On those grounds,

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 15, 33 and 34 of the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the judgment of the Court of 22 March 1961;
Having regard to the Rules of Procedure of the Court;

THE COURT

hereby:

1. Dismisses the application as unfounded;

2. Orders the applicant to pay the costs, including those of the intervention.

Donner Riese Rossi
Delvaux Hammes Trabucchi Lecourt

Delivered in open court in Luxembourg on 12 July 1962.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 4 JUNE 1962[1]

Mr President,
Members of the Court,

The Hoogovens company has brought before you an application, under Article 33 of the ECSC Treaty, for the annulment of a Decision of the High Authority of 14 June 1961 withdrawing with retroactive effect the exemption granted to it from payment of equalization

1 — Translated from the French.

contributions on ferrous scrap coming from the Breedband company.

This application follows upon your second SNUPAT judgment, Case 49/59 of 22 March 1961, annulling the implied Decision of the High Authority

'refusing to withdraw with retroactive effect the exemptions granted to the interveners',

that is to say, to Hoogovens and Breda Siderurgica,

'and to fix, with respect to the withdrawal, the contribution due from the applicant'.

Then in accordance with Article 34, you referred the matter to the High Authority

'which shall take the necessary steps to comply with the judgment of annulment',

in accordance with the terms of that Article.

What were these steps? In particular did the judgment impose upon the High Authority an obligation to withdraw the exemptions *with retroactive effect (ex tunc)* or only for the future *(ex nunc)*, or did it leave the High Authority a discretion in this respect? As you know, the Court took the last-mentioned view, invoking the concept of the balance of interests, that is to say, the need to compare the conflicting rules deriving from the principle of legality, on the one hand, and from the principle of respect for legal certainty, on the other. The Court was induced to decide this question in advance with the object of meeting an argument put forward by the interverners who contended that, as an annulment could take effect only for the future, the refusal of the High Authority to withdraw the exemptions was justified in any event, since the equalization scheme had ceased to operate and that, in consequence, the annulment would be pointless. The judgment stated that a retroactive annulment was not impossible and, at the same time, was not obligatory: it would be for the High Authority to decide the matter within the framework of its powers under Article 34.

It seems to me that three conclusions may be safely drawn from this statement:

1. The mere fact that the Court annulled the contested Decision 'refusing to withdraw exemptions retroactively' does not automatically imply that it is obligatory in law that the withdrawal should operate retroactively. In fact, the Decision was annulled because the refusal was based on the *legality* of the exemptions: it was therefore annulled because of the illegality of the *reasons* on which it was based, the Court having ruled, contrary to the view of the High Authority, that the exemptions were illegal. The illegality of the exemptions, then, was only one of the considerations to be weighed in deciding whether their withdrawal should operate *ex tunc* or *ex nunc*, but was not the only consideration.

2. The argument founded on the fact that on the basis of one alternative — withdrawal *ex nunc* only — the judgment of 22 March 1961 would have no practical effect (by reason of the earlier discontinuance of the equalization scheme) is not by itself such as to put this alternative out of court. It happens not infrequently that annulment, in which the applicant was deemed to have a legal interest (without which his application would not lie), turns out in the end to have no practical effect.

3. The fact that a withdrawal of exemption *ex tunc* would have so minute an effect on the amount of the contribution of each individual undertaking in the Community can be one criterion in the balance of interests (the matter with which we are now concerned) but it cannot be relied upon as equivalent to a lack of interest excluding any possibility of a withdrawal *ex tunc*. In fact, in ruling that the second SNUPAT application was admissible, the Court not only relied on the damaging effect on competition, but also stated that 'the individual Decision (in dispute)

concerns the applicant since the effect of these exemptions is to increase the contribution payable by the applicant . . .' (Rec. 1961, p. 148).

As I have frequently had occasion to observe, and as the Court has always admitted by implication (and sometimes even expressly) there lies beneath the expression 'concerning them', in Article 33, the idea of an inherent interest in the very nature of an application for annulment. Moreover, the judgment (Rec. 1961, p. 161) expressly provides that

'any withdrawal of disputed exemptions would involve an obligation on the part of the defendant to fix the new basic rate of equalization, to substitute for the decisions imposing a contribution on the applicant new and properly reasoned decisions based on a correct calculation and to communicate those decisions to the applicant'.

I

Before embarking on the substance of the dispute and examining the legality of the contested Decision, it may be convenient to recall precisely the matters leading up to this Decision and to attempt an analysis of the judicial doctrines invoked or relied upon by the Court in justification of its ruling. Such an examination appears to be called for, not only for the better understanding of the nature of the balance of interests which the High Authority was urged to give effect to in this case, but also for the purpose of attempting to outline the direction which your case law is tending to take in this matters.

I have, indeed, appreciated — as the Court most certainly has — the note of warning sounded in argument against a Community law which might be less advanced than national laws, so far as the legal protection of undertakings is concerned, and the risk that they might fail to find in the new system of law to which they are subjected the same powerful safeguards as they enjoyed before the transfer of the powers — to say nothing of the change of sovereignty — affecting them.

But it has become recognized among lawyers that the legal protection of undertakings under the ECSC Treaty is satisfactorily assured, at least as satisfactorily, for the most part, as under national law, and that the Court has in large measure contributed to this result. I should like to show that, despite certain appearances to the contrary, the same applies to the matter now before you — that is, the protection of rights arising from an administrative measure tainted with illegality.

Here is the sequence of events.

On 30 October 1957, the OCCF sought to obtain from the High Authority, in accordance with Article 15 (2) of Decision 2/57, 'an objective interpretation of the basic Decisions on the concept of own resources', a question on which the OCCF had not been able to reach unanimous agreement. On the other hand, in two particular cases, those of Hoogovens and Breda Siderurgica, a unanimous decision had been reached to the effect that no levy should be imposed on ferrous scrap circulating in each of these two industrial combines, but the representative of the High Authority at the OCCF had made reservations on this subject, which made it necessary for the OCCF to submit this point also to the arbitration of the High Authority.

On 18 December 1957, the High Authority replied to the OCCF by a letter which was published in the Official Journal of 1 February 1958. In this letter the High Authority declared, on the one hand, that the criterion of the company's name must be maintained to the exclusion of any exception for what has since been called 'group ferrous scrap', and, on the other hand, stated that

'so far as the two abovementioned exemptions are concerned (that is to say, those

relating to Hoogovens and Breda Siderurgica) it withdraws the reservations made by its permanent representative, on account of the exceptional nature of the situation in question'.

On 17 April 1958, the High Authority addressed a further letter to the OCCF, which it published on 13 May 1958, and in which it stated the *reasons* for which it had allowed the two exemptions, those reasons being based entirely on the criterion of local integration in one and the same industrial combine. Was the letter of 18 December 1957 in the nature of a decision which could be appealed against?

By its judgments in the Phoenix- Rheinrohr and other cases on 17 July 1959 the Court, contrary to my opinion, refused to accept that the letter was of such a nature, and for this reason dismissed the applications as inadmissible; it held that the letter constituted only an internal office directive, and concluded with the words

'accordingly, the letter of 18 December 1957 is not a decision within the meaning of the ECSC Treaty'.

The generality of this assertion might have led to the belief (which I myself entertained) that it applied to all the questions dealt with in the letter, that is to say, not only to the question of group ferrous scrap but also to that of exemption for reasons of 'local integration', which had led to a withdrawal of the reservations made by the High Authority with regard to Hoogovens and Breda. That is why, in my opinion in the second SNUPAT case (Application 49/59) concerning the legality of the exemptions granted to Hoogovens and Breda, I took a different attitude and based my argument on the amount of the contribution due from SNUPAT, a contribution which was necessarily affected by the exemption enjoyed by the two companies in question. From this point of view there could be no question of 'rights arising' under 'an administrative measure creating rights' or of 'a reasonable period of time' during which a measure of this nature, when illegal, can be revoked, because, *ex hypothesi* (as it seemed to me), such a measure had no existence. That is why, looking for analogies from the fiscal aspect, I had envisaged a period of the kind usually allowed to a fiscal administration for the adjustment of taxes, that is to say, a period of limitation in the order of some years.

However, by its judgment of 22 March 1961, the Court recognized that a decision was constituted by that part of the letter of 18 December 1957 in which the High Authority had

'withdrawn the reservations previously made by its representative on the subject of the disputed exemptions'; and added that 'the exemptions granted to the interveners therefore constitute decisions'.

These Decisions, however, were not contested before the Court, either by SNUPAT or by any other undertaking, within the period allowed by law, a period which began to run — as far as third parties who did not have to be notified of the Decisions were concerned — from the date of the publication in the Official Journal of the letters of 18 December 1957 and 17 April 1958, which brought to the notice of the public the exemptions granted to Hoogovens and Breda. Similarly, they were not revoked within 'a reasonable period of time' in the sense of the Algera judgment, because nearly three and a half years elapsed between the Decision granting the exemption (18 December 1957) and the Decision withdrawing it (14 June 1961).

Is it to be inferred, then, that the Court had abandoned the principle expounded in the Algera judgment? Surely not. This principle is really concerned only with those administrative measures which *create* subjective rights. There is, in fact, an essential distinction between measures which *create* a right and those which merely

apply the law to a particular situation — *declaratory* measures, as they are sometimes called and as the intervener has described them. A measure which creates rights is a measure by which a public authority exercises a power conferred upon it by law or regulation, in the fulfilment of its public service, and which creates legal relations between the administration and those subject to it, such as the appointment of an official or the grant of an authorization: *here the right derives from the measure.* In the second category are, for example, the financial relations, debts and credits of the State or of public organizations, contested revenue claims, and so forth: in these cases, the right derives solely from the law or regulation, and the measure does no more than apply the law or regulation, interpreting it if need be.

This does not, of course, mean that measures creating rights can never be found in this second category. But they can exist only where a special competence is conferred on the administration, permitting it, in the exercise of limited discretionary powers, to create a new legal situation, as, for example, by granting benefits under certain conditions.

This, however, is not the case here. As I have frequently had occasion to state in previous opinions, the High Authority has no power whatever to *grant* derogations or exemptions from the payment of equalization contributions. Such a power could have been provided in the legislative Decisions which set up the financial arrangement — but it was not. The High Authority has the power — and the obligation — only to *apply* those Decisions to concrete situations, that is to say, in this particular case, to ensure that 'bought ferrous scrap' is subjected to the levy and that 'own resources' are not, and it can interpret the legislative Decisions, subject to review by the Court, only to ascertain the legal criteria for distinguishing between these two categories of ferrous scrap. Those undertakings, then, which can claim the exemption of 'own resources' can claim it as a right derived from the law (in this case from the basic Decisions) and not from a right-creating measure of the High Authority.

I appreciate that the distinction I have just drawn is most marked in French law. It results in quite different legal effects for measures which create rights (at any rate individual measures, with which we are here concerned) and measures merely declaratory of them.

Measures which create rights confer on their beneficiaries a very high degree of legal protection, for it has been decided again and again, and the weight of authority gives the principle the force of law, that a measure which creates rights cannot be revoked unless it is challenged within the limitation period or until the Court has delivered judgment. As a government commissioner said before the *Conseil d'Etat* (quoted by Professor Weil in his opinion):

'Individual administrative decisions . . . become final at the expiration of the period of limitation for impugning them as *ultra vires* . . . and thus acquire the authority of *res judicata*'.[1]

Another government commissioner (also quoted by Professor Weil) put the matter in this way:

'Once the period of limitation of the application for annulment has expired, if no proceedings have been instituted against the measure, it becomes final; for while injustice is not to be preferred to disorder, it is neither possible nor desirable that established individual rights should be open to challenge at any time, when they were not contested at their inception'.[2]

This rules admits of exception in two

1 — Opinion of Mr Mayras on a judgment of 12 June 1959, Syndicat chrétien du ministère de l'industrie et du commerce, Actualité juridique, — 1960, II, 62.

2 — Opinion of Mr Henry on a judgment of 1 April 1960, Queriaud, Rec., p. 245.

cases only: (1) when the decision creating the right was obtained by fraud; and (2) when the decision is so gravely defective that the measure can be considered non-existent — although the notion that an administrative measure can be non-existent has often been criticized. As to the application of the rule, it varies, naturally, according to whether the measure creating rights is final in character or not. If it is final, it remains valid and continues to be effective for the future and cannot be revoked or withdrawn: an example is the appointment of an official. If it is not final, it can be withdrawn ('retiré') but not revoked ('rapporté'): an example is a revocable authorization — if it was granted illegally, it cannot be revoked, that is to say, the withdrawal cannot be made to operate retrospectively, once the period of limitation has expired; but it can be decided that it shall cease to be effective for the future, because the person to whom the authorization was granted had no legal right to its continuance. According to this principle, there is no conflict between legality and acquired rights, because the measure is *deemed legal* if it has not been challenged with the period of limitation. So much for measures which create rights.

Measures which are merely declaratory of rights, on the other hand, enjoy no special protection in French law. The administration can at any time go back on its decision if that decision is affected by an error of fact or of law, whatever the reasons which may have led to the error, and, except where the period of limitation has expired, the administration is entitled to pursue claims for payment of those sums which the persons concerned are in the end found liable to pay or for the repayment of those sums which they had no right to receive. The only relief against this principle, often so inequitable in its effects, is the possibility, in a wide variety of circumstances, of bringing an action against the administration for a wrongful act or omission, the particular wrongful act or omission being the abnormal and inexcusable delay on the part of the administration in discovering the error. The court may at the same time take into account the conduct of the party concerned, who may, for example, be found to have acted inexcusably in failing to notice an easily discoverable error or, of course, in having himself induced the error by making a false declaration.

Consideration is given also to the nature and extent of the trouble which the obligation to discharge his debt would entail for the person concerned (for example, in the case of an official, it would be borne in mind that his salary comprises a living allowance) — a consideration which extends beyond the concept of a wrongful act or omission. It is, in reality, 'the balance of interests' that the administrative court turns to in this type of case, although one never comes across this expression in the judgments. It should be noted that this concept of wrongful act or omission can be much more easily invoked in French law, because the administrative court has exclusive jurisdiction in the matter of the non-contractual liability of the administration, and also has jurisdiction, as a general rule at least, to determine the amount due, so that most often the two actions are tried at the same time and the issue is resolved by means of one compensation payment, being the difference between the amounts due from the person concerned and from the State in default.

Nevertheless, reliance on the concept of a wrongful act or omission ('faute') as the sole means of excluding, wholly or in part, the consequences or retroactive revocation is, as I have said, a mere palliative which works satisfactorily in France only for the incidental reasons which I have mentioned and thanks to the manner, at once elastic and robust, in which the concept of a wrongful act or omission ('faute') has been treated by

the Conseil d'Etat. Furthermore, I support unreservedly the principle, first stated by the Court in its second SNUPAT judgment, which requires that in each case the public interest and legitimate private interests should be balanced against each other: that, moreover, is one of the fundamental concepts of administrative law, and is without doubt the chief justification for the very existence of administrative courts.

This theory, as it is applied in the case of revocation of administrative measures, is most highly developed in German and Dutch law, where it appears, moreover, to have general application and not to be limited to what I have called declaratory measures — although all the examples mentioned in the course of this case related to measures determining financial rights (pensions, insurances, equalization of charges, etc.). German law, in particular, is concerned rather with the question of revocation of administrative measures *which confer a benefit,* and not merely acts which create rights. In Italian law, although in practice the revocation of illegal administrative measures is not subject to the expiry of a period of limitation, nevertheless it cannot be claimed on the basis of the illegality alone: revocation must be justified on other grounds of public interest, and it is for the court to decide their legality; this is another way of balancing the interests involved.

If it be conceded that the legal principle to be found in the two SNUPAT judgments applies only to declaratory measures, there is no doubt that this constitutes a step forward as compared with the state of the law in certain countries of the Community, particularly France. It enables consideration to be given to all matters which can be invoked, on the one hand, in support of the public interest — which in this context embodies the principle of legality — and, on the other hand, in support of legitimate private interests — which find one of their safeguards in the respect for legal certainty.

On the other hand, it would mark a step backwards in comparison with French law if this legal principle were held to be general in scope and were to be applied to measures which create personal rights. It is my fervent hope in this connexion not only that the legal principle regarding 'a reasonable period of time' (which was established in the Algera judgment) may, if the occasion should arise, be affirmed, but also that we may see the application of the principle of French law, which lays down the same limitation period for the revocation of an illegal measure creating rights as for legal proceedings — a principle which the Algera judgment does not preclude. That is the only real means of ensuring legal certainty. In that way the definitive nature of the measure results from an objective and easily established criterion, namely, the expiration of the period of limitation for proceedings; whereas an appeal to the concept of 'a reasonable period of time' leaves an uncertainty, like a sword of Damocles, hanging over the head of the person concerned — uncertainty both as to the possibility of an ultimate dispute and as to the appraisal which the court might make, in the event of such dispute, regarding the meaning of a reasonable period of time. I would add that the general — one might even say universal — character of the application for annulment under the Treaty, as well as the existence of a limitation period known to everyone, would make this system as workable and satisfactory as it is in French law.

In this way the case law of the Court, in so far as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical 'common denominators' between the different national solutions, but chooses from each of the Member States those solutions which, having regard to the objects of

the Treaty, appear to it to be the best or, if one may use the expression, the most progressive. That is the spirit, moreover, which has guided the Court hitherto.

II

In the light of these observations — and I hope that the motives that inspired them will induce you to excuse their amplitude — I turn to an examination of the application.

The application is based in part on the lack or insufficiency of reasons, constituting an infringement of an essential procedural requirement and in part on infringement of the Treaty and of the rules of law relating to its application.

As to the former submission, there is clearly no lack of reasons: one has only to read the four pages of the preamble to the Decision to appreciate that. The applicant is really complaining either of a lack of relevance in certain of the reasons or of the fact that the High Authority omitted to carry out in practice certain appraisals which it was bound by the SNUPAT judgment to do. The defendant, on the other hand, contends that these appraisals either did take place or were unnecessary for the purposes of the comparative examination which it was bound to make.

Thus, what is at issue is the *legality* or the substantial correctness of the reasons rather than their formal insufficiency. For this reason the examination of the first submission seems to me inseparable from that of the second.

Another preliminary point should be considered: what are the limits on the Court's powers of review, so far as the legality of the Decision is concerned?

The High Authority has reminded us that, according to the very grounds of your judgment, it had full powers of appraisal in this matter of weighing the different interests. It argued from this that it enjoyed in this case a true *discretionary power,* which left the Court only a kind of external check on legality. This does not seem correct to me. The limitations resulting from the second sentence of the first paragraph of Article 33 (evaluation of the situation, resulting from economic facts or circumstances) do not operate in this context. Accordingly, legal control must be exercised in the normal conditions of an application for annulment of a decision. It is for the Court to investigate whether the different reasons stated in the contested decision are, on the one hand, correct in substance and, on the other, such as to justify the decision in law. In particular, the Court must review the administration's concept of the legal nature of the interests which it must take into consideration and it is only within these limits that the discretionary power of the High Authority can be exercised.

The central issue in the case, then, is 'an appraisal of the respective importance of the interests in question', to cite the words of your judgment — an importance which, again in the words of your judgment, governs 'the decision whether or not to withdraw the irregular exemptions with retroactive effect'. It is this 'balance of interests', of which we have heard so much and which must be appraised by the High Authority, but subject to review by the Court under the conditions which I have just tried to define.

However, three other types of question have been raised, and I should like first to examine them in order to clear the ground.

The first relates to the supposition that exemptions were granted on the basis of *false or incomplete information* supplied by the parties concerned — a possibility which had not been excluded by the Court.

In fact, this question is today not at issue, the High Authority having found no irregularity in this regard. Truth to tell, if the Court's attention was drawn to this point, it was because it might have been important in the investigation of the real degree of industrial integration

between the two companies and the legal inferences to be drawn therefrom as regards the ownership of the ferrous scrap going back to Hoogovens, and not in order to raise the presumption that false or incomplete declarations had been made.

The second question relates to the 'reasonable period of time'. The entire argument between the parties on the subject of the 'reasonable period of time' seems to me pointless, in so far as it touches on a matter which is *res judicata* by virtue of your judgment — that is to say, in so far as it is claimed that the period of time between the grant of exemption and its withdrawal was too long for it to be possible in law for the withdrawal to be made retroactive in effect. The only argument which the applicant can base on the length of time which expired — an argument which it has not omitted to put forward — is that it is one of the criteria on the side of respect for legal certainty in weighing up the opposing interests.

Thus we come to the question of the influence which the High Authority's attitude during the whole of this period might have had on the sense of certainty which the applicant would normally have been entitled to feel during this same period.

It is certain that the attitude of the High Authority has not changed, its administration having always continued, after 'withdrawal of its reservations' as regards Hoogovens and Breda, to defend the criterion of local integration, even after the first SNUPAT judgment. Can one see in this a factor which could justify the confidence of Hoogovens in the legality and finality of the exemption granted in its favour? Yes, without doubt, until the first SNUPAT judgment. On the other hand, this judgment, delivered on 17 July 1959, was certainly such as to shake that confidence severely, on account of some of its grounds which referred to the criterion of local integration and which the Court itself considered as constituting a 'new fact capable of changing the essential circumstances and conditions which governed the adoption of the original measure'.

Although only the operative part of the judgment was published (Official Journal of 11 August 1959), Hoogovens could not fail to have had its attention drawn to the judgment. It was only, therefore, during a relatively short period (December 1957 — August 1958) that the confidence of Hoogovens could seem to be truly justified. As to the period before December 1957, it cannot be considered to have been a time of real legal certainty for Hoogovens, as the question at issue had never until then been resolved. In conclusion, the extent of the period during which the applicant could legitimately believe itself to be in a safe legal position seems to me to be of but little weight in the balance.

However — and this is *the third question* — is not the applicant entitled to hold it against the High Authority that it persisted in its illegal attitude, thus encouraging the confidence which the applicant might legitimately have in the permanence of the legal situation resulting from the decisions of exemption? I would make the following observations: (1) until the first SNUPAT judgment the question of own resources was one of the most controversial and no complaint could in all honesty be made against the High Authority for having come to a decision on that question, as it did in its letter of 18 December 1957; and (2) even after the first SNUPAT judgment, it seemed normal that the administration should continue to stand by its decisions on the question of local integration as well, since the judgment had made no express pronouncement on this point and had furthermore confirmed the High Authority's position regarding the levy on group ferrous scrap. We are not concerned here with a wrongful act or omission, and besides, an illegality does not *necessarily* constitute such a

wrongful act or omission.

We thus come to the central issue, the balance of interests.

You know the applicant's arguments in this regard, so ably presented and expounded by its eminent counsel. I shall not go over them in detail.

I would remind you only that they are in essence based on a comparison between the effect of a retrospective levy on Hoogovens and the damage suffered by the undertakings liable to the equalization levy, both from the financial point of view and as regards the adverse effect on the conditions of competition.

1. From the financial point of view, on the one hand 6 million guilders (a figure disputed by the High Authority), on the other a surcharge of 0.37% in relation to the total of the contributions, amounting to an insignificant sum for each undertaking (less than 10 000 guilders for SNUPAT): thus the financial interests of Hoogovens are seriously affected, while the financial interests of the other undertakings are hardly affected at all. The situation would furthermore be aggravated by the revaluation of the guilder and the change in market conditions (expected to become more unfavourable in years to come) and the effects of the situation would be felt at the time when the repayments would have to be made.

2. From the point of view of competition, the adverse effect would be practically nil, because 97% of the products manufactured by Hoogovens' competitors are manufactured by undertakings which as companies are integrated, and for this reason do not pay the equalization levy for the ferrous scrap used in the production cycle. But the decisions of the Court (the Pont-à-Mousson judgment for example) require a substantial adverse effect on the *natural* conditions of competition.

In any case, whether in respect of competition or of financial interests, the applicant alleges that the contested Decision made no actual comparison between the different interests at stake. Here, in fact, is where the whole problem lies. If one followed the applicant to the point to which it seeks to lead the Court, it is clear that its argument would be most pertinent and, no doubt, compelling. But in my view it misses the point, because it overlooks an essential matter, namely, the different *nature* of the public interest and the private interests in question. Much has been said in this case about 'balance', which brings in the idea of weight: but if this metaphor is well adapted to private interests, it is far less accurate for the public interest, where it is much less a question of weight than of value. In general, it is the public interest, represented here by respect for legality, which should prevail. The only exception is where that respect may demand such a sacrifice on the part of the private interests that the public interest involved cannot justify it.

I think that, in such a case as the one now before you, it would have to be shown that a claim for the contributions due would be capable not, of course, of causing the insolvency of the undertaking (no one would contend that the equalization scheme demands as much as that!) but of causing a *serious disturbance* in its working conditions. The principle of joint liability on which the scheme is based, as the Court again pointed out in its judgment, permits me to think that such a demand is not excessive. It is, however, by no means established that the payment of contributions, suitably phased as suggested in your judgment and agreed by the High Authority, would involve such consequences. In my opinion, therefore, no limitation, even of a partial nature, on the retroactive effect of the withdrawal is justified in this case.

Moreover, two considerations in the contested Decision should, in my view, be affirmed. The first is concerned with the *provisional character* of the calculation — a point mentioned in your judgment.

The second relates to the total ineffectiveness of a withdrawal *ex nunc* only, through the cessation of the equalization scheme before the contested Decision.

I have already alluded to this circumstance, remarking that it did not, in itself, constitute a *conclusive* reason for making the withdrawal retroactive. Nevertheless, it undoubtedly argues in favour of retroactivity. In this connexion, one of the judgments of the Bundesverwaltungsgericht (German Federal Administrative Court) which were cited during the proceedings seems to me very interesting. It is the judgment of 28 June 1957.[1] The judgment states first that revocation of an administrative measure is generally regarded as permissible, because,

'despite the protection of good faith owed to the person concerned, respect for law and justice in the functioning of the administration must, if necessary, be able to affect the individual adversely',

and it goes on:

'Whether an illegal administrative measure can be annulled with retroactive effect or only for the future is a different question. The Court is of the opinion that this question cannot be answered in the same way for every revocation of an administrative measure. To approach the problem in a reasonable manner, one can only decide on the facts of the particular case, taking fairly into account the interests of the person concerned, and furthermore one must have particular regard to the legal effect of the irregular administrative measure, *the reason for the revocation and the object of the proposed revocation . . . If the object of the revocation cannot be reasonably attained without retroactive effect, the authority will in principle have to be in a position to cancel the administrative measure ex tunc . . .*'

The case in question concerned the award of an idemnity on immovable property,

'that is to say, a legal consequence representing a factual position in the past — all the more so, in that the payment of an indemnity had already taken place. *Revocation ex nunc would leave matters as they were for the past and would be of doubtful value. It would be practically the same as a complete refusal to annul the illegal administrative measure.*'

The court thus drew a distinction between 'administrative measures of *lasting effect*' which in principle can be cancelled only *ex nunc*,[2] and those of the kind where

'*the only possible result of balancing the protection of the interested party's good faith against the public interest is that the revocation of the irregular administrative measure is permissible ex tunc or not at all.*'

This decision is the more noteworthy in that it is concerned with the 'equalization of burdens', that is to say, indemnification for war damage, where the individual interest affected is of a proprietary nature and particularly deserving of protection. The case concerned a joiner who had lost his workshop and the tools of his trade in a bombing attack and had for this reason received advances on his war damage claim. Various errors were made in the calculation of these advances, with the result that there was an over-payment of 730 DM as against the amount of compensation assessed by administrative decision; the good faith of the person concerned was not in dispute.

This example shows the spirit in which comparisons are made between the private and public interest, and also the different character of each. On the one side there are truly interests, on the other it is a question of the value of a principle. Having regard to all these considerations, I consider that the contested Decision is founded on sufficient reasons and justified in law.

1 — NJW, I, pp. 154-156.

2 — Another case taking this view: the judgment of the Bundesverwaltungsgericht of 7 December 1960, NJW 1961, I, pp. 1130 and 1131.

I am therefore of the opinion:

— that the Court should dismiss the application; and

— that the costs, including those of the intervention, should be borne by the applicant company.