JUDGMENT OF THE COURT
8 FEBRUARY 1968[1]

Fonderie Acciaierie Giovanni Mandelli v Commission of the European Communities

Case 3/67

Summary

1. *Measures adopted by an institution — Decisions of the High Authority — Statement of reasons — Preparatory inquiries — Irrelevant objections — Uncertainties due to applicant's own conduct*
   (ECSC Treaty, Article 15)

2. *Assessment to contribution — Estimated assessment — Powers of the High Authority*
   (Decision No 13/58 of the High Authority of 24 July 1958, Article 2; Official Journal 1958, p. 269
   Decision No 16/58 of the High Authority of 24 July 1958, Article 15; Official Journal 1958, p. 275)

1. Cf. paragraph 1, Summary Case 36/64, [1965] E.C.R., p. 329.
   Cf. paragraph 2, Summary Case 2/56, Rec. 1957, p. 13.
   The High Authority is under no obligation to communicate all the details of its preliminary investigations, or to 'make known its views on wholly irrelevant objections.
   A party cannot plead to its advantage any uncertainties in the High Authority's attitude caused by that party's own conduct.
2. Article 12 of Decision No 13/58 of the High Authority and Article 15 of Decision No 16/58 of the High Authority are designed to enable the High Authority, either in the absence of any declaration or where a declaration is incomplete or insufficiently proven, to make good by any suitable means the lack of a declaration or to remedy the omissions or inaccuracies in declarations supplied by undertakings.
   The powers conferred on the High Authority to correct declarations are not distinct from those which it may exercise in the total absence of a declaration.

In Case 3/67

FONDERIE ACCIAIERIE GIOVANNI MANDELLI, a partnership having its office in Turin, represented by it Managing Partner, Walter Mandelli, assisted by Professor Mario Giuliano of the University of Milan, advocate of the Milan Bar and at the Corte di Cassazione, with an address for service in Luxembourg at the Chambers of Ernest Arendt, avocat-avoué, 6 rue Willy-Georgen,

applicant,

1 — Language of the Case: Italian.

V

COMMISSION OF THE EUROPEAN COMMUNITIES, taking the place of the High Authority of the European Coal and Steel Community under Article 9 of the Treaty of 8 April 1965 establishing a single Council and a single Commission of the European Communities, represented by its Legal Adviser, Italo Telchini, acting as Agent assisted by Professor Giuseppe Sperduti of the University of Milan and the Rome Bar, with an address for service in Luxembourg at its offices at 2, place de Metz,

defendant,

Application for the annulment of two individual decisions of the High Authority of the European Coal and Steel Community of 7 December 1966, the first fixing the amount of bought scrap consumed by the applicant undertaking for the period from 1 February 1957 to 30 November 1958 and the second demanding payment from it of the sum of lit 137 910 340 by way of contribution to the equalization scheme,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and W. Strauß, Presidents of Chambers, A. Trabucchi and P. Pescatore (Rapporteur), Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts of the case may be summarized as follows:

The firm Mandelli is engaged in a mixed production, according to the Commission, in that it produces both castings and steel ingots and is only subject to the provisions of the ECSC Treaty and, consequently, to the ferrous scrap equalization scheme, in respect of the latter production.

Declarations of its consumption of scrap subject to equalization were duly sent by the applicant company to the High Authority, showing the acquisition of a total of 10 702 metric tons for the period covered by the disputed decisions.

An initial check was carried out at the Mandelli premises between 16 and 25 January 1961 by the Société Anonyme Fiduciaire Suisse on behalf of the High Authority. The Commission claims that the documentary records necessary for a proper check were not available as the applicant had not kept them; moreover it came to be convinced that steel ingots had been sold without invoicing.

On 16 April 1962 Mandelli submitted to the High Authority, at the latter's specific request, invoices relating to its consumption

of electricity, after which an interview took place between representatives of Mandelli and of the High Authority in Luxembourg on 24 September 1962 and new checks were made at the applicant's premises by the Istituto Fiduciario Italiano (Fidital) between 11 and 14 December 1962 and between 8 and 18 January 1963.

With the agreement of the applicant an expert investigation was carried out on the spot on 6 October 1964 by an engineer, Mr Studer; on receiving his report on 26 March 1965 the applicant submitted its observations to the High Authority in letters of 9 June and 21 September 1965 and 29 January 1966.

In the light of the information collected by the expert, and some of the objections raised by the company against his report, the High Authority saw fit to amend Mandelli's declarations and to make an estimated assessment of its consumption of ferrous scrap subject to equalization.

By its decision of 7 December 1966 it determined, first, the undertaking's total production of crude steel, by taking into account the length of time during which the undertaking had actually been in production, the hours during which the furnaces were operating, the casting time, the time the furnaces were actually in use, the number of loads and the furnace capacity; it then deducted from this the steel produced for castings and for ingots, on the basis of a comparison between the steel made for ingots and the production of crude steel (calculated by reference to the charging, the melting loss, the arisings in the plant and certain added scrap) assessed the production of ingots and from that the consumption of scrap subject to equalization.

This is fixed, for the period 1 February 1957 to 30 November 1958, at 24 026 metric tons. This basis of assessment to contribution was substituted for the figure adopted in a previous statement of account drawn up by the High Authority on 31 December 1965 and communicated to Mandelli by letter of 23 December 1965.

By a second decision taken on the same day, 7 December 1966, the High Authority accordingly fixed at Lit. 137 910 340 the sum to be paid to it by the applicant under the equalization scheme.

The applicant was notified of the two decisions by registered letter with form of acknowledgment of receipt dated 15 December and received by it on 20 December 1966.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— declare the application admissible and well founded, and accordingly:
— annul the individual decision taken by the High Authority with regard to the applicant on 7 December 1966 concerning the tonnages of ferrous scrap assessable under the equalization scheme.
— annul the individual decision of 7 December 1966 taken by the High Authority with regard to the applicant concerning the amount to be paid to the equalization scheme.
— So far as is necessary, order the following measures of inquiry:
  (a) A report by one or more foundry experts of international repute to determine what the quantities of scrap acquired and consumed by the applicant undertaking during the period in question could have been, taking into account its special features, the technological running-in period in which it was at the time any other factors, including those arising from the undertaking's past development; alternatively or additionally:
  (b) A visit of inspection in order to obtain a better and direct impression of the technical facts and the real nature of the situations described during the course of the present case;
— order the defendant to pay the costs.

The *defendant* contends that the Court should dismiss the application and order the applicant to pay the costs of the proceedings.

III — Submissions and arguments of the parties

The two contested decisions are closely linked, in that the second, fixing the amount

payable, depends on the one fixing the assessable tonnage. Only the first is discussed.

The applicant bases its case on two main submissions; infringement of an essential procedural requirement and infringement of the Treaty or a rule of law relating to its application.

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

1. *Infringement of an essential procedural requirement*

The *applicant* claims that the reasons given for the decision fixing the assessable tonnage are not adequate, lack relevance and are inconsistent.

In this respect it alleges, first, that even according to the wording of the contested decision, the various checks carried out by the High Authority in January 1961, December 1962 and January 1963, and the electricity invoices produced, were not sufficient to enable the High Authority to decide that the declarations made by the company were incorrect; on the contrary, the contested decision relies, in order to justify procuring the expert's report of 6 October 1964 which formed the main basis of the assessment of the amounts of scrap subject to equalization, on 'certain inconsistencies and disparities in the information to be taken into consideration', and 'some difficulties of a technical nature, in particular the fact that the company was producing simultaneously, in the same furnaces, products subject to equalization and exempted products'.

Secondly, the applicant remarks that while the contested decision concedes that 'the observations made by the undertaking (concerning the expert's report) justify the amendment in certain special particulars of the calculations previously communicated by the departments of the High Authority', it does no more than declare that it has taken Mandelli's objections into account, 'to the extent to which they appear to be justified and acceptable, namely...'. The contested decision thus contains no mention of the objections not upheld by the High Authority and, above all, gives no reasons for rejecting them.

The various facts taken into consideration by the expert are closely dependent on each other and so the applicant takes the view that the fact that the High Authority admitted the relevance of some of its objections is enough to invalidate the entire expert's report.

Accordingly, the reasons given for the decision are not sufficient to demonstrate the logical process whereby the High Authority arrived at the assessment which it seeks to enforce.

Thirdly, the applicant claims (relying on a statement by Professor Régé) that the report made by the expert Mr Studer, and consequently the contested decision, failed to take into account

— certain special technical features of the undertaking which is solely a castings foundry, (in particular the plant, the machining systems, the working methods, and the input of scrap to the furnace) and it considered only theoretical factors (working hours and capacity of the furnaces);
— the stage reached by the company in its technological development at the period under consideration;
— arisings.

Lastly, the applicant remarks that the High Authority sent it a statement of account on 8 April 1963 according to which its contributions for the period covered by the contested decision amounted to approximately Lit 8 million. The huge difference—almost Lit 130 million—between this amount and that claimed in the decisions in the present dispute is in no way justified and no reasons are given for it.

The *defendant* commences by pointing out that Mandelli kept no proper accounts for the period in question. Its own checks were made the more difficult by the fact that it had to distinguish the consumption of scrap subject to equalization from that exempted. The first check, despite its summary nature owing to the absence of several essential documents, showed that the declared consumption was lower than the actual consumption. Finally, it thought it had good reason for believing that ingots had been sold without invoices (as was admitted by Mandelli with regard to castings).

In the circumstances, the High Authority

was entitled to choose the inductive method of assessment on the basis of the information supplied by the undertaking so far as it could be verified and was supported by documentary evidence.

It was precisely in order to verify the existence and the effect of the special technical factors in its manufacturing process referred to by the applicant that the High Authority suggested that an expert opinion be obtained. The expert was not an arbitrator. That the High Authority did not passively accept the results of his investigations only demonstrates its detachment and good will.

The High Authority need not answer point by point all the applicant undertaking's observations. It is enough that the contested decision should contain—as it does in the present case—a clear statement of the reasoning leading to the operative part of the decision.

As to the complaint that its decision was founded only on theoretical considerations, this according to the defendant is contradicted by the actual text of the contested decision. Moreover, the expert was not required to take into account all the special technical features of the undertaking. He had only to ascertain the date necessary in order to establish the production of liquid steel.

The defendant's reply to the complaint that it failed to take into account the running-in period is that the undertaking had been producing castings and steel ingots since at least 1954 and that its third furnace came into operation in October 1956.

The defendant further claims that the arisings from castings did not in any way influence the calculation of the amount of scrap subject to equalization. Since the foundry did not come within the High Authority's jurisdiction, the production of liquid steel for castings had to be deducted from the total production of liquid steel in order to find the amount of scrap subject to equalization.

The defendant expressly objects to the findings contained in the statement drawn up by Professor Régé.

As for the discrepancy between the statement of account of 8 April 1963 and the sums now claimed from the applicant, the defendant remarks that, leaving aside the question of interest, on the one hand the 1963 statement of account was designed solely to acquaint the applicant like all the other undertakings, with its (provisional) situation with regard to the equalization scheme following the new prices and equalization rates fixed by General Decision No 7/63 of 3 April 1963, and that on the other hand it was made up exclusively on the basis of the declarations submitted by the company, and these had subsequently been shown to be incorrect.

Concluding, the defendant says that it considers the statement of reasons for the disputed decision to be consistent and to give a clear and relevant explanation of the factors forming the basis of the determination of the applicant's contributions, as well as the logical interaction of the necessary procedures.

2. *Infringement of the Treaty or a rule of law relating to its application*

The *applicant* claims that in the present instance the High Authority was not entitled to make an estimated assessment. According to the first paragraph of Article 2 of General Decision No 13/58 (and Article 15 of General Decision No 16/58) this method can only be used in the absence of declarations submitted by the company. Doubtless the High Authority is entitled to rectify on its own initiative any such declarations in support of which no valid proof can be supplied, but it cannot do so by making its own assessment.

The applicant also points out that it was not notified by the High Authority of the results of the checks carried out in December 1962 and January 1963. According to the applicant, no definite rule exists on this, such conduct on the part of the High Authority is contrary to its general practice, and violates the principle of non-discrimination.

The same principle is also violated, in the applicant's view, by the High Authority's failure to take into account the particular features of production, so that it used the same criterion in order to evaluate non-comparable production activities.

The *defendant* objects to the applicant's interpretation of the general decisions, contending that the preamble to Decision No

13/58 reveals that the High Authority is also entitled on its own intiative to correct inaccurate declarations, or those in support of which no valid proof can be supplied, by making an inductive assessment. If this power were denied to it, this would amount to discrimination against undertakings which, unlike the applicant, keep proper books of account.

The defendant notes, moreover, that the applicant itself agreed that an expert's report should be obtained with the very same object of assessing its scrap consumption.

As to the second point, the defendant claims that there is no obligation on the High Authority to give official notice of the results of its checks. In the present case, however, the applicant was told that the results of the checks did not coincide with the declarations submitted. It was because of this that the High Authority had considered a report from a technical expert to be appropriate.

Lastly, the defendant claims that it did take account of the undertaking's special characteristics to the extent necessary to determine its consumption of scrap subject to equalization.

IV — Procedure

The written procedure followed the normal course. On hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided that no measures of inquiry were necessary.

The defendant was asked to produce certain documents and did so within the required time.

The parties presented oral observations at the hearing on 5 December 1967, and replied to several questions put by the Judge-Rapporteur.

The Advocate-General delivered his opinion at the hearing on 18 January 1968.

Grounds of judgment

The application concerns two decisions of the High Authority of 7 December 1966, the first establishing the applicant's consumption of assessable scrap during the period from 1 February 1957 to 30 November 1958, and the second fixing contribution due from the applicant to the equalization scheme on the basis of that consumption. In the circumstances the Court need only examine the first of these two decisions, concerning the consumption of assessable scrap.

The applicant objects to this decision on the ground that it infringes, first, an essential procedural requirement in that the statement of reasons for it was either omitted or inadequate, and secondly, the Treaty or a rule of law relating to its application, as regards the method of assessment used by the High Authority.

1. The statement of reasons for the decision fixing the tonnage of assessable scrap

The applicant maintains that the reasons given for the contested decision are inadequate, inconsistent and irrelevant. In particular, it points out the large discrepancy between certain preliminary assessments of the case and the final decision. It also accuses the High Authority of failing to notify it of the results of certain checks which were carried out, and of not having expressly made known its attitude to all the objections raised by the applicant while the checks were being carried out.

The applicant claims that this constitutes discriminatory treatment, in view of the High Authority's practice in relation to other undertakings.
(a) The statement of reasons for a decision is sufficient where on the one hand it enables those concerned to know the essential considerations of fact and of law upon which the High Authority relies, and on the other hand enables the Court to exercise the judicial review entrusted to it by the Treaty. The High Authority has given a clear and consistent statement of the reasons for its decision as regards the recourse to an estimated assessment, the procedure followed and the facts taken into consideration in applying this procedure. These elements are sufficient to enable the applicant to understand the scope of the decision concerning it and to defend its interests, as well as to enable the Court to exercise its review.

(b) The discrepancy found between the provisional information communicated to the applicant during the preliminary procedure and the decision of 7 December 1966 does not affect the validity of the decision, which is justified in itself. The applicant cannot plead to its advantabe discrepancies which are due mainly to the deficiencies and uncertainties present in the information which it supplied.

The High Authority was under no obligation to communicate to the applicant all the details of its preliminary investigations; its only duty, under the Treaty, is to provide a full statement of the reasons for its decision.

As for the objections to the results of the checks carried out by the High Authority, the reasons given in the disputed decision are sufficiently explicit to enable the applicant to know the extent to which its observations were taken into account. The High Authority, for its part, was not bound to make known its views on wholly irrelevant objections concerning the method of assessment used. This is the case in particular with regard to the objections based on the operation of the castings foundry.

The conduct of the High Authority was justified by the circumstances created by the applicant itself, for any other treatment might have given rise to discrimination against the undertakings which supplied accurate declarations of their scrap consumption, thus accepting the full burden of their contributions to the equalization scheme established by the High Authority.

Accordingly the submission of insufficient, inconsistent and irrelevant reasons cannot be upheld.

2. The method of assessment used by the High Authority

(a) The applicant submits that, according to General Decisions Nos 13/58 and 16/58, recourse to the procedure of estimated assessments for the purpose of determining the consumption of scrap subject to contribution is only permitted where no

declarations have been submitted by the undertaking, so that the High Authority failed to take into account certain criteria of assessment, relating in particular to the company's casting foundry, thereby discriminating against the applicant.

According to Article 2 of Decision No 13/58 of 24 July 1958 and Article 15 of Decision No 16/58 of the same date, as extended by Decision No 18/58 of 15 October 1958, the High Authority is entitled, should undertakings fail to declare the factors for calculating the equalization contributions, to estimate these on its own authority. The same provisions allow the High Authority to correct on its own authority declarations in support of which no valid proof can be supplied.

These provisions are designed to enable the High Authority, either in the absence of any declaration or where a declaration is incomplete or insufficiently proven to make good by any suitable means the lack of a declaration or to remedy the omissions or inaccuracies in declarations supplied by undertakings. The powers conferred on the High Authority to correct declarations are not distinct from those which it may exercise in the total absence of a declaration.

In the course of the successive checks which the High Authority caused to be carried out it was established that the applicant was unable to produce the accounting and other documents on the basis of which it would normally have been possible to determine or to verify the consumption of assessable scrap. The High Authority was therefore entitled to have recourse to the procedure of making an estimated assessment.

The method of assessment used in this case—based on an estimate of the capacity and operating times of the furnaces for the purpose of calculating the undertakings aggregate production of steel and of thus establishing, after subtracting the consumption of the casting foundry, the production of steel for ingots—was well adapted to give a reasonable assessment of the consumption of scrap subject to contribution. Moreover, the result reached by the method used by the High Authority coincides largely with the information supplied by the applicant in the preliminary stages of the procedure. The possibility of a discrepancy between the result arrived at by such a method and the actual consumption is a risk which must be borne by the applicant, whose conduct it was that induced the High Authority to have recourse to the assessment procedure.

As regards in particular the complaint of discrimination, the High Authority only needed to assess the production of the foundry to the extent required in order to establish the steel tonnages corresponding to the consumption of scrap exempt from contribution. Since these tonnages were determined on the basis of the declarations submitted by the undertaking to the High Authority, there was no need to make any further assessment of the foundry's operation. The complaint of discrimination is therefore wholly unjustified.

(b) All the fundamental data on which, as a result of the procedure adopted for making an estimated assessment, the High Authority's decision is based, arise from the data supplied by the applicant while the inspections were being carried out, as is expressly stated in the statement of reasons itself and, more particularly, from its observations on the investigation conducted on behalf of the High Authority by the engineer Mr Studer. These particulars disclosed the inaccuracy of the first declarations made by the undertaking with regard to scrap bought. In making use of the particulars thus supplied by the applicant, the High Authority also took into account various factors capable of improving the undertaking's liability to pay contributions, even to the extent of including tonnages of exempt scrap corresponding to sales of castings for which no invoices were issued.

The applicant has brought no evidence capable of invalidating the information supplied by itself to the High Authority while the checks were being carried out, or of casting doubt on the appropriateness of the technical norms adopted by the High Authority. In particular, the explanations which it has given concerning the running of its castings foundry were not capable of calling into question again the declarations of the production of crude steel for castings previously submitted by it to the High Authority. The only exception to this is the data supplied subsequently concerning sales of steel castings for which no invoices were issued.

The criticisms levelled at the method of estimated assessment adopted in this case by the High Authority therefore cannot be accepted.

3. Costs

Under Article 69(2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

On those grounds,

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 the Treaty establishing the European Coal and Steel Community, especially Articles 4, 14, 15, 33, 47, 53, 80 and 92;
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,

THE COURT

hereby:

1. Dismisses the application; and

2. Orders the applicant to bear the costs.

Lecourt Donner Strauß

Trabucchi Pescatore

Delivered in open court in Luxembourg on 8 February 1968.

A. Van Houtte R. Lecourt

Registrar President

OPINION OF MR ADVOCATE-GENERAL ROEMER 18 JANUARY 1968[1]

Index

Mr President,
Members of the Court,

The applicant in the case on which I give my opinion today is an Italian undertaking in the iron and steel industry with a works in Regina Margherita (Turin). We will go into the details of its production later, but in any event it is certain that the undertaking used ferrous scrap in its manufacturing process and that the High Authority found it liable in consequence to pay contributions to the ferrous scrap equalization fund. The undertaking itself seems always to have been of the same opinion, for it made regular declarations of bought scrap (totalling 10 702 metric tons) for the period here in question, from February 1957 to November 1958, and it paid a certain amount (Lit 29 941 334) by way of contributions into the equalization fund.

As with other undertakings, the High Authority had the information supplied by the applicant checked on a number of occasions. The first was in January 1961, by the Société-Fiduciaire Suisse which presented its report thereon on 5 May 1961. It showed that not all the documents necessary for the check were available at the applicant's works, so that no reliable picture of the actual amounts of scrap bought could be formed. The High Authority therefore tried to get precise

1 — Translated from the German.