JUDGMENT OF THE COURT
11 FEBRUARY 1955[1]

Associazone Industrie Siderurgiche Italiane (ASSIDER) v High Authority of the European Coal and Steel Community

Case 3/54

Application for annulment—General decision of the High Authority—Applicant undertakings and associations of undertakings—Admissibility

For an application by an undertaking or by an association of undertakings against a general decision of the High Authority to be admissible it is enough for the applicant formally to allege that there has been a misuse of powers affecting it. The allegation must indicate the reasons for which the applicant considers that there has been a misuse of powers affecting it. If the applicant is an association of undertakings, it is sufficient for it to claim that there has been a misuse of powers affecting one or more undertakings which are members of the association.

The Treaty does not impose any further condition for an application to be admissible such as, for example, proof that a misuse of powers affecting the applicant has actually been committed, since this latter question goes to the substance.
(Treaty, Art. 33)

In Case 3/54

ASSOCIAZIONE INDUSTRIE SIDERURGICHE ITALIANE (ASSIDER), whose registered office is in Milan, represented by its President, Dandolo Francesco Rebua, assisted by Cesare Grassetti, Professor at the University of Milan, of the Milan Bar and the Corte di Cassazione, Rome, with an address for service in Luxembourg, care of Guido Rietti, 15, Boulevard Roosevelt,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Nicola Catalano, acting as Agent, assisted by Jean Coutard, Advocate at the Conseil d'Etat and the Cour de Cassation, Paris, with an address for service in Luxembourg at its offices, 2, Place de Metz,

defendant,

APPLICATION for the annulment of Decisions Nos 1/54, 2/54 and 3/54 of the High Authority of 7 January 1954,

1 — Language of the Case: Italian.

THE COURT

composed of: M. Pilotti, President, P. J. S. Serrarens and Ch. L. Hammes (Presidents of Chambers), O. Riese, L. Delvaux, J. Rueff and A. van Kleffens, Judges,

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

gives the following

Judgment

Facts

On 18 February 1954 the applicant lodged at the Court Registry an application for the annulment of Decisions Nos 1/54, 2/54 and 3/54 of the High Authority of 7 January 1954 published as follows: No 1/54 in the Official Journal, English Special Edition 1952-1958, p. 14; No 2/54 in the Official Journal, English Special Edition 1952-1958, p. 15; and No 3/54 in the Journal Officiel de la Communauté Européenne du Charbon et de l'Acier, 13 January 1954, p. 219).

The application was submitted within the required period in accordance with the third paragraph of Article 33 of the Treaty and with Articles 84 and 85 of the Rules of Procedure of the Court.

Under the first paragraph of Article 22a of the applicant's articles of association, the President directs and represents the association in its internal and external relations and his signature is legally sufficient to bind it.

The applicant has established that Mr Rebua is its President.

The applicant's lawyer has been properly appointed.

It appears from the documents produced by the parties as well as from the decisions at issue that the facts of the case are as follows:

Under the terms of Article 60 of the Treaty, the High Authority on 2 May 1953 adopted Decisions Nos 30/53 and 31/53 which define the practices prohibited by Article 60 (1) and contain rules for the steel market relating to the publication of price-lists and conditions of sale (Official Journal, English Special Edition 1952-1958, pp. 9-12); under the terms of these decisions, undertakings were under an obligation to publish their price-lists before carrying out any transactions and keep strictly to the prices stated therein—any variation in relation to the aforementioned lists constituting, according to these texts, a prohibited discriminatory practice.

On 7 January 1954, the High Authority amended and supplemented these rules by Decisions Nos 1/54, 2/54 and 3/54 against which the present proceedings are now brought.

Under this new system, a variation from published prices no longer amounts to a prohibited practice if the seller can show that the transaction in question does not fall within the categories of transactions covered by his price-list, or that the prices or conditions have been departed from uniformly in all comparable transactions (Decision No 1/54);—moreover, in the case of the steel market, and the steel market alone, an average margin of 2.5% was introduced, within which a variation from the lists was allowed in the case of all transactions concluded within the preceding sixty days, without the need for prior publication of new lists (Decision No 2/54);—lastly, for purposes of verification, steel undertakings must submit fortnightly reports on all variations made (Decision No 3/54).

The applicant claims that the Court should:

'Entertain the present action and annul Decisions Nos 1/54, 2/54 and 3/54 of the High Authority of 7 January 1954 and after making an order suspending the execution of the contested decision at the same time adopt the measures provided for under the Treaty;
Order the defendant to pay the costs.'

With the consent of the defendant, the applicant subsequently withdrew its request for suspension.
The applicant relies on the following submissions in support of its application:

A. Misuse of powers;
B. Infringement of the Treaty.

The application was served on the High Authority on 19 February 1954 in accordance with Article 33 (2) of the Rules of Procedure of the Court.
The statement of defence was lodged at the Court Registry within the period laid down by Article 31 (1) of the Rules of Procedure.
The High Authority's Agent and Counsel were duly appointed.
In its statement of defence, the High Authority contended that the Court should:

'(a) declare the application submitted by the Associazione Industrie Siderurgiche Italiane (ASSIDER) on 18 February 1954 and served on 19 February 1954 to be inadmissible ('improponibile'); or

(b) alternatively, dismiss the application as unfounded and in any event order the applicant to pay the costs of the action.'

The statement of defence was served on the applicant on 20 March 1954 in accordance with Article 33 (2) of the Rules of Procedure of the Court.
The reply was lodged at the Court Registry within the period laid down in the order of the President of the Court of Justice of 20 March 1954 and was served on the High Authority on 4 May 1954 in accordance with Article 33 (2) of the Rules of Procedure.
The rejoinder was lodged at the Court Registry within the period laid down in the order of the President of the Court of 4 May 1954, as extended by the order of 2 June 1954, and was served on the applicant on 13 July 1954 in accordance with Article 33 (2) of the Rules of Procedure.
After the rejoinder had been lodged on 12 July 1954, the written procedure was terminated, in accordance with the first paragraph of Article 34 of the Rules of Procedure.
In accordance with the first paragraph of Article 34 of the Rules of Procedure of the Court, the President on 12 July 1954 appointed Judge O. Riese as Judge-Rapporteur.
In his preliminary report, the Judge-Rapporteur reported that in this case a preparatory inquiry was not necessary.
In accordance with the final paragraph of Article 34 of the Rules of Procedure, after hearing the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.
In accordance with Article 45 (2) of the Rules of Procedure of the Court, the President of the Court fixed the date of the oral procedure for 3 November 1954.
Hearings were held in open court on 8, 9, 10 and 11 November 1954.
In the course of those hearings, the parties presented oral argument.
At the hearing on 8 November 1954 the applicant lodged conclusions to the effect that the High Authority should be invited to make available to the Court all documents relating to the case and that the applicant's lawyers should have access to them under the seal of professional secrecy.
In the course of the hearing held on 11 November 1954, the Advocate General, in accordance with the procedure laid down in Article 11 and the final paragraph of Article 21 of the Protocol on the Statute of the Court of Justice, gave his opinion that the application should be dismissed.
At the hearing on 11 November 1954, the President in accordance with Article 50 (2) of the Rules of Procedure declared the oral procedure closed.
In support of their submissions and conclusions the parties put forward the arguments summarized hereunder:

1. Admissibility

(a) Defendant's arguments

The High Authority contests the admissibility ('proponibilità') of the application. Under the provisions of the second paragraph of Article 33 of the Treaty, associations of undertakings may institute proceedings against a general decision of the High Authority only if such a decision involves a misuse of powers affecting them. In those circumstances a misuse of powers presupposes that the contested decision is general only in appearance and that in reality it refers individually to the applicant undertaking or undertakings, the High Authority having thus exercised its powers for a purpose other than that provided for by the Treaty. Even if the applicant's contentions are accepted, this does not apply in the present case. If this interpretation is not accepted the applicant must nevertheless be refused the right to bring proceedings because it has not submitted proof of the existence of a 'misuse of powers affecting it'. It is not enough for the applicant to allege the existence of a 'misuse of powers affecting it'; the application is 'proponibile' only if this misuse of powers has actually been committed.

(b) Applicant's arguments

The applicant contends that the interpretation placed by the High Authority on Article 33 is incorrect.
The words 'general decisions' are contrasted with the words 'decisions . . . which are individual in character'; it follows that the article refers to general decisions strictly so called. The expression 'misuse of powers' in the second paragraph of Article 33 must be interpreted as having the same meaning as in the first paragraph.
For an undertaking or association of undertakings to have the right to institute proceedings against a general decision, it is sufficient if the interests of the party concerned, either alone or in conjunction with other undertakings, are directly damaged. This applies in the present case as is clear from the detailed statements of the applicant in support of its application. If the High Authority's argument were accepted this would be tantamount to granting to undertakings, contrary to the spirit of the Treaty, a degree of legal protection less than that which they enjoy under the national law of the Member States, in particular Italian law.
Even if the High Authority's point of view were accepted, the application would not on that account be 'improponibile' since, in spite of their being *prima facie* general decisions, the contested decisions have, in view of Article 30 (2) of the Convention on the Transitional Provisions and, as is also clear from the arguments relied upon in support of the application, special relevance to Italian steel undertakings.

2. Substance

A. Misuse of powers in respect of Articles 4 (b) and 60 of the Treaty; infringement of those articles

(a) Applicant's arguments

The contested decisions are vitiated by misuse of powers and are contrary to the Treaty. They pursue objectives other than those for the purpose of which the High Authority was, under Article 60, vested with regulatory powers. Moreover, the objectives actually pursued as well as the legal consequences of those decisions are in conflict with the very clear provisions of the Treaty.
Under Article 60 the High Authority was vested with power to define discriminatory practices (paragraph (1)) and with the right to supervise publication of price-lists only for the purpose of ensuring observance of the prohibition of unfair competitive practices and discriminatory practices. But it used this power and this right in order to legitimize, after the event, variations effected between actual and published prices. Moreover, the new rules in fact make discriminatory practices possible since, in particular cases, the mean variation of 2.5% allows of considerably greater variations; moreover, the fact that exceptional transactions are not taken into account in calculating variations makes any supervision impossible. Only a few months

after the entry into force of the new rules certain undertakings allowed discounts some of which were excessive and amounted to discrimination both geographically and as regards their timing. This shows that, under Decision No 2/54, no distinction can be drawn between temporary variations and persistent trends on the market. In its new rules the High Authority is in fact trying indirectly to revise the Treaty. But it is clear from the provisions of the Treaty that variations from the price-lists are not authorized under any circumstances and, moreover, amount to discrimination because only the price published and fixed in a list constitutes a guarantee that it will be applied without regard to the identity of the purchaser.

The contested decisions deprive the price-lists of any real meaning.

Moreover, the new rules are unlawful in that they permit practices which the Treaty expressly prohibits, namely, 'purely temporary or purely local price reductions'. Generally speaking the new rules allow of discrimination since henceforth it is at most the High Authority which has the opportunity to check whereas, under the previous rules, third parties were in a position to check whether the prices applied were lawful.

Finally, the objectives which the High Authority had in view in taking the contested decisions are themselves contrary to the Treaty. Thus the power conferred by Article 60 (2) (a) to draw up rules in relation to publication of price-lists has been used for another purpose—in order to make possible discounts on prices, which is an infringement of Article 60 (2) (b); similarly, the power conferred under Article 60 (1) to define discriminatory practices has been misused to permit variations from price-lists, which conflicts with the general system set up by the Treaty.

(b) Defendant's arguments

The submissions of infringement of the Treaty and misuse of powers cancel each other out. That of infringement of the Treaty assumes that the High Authority has exceeded the powers which it possesses under the Treaty, while misuse of powers is conceivable only if it acted strictly within the scope of its powers.

As regards Decision No 1/54, there can be no question of any misuse of powers since the High Authority has no power of discretion in this connexion; it merely discharged the obligation imposed upon it by the Treaty to provide a definition. The rules with regard to publication are nothing more than a means of ensuring compliance with the rules on non-discrimination. Infringements of the former cannot be assimilated to infringement of the others.

Article 60 (2) enables the High Authority to permit some variation from the price-lists. In no case does a rigid price system constitute a guarantee against discrimination. In the case of a tendency of prices to fall, such as existed when the contested decision were adopted, it is pointless to expect purchasers to exercise effective control. The variations are then variations downwards and constitute an advantage of which purchasers will not complain.

The price-lists retain their importance since now, as in the past, they are the basis on which prices lawfully applicable are calculated.

The arguments regarding the definition of 'purely temporary or purely local price reductions' are misconceived. The rule to which the applicant refers has a quite different objective, namely to prevent monopoly positions. Moreover, the danger apprehended by the applicant existed in the same way under the previous system.

The object of the new rules is not to revise the Treaty or to 'ratify *ex post facto*' infringements perpetrated in the past; the statement of the reasons on which the contested decisions are based does no more than describe a factual situation. It is true that the High Authority also had in mind objectives of the Treaty other than that to prevent discrimination and, in particular, wished to encourage downward price movements and to combat agreements on prices. But it was obliged to do this by the very clear provisions of Article 60, and the previous system might have frustrated the furtherance of these objectives. Moreover, as a result of the arrangements with regard to information, introduced by Decision

No 3/54, the new rules make it easier to discover any discrimination.
The High Authority denies that there has been any discrimination; it is for the applicant to prove it.

B. Misuse of powers in respect of Article 60 and 64 of the Treaty

(a) Applicant's arguments

The High Authority neglected to impose the penalties provided for in Article 64 against undertakings which, prior to the contested decisions, applied prices lower than those on their lists although it was under a duty to do so. This omission constitutes a manifest injustice and, in consequence, a misuse of powers affecting undertakings which complied with the Treaty. The statement of the reasons on which the contested decisions were based proves that the High Authority allowed itself to be motivated by a desire to avoid the application of penalties.

(b) Defendant's arguments

The High Authority denies having wished to avoid applying penalties. The Treaty gives it the power to impose penalties in cases of infringement; it in no way imposes an obligation to do so. In any case it cannot do so with fairness without possessing accurate information on the various infringements and is thus in a position to punish all offenders. It is the object of Decision No 3/54 to make it easier from now on for these conditions to obtain.

C. Misuse of powers arising from the unreasonableness of the decisions

(a) Applicant's arguments

The arrangements with regard to information, introduced by Decision No 3/54, are impracticable and in consequence unreasonable. Because of this, they are vitiated by misuse of powers. Undertakings are not in a position to give an exact indication of the mean variations applied each time until a given date, *a fortiori* since they arrange for most of their business to be transacted by representatives.

(b) Defendant's arguments

The ground of misuse of powers cannot be based on the impracticality or unreasonableness of a decision. In any case Decision No 3/54 is in no respect unenforceable. It is not the representatives who have to decide on any grant of discounts but the management of the producer undertakings, otherwise the latter would be liable to penalties provided for under the Treaty.

D. Misuse of powers in respect of Article 30 (2) of the Convention on the Transitional Provisions

(a) Applicant's arguments

The contested decisions ignore the provision in Article 30 (2) of the Convention on the Transitional Provisions, a rule created for the benefit of the Italian steel industry. That rule prohibits any non-Italian undertaking in the Community from selling on the Italian market at prices lower than those shown in the published price-list even though the variation thus agreed does not constitute discrimination. On the contrary the new rules make it possible to grant discounts to purchasers from all countries in the Community including Italian purchasers.

(b) Defendant's arguments

The only effect of Article 30 (2) of the Convention on the Transitional Provisions is to prohibit non-Italian sellers from aligning their prices on the price-lists of Italian steel undertakings. The new rules in no way modified this prohibition. Now, as in the past, Italian steel producers are effectively protected; foreign undertakings must sell in Italy at a higher price than in other countries of the Community as a result of the protective duties which still exist on a provisional basis and of the need to add transport costs to the prices.
By judgment delivered on 21 December 1954 in the case of the *French Government* v *The High Authority* (Case 1/54) the Court annulled Article 1 of Decision No 2/54.

By its decision No 1/55 of 4 January 1955, published in the Journal Officiel 1955, p. 542, the High Authority revoked Decision No 3/54.

Law

The Court's judgment in the present case has taken the following points of the law into account:

1. Admissibility

(a) The Court finds that by virtue of Article 2 of its articles of assocation the applicant is an association of undertakings fulfilling the conditions required by the second paragraph of Article 33 and by Article 48 of the Treaty.

(b) The contested decisions are general decisions. The Court rejects the defendant's argument that the admissibility of proceedings brought by undertakings or associations of undertakings against general decisions is subject to proof of the existence of a misuse of powers affecting them. Under the provisions of the second paragraph of Article 33 of the Treaty, undertakings or associations of undertakings 'may .... institute proceedings ... against general decisions .... which they *consider* to involve a misuse of powers affecting them.' From this wording, which is perfectly clear, for an application to be admissible it is enough for the applicant formally to allege that there has been a misuse of powers affecting it just as it is sufficient, as regards the admissibility of an application from a State, for it to allege the existence of one of the four grounds for annulment set out in the first paragraph of Article 33 of the Treaty. The allegation must indicate the reasons for which the applicant considers that there has been a misuse of powers affecting it. Those conditions have been fulfilled in this case. In the case of proceedings instituted by an association of undertakings it is sufficient for it to claim that there has been a misuse of powers affecting one or more undertakings which are members of the association. In the present case the applicant claims, with supporting arguments, that there has been a misuse of powers affecting the undertakings which it represents in terms of Article 30 of the Convention on the Transitional Provisions as well as of Articles 4 (b), 60 and 64 of the Treaty, and as a consequence also of the unreasonableness of the decisions in question.

The Court does not consider that the Treaty provides for or imposes any further condition for an application to be admissible such as, for example, proof that a misuse of powers affecting the applicant has actually been committed. Such proof is necessary to establish that the application is well founded but this question goes to the substance and does not affect admissibility.

(c) The Court agrees with the Advocate General's view that the three decisions in dispute may be contested in a single action.

2. Substance

For the foregoing reasons the Court considers that the action has lost its purpose as regards the application for annulment of the first article of Decision No 2/54 of the High Authority and also as regards the application for annulment of Decision No 3/54. As for the application for annulment of Decision No 1/54 and of Articles 2 to 5 of Decision No 2/54 it is without foundation.

In these circumstances the Court is not called upon to give a decision on the definition of misuse of powers within the meaning of the second paragraph of Article 33 of the Treaty or on the interpretation of the words, 'to involve a misuse of powers *affecting them',* employed therein.

1. Since Article 1 of Decision No 2/54 of the High Authority was for all purposes anulled by judgment of 21 December 1954 in the case of the *French Government* v *The High Authority,* this application for annulment has on this point no longer any purpose.

In these circumstances it is not necessary to consider whether, on this point, the application is or is not well founded or to give an express ruling thereon in the judgment since a decision which has already been annulled or withdrawn in the meantime cannot compromise the rights or interests of the applicant. In consequence, the present judgment must be confined to stating that no decision is called for on the application for annulment of Article 1 of Decision No 2/54 of the High Authority.

2. The same conclusion must be reached as regards Decision No 3/54 since the High Authority withdrew it by its Decision No 1/55 of 4 January 1955 (Journal Officiel of 11 January 1955, p. 542). It must in consequence also be stated that no decision is necessary in respect of Decision No 3/54 of the High Authority.

3. As regards Decision No 1/54 of the High Authority, the applicant relied on the same grounds as those invoked against the High Authority by the Government of the Italian Republic in Case No 2/54. The Court rejected those grounds in the judgment which it delivered in that case when it held that the provisions in question infringed neither the Treaty nor the Convention on the Transitional Provisions and did not constitute a misuse of powers. No new ground has been adduced capable of leading the Court to a different decision, whatever interpretation might be placed on the concept of 'a misuse of powers affecting them' within the meaning of Article 33 of the Treaty.

While Decision No 1/54 of the High Authority declared not to be discriminatory variations from the prices contained in the price-list of an undertaking in the case of an exceptional transaction or when similar variations are applied to all comparable transactions, it expressly maintains the obligation to comply with the

rules concerning the publication of price-lists; this provision in no way compromises the legal position of the Italian steel industry and does not tend to legitimize previous infringements.

4. In the judgment delivered on 21 December 1954 in the case of the *Italian Government* v *The High Authority* it was held that Articles 2 and 3 of Decision No 2/54 of the High Authority constitute neither an infringement of the Treaty or of the Convention on the Transitional Provisions nor a misuse of powers.

While the provision in Article 3 of Decision No 2/54, which reduces to one day the period within which new price-lists may become applicable, obliges Italian undertakings to react more quickly to changes in the price-lists of their competitors, it does not seriously undermine the special protection provided for their benefit.

Articles 4 and 5 of Decision No 2/54 of the High Authority are of wholly general application and constitute no threat whatever to Italian steel undertakings or associations of undertakings. The subject-matter of those articles has nothing to do with the present case; moreover the applicant, which has submitted no arguments on the subject, did not refer to it. The said articles cannot in consequence be vitiated by misuse of powers as the applicant alleges.

5. It is clear from the foregoing considerations that none of the contested provisions referred to in 3. and 4. above infringes the Treaty or the Convention on the Transitional Provisions.

There is in consequence no need to deal with the question whether and under what conditions undertakings and associations of undertakings may challenge a general decision of the High Authority on the ground that it infringes the law.

6. The Court dismisses the conclusions claiming production of all the documents relating to the case; those produced by the defendant suffice in this case to explain to the Court the objectives being pursued by the High Authority.

Costs

The defendant having failed in its principal contention that the application is inadmissible (improponibile) the Court considers it fair that the parties should bear their own costs as provided under Article 60 (2) of the Rules of Procedure.

On those grounds,

Upon reading the pleadings;
Upon hearing the parties;
Upon hearing the opinion of the Advocate General;
Having regard to Articles 31, 33, 48, 60 and 80 of the Treaty;
Having regard to the Protocol on the Statute of the Court;

Having regard to the Rules of Procedure of the Court including those relating to costs,

THE COURT

hereby:

Declares that there is no need for a decision on the application for annulment of Article 1 of Decision No 2/54 of the High Authority or of Decision No 3/54 of the High Authority;

Dismisses the application for annulment of Decision No 1/54 of the High Authority and of Articles 2 to 5 of Decision No 2/54 of the High Authority;

Orders each of the parties to bear its own costs.

Pilotti Serrarens Hammes

Riese Delvaux Rueff van Kleffens

Delivered in open court in Luxembourg on 11 February 1955.

M. Pilotti
President

O. Riese
Judge-Rapporteur

A. Van Houtte
Registrar

OPINION OF MR ADVOCATE GENERAL LAGRANGE[1]

Summary

General considerations. 73
'Improponibilità' and admissibility 73
Misuse of powers in general 74
French law. 75
Belgian law. 76
Luxembourg law 78
Italian law 79
Netherlands law 80
German law 83
Conclusion. 85
Misuse of powers under the Treaty 85
Application to present case. 89

1 – Translated from the French.