OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 1 APRIL 1965[1]

Mr President,
Members of the Court,

Seven Italian iron and steel undertakings—several of which have already appeared before you—once again raise the question of the liability of the ECSC incurred by reason of the alleged wrongful act or omission on the part of the High Authority in the management and supervision of the equalization scheme for ferrous scrap.

Without describing this scheme, which is well known to you, in detail, I need only recall that its purpose was to ensure the regular supply of a product of a very speculative nature, and that it was set up on the basis of Article 53 (b) of the ECSC Treaty which authorizes the High Authority, with the unanimous assent of the Council, to make any financial arrangements which it recognizes to be necessary for the performance of the tasks set out in Article 3. It obtained its obligatory character from Decision No 22/54 of 26 March 1954 and was subsequently extended by Decisions Nos 14/55 of 26 March 1955 and 2/57 of 27 January 1957. It involved the payment of contributions based on the consumption of bought ferrous scrap by each undertaking and of equalization payments to undertakings which obtained ferrous scrap which was either imported from third countries or was treated as such, such as ferrous scrap obtained from shipbreakers' yards. The functioning of the scheme was ensured by two cooperative associations incorporated under Belgian law, the Office commun des consommateurs de ferraille and the Caisse de péréquation des ferrailles importées, acting under the responsibility of the High Authority.

Following your judgment of 13 June 1958 in the Meroni case, which held that the conditions under which powers had been delegated to the so-called Brussels agencies were not in accordance with the Treaty, the High Authority once again took over control of the scheme from 1 August 1958 to 30 November 1958, on which date the scheme was wound up.

But even before that date serious irregularities had been discovered, consisting in particular of the delivery of forged ship-breaking certificates by the Head of the Iron and Steel Department of the Netherlands Ministry of Economic Affairs. This first discovery was followed by the finding of other, more far-reaching, frauds committed in several Member States; these are set out either in the High Authority's Report of 8 April 1961 or in the Report of the Domestic Market Committee of the European Parliamentary Assembly of 15 December 1961, known as the 'Poher Report'.

On several occasions applications have been made to you putting at issue the liability of the Community for various acts connected with the functioning of the equalization scheme, and this will enable me, on many points, to shorten my observations. In your judgment of 17 December 1959 in the Feram case (Rec. 1958-1959, p. 503), it was held that the fraudulent acts of a national official in drawing up certificates of origin could not constitute a wrongful act or omission incurring the liability of the High Authority. This was confirmed by the two judgments of 14 December 1962 in the Compagnie des hauts fourneaux de Chasse and the Meroni cases (Rec. 1962, pp. 725 and 189). The contrary was held in regard to

1 – Translated from the French.

assurances improperly given by the agencies in Brussels concerning parity in transport costs (Sté. Fives-Lille-Cail of 15 December 1961—Rec. 1961, p. 565), but here again the failure to prove the existence of loss led you to dismiss the claim for compensation.

The almost identical conclusions in the two Applications 9 and 25/64 claim, on the basis of the first paragraph of Article 40 of the ECSC Treaty, that the High Authority is liable for a 'wrongful act or omission' on the ground that, throughout the whole period of operation of the compulsory equalization scheme for ferrous scrap, it was unable to prevent the commission of 'flagrant and gross frauds' to the detriment of the iron and steel undertakings of the Community, frauds which were only referred to in part in the High Authority's Report of 8 April 1961. Therefore, you are requested to entrust to a committee of experts the task of confirming the inquiries carried out by seven firms of auditors, to pronounce upon the possible existence of other frauds not brought out in the Report and to make a conclusive finding as regards the exact tonnage involved in the frauds, the percentage increase in contributions resulting from it and the total amount of the expenses incurred by all the investigations to which these frauds gave rise.

But the applicant undertakings have also requested you, as a preliminary point, to put to the High Authority 21 questions dealing with widely differing matters. In particular, this would involve reconstructing, year by year, a detailed account of the tonnages involved in the frauds and of premiums wrongly paid as well as of sums recovered, drawing up a list of names of the undertakings, of the servants of the equalization agencies or of other persons against whom criminal or civil proceedings were brought and specifying the difficulties encountered by the investigations made after the discovery of the frauds. Other questions related, for example, to the wording of the 'compromise' made with the Council of Ministers on the establishment of the compulsory equalization scheme. Their diversity and scope are such that they go well beyond the case of the applicant companies and in reality put at issue as much the political responsibility of the High Authority, which has been questioned before the European Parliamentary Assembly, as its civil liability before you. In any case, up to the present, you have not seen fit to accede to the request put to you.

The applications have been made within the framework of Article 40 of the ECSC Treaty which provides, without prejudice to the first paragraph of Article 34 (direct and special harm caused by a decision's being declared void), pecuniary reparation from the Community, to make good any injury caused in carrying out the Treaty by a 'wrongful act or omission' on the part of the Community. The High Authority —as you heard in the oral arguments —has raised two objections to the companies' applications, either that the application was brought outside the period of limitation or, alternatively, that it was premature. But the obligation to answer this question does not absolve me from considering the two points which determine the recognition of liability: the existence of a wrongful act or omission and its gravity, as shown by the existence of damage.

The wrongful act or omission

1. In a previous case you criticized the applicant for having merely placed on the file various parliamentary papers without indicating sufficiently which of the irregularities referred to therein constituted wrongful acts or omissions on the part of the High Authority. The Feram company and the other under-

takings concerned do not altogether escape this criticism, at least as regards their applications; in their replies, they set out in detail their arguments and the facts on which they propose to base the liability of the High Authority. In the first place, there is the fact that in 1954 the High Authority accepted a 'compromise' with the Council of Ministers—and for a long time kept it secret—by which it consciously confined its action to the general supervision of supply policy, thus giving up all supervision of the management of the agencies in Brussels. This conscious forbearance had entailed, or had at least made possible, the frauds subsequently discovered. Further, the High Authority waited until September 1958 before adopting detailed measures regarding evidence of the origin of ferrous scrap, while formerly, in the absence of any standard regulation regarding the documents to be supplied, each regional office had adopted its own procedures on this point. The differences in price, the difficulty of checking accurately the origin of ferrous scrap from ship-breakers' yards, or of the so-called 'substitute' ferrous scrap which also qualified for equalization, were sufficient reasons to provide for the preparation of strict rules of supervision: the absence of such regulations led to widely differing types of fraud, some of which are detailed by the applicants and which have been described to you several times. In addition there is the fact that—although the agencies in Brussels had been warned of at least the possibility of frauds well before the report made by Mr Worms in November 1957—an inquiry was only begun on 15 March 1958 and the authority for it, inadequate and limited, was given by the Caisse de péréquation to the Société Fiduciaire Suisse; the High Authority then waited until September 1958 before extending this authority and itself taking control over the supervision of the investigations. Hence, during this period, fraudulent persons and their accomplices were able to continue their activities. The applicants add finally that, more than three years after publication of the High Authority's Report which, on its own admission, did not finally settle the question raised by the frauds, numerous points have still not been clarified which shows, it is alleged, the 'incredible reluctance' of the competent authorities to settle the matter finally.

It does not reflect on the abilities of learned counsel for the applicants to observe that the facts thus raised by him are mainly those considered by Mr Advocate-General Lagrange in the Hauts Fourneaux de Chasse and Meroni cases as being capable of incurring the liability of the Community. I have all the less reason for criticizing him in that I entirely share the opinion of my predecessor on this question. In referring to what he said at the time, I shall merely deal with the following points.

— Although the need to obtain the unanimous assent of the Council may to some extent reduce the political responsibility of the High Authority, it in no way releases *the Community* from civil liability, since it is the liability of this body, the only one to have legal personality and be referred to in Article 40 of the Treaty, which is at issue, even if liability for the wrongful act or omission complained of actually falls on the High Authority. Furthermore, no internal agreement could legally have released the High Authority from the obligations imposed on it by Article 53 of the Treaty.

— The defendant institution emphasizes that the failure to check the origin of the ferrous scrap may well be the act of the agencies in Brussels but it was encouraged by the refusal of the High Authority to accept that it was *obliged* to supervise the management of the equalization scheme and not to limit itself to a general supervision of the

supply policy. Secondly, although the agencies in Brussels are legal persons governed by private law, their activities are governed by public law for which the High Authority has for a long time accepted full legal liability, as was made clear by its Decision No 22/54. Your judgment in the Fives-Lille-Cail case expressly decided that 'the very fact of having authorized the equalization scheme, in whatever form, obliged the High Authority to supervise it'. And your judgment of 4 April 1960 in Mannesmann case did not hesitate to refer to the Office commun des consommateurs de ferraille as an 'organ of the Community'.

— That the High Authority displayed excessive diffidence in 1958 when the first frauds were already discovered is certainly unfortunate, but it does not follow that this diffidence constitutes in itself a 'wrongful act or omission'; in any event it is unrelated to the liability incurred by the institution as a result of its previous refusal to supervise the functioning of the agencies in Brussels.

— Finally, I agree with the High Authority that its three-year delay in making known the result of the investigtions into the frauds—a delay which is, moreover, disputed by the High Authority—has no bearing on this case. It has no bearing on the existence of the frauds and on the prejudicial consequences which may possibly have resulted for the applicants.

2. It seems clear to me that the functioning of the agencies in Brussels was defective and that there was lack of supervision on the part of the High Authority, but do these facts constitute the 'wrongful act or omission' required by Article 40 in order to render the Community liable? In challenging this at the hearing, the defendant institution based its case essentially on two points:

First, the distinction between the management of the equalization scheme by the agencies in Brussels and the supervision of this management by the High Authority. Since we are dealing with companies governed by private law, which could not under any circumstances be called 'organs of the High Authority', management of the equalization scheme by the agencies in Brussels could only render those agencies liable. This is evidenced by the fact that the Court held that the delegation of power made to them by the High Authority was unlawful; one does not delegate to an organ of oneself.

I shall repeat the actual words used in the Mannesmann judgment that 'the structure of the equalization scheme for ferrous scrap exhibits, *taken as a whole,* the characteristics of an institution governed by public law', and I shall not comment further on the significance given by that same judgment to the term 'organ of the High Authority'. It must of course be understood to imply that the liability of this institution for the management of the scheme is its own, direct liability and not that incurred by a principal by reason of the acts of his agent. This argument, which was originally that of the defendant, appears to me to be established by your own case-law.

Having set aside—wrongly in my view—all possible liability for the management of the equalization scheme, the defendant refers, *secondly,* to Italian and French law in order also to disclaim this liability as regards the lack of supervision or inadequate supervision by the High Authority. More precisely, it refers to the solutions accepted by these two legal systems in the case of failures to carry out supervision on the part of banking organizations. The former—Italian law—refused in such cases to recognize the liability of the public authority, not only before the ordinary civil courts which have jurisdiction to hear cases involving the infringement of direct rights but also before an administrative court or tribunal, in the absence of a failure to acknowledge a

legitimate interest. As for French law, although by a decision of 24 January 1964 the French Conseil d'Etat accepted for the first time the liability of the State for a *grave wrongful act or omission* ('faute lourde') in the supervision of a bank, the circumstances of the case show that the reason for this solution is not the seriousness of the irregularities in which the bank was involved, but the failure of the supervising agency to take action after the discovery of those irregularities; in this instance no grave wrongful act or omission of this nature could be imputed to the High Authority.

I should certainly like to accept that by employing the expression 'wrongful act or omission' the authors of the Treaty of Paris intended to refer to concepts borrowed from certain national legal systems and to leave to the Court the task of adopting flexible solutions which take into account the nature of the departments in question and of the greater or lesser difficulties encountered by each one in carrying out its task. That in certain cases recognition of the liability of the Community under Article 40 may thus depend on the existence of a grave wrongful act or omission is an arguable proposition, but it is one which I do not consider to be applicable to the present case. In this case we are not dealing with a public authority which supervises a private activity carried on by persons or undertakings which are outside it, as is the case with Italian or French case-law concerning the supervision of banks. On the contrary, although the agencies in Brussels were established in the form of companies incorporated under private law, their activities, as is stated in the Mannesmann judgment, are of a public law character for which the High Authority alone must assume liability. It is, in fact, the measures taken by all those whose cooperation in the equalization scheme was necessary —first, the Office and the Caisse, and, secondly, the High Authority—which were defective, either from the point of view of day-to-day management or from that of the supervision to be ensured and the stimulus to be given and there is therefore no reason to require the existence of a grave wrongful act or omission in order to involve the liability of the Community. I consider that the facts, as they are known to you, show with ample clarity the existence of a 'wrongful act or omission' on the part of the High Authority within the meaning of Article 40 of the Treaty.

Damage

The remaining problem which I find more delicate is that of determining whether the applicant companies have so far sufficiently demonstrated the existance of damage suffered as a result of the acts or omissions of the Community. They accept that the amount of the damage suffered cannot be assessed at this stage—and that is also why they ask you to appoint a committee of experts—but they maintain that its existence is certain: it is all the less possible to recover the entire equalization payments which were wrongly made, as your case-law does not allow the High Authority to order those undertakings using ferrous scrap to pay back the sums in question. Again, the inquiries and checks carried out incurred considerable expense which was certainly greater than would have been required for a contemporaneous supervision by the High Authority of the functioning of the equalization scheme.

The defendant objects here that the very existence of damage presupposes that the undertakings have in fact paid the contributions claimed from them: as the tonnages of ferrous scrap wrongly allowed to benefit from equalization represents 2% of the total tonnage, the potential damage could not in any case exceed this percentage, given that this

figure of 2% must be reduced still further as much by reason of the recoveries made as by virtue of the transactions which cannot incur the liability of the High Authority and which gave rise to the judgment in the earlier Feram case. At present the applicant undertakings are far from having paid 98% of the contributions required of them. The High Authority sums up its arguments on this point in the following manner: if the damage consists of the payment of sums which were not owing, then so long as the payment has not been made the damage does not exist any more than does the right to reparation.

As for the factors constituting the damage referred to, the defendant institution disputes the claim that the cost of *a posteriori* supervision is necessarily greater than that of supervision which it would itself have exercised during the functioning of the equalization scheme. In any case, it is for the applicants to bring evidence of their allegations. Further, as the funds necessary for carrying out the supervision were required from the undertakings by the general decisions governing the winding-up of the equalization scheme, reparation for the damage possibly caused by these decisions should be claimed not on the basis of Article 40 of the Treaty but on that of Article 34.

This defence raised by the High Authority certainly invites quite serious reservations but I do not think it necessary to discuss it in detail since it leads me, in fact, in a roundabout way to the two objections of inadmissibility of the applications to which—reversing the usual order of dealing with the matters at issue—I now pass. As you know, of the two objections raised, the principal one is that the application is time-barred, and the other, the alternative objection, that the application is premature. The defendant institution maintains that the facts giving rise to the applications are those equalization payments made in respect of ferrous scrap which was not entitled thereto, and it here refers to the analysis made by Mr Advocate-General Lagrange in the Meroni case in 1962. According to Article 40 of the Protocol on the Statute of the Court of Justice of the ECSC, the 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*: since the payments were made at the latest during 1958, the proceedings had become time-barred in 1964 when the applications were filed.

The applicants object that in the judgment referred to above the Court declared that it would receive, without holding them to be outside the period of limitation, applications based on irregularities other than those relating to the Van De Grift affair and made after the closing of the accounts of the equalization scheme. From this they rightly infer that their claims are not time-barred. But are they not then premature, as the High Authority maintains in its alternative objection? If one refers to another passage in the above-mentioned judgment in the Meroni case it certainly appears that an affirmative reply must be made. You made it clear in that case that there was no risk of the applications being time-barred 'as it has not yet been possible finally to fix the amounts to be paid in respect of the equalization levy on ferrous scrap'. How can this statement be interpreted except as implying that, as long as the proceedings for recovery taken by the High Authority and the winding-up of the equalization scheme are still pending, and while the final balances are not yet drawn up, then the period of limitation has not *started to run*? But it is also an implied admission that recognition, not only of the extent of the damage, but of its very existence, depends on a final assessment of the sums to be paid and that so long as this

stage has not been reached the application is premature.

This at least appears to be the necessary consequence of your judgment in the Meroni case and I consider it reasonable. We know that at present the High Authority is engaged in difficult proceedings before the courts or tribunals of the Member States to put an end to the inquiries and obtain a settlement of the actions now pending and to recover that which is still recoverable. As nothing has been finally settled, I am at present unable to see what would be the result of the work of the committee of experts which the applicant companies are requesting you to appoint. In what way would they be better placed than the departments now in charge of this work to quantify, for example, the exact tonnage of ferrous scrap fraudulently presented for equalization, or to fix the bases of calculation of the percentage increases in the equalization contributions caused by the frauds? And what use would their work be as long as the inquiries have not ended? It is true that the companies are asking you, after you have set up this vast research programme the results of which are for the moment theoretical, whatever else you do, to order the High Authority to pay damages; for that very reason the existence of damage must be established at this stage, which I do not consider to be the case. For these reasons I consider that the applications are premature, as is maintaind by the High Authority.

I am therefore of the opinion that

— Applications 9 and 25/64 should be dismissed;

— the applicants should pay the costs of the proceedings.