In Joined Cases

19/60 SOCIÉTÉ FIVES LILLE CAIL, whose registered office is at 7, Rue de Montalivet, Paris, represented by Raymond Barraine, Head of its Administration and Legal Departments,

21/60 SOCIÉTÉ UNION SIDÉRURGIQUE DU NORD DE LA FRANCE (hereinafter referred to as 'Usinor'), whose registered office is at 14 Rue d'Athènes, Paris, represented by René Damien, Chairman of its Board of Management,

2/61 SOCIÉTÉ DES FORGES ET ATELIERS DU CREUSOT, whose registered office is at 15, Rue Pasquier, Paris, represented by Georges Chambon, its managing director,

3/61 SOCIÉTÉ MARREL FRÈRES, whose registered office is at 28 Rue Claude-Drivon, Rive-de-Gier (Loire), represented by Jacques Marrel, its General Manager,

assisted by Jean-Pierre Aron, Advocate at the Cour d'Appel, Paris, with an address for service in Luxembourg at the offices of the Chambre Syndicale de la Sidérurgie Française, 49 Boulevard Joseph-II,

applicants,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Italo Telchini, acting as Agent, and Professor André de Laubadère, of the University of Paris, acting as co-Agent, with an address for service in Luxembourg at its office at 2 place de Metz,

defendant,

Application:

(a) *In Case 19/60:*

For the annulment of the implied decision of the High Authority refusing to pay to the applicant, Fives Lille Cail, as parity of transport costs (hereinafter referred to as 'transport parity'), the sum of FF 5 764.16 representing the difference between the cost of carriage of ferrous scrap to the recipient works from, on the one hand, the nearest station to the scrap recovery yard and, on the other, the nearest port of entry; or in the alternative, for an order that the High Authority pay as damages to the said applicant the sum of FF 5 764.16;

(b) *In Case 21/60:*

For the annulment of the implied decision of the High Authority refusing to pay the applicant, Usinor, the sum of FF 14 912.71 as transport parity in respect of the said ferrous scrap; in the alternative, for an order that the High Authority pay as damages to the said applicant the sum of FF 14 912.71;

(c) *In Case 2/61:*

For the annulment of the enforceable decision of the High Authority of 14 December 1960 ordering the applicant, the Société des Forges et Ateliers du Creusot, to repay to it the amount of FF 20 800 which had been wrongly paid to the applicant under the scheme for the equalization of imported scrap and scrap treated as such; in the alternative, for an order that the High Authority pay as damages to the said applicant the sum of FF 20 800;

(d) *In Case 3/61:*

For the annulment of the enforceable decision of the High Authority of 14 December 1960 ordering the applicant, Marrel Frères, to repay to it the amount of FF 4 760; in the alternative, for an order that the High Authority pay as damages to the said applicant the sum of FF 4 760.

THE COURT

Composed of: A.M. Donner, President, J. Rueff, President of Chamber, L. Delvaux, Ch. L. Hammes (Rapporteur) and R. Rossi, Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I – Facts

The underlying facts may be summarized as follows:

1. In 1954 the High Authority, finding that the supplies of ferrous scrap within the Community were insufficient to meet the needs of current consumption and to keep stocks at their normal level, introduced, under Article 53 of the ECSC Treaty, financial arrangements, which were binding on all undertakings in the Community which were consumers of ferrous scrap and which provided both for joint purchase of ferrous

scrap from third countries and shipyard scrap treated as such and for equalization of the prices of this scrap and domestic scrap.

2. Since the equalization scheme was introduced, the Office Commun des Consommateurs de Ferraille (the Joint Bureau of Ferrous Scrap Consumers, hereinafter referred to by its French initials as 'the OCCF') has negotiated on behalf of the undertakings of the Community a large number of contracts for the purchase of shipyard scrap for delivery price-free on rail ex-railway station nearest to the scrap recovery yard; the recipient undertakings were designated to the seller of the scrap by the regional offices (in France, the Union des Consommateurs de Ferraille de France, the French union of ferrous scrap consumers, hereinafter referred to as 'the UCFF').

3. Because of the difference in the cost of transporting ferrous scrap to its destinations from the ports of entry or the scrap recovery yards, some scrap consumers' works situated nearer the ports of entry than the shipbreaking yards tended to look for scrap imported by sea from third countries rather than shipyard scrap.

4. In these circumstances, the undertakings concerned were unwilling to take supplies of shipyard scrap without an assurance that, to put them on an equal footing, they would be repaid the difference between the cost of transport from the railway station nearest to the scrap recovery yard (in the case of shipyard scrap) and the cost of transport from the nearest port of entry (in the case of scrap from third countries).

5. From 1954 to 1958, some undertakings in the Community, particularly in France but also in Italy and in the Netherlands, among them the four applicant companies, received from the OCCF a rebate totalling about $523 000 in respect of the difference in transport charges.

Evidence of the extent of this practice, as far as they were concerned, was provided by the applicants during the oral proceedings by the discount payments from 1954 to 1958.

The first applicant received $20 000 as transport parity, the second applicant $70 000 and the third and fourth companies about $15 000 each.

6. In October 1958, the four applicant companies accepted delivery of certain quantities of shipyard scrap in execution of supply contracts concluded by the OCCF, namely:

(a) Fives Lille Cail (the applicant in Case 19/60): 392 120 metric tons in execution of Contract 2/RN–2568f concluded by the OCCF with Les Abeilles, Le Havre, a recovery and salvage undertaking, on 19 September 1958;

(b) Usinor (the applicant in Case 21/60): 1 014 470 metric tons in execution of Contract 6/RN–2582f concluded by the OCCF with the Lombarda Metalli undertaking, Milan, on 24 September 1958;

(c) The Société des Forges et Ateliers du Creusot (the applicant in Case 2/61): 2 918 metric tons in execution of Contracts 766/DN–2588f and 772/DN–2605f concluded by the OCCF with the Compagnie Minière et Métallurgique, Paris, on 27 September 1958, and on 29 September 1958 with the Société de Démolitions Navales et Terrestres, Paris;

(d) Marrel Frères (the applicant in Case 3/61): 506 220 metric tons in execution of the said Contract 772/DN–1605f.

The applicant companies maintain that they had, through the UCFF, obtained the prior consent of the OCCF to the grant of transport parity, calculated on the basis of notional ferrous scrap imports either through the port of Dunkirk ('Dunkirk parity' of FF 14.70 per metric ton) or through the port of Marseilles ('Marseilles parity' of FF 10.50 per metric ton).

In support of these statements they produced the following documents:

the applicant in Case 19/60 produced a letter of 9 October 1958 from the UCFF registering its consent to the grant of transport parity in respect of the purchase referred to in (a) above:

the applicant in Case 21/60 produced

a letter of 27 October 1958 in which the OCCF notified the UCFF of its agreement that the consignee should, in respect of the purchase referred to under (b) above, be credited with an amount of FF 1 470 per metric ton (Dunkirk parity);

the applicant in Case 2/61 produced a letter of 15 October 1958 in which the OCCF gave the vendor of the ferrous scrap in respect of the purchase referred to under (c) above its consent to invoice a price 'equivalent to the Marseilles parity';

the applicant in Case 3/61 produced a letter of 21 October 1958 in which the OCCF requested the vendor of the scrap in respect of the purchase referred to under (d) above to increase its invoices by FF 1 050 per metric ton (Marseilles parity).

7. On 15 March 1960, the Directorate General for Steel of the High Authority sent to the applicants in Cases 19/60 (Fives Lille Cail) and 21/60 (Usinor) equalization statements in respect of the above-mentioned contracts which took no account of the agreed transport parities (FF 5 764.16 for the former, and FF 14 912.71 for the latter undertaking).

By letters of 30 July and 11 August 1960 respectively the said applicants requested the High Authority to correct these statements of account by allowing for transport parity; when, after two months, they had received no reply, they lodged an application on 26 October and 5 November 1960 against the implied decision of refusal to be inferred from the failure of the High Authority to reply.

8. On 10 and 14 August 1959, the High Authority sent to the applicants in Cases 2/61 (Société des Forges et Ateliers du Creusot) and 3/61 (Marrel Frères) respectively, provisional equalization statements of account under which they were credited, as reimbursable expenses, with the difference in transport costs calculated in accordance with the 'Marseilles parity'. On 10 December 1959, three out of four of these statements of account were corrected by the High Authority; as in the case of the earlier calculations, allowance was made in the corrected calculations for payment of the transport parities.

In consequence, the applicant in Case 2/61 received the sum of FF 20 800 under that head and the applicant in Case 3/61 the sum of FF 4 760.

The High Authority subsequently reconsidered these payments and on 15 March 1960 sent to the two abovementioned applicant companies fresh statements of account which amended the earlier ones and no longer allowed for the 'Marseilles parity'. By enforceable decisions of 14 December 1960, it ordered the applicants to repay the aforementioned amounts.

On 16 January 1961, the Société des Forges et Ateliers du Creusot and Marrel Frères lodged applications against these decisions which were entered in the Registry under Nos 2/61 and 3/61 respectively.

II – Conclusions of the parties

The applicants claim:

(a) *In Case 19/60 (Fives Lille Cail)* that the Court should annul, 'as being *ultra vires* and contrary to the rules of law relating to the application of the ECSC Treaty', the implied decision of the refusal by the High Authority to grant the request contained in the letter of 30 July 1960 for payment of the sum of FF 5 764.16 as transport parity;

In the alternative that the High Authority be ordered to pay the same sum of FF 5 764.16 as damages for a wrongful act or omission in the performance of its functions;

(b) *In Case 21/60 (Usinor)* that the Court should annul 'as being *ultra vires* and contrary to the rules of law relating to the application of the ECSC Treaty', the implied decision of refusal by the High Authority to grant the request contained in the letter of 11 August 1960 for payment of the sum of FF 14 912.71 as transport parity;

In the alternative, that the High Authority be ordered to pay the same sum of FF 14 912.71 as damages for a wrongful act or omission in the performance of its functions;

(c) *In Case 2/61 (Société des Forges et Ateliers du Creusot)* that the Court should annul, 'as being *ultra vires* and contrary to the rules of law relating to the application of the ECSC Treaty', the enforceable decision of the High Authority of 14 December 1960 ordering it to repay the sum of FF 20 800 which it had received as the difference in the transport costs of shipyard scrap on the basis of the Marseilles parity;

In the alternative, and in the event of the enforceable decision's being upheld, that the High Authority be ordered to pay the same sum of FF 20 800 as damages for a wrongful act or omission in the performance of its functions;

(d) *In Case 3/61 (Marrel Frères)* that the Court should annul 'as being *ultra vires* and contrary to the rules of law relating to the application of the ECSC Treaty', the enforceable decision of the High Authority of 14 December 1960 ordering it to repay the sum of FF 4 760 which it had received as the difference in the transport costs for shipyard scrap on the basis of the Marseilles parity;

In the alternative, and in the event of the enforceable decision's being upheld, that the High Authority be ordered to pay the same sum of FF 4 760 as damages for a wrongful act or omission in the performance of its functions.

(e) *In all four cases,* that the High Authority be ordered to pay the costs.

The *defendant* contends that the applications lodged by the four applicant companies should be dismissed as inadmissible or unfounded, with all legal consequences, especially as regards the payment of fees, costs and any other expenses.

III – Submissions and arguments of the parties

From the conclusions of the parties it is clear that the applications come, first, within the context of proceedings for annulment (Articles 33 and 35), and, secondly and alternatively, of those for damages (Article 40).

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

A – Admissibility

The *defendant* contests the admissibility of the applications only in so far as they arise out of the proceedings for annulment, and in any event largely as a formality.

1. *Admissibility of Applications 19/60 and 21/60 with regard to the application of Article 35 of the Treaty*

In respect of these two applications the *defendant* raises the question whether the conditions precedent for an action for failure to act based on Article 35 are satisfied in the present case. It does so from two points of view:

(a) Under what provision was the High Authority bound to take the decision requested?

(b) There was not in this case an express request for a decision or, in consequence, formal notice duly served.

On the first point (a), the *applicants* reply that, in making 'part' payment of the equalization amounts due to them, the High Authority was acting on the basis of its Decisions Nos 16/58, 17/58, 23/58, 29/59 and 30/59 fixing the general rules to be applied with regard to equalization. For this reason, it had a duty under those decisions to make the equalization payments and was, of necessity, bound subsequently to meet the applicants' requests for a further payment.

The applicants also rely on Article 53 of the Treaty as a lawful and mandatory provision which regulates the working of the equalization scheme.

On the second point (b), they maintain that they could not have given the High Authority formal notice to take a decision in clearer terms than those in their letters of 30 July and 11 August 1960.

The *defendant* replies, first, (a) that none of the decisions referred to by the applicants provide, in the case of shipyard scrap, for the grant of reimbursement of transport charges within the Community and secondly (b), that it is doubtful whether the letters

of July and August 1960 can constitute the essential formality provided for under Article 35.

2. *Admissibility of the applications from the viewpoint of exceptio obscuri libelli*

Again, the *defendant* raises the principle of *exceptio obscuri libelli* but the Court is unable to say with certainty whether this refers to all four applications or merely to Applications 19 and 21/60.

Pursuing this objection the defendant maintains that the wording of the applications makes it impossible to understand what constitute the alleged *ultra vires* acts and 'infringement of the rules governing the application of the Treaty' which vitiate its implied decisions of refusal and its decisions regarding repayment. Applications based on such vague and indefinite submissions must be dismissed.

In their reply the *applicants* maintain that they have set out in the clearest terms two basic legal submissions:

(a) The fact that the High Authority repeatedly allowed for transport parity in making previous equalization payments and the assurances which, in this case, they were given by the OCCF created a right in their favour and the High Authority could no longer, in March 1960, validly annul the effects of the said agreements.

(b) In their reply, they contend that to ignore this situation constitutes a breach of a general principle of law 'which comes within the rules governing the application of the ECSC Treaty', namely, the principle governing the revocation of an administrative measure and, in particular, the time-limit within which revocation can be effected.

The applicants add that, as the OCCF has always operated under the control and on the responsibility of the High Authority, 'the formal undertakings' which it has 'entered into' are binding on the latter and 'annulment' of them is illegal.

The *defendant* replies that the meaning and scope of the arguments on which the applicants appear to base the substance of their claim are made clear only in the applicants' reply.

B – The substance of the case

Action for 'ultra vires acts and infringement of rules relating to the application of the Treaty'

1. In support of their argument, *the applicants* maintain that the High Authority had no right to revoke the measures adopted by the OCCF concerning transport parity for shipyard scrap because this practice constituted a substantive right of the parties, which is infringed by its withdrawal *ex post facto*.

In their reply they submit, on this point, the following arguments to establish the legal basis and nature of this practice:

(a) The consent of the OCCF in October 1958 as regards transport parity was in accordance with a practice regularly followed by the OCCF since 1954 which was, moreover, subsequently confirmed when the High Authority itself applied it to Applicants Nos. 3 and 4.

(b) This consent, which was a condition of their acceptance of the deliveries in question, and which, under Article 1 (5) of the statutes of the OCCF, they were free to accept or to refuse if the price of the scrap was unsatisfactory, was binding on the High Authority as the body responsible for the working of the OCCF, which it controlled through a permanent representative.

In this connexion, the applicants invoke also the High Authority's quasi-delictual liability for a wrongful act or omission in the performance of its functions.

(c) By virtue of the rules applicable to the revocation of administrative measures, even assuming their illegality, it was not legally possible for the High Authority, in March 1960, that is to say after a

lapse of 17 months, to annul the effect of the consent given by the OCCF in October 1958 regardless of the reasons which impelled it to withdraw these agreements, especially in view of the fact that the High Authority did not accuse them of bad faith as a result of false or incomplete information.

(d) The principle which prohibits withdrawal of administrative decisions cannot be undermined by the fact that the statements of account or the equalization payments are provisional. They are provisional only in so far as adjustments have to be made either because of substantive corrections of arithmetical errors or because of revision of the amounts of the factors used in the calculations but not because of changes in the basic principles themselves; once these have been adopted, they cannot be called in question again.

The decisions of the OCCF have, accordingly, conferred individual rights on the applicants which the High Authority can no longer take away from them.

2. Against the arguments of the applicants the *defendant* puts forward four submissions which may be summarized as follows:

(a) No withdrawal of an administrative decision, properly speaking, is involved in this case.

(b) The 'undertakings' which the applicants claim constitute decisions have no legal value because they were entered into unlawfully by unauthorized agents.

(c) The said 'undertakings' are absolutely void since they conflict with the fundamental principles of the Treaty and of the equalization scheme.

(d) The fact that the statements of account and payments are provisional makes it possible for them to be revised or recovered.

As regards the actual situation, the defendant contends in general terms that, far from being widespread, as the applicants argue, the practice of granting a transport parity appears to have been fairly common in France, intermittent or at least very variable in Italy and in the Netherlands and, finally, completely non-existent in Germany, Belgium and Luxembourg.

On this point the *applicants* claim that the problem of parity arises very rarely or not at all in countries where the seaports are situated at the same distance from or closer to the works than the recovery yards.

As regards the legal arguments:

(a) The *defendant* states first that the revocation of an administrative measure consists in a decision taken by an administrative authority concerning measures it has adopted itself and which it decides to retract. This is not the situation in this case since:

In Cases 19/60 and 21/60, no decision had been taken by the High Authority, and it is not, therefore, withdrawing any decision; it merely claims that undertakings given unlawfully by OCCF officials who are not empowered to do so have no value and ought not to be enforced.

In Cases 2/61 and 3/61, the claim for repayment amounts to nothing more than recovery of sums not owed and paid in error.

In any event, the Court has in its judgment in Joined Cases 42 and 49/59 (SNUPAT) itself recognized that the withdrawal of an administrative measure with retroactive effect is permissible where, as in the present case, the public interest of the Community, which is to ensure the proper functioning of the equalization scheme, must prevail over the private interest which particular undertakings have in maintaining an illegal advantage.

In the rejoinder, it reinforces this argument by emphasizing that, during the period when the purchases in dispute took place, the price of imported scrap was lower than that of shipyard scrap.

The *applicants* contest this argument by producing, in their reply, statistics to demonstrate that, despite the liability constituted by the grant of the transport parity, the purchase and consumption of shipyard

scrap were in the interests of the Community because its cost price was undoubtedly lower than that of imported scrap. They add that, in any case, it was not in the interest of the Community to import scrap at the cost of foreign currency.

(b) Finally, the *defendant* states that the 'undertakings' of the OCCF were without legal value since they were entered into by officials of the OCCF who had no power to enter into them and that, in those circumstances, these undertakings cannot create or constitute a legal rule subject to the principles governing the withdrawal of administrative measures. This is because:

(i) Neither the OCCF nor the Caisse de Péréquation des Ferrailles Importées (the Imported Ferrous Scrap Equalization Fund, hereinafter referred to as 'the Fund') had the power, without the approval of the High Authority, to decide on their own initiative that the disadvantageous geographical position of certain undertakings should be redressed by refunding the difference in transport costs.

In this connexion the High Authority recalls that its permanent representative or his deputy could make the decision of the Council of the OCCF or of the Fund subject to approval by the High Authority.

According to the defendant, there was, before 1956, already some disagreement within the Council of the OCCF about the extent to which the geographical position of undertakings could be taken into account in fixing the equalization price.

To settle the argument, the High Authority in turn adopted Decisions Nos 34/56, 19/58, 15/59 and 18/60 which 'expressly' fixed at the vendor's yards the equalization price for scrap treated as imported scrap broken up on the territory of the Community and laid down the principle that the equalization price could in no way be corrected to allow, in whole or in part, for transport costs or other charges incurred between the place of delivery fixed for the equalization price and the place at which the scrap was used.

The *applicants* object that the last three of these decisions (Decisions Nos 19/58, 15/59 and 18/60) were of subsequent date to the undertakings given by the OCCF in October 1958 and that, in any case, before Decision No 18/60, there was no express prohibition in the defendant's decisions against applying the correcting factor for transport on which they rely; by the date on which Decision No 18/60 was issued, 24 August 1960, the scrap had been delivered to the applicants for almost two years.

(ii) The OCCF's general lack of authority and that of the Fund involve, *a fortiori*, that of the servants of the governing bodies of those organizations and, even more, of all other subordinate staff, to whom powers can be delegated by management boards only in terms of purely executive action. All power of decision which involves incurring liability on the part of the agencies of the equalization scheme is vested solely in the relevant management boards.

This situation, which arises under the published statutes of those organizations, could not have been unknown to the applicants, still less to their representative at the OCCF, namely the UCFF. Against this argument the *applicants* advance the contention that, even if the financial bodies set up by the High Authority and which are subject to its control had exceeded their powers because of their

organization, they were as ostensible agents, able to give valid 'undertakings' to *bona fide* third parties without in each case obtaining prior proof of authorization from the High Authority.

(iii) The *defendant* continues to maintain that, after publication of the basic decision, No 13/58, measures such as those which the contested undertakings involved could only be made by itself.

This decision, No 13/58, which was adopted following and in execution of the judgment of the Court in Case 9/56 (*Meroni* v *High Authority*), expressly put an end to the delegations of powers made earlier to the OCCF and the Fund.

After 1 August 1958 those organizations could have been entrusted only with simple executive work; consequently any organization, authority or agent other than the High Authority had absolutely no power to take a decision such as that permitting the refund of the transport parity. 'Assurances' such as those on which the applicants rely and which date from September 1958 were therefore based on measures having no legal value and which, assuming that the High Authority wanted to change its point of view, ought to have been taken by it in the form of and pursuant to a general decision.

The *applicants* reply that the principle of transport parity has always been accepted by the OCCF for whose work the High Authority was in any case responsible.

The latter itself applied the principle on two occasions after August 1958, after checking the relevant statements of account and payment of the amounts in question; it could not have more clearly confirmed and ratified the undertakings given earlier by the OCCF.

(c) The *defendant* contends that the practice of granting a transport parity contravened both the general principles of non-discrimination and of equal access to the sources of production provided for under Articles 4(b) and 3(b) of the Treaty and the very reason for the equalization scheme. Its permanent representative at the OCCF could not therefore have allowed it even if he had been aware of it, and the High Authority was unaware of the problem until after the OCCF and the Fund had been dissolved. Moreover, if the principle on which the applicants base their claims was accepted, it ought logically to have been applied to imported scrap in the case of consumers who were at different distances from the seaports, but that has never been suggested.

The principle of refunding the transport 'parity' has, therefore, never been recognized by the High Authority and was formally disapproved by it as soon as unjustified action to that effect was found to have been taken.

The *applicants* reply that the contested undertakings are not in conflict with either Article 3(b) or with Article 4(b) of the Treaty.

First, they certainly accord with the principle of equal access, since their absence would have meant that some works would have been denied access to shipyard scrap.

Secondly, the result of the provisions adopted by the OCCF is not to create but, on the contrary, to prevent discrimination between consumers of imported scrap and consumers of shipyard scrap because their effect is to place both in the same position.

Nor is there any discrimination between the various undertakings needing shipyard scrap because the principle of refunding transport charges was applied to all undertakings in the six countries which could prove excessive transport costs.

The applicants further maintain that transport parity is in the interest of the general public, which bears the excess of the purchase price of imported scrap and scrap treated as such including shipyard scrap, over the equalization prices. During the whole equalization period, the cost price of shipyard scrap, on rail ex scrap recovery yard was markedly lower than the cost price of scrap imported by sea cif the port of entry; it was therefore in the interest of the public to purchase all available supplies of shipyard scrap. The effect, therefore, of the undertakings entered into by the OCCF was to reduce the burden of equalization and to prevent the export of amounts of scrap at prices which were especially favourable to consumers as a whole; these undertakings fulfilled one of the fundamental objectives of the Treaty, which is to ensure the establishment of the lowest prices in accordance with Article 3(c).

In its reply, the *defendant* states that the applicants' view is based on misinterpretation of the fundamental provisions of the Treaty governing equal access and non-discrimination. It presupposes that natural differences produced by geographical location are compensated for by artificial means; to introduce into the equalization scheme a formula for geographical correcting factors based on the distance between undertakings and their centres of supply would be to adopt an attitude which is in every respect alien to the fundamental principles of the Treaty.

The *applicants'* reply to this is that the High Authority has, in the case of ferrous scrap, nevertheless allowed differences arising from geographical location to be redressed by adding $2 to the equalization price of scrap according to whether or not imports entered over land or by water; the feasibility of making such imports is essentially dependent on geographical circumstances.

(d) (i) The *defendant* contends that there can be no doubt about the legality of the procedure for recovering unlawful payments when it is borne in mind that the equalization scheme is based on principles of public law and when account is taken of the necessarily provisional nature of the amounts paid under this financial machinery. It denies that the provisional nature of the statements of account is as unimportant as the applicants claim. It goes without saying that material errors are always subject to amendment; to describe a discount as only provisional implies that it is subject to further adjustments going beyond mere material amendments, for example adjustments arising from the fact that the initial calculation took account of factors which ought to have been ignored. Of course, the provisional nature of the statements of account obviously does not constitute authority for alterations in the principles themselves, but the decisions concerning repayment which are complained of entail no alteration in the principles which the High Authority claims to have previously accepted.

(ii) The defendant contests, as regards the effect in law of errors which it holds to be open to amendment, in particular those concerning the applicants in Joined Cases 2 and 3/61, that the fact that it included the transport parity refund in the applicants' first statement of account and subsequently in certain fresh amended statements, can be interpreted as meaning that it thereby decided to accept the actual principle of reimbursement and to confirm the agreements and undertakings entered into earlier by the OCCF; in its view, it only intended to take an implementing

decision into which there crept an error.

To maintain the contrary would be to accept that the High Authority consciously acted in conflict with its own general decisions and deliberately agreed to discrimination between the undertakings in the Community which is expressly prohibited under the Treaty.

The High Authority merely made a mistake which it had a duty to correct and which the provisional nature of statements of account in any case enabled it to make good.

Application for damages in respect of a wrongful act or omission

1. The *applicants* claim that the defendant has been guilty of a wrongful act or omission in that it failed to make its new viewpoint known in good time and thus allowed undertakings to enter into undertakings which they would have refrained from entering into if they had been properly informed.

In their view, it was for the High Authority, as soon as it took over the management of the equalization scheme itself on 24 July 1958 to announce without delay that it intended to put an end to the practice of refunding the transport parity which had been followed constantly since 1954. By failing to do so and in waiting nearly two years to define its position *expressis verbis* after having itself carried out the OCCF's undertakings to the applicants in Joined Cases 2 and 3/61, the High Authority was guilty of a wrongful act or omission giving rise to liability on its part. It should, therefore, be ordered to compensate the applicants for the damage suffered, which they assess as the amounts which they could have claimed as additional transport charges.

The *defendant* replies that repayments of transport charges merely constituted mistakes confined to certain undertakings in the Community and in no respect a regular and widespread practice based on a principle which it accepted and which it decided to abandon at some time. Accordingly, its refusal to allow for the transport parity in no way amounted to a change of mind on its part, of which it should have informed those concerned, but was the application of the legal rules which it had laid down: it denies having been guilty of a wrongful act or omission by failing to inform the undertakings of the alleged abandonment of a practice which was neither consistent with the Treaty nor widespread.

In any case, the applicants cannot complain of lack of information without revealing the negligence of which they themselves were guilty when, particularly after publication of Decision No 13/58, they relied on promises which were made to them in the circumstances which they describe; after publication of that decision, they could not have been unaware that the executive bodies with whom they were dealing had no power whatever to take decisions of principle such as that in question. A wrongful act or omission on the part of the alleged victims exempts the defendant from liability.

2. Another wrongful act or omission on the part of the High Authority is, in the *applicants'* view, the way, which the defendant itself describes as improper, in which the equalization scheme for which it is responsible functioned. The OCCF always functioned under the control of the High Authority and not under that of the undertakings; it was therefore the duty of the High Authority and of it alone to examine the measures adopted by the OCCF.

If, as the defendant maintains, the OCCF's agreements were manifestly irregular, the High Authority is gravely at fault for having, in two of the present cases, itself given effect to provisions which were so clearly unlawful under the signature of one of its Directors-General.

The applicants add that, according to the defendant's submission, the agreements of the OCCF, on the basis of which the applicants committed themselves, are null and void since they were made by unauthorized agents who acted without the consent of the High Authority. The OCCF has accordingly been guilty of a wrongful act or omission in

not consulting the High Authority in advance. It is responsible for the working of the OCCF and any wrongful act or omission on the part of that body constitutes a wrongful act or omission on the part of the High Authority.

The *defendant* replies that, although it is true that Decision No 14/55 of 26 March 1955 entrusted the OCCF and the Fund 'under the responsibility of the High Authority' with the operation of the financial machinery, this provision must not be interpreted as establishing a system of automatic and absolute substitution of responsibility but only as placing the said bodies under the supervison of the High Authority and making the latter responsible for the proper functioning of that supervision.

What may, therefore, be required of the High Authority is normal diligence in the exercise of its supervision; it is possible to seek to establish its liability only in so far as this supervision is seen to have been lacking. To appraise these alleged deficiencies *in concreto* regard must be had to the difficulties which may arise from the technicality of the working of an equalization scheme and to the periods of time which are inevitably required to correct the irregularities or mistakes which may have been committed.

In the light of these observations, the defendant contends that no serious negligence on its part can be established.

3. In its rejoinder, the *defendant* points out that the estimate made by the applicants of their damage appears to be erroneous and to be the result of confusion between the question of *ultra vires* acts and that of liability for a wrongful act or omission.

Since the undertakings on which the applicants rely are invalid, there is, accordingly, no legal basis for payment of the amounts relating to those commitments.

The alleged damage must therefore be assessed 'directly, as it actually was'. The damage to which the applicants refer arises from the fact that they were dissuaded from making purchases of imported scrap which would have been more profitable for them. The criterion of the 'Dunkirk parity', which is the only one to which they refer, is arbitrary.

IV – Procedure

The applications were lodged in due form and within the prescribed period; the procedure, including the joinder of the cases, followed the normal course.

Grounds of judgment

I – The applications for annulment

Admissibility

Consideration must first be given to the admissibility of the applications. This question arises in a different form in Cases 19 and 21/60 on the one hand and in Cases 2 and 3/61 on the other.

1. *Cases 19 and 21/60*

These applications are against an implied decision of refusal by the High Authority of requests for the payment of certain sums as transport parity. Their admissibility

is therefore subject to the conditions laid down by Article 35 of the Treaty for the institution of an action for failure to act.

The admissibility of such an action is subject in the first place to a finding that the High Authority had, under a provision of the Treaty or rules laid down for the implementation thereof, a duty to take a decision or make a recommendation.

It is established in this case that neither any provision of the Treaty nor any decision of general or individual application which would constitute a rule laid down for the implementation thereof provided for or governed any allowance whatever as transport parity. None of the decisions adopted by the High Authority under Article 53 of the Treaty, the legal basis for the institution and the working of the equalization scheme, contains or lays down specific rules on this subject. Without its being necessary to examine whether these decisions formally preclude the practice regularly followed in respect and to the advantage of the applicants, they could not in any case, in the absence of a general foundation in law, constitute rules laid down for the implementation of the Treaty which could create for the High Authority a duty to act in a particular manner. Since the High Authority was under no duty to act, the conditions laid down in the first paragraph of Article 35 are therefore not satisfied.

Furthermore, since there was no submission alleging misuse of powers, it is not necessary to enquire whether it was open to the High Authority to take action within the meaning of the second paragraph of Article 35.

Since, in these circumstances, the conditions of Article 35 of the Treaty have not been fulfilled, the action brought by the applicants must be declared inadmissible.

2. *Joined Cases 2 and 3/61*

The defendant contends that, in the absence of details, the wording of the applications does not make it possible to identify the substance and effect of the complaints of *ultra vires* acts and of 'infringement of the rules of law relating to the application of the Treaty' which may entail the annulment of the contested decisions. Thus both the mandatory rules laid down in Article 22 of the Protocol on the Statute of the Court of Justice of the ECSC and those laid down in Article 38 of the Rules of Procedure, which provide that the applications originating the proceedings shall contain a 'brief statement of the grounds on which the application is based' have been infringed.

It is not clear from a study of the submissions of the High Authority whether it intended to challenge the applications in Joined Cases 2 and 3/61 from the viewpoint of procedural requirements as well as those in Joined Cases 19 and 20/60. Nevertheless, the Court must of its own motion consider this question since the provisions governing the form of applications affect not only the interests of the parties but also the right of the Court to exercise its power of judicial review.

With regard to the wording of the applications, although it must be accepted that the statement of the grounds for instituting the proceedings need not conform with the phraseology or the list in the first paragraph of Article 33, it may be sufficient for the grounds for instituting the proceedings to be expressed in terms of their substance rather than of their legal classification provided, however, that it is sufficiently clear from the application which of the grounds referred to in the Treaty is being invoked. A mere abstract statement of the grounds in the application does not alone satisfy the requirements of the Protocol on the Statute of the Court of Justice or the Rules of Procedure. The words 'brief statement of the grounds' used in those instruments mean that the application must specify the nature of the grounds on which the application is based. The ground of complaint relied upon must therefore be established in relation to the facts which have been set out. This has not, however, been done in the present case.

The applicants have, in fact, confined themselves to accusing the High Authority of acting *ultra vires* and infringing the rules of law governing the application of the Treaty without specifying what constituted the *ultra vires* acts, which is a general expression capable of covering all cases in which an application for annulment is lodged as provided for in Article 33, and, moreover, without identifying the rule of law the infringment of which by the High Authority is such as to justify lodging an application.

Reference to an undertaking given to the applicants and to an assurance given to them by the OCCF or the UCFF when contracts relating to scrap were entered into does not disclose a general and impersonal rule of law the infringement of which can by itself initiate proceedings for annulment. Only in their reply do the applicants specify 'the rule of law' alleged to have been infringed as the general principle governing the legality of the revocation of administrative measures, a principle 'which comes within the rules of law relating to the application of the ECSC Treaty'.

The ground for annulment set out in these terms was referred to neither directly nor by implication in the applications originating the proceedings. It does not constitute the amplification of a submission set out therein but an entirely new submission. The submission was accordingly, made out of time and, for that reason, the applications must be declared inadmissible.

II – Applications for damages

A – Admissibility

The four applicants seek pecuniary compensation from the High Authority for the damage which they claim was caused them by a wrongful act or omission on the part of the Authority in the performance of its functions.

This wrongful act or omission is alleged to take three forms. In the first place, the High Authority failed to make known in good time its new view on transport parity and thus allowed the undertakings to enter into commitments which they would have refrained from entering into if they had been properly informed. Secondly, it failed to prevent, by adequate supervision, the bodies operating under its control or under its direction from taking unlawful action and entering into illegal commitments. Finally, it is accordingly liable for the unlawful and defective working of the equalization scheme.

In consequence, the applications for compensation are not based on the submission that the High Authority illegally withdrew from them rights and privileges which had been granted to them by the OCCF. Those applications are based on grounds which are independent of those of the applications for annulment. They are, consequently, admissible.

B – Substance

1. *Wrongful act or omission on the part of the High Authority*

The defendant claims that the applicants wrongly accused it of having, in 1958, changed its mind with regard to transport parity. On the contrary, it always considered that this parity could not form part of the equalization price, and in support of this claim the High Authority relies principally on Decision No 34/56. It further contends that, although the question of refunding the transport parity was raised at the OCCF, it was never the subject of a decision of principal. However, there appears to be no need to go into these arguments. Even if they were substantiated they would not alter the fact, admitted by the High Authority, that promises to refund transport costs were on various occasions made and carried out.

These promises were made possible only because the High Authority failed to exercise sufficient control over the working of the equalization scheme, with the result, as is, moreover, clear from its own statements, that it was unaware of the existence of practices which were incompatible with its policy on transport parity.

The High Authority contends in vain that it could be unaware of the existence and extent of the transport parity by seeking to minimize its effect and reduce it to 'errors confined to certain undertakings in one of the countries of the Community'. In fact the size of the payments made as transport parity to French undertakings ($349 021), Italian undertakings ($160 000) and Netherlands undertakings ($13 000), which is a total of more than $500 000, was certainly such as to attract its attention if it exercised sufficient supervision, especially since it had a permanent representative on the boards of management of the Brussels organizations. In any case, the very fact of having authorized the equalization scheme, in whatever form,

obliged the High Authority to supervise it, which in fact was the principle laid down by Article 1 of Decision Nos 22/54 and 14/55 setting up the said scheme. The High Authority's failure to exercise adequate supervision is further aggravated as regards the present disputes. In these cases the assurances with regard to the transport parities were in fact given to the applicants at a time when the High Authority no longer limited its activities to mere supervision of the equalization scheme but had, by Decision No 13/58, taken over the administration of it. Alerted by previous difficulties, it ought to have intensified its surveillance of the organizations which continued to act *de facto* on its behalf. Whatever the reasons for this failure, in not preventing them from continuing their previous practices and, in particular, from making promises in October 1958 to the four applicant companies, with regard to the grant of the transport parity, whatever were the reasons for this omission, it gravely neglected the duties of supervision required by a normal standard of care, and it is this shortcoming which gives rise to its liability.

The defendant continues to maintain that the lack of supervision cannot have affected the applicants adversely since the latter must have been aware of the illegality of the measures adopted in their favour and also of the lack of authority of the organizations which had adopted them.

This submission cannot be accepted. The fact that, by Decision No 13/58, the Fund had been entrusted with the application of the financial machinery and that, at the time, similar promises had been repeatedly made and fulfilled in the case of a large number of undertakings in the Community might lead the applicants to believe that the promises made to them were legal and reflected the intentions of the High Authority. It is impossible to argue against this that neither the nature of the equalization scheme nor the principles of the Treaty permitted the equalization rules to be applied in this manner. In fact, whatever the merits of such an argument, it is not in dispute that the practice of transport parity was forbidden in clear and formal terms only by Decision No 18/60. It is understandable that, not having made a detailed study of the legal issues likely to be involved in this connexion, the applicants regarded that practice as a normal application of those regulations.

2. *The applicants' damage*

The applicants assess the damage for which they are seeking compensation as the amounts of transport parity which were promised or paid to them. This assessment is unacceptable. The wrongful act giving rise to the liability of the High Authority is not caused by the fact that it did not pay that parity but by the lack of adequate supervision of the organizations responsible for applying equalization. It is from this view, therefore, that the existence and amount of damage must be assessed.
The existence of damage can be accepted only if it is established that the purchase of shipyard scrap without the benefit of the transport parity grant was more expen-

sive for the applicants than an outright purchase of imported ferrous scrap. The applicants have neither submitted nor offered evidence on this point and their applications cannot therefore be upheld.

Costs

The applicant parties, having failed in their submissions, must, under the terms of Article 69 of the Rules of procedure of the Court of Justice of the European Communities, be ordered to pay the costs.

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 Articles 35, 40 and 53 of the Treaty establishing the European Coal and Steel Community;
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 applications;**

2. **Orders the applicants to pay the costs.**

Donner Rueff

Delvaux Hammes Rossi

Delivered in open court in Luxembourg on 15 December 1961.

A. Van Houtte
Registrar

A. M. Donner
President