OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 16 OCTOBER 1963[1]

Mr President,
Members of the Court,

Under the liquidation of the scrap equalization scheme, the Directorate-General for Steel, Marketing Division, sent to the applicants in these proceedings, as well as to other undertakings within the Community, letters dated 8 April 1963. Pursuant to Decision No 7/63 of the High Authority relating to the revised rates of contribution for the equalization of imported ferrous scrap and ferrous scrap treated as such, these letters set out a statement of account of the credits and debits of the undertaking in relation to the equalization schemes with the aim of 'adjusting the present state of your account as closely as possible to the final state' and requested the undertakings to make payment of the balance due to the High Authority by 31 May 1963 at the latest.

The applicants maintain that the statements of account and Decision No 7/63 upon which they are based are prejudicial to their legal position in so far as they do not take into account the resolutions granting exemptions passed by the administrative bodies in Brussels on 8 May 1957, and thus clearly constitute an unlawful revocation of the exemptions.

For this reason, they made applications to the Court of Justice on 15 May 1963 in which they presented the following conclusions:

— that the Court should annul the High Authority's order for payment of 8 April 1963 in so far as it fails to take account of the resolutions granting exemptions;

— that the Court should annul Decision No 7/63 of the High Authority of 3 April 1963 (*Official Journal of the European Communities*, pp. 1091/63 et seq.) in so far as it fails to take into account the resolutions of the Council of the Equalization Fund (CPFI) of 8 May 1957 which exempted the applicants.

To these applications, the High Authority replied with conclusions dated 13 June 1963, asking in conformity with Article 91 (1) of the Rules of Procedure that the Court should, as a preliminary point, decide on the admissibility of the applications and should declare them inadmissible. It maintained that the letters of 8 April 1963 did not constitute decisions which were open to challenge before the Court and that Decision No 7/63 did not deal with the particular cases of the applicants and so did not concern them individually.

In accordance with Article 91 (3) of the Rules of Procedure these conclusions were the subject of oral proceedings on 9 October 1963. At the present stage of the proceedings, my task is therefore to express my views on the *admissibility* of the applications.

It is clear that a judicial examination which is confined to the question of admissibility, and the outcome of which the High Authority considers of vital importance, will serve a useful purpose, as it is the first time since Decision No 22/60 of the High Authority was taken that the question has arisen whether a letter can be considered as a measure open to challenge before the Court. We remember that in many previous cases the nature of statements in the form of letters from the High Authority has played a part and placed a considerable strain on relationships between the High Authority and undertakings.

In an effort to avoid similar controversies and to contribute to an increase in legal certainty (cf. the communication in *Official Journal of the European*

1 — Translated from the German.

Communities, 1960, p. 1250), the High Authority in its Decision No 22/60 laid down certain criteria which were intended to make it possible to determine when pronouncements of the High Authority constituted a decision, a recommendation or an opinion within the meaning of Article 14 of the Treaty.

It is now for the Court to decide whether, nevertheless, there can exist difficulties of interpretation in particular cases or whether there can be a decision open to challenge before the Court even though the conditions of Decision No 22/60 are not fulfilled.

Legal consideration

1. Legal nature of the letters of 8 April 1963

In their written and oral submissions, the applicants admit that in their opinion the letters in question do not constitute decisions within the meaning of Articles 14 and 33. However, they consider that an application is necessary because Decision No 22/60 does not bind the Court, and thus does not provide absolute certainty and because the High Authority has often not considered itself bound to follow its previous opinions.

If one considers the external form rather than the contents of the letters of 8 April 1963, it is plain that they cannot be considered as decisions within the meaning of Decision No 22/60. They do not have headings which would designate them as decisions of the High Authority. They do not have any indication of the date of adoption of the decision by the High Authority nor do they contain a postscript to the effect that they are signed 'on behalf of the High Authority', and the text of the letter is not signed by a member of the High Authority (Articles 1 and 3 of Decision No 22/60). Instead, the heading of the letters mentions that they originate from the Directorate General for Steel, Marketing Division, and they are signed by a Director-General and a Director of the High Authority.

But even though the formula established by Decision No 22/60 is clearly not observed, it would be possible to contemplate ascribing to these letters the nature of a decision only if three conditions were fulfilled:

— It is necessary to examine whether the criteria of Decision No 22/60 have a binding force, at least in so far as they are of importance in the present proceedings, that is to say, we must ask ourselves whether the High Authority was able to specify in an obligatory and general manner which of its statements could be considered as measures open to challenge before the Court.

— If the answer is in the affirmative, it is necessary to examine whether the High Authority has annulled Decision No 22/60 or whether in this particular case it has lawfully departed from that Decision.

— Finally, in order to deal with the matter fully, one must consider how the letters should be classified according to the case-law of the Court up to the present time.

(a) Can the High Authority make rules in accordance with which the binding nature of its statements may be examined?

The preamble to Decision No 22/60 (of 7 September 1960, *Official Journal of the European Communities*, p. 1248/60) quotes the fourth pargraph of Article 15 of the Treaty as the legal basis which allows the High Authority to determine the manner in which this Article is to be implemented. Article 15 provides that decisions etc. . . . of the High Authority shall state the reasons on which they are based, that they shall refer to any opinions which were required to be obtained and that they shall be notified to the party concerned or that they must be published.

This being the content of Article 15, it may seem doubtful whether the enabling power in the fourth paragraph extends to anything more than the regulation of certain formal points of view (the form of the statement of reasons, the manner of notification and publication), and in particular whether it permits the High Authority to fix the conditions under which its pronouncements are to have the character of binding decisions.

These doubts, however, become of little importance if one considers, as I believe is right, that the High Authority did not need special enabling powers under the Treaty, because its general powers of acting as an administrative authority would in principle cover the regulations in question.

A decision is nothing more than the expression of the will of an authority which aims at obtaining a legal result. The important thing, as the representative of the High Authority has rightly stressed, is that there exists a subjective element, *the intention* to take a decision, and that it can be recognized. If an authority leads one to believe that a statement is not as yet intended to be definitive in character in individual cases and therefore is not binding so as to produce legal consequences (a reservation which it is certainly entitled to make) its statement does not have the features of a legal measure, of the character of a decision, to use the wording of the Treaty. However what is admitted in this particular case, can, in my opinion, be stated in a general manner, that is to say, that an authority must have the right to lay down criteria, the observance of which, in compliance with its intentions, is necessary in order that they should produce legal consequences as regards the relationships with the parties affected. In accordance with the principle of the preservation of confidence (Vertrauensprinzip) which every authority is obliged to observe, these criteria are valid so long as the authority does not change the general regulations or does not make it plain that it intends to depart from them in an exceptional case, which is conceivable, particularly as regards external form.

But Decision No 22/60 is not limited to establishing formal rules: it also contains a special factor the importance of which emerges specifically in the present proceedings. Under the Treaty the power to take decisions is reserved to the High Authority, that is to say, to a body of nine members. Only the decisions of this body are binding unless the High Authority delegates the exercise of particular powers to certain of its members or to subordinate departments. If Article 1 of Decision No 22/60 stipulates that only those measures which bear the signature of a member of the High Authority and the postscript 'on behalf of the High Authority' can be considered as decisions of the High Authority, in so doing it establishes the principle that subordinate departments of the High Authority are not empowered to act in a binding manner on behalf of the High Authority, that is to say, take decisions themselves or publish with binding effect resolutions allegedly made by the High Authority. Seen in this light, Article 1 of Decision No 22/60 constitutes a sort of regulation of jurisdiction which the High Authority is always empowered to undertake.

(b) If, therefore, we arrive at the conclusion that there is nothing to criticize in principle in the rules contained in Decision No 22/60, not all the details of which are relevant in these proceedings—there is no doubt as to its administrative value for all those subject to the jurisdiction of the High Authority—the second question to arise is whether by virtue of any subsequent measures taken by the High Authority the importance of these rules has been destroyed or limited. I do not, however, believe this to be so.

In fact, nothing in General Decision No

7/63 alters either expressly or by implication the basic Decision No 22/60. Apart from its substantive content relating to the equalization calculations—the fixing of equalization prices for certain periods, the rates of contribution, etc. . . . —it states in declaratory form subsequent liquidation measures: 'A complete statement of account taking into consideration all debits and credits in relation to the equalization scheme will be sent to each undertaking subject to the scheme . . . if the balance of the account is to the credit of the equalization scheme, payment of the amount due is to be made by the undertaking to the account of the High Authority at one of the Banks mentioned below by 31 May 1963'. Decision No 7/63 is, therefore, nothing more than a general decision taken within the framework of the equalization of ferrous scrap which necessitates the adoption of implementing measures in which the contributions due will be specified for every undertaking.

When it refers to statements of account in Article 6, it does not, however, imply that the complete statement of account made out by the subordinate departments of the High Authority constitutes anything more than notification of a commercial transaction and that, in order to fix the amount of the debit balance in a *binding* manner, it was not necessary to follow the rules laid down in Decision No 22/60, and in particular its rules relating to jurisdiction. Consequently, we must find that in accordance with the formal criteria of Decision No 22/60 which are still in force and in particular in accordance with its rules relating to jurisdiction, which in a legal evaluation must have priority over the substantive content of the statements of account, the contested letters of 8 April 1963 cannot be considered as decisions.

(c) Finally, we must still ask ourselves however what interpretation is to be put upon the letters if they are considered in the light only of the criteria which emerge from cases decided by the Court. These cases relate exclusively to the period prior to the issue of Decision No 22/60. During this period a series of cases arose in which disputed communications originating from the High Authority or from the department administering the equalization scheme were considered as decisions open to challenge in the Court. (Letter of the High Authority to the Belgian Government on the re-organization of the Belgian equalization machinery, Case 8/55; communication of the Equalization Fund on the amount of the levy, Joined Cases 32 and 33/58; refusal of a request for exemption from scrap equalization, Case 14/59; letter from an official of the High Authority on the possibility of exemption from scrap equalization, Joined Cases 15 and 29/59; refusal of a request for a refund of the general levy, Joined Cases 41 and 50/59).

However, the following must be noted:

— the contested letter in Case 8/55 had been published in the *Official Journal of the European Communities* and described in its heading as a letter from the High Authority;

— the measures to be adjudicated upon in Joined Cases 32 and 33/58 originated from the Imported Ferrous Scrap Equalization Fund at a time when the latter still possessed the powers delegated to it by the High Authority;

— in Case 14/59 the contested letter was headed 'High Authority'; by the side of the signature, it was mentioned that the letter was signed 'on behalf of the High Authority'; and the letter was signed by a member of the High Authority;

— the contested letter in Joined Cases 41 and 50/59 was also signed 'on behalf of the High Authority';

— in Joined Cases 15 and 29/59 the

contested letter contains the phrase 'la Haute Autorité a constaté' ('the High Authority has ascertained');

— and above all, the most recent judgment of this series (Joined Cases 42 and 49/59, judgment of 22 March 1961, Rec. 1961) contains the following statement: 'As regards its form, this letter was signed solely by the Director of the Marketing Division acting in his own name and not in the name and on behalf of the High Authority; it cannot *therefore* be regarded as a decision of the High Authority.'

Thus, according also to the case-law of the Court, and in particular according to its most recent judgment, there is no reason to describe the letters contested in these proceedings as decisions, or even as decisions suffering from defects of form.

(d) Since, according to the Treaty, only decisions and recommendations may be contested, the Court has no alternative but to dismiss the conclusions relating to the letters of 8 April 1963 as inadmissible. This does not entail any diminution of the legal protection afforded to the applicants, for once individual decisions have been taken they can still cause to be reconsidered all the questions which have been raised in the present case.

2. The application against decision No 7/63

However, that does not exhaust the subject-matter of the dispute. The applicants have in addition asked for the annulment of Decision No 7/63 in so far as it does not take into consideration the resolution of the Board of the Equalization Fund of 8 May 1957, which is said to have exempted the applicants from the equalization of ferrous scrap for a certain period. It is true that in their pleadings they admitted that they could not establish an express revocation of the resolution of 8 May 1957, either in General Decision No 7/63 or in the order for payment of 8 April 1963, and consequently they declare that they are doubtful whether this decision concerns them in this respect. But far from dispelling their doubts, a conversation with one of the Legal Advisers of the High Authority on 3 May 1963 served only to intensify them. In addition, they were induced to institute proceedings by the wording of the preamble to Decision No 7/63 in which the possibility of general amendments was announced, as also by the statement that the orders for payment of April 1963 must be based upon the fact that the exemption has been abolished.

With regard to this head of the conclusions, the representative of the High Authority stated that, at the time of their conversation with the Legal Adviser of the High Authority, the applicants were under a misapprehension. According to its wording and to the intention of the High Authority, Decision No 7/63 constitutes a general decision which was not intended to deal with the actual cases of the applicants and which consequently does not concern them individually.

For the purpose of considering the second head of the conclusions, it is first of all important to bear in mind the clarification which was obtained at the end of the oral proceedings, from a question put by the Court. The representatives of the applicants stated that Decision No 7/63 was contested only in so far as it contained an individual decision. If Decision No 7/63 must be regarded as a general decision and if the first head of the conclusions is dismissed as inadmissible there is no longer any necessity to deal with the second part of the conclusions.

This clarification is important because no objection can be raised to the admissibility of an application which relates to a general decision, when, and such is the case here, the complaint of

a misuse of powers ('détournement de pouvoir à leur égard') is submitted with all relevant particulars.

As regards the character of Decision No 7/63, it is clear from reading the operative part, the preamble and the annexes to that Decision, that it is not concerned with a particular obligation on the part of the applicants or of any other undertaking to contribute or with their exemption from contributions. The purpose of Decision No 7/63 is to create a *basis* for the issue of final statements of account to individual undertakings. Above all, it lays down what quantities of scrap should be considered for the purpose of equalization and what would be the resultant rate of contribution for different periods.

In the same way, the annexes to the Decision reveal only *aggregate* figures which say nothing concerning the fate envisaged by the High Authority for the applicants' scrap. Thus in reality there is nothing which would make it possible to describe even specific parts of Decision No 7/63 as individual in character. It will be impossible to say with any certainty whether General Decision No 7/63 affects the applicants in a detrimental way or if it does, then to what extent, unless or until individual decisions are taken for its implementation. The applicants will then be able to submit General Decision No 7/63, which will constitute the basis of the individual decisions, to judicial review by raising an objection of illegality.

The clarification of the conclusions during the oral proceedings therefore enables us to dismiss also the second head of the conclusions without going into the substance of the application.

The applications are therefore inadmissible in their entirety.

3. Costs

Finally there remains the question of the burden of costs. It appears that the High Authority has not incurred any special costs and it has made no application for costs.

But the applicants ask that the High Authority should be ordered to pay their costs. This would be possible under Article 69 (3) of the Rules of Procedure if the successful party has unreasonably or vexatiously caused the opposite party to incur costs.

There are similar provisions in national procedure (para. 93 ZPO; paras. 155, 156 VGO; Lenoan, La Procédure devant le Conseil d'État, 1954, p. 198). As a general rule they are interpreted in the sense that an order for the payment of the costs of the opposite party is made when, having regard to all the circumstances so far as they are known, it was reasonable for legal proceedings to be instituted.

In Joined Cases 16 to 18/59 (Rec. 1960, p. 65), in spite of the fact that the applications were inadmissible, the Court ordered the High Authority to pay part of the costs because the latter by the clearly imperative wording of one of the grounds of the Decision had given the *impression* of a final opinion.

Attempting to apply these principles to the present case, I arrive at the following conclusions:

(a) It must be admitted that the contents of the contested letters could easily give the impression that they constituted binding decisions. They request payment of a definite sum and fix a time-limit for the settlement of the debt, from which the recipients might infer that if they do not pay within the time specified an unfavourable legal position, in other words certain legal consequences detrimental to them, may arise.

This impression is reinforced by the reference in the letters to General Decision No 7/63 which itself contains an order for payment, though a general one, and specifies the same time-limit.

The explanatory note sent with the statements of account is scarcely such

as to correct the first impression given by the letter, for it contains the reservation that only those questions which have not yet been the subject of an opinion by the High Authority could be submitted by means of counter-proposals. The questions which have been the subject of an opinion by the High Authority (and it is not clear what meaning is to be given to the term 'opinion', that is to say, whether it is a determinative statement of the High Authority as a body, or whether it is a decision by one of its departments) must clearly be elicited from the discussion of the law and the facts during the administrative procedure before the High Authority.

But all this tends to make one think that the statements which are affected by this reservation are intended to have a definitive character, even if, objectively, there may be some doubt whether such a reservation is lawful.

If, therefore, the *contents* of the letters could easily lead the recipients to think that these were decisions open to challenge in the Court, one must then ask oneself whether their form should have led the undertakings to modify that view in a fundamental way.

Decision No 22/60 provides us with a test in this respect. But its contents have not been the subject of judicial decisions and even highly-placed administrative officials and members of the High Authority have naturally not been able to give an authoritative opinion on the influence which this decision must have upon the judicial interpretation of pronouncements of the High Authority.

On the other hand, a test may be found in the case-law of the Court, in particular its last judgment on the question of the character of administrative measures (Joined Cases 42 and 49/59). But we must recognize that all the various relevant statements made by the Court, bearing in mind all the variations in the facts, cannot perhaps give a perfectly clear picture and thus constitute a certain guide for the purpose of the procedure to be followed.

Finally, the statement of a member of the High Authority may have influenced the attitude of the applicants: in a letter of 6 May 1963, in reply to a question from the Luxembourg office of the Deutsche Wirtschaftsvereinigung Eisen - und Stahlindustrie, which was obviously raised at the instigation of the applicants, he gave an assurance that the orders for payment of 8 April 1963 did not constitute formal decisions. Individual, reasoned and enforceable decisions would only be issued in cases where the undertakings refused to agree on the balances communicated to them. Objections could be raised to these enforceable decisions by instituting legal proceedings. It is only from that moment that the time-limit for the instituting of proceedings mentioned in Article 33 of the ECSC Treaty would begin to run.

But, in the course of the oral proceedings, the representative of the High Authority pointed out that the statement of an individual member of the High Authority could not bind it as a body, and even less so the Court in its adjudication. Merely to follow his advice could reasonably appear to the undertakings insufficiently certain to defend their interests, the subjective importance of which appears most clearly when the amount at stake in the dispute is compared with the size of the undertaking.

All these considerations taken together should, in my view, lead the Court to say that the decision of the applicants to institute proceedings is not unreasonable from the point of view of the law on costs and on the contrary to find that certain statements by departments of the High Authority in the contested letters fulfil the conditions which under Article 69 (3) of the Rules of Procedure justify a finding in favour of the applicants on the question of costs.

(b) As regards the second head of the

conclusions, this is based principally upon the premise that Decision No 7/63 contains an individual revocation of the exemptions granted to the applicants.

If one were to adhere solely to the wording of this Decision, which is clear and nowhere unmistakeably reveals any individual element, it would not be possible to do otherwise than to find that the action brought against this Decision, as an individual decision, is incomprehensible and to give an opinion on the question of costs accordingly.

But such is not the case. The order for payment of 8 April 1963, which is founded expressly on Decision No 7/63, was of equal importance for the applicants in inspiring them to institute proceedings. If this order for payment did not take into account the disputed resolutions granting exemptions, the applicants might conclude that the revocation of their exemption (which is certainly not permissible in law) was proposed in Decision No 7/63 and that the latter therefore disclosed factors of an individual nature which concerned themselves.

As to judgment on costs, therefore, the impression created by the orders for payment and its influence on the attitude of the applicants should in my opinion be treated as of equal importance as regards the second head of the conclusions. This is quite independent of the controversial question whether certain statements concerning the contents of Decision No 7/63, made by a highly-placed official of the High Authority, could have created an additional reason for the institution of proceedings. As regards the second head of the conclusions, it would again seem right that in the matter of costs there should be a finding in favour of the applicants.

4. To summarize, I have come to the conclusion that the applications presented are inadmissible, and should be dismissed for this reason, but that, in accordance with Article 69 (3) of the Rules of Procedure, the High Authority must bear the costs.