

JUDGMENT OF THE COURT
26 JUNE 1958¹

**Société des Anciens Établissements Aubert et Duval
v High Authority of the European Coal and Steel Community**

Case 10/57

Summary

1. *Procedure — Application for annulment — General decision — Undertaking as applicant — Misuse of powers — Admissibility*

Proceedings instituted by an undertaking against a general decision are admissible if it maintains that it has been adversely affected by the contested provisions and if it formally alleges that on one or more occasions a misuse of powers affecting it has been committed, if it produces a relevant statement of the reasons leading it to believe that there has been a misuse of powers on one or more occasions and if the purpose of the arguments upon which it relies is to obtain a declaration that, when the High Authority adopted the contested provisions, it exercised the powers conferred upon it by the Treaty for purposes other than those for which they were conferred upon it.

(Treaty, second paragraph of Article 33)

2. *Financial arrangements — Indirect means of action*
[Cf. paragraph 2, summary in Case 8/57 of 21 June 1958]
3. *Fundamental objectives of the Community*
- (a) *Duties of the High Authority — Implementation of Articles 2 to 5*
[Cf. paragraph 4 (a), summary in Case 8/57 of 21 June 1958]
- (b) *Reconciliation of the various objectives of Article 3*
[Cf. paragraph 4 (b), summary in Case 8/57 of 21 June 1958]
4. *Financial arrangements — System of allocation — Direct action on production*
[Cf. paragraph 6, summary in Case 8/57 of 21 June 1958]
5. *Influence on investments — Financial arrangements — Indirect action regarding investments*
[Cf. paragraph 7, summary in Case 8/57 of 21 June 1958]

In Case 10/57

SOCIÉTÉ DES ANCIENS ÉTABLISSEMENTS AUBERT ET DUVAL, present proprietor A. R. J. Duval, a Société en Nom Collectif governed by French law, having its registered office in Neuilly-sur-Seine, represented by Robert Duval, one of its mem-

¹ — Language of the Case: French.

bers, assisted by Georges Chauvel, Advocate at the Cour d'Appel, Paris, with an address for service in Luxembourg at the offices of the Chambre Syndicale de la Sidérurgie Française, 49 boulevard Joseph-II,

applicant,

V

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Gérard Olivier, acting as Agent, assisted by André de Labadère, Professor in the Faculty of Law, Paris, with an address for service in Luxembourg at its office at 2 place de Metz,

defendant,

Application for the annulment of the provisions contained in Articles 6 (3), 8 and 9 of Decision No 2/57 of 26 January 1957 published in the Journal Officiel No 4, of 28 January 1957, and consequently, of Articles 3 (1) (b), 4 (3), 5, 6 (1) and (2) and 7 thereof,

THE COURT

composed of: M. Pilotti, President, A. van Kleffens and L. Delvaux, Presidents of Chambers, P. J. S. Serrarens, O. Riese, J. Rueff and Ch. L. Hammes, Judges,

Advocate-General: M. Lagrange

Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact

1. Facts

As soon as the applicant undertaking learned of the draft of the future Decision No 2/57 of the High Authority, it sent a letter on 26 January 1957 to the President of the High Authority drawing his attention to the serious consequences which the provisions of the draft decision would have and which, according to the undertaking, were contrary to the spirit of the Treaty.

Decision No 2/57 was published on 28 January 1957 and on 12 March 1957 the appli-

cant instituted proceedings before the Court for its annulment.

In Decision No 2/57 which, *inter alia*, extends the application of Decisions No 26/55 and No 3/56, the same arrangement provides for the equalization of the prices of imported ferrous scrap and domestic scrap and the effecting of economies in scrap. It requires, in addition to contributions at the basic rate, contributions at a supplementary rate imposed in terms of the proportion of scrap consumed in existing plant in excess of the amount of scrap consumed during a

reference period in the past. In order to take account of all individual situations each undertaking is permitted to choose its reference period (six months from seven consecutive months between 1 January 1953 and 31 January 1957).

Article 8 of the decision provides a guarantee for undertakings that the increase in the contribution shall be slowly progressive whilst Article 9 permits undertakings which have reduced the specific input of their plant or their production processes, to reduce or even completely to eliminate their contributions at the supplementary rate.

The *applicant* states that it operates a steel-works at Ancizes (Puy-de-Dôme) set up in 1917, which has abundant supplies of electric energy and water power and which employs two thousand workers. The only possible manufacturing process is by electric furnace. Its production consists exclusively of high-quality alloy steel. This works can only use ferrous scrap, not liquid or solid pig-iron, as raw material. Any increase in the production of steel entails a parallel increase in bought scrap and is consequently subjected to the supplementary rate without entitlement to refunds. All technical progress reduces its own arisings and increases its consumption of scrap. In the very near future the applicant intends to replace an old furnace: the new, more technically advanced furnace will produce more and will either have no reference or will be penalized as a result of the increase in the consumption of ferrous scrap. No other solution to this situation is conceivable.

In order to escape the penalties the applicant would require to freeze its production at the level of the reference period and to fail to respond to the increasing demand from the market. This reduction in its business would involve serious social consequences since two thousand persons are concerned and the undertaking is situated in the heart of the country.

The *defendant* replies that, since the shortage on the market in ferrous scrap was brought about by the ever-increasing consumption of scrap, it appeared appropriate to require increased payment from undertakings causing increased stress on the market. This general decision may indeed affect

certain individual interests: the High Authority took a fairly broad view and effected a balance between those individual interests in the general interest of the Community. It was impossible to solve the problem and take into account all individual interests. Moreover, although certain undertakings producing special steel are in practice unable to effect economies in scrap, the selling price of their steel differs from ordinary steel and thus this charge is relatively lighter.

2. Conclusions of the parties

The *applicant* claims that the Court should:

‘Annul Articles 6 (3), 8 and 9 of Decision No 2/57 of 26 January 1957 and, consequently, Articles 3 (1) (b), 4 (3), 5, 6 (1) and (2) and 7 thereof;

Order the High Authority to bear the costs.’

The *defendant* contends that the Court should:

‘Dismiss the proceedings instituted against Decision No 2/57 in that it does not involve misuse of powers affecting the applicant, with all the consequences thereof in law, in particular with regard to the settlement of fees, costs and any other expenses.’

3. Submissions and arguments of the parties

A — Admissibility

The *defendant* states that, in accordance with the case-law of the Court, for undertakings to allege misuse of powers such misuse must be directed against them or they must at least be adversely affected by it. In the present case the misuse of powers was not directed against the applicant since Decision No 2/57 is a general decision adopted in the common interest of all the undertakings in the Community and the applicant does not allege that, when the High Authority adopted this decision, instead of pursuing an objective in the general interest, it really pursued a particular objective of its own. Since the applicant com-

plaints of the different effect of the application of the general rules in Decision No 2/57 depending on whether or not it is possible to effect economies in the use of scrap, it may to this extent be adversely affected by the provisions which it claims are illegal.

The defendant then considers whether the five submissions put forward in the application constitute complaints of misuse of powers. It maintains that, if the classic distinction between the concept of motive and that of object is applied to those submissions, they may be classified as follows:

- (a) a complaint of misuse of procedure in relation to Article 59;
- (b) two groups of complaints of infringement of the Treaty, one relating to the powers of the High Authority with regard to investments, and the other relating to the infringement of various paragraphs of Article 3.

The *applicant* replies that all the submissions which it advances constitute complaints of misuse of powers. It maintains that the misuse of powers, upon which it relies, is directed against it since the High Authority pursued a specific objective of its own instead of an objective in the general interest. The real objective of Decision No 2/57 is in fact to make a financial arrangement the objective of which is to finance, through undertakings selected as victims, a reduction in the price of ferrous scrap for the benefit of steel-works whose technical conditions permit them to benefit from the bonuses in Article 9 of the decision.

Furthermore, the applicant claims that all the submissions which it advances relate to failure to observe the objectives of Article 3 which, in accordance with Article 53, the High Authority is bound to pursue.

B — Substance

First complaint: The establishment of a system of priorities and of allocation, constituting misuse of powers with regard to Articles 53 (b), 59 and Annex II.

The *applicant* maintains that the principal and specific aim of the contested provisions is to allocate ferrous scrap. The scheme of

double prices which those provisions establish of necessity results in allocation, discrimination between undertakings, the creation of a privileged class of undertakings enjoying priority, those which are technically capable of effecting economies in the use of scrap, and a class of selected victims which are bound to be penalized. This objective, which is deliberately pursued, is incompatible with the objectives which can and must be pursued through the financial arrangements provided for in Article 53. In this respect misuse of powers also exists with regard to Article 59 and to Annex II to the Treaty.

The *defendant* replies that the complaint of allocation must be classified under the head of misuse of procedure, a species of misuse of powers, and thereby admissible in the present case. The contested decision contains no quantitative restriction and relates exclusively to prices. Consequently it must not be confused with an allocation for which provision is made in Article 59 and in Annex II to the Treaty.

It is inconceivable, moreover, that the High Authority sought to apply the procedure under Article 53 in order to avoid resort to the procedure under Article 59. First of all, the procedure under Article 53 is more difficult to implement since it requires the unanimous assent of the Council of Ministers. Further, Article 53 constitutes a means of indirect action on production, which the High Authority is bound to adopt, pursuant to Article 57, even in cases of serious shortage.

Second complaint: Misuse of powers with regard to Article 3 (b) of the Treaty, because Articles 8 and 9 of the contested decision do not differentiate between consumers in the Common Market who are not comparably placed.

The *applicant* states that, like all undertakings using electric furnaces, it is not comparably placed, with regard to the need to use ferrous scrap, with undertakings which are technically capable of using other raw materials and of effecting economies in ferrous scrap. The contested provisions place certain undertakings, whose position is not comparable to the privileged undertakings, in a situation in which they no longer have

equal access to the sources of production. This accordingly constitutes a contradiction between the objectives actually pursued and the objectives which the High Authority is bound to observe in employing Article 53, in particular the objectives specified in Article 3 (b).

The *defendant* replies that the complaint of indiscriminate treatment of consumers in the Common Market who are not comparably placed amounts to a complaint of infringement of Article 3 (b) (equal access to the sources of production). However, the contested measure, the establishment of the supplementary rate, is intended to implement Article 3 (a) (orderly supply to the Common Market) which is itself a condition of maintaining equal access to the sources of production. The objectives of Article 3 must be reconciled in accordance with the circumstances obtaining at the time. In the present case pursuit of the objective of regular supplies is necessary for the attainment of all the other objectives. Furthermore, the applicant fails to take into consideration other factors relating to non-comparability which are contrary to its argument. In particular, the fact that, since special steel can only be produced in electric furnaces, the price is distinctly higher than that of ordinary steel and that consequently the supplementary contribution payable in respect of such steel is, relatively, very much less.

Third complaint: Misuse of powers in that through discriminatory measures the High Authority penalizes the expansion of certain undertakings and confers upon itself wide powers concerning the control of investments.

The *applicant* states that if it wished to qualify for the refunds (Article 9) or avoid the penalties (Article 8) it would be necessary to set up new plant near sources of supplies of liquid pig-iron. Accordingly, the contested measures are undoubtedly intended to influence the nature of undertakings' investments. The High Authority is thereby pursuing objectives which are contrary to the objectives in Articles 2, 3, 4, 5, 46 and 54 of the Treaty and is guilty of misuse of the powers which it possesses under Article 53 by applying them for purposes other than

their legal objective, which is to carry out the tasks with which it is charged under Article 3 of the Treaty.

The *defendant* replies that the applicant complains that it has exceeded the powers which it possesses under Article 53 and has disregarded the exclusive nature of the provisions of Article 54 with regard to measures concerning investments. However, the scope of Article 53 is general, enabling all financial arrangements necessary for carrying out the tasks laid down in Article 3 to be made and the procedure prescribed in Article 53 may lawfully involve effects on investments, as indeed is the case with other provisions of the Treaty, as for example those in Article 61.

Fourth complaint: Misuse of powers in relation to Article 3 (d) and (g), in that the High Authority is pursuing objectives the effect of which is to prevent the improvement of production and technical progress.

The *applicant* states that the application of the reference period indicates deliberate intention to discriminate against manufacturers of special steel expressed by penalizing, in the sole interest of undertakings which are technically capable of effecting economies of ferrous scrap, any increase in production or any new plant installed by undertakings. This objective is irreconcilable with the objectives of Article 3 (d). The powers conferred upon the High Authority do not permit it in the present case to impose, under the guise of alleged common interests, arbitrarily appraised, what amounts to taxation upon a certain number of undertakings in the Community.

The *defendant* replies that the complaint against it, that it intended deliberately to prevent the development of production, in fact constitutes a complaint of infringement of Article 3 (d) and (g). However the objectives described in those provisions cannot be separated from Article 3 as a whole and do not have as their objective to guarantee to all undertakings in all circumstances development of their steel production through the means of production which they presently employ. Furthermore, although the applicant only contests the provisions in Decision No 2/57 relating to the supplementary contribution, it may not isolate the

two aspects of the decision concerning equalization, on the one hand, and encouragement to effect economies in ferrous scrap, on the other.

Fifth complaint: Misuse of powers in that the objectives of the contested decision are manifestly contrary to those which the Community is bound to pursue under Articles 2 and 3 (e) of the Treaty and of Article 29 of the Convention on the Transitional Provisions, concerning the continuity of employment of workers and the improvement of working conditions and the standard of living.

The *applicant* states that it could only benefit from the compensatory bonus provided for in Article 9 of Decision No 2/57 by transferring part of its operations to an area where it can use liquid pig-iron. The community near the steel-works at Ancizes whose existence and improved standard of living depend upon the continued operation of the works would thus be diminished and the standard of living and the working conditions of the workers would be seriously affected. The prevention of expansion of the undertaking through the effects of the provisions complained of is alone capable of hampering the continuity of employment and the improvement in the working conditions and standard of living of the workers. The *defendant* replies that this complaint, which really concerns the infringement of Article 3 (e) of the Treaty, has not been supported by any proper evidence. On the contrary, when the High Authority adopted the provisions necessary for ensuring regular supplies of scrap at a reasonable price for the Common Market as a whole, it prevented a situation developing which would have harmed the iron and steel industry and thus would certainly not have promoted improved working conditions and an improved standard of living for the workers.

Sixth complaint: Under the guise of pursuing an objective in the general interest the High Authority, through the contested provisions of Decision No 2/57, deliberately pursued an objective of its own with regard to the applicant.

The *applicant* states in its reply that the si-

tuation with regard to ferrous scrap does not require any amendment of the provisions in force and does not justify steps of the kind taken in Decision No 2/57. This decision is quite inappropriate to attaining the objectives pursued; this is not to be explained by a mere error of judgment on the part of the High Authority but solely through the pursuit of purely financial and tax objectives concerning undertakings, such as the applicant, which produce high-quality special steel in solid-charged electric furnaces. The High Authority has thus disguised as a general decision a decision whose sole logical and comprehensible objective is to penalize a certain category of undertakings in the Community.

The *defendant* replies that the applicant's allegation in fact constitutes a complaint of misuse of powers. However, this allegation does not appear in the application, in which the complaints are set out in a very general form, since the individual position of the applicant merely indicates the effects of alleged misuses of powers.

The High Authority thus strenuously objects to such an amendment of the submissions put forward, in the light of the provisions of Article 29 of the Rules of Procedure of the Court. Furthermore, this complaint is unrelated to the general line of argument concerning allocation of scrap and influence on investments.

The complaint is not persuasive: it must be conceded that the successive drafts, which after a year were adopted as Decision No 2/57, had no purpose other than to draw up a formula intended to impose a higher equalization charge upon undertakings such as the applicant. Furthermore, the complaint has no serious basis. In fact the sums collected in the form of the supplementary charge upon undertakings producing special steels in solid-charged electric furnaces represent only a small of the total equalization contributions and, moreover, the equalization scheme operates in such a way that undertakings' contributions are periodically adjusted to meet the equalization charge.

The new submission relied upon in the reply is ultimately a mere attempt to replace, under the guise of misuse of powers, the line of argument set out in the application.

4. Procedure

The application is in the appropriate form and was submitted within the prescribed period.

The instruments appointing the agents and

lawyers of the parties are in order.

The written procedure followed the normal course. The statements of the parties, with their related annexes, were lodged within the prescribed periods and were duly served.

Law

A — Admissibility

According to the applicant's statutes it is a private undertaking governed by French law; it has as its objective the production of steel within the territories referred to in the first paragraph of Article 79 of the Treaty; pursuant to the provisions of Articles 33 and 80 of the Treaty it accordingly has capacity to institute proceedings against decisions and recommendations of the High Authority before the Court of Justice.

Pursuant to the provisions of the second paragraph of Article 33 of the Treaty the undertakings referred to in Article 80 may institute proceedings for the annulment of general decisions of the High Authority which they consider to involve a misuse of powers affecting them.

Decision No 2/57 is a general decision; it establishes a legislative principle, imposes abstract conditions for its implementation and sets out the legal consequences entailed thereby.

The applicant maintains that it is adversely affected by the contested provisions because it is very difficult for it to effect economies in ferrous scrap and consequently it must pay the supplementary charge if it increases its consumption of bought scrap. The applicant formally alleges that on one or more occasions a misuse of powers affecting it has been committed and it produces a relevant statement of reasons leading it to believe that there has been a misuse of powers on one or more occasions. The purpose of the arguments upon which it relies is in fact to obtain a declaration that, when the High Authority adopted the contested provisions, it exercised the powers conferred upon it under Article 53 (b) of the Treaty for purposes other than those for which they were conferred upon it both through serious disregard for certain of the objectives referred to in Article 3, and through the clear intention of attaining objectives specifically governed by Articles 54 and 59 whilst avoiding the special procedures prescribed in the said articles.

Consequently the application is admissible.

B — Substance

The High Authority has selected Article 53 as the legal basis of the scheme for the equalization of ferrous scrap which it has established. That article permits it

to intervene in connexion with the tasks assigned to it under the Treaty, in particular under Article 3 thereof.

Article 53 appears in Chapter II, entitled 'Financial Provisions', the other articles of which relate to the use of funds which the High Authority obtains through levies on production or by loans and it may accordingly be considered that the financial arrangements referred to in Article 53 are arrangements based on the transfer of resources, in particular arrangements in the nature of equalization or compensation. This interpretation is confirmed by the last paragraph of Article 62 which provides that certain equalization payments 'may ... be instituted as provided in Article 53'.

The equalization and compensation arrangements do not directly affect prices but rather the factors contributing to the formation of prices. In this way those factors, without preventing prices from being freely fixed, modify the level at which they are fixed. The financial arrangements provided for in Article 53 affect by such alterations in the level of prices the other characteristic features of the state of the market and in particular the supply of and demand for the relevant products. These arrangements thus constitute powerful and effective intervention procedures at the disposal of the High Authority, but are nevertheless 'indirect' within the meaning of Article 57 of the Treaty as distinct from the direct means of action through establishment of production quotas (Article 58) or the allocation of resources (Article 59).

The High Authority, by using the financial arrangements provided for in Article 53, is in a position to exercise a broad influence on the market in coal and steel whilst it must be borne in mind that Article 53 restricts the application of such arrangements to the procedures 'necessary for the performance of the tasks set out in Article 3 and compatible with this Treaty, and in particular with Article 65'. The express reference made to Article 3 does not release the High Authority from its duty to observe the other articles of the Treaty and in particular Articles 2, 4 and 5 which, together with Article 3, must always be observed because they establish the fundamental objectives of the Community. Those provisions are binding and must be read together if they are to be properly applied. These provisions can stand by themselves and accordingly, in so far as they have not been adopted in any other provision of the Treaty, they are directly applicable. If they have been adopted or are governed by other provisions of the Treaty words relating to the same provision must be considered as a whole and applied together. In practice it will always be necessary to reconcile to a certain degree the various objectives of Article 3 since it is clearly impossible to attain them all fully and simultaneously as those objectives constitute general principles which must be observed and harmonized as far as possible; on the other hand such financial arrangements must be instituted without infringing the provisions of Article 58 and of Chapter 5 of Title III of the Treaty.

Decisions prior to Decision No 2/57 were concerned to equalize the prices of imported ferrous scrap and domestic scrap. Decision No 2/57 continues this system but adjusts it and supplements it with new provisions intended to affect at the

same time the price of ferrous scrap and the total volume of purchases in order to encourage undertakings to effect economies in ferrous scrap in the interests of a regular supply to the market.

If the demand had over an extended period exceeded the supply of scrap it could have led to a 'serious shortage' for which the procedures laid down in Article 59 are appropriate. If the High Authority wished to avoid following those procedures—and the provisions of Article 57 require it to endeavour as far as possible to refrain from doing so—it could not avoid the need and the duty to apply the procedure prescribed in Article 53 (b), subject to observance of the conditions for its application.

1. *The complaint of misuse of powers with regard to Article 3 (b), (d) and (g) of the Treaty, that is to say, that Articles 8 and 9 of the contested decision do not differentiate between consumers in the Common Market who are not comparably placed and that the High Authority is pursuing objectives the effect of which is to prevent the improvement of production and technical progress*

(a) Pursuant to Article 53 (b) of the Treaty the High Authority may, with the unanimous assent of the Council, itself make any financial arrangements which it recognizes to be necessary for the performance of the tasks set out in Article 3. The exercise of the powers thus conferred upon the High Authority is subject to the conditions set out in Articles 2 to 5 concerning the establishment, administration and guidance of the Common Market.

Pursuant to Article 2 of the Treaty the Community has as its task to contribute to economic expansion, growth of employment and a rising standard of living in the Member States. The means prescribed for the attainment of those objectives consists in the establishment of a Common Market on the conditions laid down in Article 4 concerning the abolition of obstacles to trade. Pursuant to Article 2 the Community is obliged progressively to bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States.

To those ends the Community must ensure on the market the establishment, maintenance and observance of normal conditions of competition and, subject to observance of the priorities laid down by Article 57 of the Treaty in relation to its means of action, it must, in accordance with the provisions of Article 5, 'exert direct influence upon production or upon the market only when circumstances so require'.

In pursuing the objectives laid down in Article 3 of the Treaty the High Authority must permanently reconcile any conflicts between those objectives considered individually and, when such reconciliation proves unattainable, must grant such temporary priority to one or other of them as appears necessary having regard to the economic facts or circumstances in the light of which, in carrying out the tasks entrusted to it under Article 8 of the Treaty, it adopts its decisions.

Pursuant to the provisions of Article 57 of the Treaty in the sphere of production, the High Authority is required to give preference to the indirect means of action at its disposal, in particular to intervention in regard to prices. As has previously been stated, such means of action must be regarded as including the financial arrangements provided for in Article 53 since they influence prices in particular through compensation for and correction of factors which contribute to their formation. Since those arrangements contribute to the formation of prices they alter the price-level on the market and thereby influence the effects which the price-level produces on the direction of production, and thus on the structure of the means of production. Such arrangements thus provide the High Authority with the means to modify the effects of 'normal competitive conditions' whilst ensuring, in accordance with the requirements of Article 5 of the Treaty, the maintenance and observance of these conditions. By making appropriate use of this powerful means of intervention the High Authority is largely capable, provided that the circumstances require it, of bringing about the required reconciliation between the objectives listed in Article 3 of the Treaty in carrying out the task with which it is entrusted under the Treaty.

The powers which have thus been conferred on the High Authority are however limited by the specific provisions set out in Title III of the Treaty. In particular these powers would be used for an objective other than their legal purpose if it appeared that the High Authority had applied them with the exclusive, or at any rate the decisive, purpose of evading a procedure especially prescribed by the Treaty in order to deal with the circumstances with which it is required to cope.

At the time when the contested decisions were adopted the market in ferrous scrap was widely recognized as being characterized by a severe shortage of Community supplies, by mounting difficulties in imports and by large-scale and rapid increases in the price of foreign scrap. This situation arising from those economic facts and circumstances cannot in any event be regarded as *prima facie* excluding intervention by the High Authority to counter the consequences at variance with the requirements of Article 3 of the Treaty which this situation might have involved. Furthermore the High Authority's appraisal of the situation in the light of which the contested provisions were adopted does not by itself show that the authors of the said measures were inspired by an unlawful motive.

Accordingly the Court does not consider that the circumstances were such as to rule out, at that time, action by the High Authority on the market in ferrous scrap with a view to affecting indirectly means of production using scrap.

(b) The purpose of the provisions contested in the present application was to make the contribution for the equalization of the prices of imported ferrous scrap progressively selective by increasing the rate applicable to the consumption of bought scrap above a given reference level and by graduating the charges thereby imposed in terms of a specific input coefficient for ferrous scrap in the installations and the manufacturing processes requiring scrap.

Furthermore the said provisions contain a set of transitional measures intended

to permit undertakings to adapt themselves progressively to the conditions thereby created for them, in particular the choice by each undertaking of its own reference period, the period of six months during which payment of the contribution at the supplementary rate is suspended, the graduated nature of the rate, the allocation of a reference consumption and a specific input reference for plant which began operations during the year following the entry into force of the decision together with the allocation of a specific input reference without a time-limit for all plant beginning operations after the expiry of this latter period. Through those measures the High Authority provided the scheme for the equalization of the prices of imported ferrous scrap, which it had previously established, with conditions intended to prevent a fall in the price of ferrous scrap resulting from equalization from encouraging producers in the Common Market to increase their consumption of scrap.

Thus defined the decisive aim of the contested provisions constitutes lawful indirect action, within the meaning of Article 57, applied to the market in ferrous scrap in order to ensure, bearing in mind the facts and circumstances then observed, regular supplies to the Common Market. The said aims are thus in accordance with the provisions of Article 3 (a) and the latter part of (d), the second paragraph of Article 2 and the third subparagraph of the second paragraph of Article 5 of the Treaty.

(c) Nevertheless consideration must be given to the question whether the measures taken are compatible with the rules in Article 3 (b), the beginning of subparagraph (d) and subparagraph (g) and the applicant alleges that the High Authority's adoption of the said measures constitutes serious disregard of these objectives.

Pursuant to Article 3 (b) of the Treaty the institutions of the Community are required, within the limits of their respective powers, to ensure in the common interest that all comparably-placed consumers in the Common Market have equal access to the sources of production; this provision constitutes a necessary objective for the action of the High Authority in the exercise of the powers conferred upon it by the Treaty. Failure to observe the principle of the equality of treatment of consumers in the matter of economic rules, as that principle has been described above, may constitute misuse of powers affecting the persons or classes of persons deliberately sacrificed.

Pursuant to a principle generally accepted in the legal systems of the Member States, equality of treatment in the matter of economic rules does not prevent different prices being fixed in accordance with the particular situation of consumers or of categories of consumers provided that the differences in treatment correspond to a difference in the situations of such persons. If there is no objectively-established basis distinctions in treatment are arbitrary, discriminatory and illegal. It cannot be alleged that economic rules are unfair, on the pretext that they involve different consequences or disparate disadvantages for the persons concerned when this is clearly the result of their different operating conditions.

The supplementary rate established under Article 3 (1) (b) of the contested decision applies generally and entirely to any consumption of bought scrap in excess of that relating to a reference period. The discretion conferred upon the undertakings subject to the scheme themselves to select, within specially prescribed temporal limits, the period most favourable to them does not, however, mean that the criterion used for distinguishing between them thus loses its objective nature, without which it would appear arbitrary. Indeed the factual differences which this situation entails for undertakings stem from their dissimilar operating conditions and not from any legal inequality inherent in the decision.

The graduation of the contested supplementary rate laid down by the provisions of Article 8 is based exclusively on the successive periods for the application of Decision No 2/57. The graduation is thus general and absolute, objectively based upon the wish progressively to provide encouragement, by influencing prices, to steel undertakings consuming ferrous scrap to economize in using it so as to avoid its unconsidered exhaustion.

The refunds of the proportion of the equalization contribution calculated at the supplementary rate, which were established pursuant to Article 9 of the disputed decision, are granted on a purely objective basis, the reduction of the specific input coefficient of ferrous scrap for each type of plant and manufacturing process using that material. The varying effects which the application of that article produces on the persons concerned, by reason of varying operating conditions and technical problems which, for certain categories of plant, may reduce or even exclude entitlement to refunds cannot render the rule inequitable in law — which is excluded by the nature of the criterion adopted.

(d) Pursuant to Article 3 (d) and (g) of the Treaty the institutions of the Community, and particularly the High Authority in exercising the powers conferred upon it by Article 53 (b), are required to ensure the maintenance of conditions which will encourage undertakings to expand and improve their production potential and promote the orderly expansion and modernization of production and the improvement of quality. The High Authority refers to those legal objectives at the beginning of the disputed decision, the stated aim of which is to ensure regular supplies to the market in ferrous scrap and to encourage undertakings to save ferrous scrap without, however, making it more difficult to increase output capacity.

The applicant undertaking complains that the High Authority has seriously disregarded the objectives thus referred to by hampering, through the contested provisions, the development of certain methods of production. It must be considered whether the provisions indicate, in this respect, an unlawful motive or a serious lack of care amounting to failure to observe the purpose of the law and whether in this respect priority was perhaps accorded to certain lawful aims at the expense of certain others to an extent which is unjustified by the circumstances.

The attainment of the objectives referred to in Article 3 (d) and (g) of the Treaty cannot be pursued in isolation from and without regard to the other objectives laid down in the said article. The attainment of orderly expansion and the moderni-

zation of production may lawfully be sought within the framework of a general action on the basis of reconciling the objectives of Article 3, if necessary granting such priority to one or other of them as appears necessary having regard to the situation arising from the economic facts or circumstances observed at the time of the intervention.

(e) Furthermore the objectives laid down in Article 3 of the Treaty must be appraised as a whole and pursued exclusively in the common interest. The concept of the common interest referred to in Article 3, far from being restricted to the sum of the individual interests of coal and steel undertakings subject to the jurisdiction of the Community, considerably exceeds the scope of such interests and is defined in relation to the general aims clearly laid down in Article 2.

Consequently pursuit of the objectives prescribed in Article 3 does not rule out selective measures based in particular upon the nature of the means of production to be developed or created if it appears that economic circumstances and the reasonably foreseeable trend of market conditions call for such measures. This is certainly so when there are dangers of a serious shortage of one of the basic raw materials for the steel industry or if it appears necessary to adopt a policy of using resources rationally in order to avoid their unconsidered exhaustion. The distinctions which may consequently prove necessary to maintain conditions which will encourage undertakings to expand and improve their production potential and to promote its regular development nevertheless must be based upon purely objective criteria in accordance with the principle of equality laid down in the Treaty. The provisions of Article 6 of the contested decision are intended progressively to encourage steel undertakings to use scrap as rationally as possible. To attain this the provisions alter the cost of financing the equalization of the prices of imported ferrous scrap both in terms of the nature of the plant and manufacturing processes and the date when operations were commenced, through the combined action of reference consumption and refunds granted in respect of relative economies in scrap. The graduated increase in the cost of ferrous scrap and the selective influence thereof on the cost price of steel products vary in terms of objectively determined quantitative and qualitative criteria. Consequently the contested measures constitute with regard to the principle of non-discrimination, provisions encouraging undertakings to develop new capacities considered compatible with regular supplies of scrap for the steel industry and the orderly expansion of production. The provisions of Articles 6 and 8 of the contested decision thus constitute a body of progressive rules without which the financial arrangement established by the said decision would forfeit its character of an indirect means of action in relation to production thereby rendering it unlawful with respect to the provisions of Articles 5 and 57.

(f) The 'indirect means of action' in relation to production prescribed in Article 57 are to be distinguished from the 'direct influence' referred to in the third subparagraph of the second paragraph of Article 5 not by the aims pursued but by the

methods appropriate to attain them. Indirect means of action, by affecting, especially as a result of the financial arrangements under Article 53, certain of the factors which play a part in forming prices, create conditions which encourage undertakings freely and willingly to choose the behaviour desired by the High Authority for the accomplishment of the tasks with which it is charged under the Treaty. On the other hand direct influence, such as the allocation of resources for which provision is made in Article 59, is not concerned with how producers would behave if they acted freely but directly prescribes, on pain of fines, as is stated in Article 59 (7), the behaviour which the High Authority considers necessary with regard to the situation with which the Treaty requires it to cope.

The two procedures, indirect and direct, are intended to modify the structures to which, unless modified by intervention, individual behaviour would give rise. The procedures thus both constitute procedures for economic intervention but the former create the right conditions to encourage producers freely to adopt the behaviour which the common interest, referred to in Article 3, requires of them whilst the latter impose upon undertakings in the same common interest behaviour other than that which they would be prompted to adopt by the actual circumstances.

The indirect means of action are identical in their effects and in the power of intervention which they confer but make it possible for all those participating in the market to retain their freedom of decision whilst direct influence requires the limitation, if not the abolition, of such freedom.

All the provisions of Article 6 of Decision No 2/57 are intended to make it possible for established situations to continue and to avoid the immediate and harsh resort to measures for the allocation of resources provided for in Article 59, in preference to which Article 57 prescribes indirect means of action. The provisions in particular with regard to 'reference consumption of bought scrap', 'specific input references', the period of exemption from contributions at the supplementary rate and the graduated nature of that rate are steps in accordance with the wish to respect that preference.

With regard to 'new plant' it is true that, subject to the refunds for which it may qualify inasmuch as Article 6, at the end, grants a 'notional specific input reference', the price of ferrous scrap with which they are charged will in principle be higher. The same is true of 'solid-charged electric furnaces' in respect of which it can scarcely be anticipated that technical developments will bring about a notable reduction in their specific input of ferrous scrap.

Nevertheless those findings do not affect the lawfulness of the system. In fact the lack of supplies and the increase in the price of ferrous scrap required the High Authority at one and the same time to encourage undertakings to reduce their consumption of ferrous scrap and to prevent the price of Community scrap from being fixed at the level of that of imported scrap. It was thus necessary to provide the equalization scheme with a supplementary contribution to counter the incentive to increased consumption of ferrous scrap which might have resulted from the fall in the price brought about by equalization.

Although the High Authority wished at the same time to 'promote a policy of using natural resources rationally and of avoiding their unconsidered exhaustion', an objective laid down in Article 3 (d) of the Treaty, it also had to take into account the conditions appropriate to various categories of consumers and thus modify the application of the supplementary contribution imposed on the latter in accordance with the variations in their consumption of ferrous scrap. This modification entailed the gradual elimination of the effects of equalization, or even in certain cases their abolition.

The contested scheme was thus intended above all to ensure a regular supply to the market and to promote a policy of using resources rationally. Nevertheless there are no grounds for asserting that, by according temporary priority to certain of the aims set out in Article 3, and consequently only partially reconciling all of the aims set out therein, the High Authority used the powers given it under the Treaty for purposes other than those for which they were conferred.

Since misuse of powers has not been established this complaint must be rejected.

2. The complaint of misuse of powers with regard to Article 53 (b), Article 59 and Annex II to the Treaty, namely that the High Authority has established a system of priorities and of allocation whilst refraining from observing the formalities prescribed in Article 59 and Annex II

The financial arrangement in the contested provisions does not constitute, with regard either to its form or to its effects, the system of allocation described in Article 59 and in Annex II. In certain economic circumstances and subject to certain procedures, those measures authorize the allocation in tonnages of raw material resources to the various categories of possible consumers. The procedures thus provided for consist exclusively in establishing consumption priorities and allocating resources. Such activities are directly and solely of a quantitative nature and are thereby distinct from all indirect action on production by means of prices without restriction of the volume of purchases. Article 58 itself, upon which the applicant relies, concerns the establishment of a system of production quotas or the regulation of the level of activity of undertakings by appropriate levies on tonnages exceeding a reference level set by a general decision. It is further necessary to note the difference between the measures prescribed in cases of manifest crisis (Article 58) where the dominant idea concerns direct levies on tonnages, and the measures prescribed in cases of serious shortage (Article 59), where the concept of direct allocation of available resources predominates.

Accordingly the financial arrangement contained in the contested provisions does not constitute a system of allocation which may be treated as equivalent in its essential characteristics to the arrangement under Article 59 and Annex II.

The establishment of the supplementary contribution and the refusal of a reference consumption for plant and manufacturing processes put into operation after 31 January 1958 do not have such compelling force that they amount in practice to a system of allocation. They rather constitute means of intervention inherent

in the financial arrangement itself which necessarily, by its very nature, affects the field of competition and production. None of the arguments put forward constitutes sufficient proof in law that in this respect the system may be treated as equivalent to the allocation for which provision is made in Article 59 and Annex II. In the contested measures the High Authority was concerned to deal with a situation marked by extreme scarcity of ferrous scrap; in applying for this purpose the powers conferred upon it under Article 53 (b) of the Treaty it was acting in accordance with the provisions of Article 59 which provide that recourse shall only be had to the special procedure of quantitative allocation, even if a case of serious shortage has been duly found, if the means of action provided for in Article 57, amongst which the financial arrangements referred to in Article 53 must be classified, do not permit sufficiently effective action.

Furthermore, whilst the contested provisions are intended progressively to increase the cost of ferrous scrap in proportion to the quantities consumed and to graduate that cost so that it varies in terms of the type of plant and manufacturing processes using scrap, the applicant has failed to establish that the financial burden which this entails for the relevant undertakings is determined in such a way that the arrangement complained of must be considered as equivalent to a direct and specific arrangement for quantitative allocation or for regulating the level of their activity.

Furthermore, although the system set up does not constitute a system of allocation, even on the view that such a system might display certain characteristics of indirect allocation it would be necessary to prove that the objective of the contested decisions was to attain this allocation by means of Article 53 (b), through the expedient of a financial arrangement and contrary to the stated objective of effecting economies in ferrous scrap and ensuring a regular supply of scrap to the market, or else, to prove that the High Authority had been motivated by a wish to evade Article 59 or that, through a serious misconception, it had failed to recognize that the contested arrangement amounted to an arrangement under Article 59. Since this has not been sufficiently proved in law misuse of powers has not been established.

3. *The complaint of misuse of powers with regard to Article 54 of the Treaty, namely that the High Authority penalizes through discriminatory measures the expansion of certain undertakings and confers upon itself wide powers concerning the control of investments*

Article 54 of the Treaty confers upon the High Authority certain powers in coordinating investment programmes and in providing financial assistance in carrying out these programmes. Those powers must be exercised within the framework of the general objectives laid down in Article 46. Within such limits the powers are applied by the publication of programmes of general guidance in accordance with the common interest and by formulating individual opinions on the plans submitted to it by the undertakings.

The abovementioned provisions in no way impede the adoption of measures in accordance with the provisions of Articles 3, 5, 53 (b), 57 and 59 of the Treaty, taken together, the application of which may influence investments planned by undertakings. In particular the rules concerning prices laid down in Article 61 of the Treaty and, above all, the financial arrangements referred to in Article 53 (b), which the High Authority is entitled to use as an indirect means of action on production, entail by their nature results capable of affecting the plans of producers, and in particular their investment plans. It is consequently impossible to complain that the contested provisions, which are in accordance with the provisions of Articles 3 and 53 (b) read together, are vitiated by misuse of powers with regard to Article 54. The applicant has completely failed to establish that the High Authority's sole, or at any rate principal, purpose in having recourse to the contested provisions was to evade the specific procedures prescribed in the said article. Consequently the complaint of misuse of powers with regard to Article 54 must be dismissed.

4. *The complaint of misuse of powers with regard to Articles 2 and 3 (e) of the Treaty and of Paragraph 29 of the Convention on the Transitional Provisions, namely that the objectives of the contested decision are manifestly contrary to those which the Community is bound to pursue concerning continuity of employment for workers and the improvement of working conditions and the standard of living*

In the course of the procedure the applicant has failed either to provide any further details regarding its allegation or to point to any relevant grounds therefor. Misuse of powers with regard to Articles 2 and 3 (e) of the Treaty and to Paragraph 29 of the Convention has not been established.

5. *The complaint of misuse of powers in that, through the provisions of Decision No 2/57, the High Authority deliberately pursued an objective of its own with regard to the applicant*

There is no relevant proof of the allegation that the High Authority pursued purely financial and tax objectives with regard to undertakings, such as the applicant, which produce high-quality special steel in solid-charged electric furnaces and that it thereby disguised as a general decision a decision whose sole logical and comprehensible objective is to penalize a category of undertakings. Consequently the complaint is unfounded.

Costs

Under Article 60 of the Rules of Procedure of the Court the unsuccessful party shall be ordered to bear the costs. In the present case the applicant has been unsuccessful with regard to the substance of the case and the defendant has been unsuccessful as regards admissibility. In accordance with the second paragraph of

the said article the applicant must thus be ordered to bear four-fifths of the costs of the proceedings and the defendant to bear one-fifth.

Upon reading the pleadings;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 2, 3, 4, 5, 33, 46, 47, 48, 53, 54, 57, 58, 59, 65 and 80 of the Treaty and Annex II thereto;
Having regard to the Protocol on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice and the rules of the Court on costs,

THE COURT

hereby:

Declares that the application is admissible but unfounded and consequently dismisses the application for the annulment of the provisions contained in Articles 3 (1) (b), 4 (3), 5, 6, 7, 8 and 9 of Decision No 2/57 of the High Authority dated 26 January 1957;

Orders the applicant to bear four-fifths of the costs of the proceedings and the defendant to bear one-fifth thereof.

Pilotti

van Kleffens

Delvaux

Serrarens

Riese

Rueff

Hammes

Delivered in open court in Luxembourg on 26 June 1958.

M. Pilotti
President

L. Delvaux
Judge-Rapporteur

A. Van Houtte
Registrar

OPINION OF MR ADVOCATE-GENERAL LAGRANGE

(see p. 288)