2. Orders the applicant to bear the costs.

Hammes Delvaux Strauß

Donner Trabucchi Lecourt Monaco

Delivered in open court in Luxembourg on 15 December 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 4 NOVEMBER 1965[1]

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1 — Translated from the German.

Mr President,
Members of the Court,

The applicants in Cases 3 and 4/65 which have been joined for the oral proceedings and consequently for the Advocate-General's submissions are Belgian steel undertakings. They make coils (Hainaut-Sambre), or sheet bars and coils (Espérance-Longdoz), that is, semi-finished products which are subsequently completed partly in their own works and partly by Phenix-Works (for Espérance-Longdoz and Hainaut-Sambre) and Laminoirs de la Rochette (for Espérance-Longdoz only). Before the establishment of the Common Market and also while the scrap equalization machinery was in operation the applicant companies had contractual relations with these other companies, details of which we shall examine later. The agreements are said to have provided for the return to the applicant companies of scrap recovered during the final manufacturing process of the semi-finished products, by means of retention of ownership clauses. For this reason, the corresponding quantities of scrap were considered as coming from their own resources, and were therefore not declared to the equalization fund, such items being, it is commonly acknowledged, outside the scope of this fund. Furthermore, the first investigation carried out in 1956 by the Société Fiduciaire Suisse on behalf of the equalization authorities did not rise to any objections at this point; on the contrary, the investigators are said to have made reassuring statements to the effect that scrap covered by a retention of ownership need not be declared. It was only in the course of subsequent investigations in 1959 and 1960 that the problem posed by the inclusion of such scrap in the equalization machinery came to the fore. In any case, the High Authority came to the conclusion that the scrap recovered during the final manufacturing process of Phenix-Works and Laminoirs de la Rochette of semi-finished products supplied by the applicant companies should be considered as coming under the equalization scheme, notwithstanding the retention of ownership thereof. It was on this basis that statements of account under the equalization scheme were sent to the applicant company in the form of letters not capable of forming the subject of the application to the Court, on 8 April 1963. The High Authority was of the opinion that objections raised at the time by the applicant company were not valid. For this reason, on 13 November 1964, after the inclusion of the quantities of scrap in dispute in the amount liable to equalization, it issued final enforceable decisions which required the applicant companies to pay certain sums.

The applications for annulment on which I must give an opinion today are primarily directed against these decisions. According to the submissions of the applicant companies, these decisions should be annulled primarily because they impose contributions on scrap coming from their own resources. In other words, they should be annulled for reasons essentially concerned with the legal validity of the clauses retaining the right of ownership. At the same time, in case the contested decisions are declared valid, the applicant companies have put forward claims for damages. These claims maintain that the High Authority was responsible for a wrongful act or omission (*'faute de service'*) because it had not informed the applicant companies in time as to the validity with regard to the scrap equalization scheme of a clause retaining the right of ownership. Consequently it was under an obligation to make good the damage caused to the applicant companies by its failure to take other measures which would have relieved them of the obligation to contribute to the Equalization Fund. According to these submissions, the

High Authority should be ordered to pay certain sums by way of damages as well as the interest it has demanded within the framework of the scrap equalization machinery.
The High Authority maintains that all these claims are inadmissible or at least not well founded, and accordingly asks that they be rejected.

Legal consideration

I — Application for annulment

(1) *Preliminary remarks*

As these submissions are based essentially on legal arguments concerning the validity and significance of retention of ownership clauses, I think it desirable first of all to establish what form this retention of the right of ownership takes in the present application.
It is necessary to distinguish between the following cases:

(a) Espérance-Longdoz

(aa) First of all, I should mention a long-term contract for the delivery of semi-finished products to Phenix-Works, concluded on 28 December 1950, with effect from 1 January 1951 for a period of 5 years. Under head V, 'Supply of scrap metal', this contract contains the following clause: 'The price formula set out in Article III is based on the assumption that Phenix-Works will deliver to Espérance-Longdoz, in pressed bundles and bales, a quantity of scrap metal equal to 25% (twenty-five per cent) of the monthly tonnage of sheet bars and, in respect of coils, a percentage to be determined by mutual agreement, when the contract has been in operation for six months, of the monthly tonnage of coils supplied by Espérance-Longdoz'.[1]
Furthermore, the applicant companies assert that the individual transactions concluded under this contract all carried the following retention in favour of Espérance-Longdoz in the general conditions of sale: 'We transfer to you only the materials required for your finished products and remain the owners of the scrap arising from your processing'.
(bb) This long-term contract was superseded by an agreement made on 6 September 1956, with effect from 1 January 1956 and for a term of 10 years. This agreement contained under head VII the following clause: 'In view of the desire of Espérance-Longdoz to retain ownership of scrap resulting from the processing by Phenix-Works of the coils supplied to them, Phenix-Works undertakes to return monthly to Espérance-Longdoz a tonnage of waste scrap fixed at an amount equal to 10% of the total weight of coils supplied in the preceding month by Espérance-Longdoz'.
(cc) It would appear that sales to Laminoirs de la Rochette were subject to a reservation which, in some general conditions of sale produced to the Court, were couched in the following terms: 'We retain full ownership of the scrap metal resulting from the processing of our steel'.

(b) Hainaut-Sambre

(aa) Clearly there were no long-term contracts between Hainaut-Sambre and Phenix-Works. In the present case, the question of the ownership of the recovered scrap is alleged to have been settled separately in each transaction in the conditions of sale made by Hainaut-Sambre, carrying the following clause: 'We reserve to ourselves ownership of processing waste from the moment of delivery'.
(bb) Furthermore, the applicant company Hainaut-Sambre has pointed out

1 — Extracts from the contracts are translated from the French.

that its general conditions of sale, applicable to all commercial transactions, carry the following clause: 'Until full and effective payment is made, the goods remain our property'.

In order to simplify the dispute by eliminating all questions of interpretation and of fact which are probably not relevant for a decision, I shall without further investigation consider the aforementioned clauses in the light of the following assumptions:

— I shall assume that all commercial transactions in the present dispute have been covered either in general conditions of sale or in other provisions by clauses retaining for the sellers the ownership of the recovered scrap. Especially in respect of the relation between Espérance-Longdoz and Phenix-Works prior to 1956 I shall not look solely at the first long-term contract, which did not make it sufficiently clear whether there was really an intention to retain ownership.

— In respect of the applicant company Hainaut-Sambre, it must also be taken as fact that the provision in its general conditions of sale, to the effect that ownership of the goods sold passes to the buyer only after full payment of the purchase price, applied to all its commercial transactions, either by virtue of an express provision or by virtue of permanent tacit arrangements.

— Finally, it may be assumed that in all the aforementioned retention clauses the contracting parties' intention was to create legal effects in respect of *ownership* and that they were not merely concerned to create an obligation to return certain quantities of scrap.

It is on the basis of this clarification of view, which for the moment can only be hypothesis, that I shall now try to deal with the main issues in this case.

(2) *Validity in Belgian law of the retention of ownership of the waste scrap*

It was mainly in the light of Belgian law that the parties considered the question whether the retention of ownership clause covering the waste scrap (I shall deal later with the retention of ownership pending payment in full) was capable of producing legal effects such as to give the applicant companies sole right to ownership of the scrap as soon as it came into existence. I have the same hesitation in endorsing the parties' view here as my former colleague Lagrange felt when he examined similar legal questions on the basis of German law, in the *Mannesmann AG* and *Hoesch AG* Cases (19/61 and 20/61). I cannot say that my hesitation has been altogether dispelled by reading the legal opinions of the eminent Belgian jurists which Hainaut-Sambre has put before the Court, because, although it is true that these jurists have drawn identical conclusions, they have done so for quite different reasons.

My first impression on studying the Belgian law of property was that the rules of acquisition by accession ('accession') which govern not merely the merging of several distinct objects but also the acquisition of products resulting from division of single objects, and wherein may lie an aid to the solution of our problem, are to a large extent determined by the parties (Articles 553 and 565 of the Belgian Civil Code). Obviously the only valid limitations are those imposed by the nature of the objects themselves, 'by the équité naturelle' ('natural equity'), so that it seems quite permissible, as a technical possibility, to create by mutual agreement separate rights of ownership in the separable parts, determinable in the light of economic experience, of one and the same object.

On the other hand, we must recognize that there are certain objective limits

to the right of ownership owing to its being an exclusive and absolute right and these limitations exclude unequivocally the grant of separate rights of ownership in constituent, undeterminable parts of a single object. That is why the applicants and their legal advisers do not go so far as to claim that the retention of ownership of the waste scrap secures for the sellers of sheet bars and coils rights of ownership over parts of *those* commodities, in spite of their transfer to the buyers. They prefer a different interpretation. Either they assert that the ownership of the sheet bars and coils remains in the hands of the sellers until completion of the manufacturing process and that only the finished product, yet to be created is actually sold; or they assume a basis of co-ownership in favour of the buyers of the semi-finished product, the separation of which does not result in transfer of ownership; or finally, they put forward the view that the ownership of the sheet bars and coils has indeed been transferred directly to the buyers, but that the latter have at the outset renounced the right of acquisition on their own account of the 'products' which are brought into existence (the waste scrap) and this would appear to be valid according to the rules of *jus fruendi*.

Without wishing to display a lack of respect towards the Belgian jurists I may perhaps venture to remark that these theoretical constructions seem artificial, at least in some respects, and it is difficult to accept them as being a true interpretation of the will of the parties. Also, it cannot be disputed that the examples put forward to support the arguments of the applicant companies are far removed from the particular features of the present case. In saying this I have in mind the attempt to illustrate their arguments with cases in which separate rights of ownership are created in *qualitatively* different parts of an object, whereas the scrap affected in the present case by the retention of the right of ownership constitutes a homogeneous part of the goods supplied, determinable only quantitatively as a portion of the whole. I was struck by the fact that neither the applicant companies nor their legal advisers have been able to quote a single case in Belgian jurisprudence which contains the same features as our problem. In any case under the Belgian fiscal system the transference tax ('taxe de transmission'), applied to waste scrap, does not constitute a conclusive precedent, because it is a well-known fact that in all legal systems taxation law, guided by economic necessity, leads a separate existence and this sometimes causes it to differ considerably from corresponding concepts of civil law.

To summarize, I must say that I cannot bring myself to judge the facts precisely in accordance with Belgian civil law, but that there still remain considerable doubts as to the correctness of the arguments of the applicant companies in respect of the validity of the retention of the ownership of scrap. It does not seem to be the duty of this Court to adjudicate on these outstanding issues.

(3) *Significance of a retention of ownership of waste scrap in Community law*

According to the case-law of the Court up to now, it is not the national law on moveable property which is to be the sole, or even the principal, governing factor, but the principle which may be elicited from the fundamental decisions made in respect of the scrap equalization system. It is in this sense that one must understand the Court's decisions in Cases 19 and 20/61.

One thing needs to be said at the outset: even viewed in this light, *legal* concepts are the most important things to consider. Single facts, on the other hand, (such, for instance, as the trans-

fer of scrap from one undertaking to the other) are not conclusive when it comes to limiting the obligation to contribute, although in the present case the High Authority has put forward such a theory and although some of the reasons set out in the Court's decision in *Forges de Clabecq* v *High Authority* may be interpreted in support of this theory.

The Court's decisions in Cases 19 and 20/61 show that the definition of the concept of 'own arisings' (scrap produced by an undertaking from its own material) is drawn from the general principles which regulate the law of property in the six Member States (this means the application of a method of law similar to that outlined in the second paragraph of Article 215 of the EEC Treaty). This cannot mean that one should proceed to add up all the distinctive features of the six legal systems, but on the contrary that one must eliminate the special nuances of the law of property peculiar to individual legal systems. It is easy to pick out the deciding factors for this method: within the framework of the machinery common to six Member States and aiming at complete equalization between all undertakings, the interest of the undertakings in the equal treatment of everyone subject to the scheme demands that uniform concepts should govern the raising of the contributions necessary therefor.

In the second place, it is possible that practical considerations have played a part: these appear in other decisions relating to the scrap equalization machinery and emphasize the need, in the interests of legal certainty, to link the obligation to contribute to the scheme to clear and simple concepts. This principle has notably played a part in the manner in which the question of group scrap has been dealt with.

The judgments in Cases 19/61 and 20/61 have observed such considerations in deciding, quite independently of the possibilities offered by German law, that there was no need to consider any retention of ownership of waste scrap because such a retention would not be admissible under the laws of the other countries. This judgment also checked ventures made in the direction of a theory to the effect, for instance, that the retention of ownership gave expression to the contracting parties' intention not to transfer ownership to the buyer except in respect of the finished product, or that these contracting parties would be acting in accordance with Article 950 of the German Civil Code as processors for the account of the sellers.

The Court is now faced with the same situation and in assessing it, should not allow itself to be distracted by the variations in the terms of the clause retaining ownership, for instance, when such a clause in a contract of sale attempts to determine in advance the quantities of waste scrap generally found to be recovered in the processing of the sheet bars and coils which are sold. In fact, in Cases 19 and 20/61, it would actually have been possible to determine without difficulty the total quantity of the material covered by the retention of ownership.

That is why I think it indispensable to apply the reasoning in the aforementioned judgments to the present case, without any restrictions and without taking any account of the openings which Belgian law may offer in this matter of retention of ownership; that is to say, as far as the scrap equalization is concerned, clauses seeking to retain the ownership of the scrap produced in the finishing process to the seller of the semi-finished products are of no importance. Consequently, the transfer of ownership of sheet bars and coils to buyers who process them at their own risk and expense entails the aliena-

tion of waste scrap produced in the course of this processing, so that any return of such scrap to the sellers of the semi-finished products should logically be regarded as akin to an ordinary commercial act of sale and therefore liable to equalization.

(4) *Effect of retention of ownership contained in Hainaut-Sambre's general conditions of sale*

The preceding remarks do not apply to the retention, worded differently, in Hainaut-Sambre's general conditions of sale and which aimed at retaining for the applicant company ownership of the goods sold until full payment of the purchase price. As this retention applied to the entirety of the goods sold, the question we have been discussing concerning the delimitation of the parts of a whole or the creation of separate ownership rights in parts of an object after its division does not arise. It may also be accepted that the laws of the Member States generally recognize the validity of such a retention.

Nevertheless, it cannot be denied that difficulties arise in applying it to the equalization machinery.

The whole case of the applicant company rests essentially on combining the retention of ownership in scrap produced in manufacture and the special retention with which the Court is now faced, as well as on the claim that payment of the purchase price had always been made *after* the processing of the products sold, so that at the time of transfer of ownership there was no difficulty in determining the precise things to which the retention applied.

First of all I would emphasize that, although dates of payment can be determined without difficulty, it is doubtful if the precise moment of completion of the finishing process can be proved. Therefore, although it is vital to the applicants' thesis to know this moment precisely, it may be contended that even this special retention of ownership cannot, for those very practical reasons, be taken into account for the purposes of equalization.

Another consideration is even more important. We have just seen that, considering the special requirements of the scrap equalization scheme, a clause retaining ownership only of scrap produced in manufacture process cannot be taken into account. Since, however, according to the arguments put forward by the applicant company, the special retention in the general conditions of sale can only be considered in conjunction with the retention of ownership in the waste scrap and since the latter cannot be taken into account, the combined operation of these two clauses is frustrated. In other words: if in the equalization system the second of these two clauses is not taken into consideration, it follows that at the moment of full payment of the purchase price, ownership of the whole of the two products sold (finished products and waste scrap) must be deemed to have been transferred to the buyer. Consequently, even with Hainaut-Sambre's special clause retaining ownership, the return of the scrap can be envisaged only within the framework of a transaction akin to a purchase and as such liable to pay contributions.

Consequently, none of the clauses retaining ownership invoked in this case leads to the conclusion that the contested decisions should be annulled on the ground that they infringe principles concerning liability to the contribution established by those general decisions in the matter of scrap which exempt 'own arisings'.

(5) *Are the general decisions on scrap equalization on which the High Authority bases its claims for payment compatible with the provisions of the Treaty?*

Up to this point, my opinion has been

based on an interpretation of general decisions in the matter of scrap. The time has now come to enquire whether these decisions infringe some of the provisions of the Treaty. The applicant companies submit that, from a number of points of view, they do.

(a) Infringement of Articles 5 and 83 of the Treaty — Disregard of the laws of ownership of a Member State

The applicants stress in particular that, if in its decisions the High Authority seeks to link legal effects to concepts of national law, it is bound by their prevailing provisions. It cannot as it has done in the present case, in relation to the concept of ownership, disregard these concepts without infringing the laws of property of a Member State. If, for the purposes of specific schemes, the High Authority wishes to treat all the interested parties on an absolutely equal footing, it must either formulate independent criteria or relate the legal effects which it envisages to the facts as they exist.

I think that this interpretation is misconceived.

In my opinion, when the High Authority adopts general decisions its intention to make these of general application runs counter to the argument that in using precise legal criteria it has applied purely national concepts. (One may well ask at this point which branch of national law has been applied, for example, taxation law or civil law). The applicants have referred to a United States court decision to the effect that in respect of some matters pertaining to taxation law the various State laws have been considered applicable even to a Federal Authority. Neither this nor the fact that the EEC Treaty has not coordinated the civil law consequences of an infringement of the law on restrictive agreements provides us with an effective argument, because we are dealing with a special legal institution, that is, an equalization system which established a close community between all the interested undertakings, one in which the rule of equality of treatment must be accorded a special place. It seems *a priori* inconceivable to have regard to the special features of national laws, which must lead to a reduction in contributions in some cases and to increases in others. Recognition of the special legal character of the equalization scheme must therefore lead us in interpreting its rules to acknowledge autonomous legal concepts, even if these have not been individually formulated but have been borrowed from national laws.

I now come to the definition of 'own arisings', and here I need not have any regard to the nuances of national law; as I have just shown, it is not a question of infringement of the national laws of property of a Member State, because these have in fact no bearing on agreements governing the right of ownership of scrap as, for instance, in a case of bankruptcy. It is only if an attempt were made to modify or to influence national laws that there could be any question of an infringement of Article 83, whilst disregard of the possibility of arriving at special legal arrangements in relation to scrap equalization should be considered as covered by Article 53, notwithstanding partial integration, unless the common arrangements are to a large extent to be deprived of their meaning and effectiveness.

Consequently, the general decisions on scrap which concern us here today cannot be said to be illegal under Article 83.

(b) Infringement of the rule of non-discrimination

With reference to the general decisions in the matter of scrap the applicants have also alleged that Article 3 (a), (b) and (d) and Article 4 (b) of the Treaty have been infringed, chiefly on the

ground that these decisions provide for different treatment in similar circumstances, in so far as the waste scrap covered by the retention of ownership as stipulated by the applicants is not regarded as own arisings and therefore exempt from contributions, whereas scrap recovered from steel in the case of work contracted out is so regarded. From an economic point of view and bearing in mind the aims of the equalization system, such discrimination is not justified, since in both cases by-products of a product made by steel manufacturers are reintroduced into the cycle of production.

I think that this contention of the applicant companies bears only the appearance of being well founded. As already pointed out in the *Mannesmann* case, one should not lose sight of the considerable legal and economic differences between work contracted out and the sale of products subject to retention of ownership of the waste scrap arising from it. The undertaking to which work has been contracted out promises to manufacture finished products (an obligation which clearly does not concern the customers of the applicant companies) with all the risks in respect of production and marketing of the finished product being assumed by the party contracting the work out. In the present case, the parties contracting with the applicant companies have assumed all the risks as buyers. Consequently, it would not appear to be unjustified to treat an undertaking working on jobs contracted out to it, in conformity with its economic function, as a production division of the company giving the order and, taking account of these essential and objective points of view (and not so much of the influence on productivity which the return of scrap has on the business of the person giving the order), to give it special treatment in the scrap equalization scheme. Next, there is reason to consider that in the scrap equalization scheme a reservation of ownership is not relevant, chiefly because, in the light of the requirement of equality of treatment for all the undertakings participating in the scrap equalization scheme and also for certain practical reasons, no account should be taken of the difficult and special features of the legislation of individual Member States. From this point of view, work contracted out does not present any difficulties. It seems to be agreed that this procedure is well known everywhere and that in this particular case there is no doubt that the existence of relationships of ownership can be easily recognized, which, in view of the basic decisions in the matter of scrap equalization, cannot be lightly disregarded.

Consequently the general decisions in the matter of scrap equalization do not infringe the principle of non-discrimination and other provisions of the Treaty which have been *basically* the subject of the same criticism.

(6) *Breach of the obligation to state reasons*

Here there is reason to consider another ground of the application which, strictly speaking, should have been included in a consideration of the complaints made directly against the contested measures, because it covers the formal statement of grounds. I am dealing with it here because this complaint is to the effect that the High Authority has neglected to explain to the applicants how, in the matter of equalization, different rules can apply to work contracted out — as discussed above — and to the retention of ownership of waste scrap.

As reasons for this complaint the applicant companies assert that after receiving the statement of accounts of 8 April 1963 they argued this question with the High Authority in administrative proceedings and that they were consequently entitled to a reply.

This statement of the applicants is not entirely unjustified, because it must be considered a *nobile officium* of the High Authority to examine all important issues raised in administrative proceedings by the undertakings affected, for to do otherwise would be to create the impression that it has rejected them out of hand. However, it does seem that this complaint has clearly shown that there has been no infringement of an essential procedural requirement. In the case-law of the Court it has constantly been maintained that a decision contains a sufficient statement of reasons if it reveals the fundamental grounds of law and fact which have led to its adoption. This has been the case here, since the High Authority has explained in detail the reasons why the retention of ownership invoked by the applicants could not be taken into account, on the sole basis of Belgian law, to determine their obligation to contribute to the equalization scheme. Furthermore, it cannot reasonably be demanded of the High Authority that, in its statement of reasons, it should deal with all the points which the undertakings concerned consider to be essential, even if in its opinion these points are only of minor importance.

The applications for annulment cannot therefore succeed under Article 15 of the Treaty.

(7) *The provisions governing interest contained in Decision No 7/61*

Finally, in one of the last paragraphs, Hainaut-Sambre's application makes critical remarks about the system of interest which was set up retroactively by Decision 7/61 for the scrap equalization scheme and which has presently resulted in the applicant company's having to pay interest for delay in payment on equalization contributions without being able to ascertain during the period of operation of this scheme what was the due date for payment.

I am not quite clear in my mind whether the applicant company intends to add another ground to its application for annulment, or whether the remarks I have just quoted should not be considered within the framework of the claim for damages, to which I shall come in a moment. However that may be, the application does not give any more detailed explanation, so that for this reason alone it would be justifiable not to consider the criticisms of this system of interest. In any case, as the applicant company's allegations do not require any other examination, I may content myself with referring to the submissions in the cases of *Mannesmann AG* v *High Authority* and *Aciéries du Temple* v *High Authority* which dealt in detail with the system of interest set up by Decision No 7/61. They afford no grounds for the annulment of the contested Decision.

(8) *Summary*

In short then, I may say that neither of the arguments brought to bear against the contested decisions, nor those indirectly aimed at the general decisions in the matter of scrap equalization, can succeed. Therefore, the applications for annulment must be rejected as unfounded.

II — Claim for damages

Thus I come to an examination of the subsidiary claims that the High Authority should be made to pay damages. These claims were presented expressly in case the contested decisions were held valid.

Th applicants have complained from several points of view of a wrongful act or omission ('faute de service') on the part of the High Authority.

First of all they regard as a wrongful omission the High Authority's failure to inform scrap consuming undertakings in time of the precise definition of the concept of 'own resources' and of the

limits of any retention of ownership. It was allegedly as a result of this omission that the applicant companies failed to adopt other measures enabling them to avoid liability to pay contributions on the scrap returned by Phenix-Works and Laminoirs de la Rochette (contracting out work, changing the prices of their products for their customers Phenix-Works and Laminoirs de la Rochette, modifying the conditions of production, either by giving up the claim to scrap or by recovering scrap in their own works).

The applicant company Espérance-Longdoz thinks that it has an additional ground for alleging a wrongful act or omission ('faute de service'). It asserts that during the investigation at their works in 1956 the investigators of the Société Fiduciaire Suisse were aware of the clauses retaining ownership and had said that the recovered scrap was not liable to equalization contributions. Following this, Espérance-Longdoz said that it had also inserted in the long-term contract with Phenix-Works in 1956 the former clause retaining ownership, instead of some other legal provision for return of the scrap which it would have been able to adopt had it been informed in time.

Finally the applicants blame the High Authority for having delayed in sending their statements of account under the equalization scheme with the result that they had to pay a considerable amount of interest for delay in payment, which could have been avoided if payment had been demanded in the required time and if they had been able to discharge their equalization debts in more favourable economic circumstances.

Let us now see in detail how these complaints should be assessed from the point of view of 'faute de service'.

1. *Failure to inform the undertakings concerned within a reasonable time*

It is true that after the adoption of the first general decisions on scrap there remained doubts in individual cases which the High Authority alone could settle. As far as the retention of ownership is concerned, the first warning as to the problems which this concept posed to Hainaut-Sambre appears in an investigation report of 6 November 1957 sent to the company and, as regards Espérance-Longdoz, in a letter published on 1 February 1958 sent by the High Authority to the Joint Bureau of Ferrous Scrap Consumers, indicating that the concept of 'own resources' would be interpreted strictly. I am firmly convinced, however, that these two facts should be considered of such a nature as to shake the confidence which the applicants may hitherto have had in the exemption from equalization contributions on scrap covered by the retention of ownership, so that the question whether the High Authority should be blamed for a wrongful act or omission could be posed only in respect of the earlier periods. In any case, it would not be pertinent to consider the consequences of any elucidation which the High Authority might subseqently have given, because by then it would not have been in time to allow the applicant companies to change their arrangements in respect of the return of scrap by Phenix-Works and Laminoirs de la Rochette during the remainder of the period of operation of the equalization scheme.

In assessing the High Authority's behaviour during the years 1954 to 1958, it should first be pointed out that its failure to act by elucidating the problems of 'own resources' is not sufficient to justify a charge of culpability. Rather, it should be proved that there was an objective reason for acting, as, for instance, when — and this has been accepted by the Court in its judgments — the application of equalization arrangements raised difficulties of one kind or another.

I do not consider that the fact that in 1953 the applicant Espérance-Longdoz

submitted to the High Authority for its opinion the long-term contract concluded with Phenix-Works constitutes such a reason. The High Authority has rightly pointed out that this was done before the coming into force of the equalization arrangements, and for the purpose of ascertaining the position in relation to the law on restrictive agreements and prices. But above all, this contract did not contain any express clause retaining ownership (this was only formulated in the individual conditions of sale), so that for this reason alone the contract was not likely to draw attention to the problems raised by retention of ownership.

It also seems to me that the High Authority should not be blamed for not having acquired during the first two years of operation of the equalization machinery through thorough investigations into the undertakings concerned the necessary knowledge of special problems likely to arise on demand for the equalization contribution (as, for instance, in the case of existing retentions of ownership). Even in national taxation laws there are cases where investigations into undertakings are carried out after several years' delay, without this giving rise to the charge of wrongful act or omission.

Only the investigations carried out in 1956 and 1957 could reasonably furnish the first imperative reason to intervene, because during these investigations the agents of the High Authority must have noted that no declarations had been made relating to scrap produced in processing. The fact that this had not been done in the case of Espérance-Longdoz was manifestly due to the negligence of the administration, since either the investigators had not checked all the documents of the undertaking or else once the checking had been completed they wrongly proceeded to draw legal conclusions as regards exemption of certain quantities of scrap. Nevertheless, even here it would be difficult to talk of a neglect of duty. I have already had occasion to contend that the responsibility of the High Authority during the first four years of the operation of the equalization machinery can only, in view of the delegation of powers to the Brussels organizations, be assessed subject to criteria which, under national law, apply to supervisory bodies; that is to say, it is necessary to establish a *grave* neglect of duty. There is no question of this having occurred in the present case. In this connexion, the fact that we are dealing with one of the very first investigations carried out within the framework of the scrap equalization system and that consequently the investigators lacked experience in this difficult and complex field is not the only thing to be taken into account. In my opinion the conduct of the applicant companies themselves should not be overlooked. In Case 36/62 the Court stressed that in assessing a wrongful act or omission it was of primary importance to ascertain whether the act or omission would induce a 'prudent person' ('justiciable averti') into error. As the application of the scrap equalization arrangements was very complicated and was without precedent in practice, as, furthermore, the whole procedure was to be governed by rules to be applied in the same way in each of the six Member States and as, finally, the problems arising out of retention of ownership were not one of the clearest judicial matters in national law, there are grounds to describe as at least irresponsible the attitude of the applicant companies which, faced with these very important economic considerations, adopted a purely passive role towards the High Authority and did not demand a clarification of the situation by timely and precise questioning. It cannot be said that such conduct reflected any foresight. Consequently, from whatever viewpoint the matter is looked at, the conclusion is that the High Authority cannot be

blamed for any grave wrongful act or omission prior to the relevant period.

2. *The assurances of exemption from contributions*

With reference to the wrongful act or omission allegedly contained in some of the statements made by the High Authority's investigators, it is disputed that any assurances were actually given. Even if, to save a detailed examination of the facts, it is conceded that they were given, I think that it must be acknowledged that we are still faced with considerable irregularities. But, here again, it is necessary to bear in mind the remarks made above concerning the difficulties encountered by the investigators. Furthermore, the applicant company must have been aware that there were limits to the terms of reference of the investigators, since before the checks were carried out it received due notification from the Brussels organizations. It was therefore clear to the applicant company that the commission of the investigators was solely to ascertain facts and report them to the High Authority to enable the latter, if necessary, to give a decision. In other words, the investigators had no authority to make decisions; their task was to pave the way for any such decisions. Had it exhibited the prudence reasonably to be expected of it, the applicant company would in any case have entertained serious doubts as to the authority of the investigators to give assurances binding on the High Authority when such assurances were based on an interpretation of basic decisions in the matter of scrap equalization. Consequently I am of the opinion that even on this particular issue, raised only by Espérance-Longdoz, a wrongful act or omission on the part of the High Authority cannot be admitted.

3. *The burden of interest*

All that remains for me to consider is the complaint relating to delays in assessment and their effect on interest in the equalization arrangements. To me there appears no doubt in the light of what I have already said that this complaint is not justified, at least for the first years of the operation of the equalization machinery. While nothing could justify a belief of the applicant companies that certain quantities of scrap were exempted from equalization, the subsequent inclusion of these quantities in the equalization scheme, with all the logical consequences of such inclusion, cannot be regarded as a wrongful action, or even blameworthy. For the period after 1958, or at least after 1959, it is an established fact that the High Authority, in taking precise measures, definitely shook the conviction of the applicant companies on the subject of the exemption from contributions of certain quantities of scrap. From that moment, the applicant companies could reasonably have been expected to make provision for the possibility that they might be liable to pay contributions; they should accordingly have set aside corresponding reserves and should not have made use of the moneys to be demanded later as payment of the equalization contributions, except as funds not belonging to them. If they are required to pay interest, which, besides, is indispensable to ensure an equitable and complete equalization for the benefit of creditor undertakings, this could not amount to a wrongful act or omission.

4. *Summary*

Without there being any need to consider complicated and controversial questions concerning proof of damage and the relationship of cause and effect, which could not possibly be resolved without the help of an expert, one may conclude that the subsidiary submissions aimed at establishing the right of the applicant companies to damages fail for want of any wrongful act or omission.

III — Conclusions

In conclusion I submit as follows:

The applications of Espérance-Longdoz and Hainaut-Sambre should be rejected in their entirety as being unfounded, and in conformity with Article 69 (2) of the Rules of Procedure the applicants should pay the costs of the applications.