On those grounds,

THE COURT,

in answer to the question submitted to it by the Tribunale di Milano by order of 22 April 1982, hereby rules:

**The Commission's decision of 10 December 1981 is not valid in so far as it provides in Article 2 that the debts owed by the insolvent company in respect of ECSC levies are preferential debts ranking equally with similar debts owed to the State.**

Mertens de Wilmars Pescatore O'Keeffe Everling
Mackenzie Stuart Bosco Koopmans Due Bahlmann

Delivered in open court in Luxembourg on 17 May 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

## OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 2 MARCH 1983 [1]

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

### 1. The question submitted

In the winding up of the insolvent company Ferriere Sant'Anna SpA the Tribunale di Milano initially admitted proof of a debt owed to the ECSC under Articles 49 and 50 of the ECSC Treaty only as an ordinary debt. Whilst proceedings were pending in which it sought to have preferential status conferred on the debt, the Commission of

1 — Translated from the Dutch.

the European Communities adopted a decision on 10 December 1981, the text of which has been provided to the Court in these proceedings. That decision, besides determining the amount owed, states that the debt ranks equally with similar debts owed to the State. By an order of 22 April 1982 the Tribunale di Milano then submitted the following question to the Court:

"Is Decision No C (81) 1887 def. of 10 December 1981 of the Commission of the European Communities valid in so far as it provides in Article 2 that the debt owed by Ferriere Sant'Anna SpA to the ECSC (in respect of ECSC levies and interest thereon) must be regarded as 'a preferential debt ranking equally with similar debts owed to the State'?"

As the written observations alone, summarized in the Report for the Hearing, show, that questions raises about 25 further questions and sub-questions. Other relevant questions of law emerged from the Commission's answer to written questions asked by the Court and from argument put forward at the hearing. Before dealing briefly though comprehensively with the other questions of law in the next four sections of my opinion, I should now like to make some general observations on the admissibility of the question submitted to the Court.

At first sight the Commission's decision certainly does give the impression of being a rather artificial device which has no other purpose than to establish the formal conditions necessary for enabling a reference to be made to the Court under Article 41 of the ECSC Treaty. Moreover, for the Commission to state by decision during proceedings before a national court its own interpretation of Community law appears on the face of it to be crude, if not contrary to the general principles of a proper or fair procedure, as was argued at the hearing by, amongst others, the representative of the United Kingdom.

However, it is clear from the Commission's written and oral answers to the Court's first question as to the purpose and scope of the decision in issue that it is the first and only individual decision to be adopted after the failure by Ferriere Sant'Anna SpA to pay the debt in due time. Despite — as I shall explain more fully later — its purely declaratory nature in all its essential points, such an individual decision is expressly stated by the first paragraph of Article 92 of the ECSC Treaty to be enforceable.

In so far as the principle that tax debts spring from the law applies, it is of course quite usual in domestic law for individual decisions fixing a tax debt to be declaratory in nature, especially in the case of direct taxation. In Community law, besides being encountered in connection with the imposition of ECSC levies, declaratory decisions are also regularly adopted in the application of Articles 85 (1) and 86 of the ESCS Treaty. In that regard also, the declaratory nature of a decision does not in itself imply that the decision is a needless or artificial device.

Moreover, I have not been able to find any principles in Community law, including the decisions of the Court,

denying the Commission the power to adopt such declaratory decisions during national proceedings concerning the relevant questions of law. On the contrary, in Case 41/69 *(ACF Chemiefarma NV* v *Commission* [1970] ECR 661) the Court expressly recognized the Commission's power laid down in Article 9 (3) of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87) to intervene by means of a declaratory decision in national proceedings concerning Article 85 (1) or Article 86 of the EEC Treaty. Nor does the order for reference made in this case suggest that the national court has any doubts on this point. Lastly I share the opinion expressed by one of the Commission's representatives at the hearing that it is a general principle of constitutional law in the Member States that the mere fact that legal proceedings are pending cannot prevent the legislature or executive from exercising their statutory powers.

In the next sections of my opinion I shall examine the legal nature and legal consequences of the decision in question and consider the other legal questions raised in the proceedings. However, before embarking on that inevitably quite lengthy examination, I can state here and now that neither the declaratory nature of Article 2 of the decision, which is acknowledged by the Commission, nor the date on which the decision was adopted, render the question submitted inadmissible. Since declaratory decisions in respect of ECSC levies are, as we have seen, expressly permitted by the ECSC Treaty, Article 41 of the ECSC Treaty cannot prevent the questions put from being answered either. On the contrary, only by applying Article 41 will it be possible to decide whether the Commission was right in declaring in its decision that under Community law ECSC levies and interest thereon must be regarded as "preferential debts ranking equally with similar debts owed to the State".

## 2. The legal basis, legal nature, object and legal effect of the Commission's decision

Having regard *inter alia* to what the Commission says on this point on pages 8 and 9 of its written observations, the legal basis of the decision in question is to be found in Articles 14 and 15 of the ESCS Treaty, read together with Articles 49 and 50. Moreover, the power to adopt such an individual decision in the event of a refusal to pay a levy due under a general decision adopted pursuant to Article 50 is, as I have said, explicitly postulated in the first paragraph of Article 92 of the ECSC Treaty, and therefore exists irrespective of what the general decisions implementing Article 50 of the Treaty may provide in this regard. Apart from being necessary for the creation of an enforceable right, such an individual decision also appears necessary to enable the undertaking concerned to use its right to bring an action under the second paragraph of Article 33 of the Treaty if it contests the debt. In the present case, however, such an action has not been brought.

The fiscal nature of the levy in question is not disputed. Moreover, in past decisions Italian courts up to the highest instance have decided that the levies are

more specifically in the nature of direct taxation. In its written observations, besides citing Italian case-law, the Commission advances other arguments to support such a classification of the levy but since that classification is accepted by the Italian courts there seems to be no point in dwelling on this question in this case. I shall therefore revert to this question only very briefly. As far as the legal nature of the decision itself is concerned, the following observations may be made in addition to what I said in the first part of my opinion. The full amount of the debt, including the interest charged for delay in payment, is determined by the general decisions implementing Article 50 of the Treaty, which are cited in the preamble to the decision in issue. Article 1 of the individual decision therefore merely constitutes an authentic declaratory statement by the Commission of the amount which Ferriere Sant'Anna owes. The contested Article 2 of the decision is also a declaratory statement as to the preferential nature of the debt. Article 3 is at most constituent of a new obligation as regards the time for payment. Article 4 declares what is already clear from Article 92 of the Treaty, namely that the decision is enforceable. Finally, Article 5 states that the decision is addressed to the company Ferriere Sant'Anna. As may be seen from the copy forwarded to the Court, the competent Italian authorities appended the usual form of enforcement order to the decision. Since, according to the second sentence of Article 92, such an order must be made without any formality other than verification of the authenticity of the decision concerned, it clearly cannot affect the right of the person concerned to bring proceedings (under Article 33 of the ECSC Treaty) or preclude a review of the decision's validity (under Article 41 of the Treaty). Subject to such a review of its validity, the decision (against which, as I have said, no action has been brought) must in my view be enforced in full, including therefore Article 2, on the basis of the provisions of Article 92. In this regard I also refer to the second sentence of Article 14 of the Treaty.

The key question as to the legality of Articles 2 I shall consider separately in the last part of my opinion. The question whether it follows from the declaratory nature of Articles 1, 2 and 4 of the decision that one or more of those articles may be disregarded by the courts as being a mere expression of opinion on the part of the Commission I have already answered in the negative. For the arguments why that should be so, I therefore refer to what I said previously on this question.

The liquidator's argument, summarized on pages 5 to 7 of the Report for the Hearing, that the decision cannot have any effect as against third parties and that the Commission cannot in fact bind the Italian State with such a decision seems to me just as untenable. That argument is wrong, in my opinion, first of all because a right of enforcement in itself provides a degree of preference over the debts of third parties in so far as such parties have not yet acquired a right of enforcement. However, I consider the argument untenable in particular because Article 92 of the Treaty requires the Member State concerned and its judicial

and other authorities to assist in the enforcement of such a decision. In view of the clear language of Article 92 there can be no doubt about this binding legal effect upon the Italian State, the sole qualification being that the fact that the decision is so binding does not prevent the legality of any part of it from being examined. The Italian Government's written observations based on the assumption that the decision is individual in nature by no means appear to refute that conclusion.

## 3. Analysis of the other legal questions

All the other legal arguments advanced in the written and oral observations either concern the crucial question whether the declaratory Article 2 of the decision is compatible with Community law or they concern the interpretation of Italian law, which is obviously not within the Court's jurisdiction. In order to answer the question as to the compatibility of Article 2 of the decision with Community law, however, it is first necessary to consider in more detail the question raised during the proceedings as to whether Article 41 of the Treaty is in fact applicable in this case.

## 4. Applicability of Article 41 of the ECSC Treaty

After my observations on the legal nature of the decision I do not think that there can be any doubt about the applicability of Article 41 of the Treaty in this case. As we have seen, the decision in this case is a genuine decision of the Commission, as referred to in the first paragraph of Article 92 of the Treaty, and was adopted in order to make the pecuniary obligation enforceable, in accordance with that provision. As such decisions individually fixing a tax debt are always declaratory in nature, the fact that the decision in question is declaratory cannot prevent it from being in the nature of a decision. By virtue of the first paragraph of Article 92 alone it has binding legal effect, as is required of decisions by Articles 14 and 15 of the Treaty. In such a case the Court therefore has jurisdiction, under Article 41, to give a preliminary ruling on the validity of the decision concerned "where such validity is in issue in proceedings brought before a national court or tribunal". As the Commission rightly stated in its written observations, that jurisdiction logically means that the Court also has jurisdiction to interpret the provisions or principles of Community law in the light of which the validity of the measure in question must be judged. To reach that conclusion in the present case I do not think that it is at all necessary for the Court to consider the question of its general jurisdiction to answer questions about the interpretation of Community law raised in proceedings before national courts or tribunals. On that general question — which was answered in the nagative by the liquidator for Ferriere Sant'Anna in his written observations and by the United Kingdom at the hearing — the Commission refers on pages 7 and 8 of its written observations to the opinion of Mr Advocate General Lagrange in Case 101/63 *(Wagner* v *Fohrmann and Krier* [1964] ECR 195, at p. 205), which was endorsed in a report of the European Parliament in 1969.

My conclusion that Article 41 is applicable for the purpose of determining the validity of the decision in question also holds good for Article 2 of the decision, with which the national court's question is particularly concerned. As I have said, Article 2, like Article 1 and Article 4 of the decision, is declaratory in nature, but that alone does not warrant the conclusion that the decision cannot have any legal consequences. In view of the enforcement contemplated in Article 92 I think that it is perfectly justifiable for the declaratory decision to deal with all questions of Community law which are decisive for determining the amount for which execution is to be carried out. One of those questions in this case is whether or not the debt has preferential status in the event of the insolvency of the undertaking concerned. The question submitted by the national court therefore now requires examination as to its substance.

## 5. Conclusions regarding the substance of the question

### *5.1 The points of law raised by the question*

During the written and oral procedure the following points of law in particular were raised as regards the substance of the question:

(a) The question whether primary and secondary Community law contains any relevant provisions or binding principles;

(b) The question whether it is possible to derive from the Court's case-law on EEC levies principles which also apply to ECSC levies;

(c) The question whether the Commission has the power to confer by general decision adopted under Article 50 of the ECSC Treaty preferential status on debts in respect of levies;

(d) The question whether, and if so to what extent, levies imposed pursuant to Articles 49 and 50 of the ECSC Treaty may be accorded the same fiscal privileges as domestic taxes in particular direct ones;

(e) The parallel question whether the preferential nature, or otherwise, of a Community levy must be ascertained solely in accordance with domestic law;

(f) The question whether a requirement of Community law to accord Community levies the same privileges as domestic taxes without prior harmonization of domestic laws would not in fact be contrary to the prohibition of discrimination propounded by the Commission;

(g) The question as to the actual significance of treating Community levies like similar domestic debts, as is done in Article 2 of the decision.

In their written observations the United Kingdom and the Commission in particular considered those questions in detail, whilst at the hearing counsel for the liquidator of Ferriere Sant'Anna also went into a number of questions at some length. To avoid taking up too much time I shall consider expressly the various arguments advanced and summarized in the Report for the Hearing only where I consider this necessary in order to answer the question put to the Court.

*5.2 The principle of equality relied upon (points (a) and (b))*

In defining my approach to the question submitted I, unlike the Commission, would start from Article 92 of the ECSC Treaty. As I have already indicated, I share the Commission's opinion that Article 92 is not the real legal basis of the decision in question. Nevertheless, it appears from the Commission's written and oral answers to questions asked by the Court that the decision was adopted precisely in order to make it enforceable, as provided for by Article 92.

By providing that decisions of the High Authority (now the Commission) imposing a pecuniary obligation are enforceable, the first paragraph of Article 92, in my opinion, implies a principle of equal treatment with regard to the debts concerned. For despite their difference in origin and nature, compared with national administrative measures imposing an enforceable pecuniary obligation, the decisions of the High Authority in point create, by virtue of Article 92, a similar enforceable right. In the second sentence of Article 92 I can but see confirmation of that principle in the sense that enforceable rights arising under Community law must be treated on the same footing as comparable enforceable rights arising under national law. In Case 108/83 (*Merlini* v *High Authority* [1965] ECR 1, at p. 10) the Court stated, in the last paragraph dealing with the first submission in that case, that Article 92 also applies in relation to "the *enforcement* of claims in bankruptcy" (emphasis added) and, in an earlier paragraph, that "the fixing, pursuant to Article 92 of the Treaty, of the full amount of the debt would in no way release the High Authority, when it in fact proceeds to enforcement, from the limitations and conditions of the arrangement approved in accordance with the national law applicable, so that its claims would be reduced to the percentage fixed by the said arrangement". In view of that judgment I think that there can therefore be no doubt that the reference in Article 92 to national legal procedures also bears upon the question whether or not the debts concerned have preferential status. Therefore the equality principle which I read into Article 92, in the sense of equal treatment with comparable national enforceable rights arising under national law also applies to the question of preference dealt with in Article 2 of the decision in issue.

With all due respect for the Commission's explantations, I believe that in this regard the Commission is wrong to reply primarily on the prohibition of discrimination laid down in Article 4 (b) and on the general principle of equal treatment underlying that provision, as well as on paragraph 14 of the Court's judgment in Joined Cases 66, 127 and 128/79 (*Amministrazione delle Finanze* v *Salumi* [1980] ECR 1237). In my view, both cases involve the application of a much wider principle of equal treatment requiring the producers and consumers in the Community referred to in Article 4 (b) of the ECSC Treaty, or in the equivalent provisions of the EEC Treaty, to be treated in the same way unless differences are objectively justified.[1] Such a broadly formulated principle of equal treatment needs, I think, especially

1 — As counsel for the United Kingdom rightly observed with regard to point (f), Article 2 of the decision in question would in fact fall foul of such a broad prohibition of discrimination.

in the field of taxation, [1] a specific legal basis in order to be applied to a specific legal matter. In the *Salumi* judgment the Court found that specific legal basis in the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (Official Journal, English Special Edition 1970 (I), p. 224). The principle of equality stated by the Court in paragraph 14 of the *Salumi* judgment appears to me to be restricted in that judgment to comparable financial provisions of the Community and of the Member States and to the questions of law raised in this regard as to the means of appeal available against charges imposed on undertakings by the Community and levied by the Member States. The question of the reimbursement of wrongly levied amounts raised in *Salumi* was also uniformly regulated in Regulation No 1430/79 of 2 July 1979 (Official Journal 1979, L 175, p. 1). In the absence of such uniform regulation by the Community, the matter is governed by national law according to paragraph 17 of the *Salumi* judgment (and also, in this case, according to Article 92 of the ECSC Treaty).

In such a case, however, according to paragraph 18 of the *Salumi* judgment, a more limited principle of equal treatment than that which I read into Article 92 of the ECSC Treaty applies. [2] The Commission would certainly have done better to cite that paragraph rather than paragraph 14 of the *Salumi* judgment.

1 — I refer here to the third sentence of paragraph 17 of the Court's decision in Case 169/80 *(Administration des Douanes* v *Gondrand* [1981] ECR 1931).

2 — The most important application, in the EEC Treaty itself, of such a principle of equal treatment at the national level is, of course, Article 52.

Since paragraph 18 is in my view crucially important in this case I shall now cite it in full:

"Accordingly, in so far as no provisions of *Community law* are relevant, it is for the national legal system of each Member State to lay down the detailed rules and conditions *for the collection of Community revenues in general* and agricultural levies in particular and to determine the authorities responsible for collection and the courts having jurisdiction to decide disputes to which that collection may give rise but such procedures and conditions may not make the system for collecting Community charges and dues less effective than that for collecting national charges and dues of the same kind." (emphasis added)

With regard to a wholly different aspect of the implementation of Community law by the Member States, namely the recovery of wrongly paid denaturing premiums, the Court has established, with reference to numerous earlier decisions, a similar principle of equal treatment in relation to comparable debts owed to Member States. I refer for instance to the Court's judgment of 6 May 1982 in Case 54/81 *(Fromme* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1982] ECR 1449) and in particular to the operative part and paragraph 4 and 7 of that decision. After regretting in paragraph 4 the absence of uniform rules for all the Member States, the Court went on to stress the difference between the principle of equality in the broad sense of uniformity and the principle of equality in the narrower sense of equal treatment at the national level. The judgment is also

relevant because its application raised questions of comparison with domestic debts no less complicated than those raised by the United Kingdom in these proceedings. I shall come back to this point later.

*5.3 Whether a general solution to the question may be adopted on the basis of the ECSC Treaty (point (c))*

Before I examine the other points of law arising from the question submitted a few brief observations should, I think, be made on a question which, though not asked by the national court, was raised during the proceedings before the Court of Justice, namely whether the preferential status of the debts in question could not have been better regulated in a *general,* rather than an individual, decision adopted pursuant to Article 50 of the Treaty.

In reply to that question I would begin by observing that it should already be clear from my argument hitherto that, like the Commission, I do not consider that such a general decision was necessary in order to give general binding effect to the principle of "national treatment" declaratorily laid down for the present case by Article 2 of the decision in issue. In my view, the Commission could in fact have derived that principle from Community law as it stands, including the decision of the Court, albeit from provisions and statements of the Court other than those upon which it relied in support of its case.

The question now under consideration, which was also raised by the Court at the hearing, is therefore, in my opinion, particularly important as regards the possible application of a principle of equality wider than that derivable from Article 92 considered in conjunction with the decisions of the Court, It is particularly important as regards the possibility of adopting *uniform* rules for all the Member States, which the United Kingdom considers desirable in principle but not possible under Article 50.

In the passage which I cited, with emphasis, from the Court's judgment in *Merlini* Article 92 is also considered applicable in relation to the *enforcement* of claims arising in the event of bankruptcy. However, the second sentence of Article 50 (2) expressly empowers the High Authority to determine the mode of collection by general decision. Therefore, on the basis of the *Merlini* judgment, it might well be possible, pursuant to that provision, for the question of preference to be uniformly resolved for all Member States. However, in view of the widely diverging national views and rules of the Member States on the preferential treatment of tax debts, and above all because the national court has not asked the Court any question on this point, I think that for the sake of procedural propriety I should not at this stage of my opinion go further than to say that to me such a possibility does not seem to be ruled out *a priori.* In my view, it will only be possible to answer the question definitively in proceedings in which all the Member States can submit their written observations on this point. There may be some doubt, I think, as to the answer to be given, owing in particular to the express reference in Article 92 to the (different) legal procedures of the Member States. A point which might also be of relevance to a definitive answer to this question is that opinion differs in

Member States on the question whether the preferential treatment of debts upon bankruptcy is part of substantive or procedural law. Thus it appears from the order for reference that the Italian court considers it to be a matter of procedural law, whilst at the hearing counsel for the United Kingdom considered it to be a rule of substantive law.

*5.4 The nature of the levies in question and their comparability with domestic taxes (points (d), (e) and (g))*

I said earlier that, in my view, there can be not doubt that ECSC levies are in the nature of taxation and in particular direct taxation. According to the Italian case-law and literature cited in the proceedings, there is certainly no difference of opinion in Italy on this point.

However, the question how exactly ECSC levies are to be classified in view of the comparison required by paragraph 18 of the *Salumi* judgment with "national charges and dues of the same kind" and that required by Article 2 of the decision at issue with "similar debts owed to the State" seems to me to be one which only the national court can answer. In my analysis questions of analogous or extensive interpretation of provisions of domestic law regarding the preferential treatment of tax debts do not arise in this regard; because the requirement to treat Community levies in the same way as similar domestic levies does not result from domestic law but from Community law and in particular, in this instance, from Article 92 and from the decisions of the Court cited above on cases similar to the present one.

Finally, as I have said, only the national court can answer the question as to the specific effect of treating Community debts in the same way as similar domestic debts, as required by Article 2 of the decision. The Italian cases which have been cited enable at best certain forecasts to be made but I do not consider that it is for me or the Court to make such forecasts. Counsel for the United Kingdom was perhaps right to suggest that the need to effect such a comparison may in practice sometimes present the national court with a difficult task. I believe, however, that that task is certainly no more complex than the application by the national court of the Court's judgment in the *Fromme* case cited earlier.

I therefore conclude that the question submitted to the Court should be answered as follows:

"Decision No C (81) 1887 def. of 10 December 1981 of the Commission of the European Communities is valid and binding on the national court by virtue of Article 92 of the ECSC Treaty, in particular in so far as it provides that the debt owed by Ferriere Sant'Anna SpA to the ECSC (in respect of ECSC levies and interest thereon) must be regarded as 'a preferential debt ranking equally with similar debts owed to the State'."