JUDGMENT OF THE COURT
13 JULY 1961[1]

Meroni & Co. and Others v High Authority of the European Coal and Steel Community[2]

Joined Cases 14, 16, 17, 20, 24, 26 and 27/60 and 1/61

Summary

1. *Liability of the ECSC—Financial arrangements—Equalization—Normal disadvantages —Absence of injury*
   (ECSC Treaty, Article 40, 53)

2. *Liability of the ECSC—Conditions for the application of Article 40—Actual and specific injury*

3. *Liability of the ECSC—Wrongful act or omission within the meaning of Article 40— Inherent defects in decisions of the High Authority—Limits of judicial review*

4. *Financial arrangements—Equalization—Financing*
   (ECSC Treaty, Article 45, 50, 51, 53)

1. The disadvantages which are bound to be inherent in the system of equalization are normal and do not amount to an injury giving rise to a claim for reparation. Uncertainty as to the rate of equalization, even if the amount applicable for a single period has been increased by a considerable amount, is regarded as such a disadvantage provided that experienced producers have been able to take these increases into account in their estimates.

2. An application based on Article 40 presupposes the existence of a subsisting and specific injury.

3. When an application is made to the Court under Article 40 of the ECSC Treaty alleging a wrongful act or omission by the High Authority, the Court cannot in principle treat inherent defects in decisions of the High Authority as constituent elements of the alleged wrong.

4. If the High Authority is to avoid infringing Articles 50 and 51 of the ECSC Treaty and discriminating between undertakings subject to its jurisdiction, it can only finance equalization by the levy introduced pursuant to Article 53 and this method rules out any system providing for any deficit to be covered by the financial resources provided for by Article 49.

In Joined Cases 14, 16, 17, 20, 26 and 27/60 and 1/61

14/60, MERONI & Co., INDUSTRIE METALLURGICHE, a limited partnership, Erba (Como), represented by its duly authorized agent, Agostino Artioli,

1 – Language of the Case: Italian.
2 – CMLR.

16/60, ACCIAIERIA FERRIERA DI ROMA (FERAM), a company limited by shares, Rome, represented by its sole director, M. V. Frigerio,

17/60, FER.RO (FERRIERE ROSSI), an individual undertaking, Magliano Alpi (Cuneo), represented by its owner Gino Rossi, engineer,

20/60, SOCIETÀ INDUSTRIALE METALLURGICA DI NAPOLI (SIMET), a company limited by shares, Naples, represented by Pio Fantini,

24/60, FONDERIE OFFICINE MECCANICHE (FOM), a company limited by shares, Turin, represented by its sole director, Riccardo Alice,

26/60, ACCIAIERIA LAMINATOI DI MAGLIANO ALPI (ALMA), a company limited by shares, Turin, represented by its sole director, Giuseppe Passalacqua,

27/60, COMPAGNIE DES HAUTS FOURNEAUX DE CHASSE, a limited company, Lyon (Rhône), represented by the Chairman of its Board of Directors, Pierre Cholat,

1/61, MERONI & Co., a company limited by shares, Milan, represented by its sole director, Dr Aldo Meroni, engineer,

All assisted by Arturo Cottrau, advocate of the Turin Bar and at the Corte di Cassazione at Rome, with an address for service in Luxembourg at the Chambers of Georges Margue, 20 rue Philippe II,

applicants,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Professor Giulio Pasetti, acting as Agent,

Assisted by Professor Giuseppe Stolfi, of the University of Pavia, Advocate at the Corte di Cassazione at Rome, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Applications for compensation for damage caused by an alleged wrongful act or omission by the High Authority;

THE COURT

composed of: A. M. Donner, President, Ch. L. Hammes and N. Catalano, Presidents of Chambers, O. Riese (Rapporteur), L. Delvaux, J. Rueff and R. Rossi, Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I—Conclusions of the parties

The *applicant Meroni & Co., Industrie Metallurgiche* (Case 14/60) claims that the Court should:

'After dismissing every counter-claim, objection and submission made by defence,

1. Rule that the present application is admissible, declare that the High Authority is liable for a wrongful act or omission in that the latter did not notify the applicant in good time of the amount, which moreover was only provisional, of the equalization contribution in respect of ferrous scrap for the period from 1 April 1954 to 31 March 1959 with the result that the applicant was forced to publish its price-list and conditions of sale without being in any way able to take into account the rate at which it would later be charged;

2. Cause to be established by an expert to be appointed by the Court of its own motion, the damage suffered by the applicant as a result of having been compelled to sell its iron and steel production without having been able to pass on to the purchasers the amount of the equalization contribution and the exact amount which will have to be credited to the applicant's equalization account for the period from 1 April 1954 to 31 March 1959;

3. Order the High Authority to pay the costs.

The *other applicants* submit, with some minor variations, the same conclusions.

The *defendant* contends that the Court should

1. Dismiss all the claims contained in the applications submitted by the applicant undertakings;
2. Order the applicant undertakings to pay the costs.

II—Submissions and arguments of the parties

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

Under the heading 'preliminary observations' the *applicants*

1. Recall the case-law of the Court relating to the compulsory publication of price-lists and conditions of sale as well as the aims and scope of this publicity (Judgment in Case 1/54).

2. Give an account of the history and organization of the equalization scheme, the inadequacy whereof the Court acknowledged in its judgments in the Meroni Cases (Cases 9/56 and 10/56).

3. Emphasize that during those proceedings the applicants Meroni & Co. had already criticized the delay in notifying the persons concerned of the actual amount of the sums due by way of equalization.

4. Maintain that when, following the said Meroni judgments, the High Authority reviewed the structure of the equalization machinery, it should have worked out a system designed to reconcile the need, on the one hand, for prior and accurate publication of prices by undertakings and, on the other hand, for accurate notification in good time of the amounts payable by way of equaliza-

tion. It was all the more imperative to take these factors into consideration as the rate of equalization has continued to increase and in a way which the undertakings could not have foreseen, namely from $0.75 to $13 per metric ton, an increase of 1600%.

On the basis of these 'preliminary observations' the applicants put forward claims for compensation for a wrongful act or omission under Article 40 of the ECSC Treaty.

According to the applicants the High Authority committed a wrongful act or omission by adopting an attitude which contravened 'the rules laid down by the most elementary prudence which the very nature of the public service in question requires to be observed', namely by implementing the equalization scheme without ensuring that the applicant undertakings were notified in good time of the exact amounts due from them by way of equalization. It has thereby adversely affected the legitimate interests of the latter undertakings by making it impossible for them when they fix their prices and draw up their price-lists to take account of the amount of their equalization contributions and to pass it on to their purchasers. In this way it has 'placed the directors of the undertakings in an embarassing position in that it has conceivably caused them to make mistakes, forced them to interfere with the normal pattern of their production operations and made any normal and honest advance calculation out of the question or at least difficult'.

The applicants also point out that the rates applicable to a given period have on several occasions been amended and invariably on a provisional basis with the result that even the final rate for the year 1954 is still not known in 1961.

The High Authority has therefore infringed:

Article 5 of the ECSC Treaty which requires it to publish the reasons for its actions and to take the necessary measures to ensure the observance of the rules of the Treaty;

Article 47 which lays down that it shall publish such data as could be useful to Governments or to any other parties concerned;

Article 60 in that it placed the undertakings in the dilemma of either not complying with the principle set out in this article according to which the prices charged must correspond exactly to the published prices or not selling their products in order to obviate the risk of trading at a loss.

This attitude of the High Authority caused the applicants to suffer a loss for which 'the measure of damages should obviously be the entire amount of the equalization contribution' and which in any event could be established by an expert.

The *defendant* denies that it has committed a wrongful act or omission, since the implementation of an equalization scheme must inevitably depend upon factors which are determined by an examination of data *a posteriori*. The applicants' criticisms are in fact therefore directed against the actual nature and structure of the equalization scheme and not against its implementation; moreover the system as such, altered in the light of the earlier decisions of the Court, cannot now be called in question, as its legality has been acknowledged.

The requirement that when making the final calculation of the equalization contributions the charges are to be apportioned accurately and fairly implies that the High Authority needs a certain amount of time. On the other hand in the case of the preliminary calculation the period for notifying the persons concerned has been reduced to a minimum, because the first sets of figures were notified within a period of not more than about two months (and even within a shorter period) after the month to which they refer. It must not be forgotten that the rate of equalization could not be fixed without prior knowledge of a number of factors, especially of the respective quantities and prices of imported scrap and scrap purchased on the home market. In order to have these particulars available as soon as possible the High Authority is dependent on the diligence of undertakings which in several cases have not proceeded with very much expedition.

Moreover there has been no loss. Since the undertakings were aware that the equalization system imposes obligations and at any given moment knew the amount of the contributions for the immediately preceding periods and could follow the trends of the market, they were always, when calculating their production costs, able to take account of the major portion of the charges in question. They could and should have taken account also, by displaying a minimum of commercial prudence and experience, of the risk that there might be slight increases of these charges. If they did not do so they have only themselves to blame.

Moreover it is not the charges in question which determine price formation; this is the direct consequence of the law of supply and demand, the vendor proposing as a rule the maximum price which he can hope to obtain.

Finally the applicants have given no particulars of the alleged damage. However, even if there has been damage, it could only be the difference between a reasonable forecast of future equalization charges and actual movement of those charges and not the total amount of contributions. But it does not appear to be possible to establish any such loss because that would presuppose the notional calculation of 'what the fixing of the price and therefore the trend of the market together with the consequential increase and reduction of the profits might have been on the basis of different premises'.

In reply to arguments based on Article 60 the defendant calls attention to the fact that the undertakings are entirely free to amend their price-lists, if necessary every day, as and when any of the relevant factors such as the equalization rate change.

The *applicants* deny that they received the provisional calculation of equalization charges within the period of two months. In their applications they allege an average delay of 3 to 4 months and in their replies a delay of 4 to 5 months.

The applicants' reply to the argument that the undertakings could have reasonably foreseen the actual movement of equalization charges is to ask themselves which movement they could have adopted. For if account is taken of the judgments in the Meroni Cases (Cases 9/56 and 10/56) 'it must be conceded that even if the applicant undertakings did have the gift of prophecy attributed to them by the defendant, they nevertheless could not have foreseen either the future or the earlier charges which have never had any valid existence and which the undertakings should have treated as null and void'. The first proper notification was the publication of Decisions Nos 18 to 21/60 which gave effect to the judgments in question.

Next the reasoning that prices are solely determined by the operation of supply and demand is wrong. It comes up against the rules laid down by the Treaty as well as the actual situation which is characterized by monopolies and State intervention and often politically-fixed prices. The principle of free competition is not that the entrepreneur endeavours to sell his products at the maximum possible profit but on the contrary that he is forced to fix the minimum price of his finished product with meticulous precision.

For this reason account must be taken of the fact that a feature of sales of steel is that they are completed within a very short time. Consequently, even if the applicants had been able to alter the prices published in their price-lists whenever they were notified of the equalization rate they would still have been forced to sell in the meantime at the former prices without being able to take account of the increased rate.

Moreover it may happen that undertakings such as the applicants which only produce steel ingots and bars for reinforced concrete undergo periodic crises. In such circumstances an undertaking which does not know its production costs precisely, definitively and in good time finds it impossible to check at any given time whether it is operating at a loss. The Italian iron and steel industry, in particular, experienced crises of this kind between 1954 and 1958. It went through periods when ingots and bars for reinforced concrete were sold at a

profit margin of one lira and less per kilogramme and sometimes at no profit and even below the cost price. If during such periods undertakings had known in good time the exact equalization rate, which for some months had been eight lire per kilogramme. they would probably have shut down their furnaces and waited for better conditions.

The *defendant* replies that the notion that an entrepreneur should have a definitive knowledge of all the factors affecting the determination before fixing the list price is 'fanciful'. It is well known that, in general it is very difficult to calculate the cost price *a priori*, since it is often influenced by factors which were not foreseeable when the product was manufactured and even when it was sold, such as an increase of fiscal charges, retrospective pay rises etc.

Finally the defendant asserts, producing figures in support, that in fact 'the various rates did not always have any effect on the price-lists lodged by various undertakings on different dates'.

III—Procedure

The procedure followed the normal course.

However attention must be drawn to the fact that by an order of 17 February 1961 the Court authorized Italian to be used as the language of the case in Case 27/60 as well (Compagnie des Hauts Fourneaux de Chasse).

By order of 30 November 1960 the Court joined Cases 14, 16, 17 and 20/60 for the purposes of the written and oral procedure.

By order of 14 February 1961 the Court joined these cases and Cases 24, 26 and 27/60.

Finally by order of 29 May 1961 the Court joined Case 1/61 to the foregoing cases.

Law

I—The legal foundation of the applications and the subject-matter of the examination by the Court

The applicants have based their applications on Article 40 since they plead that the High Authority committed a 'wrongful act or omission' and ask for pecuniary reparation to make good the whole of the injury which they claim they suffered by reason of the wrong which they have alleged.

Therefore the present actions must be decided solely under this article.

Consequently the question whether the decisions whereby the system of equalization was created and modified are lawful or not must be excluded from the outset and the only question to be answered is whether there is evidence of a wrongful act or omission during the administration of the financial arrangements for which the defendant is responsible.

II—On the existence of injury

The Court cannot accept that the normal disadvantages which are bound to be inherent in the system of equalization amount to an injury giving rise to a claim for reparation and is reinforced in its view because these disadvantages affect every Community undertaking and because equalization on the other hand gives substan-

tial advantages to all consumers of ferrous scrap, especially by maintaining the price of Community scrap at a reasonable level and by preventing much larger fluctuations of this price. In the present cases it has not been shown that the disadvantage suffered by undertakings owing to the fact that they were for a time uncertain as to the final amount of their equalization contributions is greater than the disadvantage normally inherent in the system which was chosen.

Moreover there can be no injury for which the defendant can be held liable in so far as the applicants could take into account the equalization levy when they fixed their selling prices in spite of the uncertainty as to the final rate. In this connexion it must be borne in mind that the applicants knew that the statements of account were only provisional and that consequently any alterations to them might take the form of increases.

This was bound to cause them, as experienced producers, acting prudently when making their estimates, to take into account that there might be such increases, more especially as the producer frequently only has accurate knowledge *a posteriori* of some of his production costs components (for example in the case of retrospective pay rises or social security charges, of the amount of taxes referable to an earlier period, or of possible differences between actual replacement costs of equipment and those resulting from estimates for depreciation etc.).

Moreover the tables of statistics produced to the Court by the parties show clearly that in many cases the successive alterations of the rate applicable to a single period did not reflect a constant increase but were characterized either by alternating rises and falls (for example April, September to December 1955) or even by progressive reductions (for example July to December 1956). Therefore the applicants claim that they were exposed throughout the *entire* period when the financial arrangements were operating to the risk of underestimating their cost prices. On the contrary they were sometimes led to overestimate them so that it must logically be admitted that the disadvantage pointed out was to some extent offset by a certain compensation which was also built in to the equalization scheme. Finally, even in those cases where there were fairly large increases in the rate applicable to a single period the Court takes the view that the effect of the amount of these increases on the total price of scrap, that is to say on the cost price, is not such that they would be presumed to exceed any reasonable estimate by an experienced producer. It follows from all the foregoing considerations that the applicants have not shown that there has been any injury giving rise to a claim for compensation.

III — The wrongful act or omission

The complaints raised by the applicants are connected with two aspects of the attitude of the High Authority or of the agencies in Brussels, namely:

1. The 'delay' in effecting the *first* notifications of the rate applicable to the different accounting periods.

2. The fact that frequently these rates have been altered *at a later date* and sometimes successively without the final rate having been fixed to this day.

1. So far as the first objection is concerned the defendant has rightly pointed out that the system of equalization in the form given to it by the general decisions of the High Authority of necessity implies calculations *a posteriori.* In fact the rate of equalization could only be fixed after taking into account a series of factors and especially the respective prices and total quantities of imported scrap and scrap purchased within the Community. In order to know what these factors were the High Authority depended primarily on the diligence shown by the undertakings subject to the scheme in discharging their duty to make the necessary declarations. It is well known that some undertakings did not always show the desired diligence. The applicants themselves have not however alleged that the administration, by failing to remind those subject to it of their duties as energetically as it should have done, has been negligent.

The particulars produced by the parties show that the time taken to give notification amounted respectively to

117 days for the running-in period of the system of equalization (April to June 1954) as from the end of June; an average of 57 to 74 days for the remaining period of the same year and also for each of the years 1955 to 1957;

an average of 87 days for 1958 excluding December 1958 for which the period was 411 days.

The Court takes the view that these particulars do not justify the conclusion that there has been negligent administration if account is taken of the complicated nature of the factors to be taken into consideration. Although the delay of 411 days in notifying the rate applicable to December 1958 can be regarded as excessive, it must nevertheless be admitted that this single exception is not itself sufficiently serious to justify the inference that there has been a wrongful act or omission. In short no evidence of undue delays has been adduced or tendered.

2. So far as the various later corrections are concerned it is advisable to bear in mind that, for the reasons given above, the decisions whereby these corrections were prescribed and the decisions of which these corrections were, directly or indirectly, the inevitable consequence, do not come within the province of review by the Court in the context of the present proceedings. Therefore the Court must merely consider whether these modifications were caused by circumstances in no way connected

with the legal structure of the equalization scheme or by a deficient organization of the departments or work of the administration.

(a) The applicants proceed from the proposition that, having regard to their number, scope and the periods over which they were spread, the corrections, which were made, amount in themselves to irrefutable evidence of unjustifiably bad administration.

In the first place, however, the High Authority was entitled and under a duty, which was precisely in the interests of the undertakings subject to the equalization scheme, to ensure that this scheme functioned at all times on a basis of fairness, legality and accuracy as to the facts. It had accordingly to rectify any mistake of law or fact and any assessment which experience proved to have been inaccurate, inappropriate or incomplete.

It should be borne in mind
that the scheme in question is based primarily on the principle of maintaining a balance between the contributions levied and the amounts paid out by way of equalization;

that if the High Authority was to avoid infringing Articles 50 and 51 of the Treaty and discriminating between the undertakings under its control it could only finance the equalization fund by the levy introduced pursuant to Article 53 and this ruled out any system providing for a fixed rate to be determined from the outset and for any deficit to be covered with the help of the financial resources provided for by Article 49;

that the undertakings subject to the financial arrangements are in competition so that the High Authority must take particular care to ensure that the principle of equality in the field of public charges is always most scrupulously observed;

that in such circumstances the High Authority cannot be blamed for having given precedence albeit at the cost of numerous amendments to the principle of distributive justice rather than to that of legal certainty.

Contrary to the view of the applicants the fact that it was not known when the later alterations would be made and what their scope would be does not justify the finding that the High Authority is liable for a breach of the rules relating to publication set out in Article 60, because it made it impossible for undertakings to comply with these rules. It is difficult to see how the mere fact that undertakings do not yet know with any accuracy the whole of their final cost price would prevent them from selling at prices which they had freely inserted in their price-lists and this would be even less likely as they were free to alter these price-lists as frequently as they thought was necessary.

(b) Although it is not possible to criticize the High Authority for having rectified errors committed in calculating the basis of assessment to the equalization contributions it is however necessary to consider whether these errors could have been avoided by good administration as they may indicate the existence of a wrongful act or omission on the part of the High Authority or the Brussels agencies, which amounts to the same thing.

Upon reading the applicants' pleadings it appears that they attribute the errors or defects which they regard as constituting a wrongful act or omission primarily to two facts: to the delegation of powers to the Brussels agencies and the withdrawal of this delegation carried out pursuant to the Meroni judgments (Cases 9 and 10/56), on the one hand, and to the frauds whereby the basis upon which the equalization is calculated was falsified, on the other hand.

The argument based on the delegation of powers must be disregarded since, as has been mentioned above, the intrinsic defects of general decisions of the High Authority cannot be examined in the context of the present cases which are based on Article 40.

Likewise, the argument on the frauds, which are the subject of other applications where an injury of a different kind is alleged, cannot be considered in this case, since these frauds certainly have not caused the injury alleged in these proceedings. In fact at the time when the last corrections, to which the applicants have drawn attention, were made (Decision No 19/60 of the High Authority, JO of 24.8.1960) the High Authority still did not have in its possession the results of the enquiry into the said frauds, so that none of the corrections made until then can be considered as being even in part a direct and essential consequence of these frauds. On the other hand, in so far as the applicants argue that the frauds still prevent the undertakings from knowing the final rate, it must be said that it is impossible at the present time to establish whether and to what extent lack of this information could cause an injury of the kind alleged in this case (the difference between a reasonable forecast of future levies and the actual amount of these levies). The application of Article 40 presupposes the existence of a subsisting specific injury.

The foregoing considerations show that the facts put forward by the applicants as the possible reasons for the corrections do not justify the conclusion that there was a wrongful act or omission which could be taken into consideration in the context of the present proceedings. The Court does not find that there are other factors which constitute a wrongful act or omission and might have an influence on the said corrections. In particular some of these corrections, or at least the period during which they were made, are probably explained by the temporary uncertainty of the administration as to the need to include 'group ferrous scrap' in the equalization (cf. the sixteenth recital of Decision No 19/60, JO 1960, p. 1160/60, 1st

column). The High Authority cannot however be criticized for having waited for the result of pending actions before finally making up its mind in this connexion. Nor do the other recitals of the said decision, which are designed to justify some of the corrections of which the applicants complain, disclose any facts which might amount to *prima facie* evidence of negligent administration. Finally, as a general observation, it must be said that, to the extent to which previous errors or defects in the calculation of the actual bases of assessment to the equalization levy, for example the total amount of scrap subject to equalization, may have called for certain corrections, those errors and defects do not amount *ipso facto* to a wrongful act and omission. They may just as well be for example the result of difficulty of solution of intricate legal problems or of the carelessness of the undertakings themselves which are subject to the High Authority's administration. In any case the applicants have not specifically demonstrated that there have been inexcusable mistakes.

The foregoing considerations taken as a whole, lead to the conclusion that the applicants have not proved the existence of a wrongful act or omission.

IV — Whether the actions are time-barred and whether the injury had the nature of special damage

Since the applications have to be dismissed as unfounded on the grounds that there is no wrongful act or omission and also that no injury has been suffered there is no need to rule on the question whether the claims made by the applicants are in part time-barred.

For the like reasons there is no need in these cases to rule whether under Article 40 of the Treaty the damage in respect of which reparation is claimed must be in the nature of special damage and whether this condition is satisfied.

V — Costs

Under Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. The applicants have failed in all their submissions and must therefore bear the costs.

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 33, 34, 40, 50, 51, 53, 60 and 80 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 Rules of Procedure of the Court of Justice of the European Communities, especially Article 69;

THE COURT

hereby:

1. Dismisses the applications;

2. Orders the applicants to pay the costs.

Donner Hammes Catalano

Riese Delvaux Rueff Rossi

Delivered in open court in Luxembourg on 13 July 1961.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 7 JUNE 1961[1]

Mr President,
Members of the Court,

The applications which are before you and which have been joined by order of the Court, all have the same purpose: to obtain judgment against the High Authority for compensation for the damage suffered by each of the applicant undertakings through the delayed receipt of incomplete data concerning the rate of equalization and the amount of the contributions towards the equalization of ferrous scrap recovered internally and used by these undertakings between 1 April 1954 and 31 March 1959.

These actions for damages are based on Article 40 of the Treaty. The applicants all take the view that there has been a wrongful act or omission on the part of the High Authority, for which the Community is liable, because the High Authority failed to notify them in good time of the amount, which moreover was only provisional, of the equalization contribution, and this meant that they were forced to publish their price-lists and conditions of sale without being able to take into account the rate at which they would later be charged. The loss has not been quantified, even approximately: you are asked to appoint an expert for this

1 – Translated from the French.