OPINION OF MR ADVOCATE-GENERAL ROEMER 24 NOVEMBER 1959[1]

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1 — Translated from the German.

Mr President,
Members of the Court,

I – Preliminary remarks

(1) Subject of the action

In the long series of ferrous scrap cases which have been brought before the Court, it falls to me today to present a opinion on certain cases which turn on points having no precedent among the cases previously decided. These latter cases concerned the question of the obligation of equalization, the extent thereof or the possibility of an exemption for consumers, whereas the subject of today's action is the corollary of that obligation, that is to say, the right to obtain equalization.

As you know, in a series of decisions, eleven in all, the High Authority invited certain German undertakings which were scrap consumers to pay back certain equalization amounts which were allegedly wrongly paid to them. The undertakings concerned brought the actions against this order for payment and they seek the annulment of the decisions; I shall make some remarks on the fact of there being eleven decisions and ten actions.

Putting aside three cases in which a passage is devoted to pleading a set-off, the arguments in them and the replies of the High Authority agree word for word. The difference in the facts relate to the quantities of scrap and to the sums of money in question, but this has not the least effect on the legal assessment.

I shall therefore proceed in principle as if I had to present an opinion in one case only.

On the questions of procedure, the right of the undertakings to institute proceedings, evidence of the validity of their representation by agents and legal representatives and limitation periods for bringing the action, I have no objection to make.

(2) Procedural peculiarities in Case 4/59

Some special remarks should be made on Case 4/59. It is characterized by the fact that the action was brought by Mannesmann AG, but that it is directed against two decisions by the High Authority addressed to Mannesmann Hüttenwerke AG and to Hahnsche Werke AG.

According to the extracts which have been produced, the following statement appears in the commercial register of the Amtsgericht of Duisburg dated 15 December 1958 regarding Hahnsche Werke AG and Mannesmann Hüttenwerke AG:

'The above companies have been reconstructed by transfer of their assets to the principal shareholder Mannesmann AG.'

The German Law of 12 November 1956, [1] on the reconstruction of joint stock companies and mining associations, and in particular paragraphs (1), (3), (5), (6), (8) and (15) thereof, enable an assessment to be made of the legal situation arising from these changes.

The following factors may be deduced therefrom:

If the assets of a joint stock company are transferred *without the company being wound up,* the distinction between going into liquidation and total extinction which exists in the case of winding-up does not obtain. Total extinction follows liquidation and its effect is to put an end to the company as a legal entity.

With the registration of the reconstruction decision, the *joint stock company is liquidated and its company name is extinguished.* From that moment its liabilities are transferred to its assign. From that moment it ceases to exist as a legal entity.

Thus when the decisions of the High Authority were communicated, on 12 January 1959, the companies to which they were addressed were liquidated, their company names extinguished and their liabilities passed into the hands of Mannesmann AG.

This leads to the question whether Mannesmann AG can contest the decisions of the

[1] BGBl. I, p. 844

High Authority or whether it is without a legal interest sufficient for it to bring an action against decisions which were not addressed to it and which could not be enforced because the issue of an enforcement order against assigns is incompatible with the provisions of Article 92 of the Treaty.

Neither the High Authority nor the applicant has raised any objections on this point. Does this mean that the applicant accepts the raising of this claim against it as regards its form and therefore does not intend to make an objection, on the grounds of form, to the fact that these decisions were addressed to its predecessors in title, but that it demands the substantive examination of the the legality of the claim, because, at all events, it would have to take a definite position on this question if and when the High Authority changed the name of the company to which the decision was addressed? The course which the proceedings have followed allows one to think so.

In the light of this situation, it would be an indefensible insistence on a formal point to declare this action inadmissible: it would lead to the High Authority's taking a fresh decision rectifying the name of the company to which it was addressed and a fresh action for annulment would have to be brought against it. Thus, it is my opinion that the defect which I have just examined does not constitute an impediment to the applicant's action.

(3) Conclusions of the parties and nature of the submissions

After these preliminary remarks I can now devote myself to the issues of fact and of law in the action.

You will remember the conclusions of the parties.

The submissions and the different arguments put forward to support them or against them have been set out in such detail in the report that I can dispense with repeating them.

Let me simply point out the broad outline. I shall have to examine:

(a) Whether the High Authority was competent to issue demands for payment according to Article 92 of the Treaty, that is to say, in a legally enforceable form;

(b) Whether, from a formal point of view, the decisions of the High Authority give a sufficent statement of the reasons on which they are based;

(c) Whether, by taking these decisions, the High Authority infringed the Treaty or any of the general legal principles which complete it.

I do not wish to repeat here the contents of the contested decisions and I refer on this matter to the schedules to the applications.

In view of the concepts used in the decisions it seems appropriate to me to begin by making some remarks on the functioning of the ferrous scrap equalization scheme, on the tasks of the participants in this system, on the complementary measures by the Member States and on the conclusion and performance of contracts for the purchase of scrap.

(4) Structure and functions of the ferrous scrap equalization scheme

Since you know the different general decisions of the High Authority, I can limit myself to a few important remarks.

In the beginning, the High Authority did not undertake itself to carry out the equalization of ferrous scrap, but entrusted this task to a separate equalization scheme which was compulsory, although under its responsibility. This is the Office Commun des Consommateurs de Ferraille (Joint Bureau of Ferrous Scrap Consumers) (OCCF) and the Caisse de Péréquation des Ferrailles Importées (Imported Ferrous Scrap Equalization Fund) (CPFI), both legal entities incorporated under Belgian commercial law, established in 1953 by twenty-two steel producers of the Community countries, who run the equalization scheme (let me

specify: this is in the singular), as is stated in the decisions.[1]

Within the equalization scheme, the functions are shared between the Fund and the Joint Bureau. Among other public law tasks which are known to you, the Fund, acting on a proposal by the Joint Bureau, is competent to take decisions on the quantities of scrap accepted for equalization and on the conditions for equalization, which may include the condition of using imported scrap in certain Community territories. It also fixes the maximum import price and the equalization price.

Besides the right of making proposals mentioned above, the Joint Bureau, after obtaining the approval of the Fund, is competent to negotiate purchases for the joint account or to conclude contracts of purchase 'for the account' of consignes to be named subsequently (such is the French text of Article 5 of Decision No 14/55; the German text of Decision No 14/55 uses the expression 'als Treuhänder' and Decision No 2/57 'für Rechnung').

The undertakings are under a duty to pay the sums necessary to make up the funds intended for the purchase of scrap in third countries for the account of consignees to be named subsequently.

To complete the picture of the internal structure of the equalization scheme, it is also necessary to mention the following system of regulation which arises from the decisions of the High Authority.

If the Boards of Directors of the Joint Bureau or of the Fund reach a unanimous decision or if both boards jointly have competence in the same decision, that decision is replaced by a decision of the High Authority. The High Authority's observer, who has the right to take part in all meetings of the Boards of Directors devoted to deliberations and decisions, may intervene in the shaping of decisons by reserving the right for the High Authority to take a definitive decision or by making the decisions of the Boards of Directors subject to the approval of the High Authority.

The High Authority has the right to require a meeting of the Boards of Directors of the Joint Bureau and of the Fund to be called and, if a meeting is not fixed within ten days, it may decide the matter in question itself.

These provisions enable the conclusion to be drawn that within the equalization scheme no complete, precise and logical separation has been made between the public law powers of equalization and the private law operations outside in the field of joint purchases. On the contrary, it must be noted that there is a reciprocal interpenetration of functions, for instance when the Joint Bureau has the right to make proposals for a public law decision or else, conversely, when the Fund has to give its agreement to negotiations on purchases. Any attempt to conceive of an organization for joint purchases by the Joint Bureau under a purely private law form comes up in particular against the fact that the undertakings are under a duty to contribute to the provision of the Funds necessary for this purpose, as well as against the power of the Fund to establish priorities for the utilization of imported scrap. This impression is strengthened if one considers that the High Authority could in certain cases assume the powers of these two bodies. Subsequently, that is to say, after the period which we are examining here, the powers of the equalization agencies were generally speaking transferred back to the High Authority. Moreover, at the national level, the two agencies have only one auxiliary per country, the Regional Office (in Germany, the Deutsche Schrottverbraucher-Gemeinschaft GmbH in Düsseldorf, DSVG for short), which they used to carry out their tasks, in particular in their commercial and administrative activities which are here in question.

It can thus be observed that, taking into account the sharing of powers between the Fund and the Joint Bureau and the mutual links between the powers of the two asso-

1 — 22/54, 14/55 and 2/57.

ciations, neither of them could function on its own, but that when purchases, equalization and external purchasing operations were carried out, the performance of the internal tasks was subject to joint collaboration.

(5) Governmental measures in external trade in scrap

A fresh element—and an important one—which has not hitherto been mentioned before the Court appears in this procedure: it is the influence exerted by the Member States on the market in scrap.

But for this collaboration, the equalization scheme would not have been without drawbacks, or able to function. It is not enough to compensate for the differences in price between Community scrap and imported scrap, it is also necessary to prevent internal Community scrap being exported at the world market price, which is higher, and even from coming back into the Common Market in the guise of imported scrap. In 1953[1], the governments of the Member States having authority over these questions of external trade agreed to maintain in force or to introduce into their respective national regulations a general prohibition on the export of scrap. In 1954[2], they decided to provide exceptions to this prohibition for ship-breaking scrap, in the event that such scrap would not be bought for the Community by the Joint Bureau, to which it had to be offered.

These regulations coming under the national public law of the Member States extend the effectiveness of scrap equalization, established by the High Authority on the basis of Community law, to legal and administrative fields which are outside the jurisdiction of the High Authority.[3]

(6) Conclusion and performance of contracts for the purchase of scrap

The different contracts of purchase are concluded and executed, and the payment of the equalization benefits in relation to the scrap in question takes place, within the framework of this organization.

The deliveries of scrap which gave rise to the equalization payments and the demands for repayment were made under six general agreements which the Joint Bureau had concluded with Hansa, an undertaking dealing in scrap, between 31 August 1956 and 8 July 1957 for the account of undertakings to be named subsequently. They contain particulars of weight and provenance (Iceland, England and other countries outside the Community) and they refer expressly to the general clauses of the contracts of the Joint Bureau, which provide that the regional offices are entitled to name the undertakings to which the goods are to be consigned. The other clauses of the contract do not concern us in this connexion. I must merely bring Clause 4 to your attention:

'The vendor shall provide indisputable documentary evidence that the materials originate in the countries indicated in the letter of purchase.

...

For shipbreaking scrap within the Community, a list shall be sent to the OCCF with the names of the ships, including the weight and the tonnage. Furthermore, the customs declarations on entry and the contracts of sale of the ships must be produced, as well as a certificate from the administrative authority under the supervision of which the breaking took place ...

For the batches of scrap arising from these sources or from similar sources, the CPFI or its representatives shall have a right of inspection over the breaking-up of the scrap.

...

For other materials in Community territory which do not come under the provisions of the High Authority, declarations by the government agencies or other administrative authorities responsible therefor should

1 — Meeting of the Council of Ministers of 6 March 1953.
2 — Meeting of the Council of Ministers of 27 and 28 July 1954.
3 — See Articles 57 and 70 of the ECSC Treaty.

be supplied certifying that those materials or the scrap arising from them have qualified for export to third countries, the OCCF having declined to purchase . . .

During the following months Hansa made different deliveries to scrap-consuming undertakings in performance of these general agreements. For a part of these deliveries, the certificates irregularly issued by the Netherlands Ministry were supplied by a Netherlands seller of scrap to Hansa and by Hansa to the DSVG. The deliveries to the consumers were in each case preceded by allocation notices from the DSVG to those undertakings to which the goods were consigned stating *inter alia* the quantity and the provenance of the scrap. After receiving the scrap, the undertakings sent notices of receipt to Hansa and scrap accounts to the DSVG. The DSVG also received the invoices from Hansa. From time to time the DSVG grouped these scrap accounts together in the form of a statement ('Belastungsaufgabe') directed to the scrap consumers. These statements showed not the import price but the Community price, as did the individual letters of the DSVG stating the total debt of the undertakings for the deliveries of scrap. The following words appeared in them:

'By virtue of the scrap accounts which are sent to us, we debit you, subject to examination and establishment of definitive accounts by Brussels, with the sum of . . . DM.'

Some time after these letters were sent, the DSVG gave notice to the undertakings to which the goods were consigned to discharge their debts for their deliveries of scrap by credit transfer to the account of a scrap supplier named by the DSVG, who was not necessarily the one who had supplied undertakings. Similarly the DSVG potentially also had at its disposal the levy credits of the Fund. The undertakings proceeded with the transfers requested, as a general rule not without specifying on the transfer form that the transfer was being made on the order of the DSVG. This system of payment enabled the scrap suppliers to receive the sale price in full, including the part which the DSVG had not put down to the accounts of the undertakings in the total scrap accounts because it was to be covered by the equalization payments. The Fund and the DSVG did not draw up any special notices of payment of the equalization benefits, or any credit notes in respect of each delivery of scrap and of each undertaking. The Fund only sent to the DSVG each month a statement of the amount of levy for each factory, the total amount of the levy, a list of the sums available to the DSVG after the balance of the assets and liabilities of the undertakings had been drawn up, a notice to pay the equalization to the undertakings in credit and, where necessary, the order to transfer a given amount to the regional office of another Member State.

When it subsequently became apparent that the certificates of the Netherlands Ministry for Economic Affairs had been improperly drawn up, the High Authority, by a letter of 27 November 1958, demanded the equalization amounts used by the DSVG from the undertakings alleged to have received the scrap at issue. After the refusal of the undertakings concerned, the High Authority took the individual decisions the legal validity of which, both as to form and substance, is now at issue before you.

To come now to the legal examination, the first question to be asked is the following:

II – Was the High Authority formally entitled to take such decisions according to Article 92 of the Treaty?

(1) Legal basis of the decisions

According to Article 92:

'Decisions of the High Authority which impose a pecuniary obligation shall be enforceable.'

Thus Article 92 is not a rule which gives a special power to the High Authority, but confers a particular legal nature on certain of its decisions for which entitlement must be sought elsewhere. Therefore, was the

High Authority entitled, in this case, to establish a pecuniary obligation in the form of a decision taken under other rules of the Treaty?

In the submission of the applicants, the *Treaty* enumerates these cases *exclusively:* levies, penalty payments and fines.

But the scope of this argument is reduced *a priori* by a second argument, for the applicants concede that if Article 53 of the Treaty empowers the High Authority to make financial arrangements, that includes the power to impose pecuniary obligations on undertakings, provided, however, that in the decisions making the arrangement the High Authority must make express mention of the cases in which it intends to take decisions of that nature.

In fact, Article 53 (b) constitutes a valid rule of entitlement to take decisions imposing pecuniary obligations on undertakings; this is what the Court correctly stated in its judgment in Case 8/57.[1] It is stated therein:

'It can be considered that the financial arrangements referred to in Article 53 are arrangements based on transfers of funds, in particular the nature of equalization or set-off.'

It goes without saying that these obligations, imposed within the framework of a compulsory financial arrangement, are of a public law nature. As opposed to a voluntary equalization arrangement, here the undertakings are included in the equalization by a decision of the High Authority and are obliged to take part in controlled economic measures by an order of the High Authority. This observation applies as much to the obligation to pay in contributions as to the right to receive equalization benefits from the Fund.

Thus only one question remains: does the argument to the effect that, when the High Authority makes a financial arrangement, it must clearly declare the cases in which it intends to take decisions imposing pecuniary obligations also apply in the case of a repayment of equalization amounts wrongly paid?

Decisions Nos 14/55 and 2/57 do not make express mention of this obligation. Article 8 (II) of Decision No 23/58 of 30 October 1958[2] is the first such provision. But the contested decisions are not based upon this provision; they are patently based on general legal principles.

It could be feared that this legal basis is insufficient, because of the strictness with which legal writers generally, and correctly, examine whether the High Authority and the other institutions remain within the limits of a precisely defined authority. I would refer here to Articles 3, 8 and 14 of the Treaty.

On the other hand, in case 8/55 *Fédération Charbonnière de Belgique* v *High Authority)*, the Court, in my opinion correctly, broke away from an excessively strict method of interpretation by stating that:[3]

'The rules established by an international treaty or by a law imply the existence of the rules without which the former would be meaningless or incapable of reasonable and useful application.'

In my opinion, if, applying this argument, the general principles of law are called upon in this case to provide the grounds for an obligation to repay, should it arise, that does not contravene the basic structure of the Treaty, according to which a precise entitlement is necessary for any creation or amendment of law which the institutions may undertake in the form of a decision.

The obligation to repay equalization payments improperly received is nothing other than the indispensable corollary of the rights to receive equalization, and without it the equalization scheme would not be

1 — Recueil Vol. IV, p. 241.
2 — Journal Officiel, p. 431.
3 — Recueil, Vol. II, p. 305.

faultless or completely workable. It must not be forgotten either that there is a significant difference between the imposition of an obligation *to pay,* for which undertakings may rightly require an express entitlement, and the existence of a right to *repayment,* without which there would be an unjustified enrichment for the undertakings.

My view is confirmed by the fact that the Council of Ministers approved Decision No 23/58 of 30 October 1958 which makes express mention of the obligation to repay equalization amounts wrongly paid.

On this point, therefore, I come to the conclusion that, within the framework of an equalization scheme, an express entitlement is not indispensable in order to assert rights to repayments and that it suffices to refer to general legal principles according to which these rights to repayment *can* subsist. Since a right to repayment is of the same nature as a right to receive equalization on which it is founded, and since, therefore, it comes under Community public law, I have no objection to acknowledging, for the reasons given above, the legality of a repayment obligation expressed in the form of a decision taken according to Article 92.

However not all the questions raised by this problem have yet been dealt with.

(2) Power to decide on preliminary questions of private law

The applicants also consider as unlawful the fact of the High Authority's ordering the repayment of the equalization payments in an administrative decision, because the rights of the High Authority stated in the decisions taken according to Article 92 are based on private law considerations. They submit that the High Authority has no right to assess private law relations and infer rights therefrom, and on that basis it cannot settle its relations with the applicants unilaterally and without appeal. In other words, the High Authority cannot create public law rights for itself out of private law relations and on private law grounds. The defendant's arguments of fact and of law patently show that the High Authortiy *intended* to decide and did decide private law questions.

Thus in the first place the question arises whether the applicants received a benefit in the form of equalization amounts, although the Fund, or the DSVG on its order, did not make any direct payments to the undertakings. The High Authority alleges that by proceeding with the payments to the scrap suppliers it freed the applicants from private law obligations. In this way it states that obligations of that nature did exist.

The other conditions of the right undoubtedly come under public law, in particular the questions whether the scrap delivered could qualify for equalization, whether the revocation of an administrative measure giving rise to subjective rights ('begünstigender Verwaltungsakt'), namely the payment, is possible in principle and whether the structure of the equalization scheme called for an individual allocation of the contributions or the general reduction of the price of the imported scrap.

National authorities also have to deal fairly frequently with situations in which elements of public and private law are interdependent.

In this connexion, I see in French legal writing that the Conseil d'État has alway refused to entertain actions for annulment against decisions by administrative authorities when the questions submitted to it came essentially under private law.[1] But one may doubt in principle whether this practice by a national court, alongside which other courts exist, in particular civil courts, can be imitated in the field of the Community.

The most important question is whether, in the present case, the private law elements constitute the main part of the action. I do not think so. In my opinion the interdependence of public and private law in this case in no way confers upon it the nature of a predominantly private law dispute. The decisions of the High Authority derive from Community public law and it is essential

1 – Waline, 'Droit administratif', 7th edition, pp. 446 and 467.

that they be examined from the point of view of this public law. On the other hand, the private law elements in this case come within a framework in which preliminary and subsidiary private law questions may occur in a public law action.

In German administrative practice and case-law, it is undisputed that these preliminary private law questions can be decided as incidental matters in administrative proceedings. I refer here to the study on this point by Forsthoff, 'Lehrbuch des Verwaltungsrechts', p. 105 *et seq.*[1]

This solution has to be adopted when the administrative procedure does not provide any opportunity to adjourn and instruct one of the parties to obtain a civil court ruling on the private law questions. No such opportunity is provided for in the Treaty. It would be equally futile to refer the High Authority to the national courts for a settlement of the legal situations prevailing between the applicant undertakings and itself. The civil courts ought, in my opinion, to declare that they lack jurisdiction because the law relied upon is, by its nature, public law; it is also not possible to recognize an administrative law jurisdiction in national law.

Similarly, the question whether an obligation is more or less contentious and whether its legal basis is more or less complicated cannot provide any criterion to decide on the legality of a decision taken according to Article 92. Even for obligations arising simply, or apparently so, and directly from the Treaty, there can arise analogous preliminary questions and similar difficulties on points of fact and of law, but the High Authority's jurisdiction to take a decision cannot be disputed because of it.

(3) Have the applicants' opportunities for protection before the courts been improperly limited by the adoption of the decisions?

Finally, the applicants cannot claim that their legal protection is reduced because the High Authority constrained them by an individual decision to act as applicant in a case. In his dealings with the authorities, any person subject to the law may be constrained to institute proceedings if he wishes to contest the provisions of the administrative authority.

In particular, the applicants cannot rely upon the fact that in the present case the legal protection which they enjoy is less than that of the scrap suppliers and that they are thus the victims of discrimination and of abuse of procedure.

All the undertakings which come under the authority of the Community and which are obliged to obey the orders issued by the High Authority are on an equal footing as regards their protection before the courts. They cannot compare their situation with that of undertakings which are outside that legal field. But in relation to the equalization of scrap, the compulsory equalization scheme affected only the undertakings which come within the administrative area of the High Authority, that is to say, excluding the scrap suppliers. The latter could not be persons having either rights or duties under the equalization scheme. Therefore in relation to the system of legal relations between the High Authority and these undertakings, the High Authority's power to give directions, and legal protection before this Court, are not at issue. Any comparison between the opportunities for legal protection granted on the one hand to the applicants, who are undertakings within the Treaty, and on the other to the scrap dealers, who are outside the Treaty, is excluded by the substantive rules of the Treaty.

Thus, on the first main point of my examination I come to the *conclusion* that the High Authority's decisions cannot be annulled on the ground that they were taken in the form of Article 92.

III — Do the decisions of the High Authority give a sufficient statement of the reasons on which they are based?

However, this result does not bring the examination of formal problems to an end. It

1 — See also: v. Rosen v. Hoewel, 'Kommentar zum Verwaltungsvollstreckungsgesetz', 1953, Note II, under paragraph 2.

must now be examined whether the decisions fulfil the requirements of Article 15 of the Treaty, that is to say, whether they give a sufficient statement of the reasons on which they are based.

The applicants criticize the following in particular:

(a) The decisions do not explain how it is possible to treat the payments to third parties as a payment made to the applicants;

(b) The High Authority has not explained whence it infers that it was partly scrap which did not qualify for equalization which was delivered and that this scrap reached the applicants;

(c) The decisions say nothing about the concept of 'exchange scrap';

(d) The decisions give a distorted picture of the true state of affairs when they speak of 'shipyard scrap'. The contracts and the allocation notices do not have recourse to this nomenclature.

The statement of the reasons on which the contested decisions were based contains the following statements on the essential points.

In 1956 and 1957 the applicants purchased scrap from Hansa within the framework of certain general agreements for the purchase of scrap from third countries, which had been concluded between the Joint Bureau and Hansa. Part of the goods supplied, purportedly coming from shipbreaking, did not contain any scrap from third countries or any shipbreaking scrap treated as such. The applicants received certain quantities out of these deliveries, which quantities were falsely described as shipbreaking scrap, and the applicants received provisional equalization payments on those deliveries. As there was no right to equalization, the applicants must repay those sums. In accordance with Article 53 (b) the High Authority is entitled to take decisions containing an order to make a repayment, for the undertakings failed to act upon a previous invitation by the High Authority.

This statement of the reasons on which the decisions were based does not give the same idea of the factual events and the legal inferences as is given by the oral and written statement of the High Authority.

Thus, it is clear that payment of the equalization benefits was not made directly to the applicants, but to the scrap suppliers. Furthermore, this was not by a payment from the Fund, but by payments which the DSVG made or ordered the undertakings to make. Neither the contested decisions nor the exposition by the parties during the trial, nor the business papers which the Court asked to have produced and did have produced, nor the answers of the parties to the questions asked by the Court at the hearing give a complete explanation of the process of payment.

In order definitively to clarify the legal situation, it would have been necessary to say how it was possible to treat the payment to the scrap suppliers as being a payment to the applicants. (What was the legal justification of the payment made to the scrap suppliers? Of what obligations were the applicants relieved?)

The decisions do not indicate in detail why the scrap which received equalization of prices was not in reality capable of qualifying for it. Here the decisions omit to furnish explanations on essential questions regarding the actual cases. It was all the more necessary to explain the nature of the Netherlands certificates and to set out the legal consequences to be drawn from the defects which vitiated them, since neither the High Authority's proposals, nor the corresponding inter-governmental agreements of 6 March 1953 and of 27 and 28 July 1954 on exporting scrap from the Community were published.

The decisions should also have dealt with the concept of 'exchange scrap' (which appears in two general agreements), as the general decisions of the High Authority omit any definition of it or commentary on it. They speak (Decision No 22/54, Article 2; Decision No 14/55, Article 2 (a); Decision No 2/57, Article 2 (a)) of 'scrap treated as

such' (which means 'gleichgestellt' and not 'ähnlich' as in the German text). Moreover, when it is stated (Decision No 2/57, Article 10 (c)) that shipbreaking scrap and other types of heavy scrap can be treated as imported scrap, when the Joint Bureau proposes and the Fund decides to purchase scrap treated as such, the general decisions imply that apart from shipbreaking scrap, scrap from other sources is also capable of qualifying for equalization.

Finally, for the sake of clarity, the decisions should also have stated how it happened that the scrap which the applicants received was described as shipbreaking scrap, since the allocation decisions which were addressed to them do not speak of it.

The reasons actually given are therefore not only incomplete, but also misleading.

Against this, the High Authority contends that the applicants were perfectly informed of the peculiarities of the matter, so that a detailed statement of the facts was superfluous. Thus it patently starts from the idea that the only purpose of the statement of the reasons on which a decision is based is to inform the person to whom a decision is addressed of an order of the High Authority and of his own obligation, as well as to allow him to contest the decision. This view is contrary to the import of Article 15 and to the case-law of the Court. The statement of the reasons on which a decision is based must contain sufficient details to make *review by the Court* possible. I refer here in particular to the judgment in Case 18/57 delivered a short time ago.[1]

Although I do not demand here a very detailed statement of reasons for the decisions of the High Authority more resembling counsel's opinion, to use its own words, I must nevertheless say that in my opinion the contested decisions do lack a sufficient statement of the reasons on which they are based in the sense just set out. Hence I conclude that the Court can annul the decisions for want of a sufficient statement of the reasons on which they are based.

IV — Is the High Authority's right to repayment well founded?

However, I should consider that it would not be a satisfactory solution if the Court were to pass judgment only on this submission alone, because a solution is needed for other highly important problems which have been raised as submissions, both in the interests of legal peace between the parties and in order to facilitate the definitive settlement of the scrap equalization accounts, in which, on the one hand, the High Authority together with all the users of scrap and, on the other, the applicants as members of the Brussels agencies, the Fund and the Bureau, have a legal and economic interest of the first order. Let me remind you that the Fund and the Bureau, as co-operative associations, have gone into liquidation, but that patently the assets and liabilities of the participants in equalization have not been definitively established or notified regarding any past accounting period.

However, the central and finally decisive question for the two parties is whether the High Authority's decisions are well founded, that is to say, whether the High Authority may rely upon a right to repayment of the equalization payments as against the applicants. The applicants' most important arguments, pleaded under the general heading 'Infringement of the Treaty' bear on this point. As we have seen, it is much less an infringement of the substantive rules of the Treaty which is concerned than an infringement of the general legal principles concerning the repayment of payments received in error from an administrative authority.

(1) Do the legal structure and the practical application of the equalization system provide for equalization payments to the benefit of the undertakings?

I said at the outset regarding the making of equalization payments that there was no special notice for each individual case.

On the contrary, all the accounts were

1 — Recueil, Vol. V, p. 114; see also judgments in Cases 2/56 (Recueil, Vol. III, p. 37) and 9/56 (Recueil, Vol. IV, p. 29).

settled in the form of a setting-off within the regional office and on instructions from the DSVG the undertakings paid to their own suppliers or to the scrap dealers from whom they had received nothing a price no *higher* than the internal price of scrap. The DSVG proceeded directly to the settlement of the equalization benefits within the framework of the general accounts with the scrap dealers. This thus gave the impression that the undertakings themselves had never been liable for the total import price, but that they were able to have the guarantee, through the Joint Bureau and the DSVG of being able to buy scrap at a price already reduced by equalization. The applicants did not overlook this point, and they infer from it that, in view of the way in which the equalization system operated in practice, the equalization payment could not have been made to them, even indirectly.

This concerns, therefore, the problem of the legal construction of scrap equalization, to which the parties have devoted much of their explanations. Actually, as the High Authority has stated, three constructions can be conceived:

(a) Individual importing of scrap with individual equalization: the scrap-consuming undertaking benefits directly from the equalization.

(b) Joint importing of scrap a joint agency with individual equalization to the benefit of the undertakings which receive the scrap.

(c) The equalization scheme takes charge of all imports of scrap; reduction of the price of the scrap imported with the assistance of the equalization levy and redistribution of the scrap the price of which is thus reduced to the different undertakings. (In this case, there is no place for individual equalization).

Which of these procedures was taken as the basis for the decisions and, more important, applied in practice?

It cannot be denied that certain phrases in the statements of the reasons on which the decisons were based, particularly that of Decision No 14/55, tend to favour the last of these three constructions and, for their part, the applicants consider that such is indeed the case, in particular when it is stated:

'Whereas an orderly ... of scrap depends upon these tonnages (that is to say, the imported scrap) being *placed at the disposal* of the Common Market consumers at prices close to those prevailing within the Community;'

and

'Whereas disparities between the estimates of purchases of scrap within the Community and the purchases actually made ..., can be efficiently and speedily corrected only if the equalization scheme makes it possible to dispose provisionally of a certain tonnage of imported scrap immediately available to make up the deficits;'

and finally

'Whereas ... the undertakings ... which are members of the Joint Bureau of Ferrous Scrap Consumers must be able to purchase jointly in third countries the tonnages intended subsequently to be *placed at the disposal* of the consumers ... on the responsibility of the High Authority.'

Similarly, the obligation on the part of the undertakings to pay the contributions necessary to

'raise the funds necessary for the purchase of scrap in third countries for the account of consumers to be named subsequently ...'

set out in Article 2 of Decision No 14/55 could be pleaded to the same effect.

On the other hand, according to the decisions, the Joint Bureau had to conduct the negotiations on the purchases for the joint account, whereas the contracts of purchase had to be concluded directly between the sellers and the consumers, or else, where the need arose, the Joint Bureau had to conclude the contracts for the account of reci-

pients to be named subsequently. Furthermore Article 12 of Decision No 2/57 expressly decided that the Fund shall fix the supplementary sum which is *allowed to the undertakings* for the quantities qualifying for equalization of prices.

I think therefore that the decisions of the High Authority do not correspond to the applicants' ideas on the legal construction of the equalization of scrap.

On the contrary, all the High Authority's decisions on the equalization of scrap started in principle from the idea that equalization benefit should be paid out in such a way that the scrap consuming undertaking benefits from the equalization amounts fixed by the Fund. This principle certainly applies when the scrap is imported directly by the consumers into the territory of the Common Market, but the same is true when the scrap is put onto the market by the Joint Bureau by way of joint purchase within the framework of the equalization scheme. In the latter case referred to, that of purchase through negotiations by the Joint Bureau for the joint account, with the agreement of the Fund and for recipients to be named subsequently, difficulties of interpretation arise. Indeed, the decisions do not clearly specify the legal nature of the contracts, or the legal nature of the role of those taking part in the equalization, or their relationships with each other. Different kinds of contract may therefore be thought of: the contract binding only the Joint Bureau with the scrap being redistributed to the consumer by the regional office within the framework of the official scheme, or the commisssion contract, the Joint Bureau then being in the position of commission agent and the consumer in that of principal, with the derogations from the general rules tolerated by the law and by commercial custom in the form of entering into the contract as the other party to the contract, or with the agent's guarantee; finally the Joint Bureau could be thought of acting as broker or commercial agent, or finally as representative of the consumers with an express power of representation.

There also arises the dispute between the parties over the meaning of the wording of the decisions and its importance for the transactions in performance of the contracts and in settlement of the debts arising thereunder which are at issue in this case.

Without seeking, at this point in my exposition, to define the legal nature of these transactions, I should like to observe that legal forms can be thought of in which the purchase transactions would put the consumers under an obligation, at least indirectly, that is as principals, if only in relation to their commission agent. But, even in this case, the equalization supplement can benefit the scrap consumers themselves in the sense that the Fund assumes part of their obligations by reason of the relationship between principal and commission agent.

According to the wording of the general contracts concluded by the Joint Bureau, it is not possible to say that in practice the equalization scheme departed from the legal principles of the decisions. And the general set-off system also does not prevent the undertakings' being thus relieved of an obligation, hence their being able also to benefit indirectly from a payment by the Fund.

If it is thus clear that by reason of the structure of the equalization scheme and of its application in practice the undertakings can benefit from an equalization supplement, the following questions follow therefrom:

(a) Did the applicants benefit in reality from an equalization payment, that is, were they actually relieved of an obligation?

(b) Was this equalization payment wrongly made because the conditions for a right to equalization were not fulfilled?

(c) At all events, can repayment be demanded, when it is clear that the conditions for the payment were not fulfilled or have subsequently ceased to obtain?

(2) Could the scrap referred to in the Netherlands certificates receive for equalization?

I shall approach the study of these questions

by examining whether the equalization sums paid in respect of the scrap covered by the Netherlands certificates were rightly paid, that is, *whether or not that scrap qualified for equalization.*

One may well acknowledge that the quantities of scrap which Hansa received from Holland, and for which the certificates of the Ministry of Economic Affairs were drawn up, were essentially composed of Community scrap which, as such, did not come within any of the categories of scrap subject to equalization which are listed in the decisions (imported scrap, shipyard scrap, other highly-priced scrap).[1]

Shipbreaking scrap is highly-priced scrap within the meaning of the rules for equalization, because the expenses of shipbreaking are only an economic proposition if an opportunity is provided for that scrap to be exported. After an export authorization has been issued, it can be sold on the world market, on which the prices are higher. It can therefore follow the prices prevailing on the world markets. Particular stress must be laid on the fact that the opportunity of export confers on shipyard scrap the nature of highly-priced scrap.

According to what we have heard here, the practice has obviously developed in the ferrous scrap trade of delivering Community ferrous scrap in the place of ferrous scrap which is supposed to have come from shipbreakers' yards and of arranging for it to qualify as ferrous scrap from shipbreakers' yards for equalization, whereas the ferrous scrap from shipbreakers' yards still to be recovered is sold later on the market at domestic prices. This procedure was tolerated, taking into account the fact that demolition often extends over a fairly long period.

Indeed, objections may be raised against this practice in view of the difficulty connected with reliable supervision in the performance of such contracts. But it does not seem to be impossible to guarantee the proper performance of these substitution operations and thus to state that they are lawful. In these exceptional cases, ordinary Community scrap can therefore be considered as subject to equalization and can enjoy the right to equalization, because the opportunity of being exported is extended to it.

I stated above, in relation to the structure of scrap equalization, that the governments decided in 1954 to provide the opportunity for shipyard scrap to be exported if the Joint Bureau did not buy it. This agreement did not give a kind of general authorization to export shipyard scrap. On the contrary, in each individual case, the competent national authority must issue an export authorization, under the national provisions, in order that the shipyard scrap may leave the Community and be put on the world market. It follows that the issue of the export authorization, either for the shipyard scrap, or for the scrap which takes its place, amounts to an administrative measure which confers rights, not only for carrying out external trading operations, but also in regard to the scrap concerned qualifying for equalization.

The Netherlands certificates in question are to be examined in the light of this legal situation, and the question must be asked whether they are merely probative documents certifying a certain provenance in respect of the scrap to be delivered or whether they are administrative measures which confer rights granting an authorization to export.

For this purpose, allow me to quote the wording of one of the certificates:

'In reply to your application, I inform you that according to the information in my possession, you may apply for export licences up to a maximum of . . . metric tons of steel scrap coming from the breaking of the ship . . . I call your attention to the fact that this quantity of scrap cannot be exported to a country which is not a member of the ECSC unless it has first been offered to the Joint Bureau of Ferrous scrap Consumers (OCCF) in Brussels and that offer has been refused.'

I should like to point out that the equivalent in the Dutch text for the German expres-

1 — See Article 1 of Decision No. 14/55.

sion 'in anspruch nehmen' is 'ontlenen'. This distinction should not be overlooked in construing the certificates. It appears important to me, because it doubtless means that it is not the exporting of shipyard scrap itself which is authorized, but that rights to export can be inferred from the ship-breaking, for example in respect of the scrap substituted for the shipyard scrap.

The wording of these certificates does not exactly give one to understand that they are only certificates of provenance. If it were only the provenance of a batch of scrap which should have been certified or the fact that certain quantities of scrap could be expected from the breaking-up of a ship, these certificates would not have said: '... you may claim export authorizations'. During the criminal proceedings, the Netherlands official Van der Grift, who drew up the certificates, also said that he had drawn up certificates of provenance from third countries in which *the right to export* scrap from third countries was *conferred*.[1]

However, that contradicts what was said in the same trial by Van der Grift's superior, Balfoort, about the procedure for the issue of export authorizations.[2]

According to that, if, after being presented with Van der Grift's certificates, the Bureau in Brussels did not buy the scrap concerned, the scrap owner could send in an application for an export authorization, along with a certificate from Van der Grift, to the Central Import and Export Bureau, which comes under the Ministry for Economic Affairs. However, I still have doubts about that procedure which the explanations of the parties and the case-file are insufficient to dispel.

If one starts from the idea that the Netherlands certificates were administrative measures conferring rights which gave an export authorization, it must be asked what influence the fact of the nonfulfilment of the conditions set for the issue there of has on their legal effects in the present case.

'Administrative measures which certify something do not contain any provision on a legal situation, they do not establish anything, they do not change anything, They are solely designed to be means of evidence ... However, evidence of their incorrectness may always be brought.[3]

On the other hand, administrative acts which confer rights are unimportant only when they are void *ab initio* or when they are annulled with retrospective effect. In this instance, that means if the Netherlands certificates are not void, or if they have not been annulled, the equalization scheme cannot ignore their legal effect which consists precisely of enabling it to be exported and, hence, to be put on to the world market with its higher prices.

The certificates state, 'You may ask for exporting rights arising from shipbreaking', even though the conditions laid down for it were not fulfilled, that is, in spite of the fact that the persons to whom the certificates are addressed did not have the stated quantity of shipyard scrap at their disposal. But the official who drew up these certificates was competent to do so and no rule of form has been broken.

The question of the legal validity of the certificates comes exclusively under Netherlands law. I have endeavoured to study Netherlands legal writing and I believe that I have found in it principles similar to those of German administrative law. If an administrative measure is effected when the conditions of fact and of law for it are wanting, or if that administrative measure is vitiated by an infringement of the law, it may nevertheless be considered as valid.[4]

1 — Statement of Defence, Schedule 12 (a), p. 13.
2 — Statement of Defence, Schedule 12 (a), p. 5.
3 — Forsthoff, 'Lehrbuch des Verwaltungsrechts', 7th ed., p. 193 *et seq.*
4 — Stellinga, 'Grondtrekken van het Nederlands Administratiefrecht', p. 210; Kranenburg, Beel, Donner *et al.*, 'Nederlands Bestuursrecht', 1953, I, p. 249.

The invalidity of a decision is acknowledged only for very serious defects[1] and even, according to certain authors, for extremely serious and very obvious defects.[2] In a study on administrative invalidites published in November 1946 in the review 'Bestuurswetenschappen',[3] the author states that the invalidity of an administrative measure should be acknowledged only in extreme cases.

On the basis of this writing on administrative law, it is therefore impossible to start in the present case from the idea that the Netherlands administrative measures are void *ipso jure* and have had no legal effect. The cases of serious defects which have been mentioned, and which the various authors had in view when they were proposing the invalidity of an administrative measure, are not present in this instance. Here it is simply a matter of an administrative measure which was effected when in this instance the conditions of the national public law were not fulfilled. But that is a substantive defect which can lead only to voidability, that is, to revocation of the administrative measure. As far as one can see, the competent Netherlands authority has not so far revoked that administrative measure. The Netherlands official has not been convicted for drawing up false certificates, but only for corruption under Article 363 of the Netherlands Penal Code.

If one follows the argument, which in my opinion is defensible, that the Netherlands certificates are administrative measures which confer rights in an export procedure, one comes to the following result: the scrap in respect of which the certificates were issued thereby received and kept the nature of scrap from third countries. It therefore qualified for equalization under the decisions. It was therefore right, for the administrative bodies, including the DSVG, to accept the scrap for equalization in those cases and grant supplements. But then, the main condition for the institutions to have a right to be repaid is unfulfilled.

(3) Did the applicants receive equalization payments?

If one does not accept that argument, the question then arises whether the other conditions for a right to repayment are fulfilled. Then it must be considered whether the applicants did in fact benefit from the payment of equalization. This question leads into the field of private law, since, as I have already stated, one can at most envisage the existence of an indirect transfer through exemption from an obligation. We are therefore bound to inquire into the nature of the legal relations between the applicants, the DSVG, the Joint Bureau and the scrap suppliers. It is clear that the dispute between the parties essentially turns on the issue whether the applicants are under a direct obligation to the scrap suppliers by virtue of the contracts of purchase entered into by the Joint Bureau, that is, as undertakings represented by the Joint Bureau, or whether they only had legal relations with the latter (and its auxiliary, the DSVG). This question must be examined in the light of the documents produced (general agreements, general provisions of the contract, letters of confirmation, invoices, etc.).

A – The nature of the legal relations between the applicants, the Joint Bureau and the scrap suppliers

I must admit that finding the answer to it is not easy. The difficulties pertaining to construction are aggravated by the fact that the legal relations with which I am concerned here can be related to several legal orders, in the sense of the law relating to conflicts of laws: the Joint Bureau is an association incorporated under Belgian commercial law with its registered office in Brussels, whereas Hansa, the applicants and the DSVG are companies incorporated under German commercial law with their registered offices in Germany. However, I consider it unnecessary for me to go into the details of this question of private international law. The

1 – Stellinga, *loc cit.*, p. 205; Van der Pot, 'Nederlands Bestuursrecht', p. 206.
2 – Vegting, 'Administratiefrecht', p. 251, 258; Kranenburg *et al.*, *loc. cit.*, p. 234.
3 – Prof. A. M. Donner, p. 18.

questions at issue affect only the German and Belgian legal orders. In my opinion, therefore, it is sufficient to establish whether the assessment of the facts at issue would lead to the same results in both laws. It seems that such is the case.

A great many points of view are in favour of the argument for acknowledging the existence of contracts of purchase only between Hansa and the Joint Bureau and for defining the relations between the applicants and the Joint Bureau, on the other hand, in terms of a commission agency or similar situation.

It is stated in the general contracts, 'We (that is, the Joint Bureau) have made a firm booking of the purchase', or 'We confirm the purchase'. The clauses of the contract say the following:

'The purchase is made by order and for the account of undertakings to be named subsequently.

The regional offices shall be entitled to determine the undertakings to which the goods shall be sent.

We (that is, the Joint Bureau) reserve the right to terminate the contract or to claim damages.

The contract must not be assigned to third parties unless authorization has first been obtained from the OCCF.'

Finally, one clause mentions 'the OCCF's declining to exercise its option to purchase' and 'resumption by the office in Brussels'.

The documents produced by the parties after the end of the written procedure prove that Hansa always addressed invoices for the delivery of the scrap to the DSVG (which I consider as an agency of the equalization scheme). For its part, the DSVG sent the undertakings statements of their total debts and invited them to pay them to Hansa. In the letters from the DSVG to the undertakings, one passage always points out that the DSVG will *hold* the sums claimed until a certain time.

Finally, certain undertakings (such as Bochumer Verein für Gußstahlfabrikation, Gußstahlwerk Gelsenkirchen, Gußstahlwerk Witten, Ruhrstahl AG and Niederrheinische Hütte) pointed out in their credit transfers that they were acting by order of the DSVG.

It follows from certain other clauses in the contracts that the undertakings to which the goods are sent have certain direct right against Hansa (which, however, does not necessarily mean that those undertakings are in the legal situation of a purchaser in their relations with Hansa):

'The undertaking to which the goods are sent shall be entitled to damages and to recover its expenses in certain cases.

If the goods are not of the agreed quality, the undertaking to which they are sent shall address a complaint to the supplier.

The incidental expenses arising from a delivery of batches of scrap from the warehouse must not be paid by the undertakings to whom the scrap is sent.'

During the hearing, the High Authority drew attention to certain letters of confirmation or letters placing orders which the undertakings addressed to Hansa and, conversely, Hansa to a certain undertakings.

The letters from the undertakings to Hansa state as follows:

'With reference to the allocation from the DSVG, we hereby order from you', or else, 'We take the following from the ship AEIKA', or else, 'We confirm that we have purchased from you'. For its part, Hansa confirmed to most of the undertakings 'the sale of so many metric tons of scrap'.

The legal implications of these letters really emerge if one reads the replies from Hansa to certain of these confirmations of purchase. I should like to read you in full certain of them, addressed to the company Hüttenwerke Oberhausen.

In its letter of 9 January 1957:

'We have received your letter of confirmation of 28 December 1956 regarding 1000 metric tons of scrap from steel works, your sale No 944.

Solely for the sake of good order, we would point out to you that the price which you quote is not decisive for us. The same applies to the other conditions of purchase.

The provisions of the Brussels contract are decisive for us, since we have agreed terms directly with the OCCF.'

There are *similar reservations* in the letters of 29 January 1957 and of 14 February 1957, where it is stated:

'We thank you for your confirmation of the 9 instant and, for the sake of good order, we should like to point out to you that the price of DM 170 tonnes. which you quote rests solely on an agreement between yourselves and the DSVG.

Our scale of prices is based on the contract concluded with the OCCF.'

And in Hansa's letter of 6 November 1956:

'We have received your letter of confirmation of the 2 instant regarding our sale No 940.

Solely for the sake of good order, we would inform you that we have sold these materials to the OCCF in Brussels and that, consequently, the conditions of that agency are decisive for us.'

Hansa's understanding of these legal relations clearly emerges from this, and consequently the legal meaning which could be given to the letters which I have just quoted. The consignees of the scrap state therein that they are prepared to take delivery from Hansa of the scrap allocated. No concluding of individual contracts of purchase can be discerned here.

Commission agency is defined in identical terms in German and Belgian commercial law.[1] Moreover, case-law and legal writers have defined certain points. Thus, in the 'Kommentar der Reichsgerichtsräte' on the Commercial Code, there are to be found remarks on commission agency which are of particular interest here:

'The commission agent becomes the creditor, even when the third party knew that the commission agent was acting by order and for the account of the principal.[2]

'The fact that the commission agent has declared his agency, that the goods must be sent directly to the principal, or that the purchaser (in the case of a selling commission agency) must pay the principal directly, is not a decisive factor in favour of the existence of a power of agency.[3]

'The principal can make the payment directly to the other party.'[4]

'The commission agent can come to an agreement with the principal that rights against the sellers shall never vest in the commission agent, but must be from the outset the rights of the principal.'[5]

Allow me further to quote you two passages on Belgian law taken from the 'Traité de droit commercial belge' by Frédériq:

'. . . it may be said that commission agency is a variety of agency, which differs from the common law contract in the following respects:

(a) The agent contracts for the account of and in the name of his principal, where the commission agent acts for the account of the principal, but in his own name . . .'[6]

1 – See Frédériq, 'Traité de droit commercial belge', 1946, I, p. 299.
2 – § 383, Note 21.
3 – § 383, Note 15.
4 – § 396, Note 12.
5 – § 392, Note 2, 6.
6 – p. 297.

'Even if the third party knows that his contracting partner is acting for a principal, that fact does not prevent the commission agency from existing . . .'[1]

The fact that certain rights come into being from the outset in the person of the principal and that the payments must pass directly between the third party and the principal does not therefore militate against the argument for a relationship of commission agency.

But if the party for whose account the purchase has taken place is directly to become party to the contract of sale, then it is necessary for the intermediary (in this case, the Joint Bureau) to act in his name and with his power. It must be clear that all the legal implications of the contract must be borne in upon the representee[2] or, as Frédériq states:

'For the intermediary to be an agent in regard to his contracting partner, he must expressly and positively declare in whose name he is dealing.'[3]

The purchaser does not have to accept merely that the person who presents himself as the seller and who is working for the account of a third party concludes the transaction in the name of that party.[4]

The use of the expression that the agent is acting for the account of the principal does not allow only of the inference (to the exclusion of any other) that he was acting in the name of the principal.[5]

In particular in the agency to purchase something, there is not necessarily any grant of a power of representation.[6]

In this instance, there is also the fact that at the time of the conclusion of the general contracts of purchase, it was not yet known exactly to whom the deliveries were to be made.

To use German legal terminology, one could speak only of a transaction 'for the account of whom it shall concern'. In this connexion, one can read in Soergel's 'Commentary on the German Civil Code' that:

'The intention to conclude a contract with whom it shall concern must as a general rule be accepted on the part of the third party only in the case of immediate performance of the contract.[7]

For fairly substantial subject-matters , the person of the contracting partner is of importance and it cannot be accepted that there is a contract for the account of whom it shall concern.'[8]

I have already indicated whom the third party, in this instance Hansa, considered as its true contracting partner.

Accordingly, it cannot be accepted that the Joint Bureau was acting as a representative and that it put the applicants directly under an obligation to Hansa by the contracts of purchase.

An express declaration to this effect is lacking, and the circumstances also fail to indicate such an intention with sufficient clarity. Rather, they tend to show the opposite.

Furthermore, the applicants deny that they have ever given a power, either express or implied. In this instance, moreover, nothing speaks in favour of acquiescence in the existence of a power or in favour of the appearance of a power ('Duldungs- oder Rechtsscheinvollmacht') within the meaning of German case-law.

In conclusion, therefore, it only remains to state that the contracts of sale with Hansa in principle conferred rights and obligations

1 — p. 300.
2 — Soergel, Kommentar sum BGB, § 164, Note 2.
3 — *Loc. cit.*, p. 301 (Gand, 28-11-24, Pas 1925, II, 44).
4 — Soergel, *loc. cit.*, 164, Note 4.
5 — RGR — Kommentar zum HGB, § 383, Note 15.
6 — Soergel, *loc. cit.*, § 167, Note 4 (RGLZ 28, 1065).
7 — § 164, Note 4.
8 — § Note 3.

only on the Joint Bureau. In relation to the Joint Bureau, the applicants were merely in the position of a principal in relation to a commission agent.

The undertakings could not therefore be relieved of liability for the sale price by the payment of the equalization. On the contrary, only the obligations arising from the commission agency relationship are concerned.

B — In the actual situation, did there exist any obligations of which the applicants had to be relieved?

In German and Belgian law, the chief obligation of the principal is to repay to the commission agent such expenses as he may consider necessary in view of the circumstances.[1] Relieving the commission agent of the obligations which he has contracted is also a part thereof.[2]

Since that follows from the provisions alluded to, this obligation on the principal subsists only within definite limits:

'What is necessary is not what the agent considers as such, but what he is entitled to consider as such, that is what he could consider as necessary, without fault on his part, after careful, reasonable reflection.'[3]

And similarly in Belgian law:

'The principal must cover the commission agent for the obligations which the latter has contracted within the limits of his agency, and he must indemnify him for any losses suffered in his dealings . . . , provided that they are not to be attributed to his negligence.'[4]

It appears from the general provisions of the Joint Bureau's contract, which the applicants did not draw, up, that the Bureau reserved the right of supervision over the delivery of shipyard scrap. There corresponds to this an obligation to the principal to carry out such supervision. No use was made of this right of supervision in the present cases. It can thus be said that the commission agent did not fulfil his duty of care; that the expenditure of the Bureau, that is the liability in respect of the purchase price, could have been lower if the performance of the contract had been carefully supervised. Thus the argument can be defended that no obligation exists for the undertakings to repay the full amount expended on the agreed purchase price. That also entails the non-existence of the obligation of which the fund considered it was relieving the applicants by its equalization payments to the scrap suppliers. According to the rules of unjustified enrichment, in such a case, that is, in a case where his own obligation to pay the beneficiary and when the latter's liability to the recipient of the benefit did not exist, the person giving the benefit can address himself directly only to the recipient of the benefit, but not to the presumed debtor.[5]

On this ground also, the claim against the undertakings for the repayment of the equalization amounts should be declared unlawful and the decisions of the High Authority should be annulled.

(4) Even if the conditions for the High Authority's right to repayment are fulfilled, is such right excluded?

In connexion with the three conditions mentioned above for the right to repayment, it remains finally to deal with the question whether the right is excluded, even if the conditions for it, that is, the lack of the right to equalization and the enrichment of the applicants, are fulfilled. Although I examine this question only at this point in my opinion, in my view it is of the highest importance for the judgment. The answer to it is of the highest importance The answer to it is even such as to make part of the exposition which I have given above in order to follow the parties appear superfluous. But in the interest of a detailed

1 — § 670 BGB; § 396 HGB; Frédériq, *loc. cit.*, I, p. 320.
2 — RGR — Kommentar, § 670 BGB.
3 — RGR — Kommentar, § 670 BGB Note 5.
4 — Frédériq, *loc cit.*, I, p. 321.
5 — See RGR — Kommentar zum BGB, § 812 Note 4, c.

examination of all the problems arising, I did not think I should leave out the foregoing remarks.

In trying to situate in the well-known categories of national administrative law the legal actions which have taken place within the framework of the equalization scheme, one is led to the observation that every payment of equalization supplements, which constitute public law subsidies, implies an adminstrative measure in which the existence of a right to equalization is established after an examination of the conditions for its existence.

As I have already explained, in these proceedings at least, I do not find an express measure of this kind anywhere. But that does not exclude such measures having been performed tacitly by the Fund or by its auxiliary agency, the DSVG, but with effect for the applicants. They constituted the legal justification for the payment of the equalization supplement in each of the present cases. In reality, therefore, the question is whether these measures could be revoked with retroactive effect in regard to the beneficiaries and, consequently, whether the rights to repayment could be well founded.

It is possible to see a revocation in the High Authority's letters of 27 November 1958 inviting the applicants to repay the equalization supplements. At that time, the High Authority had already reorganized the equalization scheme and withdrawn the powers of the Fund and the Joint Bureau, so that those agencies were no longer capable of carrying out that revocation themselves.

A — Legality of the revocation of administrative measures creating subjective rights ('Begünstigende Verwaltungsakte') under national laws

In German administrative law there are a lot of learned works and case-law concerning the possibility of revoking administrative measures vitiated by a defect. I have made some efforts, moreover, to take a look at Netherlands and French administrative law.

First of all, regarding French administrative law, the administration's right to repayment seems to be excluded wholly or in part only when a wrongful act or omission can be alleged against the administration which wrongly made the payment.[1] Failing that, or if the beneficiary acted in bad faith, nothing prevents a claim for the payment of a recoverable debt.

In Netherlands law, just as in German law, there does not seem to be any clear and uniform solution. However, certain concordant basic ideas seem to have been conceived. I shall not presume to give you here an exact picture of Netherlands legal writing and case-law on these problems which the Court knows well. But allow me, none the less, to inform you of the impressions which I have formed from reading Netherlands administrative law. It seems possible to me to state the rule that in general an administrative measure which creates subjective rights cannot be revoked with retroactive effect, taking into account the fact that in the meantime the interested party had had confidence in the legal validity of the measure and that he has acted in reliance upon it.[2] Moreover, what seems to be decisive is the question whether the interested party, or a third party for whom the administrative measure was important, acted in good faith or whether he knew or ought to have known of the defects in the administrative measure.[3] Finally, Netherlands case-law also recognizes the idea that the interests must be weighed against each other; the courts consider what harms the public interest more, upholding the decision vi-

1 — Waline, *'Droit administratif'*, p. 561 *et seq.*; Conseil d'État, 1-7-1904, *Recueil*, p. 536, 18-6-1937, *Recueil*, p. 608.
2 — See Donner, *loc. cit.*, p. 6, 21, 22; Kranenburg *et al.*, *loc. cit.*, p. 231; Van der Wel, 'Administratiefrechtlijke Nulliteiten', p. 105, 158.
3 — See Donner, *loc. cit.*, p. 10-11, 22; Kranenburg *et al.*, *loc. cit.*, p. 227.

tiated by a defect in the interest of the beneficiary or suppressing it.[1]

These considerations also appear in different forms in German administrative law. They lead to the following result: either in certain cases to prevent the revocation of administrative measures vitiated by a defect, or in other cases to prevent such revocation having retroactive effect.

Revocation has already been declared unlawful on several occasions in the judgments, above all, of the Federal Administrative Court, when the interested party has preponderant interests deserving of protection,[2] when the administration is guilty of a serious wrongful act or omission,[3] or when it has made a mistake.[4] Sometimes retroactive effect at least is excluded, on the ground that the confidence placed by the interested party in the administrative measure[5] must be protected, or when the interested party has preponderant interests [6] except when the interested party is himself guilty of a wrongful act or omission.[7] And much of the writing on administrative law goes so far as to argue that, even if revocation is possible, it should be allowed only with effect *ex nunc,* in view of the protection to be given to the confidence placed in the administrative measure.[8]

B — Application of these principles to the present case

I wish to recommend the Court to adopt these principles in the present case, and not only within the narrow limits of French administrative law which requires a wrongful act or omission on the part of the administration to exclude revocation.

As far as I know, all the transactions over scrap in question, including the payment of the purchase price and the payment of the equalization, took place in the main before the discovery of the corruption affair in Holland. One may wonder to what extent other interested parties acted in good faith as far as the unlawful actions of the Netherlands official, and consequently the defective nature of the Fund's equalization decision, are concerned. However, nothing proves whether or not the applicants, on whose behalf the payments had been made by virtue of the certificates (and who thus also belong to the group of persons affected by the Netherlands administrative measures) were conversant with what was really happening. Let me point out in particular here that there was no reference, an any of the allocation notices sent to the applicants, to shipyard scrap, so that they had no reason to ensure that the deliveries were correct in that pariticular. As far as the Netherlands certificates were concerned, the applicants had not even seen them. The certificates were presented to the DSVG by Hansa and accepted by the Joint Bureau after a telephone conversation. Thus the applicants had no opportunity to check the provenance of the scrap (in so far as it was relevant to qualification for equalization) and the inherent veracity of the certificates.

On this ground, therefore, they cannot be made responsible for the defective nature of the original payment orders.

On the other hand, it must not be overlooked that the drawing-up and the execution of the contracts of purchase at issue, including the payment of the equalization sums, which was made directly to the suppliers, came exclusively under the responsibility of the equalization scheme. As I have already mentioned, in the general provisions of the contract, the OCCF (the Joint Bureau) reserved to the Fund the right to carry out checks on the provenance of the scrap when shipbreaking scrap was delivered. To my knowledge, in the present case, such checks did not take place, even

1 — See Donner, *loc. cit.*, p. 17.
2 — BVerwG. DOeV 58, 178; DOeV 57, 912; similarly OVG Berlin, DVBI. 57, 503.
3 — BVerwG, DOeV 57, 912.
4 — Similarly OVG, Berlin, DVBI. 57, 503.
5 — GBVerwG, DOeV, 57, 911.
6 — BVerwG, DOeV 58, 178.
7 — BVerwG, DOeV 57, 911.
8 — Nebinger, *'Verwaltungsrecht'*, p. 219; Jellinek, 'Lehrbuch des Verwaltungsrechts', p. 287; Haueisen, DVBI. 57, 503.

by random sampling, before the delivery of the scrap had been authorized and the supplements had been paid.

Let me stress again here that the High Authority's ideas on the exclusively private law structure of the purchase transactions are incorrect. Within the framework of the equalization scheme, the Brussels office had, if not a *de jure* monopoly, at the very least a *de facto* quasi-monopoly over imported scrap and other highly-priced scrap. The only scrap which could qualify for equalization was that which had been declared so to qualify on a proposal by the Joint Bureau. Before being exported, highly-priced scrap had to be offered to the Joint Bureau. This fact substantially alters the commission agency relationship which had been chosen from the point of view of purely legal theory to govern dealings with the scrap consumers. Apart from the subsidiary conditions of delivery, such as place, date, etc., the power of the applicants as principals to give instructions to the Joint Bureau as commission agent was limited essentially to accepting offers to sell scrap and to examining whether the scrap qualified for equalization. That means that the commission agent, on its own responsibility, had to propose equalization to the Fund, and after obtaining its agreement, accept the offers of the third party. Thus, the applicants only imported their requirements of scrap and received allocations, and could not exercise any greater influence on matters. This also emerges from the High Authority's answer to the questions put by the Court:

'Every month, the Joint Bureau was informed of the undertakings' total requirements of imported scrap. This information was based on details which the undertakings sent to the DSVG, in order to keep it regularly informed of their requirements of such scrap. The Joint Bureau proceeded to make individual purchases as it thought best to cover these scrap requirements.'

In the contracts of purchase the Joint Bureau was therefore in command of matters. The argument that the consumers themselves were really in charge by virtue of their relations with the DSVG must be dismissed. From a legal point of view, it is immaterial that the applicants had the rights of a shareholder in the DSVG; they are also represented as members in the Brussels cooperatives, but that fact did not in any way change the independence and legal responsibility of the Brussels associations.

Thus, the essential decisions on the supply of scrap and equalization were clearly taken by the Joint Bureau and by the Fund in Brussels. But it is also evident that certain equalization tasks coming under public law were entrusted to the DSVG as the regional office for the Federal Republic. In this connexion I refer you to the written answers of the High Authority of 17 November 1959, and of the applicants of 15 November 1959, which clearly show collaboration between the DSVG and the equalization associations in Brussels (acceptance of the offers of sale, allocation to the purchasers on behalf of the Joint Bureau, collection and management of the levies, utilization of the levies for the equalization supplements and transfers to other regional offices in other countries on behalf of the Fund).

There is no reason to think that any defects emerge from the transfer of the above tasks of the equalization scheme to the DSVG within the framework of equalization as a whole. The Court has acknowledged the validity of a limited delegation of powers conferred upon the High Authority by Article 53 (b) of the Treaty in order to set up the equalization scheme. Taking into account the practice, which was followed for several years, of calling upon the regional offices as auxiliary agencies for equalization, which can even be inferred from the High Authority's statement, the responsibility for the activities of the DSVG must lie with the equalization scheme, and consequently with the High Authority. One need not consider whether a true wrongful act or omission can be alleged against the Joint Bureau or the Fund, bearing in mind the wrongful nature of the transactions. In my opinion, that is immaterial. The applicants seek a finding to that effect only in the alternative to provide grounds for pecuniary claims which they advance for a set-off. When the facts are assessed and the inter-

ests are weighed, the objective circumstances which have been set out must, at all events, be taken into account against the High Authority.

In addition, it must be remembered that these proceedings concern the rectification of a legal situation by the repayment of certain sums, thus a settlement of financial matters. Therefore, the really decisive alternative is the following: must the burden and the risk of the exercise of rights of appeal of a civil nature fall upon the applicants or upon the equalization scheme? The High Authority itself starts from the idea that the undertakings must not ultimately bear the loss arising from the corruption affair.

As has been seen, the applicants have direct relations only with the Joint Bureau. At the most the Joint Bureau has rights derived from the contract of purchase with the scrap suppliers. By virtue of the present structure of the commission agency relationship which I have just stressed, and taking into account the legitimate expectations of the consumers who could expect to receive through the equalization scheme only scrap which qualified for equalization, there could with justice be envisaged the existence of a guarantee obligation on the Joint bureau in respect of its relations with the consumers in the nature of a commission agent's *del credere* obligation. At the very least, it cannot be accepted that the Joint Bureau had the right to relieve itself of its own responsibility for the purchase transactions by transferring its rights of appeal against the scrap suppliers under the contracts to the applicants and inviting them to enforce them before the courts. On the contrary, the Joint Bureau was under an obligation to the applicants to put them in the same situation as if a right of guarantee under the contract of sale had already been successfully enforced against the scrap suppliers.

Taking into account this situation of the facts and the interests, it appears entirely fair that the irregularities which have occurred should be settled without involving the applicants within the framework of the equalization scheme in which the Joint Bureau and the Fund collaborate, and that the equalization scheme should proceed with such settlement against those originally responsible.

The supposition that such a line of action, together with the bringing before the courts of those who were truly responsible for the case of fraud and its consequences, should fail to end in indemnification leads us, to resume, to envisage the following general consideration of natural justice. Should the losses caused be borne by the shareholders of the Joint Bureau and the Fund, both commercial associations, or by all of the undertakings participating in the scrap equalization with the levy and the right to equalization, or again by the High Authority responsible for the financial arrangement under Article 53 (b), three hypotheses between which it is not for these proceedings to decide, or, finally, by the applicant undertakings which had no opportunity of avoiding this loss?

Having made these observations, and bearing in mind the principle of good faith which is not excluded in administrative law, I consider that it is not difficult to find a just solution. In the case of retroactive revocation of administrative measures, the applicant undertakings' interests deserving of protection would be affected to a much greater extent in the case of the exclusion of revocation or of its retroactive effect than would the interests of the equalization scheme, and consequently those of the High Authority, thus common interests, in the opposite case.

For those reasons, it seems impossible to me to defend the revocation and the claiming back of the equalization payments.

V — Proposed decision

In view of the fact that there is no necessity to examine the question of the identity of the scrap or that of the applicants' claims to a set-off, I therefore arrive at the following opinion:

The actions are admissible and well founded.

(a) The contested decisions do not give a sufficient statement of the reasons on which they are based.

(b) The recovery of the equalization payment is unlawful,

1. Because the scrap in question qualified for equalization for so long as the Netherlands export certificates were not annulled;

2. Because the payment decisions cannot be revoked, in view of the balance of the interests of the participants and of the fact that the wrongful acts and omissions which have occurred fall in their entirety within the responsibility of the equalization scheme.

3. Because the applicant undertakings were not enriched through being relieved of any obligation.

The contested decisions of the High Authority must therefore be annulled and the High Authority must be ordered to pay the costs.

ORDER OF THE COURT
18 MAY 1960[1]

In Joined Cases

4/59, MANNESMANN AG, Düsseldorf,
5/59, RUHRSTAHL AG, Witten,
6/59, GUSSTAHLWERK GELSENKIRCHEN, Gelsenkirchen,
7/59, GUSSTAHLWERK WITTEN AG, Witten,
8/59, NIEDERRHEINISCHE HÜTTE AG, Duisburg,
9/59, BOCHUMER VEREIN FÜR GUSSTAHLFABRIKATION AG, Bochum,
10/59, STAHLWERKE BOCHUM AG, Bochum,
11/59, AUGUST THYSSEN-HÜTTE AG, Duisburg-Hamborn,

1 — Language of the Case: German.