JUDGMENT OF THE COURT
6 APRIL 1962[1]

Meroni & Co., S.p.A., and Others v High Authority of the European Coal and Steel Community

Joined Cases 21 to 26/61

Summary

1. Proceedings — Action for failure to act — Silence of the High Authority essential — Letter repeating and explaining this position — Absence of an express decision

2. Proceedings — Action for failure to act — Decisions of the High Authority referred to in Article 33 of the ECSC Treaty — Inadmissibility

1. A letter from the High Authority repeating and explaining its prior legal position does not constitute an express decision of refusal by it and consequently does not interrupt the period at the end of which an implied decision of refusal is to be inferred from the silence of the High Authority.

2. An applicant cannot be permitted, by using the procedural artifice of an action for failure to act, to ask for the annulment of a decision which might have been declared void if proceedings had been instituted within the time limit laid down in the third paragraph of Article 33.

In Joined Cases 21 to 26/61

MERONI & Co., S.P.A., having its registered office at Milan, represented by Aldo Meroni (21/61),

ACCIAIERIA LAMINATOI DI MAGLIANO ALPI (A.L.M.A.), S.P.A., having its registered office at Turin, represented by Giuseppe Passalacqua (22/61),

FER. RO (FERRIERE ROSSI), an iron and steel undertaking, having its registered office at Magliano Alpi (Coni), represented by Gino Rossi (23/61),

MERONI & Co., a limited partnership, having its offices at Erba, represented by Agostino Artioli (24/61),

SOCIETÀ INDUSTRIALE METALLURGICA DI NAPOLI (SIMET), S.P.A., having its registered office at Naples, represented by Pio Fantini (25/61),

ACCIAIERIA FERRIERA DI ROMA (FERAM), S.P.A., having its registered office at Rome, represented by Antonio Frigerio (26/61),

1 — Language of the Case: Italian.

all assisted by Arlino Cottrau, a member of the Turin Bar, advocate of the Corte Suprema di Cassazione at Rome, with an address for service in Luxembourg at the Chambers of Georges Margue, 20 rue Philippe II,

applicants,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by Professor Giulio Pasetti, with an address for service at its offices, 2 Place de Metz, Luxembourg,

defendant,

Application for 'a declaration that the High Authority is required to confirm by a decision that it has infringed its obligations under the Treaty by exempting producers of steel within the meaning of Annex III to the Treaty and steel foundries from equalization payments on the consumption of bought scrap as respects the proportion of scrap consumption corresponding to crude steel production for foundries, and that it is therefore required to rescind these provisions which appear to be discriminatory',

THE COURT

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

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

on the procedural issue arising out of the preliminary objection of inadmissibility put forward by the defendant under Article 91 of the Rules of Procedure, gives the following

JUDGMENT

Issues of fact and of law

I — Conclusions of the parties

The defendant in the main action contends that the Court should:

'declare to be inadmissible, without going into the substance of the case, all the claims made by the applicant(s) in the application(s) commenced on 8 (and 11) December 1961 and notified on 11 (and 12) December, and order the applicant(s) to pay the costs.'

The applicants in the main action claim that the Court should:

'without going into the substance of the case, declare that all claims made by the applicant(s) in the application(s) commenced on 8 (and 11) December 1961 in accordance with Article 35 of the Treaty are admissible, and order the High Authority of the European Coal and Steel Community to pay the fees and disbursements incurred by the

applicant(s) in connection with the procedural issue.'

II — Arguments of the parties

The arguments put forward by the parties may be summarized as follows:

According to the High Authority, the action for failure to act brought by the applicant undertakings is equivalent to an application for the annulment of paragraphs (b) and (d) of Article 10 of Decisions 2/57 and 16/58. Therefore, this application, by the procedural artifice of an action for failure to act, amounts, in fact, to an application for the annulment of a decision, which might have been declared void if proceedings had been instituted within the time limit laid down in the third paragraph of Article 33. Moreover there exists no individual decision granting the exemptions challenged by the applicants. There is therefore no decision which can be annulled.

The applicants reply that this argument confuses the validity of the action with its admissibility. It is only necessary to refer to the conclusions which have been lodged; on the other hand, according to the case law of the Court, for an action for failure to act to be admissible, it is sufficient to show that the High Authority has failed, within a period of two months following formal notice to do so, to take decisions which it has been asked to take. As the Treaty does not require any other condition for the admissibility of an action for failure to act, it is therefore only necessary to refer to the first paragraph of Article 91 (1) of the Rules of Procedure which expressly states that, in order to make an application for a decision on a procedural issue, it is essential that the application should not in any way lead to a hearing of the substance of the case. Reference is made, in respect of the admissibility of actions for failure to act, to the Court's decisions in Cases 42/59 and 49/59 (Rec. t. VII 1961, p. 105, Nos. 5 and 6 of the Summary).

Moreover, as regards the individual decisions granting exemptions, it is only necessary to refer to the evidence contained in the applications or to establish that the said exemptions, although granted generally, constitute in fact so many individual decisions taken by the High Authority in favour of the various undertakings' benefiting from them. The fact that exemptions from compulsory payment of equalization contributions for the period from 1 April 1954 to 1 February 1957 were granted to producers of special steels and castings is well known and can be established from written documents.

III — Procedure

The procedure took the following course:

The plaintiffs gave formal notice to the High Authority to take a decision by two series of letters: in Case 21/61 by letters dated 8 September and 14 November 1961; in Case 22/61 by letters dated 6 September and 15 November 1961; in Case 23/61 by letters dated 4 September and 15 November 1961; in Case 24/61 by letters dated 8 September and 14 November 1961; in Case 25/61 by letters dated 8 September and 16 November 1961; in Case 26/61 by letters dated 8 September and 14 November 1961.

The High Authority replied to the first series of these letters by a letter dated 27 October 1961, signed by the Director General, Mr Rollman, and the Director, Mr Peco.

The applications were lodged at the Court Registry on 8 December (Applications 21, 22 and 23/61) and 11 December 1961 (Applications 24, 25 and 26/61).

On 22 December an application by the defendant was lodged at the Court Registry; this application, made under Article 91 of the Rules of Procedure,

raises a preliminary objection of inadmissibility with regard to the six applications referred to above.

In accordance with Article 91 of the Rules of Procedure each of the parties produced a written statement in support of its conclusions concerning the preliminary issue and presented their oral arguments at the hearing on 1 March 1962 after the Judge-Rapporteur (Jacques Rueff) had been heard.

On 9 March 1962 the Advocate-General Karl Roemer was of the opinion that the preliminary objection of inadmissibility put forward by the defendant should be accepted.

Grounds of judgment

The second of the conclusions of the applicants in the main action is worded as follows:

'to annul for lack of competence, infringement of essential procedural requirements, infringement of the Treaty and misuse of powers with regard to the applicant, with all legal consequences arising therefrom, the implied decision of refusal which is to be inferred from the silence of the High Authority with regard to the request by the applicant for the abolition, as from the day when the exemptions were granted expressly or by implication (or merely tacitly allowed), of the exemptions from compulsory payment of equalization contributions for scrap-iron granted to other undertakings using bought scrap-iron, referred to in Article 80 of the Treaty, and which are in a similar situation.'

It is important at the outset for the Court to consider of its own motion whether the High Authority has failed to act, that is to say whether there is an implied decision of refusal.

A letter signed by Mr Rollman, Director-General of Steel with the High Authority and by Mr Peco, Director, is annexed to the application and must be taken into consideration.

This letter is a reply to the first series of formal notices sent by the applicants to the High Authority between 4 and 9 September. The letter is dated 27 October 1961; at first sight therefore it seems to interrupt the period of two months at the end of which an implied decision of refusal is to be inferred from the silence of the High Authority. A more detailed examination of the contents of this letter shows that it does not contain an express decision of refusal but a repetition and explanation of the prior legal position of the High Authority.

In particular, the third paragraph of this letter states:

'In any case before the High Authority gives its views on the problem in

question, it seems to be appropriate that further and better particulars be supplied of the claims put forward.'

There is thus no express decision of refusal by the High Authority; it is necessary therefore to establish whether the procedure laid down in Article 35 is applicable.

For this purpose it is necessary to ascertain whether, as the defendant in the main action alleges, the implied decision of refusal invoked by the applicant does not merely confirm the rules in force. In this connexion the decision, which, according to the applicants, the High Authority should have taken, must be considered.

The formal notices by letter sent by the applicants to the High Authority as well as the applications themselves permit the text of this decision to be presumed with sufficient accuracy. The description of the subject of the actions with which the applicants begin their applications reads as follows:

'The applicant asks the Court of Justice of the European Communities to declare that the High Authority is required to confirm by a decision that it has infringed its obligations under the Treaty by exempting producers of steel within the meaning of Annex III to the Treaty and steel foundries from equalization payments on the consumption of bought scrap as respects the proportion of scrap consumption corresponding to crude steel production for foundries, and that it is therefore required to rescind these provisions which appear to be discriminatory.'

In the penultimate paragraph of their formal notice dated 8 September 1961 the applicants requested that:

'The discrimination in question . . . be removed by the High Authority's taking a decision to make all purchases of scrap-iron without exception, including purchases intended for the production of steels referred to in Annex III to the Treaty and steel castings, subject to equalization payments.'

The paragraph preceding the conclusions in the applications reads as follows:

'Finally the applicant leaves it to the Court of Justice to determine whether the implied decision of refusal of the High Authority to rescind the unlawful and discriminatory exemptions contained in paragraphs (b) and (d) (of Article 10) of Decision 2/57 applies to them individually or is of general application.'

These passages are sufficient proof that, in any event, the decision which the applicants claim the High Authority should have taken was to rescind the decisions granting the exemptions in dispute and in particular paragraphs (b) and (d) of Article 10 of Decision 2/57, repeated in the same paragraphs of Article 10 Decision 16/58, as well as the practices of the High Authority having the same effect before Decision 2/57 was taken.

As regards Decision 2/57, the application must be dismissed because an applicant cannot be permitted, by using the procedural artifice of an action for failure to act, to ask for the annulment of decisions which might have been declared void if proceedings had been instituted within the time limit laid down in the third paragraph of Article 33.

As regards the exemptions alleged by the applicants to have been granted for the period before Decision 2/57, these are not expressly, or at all events not clearly, referred to in the formal notices by letter referred to above. The applicants themselves emphasize that these exemptions were well known, and they did not consider it advisable at that time to give the High Authority formal notice to withdraw them.

Nor did they bring an application for annulment of the exemptions in question when Article 10 of Decision 2/57 made them apparent and it became possible to commence proceedings in respect thereof. As they did not commence proceedings then, they are now precluded from doing so.

The preliminary objection of inadmissibility put forward by the defendant in the main action must therefore be allowed.

Costs

As the applicants in the main action have failed by reason of the preliminary objection of inadmissibility put forward by the defendant in the main action, under the terms of Article 69 (2) of the Rules of Procedure they must be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 33 and 35 of the Treaty establishing the European Coal and Steel Community and Articles 69 and 91 of the Rules of Procedure;

THE COURT

hereby:

1. **Rules that the preliminary objection of inadmissibility put forward by the High Authority with regard to Applications 21/61, 22/61, 23/61, 24/61, 25/61 and 26/61 is accepted;**

2. **Orders the applicants in the main action to pay the costs of the proceedings.**

Donner Riese Rueff
Delvaux Rossi

Delivered in open court in Luxembourg on 6 April 1962.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 9 MARCH 1962[1]

Mr President,
Members of the Court,

The claims in Joined Cases 21 to 26/61 are based on Article 35 of the Treaty. We are therefore concerned with actions for failure to act. They were initiated by letters to the High Authority dated respectively 4, 8 and 9 September which are substantially similar.

These letters contain the complaints that ferrous scrap used for the production of special steels (Annex III to the Treaty) and of steel for foundries is exempt from equalization and they request that all purchases of ferrous scrap without exception be subject to equalization payments.

The High Authority replied on 27 October 1961 and pointed out that producers of special steels had never been exempt from equalization payments, whereas producers of steel for foundries pursuant to Decisions No 2/57 and No 16/58 were not subject to equalization. Reasons were given for the latter case; in addition the applicants were asked to supply further particulars with regard to their complaints.

In letters dated respectively 14, 15 and 16 November 1961 the applicants put the same questions again to the High Authority and repeated their request that all bought scrap without exception be made subject to equalization.

On 8 and 11 December 1961 respectively actions for failure to act were brought before the Court. The applications ask in identical terms for the rescission of the implied decision of refusal to be

1 — Translated from the German.