OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 4 NOVEMBER 1964[1]

Mr President,
Members of the Court,

The Court seldom allows an application to intervene to be the subject of oral proceedings. If the Court felt it was bound to do so in this case, this is proof of the fundamental importance of the questions of law which have arisen.

The issue in question is clear and easy to comprehend; the intervention is connected with proceedings concerning the applicant's financial obligations under the scheme for the equalization of ferrous scrap. The application to intervene is not however based on the argument that, if the main application fails, the intervener will have to discharge the financial obligations of the applicant in whole or in part (which would undoubtedly be a typical ground for intervention) but on the fact that some of the applicant's submissions could also be of importance to the intervener, if, as must be expected, the High Authority proceeds to determine the extent of the intervener's financial obligations under the scheme for the equalization of ferrous scrap. To be precise the issue for examination is the argument that the liability under the equalization scheme arises at the time when an undertaking can be said to be engaged in production within the meaning of Article 80 of the ECSC Treaty but on the other hand does not arise during the earlier period when the undertaking is only engaged in preparatory operations and production trials.

The question to be considered is whether an application to intervene is admissible, when it is merely based on the expectation that the ultimate decision of the Court as to one of several submissions (a decision, moreover, which will appear if at all in the grounds of judgment and not in its operative part) will adversely affect the intervener's interests.

We have heard in detail, both orally and in written form, the views of the parties interested in the proceedings on this question: the applicant in the main action limited itself in its written statements to raising no objections, but stated in the oral proceedings that it fully supported the application to intervene. The High Authority argued as a matter of principle against any such extension of the right to intervene. When I submit my own views I shall have the opportunity of examining in detail the arguments for and against intervention which have been put forward.

Before discussing them it is appropriate to recall the relevant provision relating to the right to intervene (Article 34 of the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community). It reads:

'Natural or legal persons establishing an interest in the result of any case submitted to the Court may intervene in that case.

Submissions made in an application to intervene shall be limited to supporting or requesting the rejection of the submissions of one of the parties.'

In addition reference must be made to Article 93 of the Rules of Procedure of the Court of Justice which contains supplementary procedural provisions.

Having regard to the French text of Article 34 of the Protocol, which alone is authentic, and to Article 93 (2) of the Rules of Procedure the examination can begin with the proposition that it would be possible for the Court of its

1 — Translated from the German.

own motion to raise the question whether an interest in intervening has been *established* (justifiant d'un intérêt), that is to say whether reasons have been *put forward* (see Article 93 of the Rules of Procedure) which established an interest in the result of this case.

In fact the application to intervene consists only of a reference to the applicant's complaint in the main action that the High Authority unlawfully included in its assessment purchases of scrap which were made during a period when the applicant was not yet an undertaking within the meaning of Article 80 of the ECSC Treaty. This reference is linked with the observation that the intervener is in a comparable situation, because its legal predecessor had purchased a certain amount of scrap before qualifying as an undertaking. The oral procedure did not produce any further clarification of this point. It can therefore hardly be said that a detailed statement of the intervener's interest has been submitted to the Court, which would enable it to make an objective examination of the application to intervene. For such an examination particulars of the date of the succession, of the nature and dates of the purchases of scrap, of the consumption of scrap and of the events which enabled the intervener to qualify as an undertaking would have been valuable.

If I nonetheless refrain from submitting that the application to intervene be dismissed on this ground, the reason is that the High Authority, which criticized the present application to intervene with unusual care, did not base its objection to the validity of the intervener's interest on any facts. This certainly makes it possible to begin with the comparability of the situation of the applicant with that of the intervener with reference to qualification as an undertaking and to the purchases of scrap before qualifying. In examining this question I will therefore assume that, so far as the question of liability to pay equalization contributions is concerned, the point mentioned by the intervener raises a legal problem which applies to both of them.

Similarly before beginning the actual examination it is necessary to deal with the High Authority's objection that the intended support of one only of the submissions only covers part of the subject-matter of the dispute, that is to say, that the application brought by the intervener cannot be said to support *all the submissions* of the main action.

In fact the legal issue, in the determination of which the intervener has an interest, only relates to part of the period during which the applicant was liable to be assessed (certain months in 1956). It follows that even if this legal issue is determined in favour of the applicant an annulment of the *whole* of the contested decision cannot be based on this argument.

I can however see no reason for dismissing the application to intervene on this ground. On the one hand it can be argued that an intervener only has to support the submissions of one of the parties in the main action. For the purposes of *support* participation in proceedings which is confined to part only of the disputed claim may be regarded as sufficient.

On the other hand it is possible to divide the subject-matter of the dispute into several parts in such a way that the liability to pay contributions to the Equalization Fund before the date when the undertaking was engaged in production appears as a separate claim which could be dealt with in a separate judgment. It would then follow from a reasonable interpretation of the intervener's application that it only refers to this part of the subject-matter of the dispute with the result that its relevance would be beyond doubt. In any event a limitation of the intervener's interest of the type adopted in the intervention proceedings in Case 25/59 could easily be effected, which would

result in the application to intervene being granted at least in part.

If after these preliminary observations we turn to the question by what criteria the intervener's interest must be evaluated, either by reference to the impending result of the case, as it appears in the operative part of the judgment, or to any legal questions in the grounds of judgment which may be relevant, we have to conclude that the practice hitherto adopted by the Court does not provide an answer to this specific question. As far as I can see in all the previous decided cases dealing with the justification of an application to intervene it has been argued that the intervener's interest is affected by the result of the case and not by the grounds of judgment, which contains findings on all kinds of incidental questions. A study of the case-law of the Court and of the ECSC Treaty and the EEC Treaty produces only *one* conclusion, namely that the Court has literally interpreted the law in dealing with the numerous cases on intervention, that is to say, in accordance with a principle which the applicant and the intervener in this case both recommend should be followed in the determination of this case. I recall on this point in particular the proceedings relating to the publication of transport tariffs (Case 25/59) and Joined Cases 16 and 17/62.

If we are prepared to take a broad-minded view of this case solely from the point of view of expediency, there are indeed no grounds for dismissing the application to intervene. It contributes to a thorough clarification of the facts in dispute and the legal problems arising out of them, and therefore helps the Court to achieve an objective which it has anyhow to attain in matters relating to public law, which for the most part cannot be within the reach of the parties. Moreover the intervention helps to maintain a uniform system for protecting legal rights to be applied whenever the executive has to make decisions in a series of analogous cases but cannot make all these decisions at the same time. For instance there might be a case where, in the absence of any intervention by a third party, a judgment is delivered, the main grounds whereof would have to be reviewed if the intervener at a later stage commences an action for annulment supported by better arguments, and this is a result which is just as much to be avoided—if the Court does not vary its judgment—as the impression that its impartial interpretation of the law was affected by bias. It is moreover by no means impossible, indeed probable, that, if the Court allows an intervention, multiplicity of actions will be avoided, because the intervener, after the rejection of its principal submissions by the Court, will probably not endeavour to achieve its legal object by bringing separate proceedings for annulment at a later stage. Conversely the risk that participation by third parties in a case will make the proceedings more complicated seems to me to be small, if in fact their intervention contributes to the *legal* clarification of the facts of the case, which the Court in any event is under a duty to investigate thoroughly. Further, having regard to the relevant rules of procedure it should be possible to keep the delay in prosecuting the action caused by the intervention within reasonable bounds. The delay can be tolerated by the applicant in the main action, because the intervener supports its submissions, and the chances of its application succeeding are increased; it cannot prejudice the interests of the High Authority, because in all probability the High Authority will benefit from the anticipated abandonment by the intervener of any intention of bringing another separate action. Finally there seems to be no danger of any discrimination against other interested parties which have no knowledge of the contents of the parties' pleadings and for this reason have not intervened, a

danger which in the opinion of the High Authority could only be countered if all the legal documents in the case were published. I think I can assume that as a rule such interested parties can, after publication of the conclusions and after making searching enquiries from the party they intend to support, obtain the necessary information, especially as the subject-matter of the proceedings is in any case available to the public during oral procedure.

However our arguments cannot obviously be limited to such a general consideration of the advantages to be derived from an intervention. Such a consideration would be bad law, because it goes beyond the legal criteria clearly laid down by the Statute and because it does not take into account national legal practices, which can offer a useful guideline for solving the problems of this case as well as many doubtful questions arising under Community law.

Article 34 of the Protocol unequivocally refers to the '*solution* d'un litige' ('result of a case'). According to its ordinary meaning this expression can only mean the final result of a legal action, the decision on the claim as expressed in the operative part of the judgment and not, on the other hand, a legal observation on preliminary questions contained in the grounds of judgment.

That this expression must be interpreted in this way is in my opinion proved by the requirement laid down in the second paragraph of Article 34, that the *submissions* of one of the parties must be supported. As the submissions state the object of the application they are dealt with in the operative part of the judgment, whereas the arguments put forward by the parties are dealt with in the grounds of judgment.

The decided cases in third-party applications seem to me to show that the Court tends to interpret the applicable law on these lines. It is well known that the Court when dealing with an application originating third party proceedings must ask whether voluntary intervention by the applicant originating third-party proceedings would have been possible and appropriate in the original case. As is clearly shown by the wording of various judgments of the Court, the determinative factors in deciding this issue are the subject-matter of the application, the relief sought in the application and the object of the application, that is to say, all those elements of the proceedings which must be dealt with in the operative part of the judgment (Joined Cases 42 and 49/59, Rec. 1962, p. 305). This reads in Joined Cases 9 and 12/60 (Rec. 1962, p. 354):

'It cannot be denied that, in view of the fact that the written procedure is not of a public nature, it is only possible to determine an interest establishing a right to intervene in the case from the subject-matter and conclusions of the application as published in the Official Journal.'

and also:

'In these circumstances it is unreasonable to assert that the subject-matter of or the conclusions in the application which was determined by the contested judgment disclose a direct and specific interest on the part of the Belgian Government in intervening voluntarily in order to support or reject the conclusions of the applicant.'

National legal practices too are based on the same principles. That was the inference I drew after considering the Dutch Civil Code,[1] Italian,[2] Belgian[3] and Luxembourg,[4] under which in every case

1 — Busmann: Hoofdstukken van Burgerlijke Rechtsvordering 1955, pp. 326 et seq.
2 — D'Alessio, Diritto amministrativo italiano 1949, Vol. II, pp. 497 et seq.
3 — Dumont, L'intervention volontaire dans le recours pour excès de pouvoir, Recueil de Jurisprudence du Droit administratif et du Conseil d'Etat 1959, pp. 12 et seq.
4 — CE 3.11.1871: CE 5.7.1916, Pasicrisie X 190.

the essential point is the subject-matter of the proceedings, that is to say the result of the case, when considering whether an interest in intervening has been established. This principle must also be applicable under French law, which is undoubtedly exceptionally liberal on this matter. I have not discovered any French case where the fact that a preliminary question might be dealt with in the grounds of judgment has justified intervention. Odent (Contentieux Administratif 1957/58) states: 'C'est, en effet, par le procédé de l'intervention que tous ceux qui n'ont pas un intérêt direct à la solution de la question, notamment d'une question de principe posée par un litige, peuvent néanmoins faire valoir leurs arguments.' ('It is by means of an application to intervene that persons, even though they do not have a direct interest in the determination of the issue, in particular of a question of principle raised by a dispute, are none the less able to submit their arguments.').

By this he means—as is shown by the following examples—an interest indirectly affected by the operative part of the judgment, but not by the grounds of judgment. Also the building line case mentioned by the intervener fits this concept, because in such a case the operative part of the judgment directly affects the general legal situation.

German law, which, in the form of a procedure for the compulsory joinder of third parties, provides a mechanism having similar functions, throws considerable light on our problem. If the requirement for this purpose (paragraph 65 of the Verwaltungsgerichtsordnung (Code of Procedure before the Administrative Court)) is that the legal interests of the third party must be affected, this means that they must be affected by the operative part of the final judgment, and not by the grounds of judgment which never acquire the finality of the operative part of a judgment. Many judgments of the higher administrative courts expressly emphasize that an application for the compulsory joinder of third parties is inadmissible if it is based on clarifying a question incidental to the main issue, that is to say, a preliminary question dealt with in the grounds of judgment (Verwaltungsgerichtshof Freiburg — Die öffentliche Verwaltung 1955, Page 87).

Attempts by the applicant and the intervener to show that in Community law it is necessary to establish a different principle have not in my opinion succeeded. In this connexion I do not have in mind their argument that the *indirect* or *secondary* effects of a judgment are sufficient to establish an interest in intervening, because such effects can be traced back to the operative part of the judgment. I am thinking rather of two other considerations. On the one hand the idea of making use of principles for defining rights of action in order to evaluate the interest in intervening and secondly the argument that the effect of the grounds of judgment as far as establishing a precedent is concerned is in the case of applications to intervene to be evaluated under Community law in accordance with principles other than those applicable under national public law.

As regards the first point I will only refer to the practice in Italian administrative law,[1] under which intervention is inadmissible if a right of action by means of an independent application to the Court is available. As regards the force of precedent of the grounds of judgments in our cases there seems to me to be nothing to show that it is more extensive than that of the judgments of national administrative courts. The same applies without any limitation to judgments concerning the

1 — D'Alessio, ibid.

equalization of scrap, that is to say, concerning 'the historic fact', as the applicant calls it, which ties in a special way the fate of the intervener to that of the applicant. It does not seem possible to draw any other inference from the judgment in Case 49/59, which has been quoted. When this judgment states that the Court has worked out principles in an earlier case, with which the High Authority must comply, one must not assume, as the intervener does, that the whole of the judgment has 'the force and effect of legislation', that is to say an effect which prevents other undertakings subject to the scrap equalization scheme from referring in separate proceedings, if a suitable opportunity arises, to the principles worked out by the Court in the grounds of one of its judgments and to call them into question. Against this view there can be quoted in particular the Tariefcommissie judgment (Joined Cases 28 to 30/62) in which the effects of an interpretative judgment under Article 177 of the EEC Treaty were discussed, that is to say a judgment which can more readily be regarded as having legislative effect. On the other hand the judgment in Case 49/59 merely said that the High Authority had to apply the principles developed by the Court to the party to the proceedings by virtue of the finality of the judgment and to other parties subject to the ferrous scrap equalization scheme by virtue of the general principle of equality of treatment applicable under public law. The validity of this rule of equality of treatment in administrative law in my opinion cannot itself lead to an extension of the right to intervene as the intervener has argued.

On this point I refer to a case under Belgian law when an application to intervene was refused because it was only based on the assertion that the judgment in the main action dealt with facts which also affected the intervener (cf. Dumont, ibid).

Therefore in this case the Court must follow the principle set out in the wording of Article 34 of the Protocol in conjunction with the precedents afforded by national law, that is to say, that intervention is only possible if the intervener apprehends that his interests will be affected by the operative part of the Court's judgment.

It is only this connecting link which makes it possible to come to a correct decision on an application to intervene. There are in fact in principle only two possible results of an action: judgment in favour of the applicant or judgment in favour of the defendant. Whether any interests of an intervener exist which require protection can be easily ascertained by considering the limited number of possible results of the action. It would be different if a party's arguments in the proceedings could provide a guideline for the right to intervene. To maintain that in this case the intervener has an interest requiring protection presupposes a decision on the relevance to the judgment of the arguments put forward, because when there is a large number of submissions it is possible that the judgment of the Court only deals with one or some of them and makes no reference to the others. An evaluation of the relevance to the judgment of the various questions in dispute would without any doubt destroy the bounds set to the intervention procedure.

After all these observations I have come to the conclusion that the High Authority's interpretation of Article 34 is the correct one. I therefore submit that the application of Kloeckner-Werke AG based on only one of the arguments in the proceedings be dismissed and that the costs of the application to intervene be borne by the intervener.