JUDGMENT OF THE COURT
16 FEBRUARY 1965[1]

Mrs Emilia Gualco (née Barge), widow of Mr Leone, v High Authority of the European Coal and Steel Community[2]

Case 14/64

Summary

1. *Procedure — Application — Lawyers — Certificate of entitlement to practise — Production of authority to act not required*
   (Rules of Procedure, Article 38 (3))

2. *Measures adopted by the Community—Application for annulment—New measure identical to the unannulled part of a former measure partly annulled—Res judicata*

1. The lawyer acting for a party is required only to establish his professional status as a lawyer and is not required to produce a duly executed authority to act in the lodging of an application, subject to proof if challenged that he is so authorized.
2. A measure adopted by an institution constitutes *res judicata* in so far as it consists of a mere repetition of the unannulled part of a former measure which has been partly annulled.

In Case 14/64

MRS EMILIA GUALCO (NÉE BARGE), WIDOW OF MR LEONE, represented and assisted by Arturo Cottrau, of the Turin Bar, advocate at the Corte di Cassazione, Rome, with an address for service in Luxembourg at the Chambers of Georges Margue,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by Italo Telchini, acting as Agent, assisted by Professor Luigi Carraro, advocate, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application for annulment of the individual decision of the High Authority of 18 March 1964 whereby the said High Authority ordered the applicant

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

to pay it the sum of 169 782 125 Italian lire in respect of sums due from the former Acciaieria Leone undertaking under the imported ferrous scrap equalization scheme;

THE COURT

composed of: Ch. L. Hammes, President, A. M. Donner and R. Lecourt (Rapporteur), Presidents of Chambers, L. Delvaux, A. Trabucchi, W. Strauß and R. Monaco, 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 Leone undertaking, the original proprietor of which was Vittorio Leone, who died at Turin on 4 March 1956, passed, upon the latter' death, under the control of his wife, née Emilia Barge.

This undertaking used imported ferrous scrap. By a decision taken on 2 October 1957 the High Authority fixed the amount of the equalization contribution due from the Leone undertaking for the period from 1 April 1955 to 31 May 1957.

When the High Authority attempted to recover this equalization debt it had to apply to the company known as Ferriere di Borgaro. This was because by a public deed made on 4 February 1958 Mrs Emilia Gualco had sold the Leone undertaking to Ferriere di Borgaro for the sum of 25 million lire, the purchaser being required to pay all debts up to the amount of the acquisition price.

On 28 May 1958 Ferriere di Borgaro brought proceedings before the Court of Justice in which it disputed the abovementioned decision (Case 31/58).

The High Authority, by a fresh decision dated 10 July 1958, revoked its decision dated 2 October 1957 by reason of the death of the person to whom it was addressed, and accordingly Ferriere di Borgaro withdrew its action.

The S.A. Fiduciaire suisse was then instructed by the High Authority to examine the declarations of ferrous scrap purchases made by the Leone undertaking, using the latter's account books, now held by Ferriere di Borgaro.

During a first investigation the representatives of Fiduciaire suisse believed that they had detected an omission in the declarations for the period from 1 April 1955 to 31 January 1957.

During a second investigation, carried out some two years later, the legal representatives of Ferriere di Borgaro told them that they had destroyed all the documents of account concerning the Leone undertaking.

On 29 May 1962 the High Authority informed Mrs Emilia Gualco of two

decisions taken on 23 May 1962; one of these fixed the assessable tonnage of ferrous scrap for the period from 1 October 1955 to 31 January 1958 and the other the amount of the equalization contribution.

Mrs Gualco brought an action against these decisions (Case 18/62). In its judgment given on 16 December 1963 the Court annulled the decisions in question 'in respect of the estimated assessment of the consumption of ferrous scrap for the period from 1 October 1955 to 31 January 1957'.

The High Authority, on 18 March 1964, addressed a new individual decision to Mrs Gualco.

This decision fixed the amount of the contributions to be paid for the period from 1 October 1955 to 31 January 1958 under the imported ferrous scrap equalization scheme.

In doing this the High Authority stated that it had applied the judgment of the Court of 16 December 1963, using the method of calculation employed by the Court for assessing the tonnage of ferrous scrap in dispute.

It is against this decision that Mrs Gualco has made the present application, lodged at the Court Registry on 27 April 1964.

II — Conclusions of the parties

In her application Mrs Gualco claims that the Court should:

'(a) declare that this action is admissible;

(b) in accordance with Article 23 of Protocol on the Statute of the Court, order the defendant to produce all the documents relating to the questions at issue and in particular the records of the investigations carried out by the S.A.F.S. at Acciaieria Ing. A. Leone of Turin and at Acciaieria e Ferriere di Borgaro;

(c) annul the individual decision of the High Authority (taken on 18 March 1964 and notified on 28 March) for misuse of power owing to a misrepresentation of the facts forming the basis for the calculation of the equalization contribution which it contains;

(d) order the defendant to bear the costs.'

These conclusions are put forward:

'reserving the right to produce fresh documents, to adduce fresh facts and any other further argument, and to do so after having established proof, by means of witnesses, with regard to the following points:

1. Is it true that following the death of the late Vittorio Leone (4 March 1956) his widow tried to continue managing the undertaking herself but that being inexpert and ill-assisted, she was forced to close the undertaking and to cease all activity in the iron and steel business from 30 April 1957? Further that she was forced to cancel the contract for the supply of electricity which she had made with the Turin municipal electricity generating station, to put out her electric smelting furnace for good, to discontinue all purchases of ferrous scrap, and finally to lay off her workers?

2. Is it true that Acciaieria Leone, in carrying out for the most part processing work on behalf of third parties and in consequence recovering considerable quantities of 'arisings' treated as 'own resources', can claim to be exempt from any equalization contribution on the aforementioned quantities?

3. Is it true that the 'own resources' of the steel works were consistently of the order of 12% to 15% of the ferrous scrap used in the electric furnace?

4. Is it true that during the period when it was engaged in the iron and steel business (1 October 1955 to 30 April 1957), Acciaieria Leone produced 'castings' of the order of 20% to 25% of its production of cast steel?

5. Is it true that Acciaieria Leone divided its work force (40 workers) into two eight-hour shifts, and from sixteen hours of operation obtained on average four casts of steel a day?

Witnesses:
Mr Vigano, an official of the S.A.F.S. from Basel;
Mr Maurice Chaudat, from the 'Inspectorate' of the High Authority;
Mr Luigi Florio, via San Francisco d'Assisi 17, Turin;
Mrs Ines Cravero, via Caboto 36, Turin.'

The *defendant* in its memorandum of defence, contends that the Court should:

'*first, and as a preliminary ruling*:
declare that this case is inadmissible:
(a) for want of authority to act,
(b) for failure to observe the principle of *res judicata*:
secondly, as to substance:
dismiss the case as unfounded:
in any event:
order the applicant to reimburse costs and expenses.'

The *applicant* has inserted at the end of her reply some 'final submissions' worded as follows:

'Rejecting all other arguments and after admitting with a view to elucidating the facts the proof by witnesses proposed in the originating application (pages 11 to 13 of the French translation) and the proof by experts proposed in section 9 of the reply,

On a preliminary basis:

order the High Authority to produce, in accordance with Article 23 of the Protocol, the declarations made by the Ing. A. Leone undertaking of which the defendant has produced (Schedule 2), by way of example, the one produced on 15 January 1958, "reserving the right, should occasion arise, to produce others"; and further order (Article 23 of the Protocol) production of the *original* of the letter dated 24 October 1957 produced by the High Authority (Schedule 1 to its memorandum of defence), which is a (photocopy) letter the authenticity of which the applicant disputes, and also production of the originals of the "summaries of the Schedules to the equalization declaration" (Schedule 3 to the memorandum of defence);
and finally order the defendant to produce all such other documents as may throw further light on the dispute and in particular the reports of the alleged investigations carried out by the Fiduciaire suisse at Acciaieria Leone and Ferriere di Borgaro;

As to substance:

annul the individual decision of the High Authority, which the applicant contests for misuse of powers resulting from misrepresentation of the facts used as a basis for calculating the equalization contribution contained in that decision; and award the costs and fees of the proceedings to the applicant.'

In its rejoinder the *defendant* maintains its previous conclusions.

III — Submissions and arguments of the parties

A — On admissibility

The *defendant* raises two objections of inadmissibility against the application. According to the first it is argued that the authority to act *ad litem* given to Mr Cottrau was limited to Case 18/62, the first Barge case, which was brought to an end with the judgment of 16

December 1963. It is said that the second authority to act, produced in order to regularize the position, is not valid because it is not dated and should therefore be presumed to have been made after expiry of the time-limit for bringing proceedings.

The second objection of inadmissibility is that the application, in so far as it does not concern the fresh calculations based on the consumption of energy during the period 1 October 1955 to 30 January 1957, seeks to raise again questions already dealt with in the previous judgment and thus conflicts with the binding nature of *res judicata.*

The *applicant* replies that on the one hand the authority to act given to Mr Cottrau was properly amended, and on the other hand *res judicata* only applies to an unequivocal decision of the Court, and is not relevant here because the judgment in Case 18/62 did not decide the points raised in the present application on the basis of precise facts.

B — On the substance

1. As to the date when the Leone undertaking ceased operations

According to the *applicant* the undertaking operated only from 1 October 1955 to 30 April 1957. On the latter date the workers were laid off and the contract for the supply of electricity was terminated. Therefore the date for the close of business was 30 April 1957. The works were then used by the Ferriere di Borgaro. However, the contract for the transfer of the Leone undertaking to Ferriere di Borgaro was not made by a notarially authenticated document until 4 February 1958. Thus the date when the Leone undertaking closed down does not coincide with the date of the transfer.

According to the *defendant* the two dates do coincide as a series of documents proves. In law the Leone undertaking existed until the date of the transfer, and was actually in operation from May 1957 to January 1958, as appears from purchases of ferrous scrap made and from the supply of electricity. It matters little that this electricity was supplied on the basis of a contract made between an electricity undertaking and the Borgaro undertaking. It also matters little whether the contract of transfer was postponed or signed 'for fiscal purposes'. The only point which should be considered is the legal situation resulting from the notarially authenticated document.

2. As to the calculation of the amount of ferrous scrap used

The *applicant* distinguishes three reference periods.

As regards the period from 1 October 1955 to 31 January 1957 the Court, by its judgment of 16 December 1963, annulled the two individual decisions of the High Authority addressed to the former Leone undertaking in the person of Mrs Gualco, laying down the assessable tonnage for equalization purposes and the amount of the equalization contribution. According to the applicant the decision on which the calculation should be based is Decision No 2/57.

The judgment annulled these decisions 'in respect of the estimated assessment of the consumption of ferrous scrap for the period from 1 October 1955 to 31 January 1957'. It follows from this judgment that it is open to the applicant to prove that the estimated assessment was incorrect. With a view to doing so she first of all asserts that the coefficients for the calculations must be reviewed on the basis of factual considerations (aged plant, recovery of 12% of arisings, manufacture of steel castings constituting 20% of the total production, non-use of oxygen in the furnaces, time taken to do the work, etc.). These facts could be checked by experts where necessary. She then states that the position of the undertaking and the assessment made of it by the Italian revenue authorities show that the criteria adopt-

ed by the High Authority are inadequate. From the calculations made by the applicant on the basis of coefficients and of the estimate of the time taken to do the work put forward by her she arrives at 7 164 tons as the quantity of ferrous scrap liable to the equalization levy for this first period.

The applicant's second period runs from 1 February 1957 to 30 April 1957. The Court did not annul the estimated assessment for this period, but this did not amount to confirming it. Therefore the assessment may be calculated afresh according to the criteria suggested for the first occasion and on the basis of various documents. This calculation produces a tonnage of 1 547 tons of ferrous scrap liable to the levy.

The applicant's third period begins on 30 April 1957, the date when she ceased business. She says that the use of the works after this date is attributable to Ferriere di Borgaro, as is proved by the consumption of alloy scrap necessary only for the goods produced by this undertaking. Furthermore since this kind of scrap is exempt from the equalization contribution it should be deducted from the assessable tonnage, whichever undertaking is charged with the levy.

The *defendant* disputes Mrs Gualco's claim relating to the date when the Leone undertaking ceased business, and does not therefore make any distinction between various periods. The High Authority seeks to apply the coefficients corrected in accordance with the judgment of the Court to the whole of the activities of the undertaking. The High Authority rejects as irrelevant all offers of proof intended to reopen the decisions given in the previous judgment. The figures and coefficients put forward afresh by the applicant are 'absolutely without foundation and, in any case, are superseded by the judgment already given'.

Secondly the defendant rejects the various points of fact raised by Mrs Gualco (aged plant, recovery of 12% of arisings, manufacture of steel castings, etc.). It states that no real proof has been put forward in support of the argument founded on the use of alloy scrap by Ferriere di Borgaro.

Therefore the defendant stands by the figures given in the contested decision.

IV — Procedure

During the procedure a matter was raised by the applicant between the filing of the memorandum of defence and that of the reply.

On 12 July 1964 Mrs Gualco lodged an application on a procedural issue under Article 91 of the Rules of Procedure. According to the applicant the second subparagraph of Article 29 (1) and the first and second subparagraphs of Article 29 (3) of the said Rules had been infringed by the High Authority's having annexed to its memorandum of defence three documents, two of which were in French, whereas the language of the case was Italian.

The applicant claimed that:

'That Court of Justice of the European Communities, without considering the main issue, should:

1. Declare that the arguments set out in Case 14/64 are inadmissible as not being in due form (in the present state of the documents), and order the High Authority to amend documents Nos 2 and 3 annexed to its memorandum of defence (entered in the Register of the Court under No 15 339 and lodged at the Registry on 27 May 1964) in accordance with Article 29 (1) and (3) of the Rules of Procedure;
2. Prescribe a new time-limit from the date of the amendment and service of the documents in question for the filing of the applicant's reply; having regard to the vacation period it is requested that this time-limit be set

at at least 40 days from the said amendment;

3. Order the defendant to bear the costs of the proceedings arising out of the application concerning this procedural issue.'

The *defendant* replied that by its judgment of 10 May 1960 (Rec. 1960, pp. 363 and 364) the Court has decided that the provisions concerning the language of the case cannot be considered as peremptory provisions. The High Authority added that it had produced the translation of the two documents together with the memorandum relating to the procedural issue, and it put forward the following conclusions:

'— it leaves to the discretion of the Court the prescribing of a new time-limit for the next steps in the proceedings in accordance with Article 91 (4) of the Rules of Procedure;

— it requests the Court to place on record that the raising of this "procedural issue" is obstructive and vexatious, and therefore to order the applicant to pay the costs of the proceedings, together with those of the main action.'

The application on the procedural issue was not taken any further because the High Authority produced the translation of the two documents in question, and because an extension of time was granted for the filing of the reply.

During its administrative session of 18 November 1964, the Court decided, after hearing the Advocate-General, to open the oral procedure without a preliminary inquiry.

At the hearing on 19 January 1965 the oral arguments of the parties were heard.

At the hearing on 19 January 1965 Mr Advocate-General Roemer delivered his oral and reasoned opinion.

Grounds of judgment

Mrs Gualco (née Barge), widow of Mr Leone, has brought an application for the annulment of the individual decision taken by the High Authority on 18 March 1964 ordering her to pay 169 782 125 lire representing an equalization contribution for imported ferrous scrap, due from the company known as 'Acciaieria Ing. Leone'.

On admissibility

The High Authority argues that the case is inadmissible, for the reason that when the application was lodged the lawyer acting for the applicant had no authority to do so.

However according to the terms of Article 38 of the Rules of Procedure, the lawyer acting for a party is required only to establish his professional status as a lawyer and is not required to produce a duly executed authority to act in the lodging of an application, subject to proof if challenged that he is so authorized.

Therefore the submission in question must be rejected.

The High Authority also argues that the application is inadmissible in so far as it is not limited to the period from 1 October 1955 to 31 January 1957 and seeks to raise again questions already settled by the judgment in Case 18/62 of 16 December 1963 and which are *res judicatae*. Mrs Gualco, arguing against this objection, says that the judgment in Case 18/62 in no way dealt with the grounds for complaint in the present case, as appears from the grounds of the said judgment themselves.

In the judgment mentioned above the Court gave its ruling on the application brought against two decisions of 29 May 1962, whereby the High Authority fixed the assessable tonnage of ferrous scrap for the period 1 October 1955 to 31 January 1958 and the amount of the equalization levy for the said period.

It annulled these decisions but only 'in respect of the estimated assessment of the consumption of ferrous scrap for the period from 1 October 1955 to 31 January 1957'. Thus this partial and limited annulment left in force the remainder of the disputed decisions, as appears both from the grounds and from the operative part of the judgment which, be it noted, rejects all other wider or contrary conclusions[1]. Therefore the decision of 18 March 1964, which is the subject-matter of the case at present being considered, constitutes *res judicata* in so far as it consists of a mere repetition of those parts of the decisions of 29 May 1962 which were not annulled.

Therefore the application is admissible only to the extent to which it relates to the estimated consumption of ferrous scrap for the period between 1 October 1955 and 31 January 1957 which was criticized in the judgment in Case 18/62, given on 16 December 1963.

On the substance of the case

By a decision taken on 18 March 1964 the High Authority, following the principles laid down by the Court in its judgment of 16 December 1963, fixed the assessable tonnage of ferrous scrap at 25 506 tons, and the amount of Mrs Gualco's contribution at 169 782 125 lire.

The applicant objects first to the fact that the High Authority based its decision exclusively on the consumption of electricity, and secondly to the

1 – Translator's Note: This formal rejection, in the operative part of the judgments of the Court, is not normally expressed in the English translation of the Reports.

coefficients used for calculating the consumption of ferrous scrap by means of the said quantity of electricity which could not have any application to such obsolete plant as hers.

However, although the consumption of electric energy in the furnaces constitutes only one of the means of determining the tonnage of ferrous scrap consumed, the use of this means to the exclusion of all others may be unavoidable for want of other precise data, and in particular for want of any supporting documents of account. It is in fact Mrs Gualco's failure to produce such documents which has forced the High Authority to have recourse to inductive methods of calculation based on the known factor of the consumption of electricity.

A coefficient of 900 kWh per ton of liquid steel produced is in line with the coefficient which is usually applied in such cases, and with the opinion of the committee of experts mentioned in the judgment in Case 18/62 given on 16 December 1963 between the same parties.

It has not been shown in any way that Mrs Gualco's works were in a technical state which was not compatible with such a coefficient. Furthermore the applicant's arguments are based on mere allegations for which there is not the slighest justification. Since she has not produced the documents of account or any other documents to support her assertions or render them plausible, there are no grounds for undertaking an expert inquiry.

Therefore the first ground of complaint is unfounded.

On the other hand the applicant alleges that the High Authority fixed the quantity of own arisings at too low a level when it calculated the consumption of ferrous scrap subject to the equalization levy. She has not produced documents in support of this allegation, but has argued that the High Authority's inspectors could, when at her premises, have taken cognizance of a register of work carried out for third parties. However she has not produced this register either, and has been content to ask that witnesses be heard. Since Mrs Gualco has not lodged with the Court the register which it was for her to produce as a first step, there are no grounds for ordering such a measure.

Therefore the second ground of complaint is unfounded.

The applicant then claims that the electric current was also used in her undertaking for the manufacture of steel castings, and that the quantities of ferrous scrap for such manufacture are exempt from equalization according

to the decision of the High Authority itself. This complaint consists of a mere allegation, as the applicant's offers of proof are not supported by any facts worthy of consideration. Moreover, Mrs Gualco never gave any information about this type of manufacture in her declarations made for the purposes of fixing the general levy.

Therefore the third ground of complaint is unfounded.

The applicant claims that an assessment of her income made by the Italian revenue authorities proves that the assessment of her production capacity made by the High Authority was excessive. However the estimate of Mrs Gualco's income seems to have been made by the Italian authorities by means of an aggregate lump-sum estimate, which could not be relevant to this case. Furthermore, the equalization scheme is based on the consumption of ferrous scrap by the undertaking, and not on its profits.

Therefore the fourth ground of complaint is unfounded.

In her reply the applicant claims, for the first time, that the equalization contribution should have been assessed, not by virtue of Decision No 19/60, but of Decision No 2/57 in view of the fact that her production ceased in April 1957. This allegation, apart from the fact that it seems to be out of time and contrary to the judgment in Case 18/62 given on 16 December 1963, between the same parties, runs counter to the very provisions of Decision No 19/60. In fact this Decision not only relates to accounting periods which began to run after the alleged ending of production by the applicant, but also to the whole of the period when the equalization scheme was in force.

Therefore the fifth ground of complaint is unfounded.

Costs

The applicant having failed in all her submissions must be ordered to pay the whole of the costs, including those of the application on the procedural issue.

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 Article 33 of the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 38 and 69;

THE COURT

hereby:

1. **Dismisses Application 14/64;**
2. **Orders the applicant to pay the costs, including those of the application on the procedural issue.**

Hammes Donner Lecourt

Delvaux Trabucchi Strauß Monaco

Delivered in open court in Luxembourg on 16 February 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 19 JANUARY 1965[1]

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1 – Translated from the German.