Upon hearing the opinion of the Advocate-General;
Having regard to Article 33 of the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 38 and 69;

THE COURT

hereby:

1. **Dismisses Application 14/64;**
2. **Orders the applicant to pay the costs, including those of the application on the procedural issue.**

Hammes Donner Lecourt

Delvaux Trabucchi Strauß Monaco

Delivered in open court in Luxembourg on 16 February 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 19 JANUARY 1965[1]

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1 – Translated from the German.

Mr President,
Members of the Court,

I certainly do not need to spend much time on the facts of this case on which I am giving my opinion today. The Court knows them well through two earlier cases, namely Case 31/58 which was settled before proceeding to judgment because the High Authority revoked the contested decision and Case 18/62, which ended with a judgment of the Court on 16 December 1963. Two decisions of the High Authority were at issue in the latter case: a decision of 23 May 1962 in which an estimated assessment was made of the consumption of ferrous scrap by Acciaierie Ing. A. Leone for the different accounting periods of the equalization scheme and another of the same date which fixed the amount due as a contribution from the undertaking accordingly. The Court annulled the two decisions (I shall consider later to what extent), because arguments and evidence put forward by the undertaking concerned succeeded in throwing doubt on the correctness of the assessment of the consumption of ferrous scrap made by the High Authority and used as a basis for calculating the amount of the contribution due.

Subsequently, on 18 March 1964, the High Authority took a fresh decision which partly modified the two decisions of 23 May 1963 mentioned above. In this decision, taking account as it says of the grounds for annulment given by the Court, it determined the quantities of ferrous scrap used by Acciaierie Ing. A. Leone and fixed the amount of the contribution due on the basis thereof.

The present application is brought against this decision.

I — Objections as to admissibility

Two objections raised by the High Authority relating to admissibility will be considered first. One of these concerns the production by the applicant's lawyer of his authority to act, and the other the effects of *res judicata* as regards the judgment given in Case 18/62.

1. The production of the authority to act in proceedings

It is a fact that an authority given to the applicant's lawyer was produced with the application, and this did not authorize him to contest the decision of 18 March 1964, but only the decisions which were the subject of Case 18/62. The applicant's lawyer says as regards this that there was a clerical error in his office. With the reply he produced another authority to act giving him a mandate in general terms to represent and defend the applicant before the European Court of Justice. This authority is dated 16 March 1964, and, according to information supplied by the applicant, it was given before the application was lodged (27 April 1964). However, the High Authority is unwilling to agree that the procedural defect of which it complains was thus rectified. It has doubts as to the correctness of the date of the authority produced later, for the legislation concerning notarial acts only deals with the authenticity of the signature and not of the date. In its view, an authority to act in proceedings must in any event be given before the bringing of the proceedings and must be lodged with the application, within the time-limits laid down.

In accordance with our procedure the following remarks should be made on this disputed point. The Statute of the Court and its Rules of Procedure nowhere expressly say that a written authority to act in proceedings must be produced. Admittedly in practice the Court sees that this authority is lodged with the original application and this practice should be adhered to in the interests of the smooth running of the

proceedings. But if in fact a valid authority has not been produced within the time-limit, then, provided that a valid authority is presented later, I do not think that one can deduce that the application is inadmissible.

The Rules of Procedure themselves provide a starting point for arguments in favour of this liberal view. Article 38 (7) provides that if certain documents are not produced with the application (for example, the instrument or instruments constituting and regulating a legal person and proof that the authority granted has been properly conferred by someone authorized for the purpose), the Registrar of the Court calls on the applicant to do so within a reasonable time. If the applicant fails to put the application in order within the time prescribed the Court shall decide 'whether to reject the application on the ground of want of form'. From this it can be deduced that not every breach of the express formal provisions of the Rules of Procedure renders the application inadmissible. This is *a fortiori* the position as regards failure to observe procedural principles, which are not expressly laid down in the Rules of Procedure.

Similar conclusions can be reached by examining national administrative procedure. According to the procedure of the German administrative tribunals ('Verwaltungsgerichtsordnung', paragraph 67), an authority to act can be lodged later, and the Court fixes the time-limit where necessary. Therefore the authority does not have to be lodged at the same time as the application or within the time-limit for bringing it. When one looks at the case-law it is even certain that if the authority is *given* later the procedural acts carried out without an authority may be deemed to have been approved retrospectively (Schunck—De Clerck, 'Kommentar zur Verwaltungsgerichtsordnung', 1961, note 4 to paragraph 67; Köhler, 'Kommentar zur Verwaltungsgerichtsordnung', 1960, notes 7 and 8 to paragraph 67). I think the same goes for French law, which also considers it possible to regularize these procedural faults *ex post facto* (Gabolde, 'Traité pratique de la procédure administrative', 1960, Nos 162 bis and 169).

Therefore in view of this legal situation I do not think it would be at all right to apply to the procedure of this Court the strict principles advocated by the High Authority and I do not even know whether these are considered valid in Italian law. For this purpose the lodgement during the course of the proceedings, as happened here, of a valid authority covering all the pleadings starting with the lodgment of the application suffices. On this view it becomes pointless to consider whether the authority was in fact given on the date when it was purportedly given, for this date is of little importance.

2. The defence of res judicata under the judgment in Case 18/62

The objection of *res judicata* under the judgment in Case 18/62 raises a more complex problem which requires an exact assessment of what was done in Case 18/62 and thereafter. In this case two decisions of the High Authority were contested; in these the consumption of ferrous scrap by the Leone undertaking for the period from 1 October 1955 to 31 January 1958 was determined and the contribution due was fixed accordingly. The Court annulled these decisions *in so far as* they were based on an 'estimated assessment of the consumption of ferrous scrap for the *period from 1 October 1955 to 31 January 1957*' (such are the words of the operative part of the judgment). The result is that the contested decisions may not be questioned as regards the *remainder* of their contents, and there is no room for doubt as to their legality as regards that *remainder*. It is not possible to draw any other conclusion

because the judgment of the Court constitutes a final judgment which does not reserve any legal problem for discussion at a later stage of the proceedings. Similarly it is impossible to say that the annulment of parts of the contested decisions necessarily implies that they were overruled as a whole. The nature of the calculation of the equalization levy for ferrous scrap does not lend itself to treating the contents of the decision as inseverable in this way; rather is it certain that the liability to pay the equalization levy for different accounting periods can perfectly well be assessed independently.

Thus the conclusions which the High Authority drew from this judgment are in line with this reasoning. It did not want to take a completely fresh decision for the whole period during which the applicant was liable to the levy. On the contrary in the decision of 18 March 1964 it expressly speaks of a *fresh partial* settlement of the questions dealt with in the decisions of 23 May 1962. When the operative words and grounds for the new decisions are compared with the earlier decisions they can be understood only on the assumption that the new decisions simply replace those parts of the previous ones which were annulled. Whilst in all other respects the new decision simply *reproduces,* that is to say, republishes, the annulled parts of the earlier ones without amending their contents and without even proceeding to a new examination of the facts.

Therefore, as regards the assessment of the consumption of ferrous scrap and the fixing of the contribution due for the period from 1 February 1957 to 31 January 1958, the facts indicate that it is right to apply the concept of *res judicata,* which arises from the judgment in Case 18/62, just as the High Authority has argued. It follows from this that all the applicant's submissions and arguments relating to the calculation of the consumption of ferrous scrap and thence of the contribution due for the period mentioned must be set aside as inadmissible. This applies particularly to the main argument of the applicant according to which she says that she ceased business from 1 May 1957, dismissed her workers and terminated her electricity supply contract, and therefore could not be subjected to the equalization levy for ferrous scrap since she was neither producing nor consuming ferrous scrap after that date.

On the other hand the objection of *res judicata* raised by the High Authority is not valid as regards that part of the decision of 18 March 1964 which had to be redrafted after the Court's annulling judgment in accordance with the tenor of that judgment. The *res judicata* effect of an annulling judgment arises from the operative part of the decision arrived at following the statement of the grounds of judgment. When the judgment in Case 18/62 is thus looked at it yields the following clear and precise findings: the annulment is based on the fact that when the High Authority assessed the consumption of ferrous scrap with reference to the consumption of electricity it worked from incorrect data for the consumption of current. The *res judicata* effect of the annulling judgment relates only to these grounds, with the consequence that the administration may not re-issue this administrative measure and include in it the grounds which have been censured. But all the other observations contained in the judgment in Case 18/62 consist purely and simply of *obiter dicta* from the procedural point of view and as regards the annulling judgment, although the argument put forward in the application and discussed in it bear on the whole of the period for which the applicant was assessed. There is no doubt that they have their importance as regards evaluating the decision which is now being contested. However it does not seem possible to use them in reliance on the principle of *res judicata*

and to reject as *inadmissible* the objections raised against the newly constituted decision following the partial annulment of the earlier decisions. The most that can be said here is that the judgment in Case 18/62 provides something of a preliminary view which can be looked at in the context of examining the *substance* of the present application.

II — Substance

Let us therefore consider in detail what submissions the applicant puts forward against the new decision of the High Authority.

1. First of all she objects to the co-efficients applied by the High Authority for assessing the consumption of ferrous scrap with reference to consumption of current, observing that these co-efficients cannot apply to old plant; the capacity of the furnaces must be taken into account, as must the power of the transformer, the fact that her furnace did not operate on the oxygen process, and finally the fact that she used a great deal of ferrous scrap of poor quality.

In principle I can take this argument back to the judgment in Case 18/62, in which the Court of Justice declared that the opinion of the High Authority's committee of experts in fixing the co-efficients objected to was decisive, despite the doubts which the applicant also put forward then. At that time the Court rightly accepted that the application of this general coefficient may lead to rough and ready and incorrect results in individual cases. In order to avoid them it would in practice be impossible to work on the basis of deduction to determine the consumption of ferrous scrap, and the High Authority would even have to have an expert report made on the consumption of ferrous scrap in each case. But since the administrative procedure would thus become excessively cumbersome, the Court in the judgment in Case 18/62 rejected the submission made by the applicant in favour of an expert investigation in her particular case.

The same course of action is also called for in the present case. It is called for all the more by the fact that the High Authority has taken into account some of the factors raised by the applicant when it carried out its calculation of the consumption of ferrous scrap on the basis of deduction; for example the capacity of the furnaces, and the fact that the applicant did not manufacture by the oxygen process. Furthermore the same course should also be followed because a certificate from the Italian revenue authorities produced by the applicant herself, in which *modern* plant is mentioned, contradicts the assertion that her undertaking was equipped with obsolete plant. Finally, all her other arguments on this point are nothing more than mere assertions; there is nothing in the way of evidence or of any serious attempt to prove them.

Therefore the first argument in the application gives no ground for considering the calculations made by the High Authority concerning the consumption of ferrous scrap to be erroneous.

2. The applicant complains further that the High Authority put too low a figure on the proportion of own arisings when it calculated the consumption of ferrous scrap liable to the equalization levy. Since the applicant claims that she worked almost exclusively for third parties and that there was a large number of faulty casts in her works, she thinks that own arisings should be reckoned at 12% in the production of steel and not at 5% as the High Authority reckoned.

As regards these arguments the High Authority says that there was no reason to suppose that the proportion of own arisings at the applicant's undertaking was any higher, because she operated only an electric furnace and not a rolling mill. Furthermore this argument also

raises a question of proof as to what can be regarded as correct. During the course of the procedure the applicant has not produced any documents in support of her allegations, although she has maintained *inter alia* that the High Authority's inspectors could have examined on her premises a register of the work carried out for third parties. This being so, the applicant at least had every reason for producing this register. She has however only asked that witnesses be heard as to the facts which she alleges. These witnesses are the officials and servants of the High Authority who carried out the inspection of the undertaking, and two other Italian witnesses. This leads in principle to the question whether contrary evidence of this nature can be recognized as relevant for the purpose of assessing the consumption of ferrous scrap. The opposite could be deduced from the judgment in Case 18/62, for it is emphasized therein that the applicant did not put the High Authority in a position to rectify its estimate *by producing documents*. But, even apart from this question of principle, in this case I do not see how the witnesses mentioned above could make any useful contribution towards impugning the accuracy of the High Authority's calculations, particularly because, at any rate as regards these Italian witnesses, the applicant has not even given any indication in what capacity and on what grounds they should be in a position to give precise figures concerning production in her factory, going back to 1955.

This is why in my opinion the Court should hold that, as regards this submission also, adequate proof against the High Authority's estimate was neither offered nor given though, I must add, ample opportunities were available during the proceedings in the earlier Case 18/62. Thus there can be no question even from this angle of impugning results of the assessment made by the High Authority.

3. In the third place the applicant points out that the electric current was also used in her undertaking for producing steel castings; that the amount of ferrous scrap used in producing these is exempt from the equalization levy according to decisions taken by the High Authority, and so ought not to be taken into account in calculating the contribution due.

To this the High Authority objects that the applicant never gave any indication of this kind of production in her declarations for the purpose of the *general* levy. In reality this fact constitutes such an important argument against the correctness of her assertions as to justify abandoning now any further discussion of the third submission. What is more, the proof offered by the applicant on this point does not go beyond naming the witnesses in the second submission on which I may refer to all that has been said about that.

When, in support of her assertions, the applicant produces two supplementary documents, she cannot escape from the objection that mere description of her undertaking as 'fonderie' ('foundry') in a decision of the Italian revenue authorities is no more adequate proof of the accuracy of her assertion than another document, of doubtful origin, which describes the activity of her undertaking as 'fonderie di acciaiere' ('steel foundry'). The particular objection to this document is that it clearly does not refer to the period of production which is the material one for assessing the equalization levy on the ferrous scrap: this is clear from the details given on the size of the furnaces.

Therefore, even by referring to a supposed production of steel castings, the applicant cannot impugn the estimate of her consumption of ferrous scrap.

4. In a general way, the applicant tries to contest the correctness of the figures used by the High Authority by referring to an assessment of her income made by the Italian tax authorities during the

period at issue, claiming that this assessment shows that the High Authority put an unreasonable figure on the actual production, as well as upon the productive capacity of her undertaking.

However this attempt too fails. The High Authority is right in calling attention to the fact that it is the consumption of ferrous scrap by an undertaking and not its income which counts for the purposes of the ferrous scrap equalization scheme. Furthermore, in the absence of adequate documents of account, the Italian revenue authorities had to be satisfied with an aggregate assessment for their own purposes.

As regards the actual production as opposed to productive capacity the applicant would like first to see established a basis for a correct assessment by the hearing of the witnesses whom she mentions and also to have an expert investigation on the time necessary for the production of cast steel in her undertaking. In effect she is offering here again a sort of counter-proof, which on all the facts before us must be considered as inadequate for the purposes of these proceedings.

We must therefore adhere to the method chosen by the High Authority for estimating the applicant's consumption of ferrous scrap as the only practical basis for calculating her contribution due.

5. Finally, I note that a new argument appears in the reply and it is this: the applicant's liability to contribution should not have been fixed on the basis of Decision No 19/60 but of Decision No 2/57 because in April 1957 she had already ceased production.

However, in my view, this argument should be rejected for procedural reasons quite apart from the objection of *res judicata* which I have considered above because it was not included in the application, even by inference. Therefore the rules on delay in indicating evidence (Article 42 of the Rules of Procedure) must be applied and I shall not dwell on this point further.

Furthermore it is perfectly obvious that there is no substance in this submission either. Decision No 19/60, the text of which is clear, in fact refers not only to the accounting periods which began to run after the applicant supposedly ceased production, but to the whole period during which the equalization scheme was functioning.

III — Observations on the application regarding the procedural issue

After all that, there still remains a word to say on the application made by the applicant regarding a procedural issue during the written procedure namely as to which party must bear the costs of this action.

As we all know, the issue in question concerned the fact that the High Authority produced, at the same time as its memorandum of defence, some documents which were not written in the language of the case, but in French. Within the time-limit set for filing her reply, which incidentally was extended, the applicant complained of this fact in a special memorandum. The Registrar of the Court then wrote to the High Authority and invited it to send an Italian translation of Schedules 2 and 3 to the defence before 22 July. This being done, a new time-limit was set for the applicant to file her reply, and the written procedure followed its normal course.

According to the Rules of Procedure of the Court, it is certain that the High Authority contravened Article 29 of the Rules of Procedure when it submitted texts written in French. However that does not mean that this contravention of the Rules could justify making a separate application on this procedural issue alone. The all-important issue for the decision which the Court must take concerning the costs is whether the said contravention put the applicant at a

measurable disadvantage in conducting her defence as she alleges. There are a number of objections to that. The High Authority has said, without being contradicted, that the applicant herself had previously sent it the documents in question in that form, that is to say in French. The High Authority further points out that for the most part these documents only consist of a set of calculations and that there are no more than twelve lines of text in all. The High Authority cannot accept that the applicant's lawyer could have had the least difficulty in using these documents, the less so because in another case (Case 33/59) he conducted the whole of the proceedings before the Court in the French language.

In fact all the above points should be weighed by the Court when it takes its decision as to costs. If account is further taken of the fact that to deliver his reply the applicant's lawyer had a period of time which began to run on 27 May 1964 and which, after being extended, ended on 21 July 1964, and that it was only on 15 July 1964 that he decided to lodge an application on this procedural issue, one must agree with the High Authority that the expenses caused by that application had no reasonable foundation. I therefore agree with the High Authority that the Court should apply against the applicant the second subparagraph of Article 69 of the Rules of Procedure in the decision on the costs of the action on the procedural issue.

IV — Summary and conclusion

It does not seem to me necessary to accept the submissions of the applicant for the production of certain documents by the High Authority, not least because I do not see how these documents could help to impugn the estimate made by the High Authority. I would suggest to the Court that it should reject the application as inadmissible in so far as it relates to the period subject to levy mentioned in the contested decision and falling between 1 February 1957 and 31 January 1958, and for the rest, reject the case as unfounded.

The applicant must bear the costs of the proceedings, including those of the action on the procedural issue.