erroneous. You have accepted this for example in Case No 18/62—*Barge*—of 16 December 1963 (Rec. 1963, p. 525).

All these principles appear indisputable. A more delicate point, which seems to form the distinguishing feature of the case, is the substitution—still in the context of the estimated assessment—if not of one criterion for another, at least of figures differing from those previously adopted for a given period in agreement with the undertaking. It will be seen that the methods employed differ profoundly.

According to the schedule appended to the letter of 6 July 1959, the SAFS's inspectors adopted a figure of 1 100 kilowatt-hours for the production of one metric ton of liquid steel; they then fixed a ratio between the total input and the production of steel and then between the input of ferrous scrap and the total input. When the total input of ferrous scrap was thus obtained, they deduced the tonnage of ferrous scrap received by subtracting from this total input the undertaking's own resources and adding the increase in stock at the end of the period considered.

The system finally adopted and applied to the entire chargeable period is very different. Not only does the High Authority, on the basis of the experts' report, with which you are already acquainted, reduce the consumption of electricity per metric ton of steel from 1 100 kilowatt-hours to 850 kilowatt-hours, it fixes the ratio between the input of *purchased* scrap and the production of liquid steel or steel in ingots at 1 015: 1000. From this point of view also the method proceeds on the basis of fixed amounts and no longer takes into account the ratio between the tonnage of the input of ferrous scrap and that of the total input, or the undertaking's own resources, or the difference between the initial stock and the final stock.

Such an alteration in the method raises different questions. The applicant undertaking in the first instance put forward as an objection to it the definitive nature of the previous assessment to which it had itself agreed, which precluded calling in question the figure adopted, at least for the period from 1 October 1956 to 31 December 1957. It maintains that, although this agreement related to the method of assessment, its validity must extend to the later period, in the absence of a valid reason for altering the original criterion.

It seems to me difficult to accept this argument to the extent in the first place that it introduces the concept of agreement into the sphere of the equalization of ferrous scrap, which is not of a contractual nature. The High Authority's task is to administer the scheme under conditions excluding any discrimination; it may therefore be asked whether, up to the closure of these operations, it is not empowered to go back on its assessments, and even on its earlier decisions, for legitimate reasons. This certainly seems to arise from your judgment in *Merlini*, Case 108/63 of 21 January 1965 (Rec. 1965, p. 1). In any event, the mere fact that this institution's departments notified the undertaking of the results of a check and asked for its agreement or objections is insufficient to give this letter the nature of an actual decision committing the High Authority. The undertaking denied any validity to the document informing it of the new assessment because it was not drawn up in terms of Article 15 of the Treaty, and it is unfounded in its claim to give more weight to the former assessment which was also notified to it by these departments.

In the context of estimated assessments I think that it is therefore impossible to complain on the ground that the High Authority endeavoured to extract general rules and to perfect its criteria for assessment. It was for this purpose that recourse was had to a committee of experts, whose authority has been recognized by your judgments in the *Barge* Cases (Rec. 1963, p. 562, and 1965, p. 4). It is entirely logical to ask qualified specialists to calculate the consumption of energy necessary to obtain a given quantity of steel taking account of the different furnace capacities. In fact the coefficient

adopted, 850 kilowatt-hours per ton of steel produced, is close to that found in other cases, in which a ruling has already been given or which are presently in progress.

Two remarks however require to be made. To the undertaking, which, in order to discount this figure, put forward the special difficulties which it encountered, the High Authority replies that the experts took account of all those factors when they fixed the ratio of kilowatt-hours to metric tons of steel with a margin large enough to encompass the difficulties in question. This is possible but not certain and by definition a flat rate cannot reflect all the special features of the cases. Furthermore, as I have already indicated, the High Authority seems to have left out of account the undertaking's own arisings of ferrous scrap for re-use and of the existence of stock in fixing a flat rate ratio between the input of purchased scrap and the production of steel. But although the undertaking draws attention to this alteration in the method of assessment, it does not however base any particular argument upon it.

Although the High Authority's decision therefore seems to be beyond criticism in principle, perhaps a certain margin of uncertainty in fact remains. Is it sufficient to justify an order for the additional measures of inquiry requested by Preo e Figli? The applicant would like to prove by witnesses that the running-in period lasted from October 1956 to the end of 1957, that during this period and even afterwards many mistakes were made, that the undertaking experienced difficulties in the training and use of its work force, and that other circumstances, such as, for example, the materials used also contributed to bring about an excessive consumption of electricity.

I do not however think that a ruling should be given in favour of this request, for several reasons. We know that, until the day before the oral proceedings, the undertaking had every opportunity to have examined on the spot the special circumstances on which it now wishes to rely, as other undertakings have succeeded in doing, and it declined the opportunity offered it. Today it still limits itself to bringing before you mere allegations quite unsupported by any shred of evidence. The complete lack of evidence was sufficient in the *Barge* Case, 14/64 of 16 February 1965, for you to refuse the additional measures of inquiry which were requested. Finally, it appears to me hazardous to endeavour to establish the accuracy of facts as remote in time as these by means of witnesses who are mostly employees of the undertaking.

Finally I am of the opinion:

— that Preo e Figli's application should be dismissed; and

— that the applicant should bear the costs.

ORDER OF THE PRESIDENT OF THE COURT
12 FEBRUARY 1965[1]

In Case 2/65 R

FERRIERA ERNESTO PREO E FIGLI, Società in Nome Collettivo, having its registered office in Venezia-Marghera, represented and assisted by Raoul Levis of the Venice

1 — Language of the Case: Italian.