OPINION OF MR ADVOCATE-GENERAL LAGRANGE[1]

Summary

Mr President,
Members of the Court,

It would be inappropriate for me to give the Court a chronological account of all the interventions of the High Authority with regard to ferrous scrap and to carry out a detailed analysis of the various decisions taken in this connexion by the executive of the ECSC.

I shall confine myself to recalling that in the beginning the only purpose of the scheme for the equalization of scrap imported from third countries was to allow an orderly supply of scrap to the Common Market while preventing internal prices for ferrous scrap from being aligned on the higher prices for imported scrap. Decision No 33/53 authorized under Article 53 (a) the arrangements made to this end on a voluntary basis, then Decision No 22/54 made those arrangements compulsory pursuant to Article 53 (b). Subsequently, a second purpose appeared alongside the continuing purpose of the equalization of prices between imported scrap and internal scrap: to encourage savings of scrap to be made in the production of steel throughout the whole of the Community. Two procedures were successively put into effect for this purpose: the first consisted in paying a premium, from the resources of the Equalization Fund, for savings of scrap made by means of an increased use of cast iron, then of liquid basic Bessemer steel, in such equipment as allowed of it: these were Decisions Nos 14/55, 26/55 and 3/56. The second, of a general nature, consisted of a modulation of the equalization charge, apportioned in such a way as to encourage the saving of scrap, without however making the creation of new capacities for producing steel more difficult: this was Decision No 2/57.

However, although the aims of the scheme have changed or, more precisely, although the initial purpose directed towards the equalization of prices has been *supplemented* by the addition of a second aim relating to the saving of scrap, the *unity* of the scheme has always been maintained, as I have had occasion to point out in my explanations on the applications against Deci-

1 – Translated from the French.

sion No 2/57. In particular, the definition of what could be called the contribution-payers ('les contribuables'), that is, those liable to the contribution, has not varied: they are *'the undertakings referred to in Article 80 of the Treaty which consume ferrous scrap'*. As regards the *basis of assessment* of that contribution, certain differences of wording are to be noted: Decision No 22/54 (Article 3) provides that 'the amount of the contributions shall be calculated *pro rata* on the tonnages of scrap *bought* by each undertaking during the period of validity of this decision, *after deducting its own sales'*. Finally, Decision No 2/57 involves a much more complicated scheme, which can, however, in essence be summarized thus: the basis of assessment is the *'consumption of bought scrap'*, which is calculated by determining the total consumption of scrap and deducting therefrom any *'own resources'*, an expression appearing for the first time.

Do these differences in wording correspond to substantive amendments in regard to the basis of assessment to the contribution? This is the question which I shall have to answer. However one thing is clear from the outset, and that is that, although all the scrap-consuming undertakings are liable to the equalization contribution, they are not so liable in respect of all the scrap consumed and that a distinction has to be drawn. The actions before this Court relate precisely to that distinction.

Indeed, difficulties appeared from the beginning in regard to what is called 'group scrap' *(Konzernschrott)*, that is, scrap used in making steel and coming from works belonging to a subsidiary or to a parent company more or less closely connected financially, and even as regards management, with the consumer company. Was this scrap to be considered as 'an own resource' exempt from the contribution, or as 'bought scrap' liable to the contribution? In particular, the OCCF (Office Commun des Consommateurs de Ferraille) (Joint Bureau of Ferrous Scrap Consumers), responsible together with the Imported Ferrous Scrap Equalization Fund for managing the equalization scheme, was obliged to take up a position in this connexion following checks carried out on its behalf by a Swiss fiduciary company which brought to light the fact that certain companies had refrained from showing as 'bought scrap' in their declarations the tonnages which they had received from other companies with which they were more or less closely connected as financial subordinates.

The members of the Bureau were able to agree unanimously in acknowledging that this attitude was well founded in two particular cases, one relating to the group Breda Siderurgica-Sesto San Giovanni, and the other to the group Hoogovens-Breedband, but it was not possible to reach unanimous agreement on the adoption of a legal criterion of a general nature enabling an objective interpretation to be given to the decisions of the High Authority in relation to the concept of own resources. So, by a letter of 30 October 1957, the Bureau asked the High Authority 'to decide this question in accordance with the second paragraph of Article 15 of Decision No 2/57'. This paragraph (taken, moreover, from the previous decisions) provides that *'In the absence of a unanimous resolution* by the Board of the Joint Bureau or of the Fund on the measures referred to in Articles 3 to 11 (1) above, . . . the decision shall be taken by the High Authority'.

By a letter of 18 December 1957, the High Authority under the signature of its Vice-President replied to the Joint Bureau that in its view 'the question was misconceived' and that there was no reason for it to take a decision defining own resources, since the Bureau had always 'by implication adopted in this regard the concept of "own resources" in accordance with the semantic value of the expression, which corresponds to the principle of the legal ownership of those resources at the time of their recovery'. The High Authority went on to state that 'it follows from this that an undertaking, which is defined in all circumstances by its name, can consider as own resources only such scrap as is recovered by itself in its own works bearing the same company name'. After pointing out that by

granting exemptions in 'two particular cases having an exceptional nature' the Bureau had confirmed this position of principle, the letter goes on to state that *'the High Authority considers that the criterion of the company name, set out above, must be maintained* and, as regards the two exemptions mentioned above, the High Authority lifts the reservations imposed by its permanent representative, by reason of the exceptional nature of the situations in question'.

This is the letter which is contested by the four applications before the Court.

For the sake of completeness, let me point out that:

1. The High Authority decided to publish this letter in the Journal Officiel of 1 February 1958 under the heading 'Information'.

2. On 4 February, the Director of the Market Division of the High Authority wrote to the Joint Bureau to specify that the two exemptions granted and approved by the High Authority were not of a limitative nature and that the same treatment should be afforded when appropriate to other undertakings which were in the same situation.

3. On 17 April 1958, thus after the applications originating proceedings had been submitted (they were lodged on 18 March), the High Authority sent another letter to the Joint Bureau 'on the definition of the concept of "own resources scrap" within the meaning of Decisions Nos 22/54, 14/55 and 2/57', and in that letter it sets out—for the first time—the reasons which in its view justify the granting of the exemptions already given and which would justify the granting of further exemptions in the future. I think that I should place the essential passages of this very important letter once again before the Court, since it makes quite plain the criteria adopted by the High Authority to distinguish own resources from bought scrap and the basis of the arguments which set it against the applicants today:

> 'In view of the fact that further requests for exemption have been submitted to the OCCF, the purpose of this letter is to specify which of the different particular circumstances put forward by Breda Siderurgica and Hoogovens in support of their application were considered material for the purpose of granting the exemption. These particular circumstances are to be seen in the fact that the workshops of the two companies are locally integrated with one or more workshops which do not belong to them and in which scrap is recovered.
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> This local integration is the result of the fact that the workshops of Breda Siderurgica as well as the workshops of certain steel-processing industries form a single industrial group at Sesto San Giovanni; the same is true of the industrial group at IJmuiden, which is shared by the workshops of Koninklijke Nederlandsche Hoogovens en Staalfabrieken NV and by Breedband NV.
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> The scrap arising in these industrial groups can be considered as own resources of the two steel-producing undertakings aforementioned.
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> Although organic connexions exist between the companies which own the workshops at Sesto San Giovanni and at IJmuiden, none the less local integration constitutes the only criterion which governed the granting of the exemptions.
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> The organic connexions within the Community between steel-producing companies and other companies which recover own arisings of scrap are numerous and varied in nature and extent. On the contrary, local integration in a single industrial group, within which own arisings of scrap circulate in the same way as within a single undertaking, is a situation defined by objective criteria, which it is possible to acknowledge as being in the nature of an exception to the rule formulated in the aforesaid letter of 18 December 1957.'

Each of the four applications before the Court comes from one or more companies operating iron and steel works in which scrap is consumed. A considerable proportion of that scrap comes from works operated by companies with which the

applicant company or companies have more or less close connexions: participation in the capital ranging up to 100%; personal associations within the boards of management; a greater or lesser degree of unity of management; common directives; arrangements for the taking-over of the results of the profit-and-loss accounts. In some cases the applicant company is the one which controls the companies which deliver scrap to it, whereas in other cases it is the subsidiary of one of those companies; and again in other cases, all of the scrap-producing and scrap-consuming companies are controlled by a parent company, a holding company.

Furthermore, it is to be noted in two of the applications that, in addition to this financial and managerial interpenetration, there is also at least partial local integration: this is true in Case 20/58 of a pit and a coking plant belonging to the firm Friedrich Thyssen, in which the applicant has a 50% shareholding, and it is also true of certain workshops belonging to the firm Felten und Guilleaume Carlswerk AG (Case 21/58). However, the High Authority has not yet taken any decision on the basis of the criterion of local integration which, as we have seen, it has adopted. Furthermore, in both cases, the applicants would receive only partial satisfaction if they were granted the benefit of the contested decision, so that at all events their applications retain their purpose.

The conclusions in the four applications are for the annulment of the decision in the High Authority's letter of 18 December 1957. However, Applications 22 and 23/58 submit these conclusions only in the alternative, in the event of the letter of 18 December being held to be a decision; as their principal submission, the applicants maintain that the letter is not of such a nature. It follows from this that if the Court found in favour of these principal conclusions, it would have to dismiss the applications, since the existence of a decision is obviously one of the conditions required for the admissibility of an action for annulment brought under Article 33. The Court of Justice of the ECSC has already had occasion to deal with a situation of this kind in Joined Cases 1 and 14/57, *Société des Usines à Tubes de la Sarre* v *High Authority* (Judgment of 10 December 1957, Rec. 1957, p. 203).

On the contrary, the other two applications admit that the letter of 18 December 1957 contains a decision, and they do not contain any conclusions in the alternative.

This is the first point which I have to examine.

In my view there is no doubt: the letter in question is indeed a decision against which action can be brought. The difficulties with which the Brussels agencies were contending related in fact to the method of calculating the contributions due from certain undertakings under Article 3 *et seq.* of each of Decisions Nos 22/54, 14/55 and 2/57. It was for the Board of Directors of the Bureau to settle them by a decision which, however, had to be taken unanimously. In the absence of unanimity (as was the case), the decision had to be taken by the High Authority: this follows from the formal terms of Article 15 of Decision No 2/57 which I have already quoted. Thus it is not a question, as it was in Case 17/57 which gave rise to the Court's judgment of 4 February 1959, of the mere adoption of a theoretical position on a problem submitted to the consideration of the High Authority, but of the exercise of a power, of the bringing into action of a competence within the framework of a procedure expressly laid down by a general decision which itself was adopted pursuant to a provision of the Treaty.

Doubtless in its letter of 18 December 1957 the High Authority seems to be attempting to evade its responsibilities by refusing formally to take the decision which was sought from it by the Bureau on the definition of own resources. But, as the Court has seen, certain subsequent statements expressly take up a position in this connexion on the basis of the criterion of the company name, and the end of the letter constitutes an order to the Bureau to demand payment from the undertakings concerned of the contributions still due on the basis of the criterion thus

defined. What could be more 'decisive'? Moreover, the High Authority seems to have realized it itself after the event, since, on the one hand, it decided to publish the letter in the Journal Officiel (under the heading 'Information', it is true, but the Court in its judgment in Case 8/55 accepted the legal validity of this procedure, in spite of its disadvantages), and since it admitted first of all in correspondence (letter dated 19 February 1958, from the Director of the Market Division to the 'Deutsche Schrottverbrauchergemeinschaft'), then in the statements of defence in these actions, that the contested letter was in the nature of a decision against which action could be brought.

But—to come to the second question which must be resolved—if it is indeed a decision, is that decision 'general' within the meaning of Article 33, as the High Authority maintains, or is it a 'decision concerning' each of the applicants 'which is individual in character', as the applicants argue?

The applicants rely particularly upon the judgment in Joined Cases 7 and 9/54, in which it was held that a decision relating solely to one particular activity of a public body referred to by name is a decision which is individual in character, and it is not necessary for the decision to manifest this character 'in relation to the applicant', provided that it concerns the applicant.

As counsel for the defendant stressed in his oral arguments, it appears difficult to apply this criterion with exactitude to the present case, as it is obvious that a decision taken by the High Authority under Article 15 of Decision No 2/57 cannot take on an individual character *due to the mere fact* that it is in the form of a letter addressed to the Joint Bureau: the activity of the Joint Bureau is not a 'particular activity', to use the words of the Court's judgment in Joined Cases 7 and 9/54, since it has authority to deal with everything concerning the operation of the equalization scheme. On the contrary, in relation to this scheme, its activity is general. But regard must be had to the *purpose* of the decision. In this instance, the purpose of the contested decision is to settle a certain number of disputed cases relating to the calculation of the equalization contribution owed by certain undertakings. Doubtless, as often happens in such cases, the examination of the problem may compel the competent authority to come to a decision on questions of principle, but the purpose of its intervention is none the less to resolve the actual case or cases which are submitted to it. Here, the Bureau is only an intermediary responsible for enforcement. I think therefore that this decision is individual in character, that it concerns each of the applicants, and that consequently it is open to the applicants to make submissions on all the grounds listed in Article 33.

They do not allow this opportunity to pass, and in each of the four actions, a whole series of submissions is made on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of rules of law relating to its application, and misuse of powers. However, these various submissions are made in a manner which varies somewhat in each case, and sometimes even brings to light certain differences in their points of view. On the other hand, it happens that the same submission is made under several heads, for example lack of competence and procedural defect. Finally, it appears that a decision on the merits of different submissions is in many cases dependent on settling a single question of law or of fact. Thus I propose, rather than to examine these submissions one after the other in the order of their presentation, or in any other order, to attempt to go directly, and using as synthetic an approach as possible, to the root of the problem, which is essentially that of the legality of the criterion adopted by the contested decision in relation to the basic decisions of the High Authority: 22/54, 14/55 and 2/57.

One observation must be made first of all. The purpose of the contested decision is to give a definition of 'own resources' in scrap which escape the equalization contribution. This is exactly the question which the OCCF had asked the High Authority to decide. However, the applicants are right in pointing out that the true question is really

what is to be understood by 'bought scrap', within the meaning of the decisions of the High Authority. For it is bought scrap which is subject to the contribution, and the expression 'own resources', which as I have said appears formally only in Decision No 2/57, is of interest only to clarify by way of antithesis what 'bought scrap' is.

Second observation: I do not think that it is necessary in the present actions to go into theoretical considerations on the legal concept of an undertaking, a task which would, moreover, be particularly arduous and which is not certain to result in indisputable conclusions.

Indeed, as I have said, in this field, which strangely resembles the field of taxation, it is necessary to distinguish carefully between the determination of the person liable and the basis of assessment to the contribution. As regards the determination of the person liable, in my opinion there is no difficulty: the equalization contribution is payable by 'the undertakings referred to in Article 80 of the Treaty which consume ferrous scrap'. Admitting that the term 'undertakings' can be taken in different senses in the Treaty, it is certain that when, as in this instance, that term is used to describe an entity liable for a contribution, that is to say precisely, a contribution-payer (*'contribuable'*), it can only denote a natural or legal person, *the object of rights and duties*. The decisions of the High Authority relating to the collection of the levy use the term in this sense: 'The levy *is due from each undertaking* in the tonnage of its assessable production . . .' (Article 4 (1) of Decision No 2/52), and paragraph (3) of the same article specifies: 'Payment shall be made *by each undertaking*, for all establishments connected with it into post office or bank accounts which the High Authority has opened for that purpose, etc.'. A payment into a post office or bank account is not made by an 'economic unit', but by a natural or legal person, having civil legal capacity.

There are no grounds for following a different line of reasoning in the case of the equalization contribution: the 'undertakings referred to in Article 80 of the Treaty which consume ferrous scrap' and which are 'liable to pay contributions', are therefore the natural or legal persons who operate works in which 'production in the steel industry' is engaged in and in which scrap is consumed. The only problem is therefore that of the basis of assessment, in other words the bases for imposition of taxes. These concern 'bought scrap'. What is to be understood thereby?

It seems that the entire difficulty stems from the likelihood of reaching different solutions according to whether the question is approached from the point of view of civil law, from the technical point of view or from the economic point of view.

From the point of view of civil law, bought scrap is obviously scrap which is bought, thus which has been acquired through a sale. Thus it is enough to enquire in each case whether the scrap used in an industrial works was acquired by means of a transaction having the legal nature of a sale, without any other consideration. The financial connexions which may link the vendor the purchaser, or both of them to a holding company, are immaterial. The letter of the provisions indubitably favours an interpretation according to this view of the High Authority's decisions.

From the technical point of view, within a single industrial group, scrap coming from what is called 'own arisings' and which is re-utilized on the spot, is distinguished from scrap coming from outside. In this sense of the expression, 'own resources' are resources in scrap coming from own arisings. Such an interpretation can legitimately claim to find support in the wording of Annex II to the Treaty, which concerns scrap. In relation to the application to scrap of Article 59 on shortages, this Annex provides that 'Article 59 shall not apply to . . . undertakings' *own arisings*,' but it goes on to add *'availabilities of which* shall, however, be taken into account in calculating the bases for allocations of bought scrap' (ferraille de récupération), that is to say bought scrap (ferraille d'achat). The words 'availabilities of which' ('ressources que constituent ces chutes') tend to prove that with regard to scrap, the

expression 'own resources' ('ressources propres') has the same meaning as 'own arisings' ('chutes propres'). An interpretation of this kind of the decisions of the High Authority would lead to not taking into account the financial and corporate organization of the undertakings. It would consider as bought scrap any scrap which was acquired outside, even if it came from subsidiaries, parent companies or holding companies. In strict logic, its effect should even be to deny the character of 'own resources' to scrap from works coming under the same company name as the scrap-consuming works, if the former are geographically distant and do not form part of the same industrial group. Conversely, scrap circulating within a single industrial complex would be considered as own resources, even when the plants producing the arisings did not come under the same company name as the consumer plant: this is the legal justification of what the High Authority considers as an exception or an exemption, which is based on the criterion of local integration.

Finally, the economic point of view. What is involved? The operation of an arrangement for the equalization of prices made under Article 53 of the Treaty. It is superfluous to repeat the analysis which I had occasion to make before the Court of Justice of the ECSC in Cases 8/57 and 13/57 and which the Court adopted in its judgments of 21 June 1958. Article 53 is an indirect procedure for stabilizing the market by means in particular of action on prices. Therefore it must involve *market prices,* through which the effect of competition finds expression. Thus—still within this economic viewpoint—it can be maintained that, in so far as one is not dealing with market prices, the equalization scheme not only loses its purpose, but also loses its legal justification. The purpose of the scheme for the equalization of imported ferrous scrap is to prevent prices for internal ferrous scrap from being aligned on the higher prices for imported scrap: this applies only to scrap acquired on the market; scrap which is not on the market is not concerned by the scheme.

Seen from this angle, 'bought scrap' is scrap which is bought on the market, scrap which comes from trade in that commodity, which leads to a concept of 'own resources' considerably wider than that of 'own arisings'. Doubtless, one is then moving away from the indications given by Annex II, but it is easy to reply that Annex II is directed at the case of the allocation of scrap in the event of shortage, that is to say, in the event *of the action of the market being completely suspended.* At such a time it is natural for theoretically all amounts available to be allocated, and the exclusion of own arisings ('chutes propres' or, in the words of Annex II, 'ferrailles de chute'), although based upon obvious practical reasons, can be justified only if that concept is interpreted narrowly.

It seems to me that another objection—still within this 'economic' viewpoint—must be set aside: it is the one which could be based upon the change which has occurred—along the way, if one may say so—in the objectives of the equalization scheme, that is, the addition of the aim of savings in scrap to the original single aim of the equalization proper of import prices and internal prices. Indeed, the original aim has not ceased to obtain, far from it, with the appearance of so-called 'cast iron scrap' equalization or with Decision No 2/57, and the basis of the system is still action upon market prices. In my opinion, it must be inferred from this that, whatever the interpretation to be given to the expression 'bought scrap', it must be the same under the three decisions in question Nos 22/54, 14/55 and 2/57.

Such is the 'economic' point of view.

To tell the truth, there is a fourth point of view which one could think of, but which for myself I emphatically refuse to take into consideration, and that is the fiscal point of view. Not that the subject is not of a fiscal or parafiscal nature, on the contrary I have already stated that it is; but simply because no fiscal *legislation* in the Community exists. Even though the autonomy of fiscal law or even its existence is open to discussion, what is certain is that at all events it is a special body of law which can be founded only upon special legislation. The deforma-

tion of civil law by fiscal law has often been spoken of, either to deplore it or to justify it, but what is quite certain is that these 'deformations', or these 'deviations', which in reality are very often simple infringements of the rules of civil law, are most questionable when they are not based upon the law. It is true that in Germany a fiscal theory of *Organschaft,* having an independent nature, had been elaborated through case-law, but currently the question is governed by statute. It could be pointed out that in other countries of the Community such provisions do not exist or that there may exist provisions to the contrary. Thus in France, before the recent creation of value added tax, the production tax, which was a charge on turnover, was applicable in certain circumstances to deliveries made by a producer to himself of products extracted or manufactured by him: this solution was possible only because it resulted from statute.

Here the legislature is the High Authority, acting in accordance with Article 53 (b), that is, by a decision taken with the unanimous assent of the Council. A decision taken under these conditions could perfectly well have taken account, wholly or in part, of the considerations which the applicants put forward in order to relax or alter the concepts of bought scrap and own resources in the case of group scrap, but such is not the case and the three basic decisions must be taken as they are.

Fiscal law being thus set aside, the problem arises to which of the three aspects which I have tried to define (civil law, technical aspect and economic aspect) should reference be made, in so far as they are in contradiction with one another? In my view the question is a difficult one, and I frankly admit that I have not been able to reach an absolutely firm conviction in this matter.

The point of view which I have called 'economic' and which is, moreover, also a legal point of view, seems to me essential, by virtue of the purpose of the equalization scheme and of the purpose of the Treaty itself, which is a piece of economic legislation. However, account must obviously also be taken of the wording of the basic decisions, in seeking to interpret them in the light of the provisions of the Treaty and then in establishing, if necessary, whether or not they are in contradiction with the Treaty.

It seems to me that one question, in a sense a preliminary one, must first be resolved. It is the question whether disposals, to avoid the use of a legal term transfers, of scrap within a group are, *for the purposes of civil law,* in the nature of a sale. For if it were otherwise, either in all the cases or in a large number of cases, the criterion of the company name adopted by the contested decision would be either wrong or too absolute, and therefore illegal in relation to the basic decisions, which impose the contribution only upon 'bought scrap'.

This question was seriously discussed in the course of the written procedure, and as the Court will remember, it led to oral questions at the hearing. It seems to me that it emerges clearly from this discussion and from the answers given that disposals of scrap between companies belonging to the same group are made, even in the most thoroughgoing cases of integration, according to commercial practice. Distinct accounts are kept. The undertaking disposing of the scrap is credited with the amount of the value of the goods, and an invoice is made out. Thus in law there is indeed a transfer of property; there is payment of a price. The fact that the accounts are settled through banks on a clearing basis, with bank transfers being made from time to time only in the amount of the outstanding balances, is immaterial. It is also immaterial that a contract of sale in due and proper form is not drawn up and that the deliveries are carried out in execution of general directives issued by the parent company. Thus there is indeed a 'purchase' for the purposes of civil law, and the price is not a 'purely notional price'. It is a selling price.

Consequently the essential question arises: is the scrap which forms the subject-matter of that disposal 'bought scrap' within the meaning of Decisions Nos 22/54, 14/55 and 2/57?

For the reasons which I stated when speaking of the economic point of view, I think that the purely civil law criterion is inadequate here and that one cannot exclude the concept of a market. But how far should one go in that direction? Must the only scrap which can be considered as bought scrap be that which is *bought on the market*, that is, on the open market where all the sellers and all the buyers are presumed to be gathered together and where prices are determined only by the action of supply and demand? I am inclined to think that this would be going too far. The market in scrap is not an ideal market, any more than the market in steel, and the dividing line according to such bases between transactions involving a 'market price' and those not involving such price would be vague and difficult to draw. In my opinion it is enough—but this condition is an indispensable one—if the disposal prices for group scrap *follow, at least approximately, the market prices, in such a way as to be affected by the market.* Here again the categorical statements of the High Authority in the affirmative were not seriously disputed by the applicants, and the answers given to the questions asked during the hearing confirm that generally speaking such is indeed the case. It would be otherwise only if the 'Konzerns' (groups of companies) came to acquire such power as to be able to determine the prices themselves, so that then there would no longer be any market price, because there would no longer be any market at all. But if such a situation arose, it would prove that the High Authority had not done its duty in relation to the implementation of Article 66 on concentrations. As long as such is not the case, it must be accepted that duly authorized concentrations or concentrations duly exempted from authorization do not hinder the free formation of prices, which are therefore market prices.

It goes without saying that this extensive solution, justified in my opinion within the original framework of equalization, is even more so under the system of cast iron scrap equalization and under the system instituted by Decision No 2/57. As regards cast iron scrap equalization, let me recall that the premiums granted for increased use of cast iron in open-hearth steel works (Decision No 26/55) were made available *out of the resources of the Equalization Fund* (Article 2 of the Decision), therefore paid by all of the scrap-consuming undertakings, including those which were incapable of claiming the premiums. As to Decision No 2/57, the Court is aware that the absolute or relative disadvantages which it entails, owing to the way in which the contribution is apportioned, are borne even by those who are technically unable to avoid them. In both cases, this solution is justified by the idea of *joint responsibility,* which is fundamental to the whole system. This same idea cannot be wholly absent from this action. The impression must not be given, to use the hunting language which has been heard before the Court, of a sort of 'game reserve' for scrap. Precisely because it is a question of a scarce commodity, it would be most improper for those who took the otherwise quite legitimate precaution of guaranteeing themselves in advance against difficulties of supply in that commodity to use it as a pretext to avoid the common effort. Obviously that is not a legal consideration, but it supports an extensive solution which appears to be quite in accordance with the general principle of the system.

Furthermore, it does not seem that 'group scrap' is in fact really and completely separate, industrially and economically, from scrap bought on the open market. I have noted that, in all the cases before the Court, even the most integrated undertakings also have had recourse to scrap bought outside, since they have declared such scrap. Without doubt there is at least relative interpenetration between these kinds of scrap.

Finally, it goes without saying that in order to bear all its fruits, the encouragement to save scrap which is the basic purpose of Decision No 2/57, requires that group scrap should be subject to the contribution. For example, the technical advances enabling scrap to be saved must also be made by the 'Konzerns', since company connexions can

be made and unmade, but machinery continues to exist.

If these various considerations commend themselves to the Court, it will accept that in declaring 'that an undertaking, which is defined in all circumstances by its name, can consider as own resources only such scrap as is recovered by itself in its own works bearing the same company name', the contested decision did not infringe Decisions Nos 22/54, 14/55 and 2/57 in so far as those decisions impose the equalization contribution only upon bought scrap.

However, it remains to be considered whether the criterion of 'bought scrap' is not itself illegal on one ground or another.

First of all, it is alleged that a contradiction is to be noted between the rule according to which only bought scrap is charged and the imposition of the contribution upon scrap sent for processing under contract, which allegedly proves that the criterion of ownership is not observed.

On this point, I must admit that I do not altogether understand the line of argument. Indeed, Decision No 22/54 does not speak of scrap sent for processing under contract, from which it follows that, under that decision, scrap-consuming undertakings are not chargeable in respect of scrap so processed, which is not in fact bought scrap. Decision No 14/55, on the other hand, contains the following provision: 'In cases where undertakings process scrap under contract, the tonnages of scrap received on that basis shall be taken into consideration', which obviously means that they are chargeable, even though they have not been the subject-matter of a sale; the wording is not very felicitous, but it is clear. As to Decision No 2/57, it is not only clear but also legally quite proper (Article 10): 'For the purposes of implementing this decision, scrap processed under contract into cast iron or steel shall be treated in the same way as bought scrap'. This is a typical example of a taxation provision which derogates from civil law, but it does so with the utmost clarity, and I do not see any respect in which it is illegal. Furthermore, it seems perfectly justified in fact.

The two other complaints against the system set up by the three decisions are more serious. They are based on contradiction, arbitrariness and, of course, discrimination.

The first complaint relates to the 'exception' allowed in favour of Breda Siderurgica and Hoogovens, an exception or exemption based on the criterion of local integration. It is seen as a failure to adhere to the concept of bought scrap accepted by the High Authority itself. The High Authority is criticized for replacing without any valid reasons a legal criterion with a purely geographical criterion, which has no economic foundation and which leads to granting an exemption in cases where the undertakings concerned have much more tenuous financial connexions between them than those existing between the applicants. Such an exemption from the rules on the basis of assessment to the contribution involves in reality an amendment to the basic decisions, which would have required the adoption of a fresh decision according to the formal requirements of Article 53 (b).

It is clear that neither the Brussels agencies, nor the High Authority within the framework of its supervisory powers, have authority to amend the decisions on equalization and, in particular, the rules on the basis of assessment to the contribution which appear therein. Moreover, it cannot be accepted that the High Authority acted by virtue of a sort of 'pouvoir gracieux' (inherent discretionary power) which normally belongs to the administrative authority in charge of taxation and which enables it to cancel or reduce taxes due by law. Indeed, what is in question here is an apportioned tax, and the effect of any reduction is to increase the contribution of all the other taxpayers. Moreover, it is not enough that the exemption should be based upon objective criteria and applied to all those who are in the same situation, as the High Authority states; it must also have a legal justification.

Therefore it is important to know whether what is in question is really an 'exception', which would be illegal, or whether it is only

an application of the existing legislative provisions to a particular case, in which case it must be accepted that the administrative authority was entitled to intervene in order to specify the conditions for such application.

For my part, I am of the opinion that it is not an exception contrary to the basic decisions. Indeed, it has been seen that the distinction between 'bought scrap' and 'own resources' is strongly influenced by its technical aspect, with the concept of 'own resources' often being confused with that of 'resources coming from own arisings'. I refused, it is true, to consider as decisive the argument which the High Authority based upon the wording of Annex II in order to restrict the concept of 'own resources', but that was in order to show that for the purposes of applying Article 53 account had to be taken of the existence of the market. Ferrous scrap which circulates within a single industrial group is normally free from any market influence. The technical considerations arising from the physical arrangement of plants are preponderant here, and in such a case it is understandable that the concept of 'arisings' should predominate. In my opinion therefore, it is acceptable, in cases of this kind, for scrap not to have been considered as 'bought scrap' within the meaning of the equalization legislation.

The second complaint concerns the contribution's not being charged upon scrap which, quite apart from any local integration, circulates between different works which, however, bear the same company name.

In my opinion, this is one of the most difficult points in this case. The question may well be asked whether the logic of the system ought not to have led to the charging of the contribution upon scrap transferred from one works to another, even if they belong to a single legal person, and to treating such scrap as bought scrap.

Let me point out first of all that it does not appear possible here to accept this solution by means simply of the interpretation of the expression 'bought scrap'. Indeed, Decisions Nos 22/54, 14/55 and 2/57 each state that they impose the contribution upon the bought scrap of each *undertaking*. As has been seen, an undertaking, within the meaning of these decisions, is a natural or legal person. Therefore it is impossible here to treat an undertaking as being the same thing as a works. It has also been seen that the concept of a works has been used by the High Authority for the purposes of the basis of assessment to the levy. The concept is also to be found at the end of the second paragraph of Article 5 of Decision No 26/55, one of those which concern so-called 'cast iron-scrap' equalization: this paragraph states: 'The premiums shall be calculated in respect of specific categories of 'cast iron scrap' equalization: this *where necessary between cast iron which is a works's own production and cast iron received from another works'*. There is nothing similar here: only undertakings are spoken of. This confirms that in considering as an undertaking's own resources 'such scrap as is recovered by (the undertaking) itself in its own works bearing the same company name', the contested decision only complied with the basic decisions.

But then are those decisions thereby rendered illegal as unjustifiably providing different, and consequently discriminatory, solutions for similar situations? This point is open to debate.

What is certain is that the system is rather illogical and unsatisfactory as regards certain of its consequences. Thus—as the applicants did not fail to point out—several financially integrated undertakings have only to merge in order to be able—or more precisely in order for the new single undertaking to be able—to avoid the contributions for internal scrap.

Another undesirable consequence relates to the application of Decision No 2/57 to the case of a merger, or on the contrary a splitting-up, occurring between the reference period and the accounting period involved in calculating the consumption of bought scrap: such an occurrence is liable completely to distort the comparison. In this connexion, I note that Article 6 of Decision

No 2/57 makes great efforts to enable the comparison to be made with regard to equipment and manufacturing processes, when there have been changes or innovations from one period to another, and these efforts have been accentuated in the new version of that article, as it appears in Decision No 14/58. I have seen no similar provision for the case with which I am concerned; perhaps it has not arisen?

Must the system set up by the three Decisions Nos 22/54, 14/55 and 2/57 therefore be considered as illegal owing to the fact that it *did not impose the contribution upon* disposals from one works to another, quite apart from any local integration, if those works belong to the same undertaking (in its usual meaning in this field, that is the same natural or legal person)?

I am loath to suggest it to the Court. Indeed, it may be said that, in spite of the analogy which certain situations may present, at least in extreme cases, there is in general a difference between *integrated undertakings* and *one* undertaking operating several works. It is clear that the High Authority would have been entitled to impose the contribution upon disposals from one works to another; however, it would have had to obtain the unanimous assent of the Council of Ministers. By satisfying the same formal requirement, it could conversely have considered as a single undertaking for the purposes of equalization those which had fulfilled certain criteria of integration, as the applicants would have wished. There again, and doubtless much more so than in the first case, it would have had to enact fairly detailed legislation. Does it follow from the fact that the High Authority refrained from taking its legislation that far, and that consequently that legislation is somewhat lacking in logic, as has been seen, that that legislation is illegal? It is simple—perhaps too simple—and, as in any unrefined system, there are borderline cases in which the application of the regulation is far from satisfactory, but it does not seem to me that these imperfections are such as to be in the nature of an infrigement of legal principles such as equality in the face of taxation, the observance of which the Court must ensure.

In the course of this investigation, I believe that I have answered most of the submissions made in the four applications and the bulk of the applicants' arguments. However, some points still require comment.

First of all there is the question of *retroactivity*. In so far as the contested decision may have decided the imposition of the contribution upon scrap which hitherto had not been subject to it, it is criticized for having retroactive effect, since in effect it instructs the Brussels agencies to claim payment of the contributions due from 1 April 1954 on tonnages of scrap wrongly considered by certain undertakings as own resources.

If my view commends itself to the Court, it will accept that the contested decision did not amend the rules on the basis of assessment to the contribution as they emerge from the three basic decisions of the High Authority. It confined itself to interpreting these decisions in order to apply them in a particular case. There is no retroactivity in that. With regard to retroactivity, the only question is whether, and within what time-limits, it is possible to impose additional charges to tax in respect of omissions detected in declarations. The basic decisions do not make any provision for it. It is merely stated in Article 12 of Decision No 2/57 that 'The Fund shall notify the undertakings of the amount of the contributions to be paid and the time-limit for payment'. The contributions so fixed are based upon the declarations which the undertakings must submit within a certain time-limit (Article 16). Finally the second paragraph of Article 17 provides that 'false declarations shall give rise to the application' of certain sanctions.

It results from this system that the Fund (and also the High Authority which receives notification, 'for the purposes of supervision', of the details sent to the Fund) must check the declarations, then the Fund must establish the charge to the contribution and notify the amount of that charge to those concerned.

Must it be inferred from this that once the

Fund has notified an undertaking of a charge to the contribution it loses any right to rectify any omissions or mistakes in the declarations which were used as the basis of that charge, or even any mistakes or omissions that it might have committed itself in calculating the contribution? That would be contrary to the procedure followed in the field of taxation in all countries. It is true that, normally, the law must itself lay down the conditions and the limits of what are termed 'additional charges to tax'. Here, there are none, the reason for which is doubtless the relative shortness of the period for which the equalization scheme was applied. I should be tempted in this case to accept the concept of 'a reasonable period of time', which the Court has already applied in another case, albeit a very different one (Joined Cases 7/56 and 3 to 7/57, *Algera and Others* v *Common Assembly*, 12 July 1957, Rec. 1957, p. 114 *et seq.*; the point in issue there was the period of time within which the administrative authority in the field of public office can withdraw an illegal individual decision which has given rise to rights). In this instance, the additional contributions being claimed back are those pertaining to tonnages received from 1 April 1954: the period of time does not appear excessive.

A second question, raised by Application 20/58, refers to the allegedly improper delegation of powers by the High Authority to the Brussels agencies, in breach of the case-law created by the judgment in the *Meroni* case. This question is closely connected to another one, which is raised by all four applications, under the heading of lack of competence: it is alleged that Decisions Nos 14/55 and 22/54, which spoke only of bought scrap, were *amended* by Decision No 2/57, which for the first time mentions the concept of 'own resources'. Such an amendment could only result from a decision by the High Authority adopted according to the formal requirements of Article 53 (b), that is, after the unanimous assent of the Council of Ministers.

I have answered this submission in advance, when I expressed the view that there was no amendment of the first decisions by Decision No 2/57, since the charges remained imposed throughout upon bought scrap. As to the question of delegation of powers, it is my opinion that, as long as it was simply a question of *applying* the basic decisions, while also interpreting them, such power did belong to the Brussels agencies, subject to the application of the procedure under Article 15 of Decision No 2/57 as regards possible intervention by the High Authority.

Another submission made in Applications 22 and 23/58, still under the heading of lack of competence, is based upon infringement cle 15 of Decision No 2/57 as regards possible intervention by the High Authority.

cle: 'In the absence of a unanimous resolution by the Board of the Joint Bureau or of the Fund on the *measures* referred to in Articles 3 to 11 (1) above, . . . the decision shall be taken by the High Authority'. It is argued that the question submitted to the High Authority and which formed the subject-matter of the contested decision was not on a 'measure' to be adopted under Articles 3 to 11.

Articles 3 to 10 enact all the rules relating to the basis of assessment to the equalization contribution (Article 11 (1) has different subject-matter). The question submitted to the High Authority related to difficulties which arose from the interpretation of certain of those provisions and which concerned the establishment of the bases of assessment to the equalization contribution. Those difficulties necessitated a decision followed by enforcement measures: those were indeed 'measures' which required a resolution by the Board of the Bureau or of the Fund and which came within the scope of Article 15.

In conclusion, I come to two submissions made under the heading of infringement of an essential procedural requirement.

The first is based upon the absence of the unanimous assent of the Council of Ministers: I have already dealt with this point.

The other is based upon the lack of a statement of the reasons on which the decision was based. It is made in each of the four

applications. Here again, the point is open to doubt.

As regards the main point, that is, as far as the definition of 'own resources' is concerned, in my opinion it must be accepted that the contested decision gives a sufficient statement of the reasons on which it is based. Indeed, it states that 'the concept of own resources' must be understood 'in accordance with the semantic value of the expression, which corresponds to the principle of the legal ownership of those resources at the time of their recovery'. The High Authority goes on to state that 'it follows from this that an undertaking, which is defined in all circumstances by its name, can consider as own resources only such scrap as is recovered by itself in its own works bearing the same company name'.

In the light of the requirements laid down by the case-law of this Court, in particular in Cases 2/54 and 6/54, this statement of reasons appears sufficient.

On the other hand, the same is not true of one particular point: that which the High Authority considers (in my opinion wrongly, as I have said) as an 'exemption', that is the two cases of Breda Siderurgica and Hoogovens. In this connexion, the High Authority confines itself to 'lifting the reservations' which its permanent representative had previously imposed, and it takes this decision 'by reason of the exceptional nature of the situations in question'. That is obviously not a reason on which a decision can be based, since it should also be stated in what respects the nature of these situations is exceptional.

Must these decisions therefore be annulled for a procedural defect on this point? Here again, I am loath to propose it to the Court. Indeed, as the Court knows, a few months later, on 17 April 1958, the High Authority wrote a fresh letter to the Joint Bureau, a letter which was published in the Journal Officiel of 13 May 1958 and which gives a statement of reasons, this time quite explicitly, for the decision to consider scrap circulating within a single industrial group as own resources: I read out the material passages of this letter at the beginning of my Opinion. From that time, the applicants have been acquainted with the High Authority's reasons, and have had ample opportunity to discuss them during both the written and the oral procedure (the replies are considerably later than 13 May, the date of publication of the letter in question). I am inclined towards the view that, in such circumstances, it is possible to consider the procedural defect as not being of an 'essential' nature within the meaning of Article 33.

In the light of these observations, whilst acknowledging that several points remain debatable, I am of the opinion that the Court should:

dismiss the applications, and

order each of the applicants to bear its own costs.