THE COURT

hereby

Declares the present application admissible and:

1. **Dismisses the application as unfounded;**
2. **Orders the applicant to bear the costs of the proceedings.**

Hammes Donner Lecourt

Trabucchi Monaco

Delivered in open court in Luxembourg on 13 July 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 24 JUNE 1965[1]

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1 — Translated from the German.

Mr President,
Members of the Court,

During the course of the liquidation of the Brussels equalization scheme, the present applicant, like other undertakings consuming scrap, received a letter from the High Authority dated 8 April 1963 with a provisional statement of account, made in accordance with General Decision No 7/63, on amounts owing to and by the Equalization Fund as at 31 May 1963. To be more precise, the statement gave the amounts of contributions payable by the applicant, the amounts actually paid to the Equalization Fund and, conversely, those paid out by the Fund to the applicant. These figures result in an initial debit balance of FF 1 624 471.27. Furthermore the statement of account covers the contributions required in order to service the payment of interest and also the interest credited to the applicant, a calculation which resulted in a second debit balance of FF 476 997.65

The first of these sums, namely the principal amount, was paid by the applicant on 27 February 1964. However it questioned the legality of the second balance, that is to say, its obligation to pay the interest.

On 22 July 1964 the High Authority adopted a decision formally calling upon the applicant to pay the interest, now calculated as FF 476 963.47.

It is primarily this decision which forms the subject matter of the present proceedings. The application is directed secondarily, by means of the objection of illegality, against General Decisions Nos 21/58, 19/60, 20/60, 7/61 and 7/63 at least in so far as they govern questions of interest (interest debited and credited).

The applicant contests these measures with a whole range of arguments. To the extent that these arguments are about the system for crediting interest under Decision No 7/61 they are in their essential points familiar to us from Case 37/64, and can now only raise the question whether any new grounds exist which would demand a different conclusion.

However these arguments also raise new questions concerning the system of crediting interest. In examining the arguments it is not easy to adopt a method which is clear and which does not involve repetition.

Perhaps the most sensible way of tackling the matter is to deal first of all with the question raised by the applicant whether a system involving interest is at all indispensable to the equalization scheme. I shall then be able to examine the arguments which the applicant puts forward, under the headings of 'misuse of powers', 'violation of general principles of law' and 'infringement of the prohibition of discrimination', with regard to the legality of the system under Decision No 7/61 governing interest, and to the provisions relating to the crediting of interest. Finally, I shall then go over questions of form and of procedure, such as the alleged breach of the duty to give reasons for the decision, and the lack of any participation by the Council of Ministers in the adoption of Decision No 7/61.

Legal consideration

1. Necessity for a system of interest within the ferrous scrap equalization scheme

I frankly confess my astonishment at seeing this question raised here, not because it appears in the guise of a complaint that there was a failure to give reasons for the decision, which is certainly not the logical place for it, but for reasons of substance.

In this connexion I shall first of all remind you of the *origins* of the equalization scheme. It was brought into existence in 1953 by a number of

consumers of ferrous scrap being undertakings in the six Member States. They did so with the approval of the High Authority in accordance with the provisions governing cartels. They were traders within the meaning of commercial law. In legal form they were commercial companies 'not having as an object the acquisition of gain' ('sans but lucratif') under Belgian law, and they were entered in the Commercial Register. In accordance with the objects stated in their documents of constitution, these undertakings had authority to carry out very expensive commercial and financial operations appertaining to the purchase of ferrous scrap and to the equalization of prices. It seems to me that when the relevant rules of commercial law on this subject are looked at (see commercial usage on current account in French law; and see paragraph 353 of the German Commercial Code), one point is obvious. This is that, for the purposes of completing and accounting for transactions in the common interest, these undertakings could not do without a system of accounting showing the credit and debit entries in respect of each undertaking in relation to the other participants or without a system whereby interest was credited and debited for each accounting period.

When the equalization of ferrous scrap became compulsory in 1954 for all the undertakings consuming scrap in the Community and, as such, had to be administered, under the responsibility of the High Authority, by the appropriate bodies at Brussels which are well-known, this particular feature was not altered in any way. It still involved achieving a rough equality between the undertakings consuming ferrous scrap, for each monthly equalization period, regardless of whether the said undertakings used ferrous scrap imported at a high price as input for their production, or whether they used scrap from within the Community which was less expensive. This goal had to be achieved without the equalization scheme's having any capital of its own at its disposal, and without the High Authority's appearing, strictly speaking, as creditor or debtor. Such a scheme would certainly have worked perfectly well if precise information on all essential transactions could have been obtained promptly, and if the financial equalization could really have been carried out in its entirety not long afterwards.

In fact the situation was different in practice for manifold reasons which have been given to us on several occasions. What happened instead was that over the years it became the practice to draw up provisional statements of accounts on the basis of which undertakings subject to the equalization levy made available to the equalization scheme sums which, as it later turned out, should have been paid by other undertakings. In other cases these statements of account were not paid at all, and this meant that those undertakings which were beneficiaries under the equalization scheme did not receive full satisfaction. In these circumstances the liquidation of the scheme which followed at a later date and which was intended to place the undertakings consuming ferrous scrap on an equal footing called on the one hand for the introduction of a system crediting interest to the undertakings benefiting from the equalization scheme, and also to the undertakings which had mistakenly paid too much, and on the other hand for the recognition of the necessity, so far as the needs of the equalization scheme were concerned, to deprive those debtor undertakings which had not made their payments within due time of the unjustified financial advantage from which they had thus benefited.

Thus the nature of the facts submitted to our examination in this case justify the application of a system of interest.

In my opinion it is easy to show that none of the arguments raised by the applicant against this finding can succeed.

This is true of its argument that a satisfactory solution is possible if the High Authority were to look to those responsible for the delays occurring in respect of the equalization levy on ferrous scrap, for example by instituting civil and penal proceedings (Decisions Nos 20/58 and 7/63) against the undertakings which have benefited fraudulently or otherwise wrongfully from equalization payments. It is clear that the High Authority has made considerable use of this possibility (see its reports on the functioning of the equalization of ferrous scrap), and it continues to do so, with a view to recovering overpayments *including* interest running from the day when payment was due to be made. But it is equally clear that these measures deal with only some of the factors which have disturbed the equalization scheme and that they cannot succeed in achieving a complete equalization, especially where those who received payments acted in good faith.

As for the possibility of inflicting fines on undertakings which have returned incorrect declarations, it is true that the High Authority must also make use of this possibility under the equalization scheme for ferrous scrap. Nevertheless none of us should forget that it cannot balance the books of the equalization levy system with the help of the sums thus obtained, because the funds are paid into its general budget.

Finally it seems beyond doubt that the complaint that there was a wrongful act or omission cannot be made against the High Authority itself in every case where the functioning of the equalization scheme was disturbed (as a result of vagueness in the texts of general decisions, or of administrative errors when they were applied, such as the improper exemption of group scrap, or because of inadequate checks), and that it is therefore not possible to require it to fill the gaps in the equalization system with the help of its general budget. The case-law on the subject has already become clear in respect of a number of situations (see the questions relating to the exemption of group scrap or insufficient verification of the origin of ferrous scrap).

And so I stand by my view that the equalization scheme for ferrous scrap cannot work without a system of interest, given that it is necessary to bridge the gap between the time when the ferrous scrap is consumed, and the date when equalization contributions are paid and when they are allocated to the beneficiaries.

2. What is the system for charging interest which is the best suited to the needs of the ferrous scrap equalization scheme?

We remember from the statement of facts in this and in other cases that by virtue of a resolution of the Board of the Equalization Fund in 1955, which was subsequently renewed until the High Authority took over the administration of the equalization scheme, interest on overdue payments was required from those undertakings subject to the equalization scheme which had not discharged their financial obligations after having been called upon to do so by the Equalization Fund. When the High Authority assumed responsibility for the management of the scheme in 1958, it decreed that in respect of those accounting periods for which it fixed the rates of contribution itself, interest on overdue payments would become due upon the expiry of a period of 25 days running from the date of publication of the general decisions fixing the rates of contribution. The payment of interest to the

creditors of the equalization scheme was provided for, beginning with Decision No 21/58.

Perhaps it was possible at the beginning to take the view that this way of dealing with the matter was sufficient. At all events, contrary to what the applicant wishes, there is no reason in this case for declaring this system to be indirectly illegal in so far as it relates to interest charged to debtor undertakings. This is not only because it is obvious that the applicant was never called upon to pay interest under this system, but also and mainly because the original system was expressly dissolved by Decision No 7/61 and replaced by a new one.

The system of interest under Decision No 7/61, which is applicable for as long as the equalization scheme remains in force, is substantially as follows. Each undertaking which owes contributions is credited with interest as from the date when it actually makes its payment (the procedure is analogous to notional dates of payment in banking practice) and the sums necessary to pay this interest (and also other credited interest) is charged upon the undertakings subject to the scheme in proportion to their consumption of ferrous scrap. This leads, in the case of debtor undertakings which pay their contributions in time, to a virtually exact compensation between their contributions to interest and the interest credited to them, whereas those which are late in making their payments have to contribute a larger amount to the servicing of interest than the amount credited to them by way of interest on their paid contributions. And so, in its effects, the system is really one in which outstanding interest is paid off (Fälligkeitszinsen). In my opinion, the examples given by the High Authority leave no room for doubt on this point. If necessary an expert's report made by a mathematician could show that their submission is correct.

As I emphasized in Case 37/64, it seems to me first that such a system is fundamently more suited than is a system whereby interest is charged on overdue contributions to the sphere of public law to which the ferrous scrap equalization scheme belongs, in which periodic increases are applied on objective principles and in which the legal consequences follow automatically. Furthermore it is undeniably the only system capable of satisfactorily ironing out the anomalies which inevitably arise in a system whereby interest is charged on overdue payments. It is easy to see that at least until 1958, that is to say, during a period when no liability for interest on overdue contributions arose until after the Fund had made a demand for payment and unless the undertakings were responsible for the delay in paying their contributions, it was in many cases impossible to demand payment of interest because of a failure to make declarations of ferrous scrap consumption when, therefore, no demands for payment were issued. Other cases arose when, through nobody's fault, the equalization contributions had to be rectified. If it was desired to spare those who benefited under the equalization scheme, that is, those in credit under it, from the consequences resulting to them of a system whereby interest was charged on overdue contributions (and this was necessary, in order not to cause discrimination among any of the undertakings consuming ferrous scrap), the only solution was to iron out the anomalies, which the system of charging interest on overdue contributions could not eliminate, by means of a general levy spread out amongst all the undertakings consuming ferrous scrap. This necessarily meant that a double burden fell on those undertakings which paid in good time. It is thus on the basis of the principle of equality of treatment (in conjunction, possibly, with the need for administrative simplification, which the applicant rightly emphasizes), that the rules on interest under Decision No

7/61 seem on the whole the most suited to the equalization scheme, whereas the suggestion made by the applicant that a distinction should be made according to the good or bad faith of the undertakings in arrears with their contributions would inevitably lead to discrimination because of the objective difficulties under the equalization scheme for ferrous scrap.

3. Notwithstanding this finding of principle, I shall nevertheless examine in detail the criticisms made by the applicant to see if they are justified

(a) The complaint which I shall take first presents but few difficulties. It is that, in introducing in Decision No 7/61 rules on interest similar to those applied by banks, the High Authority infringed Article 51 of the Treaty, which forbids it to engage in banking operations. This argument could be rejected simply because it was advanced for the first time during the oral procedure. Furthermore it would not appear to stand up to impartial examination. Looked at correctly, the purpose of Article 51 (4) of the Treaty is first to ensure that existing banking concerns take part in the High Authority's financial operations, and secondly to protect the High Authority, as regards these activities, from the responsibility which attaches to a bank. On the other hand Article 51 does not forbid the High Authority to apply a system of interest, as is customary in dealings between traders and in particular between banks, to the reciprocal financial obligations administered by it appertaining to undertakings consuming ferrous scrap, if this system is the only means of ensuring that prices of ferrous scrap will be correctly and completely equalized without the High Authority making gains or losses.

(b) The second observation relates to Article 5 of Decision No 7/61, according to which sums paid by way of interest on overdue contributions are to be treated as payments on account of the amount due by way of principal in respect of contributions. The applicant thinks that it can deduce from this provision that the old system of interest on overdue contributions has been retained by implication and that interest on overdue contributions owing by certain undertakings has to be shared out as a charge amongst all of the contributor undertakings; the further an undertaking has fallen behind in paying its contribution, the smaller the contributions which it pays thereafter, and the larger are the sums payable by its competitors.

However this deduction is based on an interpretation of Decision No 7/61 which is obviously mistaken. It was realized that the provision in Article 5 was necessary precisely because it was intended that the old system of interest was to be *entirely replaced*. If it was intended to prevent undertakings which had already paid interest on overdue payments from being charged twice, it was necessary to close the old interest accounts. Instead of proceeding to return the interest on overdue contributions to those who had paid it, the High Authority decided that this interest would be considered as payments on account of the contributions still owing under the new system. Nevertheless, as I must also stress, this was only to take place on an individual basis, which means as regards each separate undertaking and by way of separate accounts. It does not mean, as the applicant thinks it does, that the interest on overdue contributions which has been paid is included in its entirety in the statement of account of total contributions. Therefore, when the old account for interest on an overdue payment relating to one undertaking subject to the scheme is closed off,

this cannot have any harmful repercussions on the accounts of the other undertakings.

(c) Another argument used by the applicant is that according to the case-law of the Court the calculation of the basis of assessment to contribution under the ferrous scrap equalization scheme must be made on an objective basis. Yet, the applicant says, the system set up by Decision No 7/61 brings subjective elements into play. It depends on how promptly the contributor undertakings pay their contributions, how quickly the High Authority pays out the bonuses under the equalization scheme and how hard it tries to arrive at the final closure of the accounts.

In reply to this criticism I shall say first of all that the basis of assessment to contribution is always arrived at objectively, since the only decisive factors are the tonnages of ferrous scrap consumed during the various accounting periods. These tonnages are now known to within an immaterial margin of error.

As for the subjective elements mentioned, no system of interest can do without them entirely. However it can also be shown that in the end they cannot result in unjust consequences for the undertakings taking part in the equalization scheme.

Let us first of all consider the promptness of those owing contributions in making their payments, as this determines how much interest is to be credited under Decision No 7/61. In my opinion the date when an undertaking pays in its contribution only affects its own financial obligations, and does not affect the extent of financial obligations on the part of other undertakings, because the interest credited in the books of the High Authority as owing to the undertakings which owe contributions to the equalization scheme must be borne *pro rata* by these self-same undertakings.

As for the High Authority's diligence in completing the liquidation of the equalization scheme, I think it is appropriate to point out on how soon the *debtor undertakings* are able to pay. I would also point out that as regards this all the undertakings are in an identical situation, so that no question of discrimination can arise.

Moreover, a distinction must be drawn here. The date when the accounts are closed makes no difference as regards the interest credited under Decision No 7/61, that is to say the interest credited to debtor undertakings as from the date when they pay their contributions, because the interest contributed by and the interest credited to the individual undertakings as from the date of payment virtually cancel each other out. Thus the new system of interest only has retroactive effects, by which I mean for the period which has elapsed between the date when the contribution became payable and the date when it was paid.

As regards the creditors' interest (by which I mean the interest payable to undertakings in credit with the scheme) and interest to provide the bonuses awarded to particular undertakings (for saving scrap), the position is different. The longer the delay in closing the accounting period, the greater will be these amounts, and therefore the proportions of contributions required to provide them. However, since we are concerned with sums which rightly accrue to those in credit with the scheme as from each equalization month, and which conversely could be used by debtor undertakings since that time as money not of their own, it does not seem unjust to give the creditor undertakings an advantage by way of interest which the debtor undertakings seek to achieve by their delay in paying their contributions.

It follows that none of the subjective elements mentioned in fact causes any loss to the undertakings taking part in the equalization scheme.

(d) It would appear that there remains to be examined the question whether, as the applicant asserts, it is correct to speak of discrimination by reason of the fact that unexpected bonuses ('windfalls') were granted to certain undertakings, and equally unexpected supplementary contributions were charged to others.

The applicant sees such 'bonuses' in the interest paid to creditor undertakings with claims on the equalization scheme and for certain bonuses thereunder and in the special interest credited under Decision No 7/61. All these favoured undertakings, says the applicant, had worked out their prices in previous years and had closed off their books in these matters. Therefore they came to benefit from additional sums which they could use for investment, and for improving their conditions of production.

When we turn, first of all, to the credited interest, that is to say, the interest on bonuses, it must be acknowledged that prior to the issue of Decision No 21/58 no due date was expressly laid down in respect of bonuses, nor was there any such provision for the payment of interest credited.

However this factor does not strike me as conclusive. The crucial consideration on this point should be deduced from the nature of the equalization scheme itself.

If the purpose of the equalization scheme is to place buyers of ferrous scrap originating within the Community on the same footing as buyers of imported ferrous scrap, and indeed to do so in respect of each equalization month, then, if equalization bonuses are paid late, this result can only be achieved provided that interest is paid on the amount credited for a period corresponding to the delay.

The same goes for the bonuses at issue whose object, too, is to influence conditions of production during each equalization month. Therefore they should carry all the benefits of interest for the month in question.

Finally, as regards the interest specially credited under Decision No 7/61, I have already shown that this cannot be considered as a gift to the undertakings which owe contributions, because the latter are required to contribute towards the servicing of this interest themselves on the basis of their consumption of ferrous scrap.

(e) To sum up, I therefore find that none of the complaints raised under the headings of 'misuse of powers' and of 'violation of the principle prohibiting discrimination', is capable of making the application succeed.

4. Unlawful nature of the retroactive assessment in Decision No 7/61

As regards the complaint asserting that the retroactive effect of Decision No 7/61 is unlawful, it should be remembered first of all that this decision is not the first one to introduce a system of interest. Starting as far back as 1955 and 1958, systems of interest forming part of the equalization scheme have been applied to the undertakings subject to the scheme. Furthermore in this connexion I need do no more than refer to the reasoning which I put forward in Case 37/64. In it, I pointed out with examples from previous cases that the Court has in general reacted in a very liberal way to amendments to the details of the ferrous scrap equalization scheme, when those amendments did not consist in the introduction of something entirely new into the scheme, but simply consisted in finer adjustments to the principles which directly stem from the fundamental decisions. Now, this is just the position as regards the system of interest adopted by Decision No 7/61.

I shall add that, and this I also emphasize in Case 37/64, Decision No 7/61 is not only more in accordance with the purpose of the equalization scheme, but it also reduces the element of discrimination, when compared with the

system which was applied at the beginning. The real intention behind the said decision is to deprive certain undertakings participating in the equalization scheme of an unjustified advantage. This would be enough to satisfy the requirement, assuming that it applies to legislative measures, that retroactive amendments may only be made in cases where the system to be amended is illegal or unfair. As against what I have just stated, nothing the applicant has said in this case contains any argument which could justify another conclusion. Therefore the applicant cannot be right in his assertion that the retroactive assessment is illegal.

5. Failure to give reasons for the decision

I shall be equally brief in my remarks on the complaint that there was a failure to give reasons for Decision No 7/61. This is because the material arguments used in support of this proposition have already been studied in another context. Furthermore this complaint has already been discussed in detail during Case 37/64.

It is apparent from such study and discussion that the decision in question is accompanied by an adequate statement of the reasons which gave rise to it. Moreover in my opinion the statement conveys to the mind the basic idea behind the High Authority's thinking in introducing the new system of interest: this was that the advantages of paying the contributions late should be eliminated. The Court has in its case-law laid down the extent of the obligation to give reasons. It would be going beyond this extent to require a detailed answer to the question why satisfactory results could not be obtained under the old system: for example why the remedies and other possibilities already mentioned did not seem sufficient for ensuring that the scrap equalization scheme worked correctly, or to what extent some system other than the one chosen could not be taken into consideration.

Therefore the complaint that there was an infringement of an essential procedural requirement is shown to be invalid.

6. Failure to obtain the assent of the Council of Ministers

Finally let us look at the arguments which the applicant raises in support of its view that the assent of the Council of Ministers was necessary for the adoption of the contested system of interest.

In the originating application, the applicant has set out a detailed history of the development of the equalization scheme on the basis of a number of general decisions. Amongst all these decisions concerning the question of interest, it was only the Decision of 24 July 1958 (No 16/58) which was adopted with the assent of the Council of Ministers. But this decision was only in force for a few months and furthermore it only provided for the charging of *interest on overdue contributions*. Therefore, says the applicant, to rely later on this decision for the introduction of a system of interest which applies to the whole period during which the equalization scheme was in force is unjustified. Furthermore it should not be forgotten that the system of interest adopted by Decision No 7/61 results in the amassing of considerable extra funds. Thus it adds substantially to the equalization scheme by means of a second scheme. The applicant further argues that the previous cases decided by the Court relating to the different problems of the ferrous scrap equalization scheme confirm the correctness of the view that it is for the Community *legislature*, the Council of Ministers, to carry out such important amendments to the equalization scheme.

In order to deal with these arguments I shall refer, first of all, to the opinion

which I gave in Case 37/64. I refer in particular to my finding that an equalization scheme of the type which we are considering logically includes a system of interest. Therefore the assent of the Council of Ministers, which was given when the equalization scheme was instituted, also applied to the introduction of a system of interest. What is more, an examination of questions of substance shows that the system of interest provided for by Decision No 7/61 is in very close conformity with the principles of the equalization scheme as derived from the basic decisions, so that there was no necessity to obtain the assent of the Council when Decision No 7/61 was adopted.

In my opinion, none of the arguments advanced by the applicant succeeds in invalidating this view.

In particular I still cannot see how the fact that Decision No 16/58 (together with Decision No 18/58 which extended its validity) was taken with the assent of the Council of Ministers proves that this assent was considered essential for adopting Article 13, which governs interest on overdue payments. In my view the only reason why the High Authority had to obtain the assent of the Council of Ministers was that the purpose of this decision was to extend by three months the applicability of the equalization scheme, which was due to expire on 31 July 1958 in accordance with Decision No 2/57.

Another of the applicant's arguments, which I do not find convincing either, is that the new system of interest changed the *basic structure* of the equalization scheme since, in addition to the levy, the proceeds of which go to balancing out the difference in price between ferrous scrap bought within the Community and imported ferrous scrap, the new system provides for a levy in order to service interest. My own view is that the basis of the equalization scheme remains, as before, the consumption of ferrous scrap and that it is exclusively on this basis that an apportionment has to be made of the burden of the interest without which the equalization scheme could not work.

Finally, as regards the case-law of the Court which the applicant cites in the first place it deals essentially with a different sort of problem (exemption of group scrap) the resolution of which was in fact bound to have a noticeable influence on how the equalization scheme worked and on what results it achieved and secondly it certainly does not justify the conclusion (see Cases 4 to 13/59) that the applicant draws from it in the form of an argument *a contrario*. What was in fact dealt with was just one specific problem concerning the equalization scheme (the possibility of requiring the refund of bonuses which had been paid out by mistake). And that has nothing to do with the subject-matter of this case. Finally, in a judgment on Article 50 of the Treaty given recently (Case 21/64) the Court actually came out clearly against the proposition put forward by the applicants.

Thus the contested decisions are not void for infringement of the rules concerning competence or, if this classification of this complaint is considered to be incorrect, for infringement of essential procedural rules.

7. Summary

In conclusion I would therefore submit my opinion in the following terms : the application made by the Société des Aciéries du Temple is admissible but it is unfounded both as regards the directly contested individual decision and as regards the general decisions contested by means of the objection of illegality. As a result the applicant must bear the costs.