JUDGMENT OF THE COURT
17 DECEMBER 1959[1]

Acciaieria Ferriera di Roma (FERAM) SpA v High Authority of the European Coal and Steel Community

Case 23/59

Wrongful act or omission—Certificates drawn up by a national authority recognized as supporting documents—Wrongful act committed by a national official in drawing up such certificates—Absence of checking by the Community.

(a) If, at the time when certificates of origin, recognized by the High Authority as supporting documents, are drawn up, a wrongful act is committed by a national official who acts neither in accordance with orders given by the High Authority nor on behalf of or in the name of that institution but in the performance of purely national duties, the wrongful act cannot be imputed to the High Authority and does not constitute a personal wrong for which the latter is liable.

(b) If, instead of making itself responsible for drawing up the certificates, the High Authority leaves this task to the national authority, there is no defective organization and, consequently, no wrongful act or omission in the performance of its functions within the meaning of Article 40 of the ECSC Treaty when the task is entrusted to a higher authority, such as a Ministry, which appears to be the most appropriate and the most likely to afford the best guarantee against any abuse and when the national regulations provide for an extremely detailed procedure before the said certificates are drawn up.

(c) Nor, in these circumstances, does the fact that the High Authority refrains from checking the authenticity of the certificates constitute a wrongful act or omission so long as there was no indication to suggest the existence of an abuse. (ECSC Treaty, Article 40.)

In Case 23/59

ACCIAIERIA FERRIERA DI ROMA SPA (FERAM), a limited company under Italian law, having its registered office in Rome, represented by the Chairman of its Board of Directors, Aldo Alliata, assisted by Arturo Cottrau, Advocate of the Turin Bar and of the Corte di Cassazione, Rome, with an address for service in Luxembourg at the Chambers of Georges Margue, 6 rue Alphonse-München,

applicant,

v

HIGH AUTHORITY OF THE European COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Professor Giulio Pasetti, acting as Agent, assisted by Professor Trabucchi of the University of Padua, Advocate of the Corte di Cassazione, Rome, with an address for service in Luxembourg at 2 place de Metz,

defendant,

1—Language of the Case Italian.

Application for reparation for injury caused by an alleged wrongful act or omission on the part of the High Authority;

THE COURT

composed of: A. M. Donner, President, R. Rossi, President of Chamber, O. Riese (Rapporteur), Ch. L. Hammes and N. Catalano, Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I – Facts

The facts which underlie the present dispute may be summarized as follows:

In a series of general decisions instituting financial arrangements for the equalization of imported ferrous scrap the High Authority provided for such scrap to be treated as shipyard scrap, with the result that purchasers of shipyard scrap were entitled to equalization payments (see in particular Article 1 of Decision No 14/55 of 26 March 1955, Journal Officiel, p. 685 *et seq.*, and Article 10 (c) of Decision No 2/57 of 26 January 1957, Journal Officiel, p. 61 *et seq.*).

Up to 1957 some tonnages of ferrous scrap were sold through the Office Commun des Consommateurs de Ferrailles (OCCF) (Joint Bureau of Ferrous Scrap Consumers), for which certificates issued by the Head of the Iron and Steel Department of the Netherlands Ministry of Economic Affairs were used as supporting documents. These certificates fraudulently certified that this ferrous scrap was 'shipyard' scrap, whereas in fact the material originated in the Community and did not qualify for equalization.

These irregularities, which resulted in criminal proceedings being brought in the Netherlands against the official responsible, were the subject of Questions Nos 56 and 59 from Messrs van der Goes van Naters and Nederhorst, members of the Common Assembly, and of the respective replies by the High Authority. (See JO of 20. 1. 1958, p. 22 *et seq.* and JO of 20. 4. 1958, p. 22 *et seq.*).

According to the last reply the total amount which wrongly benefited from equalization amounts to 22 204 metric tons (compared with a total of approximately 3 270 000 and 4 260 000 metric tons which benefited from equalization in 1956 and 57 respectively) in respect of which US $646 200 were paid.

II – Conclusions of the parties

In its application, the applicant claims that the Court should:

'1. Declare the application to be admissible;
2. Declare that the High Authority of the

European Coal and Steel Community is liable for having failed to avoid the situation whereby, during the period from 1954 to 1957, considerable quantities of ferrous scrap were sold through the OCCF, supported by fraudulent certificates issued by the Head of the Iron and Steel Department of the Netherlands Ministry of Economic Affairs, to the effect that these quantities originated from ship-breakers' yards;

3. Instruct an expert, to be appointed by the Court, to determine:
   (a) The exact number of metric tons of ferrous scrap which were the subject of these fraudulent practices which inflicted loss on the iron and steel undertakings of the Community subject to the compulsory equalization system and which made possible the issue of certificates relating to certain quantities of ferrous scrap received from internal sources which were drawn up in such a way as to cause the said quantities of ferrous scrap wrongly to benefit from the equalization payment applicable to imported scrap;
   (b) The percentage increase in the equalization rates to be attributed to the said fraudulent practice;
   (c) The exact amount of the sum to be credited to the applicant on the provisional equalization accounts for the years 1954 to 1957;
4. Order the High Authority to pay the costs.'

The defendant, in its statement of defence, contended that the Court should:

'dismiss all the heads of claim contained in the application of Acciaieria Ferriera di Roma (FERAM), SpA, made on 14 April 1959, and order the applicant company to pay the costs.'

In their reply and rejoinder the parties maintained their previous conclusions.

III – Submissions and arguments of the parties

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

1. *Submissions and arguments of the applicant*

The applicant bases its application on Article 40 of the ECSC Treaty since, in its view, the facts in the case satisfy the conditions for its application:

(a) There has been a wrongful act or omission on the part of the High Authority in the performance of its functions;
(b) The applicant has as a result suffered injury;
(c) The High Authority must therefore make reparation for it.

As to (a). There has been a wrongful act or omission on the part of the High Authority, which inadequately supervised the actions of the Brussels agencies, and there is a casual link between this act or omission and the injury suffered by the applicant since this would not have occurred if the High Authority had taken proper care.

In its decisions establishing the financial arrangements, the High Authority had given a formal undertaking to the coal and steel undertakings of the Community to provide a faultless service. In the eighth recital of the preamble to Decision No 14/55, it declared that it 'is responsible for the *regular* functioning of the financial arrangements and hence must *always* be in a position to intervene *effectively*'. The High Authority thereby undertook to ensure that fraudulent practices such as those which were carried out over a number of years and which gave rise to the present case should not take place with its knowledge.

It is common experience that such crimes have always been committed and that, in consequence, they were perfectly foreseeable. Accordingly, the fact that the High Authority has not been able to prevent them constitutes 'a case of objective liability' since the conduct of the High Authority was objectively unlawful. In any case, even if this conclusion is not accepted, it must be borne in mind that the degree of diligence expected of the High Authority is greater than that which can be required of the average administrative body.

The defendant wrongly claims that the applicant has not discharged the burden of

proof. A wrongful act or omission 'does not need . . . to be directly proved'; it is proved whenever there is an objective infringement of the rules, including the principles of sound administration, which the High Authority is bound to observe. It is for the defendant to prove that it is not liable therefore ('la prova della non imputabilità') 'because the infringement is due to circumstances beyond its control or because it exercised the degree of care required of it'.

Furthermore the wrongful act was officially admitted by the High Authority itself in its reply to Question No 59 from Messrs van der Goes van Naters and Nederhorst. It is stated therein that:

> the tonnages affected by the acts of fraud 'were sold *through* the medium of the OCCF';
>
> 'the High Authority came to the conclusion that the system used by the Fund for checking the origin of the ferrous scrap qualifying for equalization payments *must be rectified*, especially the liaison between the Fund and the regional offices in the countries of the Community';
>
> in a letter to the President of the Board of the Fund 'the High Authority asked for information on the steps proposed to remedy the *deficiencies* in the functioning of the system presently in force';
>
> the agencies in Brussels 'authorized their President to seek counsel's opinion on the legal measures to be taken with regard to compensation'.

During the oral proceedings the applicant referred, in the same vein, to the wording of a letter which the Vice-President of the High Authority addressed on 24 February 1958 to the President of the Equalization Fund. This letter appears in the file (schedule to the reply of the High Authority to the questions raised by the Court).

As to (b). The fraudulent activity of the official of the Netherlands State caused 'specific and direct' damage to all undertakings in the Community which are consumers of ferrous scrap. In fact, the total of the contributions which these undertakings had to pay in respect of equalization for the years in question was greater than the amount produced by correct calculation of the tonnages entitled to equalization.

The damage is all the greater in that in those very years, 1956 and 1957, the rate levied by the Brussels agencies reached the maximum (US $12 to 13 per metric ton).

The High Authority has itself admitted that the sums wrongly granted by the Equalization Fund amounted to US $646 200. But it appears that this sum is appreciably less than that subsequently calculated.

As to (c). It is clear 'that the applicant has an interest in having the conduct of the administration declared unlawful and the existence of a right to reparation for the damage recognized by the Court . . . and, moreover, the existence of the legal obligation on the part of the High Authority to recalculate the equalization payment, the monthly rates of the levy and of the sums charged to the applicant'. The defendant has not hitherto taken these steps. While it is true that the defendant claims that calculation of the equalization payment is a provisional one and that an action is pending for recovery of the sums wrongly paid, this has no relevance to this case.

2. *Submissions and arguments of the defendant*

The defendant contends that the essential bases of an application for reparation (wrongful act or omission, damages, causal link) are wanting in this case.

As to (a). The High Authority does not contest that it is liable for the wrongful acts or omissions of the Brussels agencies in the performance of their functions. But the applicant has not proved that such wrongful act or omission has occurred.

The liability referred to in Article 40 of the Treaty is not 'objective' in the sense of being based on the theory of 'created risk'; it is clearly related to a 'wrongful act or omission'. Nor is there any greater possibility of relying on contractual liability based on any alleged guarantee that the administration will function properly. Although in its general decisions the High Authority has announced its obligation to ensure the proper functioning of the equalization arrangements, this constitutes political

liability and not an undertaking entered into for the benefit of particular parties.

In particular, as regards the burden of proof, the applicant must prove not only injury but a wrongful act or omission and the casual link between these two factors. In particular it must show that the criminal offence of the Netherlands official was able to have, and did have, the alleged consequences, by virtue of negligence on the part of the High Authority or the Brussels agencies. Even if objective liability arises on the basis of a guarantee of proper functioning, it is for the applicant to establish that the injury of which it complains was caused by the unsatisfactory functioning of the administration. But the attempts made by the applicant to do so have failed, and it is endeavouring without success to shift the burden of proof.

Even judged by the most severe criteria as to the requisite standard of care which it is bound to observe, the High Authority cannot be expected to check the authenticity of certificates issued by a senior national official, as this would constitute unwarranted interference in the administration of a Member State. The wrongful act or omission committed by a national official for whom the High Authority has no responsibility cannot be imputed to the latter; on the contrary, the personal liability of such an official removes the legal basis of liability on the part of the Community.

Furthermore, there was no negligence, since the system applied is such that only wholly unforeseeable events could fail to be checked by the administration. The irregularities in question were unforeseeable, since they were committed by the competent official of a government ministry and the certificates issued fraudulently 'gave every outward appearance of authenticity as far as their form is concerned'.

It is quite impossible to find in the reply which the High Authority gave to the questions put by Messrs van der Goes van Naters and Nederhorst or in the letter of 24 February 1958 from the Vice-President of the High Authority any admission of a 'wrongful act or omission' or of any 'liability' in the sense contended for by the applicant. Nor do these statements disclose a link of cause and effect between the conduct of the Netherlands official and the alleged wrongful act or omission on the part of the High Authority. In contemplating an improvement of the existing system, the High Authority was merely referring to the fact that, at that time, the regional offices submitted their files to the Fund for inspection purposes only after a certain time and that the High Authority wished to expedite the process. The High Authority's statement cannot involve acknowledgement 'of possible inadequacies which could be looked for only after the inspection of the books of the Fund which were at that time in the hands of the Netherlands courts in connexion with the criminal proceedings for fraud'. In any case, it must be borne in mind that all organizations are at all times capable of being improved.

As to (b). It has not been established that there is any injury. The calculations so far made of the contributions are only provisional ones. Moreover, proceedings for recovery have been instituted against undertakings which have benefited from the criminal offence involved; recovery is, therefore, still a possibility and the applicant wrongly alleges inactivity on the part of the High Authority.

Finally, the defendant does not consider the inquiry demanded by the applicant to be necessary; there is, in any case, no need to appoint an expert since the tonnage which illegally benefited from equalization is perfectly well known.

IV – Procedure

The procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry but nevertheless invited the parties to provide fuller statements on a certain number of points and to submit certain documents to the Court, a request with which the parties complied.

Grounds of judgment

I–Existence of injury

Equalization payments have been made on the basis of certificates fraudulently certifying that a considerable quantity of ferrous scrap was 'from ship-breakers' yards' whereas, in fact, it originated in the Community and did not therefore qualify for equalization. These payments are liable to result in an increase in the contributions to be paid by all ferrous scrap producers including, therefore, the applicant.

It is still uncertain whether or not this increase in the equalization rates causes ferrous scrap consumers and, particularly, the applicant, actual, significant and definite injury, since the High Authority has instituted proceedings for recovery of the sums improperly paid and, moreover, it is still possible for such proceedings to be taken against those responsible.

There is, however, no need to settle this question because, for the reasons set out below, even the existence of injury places no obligation on the defendant to make good that injuiry.

II – Obligation to make good the injury

1. *Liability of the High Authority on the basis of a guarantee given by it*

The applicant infers the liability of the defendant from the fact that the latter, in its decisions establishing the equalization scheme, formally undertook to ensure a faultless service; this commitment extended also to iron and steel undertakings of the Community. This emerges from the eighth recital of the preamble to Decision No 14/55 in which the High Authority declared that it 'is responsible for the regular functioning of the financial arrangements and hence must always be in a position to intervene effectively'.

The establishment of the financial arrangements and the principle enunciated in the recital to the abovementioned general decision, of the liability assumed by the High Authority for the regular functioning of this scheme, belong to the political and administrative sphere and cannot thus constitute an obligation to the undertakings under its authority or a guarantee giving rise to objective, contractual or legal liability on the part of the High Authority, even when no wrongful act or omission can be imputed to it.

This submission must therefore be dismissed.

2. *Liability for a wrongful act or omission*

The application is moreover principally based on Article 40 of the ECSC Treaty which allows the injured party to bring an action to obtain pecuniary reparation from the Community to make good any injury caused in carrying out the said Treaty by a wrongful act or omission on the part of the Community in the performance of its functions.

(a) The official of the Netherlands Ministry for Economic Affairs, who fraudulently issued the certificates in question, was not subject to the control of the High Authority and did not receive orders from it, but acted in his capacity as a national official.

If, in accordance with the system applied by the High Authority, certificates issued by the Netherlands Ministry were recognized as supporting documents without further checking, it cannot be inferred from this that the official whom the Ministry had charged with issuing the said certificates acted on behalf of or in the name of the Community. The wrongful act committed by this official cannot therefore be imputed to the defendant. No other personal wrong committed by a servant of the defendant in the performance of his duties has been established.

(b) It is also necessary however to consider whether there was a wrongful act or omission on the part of the defendant within the meaning of Article 40 of the ECSC Treaty, because of its failure to provide a better organized system for issuing the certificates of origin for ferrous scrap qualifying for equalization payments, and in particular because of its failure to provide for the investigation of the authenticity of the said certificates.

At first sight, the fact that it was possible for the abuses complained of to continue for several years appears to indicate that the organization was defective and insufficient. However, that conclusion is not justified in this case. In fact, in leaving to the competent national authority the task of issuing the necessary certificates, the defendant pursued the course which appeared the most appropriate and the most likely to afford the best guarantee against any abuse. Since the certificates formed at the same time the legal basis, according to Netherlands law, for the re-export of the ferrous scrap, it was natural to entrust their issue to the national authorities who, moreover, were the best qualified to carry out the necessary checks.

The issue of the certificates had not been left to a subordinate authority but to a Ministry. The Netherlands regulations provided for an extremely detailed procedure prior to the issue of the certificates for checking the origin of the ferrous

scrap in question; it was in fact impossible to foresee that acts of fraud could occur if this system were applied.

In these circumstances the defendant cannot be blamed for having adopted this system and the fact of its having so cannot in any case be described as a wrongful act or omission.

This also holds good with regard to lack of supervision. In fact, it would have been excessive to check certificates coming from a Ministry and purporting to be official documents, at any rate so long as there was no indication of abuse which could raise doubts as to their authenticity.

The argument of the applicant that the reply given by the High Authority in the European Parliament to the questions put by Mr van der Goes van Naters and Mr Nederhorst and the letter of 24 February 1958 addressed to the President of the Equalization Fund by the Vice-President of the High Authority, Mr Spierenburg, constituted an admission of a wrongful act or omission should be rejected. Although in fact these statements did enquire how an improvement of the system could avoid such defects in future – and it was only after the acts of fraud that those defects came to light – they do not constitute an express admission that a wrongful act or omission on the part of the High Authority had occurred. They cannot moreover transform a course of action by the defendant into a wrongful act or omission – a description which such a course of action does not in fact deserve.

For all these reasons, the defendant is not under a duty to make reparation and the action must, therefore, be dismissed as being unfounded.

Costs

Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. In this case the applicant has failed in its pleas and must therefore bear the costs.

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 Article 40 of the ECSC Treaty;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69 (2),

THE COURT

hereby:

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

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

Donner Rossi Riese

Hammes Catalano

Delivered in open court in Luxembourg on 17 December 1959.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE[1]

Mr President,
Members of the Court,

The conclusions of this application are concerned with the question of the liability of the Community under Article 40 of the Treaty for an injury suffered by the applicant society and attributable to 'a wrongful act or omission . . . in the performance if its functions' on the part of the High Authority.

I

With the exception of certain disputes concerning the Staff Regulations of Officials or Servants, this is the first time that an application based on Article 40 has been brought before the Court.
Let me recall its terms:

> 'Without prejudice to the first paragraph of Article 34 [which concerns the special case of harm resulting from a decision of the High Authority which has been declared void], the Court shall have jurisdiction to order pecuniary reparation from the Community, on application by the injured party, to make good any injury caused in carrying out this Treaty by a wrongful act or omission on the part of the Community in the performance of its functions.'

Under the next following paragraph of the Article the Court also has jurisdiction in the matter of the liability of a servant of the Community to third parties in the event of injury caused by a *personal wrong* by a servant in the performance of his duties.
This wording seems rather to imply a reference to the system of French law as be-

1—Translated from the French.