THE COURT

hereby:

1. **Rules that the preliminary objection of inadmissibility put forward by the High Authority with regard to Applications 21/61, 22/61, 23/61, 24/61, 25/61 and 26/61 is accepted;**

2. **Orders the applicants in the main action to pay the costs of the proceedings.**

Donner Riese Rueff
Delvaux Rossi

Delivered in open court in Luxembourg on 6 April 1962.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 9 MARCH 1962[1]

Mr President,
Members of the Court,

The claims in Joined Cases 21 to 26/61 are based on Article 35 of the Treaty. We are therefore concerned with actions for failure to act. They were initiated by letters to the High Authority dated respectively 4, 8 and 9 September which are substantially similar.

These letters contain the complaints that ferrous scrap used for the production of special steels (Annex III to the Treaty) and of steel for foundries is exempt from equalization and they request that all purchases of ferrous scrap without exception be subject to equalization payments.

The High Authority replied on 27 October 1961 and pointed out that producers of special steels had never been exempt from equalization payments, whereas producers of steel for foundries pursuant to Decisions No 2/57 and No 16/58 were not subject to equalization. Reasons were given for the latter case; in addition the applicants were asked to supply further particulars with regard to their complaints.

In letters dated respectively 14, 15 and 16 November 1961 the applicants put the same questions again to the High Authority and repeated their request that all bought scrap without exception be made subject to equalization.

On 8 and 11 December 1961 respectively actions for failure to act were brought before the Court. The applications ask in identical terms for the rescission of the implied decision of refusal to be

1 — Translated from the German.

inferred from the silence of the High Authority, whereby the requests of the applicants for the abolition of the exemptions on ferrous scrap were refused.

After being served with the applications the High Authority requested in separate written statements that all the claims be declared inadmissible without going into the substance of the case.

In support of its request the High Authority argued that the real aim of the applicants' actions for failure to act brought in accordance with Article 35 was the rescission of certain provisions of general Decisions No 2/57 and No 16/58 providing for the exemption of ferrous scrap from equalization. The time limit for bringing actions for annulment of these decisions has expired. The resulting exclusion of these actions cannot be circumvented by actions for failure to act having the same object.

To the extent to which the applicants refer to the period preceding the issue of Decisions No 2/57 and No 16/58, the matter has not been properly brought before the High Authority, because the relevant letters do not require that, in order to rescind the exemptions complained of, the High Authority should issue separate decisions for the period from 1 April 1954 to 31 January 1957. Moreover separate decisions for the exemption of ferrous scrap from equalization were not issued, so that there can be no question of rescinding such decisions.

In their reply the plaintiffs put forward the view that the objections of the High Authority concern the substance of the applications. They did not ask for the partial rescission of Decisions No 2/57 and No 16/58. Moreover the exemptions for the period before these decisions were made (that is to say for the period from 1 April 1954 to 31 January 1957) are also at issue.

Issues of law

According to Article 91 of the Rules of Procedure the Court may on application give a separate decision on a preliminary objection, for instance with regard to the admissibility of the application. Such a decision is only possible if the main action — the substance of the case — is not dealt with in the discussion of the preliminary issue. It is only appropriate if the inadmissibility can be established without great difficulties or long investigations.

So far as the time limit for bringing an action for failure to act is concerned, a comparison of the relevant dates (4 to 9 September on the one hand; 8 to 11 December on the other hand), bearing in mind the prescribed period of grace based on considerations of distance, shows that there are no grounds for any objection.

The High Authority does not base its objections on the calculation of the period which elapsed between the raising of the matter and the commencement of proceedings. According to the High Authority the question is whether the applications are not in fact directed to a partial rescission of Decisions No 2/57 and No 16/58 against which a direct action for annulment cannot be brought as it is out of time.

It is clear from the letters dated 14, 15 and 16 November and from the conclusions on page 36 of the applications that the plaintiffs expressly challenge the exemptions from equalization for ferrous scrap contained in Article 10 (b) and (d) of Decisions No 2/57 and No 16/58. In this connection it must be noted that, after the expiration of the time limit for bringing an action for annulment, the validity of a decision cannot be made the subject matter of proceedings by way of an action for failure to act (see Judgment in Case 34/59, Rec. 1960, p. 229).

It must not be overlooked, however, that these are not the only objections to an action for failure to act. The applicants ask also for the rescission of the alleged

exemptions for the period before the issue of Decision No 2/57.

When the High Authority in reply argues that the presentation of the claims is defective, because the applicants did not ask for separate decisions to be issued rescinding the exemptions, this argument does not appear to be valid. Nor does the argument that the exemption is not based on individual decisions appear to be valid.

Moreover, so far as this issue is concerned, the High Authority's legal arguments leave much to be desired. The question of admissibility must, however, it seems to me, always be examined by the Court of its own motion.

In my opinion the claims are inadmissible and for the following reasons: A claim based on Article 35 can only be admissible, if the conclusions and the arguments in support of them are based on the previous presentation by the applicant to the High Authority of a similar, reasoned claim which the High Authority did not grant. The arguments of the applicants in their letters to the High Authority do not comply with this requirement. In general terms they complain about the discrimination against them. They only expressly mention Decision No 2/57. Although the applications as opposed to the letters exchanged contain an exact description of the periods (namely the periods from 1 April 1954 to 31 January 1957 and after 1 February 1957) this fact cannot make up for the lack of relevant detail in the letters originally raising the matter.

Moreover there is another reason which supports the inadmissibility. The actions refer expressly to Decisions No 2/57 and No 16/58 but by implication also to Decisions No 13/58 and No 14/58 which are closely connected with the two Decisions mentioned above and should be read together. These Decisions for their part are based on Decision No 14/55 which is referred to in the preamble to Decision No 2/57 and on later decisions, the main provisions whereof they extend. Although the date when the decisions were to come into force was fixed, the setting up of the organization for making equalization payments capable of adapting itself to continually changing factors (market conditions for ferrous scrap in domestic markets, and in the United States of America, market conditions for all types of steel, technical changes in finishing etc.) necessarily meant that when the payments were calculated they had retroactive effect in relation to business transactions which had been carried out earlier; indeed this retroactive effect was deliberately applied to ensure fair treatment when dealing with similar circumstances at different periods.

In this case it must also be remembered that following the judgments of the Court in 1958 the entire work of calculating equalization payments was withdrawn by the High Authority from the departments in Brussels and had to be done again with the object of drawing up a final account. It would be exceedingly unjust if the applicants were permitted to attack the system of equalization payments during the first period of its existence and thereby in fact for the whole period of its operation, although they were informed of Decisions No 2/57 and No 16/58 and accepted them without protesting or commencing proceedings.

For these reasons I am of the opinion that the contention of the High Authority should be accepted and that the claims in Cases 21/61 to 26/61 should be dismissed on the ground of inadmissibility, with the necessary consequences as regards the costs.