OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 9 NOVEMBER 1961[1]

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Mr President,
Members of the Court,

This opinion is concerned with four cases brought by French iron and steel undertakings against the High Authority. Their subject-matter is the equalization scheme for the reduction of the price of imported ferrous scrap and ferrous scrap treated as such, with which the Court is very familiar having already been called upon to decide a large number of cases on this subject. The main issue before us today is whether this equalization scheme also provides for individual equalization of transport costs in particular cases for the benefit of works which obtain shipyard scrap from recovery yards situated in the Community, but some distance away, whereas they could have obtained imported scrap from seaports involving a shorter journey. Although the various applications were lodged in different forms (actions for failure to act and applications for annulment) their single purpose, to which I have just referred, together with alternative claims for damages, enables them to be considered together.

A – Facts and conclusions

The applications arise from contracts for the supply of shipyard scrap which the OCCF entered into in the name and on

1 – Translated from the German.

behalf of the applicant undertakings which were subsequently designated by the French regional office. The contracts, together with amendments and additions thereto, and the designation, made under the contracts, of the consignee works by the regional office took place during the period between 19 September 1958 and 27 October 1958. There was a further, comparatively minor, addition to the contract at the beginning of February 1959. All the contracts provided for 'Delivery: . . . free on rail . . . ex railway station nearest to the forwarding yard'. The applicants stated that they made their agreement to being designated as consignees of the ferrous scrap subject to an assurance that, when the price of the scrap was equalized, they would be refunded the difference between the cost of transport from the station near the ship-breaking yard and the cost from the railway station nearest to the port of entry. In each of the cases in question the OCCF at Brussels made a declaration to this effect through the French regional office in Paris. The applicants also state that deliveries of scrap were made from October 1958 to February 1959.

A distinction must be drawn between the equalization statements of account: in Cases 19 and 21/60 (Fives Lille Cail and Union Sidérurgique du Nord de la France), the High Authority, on 15 March 1960, sent provisional statements which did not allow for equalization of transport costs.

On the other hand, in Cases 2 and 3/61 (Société des Forges et Ateliers du Creusot and Marrel Frères) the High Authority began by including in the provisional statements the difference in transport costs for the benefit of the applicants. It was thus that, in the provisional statements of 10 August 1959, as amended on 10 December 1959, and in those of 14 August 1959, as amended on 10 December 1959, express reference is made to 'Reimbursable costs, Brest-Marseilles parity'. In the statements of 14 March 1960, which expressly revoke and replace the previous statements, there is no reference to transport parity.

The subsequent course of events was therefore as follows: the first two above mentioned applicants wrote to the High Authority by letters dated 30 July and 11 August 1960 asking for repayment of the difference in transport costs, namely, FF 5 764·16 and FF 14 912·71. On 26 October and 5 November 1960, having received no reply, they instituted proceedings for failure to act. On 9 June 1960 the High Authority sent letters to the two other undertakings asking them for repayment of the transport costs equalization which had been granted to them, namely FF 20 800 and FF 4 760. The reply by the undertakings refusing to do so was followed on 4 December 1960 by the issue of enforceable decisions within the meaning of Article 92 of the ECSC Treaty. These are the subject-matter of the applications for annulment of 16 January 1961.

There is no need to restate here the conclusions contained in the applications. I indicated their tenor in describing the course of the procedure. Nor is there any need for me to set out the submissions. Finally, I have already stated that in all four cases the applicants submitted claims for damages of the amounts given above on the ground that the High Authority committed a wrongful act or omission in the performence of its functions.

B – Legal considerations

I – Admissibility of the applications

The High Authority raises objections as to admissibility only in respect of the applications in Cases 19/60 and 21/60 for failure to act.

1. It expresses doubts whether the conditions laid down in Article 35 are satisfied. In particular, it asks whether the applicants did in fact expressly request it to take a decision, and in accordance with what provisions of the ECSC Treaty it is under a duty to take the decision sought.

The second part of the objection seems to be concerned with the substance of the applications and not their admissibility. If however the Authority, in making this comment, wishes to raise objections to the manner in which the grounds of the application are

given, it is necessary to state that when an action for failure to act is lodged, there is no requirement that a given article of the Treaty shall be specified.

Nor are the High Authority's objections on other grounds valid. The applicants' letters make it clear that they are asking for payment of certain amounts under the scrap equalization scheme. It cannot be said, therefore, that their claim lacks precision. Nor are the applicants relying on requirements of private law but they are asserting rights which are derived from an institution governed by public law. In order that they may be satisfied in law administrative measures must be taken. This means that the conditions for originating proceedings for failure to act are satisfied.

2. The High Authority further complains that the applicants drafted their submissions in such indefinite and vague terms that it is impossible to elicit from them the grounds in support of the complaint that the Treaty has been infringed.

It is true that, in the pleadings, the applicants have not, apart from their account of the facts, made out a detailed legal case. They refer to an alleged practice followed for many years in the equalization of ferrous scrap in pursuance of which consignee undertakings situated at a greater distance from the breaker's yard than from the port of entry were credited with the transport costs of shipyard scrap. They claim that the High Authority cannot unreasonably revoke these assurances a long time after the OCCF gave them. The High Authority bears responsibility for the assurances since it has always exercised control over the OCCF.

Even accepting that, because of their slender nature, these arguments do not wholly dispose of certain doubts, it is nevertheless impossible to hold that a statement of the grounds on which the applications are based was wholly lacking. The applicants refer by implication to general principles of law which are valid for any administration whatsoever including, therefore, the High Authority. The replies confirm this view and at the same time supply further details in this respect also there can, therefore be no doubt as to the admissibility of the applications.

Since there appears to be no other objections affecting admissibility, there is no obstacle to consideration of the substance.

II – Substance

A – The action for failure to act and applications for annulment

The essential question in this case is whether the equalization of transport charges (or, as one might say, the special equalization of transport charges) sought by the applicant is legal.

1. Equalization of transport charges under the scheme for equalization of ferrous scrap

The basic decisions on the establishment and structure of the financial machinery for ferrous scrap equalization (Nos 22/54, 14/55, 2/57 and 16/58) contain no express provisions on this subject. Consideration must therefore be given to the question whether, in the light of the objectives of the Treaty, the meaning and purpose of those decisions justifies the special equalization of transport costs.

During the proceedings, it was stated that, in 1956, that is to say before the organization of the equalization scheme, the High Authority had, in default of agreement on the part of the Brussels organizations, itself fixed, for several months, the equalization price in a single decision (Decision No 34/56, JO 1956, p 382). This is what the High Authority decided at that time:

> Article 1:
> 'For each of the months from July to October 1956 inclusive the equalization price on rail or barge, before payment of taxes or duties at the port of arrival in the case of ferrous scrap imported by sea from third countries;
> at the frontier crossing-point on the boundary of the Community for scrap imported overland from third countries;

at the vendor's scrap recovery yard in the case of scrap treated as imported scrap (shipyard scrap and other costly scrap) recovered in the territory of the Community, shall be equal to the average weighted price (reduced to basic category No 11 ex vendor's scrap recovery yard, on rail or barge, before payment of taxes and duties prevailing in the Community during each of the months under review for ferrous scrap collected within the Community not subject to equalization.'

Even if, unlike Decision No 18/60, this decision does not expressly prohibit the special equalization of transport charges, it nevertheless identifies the factors taken into account in fixing the equalization price and, consequently, the equalization grant. It is clear that it uses the vendor's scrap recovery yard as the basis both in determining the average domestic price and, consequently, the equalization price and in applying that price to purchasers of shipyard scrap. From the legal standpoint, therefore, the only conclusion that can be drawn from this is that equalization cannot include other factors, in particular individual transport costs. It was on this basis that the High Authority took decisions in which, after adopting basic Decisions Nos 13/58 and 16/58, it fixed the equalization price, such as in Decision No 19/58, in the exercise of its ordinary powers. There is only one unimportant difference in that the average domestic price is determined on the basis of the cost price free at consignee's works, which attracts a flat-rate reduction of 4·50 E.P.U. units of account. The effect of this method of calculation is to eliminate the transport charges on a flat-rate basis (2·50 E.P.U. units of account) on the one hand and, on the other, the transshipment charges in a seaport (2 E.P.U. units of account). There is however nothing in this case to suggest more extensive equalization of transport costs and certainly none for special equalization.

This arrangement is wholly consistent with the purpose of the equalization scheme, which is to prevent the shortage of ferrous scrap in the Community from producing either an artificial distortion of conditions of production, if only some producers managed to obtain supplies of cheap ferrous scrap from within the Community, or a rise in the price of ferrous scrap in the Community to the level of the world market. The sole objective of the equalization of prices was, therefore, to establish comparable conditions of sale for all kinds of ferrous scrap in the Common Market and this makes it possible to allow for transport costs only up to the moment when the scrap arrives in the Common Market and for transshipment costs.

Taking into account all or part of the individual transport costs would have involved a substantial alteration to the equalization scheme because it would in this way have compensated for the unfavourable location of the consignee works owing to their remoteness from the sources of supply. The contention that the special equalization of transport costs for the benefit of purchasers of shipyard scrap was *indispensable* to the equalization scheme because otherwise imported scrap would have been bought instead of shipyard scrap, and at a higher price, and this would have increased the cost of the equalization scheme, cannot be regarded as convincing. The Fund in Brussels and, later, the High Authority was able to determine what quantity of ferrous scrap qualified for equalization; it thus possessed a means of guidance. In particular, to keep the equalization rates as low as possible, it was in a position to grant shipyard scrap a privileged place with regard to equalization. It was only bound to ensure that this scrap was not distributed in a discriminatory manner. In consequence, it cannot be accepted that shipyard scrap could be fully disposed of only with the help of the special equalization of transport costs.

During the oral procedure, the further comment was, rightly, made that, in many of its articles, especially Article 2, the ECSC Treaty very clearly rejects any artificial alteration of the conditions of production, one of which is location. The Court laid emphasis on this fundamental attitude con-

tained in the Treaty in the proceedings concerning special rail tariffs. But even if, despite this fact, it were possible to consider, *under the terms of the Treaty,* the special equalization of transport costs as permissible, it would still be necessary to require it to be the subject of a special detailed regulation by the High Authority. Such regulation would, amongst other things, have to take account of all eventualities and not discriminate in favour of consignees in certain areas of the market by restricting itself to the equalization of transport costs for shipyard scrap. It can well be imagined that purchasers of domestic scrap or imported scrap not entitled to equalization have also had to accept in many cases the disadvantages of transport charges which they would have been spared by obtaining scrap from other sources. It cannot be accepted that rules for the equalization of transport charges can be quietly introduced by an institution pursuing basically different objectives and which is governed by the principle of keeping the burden imposed on the undertakings benefiting from equalization as light as possible. Finally, it must be borne in mind that the inclusion of transport costs in the equalization of scrap by means of a wide interpretation of the powers of the High Authority would also seem to be ruled out by the fact that, under Article 53 of the ECSC Treaty, the Council of Ministers must give its unanimous assent to the establishment of an equalization scheme. When such assent is given to the pursuit of a single clearly defined economic objective, it does not follow that it automatically refers to the consideration of similar matters which have, basically, no connexion with the approved objective.

Even though, in the proceedings, an attempt was made to demonstrate that the additional costs arising from the equalization of transport costs, which is the subject of the present dispute, are very low, it is necessary to bear in mind that neither the general decisions on ferrous scrap nor the general structure of the Treaty disclose any justification for the special equalization of transport costs.

2. *The long-standing practice of the OCCF*

The only reason for considering this question is that, in support of their legal arguments, the applicants attached special importance to the fact that, by virtue of long-standing practice going back to 1954, the Brussels organizations recognized the special equalization of transport costs and granted it to ferrous scrap consumers in the Community in all similar cases. In the first place, the High Authority denies the existence of this practice and, moreover, claims not to have been aware of it. As to whether it existed or not, the practice was clearly followed by the UCFF, the French steel industry's central purchasing and distribution agency for ferrous scrap (Ministerial Order of 13 March 1953, Journal Officiel de la CECA, 9 June 1953, p. 140). To a much smaller extent Italian and Netherlands scrap consumers received similar compensation for transport costs (from 1954 to 1958, the total for France was $349 021·84, for a period not stated the total for the Netherlands was $13 000, and for Italy $160 000). It must be taken as proved that, as part of the equalization scheme, the OCCF in Brussels cooperated in this procedure. On the other hand, there can be no doubt that this question did not come before the management boards of the OCCF and the Fund, which were composed of representatives of the national scrap consumers. This is the inescapable conclusion to be drawn from the extracts, submitted by the parties, from the minutes of the meetings of the board of liquidators of the Fund, the composition of which corresponds to that of the management boards (minutes of 9 March 1960 and 10 October 1960). During these meetings, the question in issue here was the subject of discussion and, with the help of the votes of the Netherlands and Italian representatives, recognition of the legality of the special transport costs grants was refused. The High Authority's powers of supervision and control were exercised through the participation of its representative in the meetings of the management boards of the Brussels organizations and the effect he had on their decision-making. In

consequence, the High Authority's claim which, moreover, is not disputed by the applicants, that the question of the equalization of transport costs was never brought to its notice before the discussions in March and October 1960 must be regarded as proved. The High Authority did not, in fact, take a decision on this question before the particular cases which are the subject of the present proceedings or before general Decisions Nos 18/60 to 20/60.

This leads to the following conclusion: despite the undoubted practice followed for many years by the French regional office and by the OCCF in Brussels and although it is clear that these incorporated bodies are agencies of the High Authority, their conduct is nevertheless incapable of generally resolving a legal question which the High Authority alone, in conjunction with the Council of Ministers, has power to decide.

This conclusion of the applicants does not therefore provide an argument to justify their claim to the equalization of transport costs.

3. *Assurances given by the OCCF and the later statements of account relating to scrap*

I have indicated how the permissibility of the equalization of transport costs is to be appraised on the basis of the Treaty and of the general decisions on ferrous scrap; consideration must now be given to the various measures adopted in relation to the applicants which gave rise to the present proceedings.

(a) The assurances given by the OCCF.

In each case, the applicants state that, before entering into the contracts for sale, they were given an assurance by the OCCF that they would be reimbursed for the additional transport charges.

(aa) Evidence of the assurances

In the written procedure, the High Authority denied the existence of the assurances (see statement of defence, pages 7 and 12). With their applications, the applicants produced copies of letters for the purpose of substantiating their allegations. They are the following:

(i) Case 19/60

Letter from the Union des Consommateurs de Ferraille de France (that is, the French regional office) addressed to the applicant on 9 October 1958 requesting it 'to complete the order form . . . as follows: Add "The price of FF 18 480 will be raised to FF 19 950 free on rail Dunkirk rail parity. Please invoice us with this latter price for the purposes of equalization and enclose with the invoice a credit of FF 1 470 per metric ton; representing the difference between these two prices".'

(ii) Case 21/60

Letter of 24 October 1958 from the Union des Consommateurs de Ferraille de France to the OCCF '. . . We therefore request you to be good enough to inform the supplier that he should increase his invoices by the equivalent in the currency in which settlement is to be made of $3·50 per metric ton and, by separate note, credit the consignee works with the same amount . . .'

Letter of 27 October 1958 from the OCCF to the French regional office:

'We are asking the vendor, to whom we are sending a copy of the present letter, to increase his bills to the consignee works by FF 1 470 per metric ton and, by separate note, to credit the consignee works with the same amount.'

(iii) Case 2/61

Letter of 10 October 1958 from the French regional office to the OCCF:

'. . . We should be grateful if, as you did on a previous occasion in the case of ferrous scrap from Le Havre for delivery to a works in the Nord group, you would be good enough to let us know the transport parity for Marseilles which has to be allowed for in the order to the supplier.'

Letter of 15 October 1958 from the OCCF to a ferrous scrap supplier:

'. . . Consequently, we should like the "Prices" paragraph in this contract to be amended as follows: In the event of the UCCF's requesting delivery to a

qorks in the Centre-Sud the price to be involved will be FF 19 530 per metric ton basic category II free on rail, equivalent to the Marseilles parity'.

Letter of 20 October 1958 from the French regional office to the OCCF:

'... We have finally been able to obtain the agreement of the Forges du Creusot and of Marrell to the allocation of, respectively, 1 000 metric tons and 500 metric tons under this contract. We request you therefore to be good enough to notify the Société de Démolitions Navales et Terrestres that it should increase the contract price by the equivalent of $2.50 per metric ton and credit the consignee works with the same amount per metric ton'.

Letter of 21 October 1958 from the OCCF to a ferrous scrap supplier:

'... Please note that you will have to increase the amount invoiced to the latter by FF 1 050 per metric ton and credit the works concerned with the same amount per metric ton'.

(iv) Case 3/61

Letter of 20 October 1958 from the French regional office to the OCCF:

'... We have finally been able to obtain the agreement of the Forges du Creusot and of Marrel on the allocation of, respectively, 1 000 metric tons and 500 metric tons under this contract. We request you therefore to be good enough to notify the Société de Démolitions Navales et Terrestres that it will have to increase the contract price by the equivalent of $2.50 per metric ton and credit the consignee works with the same amount per metric ton.'

Letter of 21 October 1958 from the OCCF to a ferrous scrap supplier:

'... Please note that you should increase the amount invoiced to the latter by FF 1 050 per metric ton and credit the works concerned with the same amount per metric ton'.

These letters, which were sent by parties some of whom were identified only during the oral procedure, do not constitute evidence that the OCCF gave the assurances to the *applicants before* the latter entered into the contracts for sale. All they show is that, in the case of Applications 21/60, 2/61 and 3/61, the OCCF, at the instigation of the French regional office, allowed for the equalization of transport costs in the equalization of prices.

But, for the moment, this fact can be regarded as evidence of the truth of the applicants' contentions. For the purposes of the legal consideration, we can therefore assume that the OCCF assured the applicants that transport charges would be taken into account.

(bb) Legality of the assurances

In view of the foregoing findings with regard to the permissibility of the equalization of transport costs, the content of these assurances must be regarded as contrary to the Treaty.

For the purpose of deciding the case, the question of its formal legality is important. Thus the High Authority expressly challenges the legality of the assurances in terms of competence. The contents of the letters produced were not the subject of a decision by the management board of the OCCF nor are they based on a decision by the management board. On the contrary, they were drafted and signed by the heads of the Imports Section which, according to the High Authority, has, under the statutes of the Office, no power to take decisions. There is however no need for us to go into the distribution of powers inside the OCCF because the question of authority arises in a simpler form.

In accordance with the basic general decisions on the equalization of ferrous scrap (Decisions Nos 22/54, 14/55 and 2/57), the Fund is the decisive executive body for taking decisions (the determination of the contribution rate and accounting periods, collection of contributions and determination of the amount to be paid back to the undertakings for scrap consignments accepted for equalization of prices). It is only in certain cases that the OCCF has the right to make proposals and the right to conduct purchase negotiations or itself to enter into contracts of sale. Accordingly, no

representative of the OCCF could on his own authority give binding promises relating to the equalization of prices.

But there is an even more important consideration, namely, that neither were the contracts of sale entered into nor the assurances given before September 1958 and this is confirmed by the applicants themselves. At that time, in execution of the judgments in Joined Cases 9 and 10/56 (*Meroni* v *High Authority*) the High Authority reorganized the legal basis of the equalization of ferrous scrap and revoked the delegation of powers which the judgment has censured. By virtue of Decision No 13/58 of 24 July 1958 (JO of 30.7.1958, p. 269 *et seq.*) 'the right which these decisions conferred on the Equalization Fund and the Joint Bureau shall fall to the High Authority which may entrust the administrative work to the Equalization fund or any other appropriate body'. Similarly, Article 1 of Decision No 16/58 of 24 July 1958 (JO, p. 275/58) provides:

'1. Financial machinery shall be set up which will both ensure the equalization of imported scrap imported from third countries and lead to economy in scrap consumption.

2. The administration of this financial machinery shall be the responsibility of the High Authority which shall be empowered to take the necessary decisions to implement the present decision and which may entrust the administravite work to an appropriate body.'

Article 11 provides:

'The High Authority shall determine:

(a) whether and to what extent it is necessary, account being taken of the situation of the market, to accept for equalization tonnages of:
scrap imported from third countries,
scrap treated as such within the meaning of Article 10(c) above;

(b) where it deems it necessary, the maximum purchasing price of the tonnages mentioned under (a) above;

(c) the equalization price, ...
. . . . . .
. . . . . .

On all these points the Joint Bureau of Ferrous Scrap Consumers (the 'OCCF') established by a notarial document dated 24 April 1953, or any other body recognized by the High Authority shall be empowered to put forward proposals to the High Authority.'

Article 12 provides:

'1. To be entitled to benefit from equalization the undertakings referred to in Article 2 above must prior to purchase have had the tonnages to be purchased accepted for equalization in accordance with the procedure laid down by the High Authority.

2. . . . . .'

We must conclude from a comparison of the way in which the distribution of responsibility and legal powers under the equalization scheme developed as a result of the decisions quoted above that the powers of the Fund under administrative law were varied on a number of occasions and that Decision No 13/58 revoked them. As indicated by the preparation of commercial contracts, the sphere of the operations of the OCCF is no longer more than ancillary and consultative. It should be noted that, in respect of the decisions which the High Authority has reserved to itself, the OCCF may now only submit proposals, which the High Authority may also receive from other organizations; this conforms to the arrangements laid down in Article 46 of the ECSC Treaty. The OCCF has no powers under administrative law, no power to take decisions under public law as the High Authority has in general and in individual cases, been doing since 24 July 1958 as the body in charge of the scheme, in particular, at the stage when the scheme was being wound up (see Decisions Nos 18 to 21/60). In the light of the basic decisions then in force, approval or refusal of the special equalization of transport costs must be treated as a matter for administrative discretion.

Thus, the OCCF has no power to make binding statements concerning the factors taken into account in the equalization of prices. There is general agreement that measures adopted in clear breach of the

provisions governing the power to take them are wholly unlawful and must be classified as absolutely void, that is to say, must be regarded as non-existent. I refer:

In the case of *French law,* to Waline 'Droit administratif' ('Administrative Law') Seventh Edition, p. 386: 'Instrument bearing only the signature of a person who has manifestly no authority; instrument signed by a subordinate without authority to take a decision without due authorization';

In the case of *German law,* Forsthoff 'Lehrbuch des Verwaltungsrechts' ('Manual of Administrative Law'), Sixth Edition, pp. 201 and 207: 'Manifest lack of authority justifies a refusal of the protection granted in respect of actions done in good faith. It invalidates the administrative measure. Nullity thus covers all cases of serious breach of authority affecting substance and also accords with the interests of the State';

In the case of Netherlands law, to Stellinga 'Grondtrekken van het Nederlands Administratiefrecht' ('Principles of Netherlands Administrative Law'), p. 205; van der Pot, 'Nederlands Bestuursrecht' ('Netherlands Administrative Law'), p. 206; Vegting, 'Administratiefrecht' ('Netherlands Administrative Law'), pp. 251 and 258; Kranenburg, Beel, Donner and others, 'Nederlands Bestuursrecht' ('Netherlands Administrative Law'), 1953, I, p. 234; Professor A. M. Donner, 'Administratiefrechtelijke Nulliteiten' ('Nullity under Administrative Law') in the journal 'Bestuurswetenschappen' ('Doctrine of Administrative Law'), November 1946, p. 18.

We appear to be concerned with an example of this absolute nullity of measure because the OCCF at no time possessed administrative powers in connexion with the equalization of scrap. Consequently, its assurances did not amount to administrative measures but only to business practices which assumed the guise of administrative measures.

I cannot accept the argument put forward by the applicants during the oral procedure that *bona fide* third parties must be protected against legal transactions entered into by a representative without powers of representation so that, so far as the former are concerned, the lack of representative authority has no effect. The applicants' contention is based exclusively on civil law, the rules of which are applicable in public law only under certain conditions. The applicants' claims in these proceedings for annulment can however be assessed only in relation to the public law of the Community, and this is to be found in the Treaty and in the general principles of law in the national legal systems developed by the Court into the law of the Community.[1] Since, however, it is clear that national public law does not recognize the concept of an ostensible delegation of powers with regard to a body acting *ultra vires*, there is no need for me to consider to what extent the applicants and the management of the French regional office ought to have known and complied with the important organizational decisions (Nos 13/58 and 16/58) or how far knowledge or presumed knowledge precludes the plea of good faith.

(b) The individual heads of claim

The decisive factors in the various proceedings must be viewed in the light of this assessment.

(aa) Joined Cases 19 and 21/60

In Joined Cases 19 and 21/60 the alleged assurances of the OCCF regarding the equalization of transport costs were followed on 15 March 1960 by statements of account relating to scrap from the High Authority which did not provide for reimbursement of transport costs.

Since, in terms of administrative law, the assurances given by the OCCF must be regarded as non-existent measures, the question raised by the applicants as to whether

1 – See Judgment in Case 1/55, Rec. 1955-1956, p. 28; Judgment in Case 7/56, Rec. 1957, pp. 115-123; Judgment in Case 8/57, Rec. 1958, p. 247; Judgment in Joined Cases 32 and 33/58, Rec. 1958-1959, p. 299; Judgment in Joined Cases 42 and 49/59, Rec. 1961, p. 160; Judgment in Case 6/60, Rec. 1960, p. 1149.

administrative measures which create rights may be revoked does not arise. There is, on the contrary, no need to deal with these assurances for the purposes of a decision on the actions for failure to act.

Nor is it possible to find any other legal basis for the claims of the applicants. In particular, it is clear that the statements of account relating to ferrous scrap sent out by the High Authority on 15 March 1960 are in accordance with the basic decisions and with the Treaty. In consequence, the applicants' claims are unfounded, which means that the court must dismiss their applications.

(bb) Joined Cases 2 and 3/61

The position here is different in that, in each case, the Authority itself, on two occasions (10 August and 10 December 1959, and 14 August and 10 December 1959) allowed for equalization of transport costs in its provisional statements of account and that, as in Joined Cases 19 and 21/60, it was only in the last statements of March 1960 that it failed to reimburse these costs. In view of this conduct the applicants refer to a confirmation by the High Authority of the assurance given by the OCCF, which cannot be revoked after a reasonable time has elapsed.

The application of the principles concerning the revocation of administrative measures primarily depends upon whether the High Authority's statements of account relating to ferrous scrap are considered as administrative measures which create rights.

Both their outward form and their contents argue to the contrary. These are informal notices addressed to the French regional office amending the current accounts and were apparently sent at the same time to the undertakings. They are signed by a director of the High Authority. They contain the express indication that they are merely intended as provisional statements of account and their contents call to mind current account statements from commercial undertakings.

There can, in my opinion, be no question of accepting the contention that the assurances given by the OCCF were expressly confirmed by the High Authority, above all in view of the High Authority's Decisions No 19/58 of 22 October 1958 (JO, p. 473) and No 15/59 of 18 February 1959 (JO, p. 209) on the determination of the equalization price which were adopted before the 'confirmation' and in which the recovery yard for scrap treated as imported scrap is used as the determining place as regards calculation of the price. It cannot be assumed that the High Authority deliberately intended to produce discriminatory rules in the statements for the benefit of the applicants.

The allowance made for transport costs in the equalization is on the contrary attributable to an error caused by the large number of statements which, after August 1958, the High Authority had to make out itself. If the statements are not regarded as administrative measures which must be treated as decisions of the High Authority, the classification which in my view is correct, their revocation is not subject to particular conditions. If, on the other hand, the first statements are regarded as administrative measures of the High Authority, creating rights, those measures are clearly vitiated by defects which, in principle, justify their revocation. The case-law of the Court on this question is perfectly clear; for example the judgment in Case 7/56 (*Algera and Others* v *Assembly of the ECSC*), which held that revocation is permissible within a reasonable time, and the judgment in Case 15/60[1] which states that: 'Even if in certain cases in view of vested rights withdrawal on grounds of unlawfulness does not have a retroactive effect, it always takes effect from the present.'

It is clear from the observation quoted above that retroactive revocation is impossible in certain, but not in all, cases. The judgment in *SNUPAT* v *High Authority* (Joined Cases 42 and 49/59) is to that effect. That case concerned the question whether exemptions from scrap equalization granted to certain undertakings in December 1957 and found to be illegal could be revoked. The Court ruled that

1 – Rec. 1961, p. 242.

the balance between the public and private interests involved was the decisive factor. The Court declared in particular: 'Furthermore, according to the law of all the Member States, retroactive withdrawal is generally accepted in cases in which the administrative measure in question has been adopted on the basis of false or incomplete information provided by those concerned'. In my view, this amounts to saying that retroactive revocation is not to be restricted to cases of the kind referred to but that, on the contrary, the answer to this question must also be found on the basis of an appraisal of the interests involved.

In the present case, the following facts must be taken into account in this connexion:

Approximately eight months elapsed between the first statements of account relating to scrap, which allowed for the equalization of transport costs, and the statements of account of 15 March 1960;

The incorrect statements of account, in contrast to the assurances of the OCCF, did not give rise to any commercial contracts made by the applicants;

Till now all statements of account were provisional;

The amounts involved in the subsequent amendments to the statements of account are of small concern to the applicant undertakings;

After the High Authority assumed sole responsibility for the equalization scheme it had to review a number of decisions and regulations and the accounts of the Brussels organizations; this required considerable time;

The High Authority does not act in its own financial interest but in the general interests of ferrous scrap consumers as a whole.

Taken together, these considerations make it impossible to deny the legality of the revocation of the first statements of account relating to ferrous scrap, assuming it was necessary, even after eight months had elapsed.

In any event, therefore, the High Authority was justified in correcting its previous mistakes and ordering repayment of compensation paid as equalization of transport costs. Since no other defects can be found to vitiate the repayment decisions, the applications for annulment lodged against the latter must be dismissed as unfounded.

B — The applications for damages

In case their main claims are rejected, the applicants have submitted applications for damages. The ground given for these claims in their applications is that if the change in the High Authority's view on the subject of equalization of transport costs had been communicated to them in good time, they would not have entered into contracts for the purchase of shipyard scrap but for imported scrap delivered to the nearest seaport, thus saving transport costs.

Although it appears merely as an indication, the reply contains the additional argument that the High Authority, either *ipso jure* or because of inadequate supervision, must bear responsibility for the malfunctioning of its subsidiary bodies which gave assurances to the applicants. This argument was the principal one developed during the oral procedure.

Consideration must therefore be given to the question whether these allegations fulfil the conditions necessary under Article 40 of the Treaty for the award of damages.

I — Wrongful act or omission

Before starting my examination, I must comment that only the conduct of the High Authority *prior to* the conclusion of the contracts of sale has any relevance in establishing the right to damages. All considerations which relate to the period up to the revocation of the alleged assurances by the High Authority can be ignored because they are of no importance as regards the *origin* of the damage.

It must also be noted that all that we are concerned with here is the cause of the damage resulting from the conclusion of the contracts of sale after September 1958. We are not concerned with examining purchases of scrap made before that date and the statements of account relating thereto.

Having made this clear, I must first of all consider whether there was any wrongful act or omission on the part of the High Authority.

1. The complaint of lack of notification

This ground of complaint must be considered in conjunction with the asserion that it was the long-standing practice of the organizations at Brussels always to allow for the equalization of transport costs. For the purposes of judicial review this can be expressed thus: the conduct of the subsidiary organizations established rules which were, possibly, illegal, on whose continuing existence the applicants were able to rely in their commercial contracts until, by Decision No 18/60, the High Authority made it very clear that these rules were illegal and thereby corrected the applicants' mistake.

The important question is whether, before that date, the High Authority did nothing or not enough to shake or destroy the applicants' confidence in the legality of the practice established by the Brussels organizations.

We have seen that the High Authority set forth its view on the factors to be taken into account in the equalization of prices for the first time in Decision No 34/56. It is clear that, on a reasonable interpretation, that decision could have left no doubt as to which transport costs and other ancillary costs could, exclusive of any others, be included in the equalization of prices. This decision, which was published in the *Journal Officiel* and which, consequently, was made available to the applicants, was calculated to undermine, in no uncertain manner, their confidence in the legality of the special equalization of transport costs and to exclude it as the material basis of their commercial contracts.

Even more important, however, is the subsequent legal development introduced by the judgments in Cases 9/56 and 10/56, *Meroni* v *High Authority*. They contain this finding: 'Several proposals which, under the abovementioned Article 5, the competent Office must submit to the Fund, in particular the fixing of "the maximum import price", the "equalization price", the "criteria for the calculation of economy in scrap" and the "amount of the bonus to be granted for such economies" cannot be the result of mere accountancy procedures based on objective criteria laid down by the High Authority; they imply a wide margin of discretion and are as such the outcome of the exercise of a discretionary power which tends to reconcile the many requirements of a complex and varied economic policy'.

This finding led to the announcement that the arrangements then in force for the equalization of ferrous scrap were illegal. As a result the High Authority adopted general Decisions Nos 13/58 and 16/58 the outcome of which was a radical reorganization of the equalization scheme and which constituted the most important rupture in the equalization scheme since Decision No 32/54 was adopted. With a stroke of the pen, the Brussels organizations were stripped of all their powers in connexion with equalization; the High Authority merely reserved to itself the right to transfer to them purely executive duties at a later date. Like the judgment in the *Meroni* Case, these decisions were published in the *Journal Officiel*. As it was specifically the judgment in the *Meroni* Case which attracted general attention to this question, all concerned were well aware of the circumstances in which the ferrous scrap equalization scheme was reorganized. From then on, no-one could assume that equalization would continue as in the past. Although the practices of the Brussels organizations might have permitted those concerned with equalization to draw conclusions as to what those organizations would do in a particular case, those practices could not, after July 1958, have had any bearing on the question how the High Authority would administer equalization.

It follows that the radical change in the equalization scheme in 1958 was, as such, likely to undermine all the principles established by experience of the practice hitherto followed on equalization matters. This disposes of the question whether the High Authority was under a duty to take detailed decisions forthwith on all the various questions, in particular, on the

problem of the equalization of transport costs, so as to prevent scrap consumers from entering into commercial contracts on the basis of rules applicable up to then. Another reason why the question does not arise is that the amount of work created by the revocation of the powers of decision made it impossible to resolve all the individual problems immediately. This justifies the conclusion that the failure of the High Authority to inform the applicants before they entered into their contracts of sale does not constitute a ground for a complaint of a wrongful act or omission.

2. The complaint alleging malfunctioning of the Brussels organizations

This ground of complaint refers to the fact that, in September 1958, the OCCF illegally gave assurances and not to the previous illegal practice of the Brussels organizations because, as I have already demonstrated, the latter can no longer be regarded as a cause of damage after the adoption of Decision Nos 13/58 and 16/58.

Although, for the purposes of the applications for annulment and actions for failure to act, I have assumed that the assurances were in fact given, in considering whether there was a wrongful act or omission, I must, in case the Court cannot deliver judgment on other grounds, specifically establish whether the assurances were in fact given *to the applicants* before the contracts of sale were entered into and in a *specific form.* The answer to the question relating to a wrongful act or omission, and also that relating to causation, may depend on it.

During the oral procedure, in support of their complaint, the applicants referred in particular to Case 23/59 (*FERAM* v *High Authority*) in which the High Authority stated 'that it did not contest that it was liable for the wrongful acts or omissions of the Brussels organizations in the performance of their functions', and to the judgment in Joined Cases 14 and 16/60 (*Meroni and Others* v *High Authority*) in which the Court held that:

> '. . . consideration must however be given to the question whether these mistakes could have been avoided by good administration because they might disclose the existence of a wrongful act or omission on the part of the High Authority or, which amounts to the same thing, on the part of the Brussels organizations.'

It is obvious that the legal explanations given by the High Authority in the first of those cases are not binding on the Court of Justice. But in the case of the judgment in Case 14/60 I very much doubt whether an *obiter* observation of the Court which did not form part of the *ratio decidendi* can constitute a binding precedent with regard to a legal issue of considerable importance. This much at least can be said: the Court's concept is very wide if it treats the wrongful acts or omissions of the subsidiary organizations as though they were those of servants of the High Authority, despite the fact that, as a rule, the High Authority is able to exercise very little control over those organizations. The danger of treating them as such is that, in its exercise of supervision, control and review, the High Authority will be forced to incur substantial expenditure on staff and administration or that, abandoning recourse to appropriate organizations or institutions, it will be compelled to undertake tasks the nature of which enables them to be performed by the delegation of responsibility outside its administration. In both cases, this would conflict with the principle laid down in Article 5 ('. . . and exert direct influence upon production or upon the market only when circumstances so require; . . . The institutions of the Community shall carry out these activities with a minimum of administrative machinery and in close cooperation with the parties concerned') and in Article 57 ('. . . the High Authority shall give preference to the indirect means of action at its disposal . . .'). The opportunities for efficient, effective and inexpensive administration would be restricted and interference with the natural course of the economy would be increased. Whether this opinion is accepted or not, it cannot be decisive in the present case.

The assurances which led to the conclusion of the contracts of sale negotiated by the OCCF are said to have been given in

September 1958. A study of the principal decisions has shown that at the time the OCCF no longer had any share whatever in carrying out the tasks involved in the equalization of ferrous scrap. Neither the Fund (the organization previously vested with administrative powers) nor the OCCF retained any powers whatever in connexion with the equalization of scrap. It was only in Decision No 29/58 of 19 November 1958 (JO, p. 519) that certain minor executive tasks were assigned to the Fund in connexion with the winding up of scrap equalization in respect of the period prior to its reorganization. The OCCF is referred to in Decision No 16/58 only as an organization able to submit proposals to the High Authority and thus to take action which any other undertaking is free to do because such action has no binding force. Similarly, the statutes of the OCCF in force at the material time and which were adopted with the collaboration of all the applicants are very clear on this point.[1] Thus, the general meeting of 31 July 1958 refused to amend Article 3 (4) of the articles of association by the adoption of the following phrase:

> 'To perform the tasks which may be assigned to it by decisions of the High Authority of the European Coal and Steel Community in connexion with the supply of ferrous scrap'.

The general meeting of 28 August 1958 decided, without any amendment of substance, to word Article 3 of the articles as follows:

'The objects of the Company shall be:

1. To consider all questions affecting the ferrous scrap market within and outside the Community.
2. To centralize all information relating to consumers' demand for scrap, supplies from within the Community and the possibilities of imports from third countries.
3. On the basis of the information thus acquired to draw up statements of demand and supply from within the Community and to determine the amount to be imported from third countries and purchases of scrap treated as imported scrap.
4. Within the framework of any decisions adopted by the High Authority relating to ferrous scrap, to perform the duties which it undertakes and to submit all proposals to the High Authority.
5. To negotiate purchases on behalf of its members, the consumers concerned being responsible for signature and performance of the relevant contracts.
6. To conclude, if necessary, direct contracts for sale on behalf of consumers to be designated at a later date.
7. To carry out, in pursuance of the above mentioned objects, all other duties consistent with the provisions of the Treaty establishing the European Coal and Steel Community.
8. To represent consumers in their dealings with the High Authority and to make to the latter any necessary recommendations.
9. To carry out any transactions relating to finance, or real or personal property which may be necessary for the attainment of its objects.

Furthermore, it decided not to approve the proposed amendment to Article 11, which read:

> 'First proposed amendment:
> A representative of the High Authority may, at the request either of the High Authority or of the board of the Office Commun des Consommateurs de Ferraille, attend all meetings of the board when an exchange of views appears necessary.'
> 'Second proposed amendment:
> At the invitation of the President, an observer from the High Authority may attend meetings of the board on a consultative basis.'
>
> It was, however, decided to delete Article 11.

1 – Annex to Moniteur Belge of 24 August 1958, p. 2309 *et seq.* and Annex to Moniteur Belge of 18 September 1958, p. 2937 *et seq.*

Since therefore, in September 1958, the OCCF played no decisive role in the administration of the equalization of scrap, it could not be regarded as a subsidiary organization which assisted the High Authority in carrying out its functions. The fact that, as must have been obvious after Decisions Nos 13/58 and 16/58, it had arrogated administrative powers to itself in giving assurances that there would be equalization of transport costs does not, therefore, constitute a wrongful act or omission for which the High Authority is liable. Nor need we go into the question whether these acts gave rise to liability to pay damages on the part of the OCCF as a cooperative organization in private law endowed with legal personality.

3. In these proceedings it is therefore in no respect possible to hold that there has been a wrongful act or omission on the part of the High Authority in the performance of its functions.

Even if the Court was not prepared to adopt this view, it would nevertheless be obliged to consider whether the blame should be shared by the applicants who, even after the publication of the decisions of 24 July 1958 affecting organization relied, as far as their trading operations were concerned, on the fact that in taking essential decisions in the exercise of its discretion, the High Authority would follow the same method as the Brussels organizations. If, with knowledge or in culpable ignorance of the legal position, they assumed that there would be no changes in the details of the application of the equalization of scrap they must impute to themselves at least some of the consequences of that conduct.

II – Establishment of the damage

For the sake of completeness (though the comments I have made on the question of a wrongful act or omission make this no longer necessary in law) I must say a word or two on establishment of the damage. The decisive question is the following: If equalization of transport costs had been refused, would the applicants have been able to purchase imported scrap on more favourable terms and thereby to economize on the transport costs involved in the purchase of shipyard scrap and would they without fail have refrained from purchasing shipyard scrap?

I do not think it is possible at this moment to give a clear answer to the second part of the question because it is certain that the choice of the scrap to be purchased did not depend only on the ex works price but on other factors as well (for example, quality, long-standing business connexions and foreign exchange clearance).

In order to establish damage, the applicants have referred to annual statistics relating to ferrous scrap imports, the demand for scrap and stocks, and drawn from them the conclusion that they could have at any time had recourse to imported scrap. On the other hand, the High Authority emphasized that it would not have been possible to obtain unlimited imports from the United States without having to take export restrictions into account. While it must be admitted that the figures quoted by the applicants to some extent justify an assumption that their claim for damages is sound, no convincing proof has so far been forthcoming. It is, in fact, essential not only to prove that the general situation on the market in ferrous scrap enabled imports to be brought in, but also that the arrangement for purchase on behalf of the group specifically enabled the applicants to purchase scrap imported through ports which were conveniently situated for transport. From the legal standpoint it must be borne in mind that it was not possible to apply equalization to any quantity whatsoever of imported scrap. Under the decisions governing ferrous scrap, the Fund, and subsequently the High Authority, determined the quantities of ferrous scrap imported from third countries or of scrap treated as such for which an equalization of prices can be granted and the conditions to which the grant of price equalization is subject (consumption priorities in certain areas of the Community).

At the time of joint purchase by the Brussels organizations, preference was, of course,

given *de facto* and *de jure* to shipyard scrap for the benefit of the ship-breaking undertakings of the Community and also on grounds of quality. The applicants do not deny the legality of this policy. For the purpose of assessing their claim, therefore, evidence must also be produced that there were legal grounds (for example relating to the prohibition on discrimination) which ensured that they would have been allowed in all circumstances to purchase cheaper imported scrap.

In view of the applicants' explanations, which carry little weight, and in the absence of any offer of suitable proof, I cannot imagine how it would have been possible to provide such evidence on every point.

III – To summarize the considerations of the actions for a wrongful act or omission, there can be no doubt that certain aspects of the conduct of the OCCF justify the impression that it was at fault. Nevertheless, when all the circumstances are taken into account, there can be no question of a wrongful act or omission on the part of the High Authority which compels it to make good the damage allegedly suffered. If the Court were to take a different view on this issue it would, in my opinion, be necessary to undertake an inquiry in order to reach a definite decision on the applications relating to a wrongful act or omission, to settle the issue of the chain of causation, and to determine the extent of the damage.

C – Summary and conclusion

I recommend the Court not to adopt my alternative suggestions, to dismiss in their entirety as unfounded Applications 19/60 and 21/60 and Applications 2/61 and 3/61 and to order the applicants to pay the costs.

ORDER OF THE COURT
31 January 1962[1]

In Joined Cases

19/60 – Société Fives Lille Cail, Paris,

21/60 – Société Union Sidérurgique du Nord de la France (Usinor), Paris,

2/61 – Société des Forges et Ateliers du Creusot, Paris,

3/61 – Société Marrel Frères, Rive-de-Gier,

represented by Jean-Pierre Aron, Advocate at the Cour d'Appel, Paris,

v

High Authority of the European Coal and Steel Community,

represented by its Legal Adviser, Italo Telchini, acting as Agent, and Professor André de Laubadère, of the University of Paris, acting as co-Agent,

1 – Language of the Case: French.