Upon hearing the opinion of the Advocate-General;
Having regard to Article 40 of the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69 (2);

THE COURT

hereby

1. Dismisses the application as being unfounded;

2. Orders the applicant to pay the costs.

Donner Delvaux Rossi
Riese Hammes

Delivered in open court in Luxembourg on 14 December 1962.

For the President

A. Van Houtte
Registrar

L. Delvaux
President of Chamber

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 1 MARCH 1962[1]

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1 — Translated from the French.

Mr President,
Members of the Court,

I — Facts and conclusions

The Chasse company and the two Meroni companies appear before you once again to ask you, this time, to order reparation from the High Authority, under Article 40 of the Treaty, for the injury which they claim to have suffered owing to acts of fraud committed in allowing those not entitled to do so to benefit from the equalization of ferrous scrap, which resulted in a corresponding increase in the amount of the contributions required of them.

During the course of the proceedings your judgment of 17 December 1959 in Case 23/59 was given, which dismissed an application with the same object made by the company FERAM. Of course, that judgment (and the High Authority recognizes this) does not have the authority of *res judicata* with regard to the present disputes, since the parties are not identical, but it is self-evident that, in so far as the applicants base their applications on the same facts and circumstances, the existence of such a precedent constitutes a serious obstacle to a favourable reception of their claims. It is also important — and this is the first point to be clarified — whether and to what extent their conclusions are different from those presented by the company FERAM.

The conclusions of Chasse (Case 33/59) are that the Court should:

'Declare that the High Authority of the ECSC is liable for having failed to avoid the situation whereby, during the period from 1954 to 1957, considerable quantities of ferrous scrap were sold, supported by fraudulent certificates issued by the head of the Iron and Steel Department of the Dutch Ministry of Economic Affairs to the effect that these quantities originated from ship-breakers' yards;

appoint an appropriate expert to estimate the exact amount of the injury suffered by the applicant during the period from 1954 to 1957 owing to the wrongful act or omission on the part of the equalization agencies;

order reparation from the High Authority for the damage resulting therefrom, with default interest'.

These conclusions are identical, almost word for word, with those of FERAM.

The conclusions of Meroni (Erba) (Case 46/59) are, in their first part, practically identical with those of FERAM and of Chasse, but there is the addition of the following:

'likewise declare the High Authority liable *for all the other facts which may be established in the course of the proceedings*':

and, later,

'. . . if need be, entrust to an expert to be appointed by the Court the task of ascertaining . . . . the exact tonnage of ferrous scrap fraudulently sold to the prejudice of the iron and steel undertakings of the Community liable to compulsory equalization, by means *either of false certificates or of other acts of fraud*, with the aim of benefiting improperly from the equalization premium for imported ferrous scrap'.

The conclusions of Meroni (Settimo Torinese) (Case 47/59) are virtually the same as those of Meroni (Erba).

Thus it is not only the acts of fraud arising from the false certificates issued by the official of the Dutch Ministry of Economic Affairs which are invoked, but all the acts of fraud which, between 1954 and 1957, made equalization available to ferrous scrap which was not entitled thereto.

These differences in the presentation of the conclusions are easily understood, if reference is made to the different *dates* when the proceedings were instituted (April 1959 and July 1959). The extent of the frauds, which were no longer limited to the actions of the Dutch official, only gradually came to light, and it was only after the closure of the written procedure and in particular

through the publication of the Report of the High Authority of 8 April 1961 that it was possible to obtain a clear idea of the nature of the acts of fraud and a general idea of their extent. It is for this reason that the Court refused to suspend proceedings until the then current enquiry was concluded (Order of 2 June 1960), and by the same Order required the High Authority to produce its final Report as soon as it was drawn up, and only opened the oral procedure several months after this had been lodged and the parties had lodged the documents which they had been authorized to produce. We read, moreover, in the report of the Judge-Rapporteur (p. 4 of the French translation): 'The chronological sequence of events shows clearly that, during the written procedure, the parties were only able to present observations *limited to certain aspects of these irregularities*. It is in this sense that the arguments of the parties (set out below under III) must be understood'.

II — Admissibility

This brief explanation now enables me to deliver my opinion, at least so far as the two Meroni cases are concerned, on the plea of inadmissibility put forward at the hearing by the representative of the High Authority on the basis that there is a change in the subject of the application. There is no such change — what in French law is called 'demande nouvelle' — because, as we have seen, the conclusions in the application refer expressly to all the facts of the fraud involving the irregular admission of ferrous scrap to equalization to which it was not entitled. It is true that the actual scope of the conclusions of an application must not be understood too literally or too widely; they must be seen in the light of the arguments accompanying them. In this respect, the High Authority considers that the proceedings, at the time they were instituted, were really only concerned with the frauds arising from the false certificates issued by the Dutch official, as in the FERAM case.

That is not my opinion. What is the object of the conclusions? It is to obtain reparation for the injury caused by a *wrongful act or omission* on the part of the High Authority and of the agencies in Brussels in the exercise of their duty of checking the origin of ferrous scrap qualifying for equalization. The legal cause of action is therefore the wrongful act or omission arising from an absence of any or any sufficient check, which made the improper equalization payments possible. The fraudulent acts of the Dutch official do indeed constitute one of the facets of these frauds — 'one aspect of the irregularities', to repeat the expression in the report of the Judge-Rapporteur. But it is not these actions which constitute the legal cause of action: on the contrary, they have been invoked by the High Authority — and successfully — as justification, since the personal wrong of the official in the service of a national administration cannot give rise to liability on the part of the Community. There is therefore no new cause of action in invoking other instances of fraud leading to the same result: the cause of action is still the wrongful act or omission in checking the origin of ferrous scrap.

I have no doubts therefore as to the admissibility of the conclusions as a whole in the two Meroni applications.

On the other hand, it does not appear to me possible to admit that in the Chasse case the conclusions have the same scope, given their extremely precise wording. The cause of action is indeed the same as in the Meroni applications, but the damage for which reparation is claimed is only concerned with the consequences of the issue of false certificates by the official of the Ministry of Economic Affairs of the Netherlands. This solution is, no doubt, distressing, in view of the similarity between the three actions, but the requirements of procedure do not always accord with

those of equity. It is all the more regrettable because this is a sphere in which, with the exception of the period of limitation, to be examined in a moment, there are no time limits as there are in the case of an application for annulment. There is no preliminary decision and, again excepting the application of the period of limitation, the Chasse company could at any time have completed its conclusions or admitted that the rigidity of our procedure would have made this impossible and made a fresh application. Be that as it may, that restriction only relates to the nature and amount of the loss and not to the facts and arguments by means of which the applicant endeavours to establish the liability of the High Authority in carrying out its task of supervision. In this respect, the position is exactly the same as in the other two actions and the applicant appears to me to be entitled to avail itself of all the newly discovered circumstances which are capable of establishing the liability of the High Authority by reason of the frauds *in general*, the extent of which can only be explained by the negligence of the Authority, including the acts of fraud for which the Chasse company requests reparation. In short, the Chasse application should be judged in exactly the same way as the other two, except for the operative part of your judgment to avoid deciding *ultra petita*.

III — Existence of injury and the period of limitation

We must now examine the second objection raised by the High Authority that no injury exists, in any event at present or, if I may express it thus, any injury which has arisen and still exists. It would also follow from this that the period of limitation has not yet begun to run and that all these actions are at least premature. In fact, the defendant states that the High Authority is in the process of recovering the sums paid in error in respect of equalization; moreover, part of the amount owing has already been recovered and only when these operations have been completed can it be known exactly whether and to what extent the final amount of the equalization contributions remains higher than it would have been in the absence of the acts of fraud.

This objection does not seem to me to be relevant. In fact the existence of loss must be distinguished from its quantification. It seems most unlikely that recovery will be total. The Court in its judgment of 4 April 1960 in Joined Cases 4 to 13/59, *Mannesmann and Others*, rules that the High Authority was not entitled to recover payments made in error to undertakings consuming ferrous scrap. The High Authority or the OCCF must therefore endeavour to recover the sums from the perpetrators of the frauds, which scarcely gives rise to hopes of complete recovery, no matter how diligent they are; the Report of the High Authority (pp. 43 et seq.) is illuminating in this respect. Moreover, as the representative of the applicants has pointed out, the damage also includes the considerable expense occasioned by the checking operations. However, on this point account must be taken, as an extenuating circumstance, of the costs which would have been involved in organizing a satisfactory *preventive* checking system which is exactly what the applicants complain that the High Authority has failed to establish during the functioning of the arrangements.

The existence of injury therefore appears to me to be certain, even if its amount is not yet so. There is nothing exceptional is such a situation; it calls to mind, for example, the case of bodily injury involving disability, the duration and extent of which are not yet known. Nevertheless, the court gives a decision.

For similar reasons, I think that the period of limitation began to run a long time ago and that the applicants were well advised to interupt it by their applications. Article 40 of the Protocol

on the Statute of the Court of Justice, in fact, provides that

'Proceedings provided for in the first two paragraphs of Article 40 of this Treaty shall be barred after a period of five years *from the occurrence of the event giving rise thereto*'.

The 'event giving rise' to the present proceedings is constituted by the *equalization payments* relating to ferrous scrap not entitled thereto, payments which, according to your judgment in Joined Cases 4 to 13/59, are not recoverable from the consumer undertakings. It is this fact, namely the payment, which is the cause of the damage constituted by a corresponding increase in the amount of the contributions. It is clearly possible to envisage cases where the damage would only manifest itself more than five years after the occurrence; but this is the result of a system of limitation which does not aim at limiting the effect of a creditor's negligence but at ensuring a degree of stability in legal relationships.

Before coming to the substance of the case, it is without doubt necessary to restate the scope of the FERAM judgment. No doubt, as I have said, that decision does not have the authority of *res judicata* with regard to the present actions. However, I do not intend to discuss the possible solutions again, at least on the essential points. First of all, as to the principal argument of 'objective liability' advanced by FERAM and repeated in the present proceedings, the basis of liability under Article 40 of the Treaty is the 'wrongful act or omission': this is subjective liability and the wrongful act or omission must be established. Secondly, I do not see that the Court must reject the part of the judgment which relieves the High Authority of its liability by reason of the guilty actions of an official of a national administration who cannot be regarded as having acted on behalf of or in the name of the Community. Finally, I am of the same opinion with regard to the part of the judgment which refuses to regard as a wrongful act or omission the fact of having entrusted the task of issuing the certificates to the competent national authority, in view of the fact that those certificates were also used as the legal basis for re-exporting ferrous scrap.

All this is in itself extremely relevant, but the present case has a much more general basis, that of the liability of the High Authority by reason of the defective organization of the system for checking the origin of ferrous scrap qualifying for equalization. It is the widespread nature of the frauds of all sorts brought to light by the subsequent checking of the trust companies which has provoked the thought that therein lies an indication of a defect in the organization and functioning of the administrative and supervisory departments, a defect which could not have been presumed solely from the guilty actions of an official in one particular section. Moreover, no other case of fraud of the type committed by the Dutch official (ships which had already been sunk and were at the bottom of the sea) was revealed by the inquiry (Poher Report, No 44).

With regard to the nature of the acts of fraud discovered and the different forms which they took, I can only refer to the Report of the High Authority, Nos. 41 to 73, which is most edifying. Taking passages at random, *for imported ferrous scrap,* export licence obtained by subterfuge (10 601 metric tons), customs receipts falsified by superimposed photographs (4 092 metric tons), equalization of a greater tonnage than that appearing in the declarations (433 metric tons), using bills of lading twice (8 500 metric tons). *For ferrous scrap from ship-breakers' yards* treated, as you know, as equivalent to imported ferrous scrap, the basis is a presumed percentage yield, for example 60% of the tonnage of the vessel; when higher tonnages have been presented there is a presumption of fraud which, in certain cases, made it possible to institute proceedings. Finally, a special category exists, Heeresschrott, which is

ferrous scrap purchased from units of the American armed forces stationed in Germany, deemed by customs not to have been imported into the Federal Republic. According to the Report of the High Authority (No 48, *in fine*), 'checks have shown that, if a greater tonnage was declared to customs and the appropriate duties paid, a document was obtained enabling the corresponding equalization payment to be claimed'.

Other irregularities should be noted: forged customs receipts (10 133 metric tons), customs receipts fraudulently obtained (54 034 metric tons), etc.; 87 050 metric tons of Heeresschrott were wrongly equalized out of a total of 181 000 metric tons, that is, almost half!

The total tonnage of ferrous scrap wrongly equalized amounts to 229 889 metric tons out of a total of 13 018 270 metric tons, according to the reply given by the High Authority to a question put by Judge Hammes.

IV — Existence of a wrongful act or omission

We must now try to answer the question: Do the facts in general, such as we know them to be today, indicate the existence of a 'wrongful act or omission' within the meaning of Article 40 of the Treaty?

In this respect several observations must be made.

First Observation: the nature of the alleged wrongful act or omission must be stated very clearly to know what liability it could involve. We are concerned with a wrongful act or omission in carrying out the checking of the origin of ferrous scrap as I have said, but the word 'checking' is equivocal and its sense varies depending on whether the liability of the OCCF and the Imported Ferrous Scrap Equalization Fund (La Caisse de péréquation des ferrailles importées) or that of the High Authority is contemplated. The checking of the origin of ferrous scrap by the agencies in Brussels and the regional offices forms part of the very functioning of the equalization arrangements. It is an *administrative* responsibility. With regard to checking by the High Authority, this comes under the heading of its general responsibility as it emerges from Article 53: it is a *supervisory* responsibility.

It is true that the High Authority has, at least for a long time, formally assumed full liability for errors committed by the agencies in Brussels; it was still so in the FERAM case and it is only at a later date that it appears to have tried to relieve itself of this liability, to judge for example from the attitude it took in its defence in the case of Fives-Lille and others (I refer in particular to the oral arguments of Mr de Laubadère). But your decisions have always refused to make the distinction. Not only do they regard the activity of the agencies in Brussels as an activity governed by public law although these agencies are legal persons in private law, but they regard their acts as equivalent to decisions taken by the High Authority. One of your decisions has even gone so far as to state that the OCCF was an *agency of the High Authority* (Mannesmann and Others, previously cited, Rec. 1960, p. 283). In the context of a wrongful act or omission the judgment in the Fives-Lille case also confirmed the same view — the High Authority is liable for the wrongful acts or omissions committed by the equalization agencies.

This is very important, because the responsibility of an administrative department is clearly far greater than that of a supervisory department, for whilst a grave wrongful act or omission is generally required to create liability on the part of the latter, an ordinary wrongful act or omission suffices in the case of the former which is the department 'directly' responsible.

Second Observation: The Report of the European Parliamentary Assembly (which I shall refer to hereafter as 'the Poher Report') has as its object — and it

could not have had any other — an assessment of the *political* responsibility of the High Authority. That is why it only refers to the lack of the *supervision* which it was required to exercise over the agencies in Brussels and not to its *civil* liability, or in particular to the liability which, in accordance with your decisions, it assumes automatically from the malfunctioning of these agencies.

Final Observation: The Poher Report stresses on several occasions the fact that the unanimous agreement of the Council necessary to make the arrangement obligatory was only obtained subject to the assurance that the High Authority would abstain from all interference in the internal functioning of the arrangement and, in particular, from all supervision over administration. Perfectly understandably the Poher Report sees in this an appreciable diminution of the responsibility of the executive. But, here again, such a factor can only be taken into consideration in the context of political responsibility. It cannot be taken into account from the legal point of view for two reasons: first, because the 'condition' which the Council thus put on its agreement — admitting that it was in fact imposed — cannot legally relieve the High Authority of its liability under Article 53, which, moreover, it has since acknowledged; and also because Article 40 refers to the wrongful act or omission of the *Community* and not of one institution or another. The Council is an institution of the Community. It is of little importance, then, to the injured parties whether liability is divided, as seems indeed to be the case, or whether it is only to be imputed to the High Authority; it is still a question of liability of the Community, which alone has legal personality under the ECSC Treaty, but with regard to third parties the Community is, in this case, represented by the High Authority alone. Thus, in the legal sphere one cannot see in the attitude of the Council a ground for the diminution of liability.

Having made these observations, I shall now investigate whether the attitude of the agencies in Brussels on the one hand and of the High Authority on the other should be regarded as having the character of a wrongful act or omission within the meaning of Article 40 of the Treaty.

It appears to me that two arguments set forth by the representative of the applicants at the beginning of his oral arguments must be rejected. The first is that it would have been irregular to entrust the High Authority with the task of investigating its own actions: it was to be the subject of the investigation and not the investigator.

The reply to that must be that first of all the enquiry was to relate in essence to the functioning of the arrangement undertaken by the agencies in Brussels. With regard to the High Authority itself, we are not concerned with a failure in its departments but the attitude which it took in principle by its refusal to participate in the administration of the arrangements; the departments of the High Authority themselves were not especially involved. Moreover, in a public administration it is normal for an enquiry into the functioning of the departments of that administration to be entrusted to servants of the State and even of the same Ministry where the actions occurred; the inspectorate and supervisory bodies have no other task.

The second argument, which we have often heard, disputes the usefulness of the equalization arrangements themselves, which have in no way saved the iron and steel industry three thousand million dollars and the artificial nature of which became more and more pronounced, as is shown by the abundance and low price of ferrous scrap after they were abolished.

At this point — without wishing to enter into that controversy — I should say that this is a responsibility of political economy for which the High Authority is answerable only to the European

Parliamentary Assembly. If States were to be financially answerable to their citizens for the errors which they commit in their political economy most of them would doubtless have been ruined a long time ago . . . .

Having said that, I think that a clear distinction should be made between what has to do with the rules of *normal preventive checks* and *the institution of enquiries* after the existence of frauds has begun to come to light.

A — *Wrongful acts or omissions in the exercise of normal preventive checks*

The checking of the origin of ferrous scrap formed part, as I have said, of the functions of an administrative department. It was clearly one of the essential duties of the departments charged with ensuring the functioning of the arrangements to check that the origin of ferrous scrap was correctly recorded before allowing it to qualify for equalization.

It may be said from the outset that this check must be carried out with particular vigilance for the following reasons:

The first relates to the wide difference in price between ferrous scrap imported or treated as such and domestic ferrous scrap. For this fact alone, there was a very great temptation to try to obtain the benefits of equalization for domestic ferrous scrap passing it off as ferrous scrap originating outside the Community or from ship-breakers' yards. Moreover, the peculiar nature in many respects of the trade in ferrous scrap, of which neither the High Authority nor still less the iron and steel undertakings which operated the arrangement could be unaware, called for special vigilance.

This was particularly so in three respects:

1. *With regard to ferrous scrap from ship-breakers' yards,* it is almost impossible to check to an accuracy of one ton the origin of such scrap, having regard to the hazards of its recovery and the approximate character of the proportionate tonnages of ships to be broken up which are normally used as the basis for checking. In these circumstances, the operations must be supervised as strictly as possible.

2. *With regard to the so-called 'substitute' ferrous scrap,* my learned colleague Roemer has expressed himself in his opinion in the case of Mannesmann and others (Rec. 1960, p. 317):

'According to what we have heard here, the practice has obviously developed in the ferrous scrap trade of delivering Community ferrous scrap in the place of ferrous scrap which is supposed to have come from ship-breakers' yards and of arranging for it to qualify as ferrous scrap from ship breakers' yards for equalization, whereas the ferrous scrap from ship-breakers' yards still to be recovered is sold later on the market at domestic prices. This procedure was tolerated, taking into account the fact that demolition often extends over a fairly long period.

Indeed, *objections may be raised against this practice in view of the difficulty connected with reliable supervision in the performance of such contracts.* But it does not seem to be impossible to guarantee the proper performance of thse substitution operations and thus to state that they are lawful.'

It is clear, however, that such a practice was capable in itself of provoking numerous abuses. The agencies in Brussels moreover have recognized this and, during the course of meetings held from 22 to 24 April 1958, decided that

'so-called replacement scrap will no longer be accepted for equalization, since experience has shown that checking of the origin of this category of ferrous scrap presents too many uncertainties'. (Schedule III to the Poher Report).

3. *Finally, with regard to Heeresschrott* I have already expressed my views.

Faced with these requirements, both general and particular, of what can

the CPFI and the OCCF on the one hand, and the High Authority on the other, be accused?

First, with regard to the agencies in Brussels, we are concerned, as I have said, with administrative responsibility. On this point we read the following in the Poher Report (No 31):

'The administration undertaken by the agencies in Brussels seems open to criticism in more than one respect. The directors of these agencies did not take sufficient account of the fact that they were exercising a public duty. The operations of payment and appraisal of the documents ought to have been more rigorously performed.'

One of the most striking instances of this slackness in the appraisal of documents relates to the functioning of the regional office in Milan (Campsider), with regard to which paragraph 71 of the Report of the High Authority contains the following passage:

'The supervision carried out by the High Authority has shown that the files handed over by the regional office in Milan contained no document affording valid proof of the source and origin of the ferrous scrap accepted for equalization'.

The agencies in Brussels are also open to criticism on the ground that the supervision which they exercised over the regional offices was insufficient.

Second, with regard to the High Authority, the essence of the charge which it incurs, and which dominates the entire case, is that for a long time it refused to admit that its responsibility extended to the supervision of the administration of the scheme. As soon as the compulsory scheme was introduced, Decision 22/54 provided expressly that

'*the functioning* of the scheme is entrusted — *subject to the responsibility of the High Authority* — to the OCCF and the CPFI'.

In this connexion, again under No 31 of the Poher Report, we read this:

'On the other hand the High Authority was able to put forward the idea that the industrialists and parties concerned could act as their own police force. However, a distinction must always be made between commercial practices and the management of the funds of a scheme for which a public authority is responsible. It seems, unfortunately, that this distinction has not always been made'.

Clearly it cannot be claimed that the organization of supervision by the High Authority of the administration of the scheme would have sufficed to eliminate the frauds completely. Nevertheless it should be considered that such supervision would have stimulated the administrators and would doubtless have facilitated the earlier discovery of the acts of fraud and prevented their increase. On the other hand, it is not possible to complain that the High Authority should have spontaneously appreciated the position in public law, subsequently recognized by the Court in the above conditions, of the agencies entrusted with operating the equalization scheme. Thus on 24 March 1955, the representative of the High Authority on the Board of the CPFI requested the latter to entrust the Société fiduciaire de Belgique with checking the equalization accounts in particular, without intending thereby to interfere personally in any way in this check — which in any case does not appear to have produced any significant results. Nevertheless the fact remains that the refusal in principle of the High Authority to supervise the administration of such a scheme for which it was responsible does not of itself, in my opinion, constitute a serious administrative error.

B — *Wrongful acts or omissions in the institution of enquiries*

It is self-evident that once the first frauds were discovered, special measures were required both to try to discover others (which the existence of the first ones suggested were probable) and to avoid similar practices in future.

Here once again I shall distinguish

between the errors which can be imputed to the agencies in Brussels and those for which the High Authority is responsible.

First, with regard to the agencies in Brussels, it appears that although these agencies had been warned of the existence, or at least of the possibility, of certain irregularities long before the accusation made by Mr Worms in November 1957 (Poher Report, No 40), it was however only on 15 March 1958, after the intervention of the High Authority, that the CPFI gave authority to the Société fiduciaire suisse to carry out investigations into the origin of the ferrous scrap. This authority was strictly limited (Poher Report No 36). By all accounts, there was then no endeavour in Brussels to enlarge the sphere of investigations, and this was only done in August 1958; in the meantime the frauds had every opportunity to continue.

Secondly, with regard to the High Authority, it certainly cannot be suspected of having tried to 'minimize' the affair. Nevertheless, at that time, it had not — and this is the least which can be said — displayed excessive zeal. The dates bear witness to this: Worms's accusation was made in November 1957 and it was only on 29 September 1958 that the High Authority took direct control of the supervision of the investigations to be carried out and itself gave unlimited authority to the Société fiduciaire suisse. The interval between these two dates was occupied by studies, meetings and correspondence with the CPFI: the Poher Report relates all these facts (No 30).

The principal complaint which may be made against the High Authority during this period, apart from the excessive caution — not to say dilatoriness — which it displayed, is not to have noticed *until the end of August 1958* the limited nature of the authority given by the OCCF to the Société fiduciaire suisse on *15 March* of the same year! (Poher Report, No 38, penultimate paragraph). From September on the other hand, the High Authority, having taken control at the same time as it proceeded to remodel the scheme following the Meroni judgment, made the greatest efforts to discover the frauds and, in collaboration with the competent authorities of the Member States, to prosecute the perpetrators before the courts. It appears that at present the continuation of these efforts depends above all on the goodwill of the said authorities and their spirit of cooperation.

What are we to conclude from all this?

In my opinion the shortcomings of the agencies in Brussels are clear: the directors and members of these agencies could not be unaware of the considerable risk of fraud which the system itself involved and, in consequence, the need for an appropriate administrative and accounting organization; the organization set up did not measure up to these requirements and instances of carelessness in the actual administration of the scheme, in particular at regional office level, came to light. Moreover, their attitude did not change when the first frauds were discovered and they have only made the necessary adjustments belatedly and through the pressure, itself slow and ponderous in the beginning, of the High Authority.

As for the High Authority, the dilatoriness which it displayed in the months following the discovery of the first frauds, somewhat regrettable though it may be, has not appeared to me to be by itself capable of constituting a 'wrongful act or omission' within the meaning of Article 40. On the other hand, the indisputable administrative error which it committed arises from its intentionally refraining from all supervision of the administration of the scheme for which it had assumed responsibility.

So as to describe them better, since they have different characteristics, I have distinguished between the faults which may be imputed to the agencies in Brussels and those which may be imputed to the High Authority. But according to your decisions the former as well as

the latter involve the liability of the Community.

However an objection might be made: can this be interpreted as liability *towards the undertakings consuming ferrous scrap,* which were participants in the equalization scheme the administration of which had been entrusted to them? Are they entitled to invoke a quasi-tortious liability against the same agency to which they belong? Are they entitled to complain of a lack of supervision to the party entrusted with supervising them? The involvement of the liability of corporate organizations obeys different rules depending on whether the injured party is a member or a third party. Let us not forget moreover that, although, as I have recalled, the Council appears to have given its unanimous agreement only on condition that great freedom of management was left to the equalization agencies, this was clearly under pressure from the undertakings operating the scheme.

In this respect I think that a precise distinction must be made depending on whether we are concerned with members or above all directors of the corporate organizations in question, the OCCF and CPFI, or with undertakings which, although participants in the scheme owing to its obligatory nature, were not members of these organizations and therefore could not exercise any influence over their activities. In the first case the position is open to question, but we can allow it to remain so. As for the second (the case of the three applicants) I consider that the objection has no value: they are in the purely passive position with regard to a public service of the citizen who enjoys the advantages and suffers the disadvantages of the service, without having any liability for its administration, but is entitled, on the other hand, to receive reparation for injury caused by its fault.

V — Final Considerations

I am finally brought therefore to the point of recognizing the existence of a wrongful act or omission on the part of the High Authority incurring liability on the part of the Community with regard to the three applicant companies. We have already seen, on the other hand, that damage resulting from that fault was certain, 'has arisen and still exists', although the criteria necessary to quantify the amount are not available to the Court. What must be decided in the circumstances?

I think that the happiest solution is to refer the case to the High Authority to fix and settle the compensation due.

In fact, you will know that the High Authority is presently involved in drawing up the equalization accounts. It is clear that these accounts must be adopted as soon as the present activities come to an end and without waiting for the final outcome of the last of legal proceedings, either current or still to be commenced. It seems to me that such is indeed the intention of the High Authority. If so, the compensation due must be equal, for each company, to the difference between the amount of the equalization contribution as it would have been if the ferrous scrap wrongly taken into account for equalization had not been accepted, and the amount of the contribution actually settled at the date of the conclusion of operations. It is self-evident that, if subsequently other recoveries are effected, it must be possible, *as regards the share pertaining to the three companies already compensated,* for the High Authority to retain the sums, whilst for the other companies the sums will be proportionally divided amongst those companies as members of the former equalization agencies. I do not need to give my views on the question whether the High Authority will be able to effect such recovery to the benefit of its own budget by 'legal subrogation', by assignment of claims or by some other legal process.

On the other hand, as I have already said, in its quantification of the damage, the High Authority must also bring into account the expenses arising from enquiries and legal proceedings necessitated by the discovery of the frauds, but taking account also, in diminution of its liability, of the additional administrative expenses which the setting up of a department for normal preventive checking would have involved. On these last points there is clearly a certain amount of arbitrary assessment, which the High Authority must carry out according to the rules of fair play, and, it is my firm hope, with sufficient agreement among the parties to avoid a fresh dispute.

I am therefore of the opinion:

— that the High Authority should be declared liable towards the applicant companies for the injury to them resulting from the equalization payments from 1954 to 1957 for the ferrous scrap for which equalization was wrongly made available;

— that the case be referred to the High Authority to settle the compensation due under this head, the compensation allotted to the Chasse company being limited however to the injury arising from making equalization available for ferrous scrap for which fraudulent certificates issued by the head of the Iron and Steel Department of the Dutch Ministry of Economic Affairs to the effect that it had originated from ship-breakers' yards had been produced as supporting documents;

— that the High Authority should be ordered to pay the costs.

FURTHER OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 18 OCTOBER 1962[1]

Mr President,
Members of the Court,

I wish to present to you today the few additional observations suggested to me by the re-opening of the procedure, as prescribed by your Order of 21 March 1962, and by the subsequent procedures, both written and oral. They bear on liability and damage. Despite the illogical order, for greater simplicity I shall begin with the last point.

A — The damage

The controversy turns on whether the damage is hypothetical, and therefore not established, or whether on the contrary it 'has arisen and still exists' and, consequently, is capable of being compensated if liability is established.

I continue to think that, although the *amount* of the damage cannot, at the moment, be definitively quantified from the documents available to the Court, on the other hand its present *existence* is certain. In fact, the amount of the contributions claimed from the undertakings, which emerges from the provisional accounts drawn up by the High

1 — Translated from the French.