JUDGMENT OF THE COURT
15 DECEMBER 1965[1]

Société Anonyme Métallurgique d'Espérance-Longdoz v High Authority of the ECSC[2]

Case 3/65

Summary

1. *Common financial arrangements — Equalization — Contributions — Exemptions — Principles*
   (ECSC Treaty, Article 53)

2. *Common financial arrangements — Equalization — Ferrous scrap — Exemptions — Own resources — Concept*
   (ECSC Treaty, Article 53)

1. The conditions for granting exemption from contributions under an equalization scheme must be interpreted strictly and must be consistent with the aims, the basic principles and requirements for the proper functioning of such a scheme, in particular the principle of the equal liability of all those affected to pay contributions shared in proportion to the amounts respectively consumed, and the requirement that the scheme be applied impartially to all those subject to it.
   No exemption from equalization contributions can be allowed which would tend to increase substantially differences in production costs, otherwise than by altering the level of output, and thereby bring about an appreciable disequilibrium in the competitive relationships between undertakings.

2. Any exemption from equalization contributions which depends not on the way in which an undertaking arranges its production but on the contractual relationships which it has with other undertakings is not compatible with the equalization scheme. Classification of scrap as 'own resources' is not necessarily dependent on the concept of ownership of the scrap, but is intended to apply in the main to scrap which is genuinely the product of an undertaking's own activity.

In Case 3/65

SOCIÉTÉ ANONYME MÉTALLURGIQUE D'ESPÉRANCE-LONGDOZ, having its registered office at 60 rue d'Harscamp, Liège, represented by Alexandre de Posson, general manager, and Albert Lamproye, secretary-general, assisted by J. Mertens de Wilmars, Advocate of the Antwerp Bar, with an address for

1 — Language of the Case: French.
2 — CMLR.

service in Luxembourg at the chambers of Ernest Arendt, 6 rue Willy-Goergen,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Giuseppe Marchesini, acting as Agent, assisted by Cyr Cambier, Advocate at the Cour d'Appel, Brussels, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application

— primarily for the annulment of the defendant's decision of 13 November 1964 requiring the applicant to pay a specific sum as its contribution to the equalization scheme for imported ferrous scrap;

— secondarily for damages for the defendant's wrongful act or omission,

THE COURT

composed of: Ch. L. Hammes, President, L. Delvaux and W. Strauß (Rapporteur), Presidents of Chambers, A. M. Donner, A. Trabucchi, R. Lecourt and R. Monaco, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts of the case may be summarized as follows:

1. (a) On 28 December 1950 the applicant concluded with S.A. Phenix-Works (hereinafter referred to as 'Phenix') a contract which included the following terms in particular:

— an agreement by the applicant to supply Phenix with sheet bars and coils;

—'the price formula laid down in Article III' (sc. for coils and sheet bars) 'is based on the assumption that Phenix-Works will supply Espérance-Longdoz with a quantity of ferrous scrap equal to 25% of the monthly tonnage of sheet bars and, for the coils, a percentage, to be determined by mutual consent when the contract has been in operation for six months, of the monthly tonnage of coils supplied by Espérance-Longdoz' (this percentage was subsequently fixed at 10%);

—'the price for the scrap delivered to Seraing' was fixed at 30% of the basic price for the sheet bars when melted down.

The percentage 25% was subsequently reduced to 22%.

From 1953 onwards, the order specifications sent by the applicant to Phenix under the above contract contained the following clause:

'As agreed, we transfer to you only such material as is required for your finished product, and retain ownership of the scrap arising from your processing.'

(b) A new contract dated 6 September 1956 was substituted for the above-mentioned contract by the applicant and Phenix, providing that, with effect from 1 January 1956:

— the applicant undertook to supply Phenix with coils for re-rolling;

— since the applicant 'wishes to retain ownership of the scrap arising from the processing by Phenix . . . of the coils supplied, Phenix ... undertakes to deliver to [it] each month ... a tonnage of scrap fixed at a standard rate of 10% ... of the weight of coils supplied' by the applicant 'the previous month ... This scrap is to be delivered by lorry ex Phenix-Works'.

(c) During the year 1957, the applicant made a series of contracts by correspondence with S.A. Laminoirs de la Rochette (hereinafter referred to as 'La Rochette'), the object of which was the delivery by the applicant of coils, heavy plate and hot rolling mill cast-offs for re-rolling; in particular, the applicant wrote the following in its confirmatory order to La Rochette.

'... scrap arising from the processing of our steel shall remain entirely our property. In this matter, the quantity of scrap has been fixed at ...% of the material delivered to you. It is understood that this scrap will be placed by you at our disposal, ex your works'.

2. The applicant considers that the 'scrap' referred to constituted its 'own resources' within the meaning of the basic decision establishing the equalization scheme for imported ferrous scrap, and consequently that it was not subject to payment of contributions. The defendant held the contrary view that it was 'bought scrap', and therefore assessable to contribution.

Neither party wishing to alter its view, the applicant put his case in an initial application (No 24/63) which was declared inadmissible by a judgment of the Court of 5 December 1963.

3. By a decision of 13 November 1964 communicated on 21 December 1964, he defendant rejected the applicant's proposition and demanded payment by it of the sum of BF 12 608 323; according to the grounds given by the defendant this sum represents the difference between

— the sum of BF 17 587 340 equalization contribution on the scrap in question;

— the sums of BF 1 455 434 and BF 3 523 583 payable to the applicant under the equalization scheme and by virtue of over-paid contributions respectively, 'if the scrap in question was not subject to payment of contributions'.

4. On 19 January 1965, the applicant filed the present action.

II — Conclusions of the parties

In its application the *applicant* claims that the Court should:

'A — In the application for annulment,
annul the contested decision, not only in so far as it requires the applicant to pay BF 12 608 323, but also in that, by necessary implication, it charges the applicant with payment of the sum of BF 17 587 340 as its contribution to the scrap equalization scheme;
B — In the application for damages,
declare the application admissible and well founded in so far as the application for annulment is rejected; and in that event grant:
the main request, that the High Authority be ordered to pay the applicant the capital sum of BF 17 587 340 by way of damages;
the subsidiary request, that the High Authority be ordered to pay the applicant the capital sum of BF 6 998 000 by way of damages, subject to adjustment either way during the course of the proceedings;
in both instances, the capital sum to be augmented by the same penal interest as that requested by the High Authority from the applicant for the equalization contribution;
the further request, that before judgment is given one or three experts be appointed to make a report to the Court which report shall:

(1) Define the influence that the scrap equalization contribution, or at least the knowledge that there is liability to pay contributions on the scrap in question, would normally have on the financial and technical conditions in the supply contracts made between the applicant and Phenix-Works and/or Laminoirs de la Rochette, and to estimate the damage or loss or the loss of profit incurred by the applicant by virtue of the fact that when the contracts were made the parties were unaware that contributions were chargeable on scrap recovered;

(2) Define the financial burden and loss to the applicant occasioned by reason of its being unable to include the burden of equalization contributions on the scrap in dispute in its accounts for the years 1954 to 1959, by reason of the effect this had on its tax liability, by reason of the application of Decision No 7/61 and for any other reason which could have made this burden more onerous owing to the lateness of the assessment;

and answer any relevant questions raised by the parties;
costs as provided for by law';

in its reply, the *applicant*

— maintains its conclusions as to annulment and costs;

— claims further that the Court should:

'B — In the application for damages,
... in so far as it decides to reject the application for annulment,

— in the first place,
order the High Authority to pay the applicant the capital sum of BF 17 587 340 by way of damages;

— as a subsidiary matter, order the High Authority to pay the applicant the capital sum of BF 6 998 000 by way of damages;
in both cases the capital sum to be increased by the same penal or compensatory interest as the High Authority requested the applicant to pay for its equalization contributions, or at least increased by penal or compensatory interest at 5.5% or at such other rate and from such date as the Court may determine;

— as a further subsidiary matter —
prior to giving judgment, appoint one or three experts for the purposes set out in the body of the application ... and in addition for the following purposes:

(1) to say whether technically within the terms of the contract made between it and Phenix-Works the applicant could have undertaken the pickling of coils in its own works and to say what amount of the contribution would have been saved had the applicant pickled the coils in its own works;

(2) to say to what extent the reduction in the value of the scrap owing to its being subject to payment of contributions should normally be taken into account in fixing the contract price between the applicant and Phenix-Works and La Rochette;

and any other tasks the Court considers it advisable to entrust to them concerning the damage actually incurred and its extent;

— as a wholly subsidiary matter,

prior to giving judgment, authorize the applicant to prove by any means open to it in law and particularly by the witnesses that at the time of investigation carried out by S.A. Fiduciaire Suisse at the applicant's works in November 1956 the problem of scrap coming from Phenix-Works and La Rochette was raised and that the applicant was given assurances as to the non-liability to pay contributions on this scrap;

and then to proceed to judgment according to the provisions of the law'.

In its statement of defence, the *defendant* contends that the Court should:

'(1) Declare, as to the application for annulment, that it is inadmissible, and in any case unfounded;

(2) Declare as to the main, subsidiary and further subsidiary claims made in support of the action for damages that they are—following the application—inadmissible and unfounded;

(3) Dismiss the action accordingly and order the applicant to pay the costs'.

These conclusions were repeated by the defendant in its rejoinder.

III — Submissions and arguments of the parties

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

A — *Application for Annulment*

1. First ground: infringement of the basic decisions

The *applicant* states that at no time did the scrap in question belong to another undertaking. By making it subject to payment of equalization contributions, therefore, the defendant infringed the basic decisions, according to which contributions are to be calculated only on the basis of bought scrap.

(a) The contested decision is wrong in assuming that the contracts in question:

'reveal some conflict of purpose, since on the one hand the undertaking retains ownership, while on the other hand it contains the usual clauses in a contract for sale, fixing quantity, price and place of delivery.';

'that it is therefore impossible to have regard only to the reference to "ownership", and that consideration must also be given to the factual basis of the contracts.'

There is no contradiction, since the matters referred to by the defendant are not peculiar to contracts of sale, but are to 'be found in any contract involving the return of a physical object'. Moreover, 'the mutual and apparent intention of the parties is for the applicant to retain ownership of the arisings. A clause such as this precludes any notion of sale or re-sale of the scrap'. The contracts fix 'neither an actual nor a notional price'; they 'merely take into account the value of the scrap metal in

the price of the sheet bars and coils delivered, precisely because, owing to the effectiveness of the retention of ownership clause, the buyer receives less than might appear at first sight'.

Next, the statement in the contested decision to the effect that:

'the scrap is neither a product nor a by-product of the consumer undertaking; it constitutes a by-product the commercial nature of which differs from the original semi-finished product, and this by-product is created in the course of a manufacturing process, carried out by another undertaking, a processing undertaking, into which the consumer does not enter at that stage,'

misses the point, since it is equally true, where work has been contracted out, of scrap arising at the rolling-mill and sent back by the contractor; so the defendant itself admits that the scrap must be exempt from equalization. This point is moreover irrelevant 'in considering whether or not there is truly a retention of ownership as to the by-products'.

Lastly, the argument used in the contested decision to the effect that:

'the contracts in question are primarily concerned with guaranteeing the applicant a supply of scrap against a price to be fixed',

is ineffective since the desire to ensure a supply can be reconciled 'just as easily within the framework of a contract with retention of ownership as within that of a supply contract'.

(b) The defendant is likewise mistaken in contesting the validity in Belgian law of the disputed clause. On this point, the applicant's argument runs essentially as follows:

'—While Article 546 of the Belgian Civil Code, confirming the principle of accession, declares that ownership of an objective gives title also to what is produced from the object and what is an integral part of it, the parties may provide otherwise. So it cannot be maintained on the basis of this provision that a separate title to a constituent and undetermined portion of one and the same thing is impossible under Belgian law. "The possibility of separate title in the constituent elements of an object existing is in any case, in certain circumstances, generally admitted, as is shown by its many applications in connexion with rights in land leased for building and other purposes (droit de superficie), rights of user (usufruit), deposit for return *in genere* (dépôt irrégulier) and long leases (bail emphytéotique)."

— The defendant is right, in principle, when it states that any retention of ownership must accord with the fundamentals of the law of property; but it applies this principle too harshly. In particular, its description of the right of ownership as "absolute and exclusive" is, "in the light of the economic law of the second half of the twentieth century, an amazing assertion".

— Even granted that—as is not the case—a retention of ownership in respect of a constituent and undetermined part of a thing is not valid in Belgian law, the rule would not be applicable here; for the scrap in dispute "cannot be considered to be a constituent element, of undetermined quality and quantity, of the thing delivered and in which separate ownership cannot exist, since the purpose of the contract necessarily entails separation of the scrap, and this separation, far from destroying the substance of the thing delivered, is necessary to restore to that thing its own full value, while the reservation relates to quality and quantities which are determined" or at least determinable.

— The objection that separate ownership of the separable and determinable element arises only at the the moment of separation cannot be

maintained. On the one hand, "this theory assumes that the problem of whether separate ownership of constituent elements is possible or not has been disposed of *a priori* and in accordance with the view favoured by the defendant"; on the other hand, if the theory is correct, it would not invalidate the applicant's arguments, since, in pursuance of this theory, "separate ownership of the scrap arises in the processing; when the sheet bar is rolled, a new thing of a different nature is created, waste scrap . . . And this new thing is, from the moment of its creation, the property of him in whom the law or the will of the parties vests it".

— The contested decision should not have relied on the judgments of the Court in Cases 17 and 20/61 and 19/61, since paragraph 93 of the German Civil Code, applied by the Court in those judgments, differs from Belgian law on this point.'

It cannot seriously be maintained that the percentages of scrap to be delivered are fixed independently of the actual volume of waste scrap; in fact the figures quoted in the contracts were fixed on the basis of past experience. Moreover, if Phenix or La Rochette undertook to deliver more than that quantity over which ownership was retained, the sole result would be to make the excess subject to equalization contributions.

To the defendant's attempt to maintain that the parties contracting with the applicant were authorized to deliver scrap other than that arising from the products in dispute, the following objections can be made:

— this assumption is not borne out by the facts;

— it has no bearing on the situation in hand, since the defendant does not require that the scrap returned to the original works, under a jobbing contract, be identical with the arisings [waste scrap]; it never made any check on this; 'the truth is that, when the person giving the order hands over the scrap to the jobber, the High Authority concedes that the former deducts from his stock subject to equalization, as having been sold, a quantity of bought scrap equivalent to that which remains with the jobber under a jobbing contract'.

The *defendant* states that both in the contested decision and in the judgments on which it relies the arguments based on national law were considered to be of secondary importance; it is primarily from the point of view of Community law that the questions in dispute must be settled.

(a) The disputed clauses amount to an undertaking by Phenix and La Rochette to sell the waste scrap to the applicant; the appeal to the concept of 'ownership' is a mere device; the facts forming the background of this case are different from those which are present in the case of a jobbing contract.

This is because:

— the 'retention of ownership' relates to a quantity of scrap determined at a standard rate; if those percentages are not attained, the buyer of the sheet bars, coils etc. must relinquish scrap other than that arising from the processing of those semi-finished products; if they are exceeded, the buyer may retain the excess scrap;

— 'consequently, those acquiring the sheet bars and coils do not undertake to restore a part of the thing sold to them which goes to make up, by combination or accretion, a single whole. They undertake to keep the applicant . . . supplied with a predetermined quantity of scrap . . .';

— the applicant is mistaken in seeking to refute this argument by asserting that arisings are equally fungible in the case of jobbing contracts; the defendant has in no way ignored the

aspect of substitution; but the comparison has no relevance here.

(b) Proceeding to a detailed analysis of Belgian law, the defendant endeavours to show that the disputed clauses are ineffective because they are incompatible with the character of real (rights *in rem*).

— It is futile for the applicant to lay emphasis on the law relating to accession, to which there is no need to resort in order to justify the defendant's theory. On the contrary, as most Belgian authorities agree, 'it is not correct to say that the owner of a thing acquires by accession the product of that thing. The product of the thing is the property of the owner by virtue of his exercising his right of ownership, the *jus fruendi*'. Thus, in our case, the purchaser of sheet bars, etc., has not 'relinquished his right to become owner of the scrap in derogation from the law of accession. He has by way of transfer reassigned his right to ownership of the scrap'.

— The right of ownership is an exclusive right. This being so, there cannot be several persons possessed at the same time of the right to use and enjoy a thing and to dispose of it, except in a case of co-ownership, which does not concern us here; cf. Article 544 of the Belgian Civil Code.

In the present case, the person acquiring the semi-finished products 'exercised over them a right of disposal, brought about by the processing of the said material. The exercise of this right could not have been the subject of a reservation touching the ownership of the thing so disposed of by its owner in the exercise of his exclusive right'.

— In no case does the law permit a separate right of ownership in parts of the whole which are not determined and which are indistinguishable in substance from the single whole.

2. Second ground: Lack of competence; infringement of the first paragraph of Article 5 and Article 83 of the ECSC Treaty

The *applicant* claims that the contested decision goes beyond the bounds of the defendant's powers and fails to observe the compulsory limitation on its powers of intervention by asserting that acceptance of national law as decisive:

'would allow undertakings in certain countries to control the application of Community law in this field'.

Since the ECSC has not yet achieved full integration, however, the defendant is bound to have regard to any differences existing between the national legislative systems which do not amount to a prohibited discrimination. This duty exists with regard to the equalization scheme, if nowhere else, since the defendant has deliberately selected 'a criterion accorded legal recognition only by the national legislature', the concept of ownership, to define scrap not subject to payment of contributions.

Nor has the defendant any grounds for claiming that, of the civil laws in Member States, priority should be accorded to those which give the widest interpretation to the concept of bought scrap.

The *defendant* replies that it would be incompatible with the sense and purpose of the equalization scheme, characterized by the principles of interdependence and equality, to make the granting or refusal of exemption dependent on which of the Member States the relevant enterprise belonged to. For similar reasons, it would not be right to make the contributions depend on the type of contract which the consumer firms chose to use. Thus the High Authority in no way exceeds its powers by fixing uniform criteria for charging the contributions.

The contested decision is in accordance with the case-law of the Court, where

— it was held that it was necessary to have recourse to general principles

drawn from the laws of Member States, provided that such principles were consistent with the requirements of the financial scheme in question;

— it was declared that the concept of 'bought scrap' must be given a generous interpretation, that is, it must embrace notions which, although not amounting to 'sale' in the strict sense of the term, are comparable therewith; consequently, in the present case, it is sufficient to find that there has occurred some 'movement of scrap between different undertakings', and that the disputed arisings were the result of a productive process carried out by a firm other than the consumer firm.

Lastly, bearing in mind the two principles of *res judicata* and non-discrimination, the High Authority is bound to apply the Court's *ratio decidendi* in one case to all like cases.

3. Third ground: Infringement of Articles 3 (a), (b) and (d), 4 (b) and 15 of the ECSC Treaty

The *applicant* claims that:

(a) The defendant has introduced discrimination in making the scrap in dispute subject to payment of equalization contributions while granting exemption to scrap which, on completion of a jobbing contract, is returned to the person giving the order; this is a breach of Article 4 (b). In fact the two situations are fully comparable so far as the purposes of the equalization scheme are concerned, since in both cases:

— the recovered scrap is a by-product of the original semi-finished product;

— the task of separating the steel from the arisings is delegated under the contract by the consumer firm to another;

—'the using of the recovered scrap means that a by-product of the consumer firm re-enters that firm's production cycle'.

—'recovery of the scrap constitutes an improvement in efficiency within the firm itself'.

The disputed decision made some of these same points in order to justify charging the applicant equalization contributions.

Moreover, the amount of the contributions is increased by the exemption of firms doing work contracted out to them.

Lastly, the applicant repeats here the argument based on the regulations applicable to work contracted out (cf. *supra*, 1).

(b) Furthermore, the contested decision is in breach of the duties imposed on the defendant by paragraphs (a), (b) and (d) of Article 3 of the Treaty. In particular it infringes:

— paragraph (a), since it 'penalizes a measure which helps to ensure as efficiently as possible an orderly supply of scrap to undertakings', and this 'precisely on the pretext that the reservation of property clause is intended to safeguard supplies';

— paragraph (b), by imposing an equalization contribution on the disputed scrap while exempting what is known as scrap arising from rolling work contracted out.

(c) Lastly, the defendant has contravened Article 15. 'Bearing in mind the procedural phase completed before the Court of Justice (Joined Cases 23, 24 and 52/63—Rec. 1963, p. 451 et seq.) and the fact that during this phase, as well as in earlier approaches, the problem posed for the equalization scheme of assimilating scrap subject to a retention of ownership clause and scrap resulting from work contracted out was expressly raised by the applicant, the contested decision could not ignore this problem'; the more so since during that phase the defendant formally declared that it would make its decision 'after recourse to all the internal procedures had been tried', and the applicant took formal note of this declaration.

The *defendant* replies:

To point (a):
This part of the argument is inadmissible, since the validity of an act cannot be prejudiced 'by the existence of grounds on which it was not based'. And it is not well founded either, since the two procedures differ in both (1) their legal; and (2) their economic aspects as described by the applicant:

(1) In the case of work contracted out, the person giving the order never ceases to be the owner of the goods, which are processed on his behalf;
(2) The choice between one or other of these methods is not an idle one, but deliberate; the individual features of these two types of contract are reflected in their consequences and therefore in the parties' economic circumstances—if only because the considerable variation in the risks involved . . .'.

To point (b):
The claim that Article 3 (b) has been infringed is refuted by the defendant's arguments on point (a), *supra.*
The applicant's claim that Article 3 (a) has been infringed amounts to saying that all supplies of scrap should be exempt from contributions.

To point (c):
The objection made here is not admissible because it is not based on the grounds given in the contested decision. Nor is it well founded; for once it has been established that the retention of ownership clause is ineffectual in fact and in law, the charging of the contributions in dispute finds sufficient justification in the terms of the contested decision.

On the question of admissibility, the *applicant* replies:

— as to point (a), that this part of the argument, alleging unacceptable discrimination, is a fundamental ground of claim and must, therefore, be admissible;
— as to point (c), the objection 'is mere sophistry'; the question we are trying to answer is precisely whether the grounds given by the decision are 'genuine and worthy of consideration'.

4. Fourth ground: Illegality of the basic decisions concerning the equalization scheme

The *applicant* considers that even if it were conceded that the contested decision applied the basic decisions in the correct manner, the latter are themselves illegal, for the reasons given in the second and third grounds, that is to say:

— because they fail to observe the law relating to ownership applied by national legal systems;
— because they infringe Articles 3 and 4 of the Treaty.

The *defendant* considers that its answers to the second and third grounds apply equally to this complaint.

B — *Application for damages*

1. For a wrongful act or omission

The *applicant* states that if the contested decision must be considered valid the defendant is guilty of a wrongful act, as may be seen from the chronological order of events:
— From 1953 onwards, the defendant's Market Division was aware of the first contract made with Phenix.
— In November 1956, the Société Fiduciaire Suisse, acting as agents of the Imported Ferrous Scrap Equalization Fund (referred to by the initials of its French title, CPFI, carried out a check on the applicant's premises as to the quantity of scrap entering its works. 'These deliveries . . . are logged in a single register . . . where scrap coming from Phenix-Works and La Rochette appears under a heading in large letters' (the applicant produces photocopies of extracts from the register). 'This being so, one of two alternatives must apply':
— Either this firm has failed to carry out its investigation in the proper man-

ner, in which case there has been serious negligence for which the defendant is liable;

— Or else—and this is the correct assumption—it did its work properly, in which case it cannot have failed to notice that scrap was coming in from outside and was not declared for the purposes of equalization.

If it be assumed—as is not the case—that despite these assertions the firm conducting the investigation did not broach the question, then there, too, lies a wrongful act or omission, since this 'passing over' *sub silentio* was liable to mislead the applicant. But the truth is that the applicant 'was given every assurance' at the time.

— The defendant is mistaken in referring to the letter of 18 December 1957 sent by it to the Joint Bureau of Ferrous Scrap Consumers (referred to by the initials of its French title, OCCF) and published in the Official Journal of 1 February 1958:

— In the first place, this letter was not in itself sufficient to shake the applicant's conviction; in fact even the defendant did not apply it to the letter since it held that scrap recovered under a jobbing contract—that is, in a factory bearing a company name other than that of the consumer firm—was 'own resources'; furthermore, this letter was essentially concerned with the problem of group scrap, which does not concern the applicant here;

— in the second place, even were the letter capable of alerting the applicant, it came very late. The equalization scheme was wound up on 30 November 1958;

'but the period available for perceiving the practical import of this letter was in reality considerably shorter since the last lot of scrap subject to the contributions, that is, scrap received at the end of November 1958, originated from semi-finished products delivered to Phenix-Works or La Rochette considerably earlier'; the same may be said *a fortiori* of Decision No 13/58 published in the Official Journal of 30 July 1958.

— It was not until a check was carried out in November/December 1959, that is, after the equalization scheme had been wound up, that the Société Fiduciaire Suisse showed doubt for the first time whether the scrap in question was exempt from equalization, when it classified the scrap in a report under the heading 'Points as yet unsettled'.

In the light of the foregoing the conclusion must be that the defendant has been negligent in that:

— during the first period, it failed to express any official opinion, or to alert the applicant to the presence of the difficulty;

— during a subsequent period, beginning in 1956, 'it resolved the difficulty in the wrong way and gave, or permitted to be given, formal assurances which would in the normal course be received as reassurance by those concerned when in fact it was its duty to give them the full facts, or at least . . . to draw the attention of the undertakings to the existence of a complex and delicate problem'.

The *defendant* disputes the allegation of a wrongful act or omission, and that the applicant could have been misled; the chronological order of events is described and evaluated by it as follows:

— When, in 1953, the Market Division learnt of the first contracts made between the applicant and Phenix, it was in the context of provisions of the Treaty which had nothing to do with the equalization of scrap prices. Moreover, the said contract does not expressly mention any retention of ownership.

'It is quite impossible' for the officials of the Société Fiduciaire Suisse to have given the applicant explicit assurances. In fact, they 'were in no position to do so. If they did pass

any comment, it could only have been a purely personal one, for their task was quite unambiguous: they were given no authority to draw any conclusions as to the legal significance of the facts found by them. Indeed, the difficulty was not even raised' by these officials. What is more, the second contract made between the applicant and Phenix was prior to the check carried out in 1956. 'The opinion of the investigators is thus irrelevant to the obligations entered into by the applicant'.

— The defendant's subsequent actions (letter published in the Official Journal of 1 February 1958, Decision No 13/58, the second check on the applicant's business) 'are visibly biased in favour of making the scrap in question subject to equalization . . . either the applicant formulated its contract independently of any opinion of the High Authority, or it must have realized that the scrap in question was subject to equalization'. On this last point, the defendant agrees with the applicant that the letter referred to above was obviously more restrictive than the practice later followed by the administration; but it takes the view that the applicant should *a fortiori* have taken a warning from the letter. As regards Decision No 13/58, wherein the defendant declared itself competent to revoke any resolution adopted by one of the Brussels organs, this should have constituted 'yet another warning'.

Lastly, the checks carried out by the defendant do not in any way amount to an act which it is bound to perform in the interests of those liable to contributions. Further, 'where there is a conflict between the interests of private individuals and the general interest, the latter must be given absolute priority, particularly where it concerns a remedy for a situation inequitable in law, or the removal of discrimination between scrap consumers'; these principles have the sanction of judgments of the Court.

2. Injury and the causal link

The *applicant* claims that, had it known in time of the view now taken by the defendant, it would have acted otherwise and in any case would have found itself in a more favourable financial situation. In this context, it considers that 'three possibilities must be considered' which might also have existed in combination:

— Either it would have drawn up 'contracts in such a way that the pickling of coils would have been done at its own works; while indicating this technical possibility, it acknowledges that such an alteration of the contract could only reasonably have been contemplated for the pickling of the coils alone, and would have been out of the question as regards the supplies of sheet bars'. It is true therefore that by itself this method of procedure could only have saved the applicant roughly a quarter of the sum of BF 17 587 340.

— Or, knowing that the 'scrap delivered in lieu of payment is diminished in value by the fact that contributions are liable to be charged on it' for equalization, the applicant would have claimed—and got, as a result of 'the hard facts of business life'—'compensation which would have modified the price formula established for the sale of the semi-finished product'.

For these two possibilities, existing in combination together or with others, 'the injury sustained is represented by the full amount of the contribution with which the applicant would not have been burdened'; it thus amounts to BF 17 587 340.

— Or, finally, there is the lesser possibility that nothing would have enabled the applicant to avoid having to pay contributions; even then, it

would have suffered an injury. 'The sum of BF 12 608 323 would, had it been charged in instalments during the course of the trading years between 1954 and 1958, have been easily borne by either the company funds or the profits, particularly since the total sum would have been spread over five financial years.'

On the other hand, 'to have to pay this sum all at once . . . constitutes a burden . . . which the firm is being made to bear in . . . less favourable financial circumstances; furthermore, had it spread the payments, it would have had the advantage of interest discounts granted by Decision No 7/61 . . . The damage incurred is represented by the financial burden of the sum charged, calculated at 7% on the sum of BF 12 608 323, payable over five years, that is, BF 2 648 000. However, not being able . . . to treat the sum of BF 12 608 323 as a charge deductible from its taxable profits at the various times referred to, the applicant paid tax on a higher level of profit. The burden of this tax may be estimated at 34.5% — subject to adjustment—namely BF 4 350 000'. In the third instance, the damage suffered therefore amounts to: BF 2 648 000 + BF 4 350 000 = BF 6 998 000.

The applicant denies, and submits facts in support of its denial, any suggestion which might lead to an admission that the retention of ownership clause was included in the relevant contracts for the purpose of avoiding the equalization of the scrap in dispute. And even had this been the case, the applicant would not have been acting improperly in so doing.

The *defendant* denies the existence of any injury and claims, moreover, that the method used by the applicant to assess it is 'arbitrary'.

In particular, the applicant's claim that it could have passed on to the other parties to its contracts the equalization contributions is not consistent with the price being fixed by the fluctuations in supply and demand; also, 'it is difficult to see why the buyers should agree to pay prices in excess of those in the published price-lists, which would in any case constitute a breach of Article 60 of the Treaty'.

To the applicant's affirmation that it could have accomplished the work in question by means of a jobbing contract, it may be objected that that type of contract has a legal nature quite distinct from the contracts here under consideration; the two types of contract are not therefore interchangeable.

As for the economics, 'one need only recall the risk attaching to the contract for job-rolling compared with that attaching to a contract for sale, which involves the placing of finished products on the market with all its consequences as regards prices and fluctuation in demand'.

When the applicant considers that it suffered damage as a result of the obligation to pay its contribution all at once, it misunderstands the system introduced by Decision No 7/61. It is true that by virtue of this, the later a firm pays, the later it becomes entitled to the benefit of credit interest; but it is to a great extent compensated for this by the fact that meantime it has had it at its disposal the money which it owed.

Lastly, as regards the changes deductible under the national fiscal provisions there appears to be no reason why the entire amount of the contribution cannot be deducted from the taxable income for the financial year during which it is paid.

It matters little whether the disputed clauses were inserted in order to enable the applicant to avoid paying contributions or not. 'It need only be noted that the formula used by the applicant had the advantage of avoiding the transfer tax levied by the national fiscal authorities, which explains why it has kept to it in all circumstances.'

C — *The offer of evidence*

'As a further subsidiary point', the *applicant* declares that it is willing 'to prove, by any means open to it in law, including the calling of experts and witnesses, all the facts adduced by it and in particular the existence and amount of the damage', and it requests 'that experts be appointed for the purpose if required'.
Likewise it offers to prove, in particular by means of witnesses 'that the problem whether the scrap returned by Phenix-Works and La Rochette was subject to equalization was in fact raised at the time of the 1956 investigation' carried out by the Société Fiduciaire Suisse.
The *defendant* replies, in particular to the offers of evidence regarding the assessment of damage, that they are not acceptable because they 'relate to submissions which are themselves inadmissible'. 'In any event, as regards the possibility mentioned by the opposite party that once it had been duly warned that the arisings were subject to contributions, it would have been able to charge prices augmented by the amount of the contributions, it would be essential to know what prices it actually charged its contractors. A comparison between these prices, which are not based on the contracts, and the prices prevailing in trade at the time might demolish the latest arguments which the applicant has developed *in abstracto*.'

IV — Procedure

The procedure followed the normal course.
By order of 11 October 1965 the Court decided to join this case and Case 4/56 (*Société Anonyme Métallurgique Hainaut-Sambre* v *High Authority*) for the purposes of the oral procedure.
The parties' oral observations were heard on 18 and 19 October 1965.
The Advocate-General delivered his opinion on 4 November 1965.

Grounds of judgment

I — The application for annulment

1. *The first ground*

The applicant claims that the scrap in dispute constituted not bought scrap within the meaning of the general decisions, but 'own resources' which, as such, were granted exemption from the equalization contribution.

On the basis of this description, it concludes that the ownership of the said scrap never ceased to be vested in it by virtue of the retention of ownership clause included in the contracts of sale made with Phenix-Works and La Rochette and that the decision which it contests was therefore wrong in subjecting the scrap to equalization contributions.

The general decisions applicable to this question introduced, for the benefit of all undertakings within the Community, a scheme designed to ensure them

a regular supply of scrap at uniform prices whatever the Member State to which they belonged or the origin of the scrap in question.

These decisions, aimed at spreading between undertakings the financial burden of a benefit in which all could share, accordingly made all scrap consumed by Community undertakings subject to the equalization levy, with the single exception of scrap which constituted their own resources.

The scope of this exemption can be determined only by reference to the system within which it is designed to operate and in the light of the fundamental principles on which it is based.

Since the obligation to contribute to the equalization scheme is the rule and exemption the exception, the latter must be interpreted strictly and must be consistent with the aims, the basic principles and the requirements for the proper functioning of the equalization scheme, in particular the principle of the equal liability of all those affected to pay contributions, shared in proportion to the amounts respectively consumed, and the requirement that the scheme be applied impartially to all those subject to it.

When it pleads the right of ownership, which it claims never to have ceased to enjoy in respect of the disputed scrap, and the fact that this element has been taken into account in certain similar cases previously, the applicant is ignoring the fact that the concept of 'own resources' depends equally on a consideration of the method of scrap production required by the spirit and purpose of the equalization scheme. The applicant is therefore mistaken in thinking that the exemption can be made to apply to the scrap here in dispute simply by showing that at no time did it transfer its ownership thereof.

In doing so, it fails to appreciate that the fact that scrap arising from a transfer of ownership was classified in previous similar cases as bought scrap does not by any means indicate that the absence of any transfer will justify exemption from the equalization levy.

Indeed, the question who holds title to the ownership of the disputed scrap, however important, cannot be the sole determining factor in the equalization scheme.

The aims of the scheme make it imperative to take into consideration the circumstances surrounding the production of the scrap in question.

No exemption from equalization contributions can be allowed which would tend to increase substantially differences in production costs, otherwise than by altering the level of output, and thereby bring about an appreciable disequilibrium in the competitive relationships between undertakings.

That does not occur when an undertaking puts back into its production cycle wastes arising from the production or processing, carried out by it or on its behalf, of its own products.

Such re-utilization constitutes in fact an internal measure of economy conducive to increased productivity; exemption of scrap so used does not therefore distort competition within the market.

On the other hand any exemption which depends not on the way in which an undertaking arranges its production, but on the contractual relationships which it has with other undertakings, is not compatible with the scheme.

The classification of scrap as 'own resources' is not therefore necessarily dependent on the concept of ownership of the scrap, but is intended to apply in the main to scrap which is genuinely the product of the undertaking's own activity, the result of its own work.

The scrap in question did not arise by separation from the semi-finished product by a joint *pro quota* operation performed by the applicant and each of the undertakings with which it has contracted but is the outcome of the manufacture of finished products carried out by the firms Phenix-Works and La Rochette working on their own account and at their own risk.

In addition, a valuation was made of the scrap transferred by Phenix-Works and La Rochette to the applicant and taken into account when the selling price of the semi-finished product was fixed.

However, at least in the case of the first contract made with Phenix-Works, the value so fixed for the scrap differs from the value of a corresponding quantity of the semi-finished products.

This separate valuation of the semi-finished products sold and of the scrap recovered confirms that the latter does not merely represent a portion retained from the semi-finished products sold, but is a new product.

Consequently consumption of this scrap by the applicant cannot be considered as a re-utilization by the producer undertaking of its own resources.

In these circumstances, the scrap in question must be subject to the payment of equalization contributions, the affinities with private law invoked here by the applicant being irrelevant to the matter.

The determining factor lies not, therefore, as the applicant claims, simply in the physical transfer of the scrap, but in its incorporation into the cycle of production of an undertaking which has had no part in the production process from which it has arisen.

The ground put forward by the applicant is therefore not well founded.

2. *The other grounds in the application for annulment*

A — The applicant accuses the defendant of having 'penalized a measure which helps to ensure in the most rational manner regular supplies of scrap to undertakings'. Thereby the contested decision, or at least the general decisions on which it is based, have, it claims, infringed Article 3 (a) of the Treaty.

The applicant bases its complaint in particular on the reasons set out in the contested decision, according to which the disputed contracts 'appear to be intended primarily to secure (for the applicant) a guaranteed supply of scrap'.

This complaint effectively negates the whole concept of a financial mechanism since it amounts to saying that any method of supplying scrap which can be called 'rational' must be exempted from equalization.

More particularly, as regards the passage complained of in the statement of the reasons on which the decision is based, the context reveals that it is intended simply to demonstrate that the disputed contracts were drawn up with the same intent as any contract of supply not containing a retention of ownership.

This ground is accordingly unfounded.

B — According to the applicant, the contested decision conflicts with Articles 3 (b) and 4 (b) of the Treaty, since it imposes the equalization levy on scrap covered by a retention of ownership clause, whilst exempting scrap returned to the person ordering a jobbing contract on completion of the contract.

It is clear from the foregoing that subjecting the scrap in dispute to the equalization contribution accords with the true purpose of the equalization system.

As a subsidiary point the applicant claims that, even if the differing treatment of the two types of scrap mentioned above is sanctioned by the basic decisions, these latter conflict with the Treaty.

It follows from what has already been said that this claim is unfounded.

C — The applicant claims that the reasons stated for the contested decision are not adequate in law, since they omit to give reasons why the defendant accords different treatment on the one hand to the scrap in question and on the other hand to scrap returned to the person ordering a jobbing contract on completion of the contract.

The defendant was under no obligation to state its reasons for not charging the equalization contributions on other categories of scrap, but only those which led it to conclude that the scrap in question constituted 'bought scrap'.

The grounds stated in the decision reveal those reasons in a manner both detailed and clear.

Accordingly this claim is unfounded.

It follows from all these considerations that the application for annulment must be dismissed as unfounded.

II — The application for damages

The applicant claims that, if the Court decides that the disputed scrap should be considered as bought scrap, the applicant has suffered damage caused by the defendant's wrongful act or omission.

It states that the conduct of the defendant or its servants or agents was such as to persuade the applicant that the said scrap was not subject to the payment of equalization contributions. In consequence it made no attempt so to arrange its relationships with Phenix-Works and La Rochette as to avoid in whole or in part the payments for which it now finds itself liable.

1. The applicant claims that, during the period running from the commencement of the equalization scheme to the month of November 1956, the defendant 'neglected or omitted to draw the attention of undertakings to the existence of the problem in question'.

It claims that the first contract concluded between it and Phenix-Works was known to the Market Division of the High Authority from 1953 onwards, and the defendant does not dispute this.

It has been established that the contract referred to above was submitted to the defendant for reasons not connected with the compulsory equalization scheme, and at a time when the latter had not yet been introduced.

Moreover, the contract contained no retention of ownership clause, which at that time appeared only in the confirmations of orders sent by the applicant to Phenix-Works, of which the defendant had no knowledge.

On the other hand, the contract did refer to deliveries of scrap and even mentioned the price to be entered in the accounts for it.

In these circumstances, it being impossible for the defendant to take into account all aspects of the case, it cannot be accused of not having taken the initiative in order to avoid the consequences for the applicant of the error complained of by the latter.

2. It has been established that in November 1956, when the first check was carried out on the applicant firm, the officials of the Société Fiduciaire Suisse (SFS), while aware that the applicant was receiving scrap from Phenix-Works which it did not declare as 'bought scrap', did not refer the problems to the bodies responsible for the administration of the equalization scheme.

The applicant claims that the officials gave it 'every assurance that the contract was effective as regards the problem of liability to pay contributions'.

The file of the case shows that the task of these officials was one of checking and inspection, and excluded any administrative duty which might confer on them the capacity of representatives of the defendant.

They did not, therefore, have any powers to settle the legal problems raised by the basic decisions.

No interested party with due warning, such as the applicant, could have been ignorant of these facts, the more so since the investigators were accountants from a private firm based in a non-member country.

In addition, it appears from the letter from the defendant to the OCCF of 18 December 1957 (Official Journal of 1 February 1958, p. 45 et seq.) that, 'since the inception' of the financial scheme, the organs responsible for its administration had applied the concept of 'own resources' to mean 'scrap recovered by (the consumer undertaking) in its own works bearing the same company name'.

This being so, the applicant could not at any time be certain that it would not have to pay the contributions in question.

The applicant's allegation is therefore unfounded, even if its claims concerning the conduct of the officials of the SFS are accurate in fact.

Accordingly, it is not necessary to grant the applicant's request for an inquiry into the matter.

It follows from these considerations that the application for damages must be rejected.

III — Costs

According to Article 69 (2) of the Rules of Procedure, the unsuccessful party must pay the costs. The applicant has failed in its submissions, and must therefore bear the costs of the action.

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 the Treaty establishing the European Coal and Steel Community, especially Articles 3, 4, 15, 33, 40 and 53;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69,

THE COURT

hereby:

1. **Dismisses the application as unfounded;**

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.