THE COURT

hereby :

1. **Dismisses the application as unfounded;**
2. **Orders the applicant to pay the costs.**

Donner Hammes Trabucchi

Delvaux Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 16 December 1963.

A. Van Houtte — A. M. Donner

Registrar — President

## OPINION OF MR ADVOCATE-GENERAL M. LAGRANGE DELIVERED ON 17 OCTOBER 1963[1]

*Mr President,*
*Members of the Court,*

You are asked to give judgment in an application, under Article 40 of the ECSC Treaty, made by the Société des Aciéries du Temple (the successor of the Société nouvelle des usines de Pontlieue—Aciéries du Temple, or SNUPAT, which you know well) for reparation for a wrongful act or omission on the part of the High Authority.

This wrongful act or omission is said to have consisted:

(1) in an *error of law* committed by the High Authority in the reconciliation which it was required to make between the aim of equalization, an essentially economic aim, and respect for the principle of equality between the contributors, a principle which, it is alleged, was infringed;

(2) in the persistence of the High Authority in that error and the uncertainty which it caused among the undertakings regarding their actual rights.

As regards the error of law, the applicant recalls at length—one might even say, with a certain nostalgia—the argument developed in its first application, according to which the essentially economic purpose of the equalization scheme should have been based on the concept of the *market*, from which it follows that movements of ferrous scrap having no repercussion on the market, such as those of group ferrous scrap, should not be taxed. It is in this sense that the creators of the Equalization Fund had always intended it. Certainly, the applicant declares that it submits to the decisions of the Court which have held otherwise, on the basis that the event giving rise to the contribution was the

1 — Translated from the French.

consumption of ferrous scrap and not participation in the ferrous scrap market. But nonetheless, it adds, the Decisions of the High Authority and the manner in which they have been applied would suggest an interpretation other than that which has been finally given by the Court and which has led the undertakings into error.

I will merely observe on this point that, even if it is possible that the creators of the scheme only intended that the burden of equalization should be borne by the undertakings buying ferrous scrap in the market, since it was equally the difficulties of supply in the market which had led to the creation of the scheme among those concerned, the concept was able to be modified when the system became compulsory for all consumers of scrap and the idea of joint liability between all such consumers, whether or not buyers in the market, became predominant. In any case, the basic Decisions establishing and governing the compulsory scheme have been interpreted in this sense by the Court and declared legal. It would only be possible, therefore, to imagine the existence of a wrongful act or omission on the part of the author of these Decisions if it is shown that, by its conduct, it led those concerned into error as to the proper *application* of the Decisions, as for example in Joined Cases 19 and 21/60 and 2 and 3/61, Société Fives Lille Cail and Others, Judgment of 15 December 1961 (Rec. 1961, pp. 590 et seq.), since the obscurity or the bad drafting of a regulation cannot suffice in itself to constitute a wrongful act or omission. Even its illegality cannot be invoked in an action based on Article 40 (Meroni, 14/60, 13 July 1961, Rec. 1961, p. 333) since reparation for the damaging effects of a decision which has been annulled or declared illegal comes, in the ECSC Treaty, under the special rules of Article 34. In addition, the only Decisions recognized as illegal by the Court in the field which concerns the applicant are those which had granted exemptions to Hoogovens and Breda Siderurgica and clearly the applicant cannot complain of that, since the judgment which recognized them as illegal was given as a result of its application and has been executed.

Can one then find in the High Authority an attitude capable of having led those concerned into error as to the proper application of the basic Decisions? That is what I have now to look at in examining the five heads under which the applicant has enumerated its complaints in this matter.

*First head:* Absence of a solution to the problem of *group ferrous scrap*. This problem, we are told, was not settled by the basic Decisions which, in referring to 'bought ferrous scrap' and adding 'within the Community' gave rise to the idea that only ferrous scrap bought on the market was assessable. This head is thus a criticism of the drafting of the legislative Decisions. I have just given my opinion on this point and shall not return to it.

Then come three heads which are closely linked and which I shall examine together:

*Second head:* The High Authority refrained in the application of the Decisions on this occasion, from defining and specifying the concept of bought ferrous scrap. It kept rather to the concept of 'own resources', leaving it to be supposed that in its opinion all that is not 'own resources' is 'bought ferrous scrap'. The expression 'own resources' only appeared for the first time in the wording of Decision 2/57. In view of the uncertainties resulting from the wording, it was imperative from the first for the High Authority to take an unequivocal stand.

*Third head:* Similarly, as regards 'own resources' themselves, the High Authority delayed and showed uncertainty in defining this concept. It was only in its letter to the O.C.C.F. of 18 Decem-

ber 1957 that for the first time it gave some hints—incidentally much too vague ones—on this subject.

*Fourth head:* The uncertainty was still further increased by the fact that the High Authority 'withdrew its reservations' with regard to the exemptions granted to Hoogovens and Breda Siderurgica, allowing it to be thought that group ferrous scrap, still undefined, could be exempted in certain cases. The ground for the exemption was only given in the letter of 18 April 1958 and it is doubly illegal since, first, it permits the exemption of group ferrous scrap and, secondly, it puts forward the purely arbitrary criterion of 'local integration'.

These three heads summarize in themselves the whole history of the levy on group ferrous scrap. Allow me, for my part, to refer to my opinion in Cases 20/58 et seq., Phœnix-Rheinrohr and Others (Rec. 1958-1959, pp. 186-190).

There you will see quite clearly that the question of the levy on group ferrous scrap was far from resolved from the outset. This was only done by a series of tentative efforts on the part of agencies in Brussels and of the High Authority itself and final solutions were reached only after several judgments of this Court. However, in the midst of these efforts two points remain clear: first, the existence of a problem of group ferrous scrap ('Konzernschrott') has been recognized from the beginning. The applicant was itself very much aware of the problem, since it felt obliged to draw the attention of the High Authority to it by a letter of 19 October 1956, in which is found the following passage (which was cited in Court): 'In fact, the rules adopted by the C.P.F.I. provide that part of the ferrous scrap delivered by Régie nationale des usines Renault *might in appropriate case be liable to the equal-ization contribution*'. Secondly, it is no less certain that the High Authority has never allowed the exemption of group ferrous scrap, although learned counsel for the applicant maintained the contrary, claiming that by limiting the exemption to cases of local integration the High Authority had for practical reasons admitted the principle of exemption. This is not correct. On the contrary, comparison of the two letters of 18 December 1957 and 17 April 1958 clearly shows that group ferrous scrap is in principle subject to contribution and that an exception had only been made to this rule in special cases of local integration.

So, on the question of the imposition of the levy on group ferrous scrap, the High Authority has not changed its position. Can it be charged with a wrongful act or omission for not having expressly fixed its position earlier, in view of the uncertainty resulting from the position of the O.C.C.F. as well as from the basic provisions? I do not think so. It began to study the question as soon as the problem was put to it by the O.C.C.F. which had already discussed it without reaching agreement, at least in the two specific cases of Hoogovens and Breda. I do not see in the conduct of the High Authority, or of the agencies in Brussels for which it is responsible, negligence or excessive delays in solving the problem.

*Fifth and final head:* This is based on the alleged wrongful act or omission on the part of the High Authority in persisting in its error after the first SNUPAT judgment.

It is clear that the applicant cannot maintain after the first SNUPAT judgment, which unequivocally condemned the exemption of group ferrous scrap in accordance with the argument of the High Authority, that it was still misled on this subject . . . by the action of this same High Authority! The 'diabolic persistence' of the High Authority, if it can be criticized for this, only referred to the exemption of Hoogovens and Breda on the grounds of local integration. In this matter the applicant was successful and, as I have already

stated, the judgment was executed; in any case, there is no dispute on this point. Only those benefiting from exemption could have complained of a wrongful act or omission on the part of the High Authority. But Breda merely complied and as to Hoogovens which invoked a wrongful act or omission on the part of the High Authority in this respect, that company could not persuade the Court to accept its point of view, which declared that 'the attitude adopted by the High Authority until the SNUPAT judgment' (that is, the second SNUPAT judgment of 22 March 1961) 'was certainly not a wrongful act or omission'. (Hoogovens, 14/61, 12 July 1962, Rec. 1962, p. 522).

In short, I consider that the existence of a wrongful act or omission capable of rendering the High Authority liable under Article 40 of the Treaty has in no way been established.

Therefore, I shall say little on the loss suffered and the causal link between the alleged wrongful act or omission and the damage. The applicant in this respect adduces arguments very similar to those relied on by Hoogovens in Case 14/61 : that it has not hitherto paid the disputed contribution, and that if it had done so at the time in question, it would have been in a position to pass the sums paid on to its purchasers because of the favourable conditions at that time which do not exist at present. All these arguments were dismissed by the judgment in Case 14/61, although the legal position of Hoogovens was clearly more favourable than that of Aciéries du Temple, since, once again, Hoogovens had benefited from a favourable decision of the High Authority, which the applicant has not. The applicant has only itself to blame for the consequences of its delay in paying its contributions and in not even having made provision for them.

I am therefore of the opinion :

— that the application should be dismissed; and

— that the Société des Aciéries du Temple should bear the costs.