

JUDGMENT OF THE COURT
17 DECEMBER 1959¹

Macchiorlatti Dalmas e Figli
v High Authority of the European Coal and Steel Community

Case 1/59

Prices — Non-discriminatory infringement of the provisions relating to publication.

Any price which departs from the price list, even if the latter has been departed from uniformly in all comparable transactions and the departure for that reason is not an in-

fringement of the rules on non-discrimination, is an infringement of the rules regarding publication.

(ECSC Treaty, Articles 3 and 60)

Prices — Infringements of the provisions relating to publication — Justification of the amount of the fine

In order to determine accurately the gravity of the infringement and consequently the amount of the fine, it is necessary to consider whether or not the failure to comply with the rules regarding publication also includes an infringement of the rules on non-discrimination. Infringement of the rule on non-discrimination is a more serious offence than infringement of the rules regarding

publication. The latter infringement cannot however be regarded as a minor offence in view of the aims of compulsory publication. A mere infringement of the rules regarding publication calls therefore for the imposition of a fine which is appropriate having regard to the consequences of that infringement.

(ECSC Treaty, Articles 36, 60 and 64)

In Case 1/59

MACCHIORLATTI DALMAS e FIGLI, a limited partnership governed by Italian law, having its registered office in Turin, represented by Antonio Macchiorlatti Dalmas, assisted by Arturo Cottrau, Advocate of the Turin Bar and at the Corte di Cassazione of the Italian Republic, with an address for service in Luxembourg at the Chambers of Georges Margue, Advocate, 6 rue Alphonse-Munchen,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Professor Giulio Pasetti-Bombardella, acting as Agent, assisted by Professor Alberto Trabucchi, Advocate at the Corte di Cassazione of the Italian Republic, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

¹—Language of the case: French

Application for the annulment of the Decision of the High Authority of 14 November 1958, notified to the applicant on 4 December 1958, imposing upon it a fine of Lit 2 500 000 for having effected sales subject to prices higher and conditions more onerous than those shown on its price list,

THE COURT

composed of: A. M. Donner, President, L. Delvaux (Rapporteur) and R. Rossi, Presidents of Chambers, O. Riese and N. Catalano, Judges,

Advocate General: M. Lagrange
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I – Conclusions of the parties

The *applicant*, reserving all other arguments in justification of its conduct, claims that the Court should:

'In the first place, declare that the contested decision of the High Authority of the ECSC is null and void;

Alternatively, reduce the amount of the fine imposed upon the applicant;

In any event, order the High Authority to bear the costs.'

The *defendant* contends that the Court should:

'Dismiss all the claims made by the limited partnership 'Macchiorlatti Dalmas e Figli' in its application of 6 January 1959;

Order the applicant partnership to bear the costs.'

In October 1957 Mr. Robert Lepape, Chief Inspector of the supervising departments of the High Authority visited the applicant partnership's registered office for the purpose of inspecting and checking the latter's accounts as provided for in Decisions Nos 30/53, 31/53, 1/54 and 2/54. On 16 January 1958 the High Authority notified the undertaking that some of its invoices, amounting in value altogether to Lit 70 569 655 did not appear to be in order because they recorded sales at prices exceeding those in its price list, the price increases amounting in the aggregate to Lit 9 199 973; the High Authority therefore invited it to offer an explanation for this within a period of 15 days, failing which it would impose the penalties provided in Article 64 of the Treaty.

According to the applicant it gave its explanation orally to Mr. Lepape when the checks were being carried out and for various reasons omitted to confirm it in writing to the High Authority. Consequently, on 4 December 1958 the

II – Summary of the facts

The principal facts of this case may be summarized as follows:

High Authority notified to the applicant the Decision of 14 November 1958 in which it ordered it to pay as a penalty within a period of 30 days the sum of Lit 2 500 000 by way of a fine as provided by Article 64 of the Treaty.

This fine of Lit 2 500 000 is the subject-matter of an appeal in which the Court has unlimited jurisdiction (Article 36 of the Treaty).

III — Submissions and arguments of the parties

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

A — *Submissions and arguments of the applicant*

1. The applicant states that the reason why it failed to reply to the High Authority's registered letter of 16 January 1958 giving it particulars of the invoices which Mr. Lepape considered were not in order and inviting it to offer an explanation was that the firm's senior partner was ill. However, it asserts that this explanation had already been given by the firm's staff to Mr. Lepape while he was carrying out his investigation and it offers to call witnesses to prove this.

It cannot seriously be maintained that the correspondence produced by the High Authority constitutes an extra-judicial admission by Macchiorlatti that it has effected sales at prices higher than those stated in its price list. That correspondence refers solely to the collection of the levy provided for in Article 49 of the Treaty.

2. Article 1 of Decision No 1/54 allows the obligation to adhere to published price lists to be disregarded in two specific cases:

- (a) When the transaction does not fall within the categories of transaction covered by the price list; or
- (b) When the departure is uniform in all comparable transactions.

3. The invoicing which is criticized relates to specific sales at increased prices commonly applied in all iron and steel undertakings.

Prices are marked up by a uniform amount. 4. The applicant examines in turn all the invoices which are criticized (pages 3 to 10 of the application) and provides an explanation for each of them.

5. In support of its assertions the applicant produces in addition to its price list a very large number of letters.

In particular, its customers Cosiac (Annex 13 to the reply), Menzio Petro (Annex 14 to the reply) and Martini Francesco (Annex 15 to the reply) state that they paid prices above the list prices because there were special conditions attaching to the methods of manufacture or delivery. The 'Ferro e Acciaio' undertaking of Milan, which acted as intermediary in the case of the deliveries to the customer Ilva, states (Annex 16 to the reply) that the method of manufacturing the goods supplied and the delivery dates justified prices higher than those in the price list.

6. The applicant (reply, No 6) offers to prove by witnesses that, as indicated in its price lists, when it has received special orders from its purchasers it has invariably applied fixed price increases, of which it produces a detailed list.

B — *Submissions and arguments of the defendant*

1. The defendant submits that, in the absence of an explanation by Macchiorlatti Dalmas e Figli, the High Authority had no other option but to impose the penalties prescribed by the Treaty. The letter of 15 December 1958 which the applicant sent to the High Authority (Annex 3 to the statement of defence) is an extra-judicial admission wholly at variance with the case presented afterwards in its application; in it the applicant acknowledges in particular that it *took account* when fixing its prices of the *financial standing and size of each customer* and this amounts to discrimination prohibited by the Treaty.

2. An examination of the invoices mentioned in the contested decision reveals that the applicant's conduct was determined by the criteria mentioned in its letter of 15 December 1958 which contravene the

Treaty. For example, the criterion of the financial standing and size of the customer was applied in the case of invoices Nos 9, 70, 72, 4, 63, 64 and 67.

3. The applicant did not apply the price increases uniformly. This is proved by comparing invoices 444 with 53, 12 with 441, 464 and 465, 4 with 63 and 64, 4 with 9, 70 and 72. Further, contrary to normal commercial practice, the increases were not specially mentioned on the invoices.

4. The applicant maintains that each invoice contains a number of special particulars which are however so *commonly used* in all iron and steel undertakings that they give rise to price increases *the amount of which is thereby standardized quantitatively*. If this were true it would mean either that the sales at issue are not subject to special conditions or that they infringe

the obligation to publish such conditions according to the rules for the publishing of price-lists (Articles 60 and 64 of the Treaty).

5. The statements contained in Annexes 13 to 16 to the reply in no way prove the applicant's assertions, that is to say, that the sales were special or that it applied uniformly those prices or conditions which departed from the price list.

6. The applicant in its reply (No 6) does not offer to prove that *every sale* contained the special particulars set out in detail in its application but that *in general* it was in the habit of making certain increases if a particular client had certain special requirements. Only complete and positive proof that it applied the same price increases to every special sale can justify Macchiorlatti's charging prices which depart from or disregard the price list.

Grounds of judgment

Admissibility

The applicant is a mechanical engineering undertaking. It is also an iron and steel undertaking and for this reason falls within Article 80 of the ECSC Treaty; it is not disputed that it produces, *inter alia*, steel ingots, rolled steel products and steel sections, which are products mentioned in Annex 1 to the Treaty.

In accordance with Article 36 of the Treaty the Court has unlimited jurisdiction in appeals against pecuniary sanctions imposed under that Treaty such as those which are at issue in this case.

Therefore the application is admissible.

The substance

The applicant challenges, on the basis of Article 36 of the Treaty, a decision of the High Authority taken pursuant to Article 64 which imposes upon it a fine of Lit 2 500 000 for having effected sales subject to prices higher and conditions more onerous than those shown in its price list, in contravention of Article 60 of the Treaty and of the decisions of the High Authority made in implementation thereof.

The applicant denies that it has infringed the said provisions and asks that it should be released from payment of the fine which has been imposed or, alternatively, that the said fine should be reduced.

As far as concerns Article 60 of the Treaty and Decisions Nos 30/53, 31/53, 1/54 and 2/54 of the High Authority, it is necessary to consider whether the alleged infringements have been proved and, if so, whether the amount of the pecuniary sanction which has been fixed is fair and reasonable.

The High Authority's Decision of 14 November 1958, which imposes upon the applicant the pecuniary sanction at issue, mentions 46 invoices containing price increases compared with the level of prices shown in the applicant's price list; the sales which are not in order amount in value altogether to Lit 70 569 655 and the price increases to which exception is taken amount in the aggregate to Lit 9 199 973.

The system introduced by Article 60 of the Treaty and Decisions Nos 30/53, 31/53, 1/54 and 2/54 of the High Authority distinguishes between two categories of rules: those relating to the observance of the principle of non-discrimination and those relating to the publication of prices.

Under Article 2 of Decision No 30/53, as amended by Article 1 of Decision No 1/54, it is a prohibited practice within the meaning of Article 60 (1) for a seller to apply prices or conditions departing from those shown in his price list unless he can show either that the transaction in question does not fall within the categories of transactions covered by this price list, or that the prices or conditions have been departed from uniformly in all comparable transactions.

Under the rules for the publication of prices undertakings have to make known their price lists and conditions of sale in accordance with the procedure laid down; thus any price which departs from the price list, even if the latter has been departed from uniformly in all comparable transactions and the departure for that reason is not an infringement of the rules on non-discrimination, is a breach of the rules regarding publication. In this case it is not sufficient for the applicant, in order to avoid the allegation that it has not complied with the rules regarding publication, merely to establish that prices departing from those in its price list are not discriminatory, since every departure, of whatever nature, constitutes such an infringement; it must also establish that every sale in respect of which it has been found that the prices departed from those shown in its price list falls outside the categories of transactions covered by that price list. Furthermore, if the prices departing from the published price list have not been applied uniformly in all comparable transactions then there has clearly been a breach both of the rules regarding publication of prices and of those on non-discrimination.

Although a finding that the rules regarding publication of prices have been infringed is sufficient justification in law for the imposition of a pecuniary sanction, it is however also necessary, in order to determine accurately the gravity of the infringement and consequently the amount of the fine, to consider whether or not the failure to comply with the rules regarding publication also includes a breach of the rules on non-discrimination.

Existence of the infringement

It emerged at the hearing that none of the sales to which exception is taken can be regarded as exclusive of or falling outside the categories of transactions covered by the applicant's price list, although the contested decision does not mention in the statement of the reasons upon which it is based that the exceptions specified in Article 1 of Decision No 1/54 did not apply in this case.

Most of the sales at issue contravene the rules regarding publication. In some of them the price increases were a direct breach of the price list and in others that price list left out certain information which Article 2 (b) and (e) of Decision No 31/53 requires it to contain, such as any additional charge for size or length, any surcharge or increase in connexion with delivery, costs in connexion with method of shipment and any increase for certain grades and qualities. Those breaches or omissions were found in the following invoices relating to the sales in question: Nos 2 of 5 January 1957; 4, 6, 7 and 8 of 4 January 1957; 12 of 7 January 1957; 15 of 8 January 1957; 53 of 26 January 1957; 63 and 64 of 29 January 1957; 70 and 72 of 30 January 1957; 429, 430 and 431 of 3 June 1957; 438 of 6 June 1957; 441 of 7 June 1957; 444 of 8 June 1957; 445 to 455 of 8, 10 and 11 June 1957; 459 to 463 of 12 June 1957; 464 and 465 of 13 June 1957 and 466 to 473 of 13 and 17 June 1957.

Furthermore, the applicant disregarded the rule on non-discrimination in the sales recorded in its invoices Nos 4 of 4 January 1957 and 15 of 8 January 1957. The fact is that in the case of those sales the list prices were not departed from uniformly in all comparable transactions.

Moreover, the applicant expressly admitted in its letter of 15 December 1958 addressed to the High Authority that it had infringed the rule on non-discrimination in that it treated different customers in a different manner for subjective reasons. Although that letter was addressed to the High Authority in answer to a note concerning the levy, it contains certain statements which are relevant to this case.

The amount of the fine

The applicant has clearly infringed both the rules regarding publication of prices in most of the sales at issue and the rules on non-discrimination in at least two of those sales.

Although infringement of the rule on non-discrimination is a more serious offence than infringement of the rules regarding publication of prices, the latter cannot be regarded as a minor offence: the Treaty in fact provides that publication is obligatory in order to attain the following aims:

1. To prevent prohibited practices as far as this is possible;
2. To permit buyers to obtain accurate information on prices and also to participate in the detection of discrimination;
3. To allow undertakings to know the exact prices charged by their competitors and provide them with the opportunity of aligning their own prices on them.

Consequently, a mere infringement of the rules regarding publication of prices postulates the imposition of a fine which is not simply a symbolic penalty but which is appropriate having regard to the consequences of that infringement, which are to prevent the attainment of the fundamental objectives mentioned above.

In these circumstances the abovementioned infringements which have been found to have been committed – having regard to the value of the transactions complained of, the disparity between the list prices and those which were applied and to the amount of the price increase applied in a discriminatory manner to certain customers – justify the pecuniary sanction imposed by the High Authority upon the applicant and the amount of the fine is appropriate in view of the gravity of the infringements, bearing in mind the limits laid down by Article 64 of the Treaty.

The contested decision is justified and the application must be dismissed as unfounded.

Costs

Under the terms of 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; as the applicant in this case has failed in its conclusions it must be ordered to bear the 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 36, 60, 64, 80 and 92 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 Coal and Steel Community;
Having regard to the Rules of the Court of Justice of the European Coal and Steel Community relating to costs,

THE COURT

hereby:

- 1. Dismisses the application;**
- 2. Orders the applicant to bear the costs.**

Donner

Riese

Delvaux

Catalano

Rossi

Delivered in open court in Luxembourg on 17 December 1959.

A. Van Houtte
Registrar

A. M. Donner,
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE¹

*Mr. President,
Members of the Court,*

'Macchiorlatti Dalmas e Figli', a limited partnership with a capital of Lit 50 000 000, has its registered office at Corio Canavese and is managed from Turin; it is a mechanical engineering undertaking and – to a small extent, according to its own statements, (the

Court will have to consider to what extent at a forthcoming hearing) but in any case to a certain extent – an iron and steel undertaking within the meaning of Article 80 of the Treaty. It manufactures *inter alia* steel ingots, rolled steel and steel sections included in the definitions in Annex I. The partnership is challenging before the Court, on the basis of Article 36 of the

¹ – Translated from the French.