JUDGMENT OF THE COURT

17 JULY 1959[1]

Mannesmann AG, Hoesch-Werke AG, Klöckner-Werke AG, Rheinische Stahlwerke AG and Aktiengesellschaft für Berg- und Hüttenbetriebe

v High Authority of the European Coal and Steel Community

Case 23/58

Application for annulment—Definition of a decision—Criteria applicable in the legal assessment of a measure by the High Authority—Effect of declarations issued by servants of the High Authority—Distinction between a decision and an internal office directive (Cf. summary, Judgment in Case 20/58 of 6 July 1959)

In Case 23/58

1. MANNESMANN AG, a limited company incorporated under German law, having its registered office in Düsseldorf, represented by its Board of Directors;

2. HOESCH-WERKE AG, a limited company incorporated under German law, having its registered office in Dortmund, represented by its Board of Directors;

3. KLÖCKNER-WERKE AG, a limited company incorporated under German law, having its registered office in Duisberg, represented by its Board of Directors;

4. RHEINISCHE STAHLWERKE AG, a limited company incorporated under German law, having its registered office in Essen, represented by its Board of Directors;

5. AKTIENGESELLSCHAFT FÜR BERG- UND HÜTTENBETRIEBE, a limited company incorporated under German law, having its administrative offices in Salzgitter-Drütte I and its registered office in Berlin, represented by its Board of Directors;

all assisted by Werner von Simson, Advocate of the Düsseldorf Bar, with an address for service in Luxembourg at the Chambers of the said Werner von Simson, initially at Capellen 20, and then at Bertrange,

applicants,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Frans van Houten, acting as Agent, assisted by Wolfgang

1 – Language of the Case: German.

Schneider, Advocate of the Frankfurt Bar, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application for the annulment of the letter sent by the High Authority on 18 December 1957 to the Office Commun des Consommateurs de Ferraille (OCCF) (Joint Bureau of Ferrous Scrap Consumers) and published in the Journal Officiel No 4 of 1 February 1958, if and in so far as that letter constitutes a decision within the meaning of Articles 14 and 15 of the Treaty,

THE COURT

composed of: A. M. Donner, President, O. Riese, President of Chamber, L. Delvaux (Rapporteur), Ch. L. Hammes and N. Catalano, Judges,

Advocate-General: M. Lagrange
Registrar: A. Van Houte

gives the following

JUDGMENT

Issues of fact and of law

I – Conclusions of the parties

The *applicants* claim that the Court should:

'1. Annul the letter sent by the High Authority on 18 December 1957 to the OCCF and published in the Journal Officiel of 1 February 1958, page 45 *et seq.* if and in so far as that letter constitutes a decision within the meaning of Articles 14 and 15 of the Treaty;
2. Order the defendant to pay the costs'

The *defendant* contends that the Court should:

'1. Take formal note that all the documents and communications relating to this case shall be sent to the High Authority, 2 place de Metz, Luxembourg;
2. Dismiss the application lodged by the applicants on 17 March 1958 as unfounded;
3. Order the applicants to pay the costs.'

II – Statement of the facts

The facts of the case may be summarized as follows:

By its Decision No 22/54 of 26 March 1954, the High Authority established an equalization system to prevent Community prices for ferrous scrap from being aligned on the higher prices for scrap imported from third countries.

This equalization system was continued by Decisions Nos 14/55 and 2/57 but, from 1

April 1955, the proceeds of the contribution were used to finance, besides equalization, the granting of premiums for the increased use of cast iron. The implementation of the system in practice was entrusted to the Office des Consommateurs de Ferraille (OCCF) (Joint Bureau of Ferrous Scrap Consumers) and the Caisse de Péréquation des Ferrailles Importées (Imported Ferrous Scrap Equalization Fund), agencies operating under the control of the High Authority.

Under Decision No 2/57, the contribution of each undertaking is obtained by applying, for each accounting period, a basic rate to its consumption of bought scrap, and, if necessary, a supplementary rate to its excess consumption of bought scrap. An undertaking's total consumption of scrap is defined as being the sum of the tonnages of the total amount of own resources and the amounts of bought scrap received, plus any decrease in stocks or minus any decrease in stocks, and minus any deliveries of scrap sold and/or transferred. And by subtraction, the consumption of bought scrap is equal to the total consumption minus the total amount of own resources and the decrease in stocks.

Following these definitions, certain undertakings interpreted the term 'own resources' as meaning 'scrap which has not been bought' and entered as own resources in their accounts with the Equalization Fund all the tonnages received by them from subsidiary undertakings having a different company name, but in which they possessed a controlling interest. In other words, in the view of those undertakings, 'group scrap' is 'own resources scrap' and therefore is not taken into consideration for the purposes of paying the contribution imposed on the consumption of bought scrap.

By a letter of 30 October 1957, the OCCF then asked the High Authority to take a decision on this question under the second paragraph of Article 15 of Decision No 2/57. In its reply on 18 December 1957, published in the Journal Officiel of 1 February 1958, the High Authority took the view that the question was misconceived and asserted in support of this view that there already existed a well-established opinion linking the concept of 'own resources' to the legal concept of 'ownership'.

This application is for the annulment of the aforesaid letter of 18 December 1957.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

1. *Admissibility*

The defendant acknowledges that according to the case-law of the Court (Cases 8/55 and 9/55) a letter from the High Authority can be contested as well as a formal decision. But it asserts that the criterion in question applies equally to all the undertakings in the Community and that consequently the letter in dispute is of a general nature. It follows from this that under the second paragraph of Article 33 of the Treaty the applicants can put forward only the submission of misuse of powers affecting them.

The *applicants* take the view that the letter complained of is not a decision. The only measures of the High Authority capable of having binding force are those which are clearly described as a decision or a recommendation and whose form and content satisfy the requirements of Articles 14 and 15 of the Treaty.

If the contested letter is a decision, it is individual in character, since it is addressed to the President of the OCCF, and it concerns the applicants, whose equalization contributions it considerably increases. Therefore it is open to the applicant companies to put forward any or all of the grounds referred to in the first paragraph of Article 33 of the Treaty.

2. *The substance of the case*

First submission: lack of competence

The *applicants* state that under the second paragraph of Article 15 of Decision No 2/57 the High Authority may take a decision only in the absence of a unanimous resolution by

the Board of the OCCF on the *measures* referred to in *Articles 3 to 11 (1)* of the said decision. In the present case, the point at issue is the definition of the concept of an undertaking. And it is *Article 2* of the decision which defines that concept as meaning 'an undertaking referred to in Article 80 of the Treaty'. Furthermore, that definition does not constitute *'a measure'*.

The applicants add that, according to Article 53 (1) (b), with regard to the making of financial arrangements, the High Authority is competent to act only after obtaining the unanimous assent of the Council of Ministers. The *defendant* takes the view that the submission based on lack of competence cannot be admitted (see *supra:* 'Admissibility') and therefore replies to the arguments put forward by the applicants in support of the submission only in the alternative.

It asserts that the contested letter cannot be considered as amending its previous Decisions Nos 22/54, 14/55 and 2/57 and that therefore there was no occasion for the Council of Ministers to intervene. On the request of the OCCF, the High Authority confirmed and clarified the interpretation of the concept of 'own resources' which the OCCF had hitherto been following. An interpretation in accordance with the habitual meaning of the word and the material context is not an amendment.

The exemptions granted in the contested letter also do not constitute an amendment of the previous decisions. Indeed, it is for any higher administrative authority to determine the limits of a decision by applying objectively defined and universally valid criteria. Unity of location is a criterion which fulfils these conditions.

As to the complaint that Article 15 of Decision No 2/57 does not refer to Article 2 of the same decision and that consequently the High Authority cannot make a pronouncement upon the concept of an undertaking referred to in Article 2, this contains a double error. First, the point at issue here is not the interpretation of the concept of 'an undertaking' but that of 'own resources' and, secondly, the concept of an undertaking is not only contained in Article 2 but also in Article 3, which determines the calculation of the contribution.

Second submission: procedural defects

The *applicants* advance the argument that the letter complained of had to be approved by a unanimous resolution by the Council of Ministers. The letter amends Decision No 2/57 by substituting for the criterion of 'an undertaking referred to in Article 80 of the Treaty' that of 'an undertaking bearing the same company name' or of 'a legal person'. Furthermore, the letter does not state the reasons on which it is based, contrary to the provisions of the first paragraph of Article 15 of the Treaty.

The *defendant* takes the view that the submission based on infringement of an essential procedural requirement cannot be admitted (see *supra:* 'Admissibility') and replies to the arguments in support of this submission only in the alternative.

The defendant asserts that the complaint of inadequacy of the reasons stated is without foundation. The third paragraph of the letter complained of sets out the reasons on which the letter is based, which are founded on the concept of ownership and on logical and literal interpretation. A more detailed statement of reasons would have been required only if the letter had diverged from the normal meaning of words. According to the principles of law, the reasons given are sufficient.

Third submission: infringement of the Treaty or of rules of law relating to its application

The *applicants* state that the annexes to the Treaty, the decisions of the High Authority and the general principles of law, universally accepted in the Member States are rules of law relating to the application of the Treaty.

1. The previous decisions (Nos 22/54, 14/55 and 2/57) allow only those undertakings which buy scrap on the market to benefit from equalization. It is obvious that when own resources are recovered in other factories of the undertaking, they are entered into the accounts only with internal

notional values fixed independently of the market and are not capable of forming the subject-matter of equalization, since the fact of prices being kept low cannot have any influence on notional values.

2. The letter complained of contains several contradictions.

3. The letter infringes the principle that laws and administrative measures should not be retroactive.

4. The letter infringes the previous Decisions Nos 22/54, 14/55 and 2/57, and in particular Article 3 (1) of Decision No 2/57, which provides for a contribution only in respect of bought scrap, and Article 4 (1) and (2), which allows undertakings within the meaning of Article 80 of the Treaty to deduct their own resources from their consumption of scrap.

5. Under Article 5 of the Treaty, the High Authority must carry out its task with a limited measure of intervention. It can exert direct influence only upon the *market* and has no right to intervene in the internal deliveries of undertakings.

6. According to Article 80 of the Treaty, the applicants together with their subsidiaries constitute *one* single undertaking. The letter complained of infringes that article, by adopting the criteria of the company name or a legal person.

7. The applicants constitute an economic unit with their subsidiaries, and to a large extent also a legal unit. Therefore they are in a position comparable to that of undertakings in the same branch of production which have grouped their different works into a single legal person. Thus the letter complained of infringes Article 3 (b) of the Treaty, which ensures that comparably placed consumers have equal access to the sources of production, and Article 4 (b), which prohibits discrimination.

8. The applicants are also victims of discrimination in relation to the undertakings to which the OCCF granted an exemption, a measure approved by the letter complained of 'by virtue of the exceptional nature of the situations in question'. In fact, the connexions between the subsidiaries belonging to the undertakings of the applicants are much closer than those between Hoogovens and Breedband, on the one hand, and between Breda Siderurgica and the companies controlled by Finanziaria Ernesto Breda, on the other. Furthermore, in the case of the applicants, scrap is recovered within a single undertaking within the meaning of Article 80 of the Treaty, which is not true of the undertakings which were granted the exemption.

9. Finally, the applicants assert that until now the High Authority has accepted the unity of the applicants' undertakings. By four decisions in 1956 and 1957, authorizing concentrations by the first applicant, Mannesmann AG, the High Authority acknowledged that Mannesmann together with its subsidiaries constitutes an iron and steel undertaking within the meaning of Article 80 of the Treaty. Therefore it is contradictory for the High Authority, by the letter complained of, no longer to acknowledge the first applicant and its subsidiaries as a single undertaking.

The *defendant* takes the view that the submission based on infringement of the Treaty cannot be admitted in this case (see *supra:* 'Admissibility'). Therefore it replies to the applicants' arguments in support of that submission only in the alternative.

According to the defendant, the applicants are confusing economic unity and legal unity. Only the latter is decisive for the application of the decisions concerning ferrous scrap equalization. According to Decision No 2/57 (Article 2) those liable to pay the contribution are 'the undertakings referred to in Article 80 of the Treaty *which consume ferrous scrap*', that is, those working directly with iron and steel but not the holding companies or parent companies which exercise an influence over them. When that provision speaks of an undertaking, it can mean only the legal person who consumes the ferrous scrap. Although German law recognizes for tax purposes the existence of organic, financial and economic links between a parent company and one or more subsidiary companies, that recognition is always limited to definite sectors and the legal independence of the controlled com-

panies is not affected thereby. The courts have also expressly refused to extend the theory of organic union *(Organtheorie)* to that of a subsidiary *(Filialtheorie)*. Therefore it is *a priori* impossible to take the view that the recognition for tax purposes in German law of an organic subordination can justify the application of particular rules of law within the framework of the ECSC Treaty.

The defendant asserts that, if it gave way to the demands expressed by the applicants, which unduly extend the concept of 'own resources' beyond its proper meaning, it would result in discrimination on its part. Indeed, in the place of 'own resources' the defendant would have to introduce in a fresh decision the concept of 'group scrap'. Thus, in order to effect the equalization of prices of assessable scrap and of imported scrap, which has to be subsidized, the defendant would have to carry out a fresh apportionment of the contributions in favour of groups and to the detriment of those plants which are not part of a group.

The different treatment applied, on the one hand, to concentrations forming a single legal person and, on the other, to undertakings linked as regards organization, economy and finances, rests on a legal foundation, ownership at the time of recovery, which cannot be of a discriminatory nature.

As to the exemptions granted to Hoogovens and Breda, they are based upon the criterion of the existence of a single industrial unit, locally integrated. This criterion is capable of objective application in all cases of a similar nature.

The criterion defined in the letter complained of is not an administrative measure having retroactive effect, but only the statement of what the administration had always held as its rule. It is true that the expression 'own resources' *(Eigenentfall)* does not appear in Decisions Nos 22/54 and 14/55, but in interpreting and applying Decision No 2/57 it would be impossible to take 'own resources' to mean anything other than did the previous decisions, which referred to bought scrap and which therefore, logically, took the view that own resources were not assessable. On the other hand, the extensive interpretation defended by the applicants could not be applied unless it had been precisely defined in the decision itself.

The contradictions alleged by the applicants do not exist in the letter complained of. The reason why the High Authority stated that it was not necessary to amend the existing procedure while at the same time inviting the Fund to recover the overdue contributions was that the tonnages had been wrongly entered in the accounts as own resources. Since, as the result of a mistake in interpretation, the applicants submitted a materially incorrect declaration, they must rectify it. The Fund has no way of knowing whether undertakings have deducted too much scrap as 'own resources'; that fact normally comes to light only when the Swiss fiduciary company carries out its check.

As to the complaint that the High Authority did not comply with Article 5 of the Treaty, which obliges it to carry out its task with a limited measure of intervention, the defendant points out that it is empowered to intervene in internal affairs, for example with regard to production and investment. Therefore, *a fortiori*, it cannot be charged with having unlawfully imposed the contribution upon deliveries of scrap carried out between different legal persons.

Finally, in reply to the last of the applicants' arguments, the defendant states that the four decisions cited are directed at cases of the application of Article 66, in which the Treaty requires authorization for concentrations by undertakings. It is true that, in that particular context, a decision by the High Authority was based upon the idea that Mannesmann AG could be considered as an undertaking producing steel. But that observation was made only in decisions relating to concentrations and it is not possible to draw from it conclusions applicable to this action. In respect of this action, only Decisions Nos 22/54, 14/55 and 2/57 are material: they clearly state that only such undertakings as consume ferrous scrap can be concerned. And ferrous scrap is consumed not by the applicants, but only by their legally independent subsidiaries.

Fourth submission: misuse of powers

The *applicants* make five points in support of this submission.

1. The High Authority seeks by means of its letter to obtain a result which it can achieve only by taking a decision; by so doing it is committing a misuse of powers.

2. The High Authority sought to amend its previous decisions without obtaining the assent of the Council of Ministers. Therefore, in order to disguise this intention, it claimed that the Brussels agencies had already previously applied the new criteria which it imposes. Such conduct constitutes a misuse of powers.

3. The High Authority knew that the economic structure of the applicants is identical to that of other undertakings which are not effected by the contribution imposed on own resources, since examples had expressly been submitted to it. By treating economically identical cases in a different way and thus knowingly discriminating between undertakings within the Community, the High Authority is committing a misuse of powers.

4. By means of the letter complained of, the defendant seeks to prejudice the unity of undertakings and to impose equalization contributions upon transactions of an internal nature; by arbitrarily describing a part of undertakings' own resources as bought scrap, it is disguising its true intention as an intervention upon the market.

5. The High Authority is committing a misuse of powers by imposing the contribution upon tonnages of scrap in respect of which the consumers do not qualify for equalization, after stating in its Decisions Nos 22/54, 14/55 and 2/57 that its principal aim was for all the undertakings benefiting from equalization to participate equally.

The *defendant* answers that it has not misused the powers conferred upon it by the Treaty. Its conduct sprang from proper administrative, economic and legal considerations. It had in view at all times the objectives which are laid down for it, and it did not use its powers to pursue aims extraneous to the Treaty.

Furthermore, the infringements of the Treaty upon which the applicants seek to rely under the heading of misuse of powers can be alleged only as such, that is, as infringements of the Treaty and not under the heading of misuse of powers.

The defendant also points out that it is doubtful whether in the present case any misuse of powers which may have been committed also 'affects' the applicants. On this point it leaves the matter to the wisdom of the Court.

As to its answer to the various arguments which the applicants put forward in support of misuse of powers, the defendant refers to the explanations which it gave in the first three submissions.

Grounds of judgment

Admissibility

The letter of the High Authority dated 18 December 1957 sets out a general principle in so far as it relates to the definition of the concept of 'own resources' with regard to scrap.

The letter was published in the Journal Officiel of 1 February 1958 and thus brought to the attention of all the undertakings in the Community.

It was described as a 'decision' by the Market Division, in a letter dated 19

February 1958 in answer to a formal request from the Deutsche Schrottverbrauchergemeinschaft sent to the High Authority on 6 December 1958.

However, contrary to the applicants' arguments, the said letter of 18 December 1957 cannot in law be considered as a decision within the meaning of the Treaty.

Although it is true that the said letter of 18 December 1957 followed a request from the OCCF, in the absence of unanimity among the members of that agency on the meaning of the term 'own resources', for the High Authority to define that concept in accordance with the second paragraph of Article 15 of Decision No 2/57, the High Authority replied that the question thus expressed by the OCCF 'was misconceived', in view of the fact that 'from the beginning' that agency 'had by implication adopted the concept of own resources in accordance with the semantic value of the expression' and that this criterion had to be maintained.

It follows that the High Authority had no intention of adopting a decision, as it had been formally requested to do, but merely to reaffirm principles which it considered, rightly or wrongly, to follow logically from the basic Decision No 2/57.

This finding is confirmed by the fact that an amendment to Decision No 2/57 would have required, under Article 53 (b) of the Treaty, the prior unanimous assent of the Council of Ministers, a condition which was not fulfilled in the present case. Moreover, there is no reason to suppose that the High Authority would knowingly have infringed this imperative provision.

These considerations are not invalidated by the fact that, in answer to a formal request from the Deutsche Schrottverbrauchergemeinschaft, sent to the High Authority on 6 February 1958, the Market Division replied by a letter of 19 February 1958 that the letter of 18 December 1957 was indeed a 'decision'.

In fact, by its very wording, this answer from the Market Division expresses the opinion of an official of the High Authority and does not necessarily, in itself alone and in the present case, convey the intentions of the High Authority. It must be noted, however, that that answer could have prompted, or even decided, the applicants to bring proceedings against this alleged decision, with the legitimate concern of safeguarding their interests.

However, the various subjective factors set out above cannot in themselves be decisive for the purpose of determining the nature of the letter of 18 December 1957 in question, since the nature of an administrative measure depends above all on its subject-matter and its content.

The said letter appears as being a directive of an internal character sent by a

superior to services coming under its authority and intended to direct the activity of those services.

Therefore, if that letter could give rise to immediate duties, it could do so only on the part of the addressee organization and not of undertakings consuming ferrous scrap. Furthermore, this situation is corroborated by the fact that that letter of 18 December 1957 was published in the Journal Officiel only on 1 February 1958.

Accordingly, the letter of 18 December 1957 is not a decision within the meaning of the ECSC Treaty.

Consequently the application is not admissible.

Costs

Under Article 60 of the Rules of Procedure of the Court of Justice of the ECSC, the unsuccessful party shall be ordered to pay the costs; in the present case the applicants were unsuccessful on the issue of admissibility.

However, since the defendant by its letter of 19 February 1958 prompted, or even decided, the applicants to bring proceedings against the alleged decision contained in the letter of 18 December 1957, an order must be made that the parties bear their own costs.

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 14, 15, 33 and 80 of the Treaty establishing the ECSC;
Having regard to the Protocol on the Statute of the Court of Justice of the ECSC;
Having regard to the Rules of Procedure of the Court of Justice of the ECSC;

THE COURT

hereby:

Dismisses the application as inadmissible;

Orders the parties to bear their own costs.

Donner Riese

Delvaux Hammes Catalano

Decided in Luxembourg on 6 July 1959.

Delivered in open court in Luxembourg on 17 July 1959.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE

(See Case 20/58, page 84)