JUDGMENT OF THE COURT
15 DECEMBER 1965[1]

Société Anonyme Métallurgique Hainaut-Sambre v High Authority of the European Coal and Steel Community[2]

Case 4/65

Summary

1. *Common financial arrangements — Equalization — Contributions — Exemption — Principles*
(*ECSC Treaty, Article 53*)

2. *Common financial arrangements — Equalization — Ferrous scrap — Exemption — Own resources — Concept*
(*ECSC Treaty, Article 53*)

1. Cf. paragraph 1, summary in Case 3/65.

2. Cf. paragraph 2, summary in Case 3/65.

In Case 4/65

SOCIÉTÉ ANONYME MÉTALLURGIQUE HAINAUT-SAMBRE, having its registered office in Couillet (Belgium), represented by Raymond Derclaye, Managing Director, and Raoul Eloy, Deputy Managing Director, assisted and represented by G. Liénard, Advocate at the Charleroi Bar, and by G. Van Hecke, Advocate at the Cour de Cassation and lecturer at the University of Louvain, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate at the Cour Supérieure de Justice, 6, rue Willy-Goergen,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser Giuseppe Marchesini, acting as Agent, assisted by Cyr Cambier, Advocate at the Cour d'appel, Brussels, with an address for service in Luxembourg at its offices, 2, place de Metz,

defendant,

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

Application

— primarily for the annulment of the individual decision of the High Authority of 13 November 1964 requesting the applicant to pay an equalization contribution on 79 990 metric tons of scrap;

— secondarily for damages for the defendant's wrongful act or omission,

THE COURT

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

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts of the case may be summarized as follows:

Since 1947 the applicant, which has an iron and steel works, has supplied the company Phenix-Works with sheet bars for re-rolling and processing as thin sheets.

In order to secure the return of any waste scrap arising from the processing of the sheet bars into sheets, the applicant first employed the legal device of the jobbing contract, and then—over a period including the whole of that involved in the contested decision—inserted in each contract for the sale of sheet bars to Phenix-Works a clause retaining ownership of the processing waste. This clause was formulated as follows:

'We retain ownership of the processing waste from the moment of delivery. For practical reasons, the scrap to be returned by you to us subject to the conditions and time-limits mentioned at (b) below shall be . . . kg per metric ton of sheet bars delivered to you. This figure of . . . kg represents the average weight of waste scrap arising from the processing of our own sheet bars.

Further, as regards the price fixed at . . . francs as set out below, the value of the scrap is fixed at . . . francs per metric ton up to 4 months after delivery of the sheet bars, that is, the average price of the scrap arising from the sheet bars.'[1]

By a decision on 13 November 1964, the High Authority charged on the scrap arising at Phenix-Works and consumed

1 — The figures omitted from this passage have since been altered.

by the applicant a contribution towards the equalization scheme for imported scrap.
This decision, notified by letter of 18 December 1964, was challenged by the applicant in an application lodged on 19 January 1965.

II — Conclusions of the parties

The *applicant* claims that the Court should:
'annul the disputed decision;
as a subsidiary matter, award it full compensation for the damage suffered by it, valued at the amount of the equalization contribution on the 79 990 metric tons involved in the dispute, calculated by the High Authority in its provisional statement of account at BF 40 082 551.
order the High Authority to pay the costs of the action'.
The *defendant* contends that the Court should:
'as regards the application for annulment, declare it inadmissible and in any case unfounded;
as regards the application for damages, declare it inadmissible and in any case unfounded;
dismiss the action accordingly and order the applicant to pay the costs'.

III — Submissions and arguments of the parties

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

Admissibility

In its conclusions the defendant asks the Court to declare both the application for annulment and the application for damages inadmissible, but submits no arguments on the point.

The substance of the case

A — The application for annulment

1. *The argument with regard to the clause retaining ownership in the scrap*

The *applicant* complains that the contested decision is vitiated by an error in law, because it assimilates recovery of the scrap in question to a transaction of sale, ignoring the retention of ownership clause. Under Belgian law however —applicable here—such retention of ownership is valid, and consequently affords exemption from the contribution levied. The validity of the clause in question rests on Article 546 of the Civil Code dealing with accession, and on the fact that the laws relating to accession can be by-passed by mutual agreement; moreover it is confirmed in this instance by the attitude of the Belgian fiscal authorities, which recognized that the return of the scrap in question constituted neither a sale nor a transfer *inter vivos* for valuable consideration.
Nor does the clause in question conflict with the principles invoked by the Court in Case 19/61, when the Court declared that a retention of ownership clause for a constituent and indeterminate part of a thing could not be valid. For, in the first place, the amount of scrap covered by the retention of ownership clause is not indeterminate, but determined precisely by each contract and, secondly, 'the waste scrap is not a "constituent part" of the sheet bar, of which it constitutes an economically inseparable element, for on the contrary, the sheet bar is intended precisely for re-rolling thus giving rise to waste scrap which, never having been sold, cannot have been re-sold'.
The *defendant* replies:
(a) The reference made to the law on accession does not go far enough. Accession really concerns the natural or civil fruits of a thing. The waste scrap to which the retention in question applies,

on the other hand, is neither the natural nor the artificial product of the sheet bars; rather, it is the result of a transformation of the bars themselves. By its reference to the theory of accession, the applicant's argument questions the exclusive nature of the right of ownership, a feature which is inconsistent with the right to enjoy and dispose of a thing being invested in several persons simultaneously. In the present case, the waste scrap is apparently the result of the exercise of the *jus abutendi*, which resides solely in the owner of the sheet bars, that is, in Phenix-Works.

The reference to the law on accession also impeaches the *real* nature of the right of ownership. This requires the right to relate to a thing which is determinate, the substance of which is separable from that of any other, and which is consequently capable of separate and exclusive appropriation. But that is not the case with a share in a thing, of a percentage fixed at a standard rate and which is applied to what is considered to be the result of a transformation of the thing transferred.

(b) The reference to the national tax provisions misses the point because the tax authorities, in the exercise of their discretionary powers, act on considerations of expediency rather than on precise legal principles.

The reference also conflicts with the applicant's own argument, since if the tax authorities recognized the legal validity of the retention of ownership they could not limit the tax exemption granted by them to a set sum, as they can in the case of some products.

(c) This case, the defendant claims, is indistinguishable from others where the Court has excluded the possibility of having a retention of ownership. The quantity of waste scrap which the disputed clause is intended to cover is not even determined as being that which will be present at the moment of completion of the transformation, but the amount of scrap which might arise from the processing of the sheet bars sold, estimated in advance: this retention of ownership clause thus corresponds to an obligation on Phenix-Works to deliver an amount of scrap fixed at a flat rate, without regard to whether this scrap does in fact arise from the sheet bars sold. The applicant's claim that the waste scrap in question does not constitute an integral part of the bars because it has never been sold is merely begging the question, since the problem is precisely that of seeing whether the retention of ownership clause is valid bearing in mind the fact that the subject matter of it is not distinguishable from the sheet bars supplied.

The *applicant*, arguing that the clause on the ownership of the disputed waste scrap is permissible under Belgian law, refers in its reply to three opinions given on this question by experts in Belgian civil law consulted by it: Jean Dabin, Professor Emeritus at the University of Louvain, Claude Renard, Professor at the University of Liège, and Jean Limpens, Professor at the Universities of Ghent and Brussels.

(a) According to the first opinion (that of Mr Dabin), the disputed scrap is to be considered as a product of rolling the bars into rough sheets. It is in fact as a result of its processing and by the exercise of the *jus abutendi* that the product is, in the legal sense, created: as, for example, in the cutting down of trees in timber forests, the extraction of stone from a quarry and other operations which transform the basic element. The applicant sold Phenix-Works a single entity not composed of constituent elements. The waste scrap is in no sense an indeterminate inseparable constituent part of the sheet bars but, on the contrary, a new and separated thing. Since this scrap does not come into existence until the moment of separation, it cannot be considered as a constituent element of the bars.

Its existence being only future, the waste scrap belongs normally to the

owner of the entity, in consequence of the right of accession by production, not to be confused with the right of accession by incorporation. Because the right of accession is not a matter of public interest, the buyer is permitted to renounce in advance his claim to the products which might arise from the thing he has bought. Phenix-Works validly renounced, by contract, its right of accession by production to the scrap which was to be produced. Thus it was impossible for it to sell something to which it had renounced its title. In other words, the waste scrap becomes instantly, from the moment of its creation, the property of the applicant by virtue of the disputed clause.

(b) According to a second opinion (that of Mr Renard), the agreement in question concerns something to be determined only after rolling and cutting, in accordance with Article 1585 of the Belgian Civil Code; it is that part of the sheet bar which will become the finished sheet. According to this view, the applicant remained the owner of the sheet bars delivered, and thus there did not at any moment exist any new ownership in the separate parts of the bar, prior to their identification and separation. When this occurred, Phenix-Works acquired title to the part of the bars which had been turned into sheet. As for the waste scrap, it remained distinct from the thing sold and Phenix-Works was obliged to restore it to the applicant in accordance with the terms of the disputed clause.

(c) A third opinion (that of Mr Limpens) emphasizes the priority that the parties' real intention must take over their declared intention, considering that in accordance with this the applicant disposed of only a part of the bar and made Phenix-Works temporarily co-owner of the thing delivered, but neither contracting party could claim exclusive ownership of a part of the bar, the parts being as yet undetermined. By analogy with the second paragraph of Article 573 of the Belgian Civil Code, it is considered that for as long as the division (here, the cutting of the rough sheets) has not been made, the owner of the future sheets and the owner of the future waste scrap are co-owners of the sheet bar in which the two future things are for the time being united. The exclusiveness of the right of ownership does not mean that the right to enjoy and dispose of an object cannot be vested in several persons at once. According to the will of the parties, the union of the two elements comes to an end when the sheet bar is divided, which operation has merely a declaratory effect. Each party must be considered to have been the owner of its particular parcel since the time of the union of the two parcels first existed. The applicant cannot therefore be said to have purchased the waste scrap of which it was always the owner.

The *applicant* emphasizes the fact that the opinions arrive at similar conclusions even though for different reasons.

As for the argument regarding the attitude of the Belgian tax authorities, the applicant claims that taxation practice is based on legal concepts, and must not operate on considerations of mere expediency as asserted by the defendant. The applicant complains of the assumption in the contested decision that the retention of ownership clause contained the elements of a contract of sale; for instance, it fixed a quantity, a price and a place for delivery. When the parties fixed by contract and in advance the quantity of waste scrap per metric ton of sheet bars, they were merely acting in conformity with normal commercial practice: the amount of waste scrap per metric ton was fixed not in an arbitrary fashion, but in the light of past experience. It is precisely because of this that the basic figure has altered as time passed. A similar approach is adopted with regard to agreements for contracting work out. Even if it were established—as the defendant has yet to

prove—that the scrap returned by Phenix-Works arose from sheet bars other than those supplied by the applicant, the substitution can be explained by the fungible nature of scrap arising from the processing carried out by Phenix-Works. The fixing of the value of the arisings to be returned by Phenix-Works does not amount to a statement of the price, its only purpose being to indicate the method by which the contract price of the thing sold was arrived at. Lastly, determination of the place for delivery does not necessarily mean that there must have been a sale; it must be present whenever there is a duty to deliver or to re-deliver.

As regards the opinions given by the three experts consulted by the applicant, the *defendant* makes the following observations:

(a) As to the first opinion: the argument developed on the theory of accession is not applicable to the present situation. Any product of an object belongs to the owner of that object, not by virtue of the principle of accession but by the effective exercise of the *jus fruendi* which is an attribute of ownership. In the present case the cutting brought about the splitting into two of the thing which belonged to a single owner. There is therefore no question of accession, which assumes the unification of two things belonging to different owners. This has been confirmed, moreover, by Professor Renard, who supplied the second opinion.

(b) As to the second opinion the defendant, while recognizing that in civil law the autonomy of the intention preserves a certain freedom of action which allows ownership to be disposed as the parties may agree, contends that this view in practice imputes to the applicant an intention which could not have been there. The processing by Phenix-Works of the thing sold, far from having been performed as part of an agreement for work under contract, represents the right of *usus* and *abusus* exercised by it in its acquired capacity as owner. It appears moreover from the applicant's statement in its application that it never claimed that its sheet bars were not sold on leaving its factory.

As a subsidiary point, the defendant remarks that the endeavour to identify the supposed intention of the parties by the writer of this opinion relies on Articles 1156 and 1157 of the Belgian Civil Code. However, the Community scheme for the equalization of ferrous scrap does not justify the calling in aid of the interpretative criteria expressed in those provisions. Other criteria exist which should be given precedence here, for instance the interpreting of the concept of 'bought scrap' in a sense most likey to foster an extension of the basis of assessment to contributions, and the preference to be given in borderline cases to charging contributions.

(c) As to the third opinion, the defendant states first that its underlying concept (co-ownership in sheet bars and in arithmetical fractions of their constituent elements in the context of the product of processing them into sheets and sheet-waste) is formally repudiated by the applicant, which has denied that there could at any time have existed co-ownership of the bars. Article 573 of the Belgian Civil Code, on which this theory relies, is not applicable to our case, for here, contrary to what was envisaged by this provision, there has been no mixture of several substances but the sale of a single substance: a sheet bar, which is a single entity not composed of different parts, as is indeed confirmed by the writers of the first and second expert opinions produced by the applicant.

Contrary to the argument with regard to the attitude of the Belgian tax authorities, the defendant draws a clear distinction between discretionary power and arbitrary power and contends that between the letter of the law and its practical application there lies a margin within which the administration may

act as it sees fit. This power is exercised in the guise of a controlled and limited tolerance, using objective criteria, determined in the interests of expediency by the administration. The requirements which dictate the actions of the Belgian fiscal authorities are altogether different from those which answer to the special aims of the equalization scheme for imported ferrous scrap set up by the High Authority.

The defendant does not agree with the applicant's view that in this instance there are no legal concepts belonging specifically to Community law, and that only national law can supply the criteria on the basis of which it may be decided whether or not the disputed scrap is liable to contributions; and it stresses the fact that in the preamble to the contested decision it is stated that use of the term 'ownership' is not sufficient to confer on the scrap in question the character of being the firm's own resources. The essential requirement to be preserved in the operation of the scrap equalization scheme is that of equal treatment of the consumer undertakings.

It is with this in mind that the consumption of scrap is made the determining factor in charging the contributions. That is why the Court has held (in Case 19/61) that the concept of 'bought scrap' does not include merely scrap acquired by the consumer undertaking under a genuine contract of sale. According to this judgment, transfers of scrap metal from one undertaking to another are as such liable to equalization, without its being necessary to ascertain whether, under the civil law applicable, they occurred as a consequence of a genuine contract of sale. If the Court has on occasion referred to principles of civil law, in particular the concept of ownership, this was purely due to the pecularities of the case in hand.

Regard must also be had to general principles of law, if unequal treatment of undertakings is to be avoided, not to any particular national legal system. In addition, these principles must not conflict with the inherent requirements of the scheme set up by the Community regulations.

In applying these principles to the present case, the defendant contends that, even if it were established that the scrap in dispute were in no way alienated, this fact would not be conclusive. For the waste scrap concerned was not created by the applicant but by another undertaking, and as a consequence of the productive operations of the latter. This being so, the transfer of the scrap to the firm which had not created it is itself sufficient to constitute a basis for charging contributions. Insistence on this requirement is justified in view of the fact that to accord the status of a determining factor to provisions enabling the undertakings subject to equalization freely to escape liability to pay their contributions would compromise and conflict with the basic principles of the scheme.

Lastly, quite apart from the question whether such transfers amount to sale in the proper sense of the word as used in national civil law, the defendant observes, as a subsidiary point, that the method used for this particular transfer bears close resemblance to a sale proper, in that the quantity, price and place of delivery are fixed.

2. *The argument relating to the applicant's general conditions of sale*

The *applicant* claims that by virtue of Article 7 of its general conditions of sale it reserved to itself ownership of the entire sheet bar until the moment full payment was made. Now the applicant asserts—and offers to prove, in the event of dispute—that during the whole period concerned the accounts were always settled after the sheet bars had been processed. Consequently, at the time the waste scrap was created, the applicant owned the sheet bars, now

transformed into sheet on the one hand and waste scrap on the other.

The *defendant* contends that this theory conflicts with that advanced in support of the ground regarding the validity of the retention of ownership clause covering the waste scrap. In addition, the form envisaged by Article 7 of the general conditions of sale amounts to a condition with retroactive effect. On payment of the purchase price, the object remains an accretion to the buyer's property; thus the applicant's theory has no relevance.

The *applicant* replies that on payment of the contract price after the creation of the sheet and waste scrap, Phenix-Works became sole owner of the sheet, but not of the waste scrap, ownership of which had been reserved by the applicant under the contract. At no time, therefore, did there exist more than one title, nor even a state of co-ownership, in a sheet bar; thus there is no conflict between the applicant's arguments. The argument concerning the retention of ownership of the thing sold pending payment becomes, moreover, of minor importance if the defendant's theory as to the impossibility of creating a separate right of ownership over the future waste is correct. Even if it had some foundation, this theory is not applicable to the present facts since the moment the sheet bar was cut the sheets, as also the waste, became the property of the applicants, payment not then having been made.

According to the case-law of the Belgian Cour de Cassation, payment of the purchase price cannot be a condition precedent for the entry into force of the contract; it is, on the contrary, a condition governing the transfer of ownership and as such is not retroactive. Besides, when payment was made, the sheet bars had been processed and no longer existed, having become sheet plus waste and in view of this fact there is no possible basis for a theory of retroactivity.

The *defendant* persists in the contention that there is the contradiction, outlined above, between the theory of co-ownership and the argument based on the actual clause. Nor is the argument compatible with the theory of accession: 'since the applicant had owned the sheet bar even before this yielded waste scrap, it was not open to the defendant to accord itself, by means of a waiver by Phenix-Works, a right, never acquired by Phenix-Works prior to the creation of the waste, over the actual thing from which the waste arose'.

3. *The argument relating to infringement of the principle of non-discrimination*

According to the *applicant,* the decision was wrong to refer to the principle of non-discrimination in order to justify its disregard of the retention of ownership. The factual and legal circumstances present here bear no resemblance whatsoever to those taken into consideration by the Court in Cases 17 and 20/61. What we have here is a practice constantly observed since 1947 and which was not created with any intention of influencing the basis of assessment to equalization contributions. Secondly, the quantity of scrap covered by the retention of ownership was at all times precisely determined. Thirdly, there was never any transfer of capital or entry in the accounts when the rolling-waste was returned. The applicant also refers the Court to Article 7 of its general conditions of sale.

As to the first three arguments, the *defendant* replies that they have no bearing at all on the legal nature of the transaction concerned. Referring to the statement of reasons for the contested decision, the defendant repeats that it is impossible to allow the disputed clauses the effect in Community law which the parties would like them to have; indeed, conditions such as these would make the undertakings in some

countries free to apply Community law themselves in such matters, which would be contrary to the fundamental principles of equalization, that is, the principles of non-discrimination and the equal treatment of all undertakings consuming scrap.

The *applicant* replies that, if the aims of the equalization scheme require Belgian Civil Law to cede to the new concept of Community law specifically applicable to the equalization procedure, the defendant should have legislated on the matter or, at least, should have employed independent concepts unrelated to the domestic law ordinarily applicable. It did not do so, and the concept of bought scrap calls to mind the rules of civil law concerning the transfer of ownership under a contract of sale. Consequently, if an element of discrimination has to be applied here, it is solely the responsibility of the High Authority, the result of its lack of foresight. The defendant's views may be useful as *de lege ferenda,* but they are contrary, in the existing state of the relevant regulations, to both Community regulations and Belgian Civil Law.

Lastly it must be asked what would be the defendant's attitude if the applicant had, after having its sheet bars processed into sheets at Phenix-Works, sold the sheets to the defendant.

B — The application for damages for a wrongful act or omission

This subsidiary request by the *applicant* relies on the claim that the High Authority failed in the obligation imposed on it by Article 5 of the Treaty to provide all parties concerned, including the applicant, with guidance and assistance. Had it done so the applicant might have been able, for instance, to have the work contracted out, or to refrain from retaining ownership of the waste and to take this into account in the sale price, or to spread payment of its contributions over a period and at a time when it was in a better position to make them.

The damages sought also cover the amount claimed by the High Authority as interest for the delay caused by its own negligence.

The *defendant* first denies that the High Authority was under any obligation such as that alleged by the applicant. There could only have been a wrongful act or omission if the relevant department of the High Authority had induced the applicant into error. The facts preclude this possibility. Even in November 1957 the defendant had expressed doubts as to the treatment of the disputed waste scrap; the letter sent by the High Authority to the Joint Bureau of Ferrous Scrap Consumers published in the Official Journal on 1 February 1958, which gave a very narrow definition of the concept of own resources, ought to have shown the applicant that it could not avoid paying equalization contributions in respect of the waste scrap in question. The second check carried out in the applicant's factory gave rise to fresh observations concerning the scrap coming from Phenix-Works. Also, in order to check the conditions governing the return of the scrap in question, the High Authority requested copies in February 1962 of the contract(s) involved. This enabled it to complete its investigation and to reach the conclusion, in a letter of 4 April 1963, that the disputed clauses could not have the effect which the applicant seeks to impute to them. Thus the High Authority did not fail to act, and indeed fulfilled in all respects the duties entrusted to it by the Treaty.

As a further alternative the defendant denies that damage occurred. In view of the clear difference between the legal characteristics of the agreement for a jobbing contract and those of a contract of sale, whether or not a retention of ownership clauses is included, the defendant declares it impossible to maintain that the two contracts are

interchangeable. The legal difference between the two contracts is also exemplified in their economic features: one has only to recall the risks involved in a jobbing contract for rolling work as compared with those in a contract of sale.

The assessment of the damage alleged to have been suffered, fixed at the amount of the contribution, is incorrect since it is not possible to know what would have been, in fact, the economic advantages and disadvantages of the agreement for rolling work contracted out.

As for the applicant's claim that it could have waived its ownership to the waste scrap and taken this into account when fixing the price, the defendant remarks that the price is usually determined by fluctuation in supply and demand and that, moreover, in the present case the applicant's prices were either the list-prices or those obtained by determining the average price from other lists in force in the market for rolled sheets. It is therefore difficult to believe that Phenix-Works had agreed to pay prices above the published list prices, and this would in any case have been contrary to Article 60 of the Treaty. As for the argument the applicant seeks to put forward as regards the alternatives of immediate payment of contributions and payment thereof by instalments, the defendant remarks that in this context the applicant could have contented itself with asking for partial compensation for the loss entailed in making the payment in one sum, without asking for the entire amount of the contribution. In addition the applicant has had at its disposal for several years the sums owed by it as its contribution, and this is no mean advantage.

The *applicant* replies that at the time of the check carried out in January 1957 80% of the scrap concerned in this dispute had already been delivered and that this figure had become 96% by 6 November 1957, the date on which the High Authority sent its letter. In view of this, it is difficult to see how the applicant could at that late stage have made the necessary alternative arrangements. And when the notice appeared in the Official Journal of 1 February 1958 the period in question had already come to an end.

The argument concerning the law of supply and demand is misconceived because the applicant had only to charge the total price of the sheet bars, which was listed, without deducting the value of the waste scrap.

The *defendant* replies that the check carried out in the applicant's works was in no way one that the High Authority was under a duty to perform in any case, far less one that it had to complete within a given time; it was merely an optional measure provided for the benefit of the institution.

As regards the argument relating to the possibility of increasing the price charged to Phenix-Works for the sheet bars, the defendant has produced a comparative table of prices charged by the applicant and of list prices charged for the same period by Cockerill-Ougrée. From a comparison of these it concludes that no increase corresponding to the amount of the contribution would have been possible in fact, since otherwise Phenix-Works would have bought from other undertakings.

The fact that the value of the waste scrap in dispute might not have been deducted from the purchase price of the sheet bars, which would then have been charged at the full price, could not have benefited the applicant, since the acquisition of a corresponding amount of waste scrap would perforce have rendered it liable to pay the contribution.

IV — Procedure

The procedure followed the normal course.

By a letter from the Registrar of the Court dated 4 October 1965 the applicant was requested to adduce evidence to show that its general conditions of sale, in particular Article 7 thereof, were applied in its transactions with Phenix-Works. The applicant complied with this by producing written evidence prior to the commencement of the oral proceedings. By order of 11 October 1965 the Court decided to join this case and Case 3/65 (*Société Anonyme Métallurgique d'Espérance-Longdoz* v *High Authority*) for the purposes of the oral procedure.

The parties' oral observations were heard on 18 and 19 October 1965.

The Advocate-General delivered his opinion on 4 November 1965, favouring rejection of the application.

Grounds of judgment

I — The application for annulment

The applicant claims that the scrap in the dispute constituted not bought scrap within the meaning of the general decisions, but 'own resources' which, as such, were granted exemption from the equalization contribution.

On the basis of this description, it concludes that the ownership of the said scrap never ceased to be vested in it by virtue of the retention of ownership clause included in each of the contracts of sale made with Phenix-Works and in Article 7 of its general conditions of sale, and that the decision which it contests was therefore wrong in subjecting the scrap to equalization contributions.

The general decisions applicable to this question introduced, for the benefit of all undertakings within the Community, a scheme designed to ensure them a regular supply of scrap at uniform prices whatever the Member State to which they belonged or the origin of the scrap in question.

These decisions, aimed at spreading between undertakings the financial burden of a benefit in which all could share, accordingly made all scrap consumed by Community undertakings subject to the equalization levy, with the single exception of scrap which constituted their own resources.

The scope of this exemption can be determined only by reference to the system within which it is designed to operate and in the light of the fundamental principles on which it is based.

Since the obligation to contribute to the equalization scheme is the rule and exemption the exception, the latter must be interpreted strictly and must be consistent with the aims, the basic principles and the requirements for the

proper functioning of the equalization scheme, in particular the principle of the equal liability of all those affected to pay contributions, shared in proportion to the amounts respectively consumed, and the requirement that the scheme be applied impartially to all those subject to it.

When it pleads the right of ownership, which it claims never to have ceased to enjoy in respect of the disputed scrap, and the fact that this element has been taken into account in certain similar cases previously, the applicant is ignoring the fact that the concept of 'own resources' depends equally on a consideration of the method of scrap production required by the spirit and purpose of the equalization scheme. The applicant is therefore mistaken in thinking that the exemption can be made to apply to the scrap here in dispute simply by showing that at no time did it transfer its ownership thereof.

In doing so, it fails to appreciate that the fact that scrap arising from a transfer of ownership was classified in previous similiar cases as bought scrap does not by any means indicate that the absence of any such transfer will justify exemption from the equalization levy.

Indeed, the question who holds title to the ownership of the disputed scrap, however important, cannot be the sole determining factor in the equalization scheme.

The aims of the scheme make it imperative to take into consideration the circumstances surrounding the production of the scrap in question.

No exemption from equalization contributions can be allowed which would tend to increase substantially differences in production costs, otherwise than by altering the level of output, and thereby bring about an appreciable disequilibrium in the competitive relationships between undertakings.

That does not occur when an undertaking puts back into its production cycle wastes arising from the production or processing, carried out by it or on its behalf, of its own products.

Such re-utilization constitutes in fact on internal measure of economy conducive to increased productivity; exemption of scrap so used does not therefore distort competition within the market.

On the other hand any exemption which depends not on the way in which an undertaking arranges its production, but on the contractual relationships which it has with other undertakings, is not compatible with the scheme.

The classification of scrap as 'own resources' is not therefore necessarily dependent on the concept of ownership of the scrap, but is intended to apply in the main to scrap which is genuinely the product of the undertaking's own activity, the result of its own work.

The scrap in question did not arise by separation from the sheet bar by a joint *pro quota* operation performed by Phenix-Works and the applicant but is the outcome of the manufacture of sheets carried out by Phenix-Works working on its own account and at its own risk.

In addition, when the sheet bars were sold, a valuation was made of the scrap transferred by Phenix-Works to the applicant and taken into account when the selling price of the sheet bars was fixed.

The value so fixed for the scrap is lower than the value of a corresponding quantity of sheet bars.

This separate valuation of the sheet bars sold and of the scrap recovered confirms that the latter do not merely represent a portion retained from the sheet bars sold, but is a new product.

Consequently consumption of this scrap by the applicant cannot be considered as a re-utilization by the producer undertaking of its own resources.

In these circumstances, the scrap in question must be subject to the payment of the equalization contributions, the affinities with private law invoked here by the applicant being irrelevant to the matter.

The determining factor lies not, therefore, as the applicant claims, simply in the physical transfer of the scrap, but in its incorporation into the cycle of production of an undertaking which has had no part in the production process from which it has arisen.

The argument put forward by the applicant is therefore not well founded.

From what has been said above it is clear that the reference to the principle of non-discrimination in the statement of reasons for the contested decision is relevant; accordingly the applicant's argument thereon is likewise unfounded.

II — The application for damages

The applicant claims to have suffered damage as a result of not having been informed in time that the scrap in question was liable to equalization, and further claims that this omission on the part of the defendant constitutes a failure to comply with Article 5 of the Treaty and is therefore a wrongful act of omission.

On the question of damage, the applicant claims that it would have been able to gain exemption from equalization contributions by having the processing done as work contracted out.

It is not certain, however, that this method would have attained the aims of both the applicant and Phenix-Works as well as a sale would have done. An agreement contracting work out serves a purpose, and implies a risk, quite different from those which characterize the contracts of sale actually used here. In view of the above it is not possible to determine either the manner in which the relationship between the two undertakings would have been created, or whether an agreement for contracting out which no longer met the actual production requirements of the applicant could still have been utilized by the latter in order to gain exemption from the equalization contributions.

Moreover the applicant cannot complain that the defendant's conduct prevented it from taking advantage of a legal device designed purely to enable it to avoid having to pay its due contributions in application of the principle of equal treatment of scrap consumers.

Nor is it established that the applicant would have been able, if it withdrew the formula whereby it sought to keep the scrap for itself, to obtain for the sheet bars terms more favourable than those actually in force.

It has also not been established that real damage was constituted by the impossibility of settling the equalization debt in instalments.

The Court is therefore not satified that damage was suffered. This being so, the application for damages must be dismissed and it is not necessary to consider the existence or otherwise of a wrongful act or omission.

III — Costs

According to Article 69 (2) of the Rules of Procedure, the unsuccessful party must pay the costs. The applicant has failed in its submissions and must therefore bear the costs of the action.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Coal and Steel Community, especially Articles 5, 33, 40 and 53;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

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

Hammes Delvaux Strauß

Donner Trabucchi Lecourt Monaco

Delivered in open court in Luxembourg on 15 December 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER

(see Case 3/65, page 1085)