JUDGMENT OF THE COURT
31 MARCH 1965[1]

Macchiorlati Dalmas e Figli
v High Authority of the European Coal and Steel Community[2]

Case 21/64

Summary

1. *Financial provisions — Levies — Surcharges for delay — Nature — Pecuniary sanction or periodic penalty payment*
   (ECSC Treaty, Articles 36, 50 (3))

2. *Financial provisions — Levies — Rules governing mode of assessment and collection — Strict interpretation*
   (ECSC Treaty, Article 50 (2))

3. *Objection of illegality within the meaning of paragraph three of Article 36 of the ECSC Treaty — Restriction of its application to general decisions and recommendations — Individual decision — Expiration of the time-limit for appeals*

4. *Objection of illegality within the meaning of the third paragraph of Article 36 of the ECSC Treaty — Direct legal connexion between the contested measure and the general measure impugned*

1. Surcharges for delay in paying levies provided for by Article 50 (3) of the ECSC Treaty represents pecuniary sanctions or periodic penalty payments within the meaning of Article 36 of the Treaty.
2. The provisions of Article 50 (2) of the ECSC Treaty relate only to the mode of assessment and collection of levies and not to the surcharges for delay for which paragraph (3) of this Article provides. As this Article lays down the essential procedural requirements for the validity of decisions of the High Authority in the matter of levies its application and scope cannot be extended by way of interpretation to cases not provided for by the Treaty.
3. Cf. para. 4 of summary in Case 3/59, Rec. 1960, p. 121.
4. A plea that general decisions are illegal can only be submitted in so far as there is a direct legal connexion between them and the contested individual measure.

In Case 21/64

MACCHIORLATI DALMAS E FIGLI, a limited partnership, having its registered office in Turin, represented by Giuseppe Macchiorlati Dalmas, assisted by

1 - Language of the Case: Italian.
2 - CMLR.

Antonio Astolfi, Advocate at the Corte di Cassazione, with an address for service in Luxembourg at the chambers of Ernest Arendt, 6 rue Willy-Goergen,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Italo Telchini, acting as Agent, assisted by Piero Ziccardi, Professor at the University of Milan, Advocate at the Corte di Cassazione, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application for the annulment, revocation or at least the variation of the decision of the High Authority made on 8 April 1964 and notified to the applicant on 14 April 1964, demanding payment by it of the sum of 7 000 000 lire 'by way of surcharges for delay in payment of levies';

THE COURT

composed of: Ch. L. Hammes, President, A. M. Donner and R. Lecourt, Presidents of Chambers, L. Delvaux and R. Monaco (Rapporteur), Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The facts may be summarized as follows:

In September 1958 the applicant firm sent the High Authority the requisite production statements for calculating the basis of assessment to the levy. These statements covered the period December 1955 to March 1958.

On the basis of these facts and others obtained as a result of checks and investigations, or at any rate indirectly, relating to periods before and after the period in question, the High Authority informed the applicant, by letter of 13 February 1959, that the amounts of the levies payable from 1 January 1953 to 5 November 1958 (a previous decision of 29 October 1958 having only calculated the amounts payable up to 25 April 1958) came to 21 541 543 lire, of which 16 060 945 lire consisted of the actual levy and 5 480 598 lire of surcharges for delay.

Macchiorlati Dalmas lodged Application

No 22/59 against this individual decision, which was removed from the register in the following year when the applicant discontinued these proceedings on the basis that the parties should bear their own costs.

The parties had in particular agreed how the principal sum in respect of the debt was to be paid, namely that Macchiorlati Delmas would pay the outstanding capital balance to the High Authority by monthly instalments of 2 650 000 lire until the end of February 1960. The amount of the principal debt was calculated up to 5 November 1958 on the basis of the provisions of the disputed decision of 13 February 1959, and, for the following months, on the basis of statements produced by the undertaking itself.

The outstanding balance of principal debt was paid in full in February 1961 (Schedule V to the application). On 26 April 1961 the High Authority informed the applicant that the surcharges for delay outstanding on 5 February 1961 amounted altogether to 9 334 514 lire. On 20 February 1962 the applicant requested that payment of the surcharges for delay be remitted (Schedule X to the application). The High Authority granted this request in part and reduced the amount in question to 7 000 000 lire; after refusing to grant a further request by the applicant (Schedules XI an XII to the application) it adopted an *ad hoc* decision on 14 December 1962. This decision was challenged by the applicant by its application in Case 1/63 and was annulled by the Court on the ground that the statement of reasons upon which it was based was insufficient.

After inviting the applicant to submit its comments pursuant to Article 36 of the Treaty (in the course of this procedure the applicant again requested that the whole of the surcharge for delay be remitted) (Schedules XIII and XIV to the application), the High Authority on 8 April 1964 adopted a new decision confirming that the amount of surcharges for delay charged to the applicant was 7 000 000 lire (Schedule VI to the application). It is this decision which is the subject of the present case.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'In accordance with this application brought against the decision of the High Authority of 8 April 1964 and notified to the applicant by letter of 14 April 1964, after dismissing all other claims:

In the first place:

declare the contested decision null and void;

Having regard to the merits and by way of ancillary relief:

after annulment of the contested decision, make a further order that the surcharges for delay payable by the applicant be remitted;

Alternatively:

vary the contested decision by reducing the surcharges for delay payable by the applicant by an appropriate amount;

In any event:

order the High Authority to pay the costs.'

The *defendant* contends that the Court should:

'On the basis of the preceding considerations and subject to a more exhaustive examination of the questions which have been briefly reviewed dismiss all the claims of the limited partnership Macchiorlati Dalmas as inadmissible or unfounded and the ancillary claims as irrelevant and order the applicant to bear the costs.'

III — Submissions and arguments of the parties

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

Admissibility

It is the *defendant's* view that certain of the submissions are inadmissible. After citing decisions of the Court which, in its opinion, justify this objection both under Article 33 and under the last paragraph of Article 36 it makes the following submissions:

1. As far as the individual decision of 13 February 1959 is concerned

— The time-limit for contesting the decision has now expired;
— the decision was contested at the time it was issued within the prescribed time-limit (Case 22/59) and the application was discontinued later;
— the discontinuance of the action was followed by an acknowledgement of the debt by the applicant;
— an appeal under Article 36 only lies in respect of legal provisions to which the decision directly challenged refers and within the limits of the dispute, which are determined by the subject matter of the decision;
— if two individual decisions are connected with each other, an application brought against one of them cannot be directed against the measures contained in the other which have become definitive.

The applicant does not need to rely on the doctrine of confirmation, stating that the calculation of the levies annexed to the decision was notified to the applicant a second time by the individual decision of 8 April 1964. Notwithstanding this fact the latter decision is independent of the decision of 13 February 1959.

2. As far as the general Decisions Nos 3/52, 29/55 and 31/55 relating to the levies are concerned

— The applicant is not entitled to bring proceedings based on them, because they do not give rise to any legal or technical dispute between the parties. These decisions, which contain the general provisions applicable to the levies, form in fact the basis for the individual decision of 13 February 1959. The applicant, however, did not dispute the legality of these general provisions applicable to the levies in the application which it brought against this latter decision; when it later discontinued its application, it made no reservation concerning these general provisions and accepted without any qualification the amount of the outstanding balance of the levies.
— Further, as the time-limit for appealing against the decision of 13 February 1959 has expired, the applicant is precluded from bringing proceedings against it and cannot therefore avail itself of the allegation that the general decisions on which it is based are unlawful.
— As the applicant has accepted them, he no longer therefore has the right to dispute the legality of the general provisions applicable to the levies.
— Finally the complaint against Decision No 3/52 that the system of sanctions adopted by the High Authority does not correspond with that laid down in the Treaty is inadmissible because individuals cannot be regarded as having a legal interest in the judicial review of general decisions.

The *applicant* also refers to the case-law of the Court in order to dispute the defendant's conclusions concerning admissibility, in particular in connexion with the last paragraph of Article 36 of the Treaty. After a careful examination (pages 3 to 9 of the reply) the applicant concludes that:

— the right to appeal in Article 36 of the Treaty applies to surcharges for delay, because they fall within the wider concept of pecuniary sanctions; and;
— the Court has given a broad interpretation to the last paragraph of Article 36 in order to ensure the

widest possible protection of legal rights.

From this the applicant maintains that this last provision can also be applied even if the decision forming the basis of the one directly contested is itself an individual decision.

There could be nothing more illogical than to infer from the expiration of the time-limit for bringing proceedings under Article 33 that the third paragraph of Article 36 does not apply to individual decisions. It is in fact clear that an individual decision will always be challenged indirectly after the expiration of the 30 days' time-limit for bringing proceedings, for the sole reason that before the expiration of this time-limit the decision in question can be contested directly.

As the High Authority itself states, the principle of legal certainty must beyond all doubt be observed. But this principle must never be applied so as to place any limits on the preservation of the rights of undertakings to legal protection from the Court. In fact legal certainty derives (see judgment of the Court in Case 10/59):

— from the fact that the illegality of the basic decision entails only the annulment of the contested individual decision;

— from the acceptance by the party concerned of the decision alleged to be unlawful.

As far as this second point is concerned the neutral, indifferent behaviour or the silence of the party concerned, which for reasons of expediency can cause the commencement of proceedings to be delayed, cannot constitute proof of acceptance. This can only be established (see Article 329 of the Italian Civil Code) by an express acceptance or by acts incompatible with an intention to avail oneself of legally recognized remedies. For these reasons the fact that an individual decision has been contested, without indirectly alleging a defect in the general decision underlying it, cannot amount to implied acceptance of the latter decision. For the fact that an applicant did not put forward a submission in one action does not deprive him of the right to raise this submission in another action, provided that he is not prevented from so doing by any procedural or substantive rules and provided that it is clear from the conduct of the person concerned that he has not by implication waived the right to make use of this submission but that he has refused to accept the disputed parts of the decision.

In the present case acceptance by the applicant of the decision may be excluded for the following reasons:

With reference to the decision of 13 February 1959

When the applicant discontinued its application in Case 22/59 against this decision it expressly stated in its letter of 30 April 1960 'that the discontinuance does not mean that we accept the High Authority's arguments regarding the criteria on the basis of which the levy contributions forming the subject of the discontinued application were calculated . . .' (Schedule VII to the application).

According to the wording of the disputed decision of 8 April 1964 the applicant's situation was 're-examined' and, as it refers to a calculation contained in the decision of 13 February 1959, this decision forms the legal basis of the decision of 8 April. In any case the statement of accounts relating to the levies and therefore to the surcharges for delay contained in the decision of 13 February 1959 can either be directly challenged, provided it is regarded as forming part of the decision of 8 April 1964 (which was challenged on one particular ground), or under the last paragraph of Article 36 to the extent to which it arises out of the decision of 13 February 1959, upon which the decision of 8 April 1964 is based.

With reference to Decision No 3/52 and to its later amendments and to Decision No 32/55

It repeats first of all the arguments developed above in support of the non-acceptance by the applicant of the decisions in question.

It then emphasizes that it had already in Case 1/63 made clear its intention not to consider the criterion used for calculating the levies as valid. If it continued nevertheless to pay them regularly, the reason was that the new rate, considerably less than the initial rate, did not justify any objection.

The *defendant* in its rejoinder relies on the opinion of the Advocate-General in Case 1/63 and finally, in order to clarify a certain number of questions raised by the applicant, which in its opinion are of undoubted general interest, it develops a considerable number of arguments intended to show:

— that the appeal under Article 36 of the Treaty is only available against individual decisions which have become final;

— the requisite procedural and substantive conditions for contesting the illegality of general decisions under Article 36 are not fulfilled in this case.

On the first point the defendant emphasizes that in contrast to the provisions relating to general decisions the remedies against individual decisions provided by the Treaty are such as to make the latter decisions definitive if no action has been brought against them under Article 33.

On the second point it distinguishes between an application disputing the validity of the levies payable in October 1958 and one which disputes the subsequent levies which fell due in December 1960. In the first case the application is now inadmissible because of the definitive nature of the decision of 13 February 1959 with regard to these levies; in the other it is inadmissible to contest the levies, as the applicant can no longer dispute the provisions or general decisions which define and regulate generally the obligation to pay the levies, either because the applicant has acknowledged that these provisions are valid or because as the decision of 13 February 1959, which refers to them, has become definitive, they too have become definitive.

The substance of the case

The principal conclusions

A — Against the individual decision of 8 April 1964

Infringement of an essential procedural requirement by reason of the contradictory and absurd statement of the reasons upon which it is based

The *applicant* argues that whilst the statement of the reasons upon which the preceding decision of 14 November was based was inadequate, as the Court decided by its judgment in Case 1/63, the statement of the reasons for the present decision is so ambiguous and contradictory that it amounts to a distortion of the facts and makes it impossible to ascertain the exact reasoning which was adopted. It draws attention to certain passages in the statement of reasons which contain incoherent or conflicting statements (pages 21 to 23 of the application).

The *defendant* disputes the substance of this complaint by means of an analysis of the statement of reasons, of the facts underlying the decision and of the meaning of the various paragraphs (pages 5 to 18 of the statement of defence). Moreover it calls attention in its rejoinder to the fact that the applicant itself seems to have preferred to withdraw this claim in its reply.

Infringement of an essential procedural requirement on the ground of the inadequacy of the statement of reasons upon which the decision on the request of 18 February 1964 for remission of the surcharges for delay is based

The *applicant* is of the opinion that the statement on page 6 of the decision that its request for remission of the surcharges for delay did not include any new fact which could justify a favourable outcome has no foundation whatsoever and is not a proper ground for the decision, particularly if it is borne in mind that the applicant had already made an application in this matter (Case 1/63) and if the opinion of the Advocate-General is recalled. In the event the High Authority was under an obligation to state the reasons upon which its decision was based and to make a separate decision on the request in question.

The invitation in the communication of 12 February 1964 therefore only has a purely formal significance and was only issued to forestall a possible complaint of infringement of the Treaty. Moreover the decision was notified to the applicant without informing it beforehand that its request had been refused.

The *defendant* summarizes its view by stating that the inadequacy of its statement of reasons complained of is only the result of the absence of reasons in support of the applicant's request. Further, the High Authority, when taking an administrative decision of the type which is disputed, did not have to take into account the arguments developed in an entirely different case (Case 1/63).

Finally the complaint of the failure of the High Authority to notify the applicant of the refusal of its request before the notification of the decision itself cannot be upheld under Article 36 of the Treaty since the procedure which it prescribes has been faithfully observed by the High Authority.

Misuse of powers in that the High Authority maintained its claim for surcharges for delay notwithstanding its agreement with the applicant for their remission

The *applicant* maintains that at the meeting of 21 April 1960 between the firm Macchiorlati and Mr Domenico Capodanno of the one part and the High Authority of the other part the parties made a compromise, the terms of which were as follows:

— the applicant agreed to pay the outstanding arrears of the levies calculated on the basis of estimated assessments made by the High Authority and to deliver its statements of production punctually in the future;
— the defendant waived its claim for surcharges for delay;
— the applicant discontinued its application in Case 22/59 on the basis that the parties were to bear their own costs.

As the applicant performed its obligations under this compromise, the claim in the disputed decision that it must pay the surcharges for delay has no legal foundation whatsoever.

In order to prove the terms of this compromise the applicant:

(a) requests in its reply that Mr Domenico Capodanno who assisted Macchiorlati at the meeting of 21 April 1960 be permitted to give evidence as a witness of the circumstances and the terms of the agreement;
(b) refers to:
— the letter of 30 April 1960 in which it informed the High Authority of the discontinuance of its application and stated that its discontinuance 'is conditional on the High Authority's abandoning its entire claim for surcharges for delay amounting to 5 480 598 lire (in the contested decision) in accordance with the express assurance which you and

the officials with whom we have negotiated have given us in this connexion' (Schedule VII to the application);

— the letter in reply from the High Authority of 6 May 1960, in which it denies that such an assurance had been given to Macchiorlati and states that it told the latter that 'after paying the whole of the outstanding levies Macchiorlati could apply for the remission of the outstanding surcharges for delay, and that the granting of this concession would undoubtedly depend upon its showing its good faith by a rapid settlement of the matter' (Schedule VIII to the application);

— the letter in reply addressed to the High Authority on behalf of Macchiorlati by Mr Domenico Capodanno, who had been present at the conclusion of the negotiations (Schedule IX to the application);

(c) relies on the wording of these letters and states that the wording of the second as well as the conduct of the officials of the High Authority at the meeting of 21 April 1960 justifiably convinced Macchiorlati that the remission would be granted.

Finally, with regard to the contention that an agreement of this nature, if in fact it was made, should have been put into writing, the applicant replies that any such requirement is in this case incompatible with the principles of good faith.

The *defendant* categorically denies that the parties made any such compromise, still less that there was any unilateral waiver of the surcharges for delay. The High Authority only agreed to accept payment by instalments and that each party should bear its own costs.

The defendant, after quoting the opinion of the Advocate-General in Case 1/63 on this point and stating that the alleged compromise, if it was in fact entered into, would, as an essential procedural requirement, need to have been evidenced by writing, relies upon the applicant's letter of 11 May 1960 in which the undertaking, abandoning its earlier claim in view of the firm attitude of the High Authority, merely expressed the hope that its behaviour would be viewed favourably as far as granting the remission was concerned. The letter of 6 May 1960 from an official of the High Authority is a denial of the existence of any compromise and is in the same tenor as the letter of 11 May 1960.

The offer to prove the compromise by oral evidence is therefore inconsistent with the result of the written evidence which has just been mentioned and that is why it is inadmissible in this case. However that may be, in the unlikely event of a measure of inquiry being undertaken the High Authority reserves the right to tender appropriate evidence.

Infringement of Article 6 of Decision No 3/52

According to the *applicant* the statement of account annexed to the disputed decision shows that the High Authority rounded up, although only by a trivial amount, the calculation of the surcharges for delay, so that the monthly percentage of the amounts not paid, fixed by the said measure, is exceeded.

The *defendant* mentions the criteria adopted by the High Authority in this statement of account to demonstrate that this complaint is unfounded and points out that the difference (0.83 lire) is derisory. It mentions in addition in its rejoinder that this submission must be regarded as having been abandoned by the applicant since it does not make any further reference to it in its reply.

B — Against general Decisions Nos 3/52 and 29/55

Infringement of Article 50 (2) of the Treaty in conjunction with general Decision No 3/52

The *applicant*, after repeating the word-

ing of Article 50 (2) of the Treaty, states that general Decision No 3/52 infringes an essential procedural requirement because it was adopted without consulting the Council, as provided by the said Article, or at least without there being any reference in this Decision to any such consultation. The fact that Decision No 2/52, with which the decision in question appears to be connected, mentions consultation is not enough to justify the failure to consult the Council in the second case, since the matters regulated by Decision No 3/52 are precisely those falling within Article 50 (2).

The applicant then recalls the procedure for the preparation of these decisions (pages 33 to 35 of its reply) and concludes that one of them (Decision No 2/52) does not in certain respects have regard to the opinion of the Council, and that the other (Decision No 3/52) was adopted without the Council's having been consulted as required or at least does not mention any such consultation.

The *defendant* points out that the applicant gives an incorrect rendering of Article 50 (2) of the Treaty by translating the word 'assiette ('assessment') in the French text by 'applicazione' (and not 'imponibilità'), applying therefore to general Decision No 3/52, which relates to the amount of the levies and to the detailed rules for their application, the provisions of Decision No 2/52, which relate on the contrary to the 'mode of assessment'. However, the obligation to consult the Council only applies to 'the mode of assessment and collection ... .' (Decision No 2/52); the High Authority was not therefore required to consult the Council in the case of Decision No 3/52 which is a decision implementing the preceding decision.

Moreover the Council was consulted on all the questions which arose in this matter, even if Decision No 2/52 is the only one which mentions consultation.

Infringement of the first paragraph of Article 36 and of Article 50 (3) of the Treaty in conjunction with Article 6 of Decision No 3/52 and Decision No 29/55

The *applicant* is of the opinion that these two provisions of the Treaty are closely connected with each other and deduces from this that the system of sanctions laid down by the Treaty:

— establishes the maximum rate of the surcharges for delay (5% for each quarter's delay);

— acknowledges that an undertaking has the right, after being notified of the complaints alleged against it and after exercising its rights of defence, to expect that the sanction imposed be in keeping with the seriousness and nature of its failure to comply with a decision, regard also being had to any possible extenuating circumstances

By Decisions Nos 3/52 (Art. 6) and 29/55 the High Authority turns this system upside down by:

— not complying with the provisions of the Treaty fixing the maximum rate of surcharges for delay;

— imposing the sanction before considering the circumstances which could lead to a reduction or remission of the pecuniary sanction and before notification of complaints. This method of procedure has *inter alia* one main disadvantage: as Article 92 of the Treaty provides that decisions imposing pecuniary obligations shall be enforceable, execution could be levied against an undertaking which has failed to comply with any such obligation before the High Authority has even made a decision as to the reduction or remission of the sanction;

— determining a fixed rate for the surcharges for delay without having regard to the nature, seriousness and frequency of the failure to pay the levies which they are intended to penalize;

— prejudicing the exercise by the Court of its powers of review in this case because, under the system adopted, this review can only be carried out if the applicant has been notified of the High Authority's complaints and because the sanction is a simple arithmetical calculation.

Therefore it is not true that the amendment of Article 50 (3) of the Treaty by Article 6 of Decision No 3/52 benefits the undertakings bound by it. However, quite apart from the question whether this finding is correct or not, it is clear that a decision which amends a provision of the Treaty must be unlawful.

The *defendant* having pointed out that this complaint has already been raised and discussed in Case 1/63 makes the following observations:

— Decision No 3/52 alters the rule laid down in Article 50 (3) of the Treaty (which provides for annual surcharges for delay of 20%) in that it restricts the power of the High Authority which cannot fix a rate exceeding 12%. It therefore benefits the undertaking which can thus have no legal interest in challenging it;

— The surcharges for delay were not applied automatically because the undertaking was enabled to submit its comments before the individual decision of 8 April 1964 was adopted;

— The High Authority did take into account the individual situation of the undertaking as it reduced the surcharges for delay.

C — Against the individual decisions of 13 February 1959 and of 8 April 1964 and general Decisions Nos 3/52 and 31/55

The *applicant* puts forward a series of complaints against the estimated assessment made by the High Authority of the applicant's production for the period from March to October 1956 and of the calculation of the levy contributions paid up to 1960.

In particular it states that the method of calculating the assessable tonnage for the period from March to October 1958 was only disclosed in the statement of defence filed in Case 22/59, without any previous explanation or prior notification having been given to the applicant, contrary to the principle laid down by the Court in Case 9/56 that, when the High Authority makes an estimated assessment, the party concerned must be given the opportunity of knowing how its debt has been calculated.

This is all the more serious because the figures supplied by Macchiorlati for this same period are lower than those arrived at by the High Authority in its estimate. This is explained by the closing down of its 8- and 10-ton furnaces during the second half of 1958, so that from that date the undertaking's production was cut down as only one furnace was in operation.

These complaints are directed against:

(1) *The individual decision of 8 April 1964*, in so far as the application of the surcharges for delay amounts to a misuse of powers, because it is based on a defective calculation of that part of the debt consisting of principal;

(2) *The individual decision of 13 February 1959*, to the extent to which its content is confirmed by the decision of 8 April 1964 of which it is the legal foundation. The applicant complains in particular that this decision infringes Article 47 of the Treaty;

(3) *General Decision No 31/55*, in so far as Article 4 of this Decision, which authorizes the High Authority to calculate itself the assessable tonnage and the amount of the levy infringes Article 47 of the Treaty because it confers unrestricted power on the High Authority and opens the way to the adoption by it of arbitrary procedures;

(4) *General Decision No 3/52 and its later amendments,* to the extent that the rate of the levies was kept at a higher level than was necessary to cover the expenditure mentioned in Article 50 (1) of the Treaty, in order to appropriate a large proportion of them to the guarantee fund and to the special reserve fund which are not mentioned in this Article. Because the amount of the levy up to June 1963 was an excessive tax burden, it has, as in the present case, necessarily led to the abandonment of the implementation of plant modernization programmes, which was contrary to the objectives referred to in Articles 3 (c) and (d) and 5 of the Treaty.

The *defendant* replies to all these complaints by referring to the sequence of facts which preceded the disputed calculations and justifies the latter as well as the criteria for calculation which it adopted. It recalls in particular that the reason why it resorted to Article 4 of Decision No 31/55 was because, in spite of repeated requests, Macchiorlati had not made the declarations concerning its production.

Until November 1958 the amount of the levy was therefore determined on the basis of the criteria in question, by means of the individual decision of 13 February 1959.

The undertaking contested this decision in its application in Case 22/59. However:

— it confined itself to disputing the estimated assessment made by the High Authority for the period prior to December 1955, that is to say a period during which general Decision No 31/55 was not yet applicable;

— it omitted to state that on 9 December 1955 it delivered to the High Authority a written declaration, duly signed, relating to the period January 1953 to November 1955. It endeavoured to contest this declaration on the ground that it was incorrect but the request was dismissed by the Court;

— following negotiations with the High Authority which took place in 1960 the applicant discontinued its application in Case 22/59. On this occasion the parties agreed on the payment by instalments of the amount of levy outstanding for the period from 1953 to December 1960, including the period from April to October, which the High Authority estimated and assessed itself. In the meantime in the production month of January 1961 the applicant began to pay the levies which had fallen due.

The general conduct of the applicant shows therefore, according to the defendant, that Macchiorlati had already abandoned its intention to contest the point at issue and that it had confirmed its acceptance of the general decisions relating to the levy as well as the individual decision of 13 February 1959.

The ancillary and alternative conclusions

In addition to asking the Court to revoke the decision of 8 April 1964 and by way of ancillary relief to remit the surcharges for delay the applicant asks the Court in the alternative to vary this decision by reducing the surcharges for delay. It argues in this connexion that the surcharges for delay imposed upon it are ridiculously high and calls attention in particular to:

— the fact that the Macchiorlati firm is a family business and is an extremely small undertaking;

— the high level of the surcharges for delay in question which are only just below the maximum annual figure laid down for a serious or fraudulent failure to comply with the obligation to pay the levy;

— the conduct of the High Authority which must be regarded as a contributory cause of the delay of Macchiorlati in paying the levy contributions;

— the existence of, or at least the conviction on the part of the applicant that there existed, an agreement to remit the entire surcharges for delay;

— the admission of the High Authority that Macchiorlati had performed its part of the compromise entered into on 21 April 1960;

— the appropriateness of applying to this case the law relating to the limitation of actions, at any rate as far as the surcharges for delay are concerned;

— the arbitrary and abstract way in which the estimated calculations were made by the High Authority without having regard to the fact that Macchiorlati had to cut down its production during the relevant period.

The *defendant* retorts that this complaint is based upon a false interpretation of the facts. It makes in particular the following comments:

— The large number of letters which the High Authority sent to the applicant reminding it to suppply the necessary declarations and the checks carried out by its inspectors prove that this Authority dealt with the matter diligently. If the High Authority was reluctant to issue any formal demand, the reason is that it respects the autonomy of undertakings and is in a position to adapt its course of action to specific situations;

— There was no compromise concerning the remission of the surcharges for delay. There can be no question either of the undertaking's harbouring any such expectation; in any case any such expectation is of no importance;

— The amount of the surcharges for delay is not at all high as can be seen from a simple comparison with the rate laid down by the tax legislation of Member States. The low rate at which this amount has been fixed simply represents the interest on capital improperly retained by the undertaking. A further reduction of this amount or the remission of the surcharges for delay would amount to discrimination between all the undertakings in favour of the applicant;

— The right to demand payment of the surcharges cannot be barred by notice of time having run from the adoption of the decision of 13 February 1959 because the limitation period was interrupted by events such as the lodging of the two applications and the adoption of decisions relating to the issue in dispute. In the same way the right cannot be barred for the period before 13 February 1959, partly because the amounts which had fallen due are recoverable for ten years and partly because the limitation period was interrupted by letters sent by the High Authority from 1954 to 1958. The doubts expressed by the applicant concerning the interruption of the limitation period are not justified under any of the positive rules of Italian law.

The defendant concludes its argument by stressing that the principle of equality of treatment and the general principles of fairness must prevail over the generic and subjective considerations put forward by the applicant.

IV — Procedure

The procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the Advocate-General, the Court decided not to undertake any preparatory inquiry.

Grounds of judgment

Admissibility

The application is directed against the decision of 8 April 1964 which requires the applicant to pay surcharges for delay on the levies in accordance with Article 6 of Decision No 3/52.

Decision No 3/52 is based on Article 50 (3) of the Treaty under which the High Authority may impose surcharges for delay upon undertakings which do not comply with decisions taken by it concerning the levy. These surcharges therefore represent pecuniary sanctions or periodic penalty payments within the meaning of Article 36 of the Treaty. The right accorded to the High Authority by the third paragraph of Article 6 of Decision No 3/52 to remit surcharges for delay in whole or in part in those cases where it considers such a remission to be justified shows that they are not just interest on overdue payments. In accordance with the provisions of the second paragraph of Article 36 of the Treaty the Court shall have unlimited jurisdiction in appeals against pecuniary sanctions.

The applicant supports its applications by relying in particular on the illegality of the decision of 13 February 1959 and of certain general decisions relating to levies on the ground that, as the said decisions form the legal and logical basis of the disputed decision, their illegality must lead to the annulment of the latter. The defendant submits that these submissions are inadmissible.

The third paragraph of Article 36 of the Treaty cannot enable an applicant to plead the illegality not only of general decisions and recommendations but also of decisions and recommendations addressed to him. Such an interpretation would conflict with the fundamental principle established by Article 33. In fact the strict time-limit for instituting proceedings laid down by this provision is in keeping with the necessity to prevent the legality of administrative decisions being called in question indefinitely.

The decision of 13 February 1959 is an individual decision addressed to the applicant. As the time-limit of one month for the institution of proceedings has expired the applicant cannot plead the illegality of this decision under the third paragraph of Article 36 of the Treaty. Therefore the submissions put forward by the applicant against this decision are inadmissible.

A plea that general decisions are illegal can only be submitted in so far as there is direct legal connexion between the contested measure and the said

general decisions. In this case the contested measure is confined to the determination of the amount of the sums due from the applicant by way of surcharges for delay, as the arrears of the principal debt were fixed in the decision of 13 February 1959.

Therefore there is no direct legal connexion between the contested decision and the general decisions to which exception is taken, to the extent to which the latter refer to the rate of the levy and to the factors used in its calculation. Therefore the submissions put forward by the applicant against the general decisions concerning the levies are only admissible to the extent to which they refer to those provisions of the said decisions which form the basis of the contested decision of 8 April 1964.

The substance

The principal conclusions

The decision of 8 April 1964

1. The applicant submits that this decision is illegal because the statement of the reasons upon which it is based is in law inadequate. It argues to begin with that its reasons are ambiguous and quotes certain passages of the statement of reasons in order to show that it is factually inaccurate and contradictory.

If however these passages are read in their context the statement of the reasons upon which the disputed decision is based appears to be adequate. It clearly discloses the factual and legal reasons upon which it is based.

The applicant then argues that the said decision does not state the reasons why the High Authority considered that it had to reject its request made on 18 February 1964 to the effect that the surcharges for delay be remitted.

However under the provisions of the first paragraph of Article 36 of the Treaty the High Authority is under a duty to consider the comments submitted by the parties concerned before imposing a pecuniary sanction upon them but does not have to explain the reasons why it has not acted on them. In the present case the applicant was duly given the opportunity of submitting its comments before the issue of the contested decision. Moreover the reasons why these comments were not taken into consideration by the High Authority are stated by implication in that part of the statement of reasons in

which it gives its views on the similar comments submitted previously by the applicant on 20 February 1962.

For all these reasons this submission is unfounded.

2. The applicant further states that the High Authority has misused its powers by continuing to demand payment of the surcharges for delay, although at the meeting of 21 April 1960 it gave it an assurance that the surcharges for delay would be remitted if the arrears of the levies were duly paid. It goes on to say that it was on the strength of this assurance that it discontinued its application in Case 22/59. In support of this submission it refers to part of the correspondence between the parties after 21 April 1960 and tenders evidence of the verbal assurances to this effect which certain officials of the High Authority are said to have given it.

There is nothing in the letter of the High Authority of 6 May 1960 to indicate that it gave an assurance that the contested surcharges would be remitted. The general rules of law governing the exercise of administrative authority and the validity or efficacy of compromises would have required that this assurance be expressly approved by the responsible officers of the High Authority. The application of this principle is all the more important in this case because the said assurance would have entailed the abandonment by the High Authority of its right to argue claims arising out of a decision duly adopted by the responsible officers. By letters of 11 May 1960 and 20 February 1962 the applicant again requested that the surcharges for delay be remitted without mentioning the alleged compromises which would have released it from paying them. In these circumstances the offer by the applicant to tender evidence is pointless having regard to the foregoing considerations. It must therefore be rejected. For all these reasons this submission must be dismissed.

3. The applicant further argues that the decision of 8 April 1964 infringes Article 6 of general Decision No 3/52, since in calculating the surcharges for delay it rounded up the amounts, thereby exceeding the flat rate of 1% laid down by this Article. The amount of each surcharge for delay is said in fact to have been rounded either up or down and only by fractions of a lira, so that the entire debt of the applicant was increased by 0.83 lire. This statement has not been challenged.

This tiny increase has been amply off-set by the reduction of the surcharges for delay which the High Authority decided to grant. The amount of the surcharges for delay does not therefore exceed the rate of 1% fixed by Article 6 of Decision No 3/52.

This submission is therefore unfounded.

General Decisions Nos 3/52 and 29/55

1. The applicant argues that Article 6 of Decision No 3/52 and Decision No 29/55 do not comply with Article 50 (3) of the Treaty, which fixes the maximum rate of surcharges for delay. These provisions are said to be contrary to the general principle of Article 36 of the Treaty to the effect that the parties concerned must be given the opportunity to submit their comments before pecuniary sanctions are imposed upon them. Article 6 of Decision No 3/52, according to the applicant, lays down a fixed rate for surcharges for delay, independently of the nature, seriousness and frequency of the failure to pay which they penalize.

As far as the first submission is concerned Article 6 of Decision No 3/52 fixes the annual rate of the surcharges for delay at 12%, whereas Article 50 (3) of the Treaty lays down a maximum annual rate of 20%. Therefore, as the above-mentioned Article 6 has not exceeded the limit laid down in the Treaty for the determination of surcharges for delay, it cannot be regarded as an infringement of the Treaty.

As far as the second submission is concerned the surcharges for delay have not in this case been applied in breach of the first paragraph of Article 36 of the Treaty, since the applicant was given the opportunity to submit its comments before the issue of the individual decision of 8 April 1964, which imposed upon it the disputed surcharges for delay.

Finally, with regard to the third submission, the decision of 14 November 1962, most of which is repeated in the contested decision, discloses that the surcharges for delay have already been reduced by 2 000 000 lire. The High Authority therefore took account of the individual situation of the applicant and of the factors capable of justifying an adjustment of the disputed figure. Therefore these submissions must be dismissed as unfounded.

2. The applicant also submits that Decision No 3/52 is illegal in that it was adopted without prior consultation with the Special Council of Ministers, as provided by Article 50 (2) of the Treaty, which also applies to surcharges for delay. The provisions of Article 50 (2) of the Treaty relate only to the mode of assessment and collection of levies. If the draftsman had intended to enlarge the scope of these provisions so as to include surcharges for delay, which he deals with in the next paragraph, he would have mentioned them expressly. As this Article lays down the essential procedural requirements for

the validity of decisions of the High Authority in the matter of levies, its application cannot be extended by way of interpretation to cases not provided for by the Treaty. Therefore the submission is unfounded.

Alternative conclusions

In addition the applicant claims alternatively a reasonable reduction of the surcharges for delay. In support of these conclusions it relies on a sequence of facts, such as the excessively high level of the contested surcharges, the small size of the undertaking, the punctual performance of its obligation to pay that part of the debt consisting of principal.

The level of the contested surcharges does not exceed the maximum rate laid down by Article 50 (3) of the Treaty. The aggregate amount of the said surcharges, as reduced by the decision of 14 November 1962, is not excessive compared with the size of the debt in respect of principal or disproportionate to the economic capacity of a medium-sized undertaking. The applicant has not produced any evidence of the existence of any special economic difficulties affecting it which would justify a reduction of the disputed surcharges. There is therefore no reason to vary the determination made by the defendant as regards the amount of these surcharges. The conclusions of the applicant must therefore be dismissed.

Costs

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. The applicant has failed in its submissions and must be ordered to bear 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 Articles 14, 15, 33, 36, 50 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 annexed to the Treaty establishing the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69;

THE COURT

hereby:

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

Hammes Donner Lecourt

Delvaux Monaco

Delivered in open court in Luxembourg on 16 December 1965.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 2 FEBRUARY 1965[1]

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1 – Translated from the German.