THE COURT

hereby:

1. Dismisses the application originating third party proceedings as inadmissible;

2. Orders the company Breedband N.V. to pay the costs both of the principal proceedings and of the interim proceedings.

Donner Riese Rossi Delvaux Hammes
Trabucchi Lecourt

Delivered in open court in Luxembourg on 12 July 1962.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 19 JUNE 1962[1]

Mr President,
Members of the Court,

Today, I have to deal in my opinion with a second case of an application originating third party proceedings, having recently had the opportunity in another case of giving my views on this review procedure.

This application is directed against the judgment of the Court of 22 March 1961. I only need to make a few observations on the nature of the judgment and the circumstances surrounding the case.

In the context of the compulsory equalization of scrap, the OCCF (Joint Bureau of Ferrous Scrap Consumers) and the CPFI (Imported Ferrous Scrap Equalization Fund) decided to regard as a company's own arising, and exempt from equalization within the meaning of Decision 2/57, the scrap exchanged between undertakings in close geographical association. Accordingly scrap delivered by the Dutch undertaking, Breedband, to the Dutch undertaking, Hoogovens, was exempted from equalization (decision of the equalization department of 13 and 14 December 1956, approved by the High Authority on 18 December 1957 and 17 April 1958). SNUPAT, a French undertaking, challenged the exemption as being contrary to the Treaty and in an application to the High Authority requested it to cancel all exemptions from the equalization of scrap. During the legal proceedings which followed, Hoogovens intervened in support of the High Authority to defend the exemptions which it had been granted. The Court however found in favour of the applicant and annulled the implied decision of the High Authority in which it refused to cancel the exemptions. The reasons for the annulment were as follows:

— the exemption of group scrap is illegal;

1 — Translated from the German.

— the exemption from equalization of deliveries of scrap between locally associated undertakings is inadmissible;

— Hoogovens, the intervener, and Breedband, its supplier of scrap, did not consitutue a single undertaking within the meaning of the Treaty because they are in law two separate legal persons;

— Hoogovens, the intervener, did not produce the contract governing its relations with Breedband and thereby did not prove that the ownership of the scrap delivered by Breedband vested in Hoogovens from the moment it came into being.

Breedband now challenges this judgment. It is attempting, by producing the contract which has been mentioned, to prove that the judgment is incorrect and prejudices its rights. Accordingly, it asks that the judgment be varied and for a declaration that the scrap delivered by Breedband represents arisings belonging to Hoogovens. Finally, it asks that the application by SNUPAT against the High Authority be dismissed.

The High Authority and the Société des Aciéries du Temple, the successor in title of the applicant company in the original case, oppose the application originating third party proceedings; the first intervener in the original case — Hoogovens — considers it to be well founded, while the second intervener — Breda Siderurgica — has not expressed an opinion.

Legal consideration

I — The admissibility of the application

A considerable part of the arguments in dispute in these proceedings too is devoted to the admissibility of the application, which has to be considered by reference to Article 36 of the Protocol on the Statute and Article 97(1)(c) of the Rules of Procedure.

1. So far as these arguments refer to the connexion between Article 36 of the Protocol and Article 97(1)(c) of the Rules of Procedure, I should like to emphasize to begin with that I see no reason to reconsider the view I expressed in Cases 9/60 and 12/60 dealing with third party proceedings.

I therefore adhere to the following view:

— Article 36 of the Protocol is a provision establishing the principle of the admissibility of third party proceedings which does not itself lay down conclusively the conditions in which they can be brought. On the contrary this Article expressly authorizes the Court to lay down in what circumstances and under what conditions third party proceedings can be brought. In the first place, therefore, it is the Rules of Procedure which are decisive as regards procedural details.

— In order to bring third party proceedings it is not sufficient that the third party was not called upon to take part ('appelé') in the original case. According to the Rules of Procedure the third party must prove that he was unable to take part in the original case.

— Since no provision is made for compulsory joinder of third parties in the Protocol or in the Rules of Procedure the expression in Article 97(1)(c) 'was unable to . . .' can, so far as third parties are concerned, only refer to the possibility of voluntary intervention, which is provided in Article 34 of the Protocol and in Article 93 of the Rules of Procedure as a right for third parties.

The applicant's efforts to give another meaning to this expression, that is to apply it primarily to the case of a party who has been duly served and who was prevented for some reason from

taking part in the proceedings, does not appear to me to be very convincing. As in Community law only the Community institutions are the defendants in the vast majority of cases and, as it is difficult to imagine their being prevented from taking part, it would appear from this that Article 97(1)(c) contemplates a purely theoretical case, and this cannot correspond to its real meaning.

If under Community law third parties, who may be affected by a legal action, are granted the legal opportunity of intervention, it is to be expected that this opportunity will be used for the protection of their own interests. If they abstain from the proceedings, they lose a legal right which cannot be made good by any other exceptional review procedures. This particular form of legal protection which presupposes that third parties exercise some care in considering cases to which they are strangers and in defending their own interests appears to be reasonable in view of the publication of applications which have been lodged and having regard to the average importance of the undertaking which may be affected. Its aim is to reduce to a minimum interference, by the use of exceptional review procedures, with the finality of judgments which have been delivered and thereby to guarantee the maximum possible legal certainty.

2. In these proceedings the applicant in the original case has raised the objection that, if the third party's arguments concerning the subject of the 'maatschap' are presumed to be correct, it would have been represented in the original case by the intervener Hoogovens, namely as a member of the association alleged to exist between it and Hoogovens and consequently as joint debtor for the payment of the equalization contributions. According to the principles of French law third party proceedings are in such cases inadmissible.

In fact, these observations touch and concern the substance of the application, because they bear upon the legal relationship existing between the two Dutch companies. In my opinion it is unnecessary to go into details in this connexion, and for the following reasons: even if the two Dutch companies are in close association and even if the existence of a 'maatschap' could be presumed, this would still not amount to evidence relevant to the question whether the two companies represented each other.

It has rightly been pointed out that the principles of French law cannot simply be incorporated into Community law. In particular Dutch and German law do not recognize a correspondingly wide concept of representation in an action. Therefore, persons affected from those countries must at least be asked to prove that in fact there was proper representation in the proceedings. Accordingly, it is necessary to examine whether Hoogovens, expressly or by implication, represented Breedband in the original case.

There is no indication that it did. So far as can be seen, Hoogovens intervened in the proceedings solely in its own name. Certainly during the course of its arguments this company pleaded the existence of a single undertaking said to consist of itself and Breedband. But it was not stated that the intervention took place in the name of this single undertaking. We were moreover told during the hearing that, even assuming that a 'maatschap' exists, one associate is not entitled in every case to represent the other (cf. Articles 1679 et seq. of the Dutch Civil Code). Even if it is assumed that there is an identity of interests between Hoogovens on the one hand and Breedband on the other hand and that as a result the interests of the third party were represented, in the sense of defended, in the original case, this would not, in my opinion, be sufficient evidence of representation in the action to lead to the dismissal of the

application originating third party proceedings.

3. Consequently, it must be considered whether the third party could have defended its rights at the proper time by way of voluntary intervention and ought to have done so in order to avoid being criticized for having neglected its own interests.

In the first case of third party proceedings I pointed out that in examining this question a number of pertinent considerations arise. First the special features of intervention proceedings must not be overlooked (participation in an action to which one is a stranger in the context of the conclusions of another party). The question is whether the legal opportunities for intervention could have made it at all possible to prevent a right from being prejudiced. On the other hand the injury to the right must have been forseeable and that is why, as I have also emphasized, a vague probability coupled with several possible solutions of the main action is insufficient. On the contrary, the intervention must, on a reasonable and objective consideration of all the circumstances, have been so obvious that failure to take this step clearly affords grounds for criticism and therefore justifies the exclusion of extraordinary review procedures after the termination of the proceedings.

How does the present case appear in the light of these principles?

The character of the alleged prejudice to rights is disclosed by the object of the application originating third party proceedings. In the wording of the conclusions of the applicant it appears as follows:

'To rule that the arisings of ferrous scrap received by Hoogovens from the third party under the "maatschap" contract concluded between them are Hoogovens' own resources or at least are not bought scrap'.

The third party has correspondingly framed its arguments for the defence and enforcement of its presumed legal claim. Its rights are said to be prejudiced by the findings in the judgment concerning the relationships with regard to ownership of the scrap used by Hoogovens. The object of the original case was a request by SNUPAT seeking to have revoked all exemptions from equalization of scrap. In such proceedings it was to be expected that the Court would have to deal with the preliminary question whether the exemptions complained of were legal or illegal, since only in the latter case could revocation be considered. The Court had therefore to consider all arguments which were likely to justify the exemptions, including the argument that scrap used by the exempted undertakings was to be regarded as their own and not bought scrap.

The result is that the alleged injury to rights was already foreseeable before the conclusion of the original case. It fell within the scope of the subject matter of the original case and taking part in the original case was unquestionably an appropriate way of preventing it.

Only Hoogovens, which benefited directly from the exemptions, took part in the proceedings with the specific aim of preventing the result which it feared.

We must therefore ask ourselves whether there are reasons justifying the failure of Breedband to intervene.

Breedband does not claim to have had no knowledge of the proceedings and their content. It is clear from the pleadings in the present case that Hoogovens and Breedband have the same management. Also when in the original case there was an inspection of the premises representatives of Breedband were present. It can be assumed with confidence that Breedband was most accurately informed of the original case. Breedband is now attempting to cast doubt on the question whether it had a sufficient interest to justify its intervention, on the grounds that the

exemption was only intended for Hoogovens. This argument contrasts strangely with the statement of reasons given in the application originating third party proceedings. Precisely from the point of view of the third party there must have been an imperative interest in intervening, for it now alleges an infringement of its own rights by the judgment of the Court, that is to say a prejudice to its rights which was certainly foreseeable at the time of the original case. There is without any doubt a close economic and legal connexion between Hoogovens and Breedband, which at least permits the assumption that they pool their profits and losses. Whether it constitutes a sufficient interest for intervening would appear to be questionable according to the principles of national law. According to the principles established by the existing case-law of the Court with regard to intervention, such an interest can be affirmed without hesitation. It was not a lack of interest in the original case but other reasons therefore which must have led to the waiver of intervention.

I should like to assume that Breedband considered, as it did in the recently argued Case 14/61, in which Hoogovens challenged the revocation of the exemption, and the demand made by the High Authority for payment of the equalization contributions, that its interests were sufficiently defended by the intervention of Hoogovens. Although Breedband in the present proceedings produced for the better information of the Court the contract to which Hoogovens referred in the original case but deliberately refrained from producing, it was not with the intention of accusing its contractual partner of conducting the case badly. Furthermore, such an accusation would be scarcely intelligible, because it must be concluded from the arguments in the third party proceedings that Hoogovens did not decide its tactical conduct in the proceedings without consulting Breedband, which is all the more likely as the persons running both companies are the same.

All this leads me to the conclusion that Breedband did not do all that was necessary and reasonable in the original case to defend its interests, although the course of the proceedings should have suggested that intervention was a matter of urgency. Breedband was therefore within the meaning of Article 97(1)(c): 'able to take part in the original case', and is therefore precluded from bringing an application originating third party proceedings.

Any other view would mean that a type of appeal would be available against the Court's judgments whereby evidence could be adduced which had been deliberately withheld in the original case. In my opinion it is precisely the facts in this case which clearly show the necessity of setting strict limits to the admissibility of third party proceedings, if the danger of continual reopening of cases which have been finally concluded is not to be created.

4. Although for the reasons which have just been given the inadmissibility of the third party proceedings is established, I should like for the sake of a full treatment of the subject to make some further observations.

According to Article 97(1)(b) the application must indicate how the judgment infringes the rights of the third party. In this connexion the applicant states that, after the revocation of the exemption which the judgment made possible, it was obliged under the association agreement to share the burden of the debt arising from the equalization charges. The judgment therefore infringes the contractual relations between Breedband and Hoogovens. But the judgment also prejudices Breedband's legal position to the extent that the relationships with regard to the ownership of the scrap consumed were incorrectly determined.

Finally, as a result of the judgment it may happen that the Dutch Inland Revenue Department will revise the treatment for tax purposes which it has hitherto applied to goods circulating between Hoogovens and Breedband.

I stated at the outset the considerations upon which the contested judgment is based. Above all account must be taken of the fact that Hoogovens did not produce any evidence that the ownership of the scrap consumed was vested in it from the beginning. Consequently, the exemption from equalization of scrap granted to Hoogovens was contrary to the Treaty.

It is doubtful whether the rights invoked by the third party are of such a nature as to lead to the review procedure of third party proceedings; whether any prejudice to rights can be proved is of no relevance in this connexion.

As regards first of all the findings concerning the ownership of the consumed scrap the following should be noted: the judgment merely states that Hoogovens' right of ownership was not proved. Questions of civil law concerning the system of property law were therefore dealt with far from exhaustively. To this must be added that a judgment of the Court, which only makes decisions in the field of public international economic law, cannot create legal effects in the field of preliminary questions of civil law. But quite apart from that, it is possible at the most to imagine a prejudice to rights in this connexion, if the judgment had contained an observation which adversely affected Breedband's rights of ownership, which would be the case if Hoogovens had been described as sole owner.

Since a finding to the contrary was made, which, although confined to these legal aspects relating to ownership of property, is favourable to Breedband, strictly speaking it is only the rights of Hoogovens which can be said to be affected and infringed. When Breedband seeks a variation of the judgment, its aim is to to that extent negative: it seeks a declaration that Hoogovens and not Breedband itself is the owner of the scrap in question. This negative request shows clearly that in reality Breedband is not defending its own rights but those of Hoogovens.

As far as Breedband's own position is concerned its statements on the question of ownership are only of indirect importance, namely to the extent to which they influence the end result of the joint profit and loss account. This takes us to the second point, which was put forward as a ground for establishing prejudice to a right: the infringement of rights arising out of the contractual relations between Hoogovens and Breedband.

It must first be stated that the judgment only deals with the exemption of Hoogovens and the possibility of the revocation of this exemption. It only offers the High Authority the opportunity of taking direct action against this addressee. There is no indication in the judgment that Breedband could be called upon to make payments as a debtor in connexion with the equalization scheme (Breedband has in fact never used scrap), nor even any indication that the association alleged to be constituted by Hoogovens and Breedband could be considered as the addressee for the purpose of equalization claims. This latter possibility is even expressly excluded because, in the view of the Court, undertakings within the meaning of the Treaty, that is to say participators in the equalization of scrap, can only be legal or natural persons.

Breedband is therefore not directly affected by the legal effects of the judgment. Accordingly this company does not ask, even as a final consequence of its application, for protection against action threatened against it by the equalization scheme, but for the retention of the exemption granted to Hoogovens as a personal right by a Decision of the High Authority. It is

only indirectly, that is to say under the contractual relationship between it and Hoogovens, that the consequences of exemption or non-exemption are transferred to Breedband, because Breedband has become liable under the law of contractual obligations ('Schuldrecht') to share production costs with Hoogovens. Rights arising from such obligations, that is, rights having a limited effect, can not, however, be enforced against third parties and cannot be infringed by them. Thus the prejudice alleged by Breedband does not appear as a direct infringement of rights but as an indirect prejudice, which only arises by virtue of the transference under the law of contract of certain legal effects, that is to say in fact as an infringement of economic and financial interests only, which it is not possible to pursue by seeking to upset a final judgment of the Court. Should the procedural conduct of Hoogovens prove to be inadequate and misconceived, Breedband could only refer to its contractual partner and demand that it be shielded from the detrimental effects of the judgment given against Hoogovens.

In my opinion the reference to the possible reaction of the Dutch Inland Revenue Department must also be disregarded. As the High Authority rightly remarks, these are only presumptions and fears, not the actual and necessary consequences of the judgment. The Court had in this particular case neither the intention nor the jurisdiction to rule on questions of national revenue law. Its judgment therefore cannot have legal effects in this field. If national courts were to adopt a view expressed in a judgment of the Court, we would be concerned solely with the factual influence of the Court's judgment in the field of the interpretation of law but not with binding legal consequences.

It therefore appears that the conditions of Article 97(1)(b) are not fulfilled. Consequently the application originating third party proceedings cannot from any point of view be regarded as admissible.

II — Conclusion

The result of this appraisal is that the review procedure under Article 97 of the Rules of Procedure, which the third party seeks to use, is not available to it. It is therefore unnecessary to examine the arguments advanced on the basis of material rights and on legal inferences, in particular on the nature of the contractual relationship between Hoogovens and Breedband, since a first scrutiny has already shown us that there is no direct infringement of the rights of the third party within the meaning of Article 97.

My view therefore is that the application originating third party proceedings should be dismissed as inadmissible and that the applicant be ordered to pay the costs.