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

THE COURT

hereby:

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

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

Donner Rossi Riese

Hammes Catalano

Delivered in open court in Luxembourg on 17 December 1959.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE[1]

Mr President,
Members of the Court,

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

I

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

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

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

1—Translated from the French.

ing that which, since it is based on principles of public law which, without relying on legislation, have been developed entirely by case-law, was considered to give the greatest freedom to the Court in itself finding the solutions best suited to the requirements of the Community's legal system. This is one of the greatest tributes which the authors of the Treaty could pay to that system.

It is a fact that, in French law, at least in principle, the liability of the State is based on the concept of wrongful act or omission, and this concept is an original one; it belongs to public law and has no basis in the rules of civil law.

> 'The concept of a wrongful act or omission in the performance of functions', declares Odent in his *Cours de Contentieux Administratif*, 1957-58 at page 657, 'is almost impossible to define. Wrongful acts or omissions are found in a variety of forms. There is a wrongful act or omission on every occasion when a department of State has functioned badly, prematurely or slowly, or has not functioned at all, and on every occasion when its servants have acted *ultra vires* or disobeyed the rules governing its activity, or have committed a wrongful act or acted injudiciously or negligently. One sees at once that the term 'faute de service public' applies to two different groups of circumstances which, on analysis, are easy to distinguish: on the one hand, wrongful acts resulting from bad organization or a poor functioning of the public service, anonymous wrongful acts for which responsibility cannot be pinned on the individual action of one or more particular officials – these are wrongful acts properly so-called in the performance of functions; and, on the other hand, wrongful acts directly imputable to those employed in the public service and committed by them in the performance of their duty, and these are personal wrongs for which the State is liable if it does not disclaim responsibility therefor.'

In La Responsabilité de la Puissance Publique, 1938, Paul Duez states, on page 21:

> 'A wrongful act or omission by the State in the performance of its functions does not necessarily involve the idea of wrong by a particular, named servant. For there to be a wrongful act or omission on the part of the State, there is no need for officials indicated by name to be particularly at fault. It is enough to point to general misconduct on the part of the department which can be blamed for the injury without identifying it with persons, and to establish that the service is at fault either in its organization or in its operation, and that the injury is the result of that fault. As Mr Bonnard writes, it is the department and not the servant which must be judged.'

That is sufficient quotation from legal opinion, although I could produce much more. What is the advantage of this principle? It is twofold. First, it is the anonymity which marks the concept of a wrongful act or omission (it would be more exact to refer to a wrongful act or omission *by* the service). The injured party does not have to *summon* the official or the servant who committed the wrong (as for example under Belgian law, which is based on the civil liability of the person committing the act, pursuant to Article 1384) or even to *identify* him (as under German law which, while permitting proceedings to be brought against the State, does so solely on the basis of the wrongful act of a servant). As regards Italian law it seems to have reached roughly the same position as French law but it remains necessary to bear in mind the distinction, which is fundamental in Italian law, between subjective rights, the infringement of which can alone be the subject of proceedings before the ordinary courts, and the protection of legitimate interests, which falls exclusively to be dealt with by the administrative courts and which is normally enforced by means of an action for annulment, the action which is specifically called that of 'legittimità'. I draw attention, however, to a recent judgment of the Italian Corte di Cassazione, reported in the *Massimario del Foro Italiano*, 1959, No 9, where the following passage appears:

> 'The exercise of the discretionary power

possessed by the administration for the purpose of organizing the means and the measures to be adopted for the operation of a public service is not subject to review by the ordinary courts. Nevertheless, when the principles have been laid down for the operation of a public service, the administration is bound, in the specific and practical performance of this service, not to act in a manner contrary to the particular needs for which the regulations are intended to provide. When, therefore, this is not the case, the ordinary court may determine whether the administration is at fault without this involving any interference in the field of application of the discretionary power.'

That represents an admirable attempt by an ordinary court of law to penetrate to the limit into the field of operation of the State, but it is clear that the task is easier for the administrative court itself where, as in France, it has jurisdiction not only to review the legality of administrative acts but also in the matter of non-contractual liability. However, as far as Italy is concerned, these attempts are liable to be undermined by Article 28 of the Constitution which, by making public officials and servants directly liable to third parties, appears to change the liability of public bodies into only an indirect civil liability; this is, at least, the general view among learned writers, according to Zanobini, and the view of Zanobini himself in *Corso di Diritto Amministrativo,* Volume I, 1958, page 344.

The second advantage of the French system, which is, moreover, a consequence of the first, is that it enables a court, so far as this seems reasonable, to *articulate* the conditions required for liability to be put in issue. In this constant battle between the needs of the State and the protection of the rights of the individual the essential consideration to be borne in mind is the nature of the service in question, the special problems peculiar to its operation, the quick decisions which its operation may require etc. It is for this reason that, according to the circumstances, the decisions of the courts require, in order that liability may be put in issue, either a 'manifest wrongful act of particular gravity' (for example, general security measures required by a state of war and for which the law confers the widest discretionary powers on the administration) or, more commonly, a 'serious error' (the most common examples are the actions of the police authorities and the strictly medical aspect of the work of the public health services) or, on occasion (and this is ordinary law), a wrongful act or omission described as 'mere' or 'ordinary' (of which there are innumerable examples).

To these must be added two very important categories:

(1) The category in which, after the burden of proof has been shifted, it is recognized that there is a legal *presumption of fault* for which the administration is responsible, in which case the injured party has to do no more than establish the relation of cause and effect between the action of the administration and the injury. This has been applied in the case of road accidents.

(2) Cases of *innocent liability* where the theory of created risk applies. This rests on the principle of the equality of citizens in relation to charges necessitated by the functioning of public services. When this equality is impaired on grounds of public interest, it must be made good in the form of financial compensation. The most common cases of the application, in French public law, of the theory of created risk arise when damage is caused by the execution of public works, quite apart from infringement of property rights, and, more generally, by the existence or execution of public projects. As further examples, reference can be made to damage attributable to the presence or the use on the part of the State of specially dangerous products or machines which create exceptional risk. One of the more recent applications of this concept involves thefts, vandalism or acts of violence committed in the neighbourhood of the new 'prisons without bars' by certain of the inmates who have not properly adjusted to modern concepts of crime prevention (Conseil d'État, Thouzellier, 3 February 1956, Recueil, page 49).

But this last category of liability cannot in-

volve the application of the ECSC Treaty since Article 40 requires 'a wrongful act or omission'. Why this requirement, which removes all possibility of relying on the theory of created risk? No doubt because the authors of the Treaty did not consider that the conditions under which the institutions of the ECSC would function were such as to create this exceptional risk, which could alone justify the existence of innocent liability. But, apart from this limitation (which in any case is absent from the new treaties), the Court has full freedom, in the light of the circumstances, to determine the nature and the gravity of the wrongful act or omission which is capable of rendering the Community liable.

As for 'personal wrong', not only is it not exclusive, in itself, of a wrongful act or omission, since the individual committed it 'in the performance of his duties' (which French case-law has long recognized) but any proceedings arising therefrom can be brought before this Court. This avoids the main difficulty of the French system, where jurisdiction varies, the general courts having it in the case of the personal liability of an official and the administrative courts in the case of liability on the part of the State. Here, once again, is the happy outcome of the *unity of jurisdiction* enjoyed by the Community.

II

In the light of these preliminary comments I now come to the question whether, in this case, there is a wrongful act or omission capable of giving rise to liability on the part of the Community.

Such wrongful act or omission is the consequence of the fact that the departments of the OCCF and its regional office were unable to prevent the issue of fraudulent certificates relating to shipyard scrap, which made it possible for a certain number of producers improperly to benefit from equalization, which in consequence increased the amount of the contributions claimed by the Community from every ferrous scrap consumer, including the applicant undertaking.

One thing is immediately clear: the wrongful acts of the official who issued the certificates were committed by him in the performance of his duties at the Netherlands Ministry of Economic Affairs. This official can in no sense be regarded as having acted on behalf of the Community and, in appropriate cases, and under conditions which we need not go into here, his actions can have a bearing only on the liability of the Netherlands State. The proceedings should really take place before the courts of the Netherlands.

Another point is that the High Authority expressly accepts that since under Article 53 of the Treaty and the decisions establishing the equalization machinery, it is responsible for the proper functioning of this machinery, any wrongful act of the OCCF or its regional offices in the performance of their functions must be regarded as a wrongful act or omission by the High Authority itself. We can only take note of this statement.

In the end what was at issue? The treatment, made possible by the relevant decisions of the High Authority, of shipyard scrap as imported ferrous scrap for the grant of the benefit of equalization obviously lent considerable importance to the supporting evidence to be produced regarding the origin of this ferrous scrap. The first question which arises is whether the Brussels agencies, acting under the supervision of the High Authority, ought to have taken the matter upon themselves and organized the verification procedure instead of leaving it to government departments.

They have not, in my view, committed any wrongful act or omission in this connexion. In the first place the departments of governments such as those for economic affairs were much better equipped to carry out the necessary checks. Secondly they were acting within their own powers: ferrous scrap importers who wanted to re-export had to obtain the necessary certificates from the national economic department and we know from the statements incorporated in the official minutes on which the unfavourable decisions and judgments delivered in the Netherlands were based, that this happened

often when the OCCF, which had to be given first refusal of this scrap, did not exercise its right to buy it. Nothing was more natural therefore than to give the competent national department the work of and responsibility for issuing the necessary certificates, even though those certificates could *also* serve the purposes of the equalization scheme placed under the control of the High Authority: this was a proper application of Article 86 under which Member States have undertaken to take 'all appropriate measures whether general or particular . . . to facilitate the performance of the Community's tasks'. But, clearly, it does not follow from this cooperation that government departments can be regarded as acting *on behalf of* the High Authority in such conditions that their actions involve the Community in liability. European integration has not reached that point yet!

But then, and this is the second question, ought not the regional office to keep a *check* on the correctness of the contents and not merely the appearance of the certificates issued by the Ministry of Economic Affairs? In other words, ought not the regional office to verify origin? I think not, in view of the fact that the responsibility for issue of the certificate was that of the Ministry. The position would have been quite different if the regional office had decided to grant the certificate *itself* on the basis, for example, of a straight-forward declaration. It would then have required the production of all the supporting documents to back up the declaration. But, in fact, as there was certification, it relied on the competent departments of the State knowing (and this is essential) that the State issued the certificate only after having required evidence in support of and carried out checks on origin. In these circumstances it is difficult to see why a new check or new evidence could appear necessary. Under these conditions, the suspicions of the regional office or of the OCCF could reasonably have been aroused only if there had been definite grounds for them; for example, if there had been ferrous scrap purporting to come from a ship known to have sunk a long time ago or, again, an apparently abnormal proportion of shipyard scrap compared with the quantities of ferrous scrap benefiting from equalization, but this does not appear to have been the case.

It remains to consider two arguments submitted by the applicant. In the first place, it refers to the High Authority's own statements in reply to questions put by members of the Common Assembly, in which the High Authority admitted the inadequacy of the system of control and the need to improve it. On this point the statement of defence replied that it would be ridiculous to regard this reply as recognition of liability on the part of the High Authority since all that it involved was an expressed intention to *improve* the operation of the service in question.

This is not completely true; in fact the second reply of the High Authority (27 March 1958) states: 'In a letter dated 24 February 1958 to the President of the Council of the Fund, the High Authority expressed a desire to be informed of the measures contemplated in order to make good the *operating deficiencies* in the system at present in force'.

What was really involved here is an interim reply along the lines of the answers given by a government to Members of Parliament. At that time the High Authority was not in possession of all the details of the business. In any case one cannot regard it as proof of bad organization of the service amounting to a wrongful act or omission in the performance of its functions.

The second argument is based on the length of time taken by the regional offices to forward the files to the Fund in Brussels. Here, too, there is a reference to this fact in the same answer from the High Authority in which it is stated: 'Proposals are constantly being made to ensure effective and *more expeditious* cooperation between the Fund and the regional offices'. But it is not clear in what way more rapid transmission could have prevented the acts of fraud since the usual supporting documents had been produced and the files were in order. The Fund had even less reason than the regional

office not to accept as authentic the certificates supplied by the competent departments of the Netherlands Ministry of Economic Affairs.

To conclude, there is nothing in the file under consideration in the present case which, in my opinion, constitutes evidence of a wrongful act or omission by the Community in the performance of its functions such as to render it liable.

I recommend:

that the application be dismissed; and

that the applicant company pay the costs.