JUDGMENT OF THE COURT
4 JULY 1963[1]

Mrs Marga Schlieker, née Diepenbruck v High Authority of the European Coal and Steel Community[2]

Case 12/63

Summary

1. Application on the grounds of failure to act—Application to the High Authority under the first paragraph of Article 35 ECSC Treaty—Persons entitled to apply

2. Proceedings within the meaning of Article 66 (5)—Provision derogating from the general provisions relating to procedure—Inapplicability to a failure to act falling exclusively within Article 35.

1. The persons entitled to apply to the High Authority as provided in the first paragraph of Article 35 of the ECSC Treaty as a preliminary to an action on the grounds of a failure to act, can only be States, the Council, undertakings or associations.
2. Proceedings under the second subparagraph of Article 66 (5) derogate from the general provisions relating to procedure laid down by the Treaty, and cannot be extended to cases of inaction on the part of the High Authority which fall exclusively within the procedure laid down in Article 35.

In Case 12/63

MRS MARGA SCHLIEKER, NÉE DIEPENBRUCK, represented by Dr Bruckhaus, Kreifels and Dr Winkhaus, 2 Berliner Allee, Düsseldorf 4, with an address for service in Luxembourg at the office of Félicien Jansen, 21 rue Aldringer,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Heinrich Matthies, acting as Agent, with an address for service in Luxembourg at its offices, 2 Place de Metz,

defendant,

1 — Language of the Case: German.
2 — CMLR.

Application for a declaration that certain agreements entered into by the Schlieker group, in which the applicant has an interest, as set out in the request addressed by her to the High Authority on 7 November 1962 are null and void;

Alternatively, for the restoration of the position before the said agreements were entered into;

on the preliminary *objection of inadmissibility* raised by the defendant,

THE COURT

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

By requests of 7 and 9 November 1962, Mrs Marga Schlieker requested the High Authority to declare null and void the agreements entered into between Mr Willy H. Schlieker, her husband, and the undertaking, Willy H. Schlieker KG, in which she has an interest, on the one hand, and certain undertakings belonging to the European Coal and Steel Community on the other; these agreements were for the most part concluded subsequent to bankruptcy proceedings in respect of the assets of the Schlieker group.

In the same requests, Mrs Schlieker alternatively requested the High Authority to order the restoration of the position existing before the agreements were entered into in the event of the High Authority's considering the agreements, in part or in whole, to be subject to its authorization alone.

According to Mrs Schlieker, the agreements in question constitute an obstacle to free competition and are consequently contrary to Article 65 (1) of the ECSC Treaty.

Following these requests, the High Authority restricted itself to replying on 21 December 1962 that it was already officially looking into 'the facts relating to the proceedings in question' and that up to that time it had had no cause to intervene, but would certainly follow developments in the matter.

On 12 February 1963, the applicant, in addition to pursuing remedies under national law in defence of her interests, lodged at the Registry of the Court an application based on the failure of the High Authority to act.

II — Conclusions of the parties

Mrs Schlieker in her application based on a failure to act by the High Authority requested the Court:

'first to declare null and void the agreements set out in the applicant's request to the High Authority of 7 November 1962; alternatively, if the said agreements should be considered, in whole or in part, to require its authorization alone, to order the restoration of the position existing before the agreements were entered into'.

The *High Authority* in its preliminary objection on the grounds of inadmissibility, requested the Court:

'if it considers that the application is in fact in order, to dismiss it as inadmissible by way of a preliminary decision under Article 91 of the Rules of Procedure and to order the applicant to pay the costs of the proceedings'.

In reply to this objection Mrs Schlieker requested the Court:

'to declare by way of preliminary decision that the application is admissible under Article 91 of the Rules of Procedure'.

III — Arguments of the parties on the preliminary objection of inadmissibility

1. The *High Authority* raises the question whether the memorandum of 11 February 1963 makes the issue and the submissions sufficiently clear.

It leaves the Court to determine whether the application and documents annexed are in accordance with Article 22 of the Protocol and Articles 38 and 39 of the Rules of Procedure (points 1 and 2 of the objection). Mrs Schlieker observes that Article 22 of the Protocol and Article 29 of the Rules of Procedure require that the application contain a brief statement of the grounds on which it is based and maintains that the grounds could have been set out in the request addressed in advance to the administration, with the copy of this request annexed to the application thus forming an integral part of the latter (memorandum in reply, points 1 and 2).

2. The *High Authority* contends that the applicant's conclusions are inadmissible on the ground that under Community procedure a judgment may not prescribe a particular course of conduct or lay down a particular decision for adoption by the High Authority (objection, p. 2, point 2); the High Authority considers moreover that the submissions made against it are 'inconclusive'; that it cannot in fact 'annul' agreements governed by private law but merely find that they are 'void' within the meaning of Article 65 of the Treaty; that it cannot order that the previously existing state of affairs be restored, Mrs Schlieker's implied reference to Article 66 (5) of the Treaty being neither relevant nor in law sufficiently elaborated (objection, p. 3, point 3).

Mrs Schlieker replies that the application instituted an action for failure to act against the High Authority's decision of refusal, as indicated in its letter of 21 December 1962. This application seeks a declaration that the High Authority must, by a decision or a recommendation, determine the nullity of the agreements set out in the letter of 7 November 1962; alternatively the application asked the Court to 'declare that, so far as these agreements required authorization, this has not been granted' (memorandum in reply, pp. 2 and 3, point 2); the Court is hence at liberty to interpret the conclusions (cf. judgment in Case 8/56).

3. The *High Authority* stresses that Mrs Schlieker, not being an 'undertaking' within the meaning of the Treaty, cannot proceed under Article 35, any more than she could have done under Article 33 against the letter of 21 December 1962, the latter moreover not being an actionable decision for the purposes of the Treaty (application, pp. 3 and 4, points 4 and 5).

The High Authority contends that the applicant has no legal interest to defend

within the Community scheme. In the applicant's documents only a few references to this subject are to be found. These references appear to reflect a concern to prevent certain agreements from being entered into, contrary to the Treaty, by undertakings with which the applicant is associated, and to prevent these undertakings from becoming as a consequence liable to fines. This does not explain the action as formulated; there is a contradiction between relying upon infringement of an agreement and at the same time claiming that agreement to be void. The bankruptcy proceedings concerning the group with which the applicant is associated must be settled within the framework of her national law and not within the framework of Articles 65 and 66 of the Treaty.

Mrs Schlieker replies that the third paragraph of Article 35 'provides in general terms' than an action may be brought before the Court for failure to act on the part of the High Authority. This Article allows the States, the Council, undertakings or associations to raise the matter with the High Authority but does not confine this right to them. Moreover, such a limitation would not be justified. Especially in the matter of infringement of Articles 65 and 66 of the Treaty, private individuals may be directly affected, as in the present case, and have a right to comparable legal protection within the Community. Such a principle must be applied generally even if the draftsmen of a given provision did not expressly so provide. A broad interpretation of the right of action in favour of individuals does not conflict with the wording of Articles 65 and 66 (memorandum in reply, pp. 3 to 5, point 3).

IV — Procedure

The application was lodged at the Registry of the Court on 12 February 1963.

On 22 February 1963 the High Authority, under Article 91 (1) of the Rules of Procedure, raised as a preliminary question the inadmissibility of the action.

On 23 March 1963 the applicant sent a memorandum in answer to the latter application.

The oral procedure took place on 29 May 1963.

The Advocate-General at the hearing on the same day gave his opinion that the action was inadmissible.

Grounds of judgment

Mrs Schlieker who has a minority interest in the Schlieker group has brought an action for failure to act against the High Authority. Following certain dealings previous to or subsequent to the suspension of payments by the said group, this group entered into agreements or transactions with certain ECSC undertakings. Such agreements or transactions may rightly or wrongly be considered as constituting an agreement or concentration required by Articles 65 and 66 of the ECSC Treaty to be authorized by the High Authority. Mrs Schlieker, by applications of 7 and 9 November 1962, has asked the High Authority first to declare these agreements void and alternatively to order the restoration of the position as it previously existed. The High Authority, by letter of 21 December 1962, restricted itself to replying that it was already officially looking into the facts relating to the proceedings

in question. Up to that time it had had no cause to intervene and would continue to follow developments. Following this reply the present application on the ground of failure to act was made to the Court.

The proceedings provided for by the third paragraph of Article 35 presuppose first an application to the High Authority which can be made only by the limited number of legal persons set out in the first paragraph of Article 35, namely the States, the Council, undertakings and associations. This interpretation is fortified by the provisions of Article 33 which lays down the general conditions for an action for annulment of which Article 35 is only a variation.

Mrs Schlieker is not an undertaking within the meaning of Article 80 and she is acting in her private capacity in defence of her personal interests. Her application is therefore inadmissible so far as it is founded on Article 35.

It is appropriate nevertheless to enquire whether the said application may be considered admissible having regard to Articles 65 and 66 which provide special rights of action. Article 65 (4) gives the Court control over the exclusive jurisdiction of the High Authority over agreements but Article 80 reserves only to undertakings engaged in production and distribution rights of action under the former Article.

Although, for its part, the second subparagraph of Article 66 (5) entitles 'any person directly concerned' to institute proceedings 'as provided in Article 33', this action is envisaged only against decisions by which the High Authority recognizes the unlawful nature of a concentration and orders consequential measures.

This provision derogates from the general provisions as to procedure laid down by the Treaty and cannot be extended to cases of inaction on the part of the High Authority, which fall exclusively within the procedure laid down in Article 35.

Mrs Schlieker's application is therefore not admissible on the basis of Articles 65 and 66 either.

The applicant pleads finally that her legitimate interests would be deprived of any legal protection if her application were dismissed and that the provisions of the Treaty relating to agreements and concentrations could be evaded by mere failure to act on the part of the High Authority, without any possibility of proceedings being taken when the interests injured are

those of a person other than an undertaking or association. Whatever may be the consequences of a factual situation of which the Court must necessarily be unaware, the Court has no authority to depart from the provisions for the protection of legal rights set out in the Treaty.

The present application must therefore be dismissed as inadmissible and the applicant must be ordered to pay the costs under Article 69 (2) of the Rules of Procedure.

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 33, 35, 65, 66 and 80 of the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community, especially Article 22;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 29, 38, 39 and 69 (2);

THE COURT

hereby:

1. **Rules that the application of Mrs Marga Schlieker is inadmissible;**

2. **Orders the applicant to pay the costs.**

Donner Delvaux Lecourt

Hammes Rossi Trabucchi Strauß

Delivered in open court in Luxembourg on 4 July 1963.

A. Van Houtte — A. M. Donner

Registrar — President