6. Discrimination – Comparable situations – Exemptions granted within the framework of financial arrangements – Integrated and independent steel foundries; foundries engaged in pre-melt and foundries engaged in melt – Importance of the raw materials used and of the production plant

There is no discrimination if, within the framework of financial arrangements under which undertakings consuming ferrous scrap have to pay contributions, the High Authority exempts integrated steel foundries so as to protect them from competition from independent steel foundries while at the same time refusing to grant foundries engaged in pre-melt similar protection against foundries engaged in melt, since the first two categories of undertaking operate with the same production plant and use the same raw materials, whereas there is no such similarity between the second two categories, with the result that the two competitive situations are not comparable.

7. Common market – Concept of common interest – Adverse effect on the normal conditions of competition

When Article 3 of the Treaty prescribes that the institutions of the Community are to exercise their powers only in the 'common interest' it forbids the High Authority to disregard the specific interests of those subject to its jurisdiction and to act with such inflexibility that those interests are adversely affected to an appreciably greater extent than might reasonably be expected.
If these principles are applied in the light of Article 5 to the effects which intervention by the High Authority may have on the competitive position of those concerned, they indicate that the High Authority would exceed the limits of its powers if it adversely affected that situation more seriously than was established to be necessary after a thorough examination of the interests involved or, in any event, if it had a substantial adverse effect on that position. On the other hand, to claim that the competitive position of an undertaking must not be changed at all by such intervention would amount to an unreasonable stipulation.
(ECSC Treaty, Articles 3 and 5[1])

8. Special charge – Concept

A charge imposed by the High Authority which in principle applies to all Community undertakings consuming ferrous scrap is not a special charge.
(ECSC Treaty, Article 4)

In Case 14/59

SOCIÉTÉ DES FONDERIES DE PONT-À-MOUSSON, a limited company having its registered office at Pont-à-Mousson (Meurthe-et-Moselle), represented by its Chairman, André Grandpierre, assisted by Maurice Allehaut, Advocate at the Cour d'Appel, Paris, Bâtonnier, with an address for service in Luxembourg at the Chambers of Alex Bonn, Bâtonnier, 22 Côte d'Eich,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Emile Reuter, acting as Agent, assisted by Tony Biever, avocat-

1 – Cf. Summary of Case No 15/57 Rec. 1958 p. 159, No 5.

avoué in Luxembourg, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application for the annulment of the letter of the High Authority to the applicant of 24 January 1959,

THE COURT

composed of: A. M. Donner, President, L. Delvaux and R. Rossi, Presidents of Chambers, O. Riese (Rapporteur), J. Rueff, Ch. L. Hammes and N. Catalano, Judges

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

gives the following

JUDGMENT

Issues of fact and of law

I – Facts

The facts of this case may be summarized as follows:

The applicant produces pig iron castings and in particular pipes and accessories for piping. At its ironworks at Pont-à-Mousson (Meurthe-et-Moselle) it uses the technique known as 'pre-melt', which consists in casting the molten pig iron from the blast furnaces directly into centrifugal machines or moulds, without passing through the solid state.

The plantiff regularly paid its contributions to the Imported Ferrous Scrap Equalization Fund up to 1 December 1956. However, by a letter of 19 April 1957 it notified the High Authority that in its opinion it did not have to pay the levy on the beforementioned molten pig iron or, alternatively, had the right to be exempted from payment.

The High Authority, after it had consulted the Joint Bureau of Ferrous Scrap Consumers which gave an unfavourable opinion, had several meetings with the applicant's representatives. Since these talks failed to reconcile the two conflicting views, the High Authority sent the applicant a letter of 24 January 1959 in which it said that it did not see its way to granting the request. That letter is the subject-matter of this application.

I I – Conclusions of the parties

The applicant in its application claims that the Court should:

'Annul, in accordance with the provisions and conditions of Article 33 of the Treaty, the Decision of the High Authority of 24 January 1959 on the ground that the High Authority wrongly subjects to equalization ferrous scrap used for the manufacture of molten foundry pig iron cast for pre-melt – or alternatively on the ground that the High Authority has created a situation which, as a result of discrimination and the special charges borne by the applicant, is incompatible with Articles 2, 3, 4 and 5 of the Treaty;

Order the repayment of the sums paid unlawfully by way of Community levies;

Order the High Authority to bear the costs . . .'

The *defendant in its defence* contends that the Court should:

'. . .

Take note that the High Authority leaves the question whether the letter at issue of 24 January 1959 is a decision within the meaning of Article 14 of the Treaty to be determined by the Court, and decide as to this question as it shall think fit in accordance with the law;

Dismiss the application directed against the letter of the High Authority of 24 January 1959 in so far as the applicant asks that the decision adopted be annulled on the ground that it infringes the Treaty, with all the attendant legal consequences, in particular as far as concerns the payment of fees, costs and any other disbursements;

Alternatively, if the Court makes its decision conditional upon the applicant's adducing certain evidence, take note of the fact that the High Authority disputes the admissibility and relevance of the evidence founded upon by the applicant in its present form; in these circumstances order the applicant to strike out, modify and supplement the said evidence having regard to the preceding considerations; in these circumstances reserve the costs.'

The *applicant in its reply* claims that the Court should:

'Accept the conclusions as set out in its application including those relating to the admissibility of this application directed against the letter of the High Authority of 24 January 1959;

Reject without any reservation the High Authority's alternative conclusions in so far as they challenge the admissibility and relevance of the evidence founded upon by the applicant in its present form and ask for further evidence or evidence which contravenes the Treaty; the costs to be reserved.'

The *defendant in its rejoinder* adheres to its original conclusions.

III–Submissions and arguments of the parties

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

1. *Admissibility*

Although the *defendant* states that it leaves the question of admissibility 'to be determined by the Court', it doubts whether the disputed letter is a decision. It points out that it is not 'an enforceable decision such as is usually adopted following a refusal to discharge a pecuniary obligation'.

The *applicant* asserts that there can be no doubt that the letter in question is a decision. That letter affirms that the applicant has to pay amounts which in its opinion it does not owe. Further, it was followed by the 'first step in execution proceedings', as the High Authority instructed the Association of Scrap Consumers, through the Equalization Fund, to calculate and demand payment of the disputed contributions.

2. *The substance*

First complaint: Infringement of Articles 53, 80 and 81 and of Annexes I and II to the ECSC Treaty.

The applicant takes the view that it is not an undertaking within the meaning of Article 80 of the Treaty because:

1. The foundry pig iron which it produces is not one of the products referred to in the Treaty.
2. The applicant is not engaged in an 'iron and steel' activity. Moreover, the Treaty only covers activities of the iron and steel industry proper and does not include those of foundries.

On the other hand, the defendant maintains that the pig iron produced by the applicant and its industrial activities do indeed fall within the scope of the Treaty.

A – *Arguments put forward by the applicant*

1. Is molten pig iron an ECSC product?

General observations

The applicant answers this question in the negative and submits two arguments in support:

(a) It is clear from an analysis of the wording that the expression 'Foundry and other pig iron' found under reference No 4200 of Annex I only covers foundry pig iron.[1]
(b) In administrative and technical terminology the expression 'pig iron' ['fonte brute'] refers only to solid pig iron.

It is the second argument which the applicant endeavours to support with various considerations based on the wording of Annex I and also of the Brussels Nomenclature, English expressions relating to pig iron and Euronorm 1-55, which emanates from the High Authority itself.

2. Does the applicant undertaking fall outside the jurisdiction of the ECSC by reason of the technical and economic structure of its works?

The applicant relies on the fact that the authors of Annex I, Note 3, as regards *steel,* drew a clear distinction between the iron and steel industry and the foundries, the former but not the latter – to the extent to which they are independent – coming within the jurisdiction of the ECSC. The applicant maintains that this distinction must also apply to *pig iron* and comes to the conclusion that 'the exclusion of the foundry industry entails . . . the exclusion of molten metal used in the foundry operation of casting by cooling alone'.

(a) The situation of a foundry engaged in pre-melt, such as the factory at Pont-à-Mousson, must be compared rather to that of an independent steel foundry than to that of an integrated steel foundry.

An integrated steel foundry is in practice always part of a steel works of greater economic importance which only sends a small part of its products to the foundry whereas most of its production is intended for the rolling mills or sold as semi-finished products.

In contrast, the applicant's production of molten pig iron is determined by its own requirements and not for the purpose of producing and selling crude foundry pig iron for casting ['des fontes brutes de moulages']. Although the applicant prepares the molten pig iron in its blast furnaces it would be unrealistic to regard it as a steel undertaking with an integrated foundry.

Note 3 to Annex I to the ECSC Treaty read as a whole shows that any undertaking – foundries being selected as an example – the production whereof is not 'an activity of the steel industry proper' does not fall within the jurisdiction of the Community. Moreover, on the two occasions when the Treaty mentions foundries – Note 3 to Annex I and paragraph (b) of Annex II – they are treated as falling outside the jurisdiction of the ECSC.

The Treaty provides for the separation of the production and casting of metal only in the case of steel foundries integrated into steel works. However, in this case the High Authority regarded the effects of this separation as being unacceptable in practice and by Article 10(d) of Decision No 2/57 exempted the said foundries from equalization.

(b) Is the fact that the applicant prepares its molten pig iron in blast furnaces – instead of utilizing the usual

1 – Translator's note: The French for this expression is 'fontes de fonderie *brutes*', literally '*crude* foundry pig iron'.

cupola furnaces – sufficient to classify the product as 'an iron and steel product'?

In the applicant's view the question whether a product is an iron and steel product cannot depend upon the kind of plant used. Otherwise independent steel foundries would come within the jurisdiction of the Community because they use Siemens-Martin and electric furnaces. Moreover, pig iron is not 'more of an iron and steel product than steel'.

(c) Comparison between foundries engaged in pre-melt and those engaged in melt ['fonderies de première et de deuxième fusion']

As the defendant itself admits, the Treaty does not apply to foundries engaged in melt, which buy solid pig iron and then melt it down a second time. Nevertheless, the composition of the molten pig iron prepared by those foundries does not differ from the pig iron prepared by the applicant.

The applicant does not accept the distinction drawn by the defendant in this connexion between the 'production' and 'remelting' of pig iron. It endeavours to show that foundries using the melt process are engaged in production in the same way as the applicant.

B – *Arguments put forward by the defendant*

In reply to Point 1 (*Is molten pig iron an ECSC product?*)

General observations

The defendant expresses the view in its statement of defence that the wording of reference No 4200 of Annex I – 'Foundry and *other* pig iron' – does not necessarily only refer to *crude* foundry pig iron ['la fonte de fonderie brute']. However, the defendant admits in its rejoinder that 'the foundry pig iron referred to under reference No 4200 is crude pig iron' ['est une fonte brute'].

It is not true that in administrative and technical terminology pig iron ['la fonte brute'] only includes solid pig iron. The expression 'pig iron' covers pig iron which has not yet either been denatured or cast in foundry moulds. The term 'brute' serves to distinguish the crude product from semi-finished and finished products.

With regard to the conclusions which the applicant draws from the wording of Annex I and to its argument based on the terminology the defendant gives a detailed explanation of the reasons why they are not conclusive.

In reply to Point 2 *(Does the applicant undertaking fall outside the jurisdiction of the ECSC by reason of the technical and economic structure of its works?)*

2 (a) *(The position of foundries engaged in pre-melt in the system of Annex I)*

According to reference No 4200 of Annex I, all undertakings which produce foundry pig iron fall within the concept of 'undertaking' contained in Article 80, whether that pig iron is cast directly into foundry moulds or not. But why, in these circumstances, are not all pig iron foundries undertakings within the meaning given to that word in the Treaty, inasmuch as they prepare their own molten pig iron?

As far as production of *steel* for castings is concerned, the Treaty has drawn a clear distinction which it does not make in the case of pig iron foundries. Nevertheless, the provision inserted in paragraph (b) of Annex II presupposes that some pig iron foundries at least are outside the jurisdiction of the Community. This being the case, the defendant has from the very beginning regarded undertakings which *produce* pig iron, but not those which merely *re-melt it,* as 'undertakings' within the meaning of Article 80.

The reasons why the defendant has not made integrated steel foundries subject to the equalization of ferrous scrap will be given when the second complaint is discussed.

2 (b) *(Classification of the products in question as iron and steel products)*

The defendant does not deny that the production of molten steel for casting is steel

production. On the contrary, that principle is confirmed by Annex I, which creates exceptions only with regard to small and medium-sized independent foundries.

2 (c) *(Comparison between foundries engaged in pre-melt and those engaged in melt)*

Foundries engaged in melt have always been regarded as not being engaged in an activity of the iron and steel industry proper; the authority for this view may moreover be paragraph (b) of Annex II, which assumes that foundries using cast iron scrap do not come under the Treaty. Cast iron scrap is in fact the typical raw material of foundries engaged in melt. Even if it was thought that the activity of remelting pig iron was to be regarded as similar to production – and it is doubtful whether it is, – paragraph (b) of Annex II would have to be understood as an exception which is to be strictly interpreted. On the other hand, foundries engaged in pre-melt engage in an activity comparable to that of the iron and steel industry. The applicant's price-lists show, moreover, that it also offers foundry pig iron for sale.

It is true that the Treaty does not attach importance *expressis verbis* to the plant used. But it is nevertheless significant that the authors believed that they must exclude expressly small and medium-sized independent steel foundries.

Second complaint: infringement of Articles 2, 3, 4 and 5 of the Treaty and of general Community legal principles

A – *The applicant's arguments*

1. General arguments

The applicant rests its case in particular on the fact that by Article 10(d) of Decision No 2/57 the High Authority exempted integrated steel foundries from equalization because they have to face up to the competition of independent steel foundries which, since they fall outside the ECSC, do not have to pay the equalization. The applicant, without challenging the merits of this exemption, takes the view that, even if its production operations fall within the Treaty, the defendant for similar reasons should have exempted it as well.

By refusing to do so the defendant has committed a flagrant breach of, *inter alia*, Articles 3(b), 4 and 5 of the Treaty; it has discriminated and imposed a special charge which is prohibited and thereby adversely affected the competitive situation of the applicant in an unusual and unlawful manner.

In fact the applicant's products come up against competition from foundries engaged in melt, from manufacturers of tubes of asbestos cement, concrete and plastic, from steel foundries and from foundries in third countries.

Those competitors are not liable to equalization, either because they are outside the jurisdiction of the ECSC or because they have been exempted by the defendant.

When the High Authority is called upon to evaluate competitive situations it must do so *in concreto* and not *in abstracto*. From this standpoint exception must be taken to the criterion applied for the purpose of granting or refusing exemption, namely that the plant, manufacturing processes and raw materials must be identical. This principle leads to discrimination, especially when the defendant refuses to acknowledge the similarity of the respective situations of different undertakings whose products compete with each other and which also use scrap.

The defendant cannot claim that it is not entitled to take account of the competition which the undertakings subject to its jurisdiction meet from undertakings outside the Treaty, except as provided for in Article 3(g). The defendant is not consistent, because it has, for example, protected integrated steel foundries against independent steel foundries without the latter's having been guilty of any 'unlawful act'.

The applicant points out in this connexion that Articles 3(b) and 4(b) do not restrict the category of consumers to undertakings as defined in Article 80.

Finally, the defendant could have granted the requested exemption without jeopardizing the equalization scheme. The applicant

knew that scrap purchased by foundries engaged in pre-melt amounted in 1956 to only 1% of all the scrap bought by Community undertakings. Therefore the basis for assessment of the equalization would have been amended only to a much smaller extent than resulted from the exemptions which were in fact granted.

2. *Specific arguments*

(a) Competition of foundries engaged in melt

The applicant does not accept the defendant's affirmation that the applicant is in a more advantageous situation than foundries engaged in melt and that the requested exemption would place it in a more favourable position compared with the latter.

In this connexion it points out in particular that:

The construction of a blast furnace requires more capital investment than the installation of a cupola furnace; consequently, the costs per metric ton of pig iron are higher in the case of foundries engaged in pre-melt and the latter are more vulnerable if prices fall.

Although it is true that when the common market was established foundries engaged in pre-melt had an advantage over foundries engaged in melt, that advantage was not artificial but was due to greater productivity; the advantage has in fact been reduced to a great extent or even brought to an end;

The advantage accruing to the applicant from using phosphoric ore from Lorraine – as opposed to the crude pig iron used by foundries engaged in melt – is not decisive: the process applied by the applicant is necessarily linked to the use of scrap, which is subject to equalization, as well as of expensive techniques and additives; moreover, foundries engaged in pre-melt do not have their own resources of scrap;

When the defendant compared the respective situations of foundries engaged in pre-melt and melt its requirements were stricter than those which it applied when granting exemption to integrated steel foundries: it now asks for a comprehensive analysis of the competitive situation. If this requirement is valid it should also have been applied to the other case.

(b) Competition from manufacturers of tubes of asbestos cement, concrete and plastic

Pig iron is dearer than, for example, asbestos cement; consequently, pig iron's share of the market in piping can only be reduced by an artificial increase in production costs. Moreover, this is what has happened since the introduction of the equalization scheme.

Competition from asbestos cement and so on, to which foundries engaged in pre-melt are exposed, represents a greater danger than the competition from independent steel foundries to which integrated steel foundries are exposed, at least during the period when there was a steel boom which caused a shortage of scrap.

(c) Competition from steel foundries

The applicant calls attention to the fact that its blast furnaces are smaller than those of steel industries which have an integrated steel foundry capacity. It cannot therefore derive any benefit, as the latter can, from any fall in production costs. Furthermore, the applicant's situation depends entirely on the economic situation on the market for castings.

It must be borne in mind that a metric ton of molten steel for castings in which the proportion of scrap may exceed 1000kg per metric ton of steel is not subject to equalization on the scrap used.

B – *The defendant's arguments*

In reply to Point 1 (*General arguments*)

The defendant denies that it had to grant the exemption applied for by the applicant; it rejects in their entirety the latter's grounds for complaint.

It asserts in its statement of defence that it is not empowered to protect undertakings against their competitors who are outside the jurisdiction of the Treaty, except under Article 3(g). Nevertheless, in its rejoinder it modifies this point of view to some extent: it

submits that, in general, it would be unreasonable to expect an equalization scheme not to alter the competitive situation of a category of undertakings and that it is merely necessary to insist that it is not operated in an arbitrary manner. As to the question of the circumstances in which the High Authority can or must intervene if disparities result from partial integration, the intention of the authors of the Treaty as expressed in the provisions of Article 67 must be ascertained (even though they only refer to the consequences of intervention by the States; examination of those provisions will show that only *appreciable repercussions* on competition are to be taken into account.

In the case of steel foundries the High Authority has not merely recorded that 'at a given time raw materials, processes and products are identical'; the fact is that 'in one particular case it deduced from that fact that production costs were comparable and that there was consequently an appreciable repercussion on the competitive situation.

With regard to the scope of Article 3(g), the defendant points out in its rejoinder that this paragraph represents one of the objectives set out in Article 3 which the High Authority must harmonize.

As to the applicant's situation, the defendant partly admits the existence of the competition claimed. But it states that the applicant's situation has not been affected more than could reasonably be expected. Preferential situations can only be justified by conclusive reasons. The financial arrangements could not function properly if the High Authority had to take every individual interest into account; the defendant mentions by way of example other industries which it would also have to exempt if it exempted the applicant.

In reply to Point 2 (*Special arguments*)

2 (a) (*Competition from foundries engaged in melt*)

The defendant denies that the charge which the applicant has to bear has appreciable repercussions on its competitive position compared with foundries engaged in melt. In fact, to the extent to which foundries engaged in melt use new pig iron, they are subject indirectly to equalization; therefore the exemption of foundries engaged in premelt would arbitrarily favour the latter. To the extent to which foundries engaged in melt use steel scrap and cast iron scrap they consume raw materials which are much more expensive than those utilized by the applicant; moreover, the applicant does not have to bear the costs of the second smelting process.

Finally, it emerges from the applicant's explanations that foundries engaged in melt are principally concerned with castings other than piping, whereas the applicant's production consists mainly of the latter. As for other castings, the application reveals that to all intents and purposes the two types of foundry do not compete.

2 (b) (*Competition from manufacturers of tubes of asbestos cement etc.*)

The defendant admits that the applicant's products may be exposed to competition from products made of asbestos cement and so on. However, in the absence of the equalization scheme the cost of scrap would be still higher and the situation of the applicant *vis-à-vis* its competitors even more difficult. In relation to manufacturers of piping made from substitute materials equalization is not therefore a burden.

2 (c) (*Competition from steel foundries*)

The applicant has not supplied any particulars concerning its statement that steel castings are in competition with its products. In these circumstances the defendant denies that these allegations are in any way well founded.

IV—Procedure

The procedure followed the normal course: Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry; it nevertheless invited the parties to give,

either in writing or when submitting their oral observations, more detailed explanations on a certain number of points; the parties gave these explanations.

In addition, on 7 October 1959, the Court visited the works at Pont-à-Mousson attended by representatives of the two parties and their agents and advocates.

Grounds of judgment

Admissibility

The defendant doubts whether the letter at issue is a decision; in particular it calls attention to the fact that it is not 'an enforceable decision, such as is usually adopted following a refusal to discharge a pecuniary obligation'; nevertheless, it leaves this question of admissibility 'to be determined by the Court'.

In the applicant's view there can be no doubt that the letter at issue stating that the applicant has to pay amounts which in its opinion it does not owe is a decision.

The disputed letter was in reply to a letter of the applicant company of 19 April 1957 to the High Authority in which the applicant requested the latter to exempt from the levy relating to the equalization of ferrous scrap the molten pig iron which it produces in its blast furnaces and immediately transforms into pig iron castings. The revelant passage of the disputed letter is the sentence which reads as follows:

> 'Consequently, the High Authority does not see its way to granting your request for exemption from the scrap equalization levy.'

As the abovementioned correspondence shows, by that statement the defendant resolved the question whether, in principle, the applicant has to pay the levy and, if so, whether it can or must be exempted from payment.

By so doing the defendant intended to settle a point of law: it expressly affirmed the existence of a duty on the part of the applicant which the latter had disputed.

Further, the Association of Scrap Consumers in its letter to the applicant of 12 February 1959 referred to the letter at issue and notified the applicant that it had been instructed by the High Authority to demand payment from it of the arrears of contributions.

This fact confirms the applicant's argument that the letter at issue was followed by the 'first step in execution proceedings' and shows that the High Authority itself regarded that letter as a decision.

For these reasons the letter at issue is a decision within the meaning of Article 33 of the ECSC Treaty.

This decision is individual in character and concerns the applicant.

Therefore the application is admissible.

Substance

First complaint: infringement of Articles 53, 80 and 81 and also of Annexes I and II to the ECSC Treaty.

The applicant submits in the first place that at its works at Pont-à-Mousson the scrap used in the making of molten pig iron intended for the production of pre-melt castings must immediately be exempted from equalization because, in so far as the applicant prepares such pig iron, it is not an undertaking within the meaning of Articles 80 and 81 of the Treaty.

It is true that under the abovementioned provisions only undertakings engaged in production in the coal or the steel industry are governed by the rules of the Treaty and that the expressions 'coal' and 'steel' only cover those products listed in Annex I, according to paragraph (1) of the said Annex.

It follows, as far as the financial arrangements provided for in Article 53 of the Treaty are concerned, that an undertaking can be subject thereto only in so far as it is engaged in similar production.

Moreover, the general decisions of the High Authority making similar arrangements are also to be interpreted in this way since, for the purposes of determining the number of persons to whom those decisions are addressed, they simply refer to the concept of an undertaking as defined in Article 80 of the Treaty (cf. for example, Article 2 of Decision No 2/57 of 26 January 1957 – *Journal Officiel* of 28 January 1957, pp. 62-57).

It is clear from Note 5 to the abovementioned Annex that the finished products made by the applicant in its works at Pont-à-Mousson, that is to say iron castings, are outside the jurisdiction of the Treaty, which the defendant does not deny.

Therefore the problem is confined to the question whether the applicant is nevertheless an undertaking within the meaning of Article 80 of the Treaty, having regard to the fact that for the production of the said castings it uses molten pig iron which it produces in its own blast furnaces.

(a) In this connexion it is appropriate to consider in the first place whether the pig iron in question is one of the products included within the concept 'Fonte de fonderie et autres fontes brutes' ('Foundry and other pig iron') under reference No 4200 of Annex I.

The applicant answers this question in the negative and asserts that 'fonte brute' ('pig iron') is solely intended to describe solid pig iron; the defendant does not accept this assertion.

It is an established fact that the word 'brut', both in its ordinary meaning and more particularly in its meaning in iron and steel terminology, is intended to denote a material in the crude state which has not, in other words, yet undergone any transformation.

Although it is true that the process for producing pig iron in a blast furnace, in particular from iron ores and coke, involves the primary transformation of those raw materials, it is equally true that it is only after the completion of that process that the material commonly known as 'pig iron' appears for the first time. Pig iron in the state in which it leaves the blast furnace and as long as it has not undergone further transformation other than simple solidification must therefore be 'crude' pig iron.

This finding is confirmed by the fact that in the language used in the trade 'fonte brute' ('pig iron') is in particular contrasted with 'fonte moulée' ('cast iron'), that is to say with pig iron as the material out of which those products called 'moulages de fonte' ('iron castings') are made.

The foregoing shows that the word 'brut' is intended to indicate a distinction quite different from that which can be drawn can be between molten and solid material. In the case of pig iron it includes the material in the state in which it leaves the blast furnace, whether it has solidified or not.

Therefore the applicant's argument that the molten pig iron which it produces in its blast furnaces does not belong to the category of 'Foundry and other pig iron' must be rejected.

(b) However, it is still necessary to determine the question whether, in relation to the pig iron at issue, the applicant is an undertaking 'engaged in production' within the meaning of Article 80 of the ECSC Treaty, in other words, therefore, whether this pig iron is a 'product' within the meaning of paragraph (1) of Annex I.

The answer to this question has to be considered as the said pig iron usually exists only for a short period during the process of producing iron castings, the finished

products to the manufacture of which the applicant's production programme is geared and which are themselves outside the jurisdiction of the Community.

If the word 'production' is given its ordinary meaning, the said pig iron is unquestionably 'produced' by the applicant.

The only question therefore is whether the authors of the Treaty intended to give the word 'production' a more limited application in law.

1. Such a limitation could first of all stem from the argument that under the system of the Treaty 'production' within the meaning of the Treaty and in particular of Article 80 consists solely in the manufacture of goods for marketing.

At first sight this argument appears to be supported by Article 1 of the Treaty, which states that the Community is 'founded upon a common market'. In fact the only conclusion which it appears possible to draw from this is that, in order to delimit the jurisdiction of the Community the Treaty applies only to products which are in a fit state to be marketed.

Nevertheless the general plan of Annex I shows that the abovementioned argument would be in contradiction with the Treaty.

The fact is that that Annex includes a very large number of products – for example 'Pig iron for steelmaking', 'Liquid steel cast or not cast into ingots', 'Hot finished products of . . . steel', and so on—which are known to be frequently, if not normally, first manufactured and then transformed, in factories or works which are separate but disposed of under the same business name, into products which are technically or economically different and which are not therefore offered for sale on the market.

Accordingly the argument in question would lead to the exclusion from the jurisdiction of the Treaty of a large if not preponderant part of the production of the goods listed in Annex I, which would clearly be contrary to the intention of the authors of those provisions.

Furthermore, the said argument would mean that the question whether a product was a Community product or not would depend upon the legal structure of the producer undertaking; in particular, the production of large integrated factories would thereby be excluded from the jurisdiction of the ECSC, which would conflict with the letter of the Treaty (cf. by way of example the first paragraph of Note 3 to Annex I) as well as its spirit and objective.

2. It is nevertheless appropriate to consider whether there is not another reason why

the concept 'engaged in production' contained in Article 80 does not exclude the production of the pig iron in question, namely that the said pig iron is not sent to factories other than that where it is produced, but is produced and transformed in works which together make up an integrated technical unit.

In this connexion it may be assumed that the economic and technical link between the applicant's blast furnaces, on the one hand, and its foundries, on the other, is extremely close, especially as the molten pig iron is produced with due regard to the special requirements of the foundry.

The applicant's argument that the close proximity of these different works is not the result of a more or less accidental juxtaposition, which is temporary and likely to dissolve at any time, but represents the characteristic structure of the Pont-à-Mousson works from the very beginning, may also be conceded.

Nevertheless, these considerations alone are not sufficient to settle the problem at issue.

For this purpose it is above all necessary to take into consideration the fact that the authors of Annex I included in the list of products covered by the ECSC the category 'Foundry and other pig iron', without excluding from the jurisdiction of the Treaty foundries engaged in pre-melt, whereas other industries were expressly excluded.

There appears, therefore, to be no doubt that the authors of the said Annex I intended foundries engaged in pre-melt to be subject to the system of the Treaty in so far as they produce molten foundry pig iron, since the latter, as has been determined above, belongs to the category of pig iron referred to under reference No 4200 of Annex I.

Although such a result implies that an intermediate and even in a way short-lived product is governed by Community law, it does not appear to be in any way contrary to common sense or to the basic principles of the Treaty.

It must in fact be borne in mind that, although the authors of the Treaty adopted the criterion of production for the purpose of delimiting the latter's field of application *ratione personae,* they were none the less aware of the fact that, to a great extent, the producers of one Community product are at one and the same time consumers of another product, steel producers for instance being at the same time consumers of coal.

The advantage of this dual role occupied by certain producers was that they could

also be effectively subjected to the rules relating to their function as consumers, which remedied to a certain extent the defects of partial integration.

Finally, there is no evidence that molten pig iron produced in the applicant's blast furnaces can under no circumstance be used for purposes other than its immediate transformation into pig iron castings. It is always possible to allow it to become solidified and to put it on the market in the form of lumps or blocks, or even to sell it in its molten state. In fact the applicant uses the surplus production of molten pig iron in its own foundry engaged in melt and it acknowledges that it is liable to pay the equalization contribution on this part of its production. Therefore the molten pig iron in question may be regarded as a separate product without its being necessary to effect an arbitrary and purely notional distinction within a sequence of production operations which in themselves form a single process.

For all these reasons there are grounds for the finding that the applicant, in its capacity as a producer of pig iron, is an undertaking engaged in production in the steel industry in accordance with the combined provisions of Articles 80 and 81 of the Treaty and of Annex I thereto. The High Authority was therefore entitled to make it subject to the rules of a financial arrangement referred to in Article 53 such as the equalization scheme in question.

The applicant's first complaint is therefore unfounded.

Second complaint: infringement of Articles 2, 3, 4 and 5 of the Treaty and of the general principles of Community law.

The discrimination alleged, as well as the other complaints made by the applicant, do not stem from a decision of the High Authority which is individual in character but arise out of Decision No 2/57 adopted, as provided for in Article 53 of the Treaty, with the unanimous assent of the Council.

In these circumstances it is advisable to ascertain whether the High Authority, without contravening the said decision and without exceeding its own powers, could grant the exemption which the applicant requested, in view of the fact that Decision No 2/57 had provided for exemption only in the case of integrated steel foundries and not in that of foundries engaged in pre-melt.

This question – which relates both to the difference in the scope and effect of general decisions, on the one hand, and subsequent individual implementing decisions, on the other, and also to the separation between the powers vested in the High Authority alone and those vested jointly in the High Authority and the Council – must be considered by the Court on its own initiative, even though it has not been raised by the defendant.

In its second submission, the applicant could have attacked the individual decision affecting it adopted by the High Authority only by pleading that Decision No 2/57 was illegal.

In fact it is general Decision No 2/57, rather than the individual decision, which the applicant could claim had infringed its rights by ostensibly discriminating against it in comparison with competing industries, especially integrated steel foundries, or else by creating a financial charge adversely affecting it.

The applicant has not expressly submitted that Decision No 2/57 is illegal and it could only with difficulty be accepted that such a complaint has been made by implication.

Nevertheless, it appears to be inappropriate to allow doubt as to the legality of Decision No 2/57 to persist, in so far as the answer to this question is relevant to these proceedings.

For this reason the Court is of the opinion that in any event the merits of the second submission must be considered.

The applicant claims that the defendant infringed Articles 2, 3 (in particular paragraph (b)), 4 and 5 of the Treaty and also the general principles of Community law and, more particularly, that it discriminated against it and imposed on it a prohibited special charge and that it adversely affected its competitive position in an unusual and illegal manner, all these complaints being derived from the fact that the defendant did not exempt it from equalization whereas its competitors are exempt.

The applicant submits that it competes with foundries engaged in melt, with manufacturers of tubes of asbestos cement, concrete and plastic, with steel foundries (integrated or independent), to the extent to which they produce steel castings, and, finally, with foundries in third countries. The defendant accepts these facts, with the exception of the competition from steel foundries, which it disputes.

It is common ground that none of these alleged competitors have to pay equalization, the integrated steel foundries because they were exempted by Article 10 (d) of Decision No 2/57 and the remaining undertakings because they are outside the jurisdiction of the Community.

1. *The complaints as to discrimination and infringement of the right of all consumers to equal access to sources of production*

The applicant claims that the defendant practised discrimination, which is for-

bidden by the Treaty, and failed to fulfil the obligation specified in Article 3(b) of the Treaty, namely to 'ensure that all comparable placed consumers in the common market have equal access to the sources of production'.

Both these complaints – the second of which also refers to discrimination in the broadest sense – have the same effect. In each case the applicant accuses the defendant of not having placed it in the same situation as its competitors which do not have to pay the equalization contribution and of having thus made access to scrap a greater financial burden for it than for its competitors.

Discrimination consisting of the dissimilar treatment of comparable situations presupposes that there is a duty to treat all interested parties on the same footing and the possibility of so doing. In this case the High Authority could only discriminate in the manner alleged by the applicant if it was empowered and bound either to make the latter's competitors subject to equalization or to exempt the applicant therefrom.

The first of those hypotheses must be ruled out immediately in so far as foundries engaged in melt, independent steel foundries, manufacturers of tubes of asbestos cement, concrete and plastic and foundries in third countries are concerned.

Such undertakings do not fall within the scope of the Treaty and the High Authority accordingly does not have the power to levy any charge on them.

Consequently, the first hypothesis may be examined only in relation to the question whether the High Authority should also have subjected integrated steel foundries to equalization.

It is clear from the applicant's statements that it has no intention of criticizing, even as an alternative submission, the legal basis of the exemption granted to integrated steel foundries. Consequently, the Court cannot review the legality of that exemption, without distorting the scope which the applicant intended its action to have.

In these circumstances the problem is simply whether the High Authority, because it had exempted integrated steel foundries, was bound also, in order to avoid discrimination, to exempt the applicant.

In order to answer this question it is unnecessary to consider whether the said exemption was lawful.

In fact, on the one hand, the fact that such exemption was illegal would not justify the grant of a similar exemption to foundries engaged in pre-melt.

On the other hand, the fact that the said exemption was lawful would not of itself make it obligatory to grant the applicant a similar exemption, since the latter's situation in relation to foundries engaged in melt is not comparable to that of integrated steel foundries in relation to independent steel foundries.

The High Authority justified exemption in the case of integrated steel foundries on the ground that the production plant and raw materials used by such foundries, on the one hand, and by independent steel foundries, on the other, are the same. There is no such similarity between the applicant, which is both a producer and consumer of pig iron, and foundries engaged in melt, which do not produce pig iron but merely consume it.

For this reason foundries engaged in melt are indirectly subject to equalization in so far as they use pig iron made from scrap on which equalization has had to be paid. Consequently, to exempt the applicant, far from merely placing it on the same footing as foundries engaged in melt, would give it an advantage compared with the latter, since it would enable the applicant to produce castings the production costs of which would not bear the burden of equalization in any way whatsoever.

On the other hand, a similar situation does not exist in the relationship between integrated and independent steel foundries.

It is clear from the foregoing that the complaint as to discrimination is unfounded.

2. *The complaint as to the adverse effect on competition*

The third indent of the second paragraph of Article 5 of the ECSC Treaty provides that the Community must 'ensure the establishment, maintenance and observance of normal competitive conditions and exert direct influence upon production or upon the market only when circumstances so require'.

Further, Article 3 provides, *in initio*, that the institutions of the Community are to exercise their powers only 'in the common interest'.

As the Court confirmed in its Judgment in Case 15/57 (*Compagnie des Hauts Fourneaux de Chasse* v *High Authority of the European Coal and Steel Community* Rec. Vol. IV, 1958, p.190) that provision forbids the High Authority to disregard the specific interests of those subject to its jurisdiction and to act with such inflexibility that those interests are adversely affected to an appreciably greater extent than might reasonably be expected.

If these principles are applied in the light of Article 5 to the effects which intervention by the High Authority may have on the competitive position of those concerned

they indicate that the High Authority would exceed the limits of its powers if it adversely affected that situation more seriously than was established to be necessary after a thorough examination of the interests involved or, in any event, if it had a substantial adverse effect on that position; but, on the other hand, as the Court also held in the abovementioned judgment (loc. cit., p. 187), to claim that the competitive position of an undertaking must not be changed at all by an intervention by the High Authority would amount to 'an unreasonable stipulation'.

(a) Having regard to the abovementioned principles it is appropriate to consider first of all whether, as a result of the decision at issue and the general decisions upon which it is based, the applicant's competitive position has been adversely affected to a substantial degree. This would only be the case if it were established that by reason of these decisions, the effects of which the applicant has been in a position to assess for several years, the competitive position of the applicant had in fact substantially worsened, for example, if the total volume of its sales had noticeably fallen; but, on the other hand, it is not sufficient that, following the intervention of the High Authority, certain distortions of the respective cost prices of the applicant and its competitors had occurred.

The applicant, in order to persuade the Court to acknowledge that its competitive position has been adversely affected to a substantial degree in accordance with the preceding arguments, merely submitted and offered to prove in its application that the share of 'pig iron' in the piping market – compared with that of asbestos cement – 'has in fact fallen since the introduction of equalization'.

Under Article 29(3) of the Rules of Procedure of the Court of Justice of the ECSC, which applies in this case, the original application must state 'the facts and the submissions . . . and the nature of the evidence founded upon in support of the application'.

It follows that in this case, in order to prove the serious nature of the assertion in question, the application should at least have contained the basic particulars, together with figures, showing the extent to which the share of pig iron in the piping market has fallen and that of asbestos cement has increased and showing the casual link between this alleged change in the market situation and the introduction of equalization.

However, the applicant did not do so but merely made a short and quite general statement.

Therefore neither the claim nor the evidence that the decisions at issue adversely affected the applicant's competitive position to a substantial degree are sufficient in law.

(b) It is also appropriate to consider whether the measures at issue do not nevertheless infringe the Treaty because they in fact had a more serious effect on the competitive position of the applicant than necessary having regard to the aim and purpose of the said measures.

The answer to this question could be in the affirmative only if it were to be shown that the High Authority could have exempted the applicant from equalization without jeopardizing the functioning of that scheme.

Even if it were true that the exemption of the applicant, considered in isolation, would not seriously interfere with the equalization arrangements, having regard to the very small amount of scrap which it consumes, this fact would not be conclusive. In effect, exemption of the applicant would inevitably lead not only to the exemption of all other foundries in the Community engaged in pre-melt but also to valid applications for exemption by other undertakings which consume only a relatively small amount of scrap. As a result the proper functioning of the equalization scheme would be appreciably threatened.

Consequently, the measures at issue go no further than their aim and purpose require.

It is clear from the foregoing that the complaint as to the adverse effect on the competitive situation must be dismissed.

3. *The complaint as to a special charge*

The applicant also claims that the decision at issue rendered it liable to pay a prohibited special charge.

However, the charge to which the applicant objects can in no circumstance be regarded as 'special'. On the contrary, it is of a general nature because in principle it applies to all Community undertakings consuming ferrous scrap. This complaint is therefore unfounded.

The effect of all the foregoing considerations is that the applicant's second submission is unfounded.

Costs

Under Article 60(1) of the Rules of Procedure of the Court of Justice of the European Coal and Steel Community the unsuccessful party must be ordered to pay the costs.

In this case the applicant has failed on all the heads of its application.

It must therefore bear the costs of the proceedings.

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate General;
Having regard to Articles 3, 4, 5, 15, 31, 33, 53, 80 and 81 of the Treaty establishing the European Coal and Steel Community and also to Annex I to the said Treaty;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Coal and Steel Community, especially Articles 29(3) and 60(1),

THE COURT

hereby:

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

2. **Orders the applicant to bear the costs.**

Donner Delvaux Rossi

Riese Rueff Hammes Catalano

Delivered in open court in Luxembourg on 17 December 1959.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE GENERAL LAGRANGE[1]

Mr President,
Members of the Court,

In this case you have to contend for the first time with Annex I to the Treaty which relates to the definition of the expressions 'coal' and 'steel'. It is a real problem of delimitation which is submitted to you, the legal and economic aspects of which are to a great extent permeated if not dominated by highly technical considerations.

1 – Translated from the French.