OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 9 DECEMBER 1965[1]

Mr President,
Members of the Court,

Acciaierie e Ferriere Pugliesi, a limited liability company whose registered office is at Giovinazzo (Bari), brings before you, on the basis of Article 33 of the Treaty of Paris, the decision of 13 November 1964 whereby the High Authority charged it with the payment of 39 329 539 lire by way of contributions under the equalization of ferrous scrap.

This company runs two plants: one, at Bari, has amongst others a furnace with a capacity of 7 metric tons and a rolling-mill for seamless tubes with a montly production capacity of 1 000 metric tons. The other, in Giovinazzo, comprises a 20-ton open-hearth furnace, a foundry with five cupola furnaces with a monthly capacity of 280 metric tons, a rolling-mill with a monthly capacity of 2 000 metric tons and a forge for retrievals with a monthly capacity of 100 metric tons. The existence in the undertaking of sectors, which, like the foundry and the forge, are outside the Treaty and the equalization scheme clearly constitutes a source of uncertainty and difficulty for the purposes of fixing the bases for contribution.

For the period from April 1954 to November 1958, the Pugliesi company declared a movement of bought scrap of 129 614 metric tons. Before it adopted the disputed decision, the High Authority caused the Société Fiduciaire Suisse to carry out various checks at the company's plants, in April 1957 for the period from 1 April 1954 to 31 January 1957, in April 1960 for the period from 1 February 1957 to 30 November 1958, and finally in 1961 at the request of the undertaking itself. These operations gave rise to an exchange of correspondence of which a part is appended to the file. They resulted in the High Authority's reducing the quantities in dispute from 25 372 metric tons to 10 520 metric tons, thus substituting for the declared 129 614 metric tons a basic tonnage subject to contribution of 140 134 metric tons. This formed the subject of a statement of account addressed on 8 April to the undertaking which contested it by letter of 18 June 1963.

It was under these circumstances that the contested decision of 13 November 1964 was taken. It states that the checks made show that the undertaking had not correctly drawn up its declarations which consequently required to be rectified. It consists of a twofold examination, by reference to time and materials, of the inadequacies found, which I must repeat, apologizing for the dryness of the topic.

A table gives first of all the allocations for the different accounting periods of the basic tonnages subject to contribution, which arise from the increases made to the tonnages declared. These increases may be summarized as 8 703 metric tons for the total of the periods 1 April 1954 to 31 January 1957, and as 1 817 metric tons for all the periods from 1 May 1957 to 30 November 1958, the declaration for the period from 1 February 1957 to 30 April 1957 having disclosed no deficiencies. The total differences noted (8 703 + 1 817) amounted to 10 520 metric tons.

The decision then analyses these deficiencies, no longer with regard to time but by reference to materials or destination. The following corrections must be made to the declared tonnage:

Increase:

— 106 metric tons of bought scrap received and not declared through error. The undertaking does not dispute this point and admits the debt.

— 1 055 metric tons of bought scrap received which the undertaking claims were for its integrated iron foundry (which section is outside the rules of the Treaty under Annex I thereto) but without supplying any proof of this.

— 9 200 metric tons of ferrous scrap received, considered by the Pugliesi company as return scrap. The High Author-

1 — Translated from the French.

ity on the other hand considers this as an increase in stocks and endeavours to prove this by a statement of general movements of ferrous scrap to which I shall return.

— 364 metric tons of ferrous scrap which were sold and wrongly deducted as coming from the iron foundry's stock of ferrous scrap which was not subject to contribution.

— 1 347 metric tons of ferrous scrap transferred from the steelworks to the iron foundry without any proof being given of this.

From this total of 12 072 metric tons should be *deducted*:

— 1 552 metric tons of ferrous scrap transferred by the steelworks to the iron foundry which deduction is agreed by the High Authority.

The increase in the basic tonnage subject to contribution is thus reduced to the figure of 10 520 metric tons which we have seen above.

Moreover there is no dispute over the tonnages for the production of steel for castings, which are exempt from the contribution, or over the rates of the latter which vary in accordance with the period to which the alleged deficiencies relate. The entire dispute revolves around the question whether the various quantities of ferrous scrap which I have indicated must be included in the basic tonnage subject to contribution. We are concerned not with an application in which the Court has unlimited jurisdiction, as if a fine had been imposed under Article 36, but with an application for annulment. Your task is not to fix the amount of the contribution but to give a ruling on the legality of the contested decision.

In support of its application, the Pugliesi undertaking complains first of all that the decision violates the principles of the rules of evidence and that it does not contain a statement of reasons. It then refers to the individual increases, and maintains that they all constitute infringements of Decision No 2/57, since they render liable to the contribution quantities of ferrous scrap which it claims that it can prove—so far as it is incumbent upon it to do so—were resold or employed respectively in the foundry, as return scrap, or for forgings.

A — The applicant points out in the first place that with regard to the corrections of 1 055, 9 200 and 1 347 metric tons, the decision expressly states that the undertaking supplied no evidence that this ferrous scrap was used elsewhere than in the steelworks. This evidence would have exempted it from equalization contributions, and the High Authority's observation concludes with a similar complaint regarding the quantity of 364 metric tons. Its activity comprises one sector, which comes under the equalization scheme, and another, the foundry, which does not. It is thus for the defendant to show that the ferrous scrap was actually used in such a way that its acquisition comes within the equalization scheme, without reversing the burden of proof, as it did. Furthermore, the decision cannot be regarded as containing a statement of the reasons on which it is based. For example, it is insufficient to state that the quantity of 10 520 metric tons was assessed on the basis of the accounting documents examined when the checks were made on the undertaking in 1957, 1960 and 1961, since no information has been given as to the content or the probative value of these documents and there is no indication of the procedure used to analyse and interpret them.

Against this the High Authority objects that the undertaking has never produced accounts for the iron foundry, so that it was impossible to check the allocation of the purchase and consumption of ferrous scrap between the various sectors of the company's activity. It drew up a general statement of movements of ferrous scrap (which moreover only concerned the period before 1 February 1957), in part on the basis of the applicant's declarations and the documents submitted by it in connexion with the input of ferrous scrap in respect of each melt. Since the figures do not agree, it must therefore be concluded that the undertaking was also employing undeclared material in the steelworks. It is of little importance that it claims to prove that the material in question was sold or re-used, and therefore deductable; the point at issue is not concerned with the work of the plants which were able to

acquire the necessary material by other means; it is concerned with the surplus stocks in the steelworks.

The High Authority disputes on the other hand that it is reversing the burden of proof by adopting this attitude. It says that it is for the undertaking to justify the presence in stock of a greater quantity than that corresponding to its declarations, and to explain why the general statement of movements of ferrous scrap contradicted these declarations.

But the Pugliesi company then complains —and not without some apparent justification—that in its reply the High Authority has altered the scope of the dispute and amended the grounds put forward in support of the disputed decision. The latter limited itself to putting forward the lack of evidence of use in the foundry, of sale or of re-use, and to assuming that it was employed in the steelworks or for increasing stocks. The defendant had in no way alleged that the company had acquired other ferrous scrap than that appearing in the purchase invoices and the input records, as the standpoint adopted in the statement of defence might imply. On the basis of the contested decision, the applicant seeks to establish that the quantities in dispute were re-used or used for pig-iron castings—this is the aim of the other submissions in its application which we shall see later; however, the defence amounts to denying that the evidence which the company claims to submit has any value.

What are we to conclude from this debate? In the first place it is not denied that the Pugliesi undertaking did not have any industrial book-keeping in the 'foundry' sector which does not come under the Community. There is no doubt that it is free, as it says, to adopt for its sections, other than the steel management, the internal organization which it considers most expedient. But this necessarily has repercussions on the sector coming under the Treaty and under the equalization scheme, since a reconstruction of all the movements of ferrous scrap cannot be effected on the basis of aggregate accounts. On the other hand, if the equalization scheme is not to be reduced to a cipher, the High Authority's right must be recognized, and you have recognized it, to assess by way of estimation an undertaking which has no accounts; but in addition the power cannot be denied it to correct a declaration made by an undertaking whose books of account are incomplete, provided that sufficient reasons are given for the corrections made. The undertaking itself still retains the right to dispute before the Court the figures adopted by the High Authority and to defend those arising from its own declarations.

Finally, I do not think that it is right to apply with undue strictness the concept of 'burden of proof' in such a sphere. In the final analysis, a reasonable degree of certainty must be attained on examining the documents produced by each of the parties and the reply made to them by the opposing party, subject to the Court's power, if it considers that the matter is insufficiently clear, to make an order for an expert's report.

With regard to the complaint levelled against the decision of a failure to give a statement of the reasons for it, it seems to me that this cannot be upheld. For each of the corrections made, the High Authority has indicated the reason justifying it. These reasons exist; whether they are accurate or not is a question relating to the substance of the case.

We turn now to the other submissions in the application whereby the Pugliesi undertaking disputes the legality of the corrections made to its declarations.

B — The Pugliesi undertaking complains that the disputed decision refused to exempt a part of the tonnage which it used in its foundry, whereas iron castings are excluded from the scope of the Treaty by Note 5 of Annex I thereto and the ferrous scrap used for this does not come under the equalization scheme.

It claims to have used 3 954 metric tons of ferrous scrap for this purpose. Of this amount, the High Authority has only agreed 1 552 metric tons and has declined to do so as regards 1 055 metric tons which, it says, represented ferrous scrap purchased during the period 1 April 1954 to 31 January 1957, and as regards 1 347 metric tons which represented the movements from the steelworks to the foundry during

the period 1 May 1957 to 30 November 1958. According to the High Authority the destination alleged has not been proved, and the quantities in dispute, that is to say, 2 402 metric tons, are the subject of two headings in the contested decision.

How does the company verify the figure which it puts forward? It commences first of all with the pig-iron products which it sold while the scheme was in force. In support of its application, it submits extracts from its books of invoices from which it emerges that the quantities sold and properly invoiced amounted to 3 444 metric tons. To this it adds 200 metric tons of pig-iron products employed for its own use at its two plants. In all, the smelting of finished pig-iron is increased to 3 650 metric tons, in round figures.

This is the basis from which it calculates the tonnage of ferrous scrap employed for this purpose, adding 10% for technical losses; it thus arrives at the figure of 4 015 metric tons of ferrous scrap, which is consequently higher than that for which it claimed exemption; from this it concludes that the inclusion of the two amounts of 1 055 and 1 347 metric tons in the basis of assessment is not justified.

This line of argument has its value: one can dispute it from a technical point of view, or debate the probative value of the invoices produced which I feel myself incapable of appraising, but at least it merits discussion. However, I am bound to say, and with regret, that the High Authority has met this argument with a mere denial. In its defence it takes the view that the complaint of infringement in this connexion of the rules of Community law is completely unfounded, since it was clearly apparent from the contested decision that the ferrous scrap used in the iron foundry is exempt, but that the exemption was only granted where proof was supplied of such use by the foundry. The High Authority makes no comment whatsoever on the probative value of the documents supplied by the company, such as its invoices.

It might be added that some of the arguments employed by the High Authority are difficult to understand. For the period 1 May 1957 to 30 November 1958, the correction of the declarations amounts to a total of 1 817 metric tons, comprising 106 metric tons of bought scrap received and not declared through an error, 364 metric tons of ferrous scrap sold which was wrongly deducted since it came from the foundry's stock of ferrous scrap, and finally 1 347 metric tons of ferrous scrap transferred from the steelworks to the iron foundry without any evidence being given for this. This last item is one of those which the company maintains was in fact employed to produce iron castings. In the rejoinder, however, the High Authority emphasizes the coincidence between the receipts of ferrous scrap not declared because, according to the applicant, it was for the foundry, and the increases made in the accounts of the steelworks' stocks. It shows that, for the period February 1957 to November 1958, they increased respectively to 3 040 and 3 000 metric tons, and for the single month of June 1958 to 1 189 and 1 000 metric tons. In these circumstances it is difficult to understand how the alteration was only 1 817 metric tons for the whole period under consideration, and 232 metric tons for the quarter 1 May to 31 July 1958.

Although a degree of uncertainty exists, I am inclined to think that the Pugliesi company has adduced sufficient evidence, which has not been refuted by the High Authority, for it to be admitted that the two disputed items of 1 055 and 1 347 metric tons of ferrous scrap correspond to tonnages used by it in its foundry and are excluded from contribution.

C — Finally, the applicant disputes the assessment to contribution of 9 200 metric tons of ferrous scrap, which the High Authority considered as corresponding to an increase in stocks resulting from purchases, although it was return scrap either sold or having been employed in producing forgings and constituting own resources which are not chargeable under Article 4 (2) of Decision No 2/57.

This tonnage, which relates to the period 1 April 1954 to 31 January 1957, has been deduced by the High Authority from what it calls the general statement of movements of ferrous scrap for the same period. This is a document drawn up on the basis of the company's periodic declarations, but drawn

up by the High Authority, and which you required the High Authority to produce to you.

The applicant recalls that it had not declared 20 227 metric tons of ferrous scrap consisting of its own arisings; although the High Authority admitted that 11 027 metric tons were of this type, the remainder, that is 9 200 metric tons, were wrongly considered to have been bought scrap.

In fact, account must be taken, with regard to ferrous scrap sold, of losses due to deoxidization and with regard to scrap used for forging, of melting losses etc. When account has been taken of this, the total quantity of return scrap results in finished products with a total weight of 16 587 metric tons. However, according to the documents supplied as a schedule to the application, forged products sold and return scrap sold amounted respectively to 4 242 and 10 410 metric tons, that is 14 652 metric tons in all. The difference, that is 1 935 metric tons, may be largely explained by the internal consumption of the two plants.

In its observations submitted after the general statement of movements of ferrous scrap was notified to it, the company gave an additional justification for the alleged increase in stocks imputed to it, by relying on a report by Campsider which assesses at 26.9 to 28.9 % of production the percentage of the Italian iron and steel undertakings' internal retrievals. On the basis of the total production, that is 155 094 metric tons, it could have declared as the steelworks' own resources a quantity of as much as 43 000 metric tons; in fact it only declared 14 127 metric tons, that is to say, 9.1 % of production; this explains why it periodically recorded in its books an increase, a reassessment of its stocks, which should not be regarded as concealing assessable bought scrap, but as justifying them as retrieved scrap. The company indicates—as appears probable—that part of the retrieved scrap was not checked or weighed, but left in the storage area. Even if we add once more to its declared own resources the 9 200 metric tons in dispute, scarcely half the percentage of retrievals given by Campsider is attained, and there is thus no reason to consider the quantities in dispute as deriving from bought scrap.

You will recall that the argument was repeated at the hearing, and the High Authority's Counsel objected that the alleged 28 % could only apply to certain clearly specified undertakings or productions, but not to the Pugliesi company's sector of activity. However the Campsider report says nothing of the sort and the 28 % is shown there as constituting an *average* percentage.

If this is indeed so, that report appears to me a sufficient reason to admit that the 9 200 metric tons must be considered as internal retrievals and thereby excluded from the equalization constribution. In sum, I suggest that this should be your ruling.

A final point remains: it relates to 364 metric tons of scrap sold which the contested decision showed as wrongly deducted, and as originating from the stock of ferrous scrap from the company's integrated iron foundry. In this connexion the company only gives rather vague explanations, namely, that even if the disputed quantity is added to the 9 200 metric tons of which I have just spoken, the final figure is considerably less than the total tonnage proved. Moreover these few hundred tons are a negligible aspect in the context of the dispute as a whole. In this instance it must indeed be admitted that the explanations adduced are insufficient.

Finally, of the 10 520 metric tons which occasioned the correction of the company's declarations, consequently rendering it liable to the sum of 39 329 539 lire, only 106 metric tons, admitted by the undertaking, and 364 metric tons which do not seem to me to have been sufficiently justified, are in my opinion of such a nature as to give rise to payment of the contribution.

But what is at issue is the annulment of the decision fixing the amount of the Pugliesi company's financial obligations; it is impossible to amend the amount of these obligations, and it is sufficient that the decision should be in part illegal for there to be grounds for annulling it as a whole. It is for the High Authority to issue it again on a different basis.

I am of the opinion that:

— the decision of 13 November 1964 whereby the High Authority charged Acciaierie e Ferriere Pugliesi with the payment of the sum of 39 329 539 lire, should be annulled; and

— the High Authority should bear the costs.