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.

purpose whose task would be to establish

> '... the damage suffered by each of the applicants as a result of being compelled to sell its iron and steel production without having been able to pass on to the purchasers the amount of the equalization contribution.'

There is a preliminary question on the matter of limitation.

You will recall that the distinguished professor, who was the advocate for the High Authority, referred in his oral submissions to the period of limitation of five years prescribed by Article 40 of the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community:

> 'Proceedings provided for in the first two paragraphs of Article 40 of this Treaty shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Community.'

In the present cases there has been no preparatory inquiry; the dates when the applications were made which cover the period from 30 September 1960 to 12 January 1961 must therefore be considered. So far as the date of the 'occurrence of the event giving rise to the proceedings' is concerned the defendant has not given particulars thereof. In my opinion it cannot be the date when the equalization scheme entered into force. The proceedings are based on the late notification of the rate of equalization and of the amount of the contributions *in relation to each accounting period.* It appears therefore that the earliest date which may be considered is the end of each accounting period, that is to say, the end of each month after 1 April 1954 when the operation of the scheme commenced. It is only the claim for compensation covering the monthly accounting periods more than 5 years prior to the date when these applications were made, that is to say, part only of the claim, which would therefore be affected by limitation.

But, my Lords, in my opinion this objection which was only raised during oral submissions after the closure of the written procedure is not admissible. On the one hand, although the procedure before this Court consists of two phases, the written and the oral, the latter covers the development or elaboration of the submissions raised during the written phase and there are even certain restrictions if fresh issues are raised (Article 42 of the Rules of Procedure).

On the other hand I do not think that a question of public policy is involved. In France Article 2223 of the Civil Code provides that 'judges may not of their own motion raise the issue of limitation'. It is true that, according to a well-established line of cases, this rule does not apply to criminal proceedings. However the decided cases have also consistently held that it does apply to administrative matters, where, however, the concept of public policy is in general wider than in civil matters: only a competent authority, for example in the case of State debts, the minister or the official to whom powers have been delegated for this purpose, is entitled to raise the objection 'déchéance quadriennale' ('forfeiture of a right of action after four years') its name originating in the period (four years) which at the present time is the period of limitation under the ordinary law for State debts. It has even been held that an observation in a pleading is insufficient: there must be a specific decision of the competent authority to raise the plea that a claim is time-barred (Conseil d'État, 21 July 1934, Gouvernement Général de l'Indochine, Rec., p. 852).

I do not know the exact legal position on this point in the other States of the Community. However I am of the opinion, on the one hand, that in civil law the limitation of actions is no longer regarded as belonging to the field of public policy; the plea must be raised by the debtor. On the other hand since the liability of public bodies in all Community countries with the exception of France is within the jurisdiction of the ordinary courts it is my view that the rules of civil law apply in these countries.

I do not see that there is any special reason

for securing the protection of the public finances of the European Coal and Steel Community by means of an exceptional privilege which is not granted for the protection of the public finances of the Member States.

I come now to my examination of the substance of the case.

First with regard to the view taken concerning Article 40 based on the text-books, I venture to refer you to certain general considerations which I submitted in my opinion in the *FERAM* case (Case 23/59, Rec. 1958-1959, pp. 523 to 527) and which the judgment appears to have taken into account by implication. On the other hand there is no doubt that your deliberations in the *Vloeberghs* case, which are still in progress, will lead you to define your own legal view on this matter.

I would only mention that, contrary to the view asserted by the High Authority in the written procedure, it is incorrect to say that under French law there must usually be a *serious wrong* to render the public authority liable: on the contrary, more often than not an ordinary wrong suffices. On the other hand it is true that the required degree of seriousness *varies* according to the nature of the service, the extent of the difficulty encountered in guaranteeing it, and, on the other hand, to the extent of the protection which the interests which have suffered damage deserve. In each case a balance must be struck between the public interest and private interests.

In the case of the system of equalization of ferrous scrap I do not think that there are grounds for requiring that the wrong must be 'serious' or 'unusually serious': it is an administrative service and it must be possible for it to be rendered liable under normal conditions: this is demanded by the importance of the interests involved. On the other hand the extremely complex nature of the system and the inevitable delays inherent in its proper functioning appear to me to be such as to require evidence of a wrong which is sufficiently serious without being 'inexcusable'.

Having made that point clear it is in my opinion advisable in these cases to distinguish carefully between the consequences which flow from the *illegality* of the High Authority's conduct and from the other factors such as negligence, bad organization of the department etc. With that perspicacity which we know is his learned Counsel for the applicants has perceived this distinction very clearly (see for example, pp. 16 and 17 of the application in Case 1/61). Although it is true, as he goes on to say, that these two points of view are linked in a certain way, they are none the less independent and in law distinct.

In so far as the injury results directly from a decision which has been annulled it can only be made good under the conditions set out in Article 34: in this connexion the High Authority

> 'shall take all necessary steps to comply with the judgment',

which it did, as you are aware, when it adopted Decision No 13/58 of 24 July 1958 the legality whereof was recognized by your judgment of 17 July 1959 in Case 36/58. The undertakings in addition are only entitled to obtain

> 'equitable redress for the harm resulting directly from the decision declared void and . . . where necessary appropriate damages'

if the decision declared void is

> 'held by the Court to involve a fault of such a nature as to render the Community liable,'

and only

> 'if direct and special harm is suffered'.

It is true that the general decisions of the High Authority have not been *declared void:* they have only been held to be unlawful following an objection to that effect, but the High Authority cancelled them, which it was entitled and undoubtedly under a duty to do, inasmuch as the Court had found that they were illegal and there appears to me to be no doubt that the rules of Article 34 also apply in such a case.

This field of law created by Article 34 covers the whole of the harm which the undertakings may have suffered *by reason only*—I will not say of 'delay' because this word is am-

biguous—but of additional periods which meant that the High Authority, in order to implement your judgments, had to cancel the unlawful authorizations which it had granted and review all the calculations of the equalization scheme, a labour whose extent and complexity are clear from a mere reading of the Official Journal of 24 August 1960 . . .

There are therefore two questions:

1. Is the illegality found to exist by your judgments of 9 and 10/56 by reason of the delegations of powers 'a fault of such a nature as to render the Community liable'? I am inclined to answer that it is.

2. Has this illegality caused the applicant undertakings to suffer any 'direct and special harm'? Direct harm probably, but not, I think, special harm: the illegal conduct affected all the iron and steel undertakings of the Community, all of which were affiliated to the compulsory scheme. Obviously the amount of harm varies from one undertaking to another but having regard to its nature, the harm suffered by one of them or by a particular category of undertakings is not 'special': each undertaking of necessity suffers the consequences flowing from the delays caused by the review of all the calculations following the 'resumption' by the High Authority of the powers which it had illegally delegated and the exercise, which was inevitably retrospective, of these powers. Can it be said that the harm suffered by undertakings such as the applicants which obtain most or all of their supplies on the domestic market for scrap is different and more substantial? Not with any degree of certainty because the review also covers the number of metric tons of imported scrap for which the Equalization Fund was responsible and is therefore of interest to the undertakings which obtained supplies of imported scrap. The conditions of Article 34 have not therefore been fulfilled. Consequently if you accept my reasoning it is only necessary to consider as constituent elements of a possible wrong those factors which, *irrespective of any illegality,* relate to the way in which the equalization scheme has operated, taking into account the various decisions which have regulated this operation.

On this point you are aware of the argument of the applicant undertakings which was in particular developed during the written procedure: under Article 60 of the Treaty as interpreted by the judgment in Case 1/54 undertakings must publish accurate prices in their price-lists and this obligation forces them to calculate their cost prices with precision and to know every component of their production costs. The effect of the course adopted by the Brussels agencies and the High Authority was that the delay, of several months and sometimes of several years, in notifying the rate of equalization and the amount of the contribution in relation to each accounting period, made any estimate of production costs impossible. This situation proved to be all the more intolerable because the rate of equalization, which was originally moderate, rapidly increased until it reached the absolutely unpredictable figure of $13 per metric ton, which would be equivalent to a charge of eight lire per kg out of the entire production costs of 20 lire when in fact the profit is sometimes only one lira. The obligation to publish exact prices has necessarily prevented the applicant undertakings from passing on most of the burden of the equalization contribution in their selling price and therefore from making their customers bear it.

Before considering whether the constituent elements of a wrongful act or omission are in fact present in these proceedings and, if the answer is in the affirmative, whether damage has been caused thereby, it is necessary to give a ruling on the following question of law: Does Article 40 (with which I am now only concerned) as well as Article 34 require that the harm suffered must be 'direct and special'? Strictly speaking the problem is only concerned with the question whether the injury is special, because it is generally agreed that injury which is only indirect does not give rise to a right to reparation.

The question is a difficult one and I commend it specially to your attention. As far as

I am concerned, after due consideration, I have come to the conclusion that it is unnecessary for the application of Article 40 to depend upon the condition that the injury must be special.

In the first place Article 40, unlike Article 34, is silent on this point, the words used being wholly general:

> '*injury* (with no other word) caused in carrying out this Treaty by a wrongful act or omission on the part of the Community.'

The contrast between this wording and that of Article 34 is striking. However, Article 40 sets out the ordinary law on non-contractual liability under the Treaty; Article 34 is a *lex specialis* dealing with the specific case of harm resulting from a decision declared void to the extent to which the enforcement of the judgment which declared that decision to be void, in spite of the fact that such enforcement must necessarily have retroactive effect, is not sufficient to secure satisfactory compensation.

On the other hand if reference is made to national law it appears that there is no requirement in the case of injury resulting from an administrative wrong that the damage must be special. This is the view expressed in the case-law of the French Conseil d'État (Société aéronautique de l'Atlantique, 3 December 1948, Rec., p. 460; Société Brodard et Taupin, 21 May 1954, Rec., p. 203 together with the opinion of Mr Letourneur published in the review *Droit social*, 1954, p. 468). Odent (p. 463) calls attention to this rule when he states that the existence of special damage is only required if the liability is founded on the risk and not if it is based on the wrong. Proof of special damage is, in the case of liability founded on the risk, the price which has to be paid for not having to prove that a wrong has been committed. As you see this distinction is perfectly logical and coherent. Under Italian law it appears that the concept 'special damage' does not exist either in private law or in relation to the liability of public bodies for quasi-delicts: the damage must be individual which is entirely different. In German law special damage does not have to be proved under civil or administrative law. Under Luxembourg law the State is only liable if the damage is direct.

It appears that the principle that every wrong gives rise to a claim for compensation if there is a direct causal connexion between the wrong and the damage is a general principle of law which does not only apply to administrative liability: it is *inter alia* the principle laid down in Article 1382 of the Civil Code.

One objection could nevertheless be raised which springs from the relatively narrow nature of the Community. The latter, unlike a State, only has a restricted number of 'subjects', the undertakings producing coal and steel which are at the same time the only 'taxpayers' in this Community. It may be asked whether there is any point in charging this Community with liability for damage which it has inflicted on all its members or at least, as is the case in these proceedings, on half of them: all things considered that amounts to making the coal undertakings of the Community bear one half of the damage suffered by all the iron and steel undertakings of that same Community which will in the end bear the other half of the damage (for the sake of simplicity my argument is based on the assumption that the levy was imposed as to half on the coal undertakings and as to half on the steel undertakings).

This objection must however be dismissed. In the first place it is incompatible with the principle of solidarity which underlies the Community. In the second place there is no doubt that the Community finances are so broadly-based that even substantial damages do not of necessity lead automatically to increasing the levy by the total amount of such damages. Finally the objection would only have any relevance if the injury was proportionately the same for each undertaking, if for instance it represented the same percentage in relation to the turnover upon which the levy is based, with the result that the amount of damages received by each undertaking would be offset by the increase in the amount owed in respect of the levy.

However this is not the position at all: in the first place it is by no means certain that the injury which we are now considering, that is to say, the injury which might result from delays caused by the inefficient functioning of the service (and not as was mentioned earlier in my opinion by the illegality of the system), does not constitute special damage. The service could have operated worse as regards one undertaking or class of undertakings than as regards another. One regional office could have been more negligent than another, etc. But even if it is assumed that there has nevertheless been no special damage, in any of the cases, it is clear that the *relative extent* of damage will vary from one undertaking to another and according to all kinds of circumstances: the interval between the date when the price-lists are published and the notification of the rate or the amount of the contribution, etc. Let us not forget that in their conclusions the applicants ask that an expert be entrusted with the task of establishing

> '. . . the damage suffered as a result of being compelled to sell its iron and steel production without having been able to pass on to the purchasers the amount of the equalization contribution.'

It is clear that the damage will not be, proportionately, the same for each undertaking. Even if large categories of undertakings are considered there could undoubtedly be an approximate average difference between the damage suffered by undertakings importing scrap and those consuming domestic scrap. Therefore precise and complete indemnification for the damage suffered in each case, considered separately, would lead to fair compensation by way of distribution, even if there had to be a correlated uniform increase in the rate of the levy.

These are the reasons why in my view there is no need to require, when applying Article 40, that there must be 'special' damage. Furthermore it would be most unsatisfactory if 'the change of sovereignty' undergone by the undertakings referred to in Article 80 were accompanied by a diminution of the legal security from which they benefited when they were under the sovereignty of one of the Member States.

I can now deal with the question whether there has been a wrong and, if so, the question of injury.

It is first of all necessary to dispel a doubt as to the meaning of the word 'delay' which was in particular used in the wording of the questions put to the parties. Counsel for the High Authority has pointed out in the oral procedure that delay was one of the forms of non-compliance with an obligation (Article 1218 of the Italian Civil Code). However we have been told that in this case there is no date by which an obligation must be performed since no time-limit has been prescribed for notifying undertakings of the equalization rate.

This is perfectly true. But it is clear that the word 'delay' was not used in a legal sense: the Court merely wished to ascertain the period or rather (the word 'period' itself being also a legal term) the *time* which *in fact* elapsed between each accounting period and the date when the notifications of the amount of the corresponding contributions were received.

There are certain differences of opinion between the parties on the method of calculating this period. The applicants take into account the number of days which elapsed between the *end of each month* of the accounting period and the notification of the equalization rate. In this way they arrive at what they call an 'average delay' of 98 days in 1954, 66 days in 1955, 57 days in 1956, 65 days in 1957 and 115 days in 1958. The basis of the High Authority's calculations however is the time which elapsed between the end of the accounting period and the date when the amount of the corresponding contribution was notified.

Another difference of opinion stems from the fact that, so far as the application of the *supplementary rates* which were applied later are concerned, the applicants calculate the period with reference to the *original accounting period* and this method makes the 'delay' one of several years.

The problem must be considered as a question of law and of fact.

In law the successive decisions of the High Authority authorized the Fund or the High Authority itself to arrange for the rate of contribution to be varied and also to *revise* the provisional rates (see for example Decisions Nos 3 and 4/60 and 20/60, Article 3). On the other hand the date of commencement and the duration of the accounting period were also altered (see for example Decision No 38/59, Articles 2(1) and 3, Decision No 19/60, Article 1), with the result that in any case, as Mr Stolfi pointed out in his oral submissions,

> 'the date from which the period in question is to be calculated could never coincide with the expiration of the month under consideration'.

These successive modifications are partly due to the complete reorganization of the system of equalization: thus, according to Article 3(1) of Decision No 26/55 the premium for the equalization of what is called 'pig-iron scrap' had to be calculated separately *each month* for each undertaking and then the period was increased to three months by Article 18(a) of Decision No 2/57. Other factors supervened, for example *exchange parities,* the changes of which did not coincide with the accounting periods. The other reason for the alterations lies in the need for the High Authority to take new decisions having retrospective effect in those matters in which it had illegally delegated its powers.

We have seen that in this respect the conditions of Article 34, which alone is applicable in my view, were not fulfilled.

In fact if account is taken of the very great complexity of the system and of the successive modifications to it and of the need to re-examine the earlier decisions I am not of the opinion that the administration has shown itself to have been negligent or that it has made mistakes amounting to a wrong in the *performance* of its duties. No evidence has been adduced and no precise allegation has even been made in this connexion.

There is no doubt that throughout the whole of its existence the system has been operated on a provisional basis and even the most recently revised rates have not yet been fixed definitively. But that is only a natural consequence of the nature of the scheme and of the various basic amendments to it during its operation. It appears in fact that the periods which have elapsed between each of the months to which the rate and the contribution refer and the date when the corresponding contribution was notified to undertakings are normal: on average about two months (except in the beginning when the rate moreover was low). On the other hand the notification of the contribution has nearly always been preceded (and only in exceptional cases *followed*) by a notification of the applicable *rate* which enabled the undertaking to have a fairly accurate idea of what the amount of contribution was going to be.

You are aware of the reasons for the later notification of the supplementary rate and of the additional contributions. They in fact only brought about very small alterations in the level of the rates.

All things considered, the authority appears to have done all it could to notify within a reasonable time the provisional amount of the contributions as and when the successive rates were fixed and the declaration of tonnages furnished by the undertakings were received, so that, to the extent to which the undertakings paid their contributions when payment thereof was demanded, the later corrections did not expose them to any serious extent to any 'repercussion'.

Finally in my opinion there is no proof that any wrong was committed during the implementation of the equalization scheme.

It appears to me to be pointless, in these circumstances, to inquire as to the *effect* which the alterations of the rates would have had on production costs and to what extent this effect would have caused the applicants to suffer damage owing to the fact that, since they were bound by their price-lists, they would have been unable to pass this effect on to their purchasers.

Let me simply make the point that one of the most difficult questions to answer is whether and to what extent the selling price is dependent upon the cost price, or upon

the market price determined by the law of supply and demand. All that can be said is that in these cases the documents on the Court's file show that there was not always even an approximate correlation between the movements of the list prices of the applicant undertakings and the movements of the equalization rates.

I submit:

that the applications be dismissed;

and that the costs be borne by the applicant undertakings.