OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 28 OCTOBER 1963[1]

Mr President,
Members of the Court,

The Forges de Clabecq company refrained from including among the tonnages serving as a basis for computing the equalization contribution payable by it a quantity of 20 682 metric tons of ferrous scrap received after 1 April 1954, the date on which the compulsory scheme set up by Decision No 22/54 entered into force, claiming that such tonnage corresponded to purchases made before that date. It based itself in this respect on the provisions of Article 3 of Decision No 22/54 according to the terms of which 'the amount of equalization contributions is calculated in proportion to the tonnages of scrap *bought* by each undertaking *during the period for which this decision remains in force . . .*', the starting point of the said period being fixed by Article 10 as 1 April 1954.

By a letter dated 23 January 1963, the Director-General of Steel of the High Authority informed the Forges de Clabecq company that 'The High Authority at its meeting on 5 December 1962 decided in the light of the decisions of the Court to include the disputed 20 682 metric tons in the amount serving as the basis of assessment to contribution for your undertaking.'

The company asks you to annul this Decision taken by the High Authority.

A — Admissibility

Numerous questions of admissibility appear first of all. I shall examine them briefly.

The first is whether the application is properly directed against a *decision of the High Authority,* which may be the subject of an action by virtue of Article 33 of the Treaty.

It is obvious that the letter of 23 January 1963, produced in support of the application and signed by a Director General, cannot be regarded as a decision of the High Authority; moreover, it does not claim to be. But, as we have just seen, this letter refers expressly to a decision taken by the High Authority itself at its meeting on 5 December 1962, rejecting the claim of the applicant company. The letter of 23 January 1963 appears in this respect as the *notification* of that decision.

Doubtless, the decision does not conform to the formal conditions set out in Decision No 22/60 of 7 September 1960 concerning the implementation of Article 15 of the Treaty. Does it follow from this that one should assume it to be non-existent in law, and for this reason reject the application as inadmissible? I do not think so. In this respect the situation appears to me to be quite different from that in which actions against letters signed by officials of the High Authority in the name of that institution are dealt with. In the present case the letter addressed to the applicant referred expressly to the existence of a Decision taken by the High Authority, with the date of the meeting at which it was taken and its purpose. The fact that the Decision does not fulfil the formal requirement prescribed by Decision No 22/60 cannot, in my view, make it non-existent; at the very most one might assert that the letter of 23 January 1963 lacks the quality of a *proper notification* to make time begin to run for bringing an action, since in fact a notification must reproduce the whole of the decision which it is intended to bring to the knowledge

1 — Translated from the French.

of the party concerned. The Court for its part may ask for the production of an extract from the minutes of the meeting at which the High Authority took its decision, as you have been led to do in the case of transport tariffs (Case 3/58 and others, Judgments of 10 May 1960). That does not nevertheless appear to be necessary, since in the present case the two parties have agreed to recognize the existence of the Decision and there is no circumstance to be found here such as that which motivated the Court to ask for precise details (that is to say, the necessity to make sure that the Decision had been taken before midnight on 9 February 1958, the date of expiry of the powers which the High Authority held under the Convention on the Transitional Provisions).

The second question deals with the alleged insufficiency of the reasons for the application. According to the High Authority it does not include an adequate 'statement of the grounds on which the application is based' which are required on penalty of inadmissibility.

It is sufficient to read the application to realize that it includes the conclusions and the submissions in support of the application, stated briefly no doubt, but in such a manner as to be perfectly clear and precise. I do not understand how the High Authority could have experienced any doubt in this respect.

Third question: the 'tender of proof' is vague and unaccompanied by the file referred to in Article 37(4) of the Rules of Procedure. Here it is a matter of the passage in the application where the applicant offers to prove 'so far as necessary' that the contracts relating to the disputed tonnages had actually been concluded before 1 April 1954.

On this point, the applicant rightly replies that it did not have to be more specific, since there had not yet been any dispute as to the facts, and as the question in dispute was one of pure law. It is true that the facts themselves have become the subject of dispute during the proceedings, but I cannot see here any irregularity of such a nature as to call the admissibility of the application in question.

Fourth question: absence of legal interest. This absence of interest, according to the defendant, results from the more or less disastrous consequences that an annulment would entail for the applicant. 'Everything leads to the conclusion', in fact, to make use of the same expression employed by learned counsel for the High Authority during the oral procedure, that not only would the reduction obtained be off-set, but an additional contribution due to the revision of the equalization calculations and the obligation which the High Authority would have to apply the same rule to undertakings which, being in the same circumstances as the applicant, have however still not made a claim.

What would be the legal consequences of an annulment ordered in favour of the applicant? This is a delicate problem which the High Authority ought possibly to resolve within the framework of Article 34 of the Treaty. What is certain is that, even if these consequences should in the outcome be unfavourable to the applicant (which for the moment we do not know), that is not a circumstance of such a nature as to cause the legal interest in the application to disappear now. As learned counsel for the applicant has mentioned, the legal interest in an application for annulment is determined on the day on which the application is made, and by reason of the purpose of that application. Only a withdrawal of the disputed Decision could cause the application to lose its purpose, which would mean that there was no occasion for proceedings to judgment rather than that the application should be rejected for lack of interest.

B — On the substance of the case

As you know, the applicant's argument is based in essence on the terms, which according to the applicant are perfectly clear, of Article 3 of Decision No 22/54, the wording of which I will once more recall:

'the amount of the contributions is calculated in proportion to the quantities of ferrous scrap bought by each undertaking during the period for which this Decision remains in force whether within the Community or by importation from third countries.'

The expression 'bought', says the applicant, can mean only the legal act of purchase and not delivery or receipt. Although later decisions have mentioned 'tonnages of bought ferrous scrap *received* during the period' under discussion (Article 3 of Decision No 14/55) or '*receipts of bought ferrous scrap*' (Article 4 of Decision No 2/57), these different wordings can only correspond to a modification of the rule and not to a simple improvement of the original drafting, all the more so because these decisions are independent, self-sufficient and having no interpretative character (as, for example, Decision No 14/58 published in the Official Journal of 30 July 1958 'rectifying and construing certain Articles of Decision No 2/57').

To this the High Authority replies that the very object and the necessities of the equalization scheme compel the interpretation of a provision which it recognizes as being badly drafted. The expression 'tonnages of ferrous scrap bought' refers particularly to the idea of *bought ferrous scrap,* (alone made subject to contribution), as opposed to 'own resources', not made subject to contribution, a distinction which was later thrown more clearly into relief. What matters in the present case, continues the High Authority, is the *commercial effect* of the receipt by the undertaking of ferrous scrap intended to be consumed, and not the *legal transaction* of the sale, resulting from a contract more or less difficult to prove, referring moreover to various laws and legal systems, and besides, liable to non-performance after having been made. On the other hand, the system proposed by the applicant would legitimize a break in the relationship which ought to exist between the paying of contributions and the remittance of equalization sums to importers, since in fact equalization is granted for 'imports *made* during the period for which the decision remains in force', even if they are the outcome of contracts to purchase made previously; such a lack of correlation would be contradictory to the very principle of the equalization scheme.

Such are the two arguments, briefly summarized.

Is it necessary to draw from this the conclusion that the Court finds itself at grips with a problem of opposition between the letter of a perfectly clear provision and 'the spirit' of this provision, which would result in giving it a different meaning? Here is a situation which judges hardly appreciate and a choice which they seek with all their power to avoid, for, if it is true that in principle there is no place for 'interpretation' except in the case of the uncertainty of the provision, it is repugnant to the spirit of justice to apply to the letter a provision clearly opposed to what is called the 'ratio legis', the legislator being supposedly reasonable.

That the text is in itself perfectly clear is hardly arguable and the exegesis which the applicant has made of it seems wholly convincing. It seems to me impossible to attribute the supposedly defective drafting to a sort of 'slip of the pen' of which the context requires rectification. Do not let us forget, moreover, that we are dealing here with a quasi-fiscal or para-fiscal matter, in which the

provisions are, according to general principles, interpreted strictly.

On the other hand, I do not think that the literal interpretation, which appears inescapable to me because of the clarity and the precision of the wording, is, at least in a certain way, contrary to the *ratio legis* or that the Court is faced with the dilemma to which I alluded a moment ago.

First of all, it is not correct to claim, as does the High Authority, that in this matter only the *commercial fact* must be borne in mind. The case-law of the Court which has held lawful both levies on ferrous scrap known as group scrap and the exemption of 'own resources', rests as you know on a concept of the undertaking based on legal personality and the criterion of the company name, which is moreover admitted by the High Authority itself. It follows, according to this case-law, that the movements of ferrous scrap from one undertaking of the group to another, which are the subject of a 'transfer' effected against a 'price', give the ferrous scrap thus transferred the nature of 'bought ferrous scrap', within the meaning of the basic Decisions. Doubtless the Court has declared that it was not necessary for these transfers to comply with 'all the conditions required by the appropriate national civil law for the validity and effectiveness of a contract of sale.'[1]

I myself in my opinion relating to Joined Cases 32 and 33/58 (the first SNUPAT case) have pointed out that the transfers of ferrous scrap between the Régie Renault and SNUPAT complied with the simplified requirements of the *code de commerce* for establishing a sale in commercial law. But if the Court has thus shown itself not to be very demanding in respect of the *application* of the rules of civil law, this is because in the case in question it was a matter of group ferrous scrap, the movements of which are made in accordance with general directives from the directors of the group, the principle of transfer being established once and for all without the necessity of requiring an order and an acceptance for each quantity transferred in order to prove the existence of a contract. This liberal attitude which is prompted by anxiety to have regard to the necessities of commercial life proves nonetheless that it is the *transfer of property*, in the strictest legal meaning, from one undertaking to another which gives legal justification to the levy: this is precisely what the Court again stated in the second SNUPAT judgment, Rec. 1961, p. 155, and in the same judgment the reasoning ends in the following manner: 'There is therefore reason for regarding as 'bought ferrous scrap' all the scrap in which there has been a transfer of property for an agreed price, *whether this transfer is effected under a contract of sale in the real meaning of the term, or by virtue of a comparable contract . . .*' (Rec. 1961, p. 158).

It is certainly to a legal concept that the Court referred in order to define purchase, as for its part the High Authority had done in its letter of 18 December 1957 in order to define 'own resources' in accordance with 'the semantic value of the expression'. There is no doubt that recourse to such legal concepts was alone capable of justifying the imposition of equalization contributions on group ferrous scrap.

In this situation, how is it possible to set aside *a priori* as absurd or at least as irreducible to the very essentials of the equalization scheme all recourse to a legal concept of purchase?

It seems to me all the less defensible that, as learned counsel for the applicant justly remarked, the High Authority in its own decisions used the term purchase as opposed to that of receipt on several occasions in situations which

1 — Rec. 1962, p. 646.

showed clearly that the two concepts, far from merging into one another, are clearly distinguishable. It is sufficient to refer for example to Article 2 (a) of Decision No 14/55 (the obligation 'to carry out the equalization of ferrous scrap imported from third countries or ferrous scrap treated as such . . . applies to *tonnages bought* during the period for which this decision remains in force'), considered together with Article 3 ('the amount of the contributions calculated in proportion to the tonnages of *bought ferrous scrap received* during the period for which this decision remains in force'); or else to refer to the particularly precise provisions of Article 11 of the same Decision and to those of Article 19 of Decision No 2/57, where distinction is made *for the same tonnages* between the date of purchase and that of receipt, which shows furthermore that in the view of the High Authority it ought to be possible to determine the date of purchase without great difficulty.

Up to the present I have argued only by analysing and by comparing the texts to show that the expression 'purchase' or 'bought' was normally used in the various regulatory decisions in the legal meaning of the term, and that it is hardly possible to assume a drafting error in the provision in question tantamount to a real mistake.

But there is another reason, more positive if not decisive, it appears to me, capable of being invoked *to give legal justification to* the result of a literal interpretation: that is the principle of non-retroactivity.

It must not be forgotten, in fact, that Decision No 22/54 is the starting point of the compulsory scheme. The voluntary scheme previously authorized by the High Authority under Article 53 (a) of the Treaty came to an end on 31 March 1954 (Article 4 of Decision No 33/53 of 19 May 1953, as amended by Decision No 43/53 of 11 December 1953) and had to be wound up. No doubt one might have thought that undertakings which were already associated with the voluntary scheme continue under the new system to bear contributions relating to purchases made before the date of the entry into force of this system, but the justice and perhaps even the legality of such a solution would have been very much open to dispute in respect of the 'new arrivals' which became automatically associated. Here we are dealing with a quasi-fiscal system and it might appear to conform to the principle of non-retroactivity of fiscal law, a principle which is, doubtless, common to all our six countries, to impose contributions only on tonnages consequent upon transactions concluded as from the date on which the Decision came into force. Let us take note that the applicant company had not joined the voluntary scheme, although its managing director had for a certain time been a member, no doubt in a private capacity, of the Board of Directors of the OCCF (Office commun des consommateurs de ferraille).

The objection of the defendant that the applicant's arguments would lead to a double levy in respect of ferrous scrap purchased before 1 April 1955 but received after that date has no great value. This is a matter of the classical problem of the application of the law to the time, which in my opinion ought to be resolved in the following way: Article 11 of Decision No 14/55 provides that 'this Decision shall enter into force within the Community on 1 April 1955.' Therefore it is at this date that it takes the place of the previous Decision (except for provisions to the contrary such as those which appear in the second paragraph of Article 11 concerning imports); from which it follows that the tonnages of scrap bought within the Community before 1 April 1955, but still not received on that date, are subject to the contribution under the new Decision (Article 3 of Decision No 14/55) except of course in the unlikely

event of their already having been subject to the contribution under Decision No 22/54.

In fact these questions of the successive application of rules are of little importance when it is simply a matter of changing from the system of one decision to that of another while the scheme is functioning, because there cannot be an interruption in such functioning. The Caisse continues to be maintained by contributions from consumer undertakings which are conversely to be debited in respect of equalization payments to importers. It matters little that, on a given date, certain contributions are due and certain payments are made by virtue of different decisions, one of which has replaced the other; the essential matter is that continuity is maintained.

On the other hand, the question becomes important and must be settled in a precise way *at the beginning and at the end* of the scheme; this applies both to contributions and equalization payments. As to the end, this was done by Article 19 of Decision No 2/57 and then, the system having been once more extended, by Article 16 of Decision No 16/58 of 24 July 1958. For the commencement of the scheme it is Decision No 22/54 which governs the matter: Article 2 for the commencement of equalization payments to importers and Article 3 for the commencement of payment of contributions. This latter provision, as we have seen, is clear, precise and legally justified: contributions are due only on scrap 'bought' as from 1 April 1954, whether it is a question of purchases within the Community or purchases by import from third countries. In respect of the equalization payments, they are made according to Article 2 in respect of 'imports effected' as from the same date of 1 April 1954.

What is to be understood by 'imports effected'? Perhaps it would be more equitable to make the equalization payments only in respect of imports which were the subject of *purchases* after 31 March 1954, which would thus avoid making the 'newly-joined' enterprises pay their share of an imposition relating to transactions carried out before the coming into operation of the scheme to which they are subject and which, logically, ought rather to devolve only upon the participants in the voluntary scheme. Such a solution would be in accordance with that which was permitted for the termination of the compulsory scheme (Article 19 of Decision No 2/57 and Article 16 of Decision No 16/58): equalization continues to apply to imports of ferrous scrap received after the date of termination of the scheme, provided that such ferrous scrap had been bought before that date.

Is it possible to make such an effort to interpret Article 2 of Decision No 22/54? This is not certain, even though the expression 'imports effected' is less precise than the expression 'tonnages of ferrous scrap bought' appearing in Article 3, which expression, in my opinion, cannot be open to interpretation. But today, you do not have to decide this question. It is sufficient to say that, if the effort to interpret Article 2 in the sense which I have just suggested were not possible, the only result would be that the amount of contribution due for the application of Decision No 22/54 should be revised, perhaps, as the High Authority claims, to the ultimate disadvantage of undertakings like Forges de Clabecq, but not that the system would be unworkable.

Other questions remain to be settled; first, that of determining *on what date* the purchases of ferrous scrap ought to be considered as having taken place. This raises questions of law: in what circumstances is the contract of sale completed? Is it necessary to require an order in good and due form? Does a verbal agreement which is confirmed later suffice? etc. You have heard these questions discussed at the Bar. It will now be necessary to apply the answers

to the present case and to ascertain whether the disputed 20 682 metric tons really correspond in whole or in part to purchases prior to 1 April 1954. In this respect the 'liberalism' apparent in your case-law, by drawing its inspiration from the usages and necessities of commerce, should give useful guidance to the parties.

But you need not, within the framework of an application for annulment relating to a pure question of law, and if you are led to allow this application, decide yourselves on the tonnage which should escape contributions as a consequence of your judgment. This task devolves on the High Authority under Article 34 of the Treaty.

In accordance with the very provisions of this Article I am of the opinion that the following course should be followed by the Court:

— that the disputed Decision should be annulled;

— that the case should be referred to the High Authority to take the measures necessitated by the carrying out of the annulment;

— that the High Authority should bear the costs.