THE COURT

hereby:

1. Dismisses Application 51/65 as unfounded;

2. Orders the parties to bear their own costs.

Hammes Delvaux

Donner Lecourt Monaco

Delivered in open court in Luxembourg on 28 April 1966.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 22 MARCH 1966[1]

Mr President,
Members of the Court,

Since 1955 ILFO, Industria Laminati Ferrosi Odolese, a company whose registered office is at Odolo (Brescia), has been producing by means of two electric furnaces pig-iron and ordinary steels, more specifically semi-finished products for re-rolling and tube rounds for reinforcing concrete. It was unable to produce the documents requested during checks carried out in July 1958 and October 1960, in particular a detailed schedule of the movements of ferrous scrap and the entry books or other records of ferrous scrap deliveries. The High Authority had therefore to make its own estimate of assessment of the undertaking's consumption of bought scrap on the basis of the electricity consumed in operating the furnace, that is, 29 527 810 kWh. To this first assessment, notified to it on 8 January 1963, the company made several objections which were subsequently met in part.

It was in these circumstances that the decision of 19 May 1965 reduced to 26 532 metric tons the quantity of ferrous scrap on which ILFO was liable to pay contributions. The High Authority does in fact accept a commissioning period of three months, during which the consumption of electricity per metric ton of steel produced was increased from 900 kWh to 1 000 kWh. It also accepts a deduction of 6% in respect of ferrous scrap recovered from material for re-rolling, the purchase of which is proved. Another decision of the same date fixed the debt owed by the undertaking at 176 080 828 lire.

These two decisions are the subject of Application 51/65. However, in its rejoinder, taking into account the invoices attached to the reply concerning 4 189 metric tons of material for re-use, the High Authority accepts a further deduction of 1 533 metric tons of ferrous scrap which is not assessable. It requests you to take note of the fact that the assessable tonnage has thus been reduced to 24 979 metric tons and the contribution debt of the undertaking to 171 765 956 lire and to dismiss ILFO's application in all other respects.

The content—if not the object—of the contested decision has thus been altered, although the competent authority has in no way revoked them. Such a revocation, followed by new decisions which would have been the subject of a new application, would undoubtedly have been in law a more correct procedure, but it would only have resulted in delaying a settlement of the dispute. I consider, therefore, that it is

1 — Translated from the French.

advisable, as the High Authority requests, for you to take note of the fact that it has met the applicant's complaints in part and to rule upon its remaining claims.

As in the application in Case 49/65, ILFO is requesting you not only to annul the contested decisions—and as far as is necessary Decision No 7/63 on which they are based—but also to order the High Authority to pay damages. As no reasons are given for the latter submissions they are in any case inadmissible.

The undertaking puts forward two submissions as regards the legality of the decisions which I shall consider in turn.

I

In the first place, the High Authority is said to have misused its powers and violated the general principle which prohibits all discrimination by adopting as regards the applicant the method of inductive assessment based on the consumption of electricity, although this method could not be used in respect of all undertakings, in particular those which do not have electric furnaces. In order to establish the volume of production and consequently the quantity of scrap consumed, another criterion could have been adopted, that based on the average consumption of ferrous scrap per working day. This criterion, adopted by the High Authority in certain cases, should have been applied in respect of all undertakings, in particular the applicant, and by not doing so the High Authority acted in a discriminatory manner and misused its powers.

The High Authority immediately pointed out that it was impossible to talk about average consumption without first knowing the total consumption and that it was in fact this figure which was to be determined. ILFO therefore gave details in its reply of the method which it wished to see applied and the various operations involved therein. First, it is necessary to calculate the quantity of steel which the works in question are capable of producing and, following on from this, the quantity of ferrous scrap consumed during a particular working period which has been adopted as a unit. This quantity is then multiplied by the number of such units during the entire period when the equalization scheme as in force and a deduction is made for stoppages or periods of reduced working. The first calculation would necessarily involve an expert assessment; as for the second calculation, although it is based on the unquestionable fact of the calendar, ILFO itself admits that correcting factors must be taken into account. To determine these, the company suggests using electricity consumption as a basis for calculation in accordance with the methods set out in detail in the reply and in the oral procedure. To clarify these various points of law and of fact, the applicant urges you to ask the High Authority whether various inductive methods, based in particular on average daily production, were not applied to other similar undertakings and declares that it is ready to produce all the documents necessary to establish the number of working days during the period of assessment.

The defendant acknowledges that in certain cases where more precise assessments may be arrived at by other indirect methods of calculation, it did not apply the criterion of electricity consumption. The Agent of the High Authority gave an example of this at the hearing and undoubtedly there are others. But it is still necessary to fall back on electricity consumption, that is to say, a factor which can be ascertained with certainty from parties other than the undertaking involved when this undertaking fails to cooperate and does not furnish any precise information which enables its consumption of ferrous scrap to be assessed. This was the case of ILFO, which—as the High Authority states in its defence—even falsified certain documents produced during the checks, for which it has been fined.

I do not consider that this first submission can be upheld.

An authority misuses its powers when it exercises its powers for a purpose other than that for which they were conferred. Such would be the case if the defendant, having been unable to determine the levy on the basis of declarations made by the undertaking, chose from among the various inductive methods that which yields the highest figures instead of the one which yields the most accurate results. This is, in short, the objection made by ILFO, but it is

a complaint of an illegal intention which is not supported by any evidence. The arguments in the application imply that the method advocated is not only more favourable to the applicant but is also more accurate than that based on the consumption of electricity, but this is pure hypothesis.

Furthermore, discrimination only occurs if different solutions are adopted in identical situations; it has not been established that the method of calculation based on 'consumption corresponding to a given unit of time' has been applied to undertakings, which, like the applicant, were unable to supply precise data on their activities. It will be recalled that in previous cases you have on several occasions been called upon to consider the use by the High Authority of electricity consumption as a basis of calculation and that you have accepted the legality of this method (Cf. for example, Case 18/62—*Barge*—16 December 1963, Rec. 1963, p. 535; Case 108/63—*Merlini*—21 January 1965, Rec. 1965, p. 1).

In fact, the method advocated by ILFO necessarily raises serious reservations. In the first place, it implies that an expert's report must be made on the productive capacity of its works, although the undertaking could have obtained this information long ago if it had cooperated in the checks carried out at its premises on behalf of the High Authority. Secondly, this method assumes that it is possible to determine precisely and exactly the number of working days during the period of assessment. Although on this point the application proposes 'the production of an appropriate report by a technical expert' one cannot fail to notice that the applicant subsequently confined itself to the rather hypothetical calculations contained in the reply. Finally, since ILFO admits that the criterion of electricity consumption, which has the advantage that it can be ascertained certainly and objectively, is used as a *correction factor*, would it not be more logical, in view of these very qualities, to use it as the *basis* of the assessment, as does the contested decision? In my opinion this is an additional reason for rejecting the first submission in the application.

II

In its second submission ILFO, referring to the contested decision, challenges certain of the factors which the High Authority adopted in order to determine the quantity of scrap assessable. ILFO maintains that there was a misuse of powers in this case resulting from a misrepresentation of the facts. Even though this term may appear unsuitable, the undertaking is certainly entitled to challenge the accuracy of the figures adopted by the defendant, but it must do so by furnishing adequate particulars.

1. In the first place ILFO criticizes both the criterion of 900 kWh per metric ton adopted by the High Authority and that of 1000 kWh for the commissioning period which was fixed at three months. It considers these figures and this period to be improbable for a furnace of 4 to 5 metric tons' capacity such as its own. It would prefer the High Authority to adopt instead the figures of 1200 and 1400 kWh and six months for the commissioning period. The only concrete argument which the applicant puts forward in support is that in a first assessment made in 1961 through the Société Fiduciaire Suisse, the defendant had adopted a criterion of 950 kWh. It asks for certain checks to be carried out at its works and comparisons made with the figures which have been adopted for other undertakings. I shall merely observe that, as the decision recalls, the criterion of 900 kWh results from an expert's report drawn up in 1962 with which you are well acquainted. You accepted it in the Barge case which involved a furnace of 5 metric tons' capacity and there is no reason to adopt a different solution here. As regards the other points at issue, the allegations are too imprecise to be able to succeed.

2. The contested decision, which fixes the liquid steel/ingot ratio at 1:1.060, allows a deduction of up to 6 per cent to take into account ferrous scrap recovered at the steel works. ILFO, criticizing this percentage, considers that it should be increased to 8 per cent at the minimum because it produces small ingots of 50 kg, a process which implies substantial losses. On this point it relies on a publication produced by the

Terni company which refers to losses of 9 per cent and here again asks that an expert's report be obtained.

In reply to a question put to it during the oral proceedings, the High Authority challenged the relevance of ILFO's reference to the position of the Terni company. Although both companies use the 'bottom pouring' method, that is, the ingot moulds are filled from the bottom upwards, Terni operates only single moulds, while ILFO operates quadruple ones, a process which results in recoverable arisings of ferrous scrap of at least one third less than with Terni. I confess that I am unable to judge the value of this technical explanation. If I take the view that the decision cannot be criticized on this point, this is because in my opinion a reference by ILFO to an article on the conditions of operation of another undertaking is insufficient evidence to justify an order for measures of inquiry. I consider that this reply must also be given in the case of the arisings from rolling which the contested decision fixed at 7 per cent but which ILFO challenges by referring to the experience of Terni, which is said to have had arisings of 14 per cent.

3. With reference to the material for re-use, the High Authority at first accepted as proved only a weight of 12 335 metric tons and dismissed all other claims. As ILFO annexed to its reply invoices referring to 4189 metric tons. the defendant agreed to take these into consideration and to deduct from the assessable tonnage a further 1 553 metric tons. The applicant has thus obtained satisfaction on this point and, as I have said earlier, the contested decisions must be regarded as amended to this extent. However, there is another point at issue: that of the percentage losses acceptable for this material: both as regards the quantities accepted initially and the additional quantities accepted in the rejoinder, the High Authority adopted a rate of 25%; for unprepared material coming from the Italian market. The applicant wishes this to be increased to 35%, but merely refers in support of this contention to 'common experience'. I consider this argument to be too brief to merit consideration.

In conclusion, I do not consider the criticisms made by ILFO of various points of the contested decision to be sufficient to lead to the annulment of the assessment to contribution or even to justify measures of inquiry. These could only be ordered if the applicant first put forward specific facts, concerning its own undertaking, and of such a nature as to justify further study and a reconsideration of the High Authority's decision. However, apart from one point on which it has obtained satisfaction, the applicant has merely expressed general considerations or made comparisons, the relevance of which is not immediately clear.

In conclusion, I have two observations to make:

— The application contained a third submission based on the contradiction which is said to exist on the one hand between the assessable tonnage established and the contribution to be paid by ILFO, both of which should be regarded as final and irrevocable in the absence of any express reservation in the contested decision, and on the other hand the necessarily provisional character of any statement of account pending termination of the equalization procedures. Following explanations given by the defence, this submission must be regarded as withdrawn in the reply.

— I have said that I consider the High Authority's rejoinder to have amended the contested decisions, but that, in order to avoid delay in the settlement of this case, the Court should take note of these amendments and rule on the remaining conclusions in ILFO's application. Although I suggest that you dismiss the objections made on the remaining points at issue, the applicant has still obtained partial satisfaction in the course of the proceedings and the costs must therefore be borne by the High Authority.

I am therefore of the opinion that:

— the application made by ILFO should be dismissed;

— the costs of the action should be borne by the High Authority.