JUDGMENT OF THE COURT
13 JULY 1962[1]

Mannesmann AG
v High Authority of the European Coal and Steel Community

Case 19/61

Summary

1. *Common financial arrangements — Establishment and functioning — Guiding principles*
(ECSC Treaty, Article 53)

2. *Common financial arrangements — Criteria for application to the economy*
(ECSC Treaty, Article 53)

3. *Common financial arrangements — Undertaking — Concept*
(ECSC Treaty, Article 80)

4. *Undertakings — Unity of economic activity — Separate legal personality — Groups of undertakings — Parent company and subsidiaries — Absence of legal unity*
(ECSC Treaty, Article 80)

5. *Common financial arrangements — Equalization of ferrous scrap — Levy — Purchase of scrap — Broad interpretation of this criterion — Ineffectiveness of reservation clauses*
(ECSC Treaty, Article 53)

6. *Discrimination — Concept*
(ECSC Treaty, Articles 3 (b), 4 (b))

1. Cf. Summary of the Judgment in Joined Cases 17 and 20/61, No 1.
2. Cf. Summary of the Judgment in Joined Cases 17 and 20/61, No 2.
3. Cf. Summary of the Judgment in Joined Cases 17 and 20/61, No 3.
4. Cf. Summary of the Judgment in Joined Cases 17 and 20/61, No 4.
5. Cf. Summary of the Judgment in Joined Cases 17 and 20/61, No 5.
6. Cf. Summary of the Judgment in Joined Cases 17 and 20/61, No 6.

In Case 19/61

MANNESMANN AKTIENGESELLSCHAFT, having its registered office at Düsseldorf, represented by its Board of Directors, assisted by Werner von Simson, advocate of the Düsseldorf Bar, resident at Bertrange-Luxembourg, with

1 — Language of the Case: German.

an address for service in Luxembourg at his Chambers, and by Professor Georges van Hecke, advocate of the Brussels Cour d'Appel,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Bastiaan van der Esch, acting as Agent, assisted by Wolfgang Schneider, advocate of the Frankfurt Bar, with an address for service in Luxembourg at its offices, 2 Place de Metz,

defendant,

supported by

PHOENIX-RHEINROHR AKTIENGESELLSCHAFT, having its registered office in Düsseldorf, represented by E. W. Mommsen, Ironworks manager, Assessor, and W. Bruns, Director, assisted by H. Lietzmann, advocate of the Essen Bar, with an address for service in Luxembourg at the Chambers of Albert Woopen, 2 rue du Fort-Elisabeth,

intervener,

Application for annulment of the Decision of the High Authority of 5 July 1961 notified to the applicant on 24 July 1961, rejecting a claim for exemption from the equalization contribution,

THE COURT

composed of: A. M. Donner, President, O. Riese (President of Chamber), L. Delvaux, Ch. L. Hammes and A. Trabucchi (Rapporteur), Judges,

Advocate-General: M. Lagrange
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Conclusions of the parties

A — *Procedure in the main action*

The applicant claims that the Court should:

1. annul the Decision of 5 July 1961, notified to the applicant on 24 July 1961;
2. even if the applicant fails in its application, order the defendant to pay the costs.

The defendant contends that, insofar as the application is admissible, the Court should dismiss it as unfounded with all legal consequences in particular as regards costs.

B — *Intervention procedure*

The intervener contends that the Court should:

— dismiss the application of the applicant in the main action, in accordance with the submissions of the defendant;
— order the applicant to pay the costs of the intervention.

The applicant in the main action maintains its previous conclusions and in addition claims that the Court should:

— order the intervening party to pay the costs of the intervention procedure.

II — Facts

The facts may be summarized as follows:

1. By Decisions Nos 22/54, 14/55, 2/57 and 16/58 the High Authority established a compulsory equalization scheme to prevent Community prices for ferrous scrap from being aligned with the higher prices for scrap imported from third countries. The Office commun des consommateurs de ferraille (OCCF) (The Joint Bureau of Ferrous Scrap Consumers) and the Caisse de péréquation des ferrailles importées (CPFI) (The Imported Ferrous Scrap Equalization Fund) were responsible for managing it. Under this scheme, the undertakings referred to in Article 80 of the ECSC Treaty were liable to pay the required contributions, the amount whereof was calculated *pro rata* on the tonnages of *bought scrap* consumed by each undertaking over a prescribed period, whilst the consumption of 'own resources' was not subject to this levy (Decision No 2/57, Articles 3 and 4).

2. At the time when this equalization scheme was in force, the applicant was a parent company responsible for managing the business of a number of companies engaged in the iron and steel industry. As a general rule these companies were 100% owned by the parent company (in some cases, more than 95%).

At the end of 1958 the following companies were amalgamated under the name of the applicant into a single legal person:

Mannesmann-Hüttenwerke AG
Mannesmannröhren-Werke AG
Gewerkschaft Mannesmann
Mannesmann-Rohstoffwerke GmbH
Hahnsche Werke Aktiengesellschaft
Essener Steinkohlenbergwerke AG

This amalgamation was effected in accordance with the German Law of 12 November 1956 on the change of corporate status of investment and miners' companies ('Gesetz über die Umwandlung von Kapitalgesellschaften und bergrechtlichen Gewerkschaften'). Before the amalgamation, the first four companies mentioned above had been among the seven subsidiary companies of the applicant, whilst Hahnsche Werke Aktiengesellschaft and Essener Steinkohlenbergwerke AG were integrated in the process of the reorganization.

3. In the meantime the applicant had interpreted the term 'own resources' as meaning 'scrap not bought' and as a result had recorded all the tonnages received from its subsidiaries as 'own resources'.

In Application 23/58, the applicant in that case, together with other undertakings similar in structure, had objected to the letter of 18 December 1957 (Official Journal of the ECSC of 1 February 1958) in which the High Authority, replying to an enquiry from the OCCF whether group scrap should or should not be considered as 'own resources', stated that there was already a well-established view that the concept of 'own resources' was allied to the legal concept of 'ownership'. The Court dismissed this application as inadmissible because the letter objected to was not a

decision within the meaning of the Treaty.

4. By letter of 11 June 1958 addressed to the OCCF, the applicant maintained that the scrap from the factories of companies which at the time were affiliated to it as the parent company should be regarded as 'own resources' and requested exemption from the equalization contribution.
By Decision of 5 July 1961, which the applicant disputes in the present case, the High Authority refused to accede to this request.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — *Admissibility*

No formal objection has been raised as to the admissibility either of the application or of the request to intervene.

B — *On the substance of the case*

1. Preliminary considerations

(a) *The applicant* has expressed doubts as to the precise scope of the disputed Decision. It raises the question whether the High Authority simply intended to reject the application for exemption because, in accordance with the decisions of the Court, it has no power to grant exemptions from equalization charges or whether it intended to confirm the applicant's liability to pay the contribution. The applicant refers to the letter from the Secretary General of the High Authority of 21 July 1961 which it is claimed confirms the second assumption since it sets out as the subject of the disputed Decision only the rejection of the applicant's request for exemption. It is precisely because of this argument that the applicant has brought its action.

(b) Against the particular Decision which it disputes *the applicant* argues infringement of the Treaty or of the rules of law as to its application, infringement of an essential procedural requirement and lack of competence. Alternatively it raises an objection of illegality against the general basic Decisions Nos 22/54, 14/55 and 2/57 on the ground of infringement of Articles 3 and 4 (b) of the Treaty.

2. Infringement of the Treaty

(a) The nature of the applicant as an undertaking under the equalization scheme

The applicant maintains that even at the time when the equalization scheme was in force and before it incorporated its most important subsidiaries into a single legal person, it constituted with its subsidiaries a single undertaking for the purposes of Article 80 of the ECSC Treaty.
According to the applicant, the principle laid down by the Court in Joined Cases 42 and 49/59, according to which 'it cannot be presumed that two separate and distinct companies can constitute a single undertaking for the purposes of the Treaty', applies only when the two companies in question themselves already have the characteristics of undertakings. Moreover for a legal person engaged in coal and steel production to constitute an undertaking, it must have the essential characteristics, in particular the control, conduct and risk involved in commerce ('die unternehmerische Führung, das unternehmerische Handeln und das unternehmerische Risiko'). As a general rule, the characteristics of an undertaking and productive activity coincide. But where control on the one hand and productive activity on the other are in the hands of separate legal persons, the concept of an undertaking can only be deemed to be realized for the purposes of the Treaty where,

within the framework of the official organization, production and the factors which characterize the concept of an undertaking are first combined in the hands of a single entity. In this respect the applicant asserts that in several places (Articles 47, 54, 60, 65 and 66) the Treaty refers to undertakings as units responsible for production programmes, investment, pricing policy and commercial policy. If production were the sole factor in determining the nature of an undertaking, then the actual responsibility would fall on undertakings not subject to the public control of the High Authority.

For the reasons set out above, the applicant claims that, as the subsidiary companies cannot themselves be classed as undertakings, the applicant itself must be classed as an undertaking engaged in coal and steel production through the intermediary of its subsidiaries. It follows that scrap recovered by the companies affiliated to the applicant should be deemed to have been produced by the applicant itself.

In support of its arguments the applicant refers to a series of decisions, addressed to it by the High Authority under Article 66, in which the defendant appears to acknowledge that the applicant has the capacity of an undertaking engaged in iron and steel production. Moreover in the course of Case 23/58, the High Authority had never questioned the capacity of the applicants as undertakings, made up of parent companies, one of which was the Mannesmann company. Finally the applicant emphasizes that the High Authority granted loans which under the Treaty can only be granted to 'undertakings' within the meaning of Article 80, to the 'Charbonnages de France', expressly described by the High Authority in its Seventh General Report as an 'undertaking' although it is not directly engaged in production and restricted to controlling legally independent collieries. The disputed Decision ought therefore to be annulled on the ground also that the concept of an undertaking on which it is based is in direct contradiction to the previous attitude of the High Authority towards the applicant, a contradiction incompatible with the principles of good administration.

The applicant refers also to the judgment in Case 23/58 in which the Court recognized the Mannesmann company as well as other similar companies as an applicant. It could not have done this without recognizing them as undertakings for the purposes of the Treaty. Finally, under German fiscal law, subsidiary companies in a relationship of 'Organschaft' with the parent company are deemed as a whole to be integrated into one undertaking financially, economically and organically (Decree of the Federal Ministry of Finance IV A/2, p. 4105 — 24/58 of 21 March 1958).

The defendant makes the preliminary point that in the light of the Court's decisions the concept of an undertaking is no longer all-important in determining what scrap is liable to the contribution. In principle the basic Decisions on the equalization of scrap impose the contribution on all scrap bought by the various consumers. The Court has already decided that scrap supplied by one legally independent undertaking to another legally independent undertaking belonging to the same group is also bought scrap and therefore liable to equalization.

The defendant goes on to state that, in spite of affiliation agreements, the companies already affiliated to the applicant possess considerable autonomy externally and in relation to third parties because they carry on business in their own names and incur responsibility for all commercial liabilities. Moreover the administrative machinery of the subsidiaries is not short-circuited even though general questions are dealt with according to uniform principles and though certain spheres of activity lie

exclusively within the jurisdiction of the parent company.

The concept of an undertaking maintained by the applicant moreover raises insoluble problems having regard to the countless variations of internal relationships between undertakings existing within the framework of the Community. An effective and fair criterion must have regard to external legal form. The difficulty which, according to the applicant, would arise from the absence of any tie whereby the parent companies were subject to the High Authority under public law is of no practical importance because in cases where parent companies actively encouraged their subsidiaries to infringe the Treaty, the High Authority has sufficient compulsory powers to force them to act in accordance with the provisions of the Treaty.

The administrative practice followed in the past by the High Authority permits of no conclusions being drawn to the contrary. The defendant denies having arbitrarily adopted this or that concept of an undertaking. In fact the decisions on scrap were taken before the authorizations on concentration to which the applicant refers. It is clear from these decisions that the equalization charges fell on individual undertakings consuming scrap. As regards authorizations to form a concentration granted to the applicant, the defendant observes that under Article 66 it is sufficient if any single one of the undertakings concerned falls within Article 80 for the concentrations to become subject to the authorization of the High Authority. Thus undertakings not subject to the ECSC when contemplating the acquisition of an ECSC undertaking are bound to seek the authorization of the High Authority. Nor does the grant of loans to the 'Charbonnages de France' indicate that the High Authority recognizes this organization as a Community undertaking; these loans have in fact been made in favour of mining undertakings designated by name. Moreover the fact that the High Authority did not oppose the applicant's pleading in Case 23/58 is not due to any alleged recognition by the High Authority of the character of an undertaking in the various applicant parent companies in that case but rather to its concern to obtain their views on the problem of the equalization of scrap. For its part the Court had no need to investigate this aspect in greater depth seeing that the application was inadmissible on other grounds.

(b) Non-comparability of the position of the applicant with groups known as 'Konzerne'

The applicant, referring to the illegality of the exemption of group scrap laid down by the Court in Joined Cases 32 and 33/58 and Joined Cases 42 and 49/59, maintains that this principle is not applicable to it, by reason of the differences between its own case and those on which the decisions were given. It states:

1. The control, trading and risk have always remained wholly with the applicant company;

2. The applicant was in a position to incorporate the various legally independent companies by unilateral decision and without consulting them.

In those cases on which the Court of Justice has so far ruled on the other hand, no parent company could have incorporated subsidiaries by unilateral act without consulting them. The extent of the legal person corresponded to the organic limits created by the different owners.

The defendant on the other hand contends that the principles enunciated by the Court of Justice on the equalization of scrap, especially as regards the illegality of the exemption of group scrap, can be applied to the applicant's case. In this connexion it refers to the opinion of the Advocate-General in Joined Cases 32 and 33/58 in which he asserted that the difficulties raised by those applica-

tions were the same as those arising from examination of Joined Cases 20 and 23/58 previously brought by undertakings belonging to German groups, the applicant among them. The Advocate-General maintained the argument already put forward in the German cases as to the definition of own resources and the Court of Justice in its judgment on the French applications adopted that opinion. The defendant stresses the importance of the fact that the Court of Justice, whilst fully conversant with the facts of the German cases, formulated in general terms the basic principles from which the liability of group scrap arises.

(c) The complaint of discrimination

(aa) *The comparability of the position of the applicant with that of certain of its competitors exempted from payment of the equalization contribution*

The applicant refers to the general principle of non-discrimination developed by the Court from Articles 2, 3 (b), 4 (b), 60 and 67 of the Treaty and maintains that from the Court's decisions it follows that the High Authority, in choosing a criterion for the exemption from payment of the equalization contribution, could only choose one which would impose the levy on competing undertakings with comparable conditions of production to the same extent. The applicant stresses the direct comparability between itself and the Phoenix-Rheinrohr company as to conditions of production and points out the differences of treatment which the criterion for exemption chosen by the High Authority involves and which operates to its disadvantage as compared with the Phoenix-Rheinrohr company. For a period of four and a half years it puts this difference at ten million dollars, meaning a difference of the order of 5 DM per metric ton of crude steel produced or almost 8 DM per metric ton of rolled products. This difference in treatment, which involves very serious consequences for the competitive position of the applicant, is, it claims, entirely due to the different legal form of the applicant in relation to the Phoenix-Rheinrohr company, which groups its factories under a single legal person and thus is exempted from payment of the equalization contribution for scrap produced in one of its factories and re-used in another of its works.

This result goes against the judgments of the Court in Joined Cases 32 and 33/58 and Case 42/58 which makes the existence of different treatment conditional on its being applied to different circumstances of the parties concerned and only allows different systems if their different circumstances can be attributed to different conditions of production and not merely to differences in the 'legal, administrative or financial structure' of the groups.

The applicant, starting from the premise that the prohibition of discrimination provided for in Article 4 of the ECSC Treaty applies not only to undertakings for the purposes of Article 80 but generally to all producers, buyers and users in the field of coal and steel — and that would be sufficient to demolish the objection raised by the High Authority as to the admissibility of the complaint of discrimination — goes on to say that if the High Authority was free to define the levying of contributions as it thought fit, it nevertheless had the duty to treat similar economic units in the same way, regardless of their legal form.

Legal form in no way determines the closeness of relations within the group; in fact with centralized organizations, economic, technical, personal, financial and functional, relationships can be closer between undertakings constituting several legal persons than between undertakings grouped into a single legal person. Moreover the applicant states that its traditional methods of pro-

duction remained unchanged, even after it had been compelled, following the Second World War, to split up between several legal persons the undertaking it had hitherto carried on in the form of a single legal person, and still remained the same after it had reincorporated the various subsidiary companies into a single legal person under its own name.

The applicant stresses that it in no way 'specially chose' its legal form, but was in practice forced into it following decentralization and reorganization of the German iron and steel industry after the war and did not anticipate any advantages whatever therefrom. The assumptions of the High Authority in this respect have no foundation in fact; this is shown by the fact that shortly after the passing of the Law of 11 October 1957 on taxation of alterations in structure, the applicant put its main subsidiaries under its own name. The applicant kept its legal form because it saw no reason to change it. Until 1957 it was free, particularly as regards the quantities recovered in its tube factories, to treat these scrap arisings as own arisings.

Moreover, although it is true that the Court has declared that certain effects of an administrative act are inevitable and therefore permissible, it must not be forgotten that the Court has also laid down in Case 15/57 that the High Authority may adversely affect the interests of third parties 'only after carefully considering all interests involved' and taking care 'as far as possible' to restrict the foreseeable harm to third parties. In Case 14/59 the Court laid down also that an intervention by the High Authority may not affect the competitive position of those involved more adversely than appears necessary after a thorough examination of the interests involved and in any event may not affect it substantially.

In view of the conditions prevailing within the Community iron and steel industry, if the High Authority wished to levy the contribution on undertakings favoured by being in the scrap market, it should have exempted the own arisings of each economic unit. If on the other hand it wished to impose the levy on the use of scrap as such, it should have levied the contribution on the scrap at all stages of production except perhaps on the steel-works themselves. In applying the criterion of the legal person on the other hand the High Authority is overlooking economic reality and so practising discrimination. In taking Decision No 26/55 concerning the 'pig iron premium', the High Authority had moreover itself appreciated that the criterion of legal form was unsatisfactory because this Decision is based on the concept of the *factory* for calculating the premium.

Apart from the discrimination between the applicant and similar undertakings which has already been stressed, the formal criterion chosen by the High Authority results in its accepting as own arisings even scrap recovered in an activity which does not enter into the concept of steel production provided that the factory producing scrap is operated by the same legal person which operates the steel-works using this scrap (for example, Renault and FIAT). This exemption is contrary to the judgment of the Court in Joined Cases 32 and 33/58, which restricts the possibility of exemption to *own* arisings re-used *'in the steel production cycle'*.

Again, this criterion leads to imposition of the levy on scrap recovered in first-heat rolling mills which, with a view to the rational utilization of heat, work in a close technical relationship with the steel-works producing the steel and re-using the scrap since steel-works and rolling mills are constituted as two legal persons, even though they are 100% integrated.

The defendant first disputes the admissibility of this complaint. It observes that, while the equalization scheme existed, it was the affiliated steel producing com-

panies which were subject to the contribution, and not the applicant parent company. Only the position of the subsidiaries can therefore be taken into account in determining whether or not there is discrimination. As the applicant does not raise the complaint of discrimination with regard to the subsidiaries, the Court cannot go into this question.

As regards the justification for this complaint the defendant observes that the effects complained of by the applicant do not result from the Decisions of the High Authority but are rather the consequence of resolutions made by the applicant itself before the Common Market came into operation, with a view to keeping intact its group structure following the deconcentration measures implemented by the Allies. Moreover the applicant could have taken steps to re-establish its legal unity before 1958 and if it did not do so this was doubtless because the applicant thought it preferable for good reasons, such as problems of valuation, costs of conversion, etc. to retain the form of a group. On that account the applicant may be treated as falling within the Court's dictum whereby interested parties who choose a given legal form, in this case voluntary retention of the group structure, have no grounds for demanding that this legal form should not be taken into account whenever its application is capable of operating to their disadvantage.

The defendant observes that the criterion of the legal person, used to determine the scrap assessable, and accepted by the Court and by the High Authority alike, is clear and objective, so that in law all undertakings consuming scrap are treated on the same footing. In these circumstances exemption from the equalization contribution of the scrap at issue would constitute discrimination as regards undertakings operating in the form of a single legal person.

On this point *the intervener* observes that the criterion of a single legal person has the advantage over that of an economic unit by its clarity and precision, whilst the application of economic criteria involves the risk of creating confusion and subjecting other undertakings to illegal discrimination.

Moreover according to *the defendant* the principle of equality of treatment cannot be carried to extremes: on the contrary it is quite proper, as the Court has already decided, to accept the inequality of the effects of a reasonable and objective criterion, because otherwise a prudent and efficient management would not be practicable; inequality of this nature could not be considered as infringing the principle of equality (Rec. 1958, pp. 187 to 189; 1958-1959, pp. 477 et seq.). The Court's ruling whereby the cost of production of steel following an intervention by the High Authority cannot be made dependent upon the *legal,* administrative or financial structure of *groups* does not indicate that the exemption of own arisings is contrary to the Treaty and that account cannot be taken within clear limits of differences resulting from the fact that not all undertakings have at their disposal in like measure their own means of processing. The Court opposes rather the defining of a vague and nebulous limitation based on the legal, administrative and financial structure of industrial groups.

As to the applicant's complaint that the High Authority failed to show the difference between the position of the applicant and that of its competitors which constituted a single legal person, the defendant contends that it is upon the applicant who alleges discrimination that the burden of proof lies.

It maintains further that when a general measure taken by the High Authority is at issue, the prohibition of discrimination shows that the measure must not be arbitrary and must not adversely effect conditions of competition. The criterion of the legal person applied by the High Authority is not arbitrary because arbitrariness means acting from motives alien to the matter in hand. More-

over the applicant has never made any such claim. This criterion is not such as to distort competition. In fact, as the Court has ruled in Case 14/59, for there to be a distortion of competition, the competitive position of the applicant must have been effectively worsened. This however does not appear to be so in the present case because a comparison between certain figures taken from the balance sheet of the Mannesmann group on the one hand and the Phoenix-Rheinrohr company on the other during the period when the equalization of scrap was in force shows Mannesmann to be in a particularly favourable position, so much so that any suggestion that the applicant's competitive capacity has suffered serious adverse effects can be ruled out.

From the figures put forward by the applicant in criticism of the difference of treatment between itself and Phoenix-Rheinrohr, the defendant states that the 4.5 million metric tons shown as the aggregate tonnage of scrap can have been obtained only by including the tonnages of Hahnsche Werke AG, which would falsify all the calculations, because the firm in question did not belong to the Mannesmann company at the time of the Equalization Fund.

The intervener observes that there is no element of discrimination solely by reason of the difference between its own legal structure and that of the applicant during the material period in this case and denies that it is in a comparable position to the applicant even at the economic level. The differences in its technical and economic organization in relation to the applicant company lie essentially in the applicant's much larger coal supply, in the greater quantity of semi-finished products processed within the applicant's group, which enables the latter to make higher profits, in the applicant's greater participation in processes outside tube manufacture, enabling it to be less exposed to short-term fluctuations in the economy in the disposal of its steel products and, finally, in the wider commercial network available to the applicant's group.

The applicant replies that the four arguments put forward by the intervener are not relevant, for none of them proves that conditions of production arising from the use of scrap differ for the intervener and the applicant. It refers to the concept of the production cycle used by the Court in Joined Cases 32 and 33/58 and stresses that this concept includes only scrap recovered in raw pig iron or crude steel production or in their processing, and re-used for production of raw pig iron or crude steel. Moreover none of the differences alleged to exist by the intervener concerns conditions of production within the cycle. On the contrary, in pointing out the advantages accruing to the applicant from collaboration within its group, the intervener succeeded only in emphasizing the fact that the different parts of this group constitute integrated elements of an economic unit arranged in relation to the economy of the whole of the undertaking and on which the rational working of the undertaking depends. The applicant also observes that, even if the differences of an economic nature invoked by the intervener did not exist, the latter would still be exempt from the levy as a single legal person whilst the applicant would be subject to it. That again shows that these differences are irrelevant.

(bb) *The criterion of output*

The applicant, after observing that in the judgment in Joined Cases 32 and 33/58 the Court, in justification of the exemption of own arisings referred to the concept of the output of the undertaking, which would be increased by the use of its own scrap, goes on to deduce from this that, as a criterion for liability to the contribution or exemption from it, account should be taken of different conditions of production and the con-

crete factors of output. Whilst in the cases so far decided the criterion of the legal person has always coincided with that of output and group accounting — and whilst for this reason it may well be that the re-use of scrap acquired from sources outside the legal person may not have involved increases in its output, as the Court stated in Joined Cases 32 and 33/58 and Case 42/58 — the position of the applicant is essentially different. In spite of legal autonomy, the profitability of the applicant did not depend on the individual profitability of each of the different affiliated companies; the applicant was in a position to make calculations on the basis of what is known as mixed accounting. This means that it accepted losses in its tube factories if these were offset by profits in the steel-works on the steel made into tubes, for example, by the recovery of arisings from the manufacture of tubes. So it cannot be said that, by reason only of the non-unitary legal form, the re-use of scrap has not involved an increase in output for the applicant, because that would be a contradiction of the principle laid down by the Court that modifications in the legal structure of a group are no typical criterion for its output.

The defendant disputes that the criterion of output for determining liability to the contribution or exemption from it can be applied only to a single legal person.

(cc) *The aims of the equalization system and the action taken by the High Authority*

The applicant states that, even if it be admitted that in accordance with the general aims and principles of the equalization scheme exemption of own resources constitutes an exception to the rule whereby all consumers of scrap are liable as such to pay the equalization contributions, this does not accord with the effective results of the distinction practised by the High Authority for, as appears from the figures given by the High Authority in its 'Second General Report on Community Activity' in 1953, the exemption of own arisings affected the greater part of the total consumption. As the High Authority declares, the contribution was only levied on scrap *acquired on a commercial basis,* that is to say, bought on the market. Even after the system, which had operated on a voluntary basis, had been replaced by its Decision No 22/54, the High Authority let it be understood that, as regards the demarcation between scrap charged with the contribution and that exempted from it, the rules in force up to that time would be applied without variation. Meanwhile the Court has decided that it is not participation in the advantages of equalization, but consumption of scrap as such which 'accords with the aims and general principles of the equalization scheme'. The criterion adopted by the High Authority from this of treating all scrap acquired from sources outside the legal person which used it as liable to the contribution did not actually put the equalization of scrap on a broader basis, so that most of the consumers continue to be exempted from equalization.

The defendant contends that the applicant's allegation, that at the time of the voluntary equalization scheme the levy was collected only on scrap bought on the market is wrong as appears from the 'Second General Report on Community Activity' (p. 104), in which it is stated that the equalization charge also fell on 'a certain proportion of the scrap constituting the consumers' own resources'. Thus, when the compulsory Fund was established, the charge on own resources was expressly abolished, this being a further indication of the intention of the authors of the equalization scheme to go no further.

(d) Exemption of the applicant or imposition of the levy on its competitors

The applicant, whilst reaffirming that the principles established by the Court, in particular the refusal of exemption for group scrap and the attachment of the criterion of output to the legal person, are no bar to the exemption of the disputed scrap by reason of the differences already stressed between its own case and those on which the Court has so far ruled, maintains nevertheless that, if the Court is of opinion that the disputed scrap cannot be exempted, discrimination can only be avoided by levying the contribution on its competitors.

In this connexion it refers to the judgment of the Court in Joined Cases 32 and 33/58 in which it sees a hint of the possibility that by way of exception the legal person should not be taken as the basic criterion for exemption when conditions of production so require.

After stating that the Court has not yet had occasion to rule on the legality of the exemption of own arisings within the same legal person, the applicant refers to the principle laid down by the Court whereby the concept of purchase is to be broadly interpreted and to the fact that this concept has already been extended to 'transactions comparable to sales' to conclude that 'it is not unthinkable that, in developing this thought, supplies from one undertaking to another undertaking within the framework of the same legal person might be regarded as transactions comparable to sales'.

If however the Court were to be of opinion that the basic Decisions Nos 22/54, 14/55 and 2/57 do not permit of such an interpretation, or that in any event they do not permit of a levy affecting all scrap users in the same way, the applicant states that these Decisions are then themselves discriminatory and therefore contrary to the Treaty and that the disputed Decision applying them should therefore be annulled.

The defendant maintains on the contrary that the Court has already ruled on exemption within the same legal person and that its judgments show clearly that scrap recovered within the same legal person constitutes own resources for the purposes of the equalization of scrap.

3. Infringement of an essential procedural requirement and lack of competence

The applicant states that, in giving its opinion in accordance with the basic Decisions, the Council of Ministers could only assume that the term 'undertaking' must be understood in the sense in which the High Authority had understood it until then, bringing into it parent companies of which the applicant was one at the time of the equalization system. If, in taking the general Decisions, the High Authority had wished to abandon this concept of undertaking it should have done so expressly. Since it did not do so, the new interpretation did not have the assent of the Council. Consequently, in adopting this interpretation, the Decision infringed the *essential procedural requirements* provided for in Article 15 of the Treaty; nor did it fulfil the conditions to which the *competence* of the High Authority is subject by virtue of Article 53 (b) of the Treaty.

Moreover the applicant, after stating that the High Authority does not impose the levy on all consumption of scrap, contrary to the principle appearing from the decisions of the Court under which participation in the equalization contribution depends solely on consumption of scrap, goes on to say that the general Decisions of the High Authority have not given grounds for the exemption of own resources. In these circumstances, according to the applicant, the question arises whether a defect of form of which cognizance must be taken by the Court of its own motion, must not involve annulment of the disputed Decision.

The defendant states that this objection is inadmissible because the Treaty re-

cognizes no cause of action based on hypothetical errors of form. Moreover the applicant does not adduce the slightest proof to support its claim.

4. Ownership of the scrap

Alternatively *the applicant* states that the disputed scrap cannot be regarded as bought scrap to the extent that, so far as quantities of scrap used since 23 December 1957 are concerned, purchase was precluded by the retention of ownership by Mannesmann-Hüttenwerke AG.

It observes moreover that in these proceedings it is not material to determine whether the title to ownership of the scrap has been effectively retained. The disputed Decision in fact starts from the premise that there has been a retention of ownership and, in not recognizing it, does not rely on the invalidity of such retention but says that the proprietary relationship is irrelevant.

The applicant stresses that the attitude of the High Authority towards it is contradictory because on the one hand it seeks to apply a strictly formal concept of ownership but on the other hand, as soon as the undertakings affected by it invoke this concept, it seeks to override the formal legal position. The applicant asserts moreover that the argument of the High Authority disputing the validity of the retention of ownership according to German law does not accord with the prevailing opinion of legal writers in Germany.

The defendant considers that the reference to a clause retaining ownership is irrelevant because it is contrary to the logic of any scrap equalization scheme to allow individual undertakings to declare at will that the whole of their group scrap constitutes own resources. The validity of clauses in a contract designed to evade the general Decisions establishing the equalization scheme cannot be recognized.

Moreover, since own resources are determined on the basis of the concept of ownership, it does not necessarily follow that the effectiveness of any kind of reservation clause must likewise be recognized; for the definition of own resources is a question of interpretation of the legal rule, whilst examination of the reservation clauses raises the question of the legal import of a clause in a contract.

Lastly, under German law, the reservation in question, limited to scrap subsequently recovered, is not valid, because one and the same thing, in the present case the steel ingot, cannot be the subject matter of different rights of ownership and because under the contract the ingot has changed ownership immediately it was handed over. The limitation of the retention of ownership to a still unascertained part of the raw material is not valid.

IV — Costs

In the event of the Court's dismissing the applicant's application on the ground that the scope of the disputed Decision is restricted to dismissing the request for exemption without touching on the principle of the actual liability for the contribution, *the applicant* maintains its conclusions as to costs on the basis of the arguments set out above under the heading 'Preliminary observations'.

The defendant has opposed this request stating that dismissal of the request for exemption by the applicant implies that its group scrap is in principle assessable.

V — Procedure

The procedure followed the normal course.

By an application presented on 3 January 1962, the Phoenix-Rheinrohr company asked to intervene in support of the defendant;

The Court by Order of 19 January 1962 allowed the Phoenix-Rheinrohr company to intervene;

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory enquiry.

Grounds of judgment

Admissibility

The admissibility of the application has not been formally contested and the Court has no criticism to raise of its own motion. The application is therefore admissible.

On the substance of the case

I — Submission based on infringement of the Treaty or of the rules of law relating to its application

1. *The concepts of 'undertaking' aad 'purchase' for the purposes of the application of the equalization scheme for scrap*

The applicant maintains that scrap moving between its subsidiaries is own resources, within the meaning of the basic Decisions, of one and the same undertaking constituted by the parent company which engaged in production through the intermediary of its subsidiaries, being stripped of the essential characteristics of an undertaking.

In support of its argument, the applicant emphasizes the very wide powers enjoyed by the parent company in relation to its subsidiaries which are stripped of all autonomy. The national law of Member States in certain circumstances treats groups constituted by the parent company and its subsidiaries as analogous to undertakings; this is especially so in the case of German fiscal law. In the present case moreover there were contracts whereby the profits and losses or the activities of the subsidiaries were taken over *in toto* by the parent company.

On this point the applicant invokes certain passages, taken out of context, from the judgments of the Court in Joined Cases 32 and 33/58 (Rec. 1958-1959, pp. 300 et seq.) Case 42/58 (Rec. 1958-1959, pp. 399 et seq.) and Joined Cases 42 and 49/59 (Rec. 1961, pp. 141 et seq.) and maintains that the illegality of the exemption of group scrap laid down by those judgments does not apply to it because they referred to 'Konzerne' (concerns) which were not completely integrated.

It must first be observed that the High Authority, in working out and applying the financial arrangements which it has established to safeguard the stability of the market, has indeed a duty to take account of the actual economic circumstances in which these arrangements have to be applied, so that the

aims pursued may be attained under the most favourable conditions and with the smallest possible sacrifices by the undertakings affected. This principle of justice however must always be harmonized with the principle of legal certainty which likewise is based on the requirements of justice and economy.

These two principles must be so reconciled as to entail the minimum of sacrifice by Community members as a whole.

By reason of the varied and changing nature of economic life, clear and objective criteria of general application and presenting certain common fundamental characteristics must be used in the establishment and functioning of the financial arrangements for safeguarding the stability of the Common Market. It is thus impossible to take account of every difference that may exist in the organization of economic units subject to the action of the High Authority for fear of fettering that action and rendering it ineffective.

To define scrap subject to the equalization levy the High Authority, in its Decisions Nos 22/54 et seq., took as its criterion the purchase of the scrap by the undertaking consuming it.

As the Court recognized in its judgment in Joined Cases 42 and 49/59 (Rec. 1961, p. 155), this criterion must be broadly interpreted. Purchase need not necessarily fulfil all the conditions required by the appropriate national civil law for the validity and effectiveness of a contract of sale but must rather be applied to every transfer effected by the undertaking consuming it when that undertaking receives scrap from an outside source at a price to be fixed.

To define the scope of this criterion the concept of an undertaking must be studied more closely.

An undertaking is constituted by a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim.

According to this concept the creation of every legal entity in the field of economic organization involves the establishment of a separate undertaking; a particular economic activity cannot be regarded as forming a single unit in law when the legal effects of that activity must be separately attributed to several distinct legal entities.

It follows from the very fact of the creation of a distinct legal person that the law recognizes in that person a formal autonomy and responsibility of its own, so that the granting of legal personality to the different subsidiaries had as its object and effect in law the granting to each of them of control over its activities and responsibility for the risks involved therein.

Such a change in the legal position arises solely from granting a legal personality, without regard to the permanence of the economic situation existing before the change.

In this light it cannot be denied that the conditions for the existence of a legally autonomous undertaking are also fulfilled in the case of a legal person whose interests are closely bound up with those of other such persons whose purposes are determined by directives from outside.

It follows that even in the case of a group of undertakings controlled by a parent company and having a closely integrated production cycle in which the output of the group as a whole and not that of the individual subsidiaries is taken into account it must be recognized in law that the activity of the group takes place between legal persons who in law are parties to economic exchanges.

In these circumstances the allegations of the applicant which seek to show that differences exist between its group and other sorts of 'Konzerne' are of no avail.

The above-mentioned concept of an undertaking, as applied here for the purposes of the equalization scheme, constitutes a legally justified criterion which should serve to determine the legal persons upon whom charges under public law fall.

It follows that, in order to determine the movements of scrap subject to equalization, it is not the group as a whole which must be looked at but each of the several legal persons individually constituting the undertakings.

This conclusion does not run counter to the fact that German fiscal law has adopted different criteria.

The explanation for this difference is that the sole purpose of fiscal law is to bring in revenue to the State budget by taxing the increased wealth presumed to arise from the movement of goods, whilst the equalization scheme is intended to maintain stability in the scrap market and to this end it imposes

a levy directly on every movement of scrap between different undertakings even when from the economic standpoint such movement does not constitute a true transfer of wealth.

In the circumstances the applicant's pleas concerning the concept of an undertaking must be rejected.

2. *The concept of an undertaking and the attitude of the High Authority*

The applicant goes on to refer to the past attitude of the High Authority which led it to believe that the High Authority shared its idea of the concept of an undertaking. It observes moreover that the High Authority adopted the same attitude towards it and maintains that, even if the Court were to be unable to accept its argument, the High Authority cannot be allowed to go back on its own action (*'venire contra factum proprium'*).

It must be stated that the attitude to which the applicant refers related to matters such as declarations concerning investments or the general levy, authorization to operate a concentration and the granting of loans, none of which had anything to do with the functioning of the equalization scheme for scrap. Therefore, quite apart from the question whether the attitude of the High Authority might have given grounds for thinking that in other respects it considered the parent company as an undertaking for the purposes of Article 80 of the ECSC Treaty, the applicant was not justified in interpreting these basic Decisions in the light of the attitude of the High Authority on matters outside the application of the equalization scheme.

Moreover the administrative authority is not always bound by its previous actions in its public activities by virtue of a rule which, in relations between the same parties, forbids them to *venire contra factum proprium*.

In these circumstances this plea of the applicant must be rejected.

3. *On the question whether the disputed scrap can be considered as 'bought scrap'*

The applicant maintains that the disputed scrap cannot be regarded as bought ferrous scrap in so far as the possibility of purchase with regard to quantities of scrap used since 23 December 1957 has been precluded by the retention of ownership by Mannesmann Hüttenweke AG.

It must be said at the outset that, at the time of transfer of scrap from one subsidiary to another, a price was always fixed, even after 23 December

1957. If it were to be admitted, as is claimed by the applicant, that the issue was one of book prices fixed independently of the market, the very fact that each subsidiary fixes a book figure for its transfers of scrap to other subsidiaries indicates that there is a transfer of ownership.

Further there is no need to consider whether, under the relevant civil law, movements of the disputed scrap between the applicant's subsidiaries took place in pursuance of an actual contract of sale; in fact these transfers of scrap from one undertaking to another are subjected as such to the levy.

Furthermore, as appears from what has been said above, the use by a subsidiary of scrap produced by another subsidiary which, although under the control of the same parent company and belonging to the same group, has a separate legal personality, cannot be regarded as implying an increase in the productivity of the undertaking consuming the scrap looked at as an entity, in the meaning specified by the Court in its judgments in Joined Cases 32 and 33/58 and Case 42/58 (Rec. 1958-1959, p. 306 and p. 406).

It follows that to exempt this scrap would confer unfair advantages on that undertaking and so distort competition.

Finally, as regards the clause dealing with the retention of ownership of the scrap, which is referred to by the applicant, it must be observed that, to secure effectively a retention of ownership in the disputed scrap, it would be necessary to attribute to this clause taken by itself an actual effect on the ownership of that part of the steel which is afterwards recovered as scrap.

In any event the retention of ownership of a constituent part of a thing, a part the quality and quantity of which are undetermined, is not permissible under paragraph 93 of the German Civil Code relating to the ownership of things situated in the Federal Republic. Moreover such a clause is incompatible with the fundamental principles of the right of ownership in force in all the Member States, principles finding expression in the concept of accession which presupposes that special rights of ownership over a constituent and indeterminate part of the same thing are excluded.

It follows that the arguments invoked by the defendant in this respect must also be rejected.

4. *The complaint of discrimination*

The applicant accuses the defendant of having infringed Articles 3 (b) and 4 (b) of the Treaty on the ground that the formal concept of an undertaking

used by the High Authority for the purposes of equalization led to discrimination against it by putting it in an unfavourable position in relation to competing undertakings.

The defendant raises a preliminary objection to the admissibility of this complaint because the applicant has not invoked it in relation to the subsidiary companies, whilst it was precisely these, and not the applicant parent company, which produced the steel and were therefore charged with the contribution.

It is to be observed however that the applicant succeeded to all the legal relationships of its former subsidiaries.

Therefore, whilst the applicant has not expressly invoked the complaint of discrimination in respect of its former subsidiaries — which would have gone against the argument on the concept of an undertaking — it nevertheless substantially represents the position in which the subsidiary companies themselves were interested.

In these circumstances the objection of inadmissibility is based on the simple issue of the formulation of the complaint and should therefore be dismissed.

It is appropriate therefore to turn to an examination of the substance of the case.

The applicant maintains that at the time when the equalization scheme was in force it was in an identical situation, as regards its production, to that of competing undertakings in the form of a single legal person comprising different branches.

However, even if this assertion is factually correct, and if it be admitted that the difference in treatment claimed brought not inconsiderable disadvantages to the applicant in relation to those of its competitors not subject to equalization charges, that of itself is not a sufficient ground for admitting the existence of a form of discrimination prohibited by the Treaty.

For the High Authority to be accused of discrimination it must be shown to have treated like cases differently thereby subjecting some to disadvantages as opposed to others without such differentiation being justified by the existence of substantial objective differences.

On the other hand in this case in spite of identical circumstances as regards production, the applicant by reason of its legal structure incorporating

several undertakings was not in a similar position to that of its competitors who formed a single legal entity. This difference is of importance in law and is therefore capable of justifying different treatment.

In these circumstances it is of no avail to examine the points of identity, the similarities and the differences of detail existing between the applicant and the Phoenix-Rheinrohr company.

It is sufficient to observe that that company cannot be in a situation comparable to that of the applicant for the purposes of the application of equalization charges for the very reason that its various activities take place within the framework of a single undertaking.

Thus the arguments advanced by the applicant stressing the close ties between the parent company and its subsidiaries, in particular by reason of 'Organschaft' (inter-group) contracts, with a view to demonstrating the similarities to companies the different branches of which were combined in a single legal person, are of no significance in the present case because they can in no way eliminate the fundamental difference which has been declared to exist between a group of undertakings and an undertaking considered as a single entity.

The pinciple recognized by the Court in Joined Cases 32 and 33/58 (Rec. 1958-1959, p. 307) that any intervention by the High Authority which made the cost of production of steel dependent upon the legal, administrative or financial structure of industrial groups would be illegal, so far from supporting the applicant's arguments, as it claims, conflicts with them. In fact, this decision of the Court, confirming the validity of the criterion of the legal person and declaring that the particular structures of economic groups are of no consequence, has settled, clearly and in a way which leaves no room for exceptions, the question whether group scrap could be equated with own resources of one and the same undertaking.

This conclusion flows logically from the concept of an undertaking and for the purposes of the equalization scheme and is also justified by the practical advantages of a simple and clear criterion. It is true that the applicant company might have found the use of a different criterion, taking account of the differences between the various types of industrial groups, more favourable to it. However, in view of the infinite variations, actual and possible, in group relations and the difficulties which would arise in many cases in making a hard and fast classification of groups in different categories, it must be admitted that a system of this kind might have given rise in practice

to serious uncertainties, would have hindered the smooth working of the equalization scheme and would have provided a source of possible discrimination.

Moreover, in establishing financial arrangements to safeguard the stability of the market, it rests with the High Authority to choose the system which it deems most likely to serve the common interests. It is open to the Court to censure this choice only if it appears that the High Authority has exceeded the objective limits to its activity outlined by the Treaty. This is not so in the present case.

In the circumstances the applicant has not proved that the criterion adopted in the basic Decisions is either irrelevant or purely arbitrary or that in itself it involves discrimination.

Therefore the complaint of illegality raised by the applicant against the basic Decisions and based on the allegation that to be compatible with the Treaty these Decisions should have charged all use of scrap with equalization even as regards scrap recovered and re-used within a single legal person, except for scrap produced by the steel-works and re-used by it, cannot be accepted.

Consequently the complaint of discrimination raised by the applicant should be dismissed.

II — Submission regarding infringement of an essential procedural requirement and lack of competence

The applicant maintains that the basic Decisions were taken without observing either the essential procedural requirements of Article 15 of the Treaty or the rules of competence on which the legality of the action of the High Authority depends. However, the applicant has not shown that its claim is well founded. It has confined itself to asserting in general terms a divergence between the intention of the Council of Ministers and the actual content of the basic Decisions.

Moreover the Court sees nothing objective to justify the applicant's argument. This objection must therefore be dismissed as unfounded.

III — Costs

Under the terms of Article 69 (2) of the Rules of Procedure of the Court of

Justice of the European Communities the unsuccessful party shall be ordered to pay the costs.

The applicant has failed in its application.

The applicant has claimed that the defendant should be ordered to bear the costs, even if the Court dismisses its application on the ground that the disputed Decision is restricted in its scope to rejecting the request for exemption without touching on the principle of the liability for the contribution. However this is not so in the present case.

The applicant must therefore bear the costs, including those of the intervener.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 2, 3, 4, 15, 33, 36, 53 and 80 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 Decisions Nos 22/54, 14/55, 2/57 and 16/58 of the High Authority;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby

1. Dismisses the application in Case 19/61 as unfounded;

2. Orders the applicant to pay the costs, including those of the intervener.

Donner Riese Delvaux
Hammes Trabucchi

Delivered in open court in Luxembourg on 13 July 1962.

A. Van Houtte
Registrar

A. M. Donner
President