JUDGMENT OF THE COURT

17 JULY 1959[1]

Felten und Guilleaume Carlswerk Eisen- und Stahl AG and Walzwerke AG

v High Authority of the European Coal and Steel Community

Case 21/58

Application for annulment – Definition of a decision – Criteria applicable in the legal assessment of a measure by the High Authority – Effect of declarations issued by servants of the High Authority – Distinction between a decision and an internal office directive.

(Cf. summary, Judgment in Case 20/58 of 6 July 1959)

In Case 21/58

1. FELTEN UND GUILLEAUME CARLSWERK EISEN- UND STAHL AG, a limited company incorporated under German law, having its registered office in Köln-Mülheim, represented by its Board of Directors;

2. WALZWERKE AG, FORMERLY E. BÖCKING & CO., a limited company incorporated under German law, having its registered office in Köln-Mülheim, represented by its Board of Directors,

both assisted by Ernest Arendt, Advocate at the Cour d'Appel, Luxembourg, with an address for service in Luxembourg at the Chambers of the said Ernest Arendt, 27 avenue Guillaume,

applicants

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Frans van Houten, acting as Agent, assisted by Wolfgang Schneider, Advocate of the Frankfurt Bar, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application for the annulment of the letter sent by the defendant on 18 December 1957 to the Office Commun des Consommateurs de Ferraille (OCCF) (Joint Bureau of Ferrous Scrap Consumers) and published in the Journal Officiel No 4 of 1 February 1958, in so far as that letter is to be considered as a decision within the meaning of Articles 14 and 15 of the Treaty,

1 – Language of the Case: German.

THE COURT

composed of: A. M. Donner, President, O. Reise, President of Chamber, L. Delvaux (Rapporteur), Ch. L. Hammes and N. Catalano, Judges,

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

gives the folowing

JUDGMENT

Issues of fact and of law

I – Conclusions of the parties

The *applicants* claim that the Court should:

'1. Annul the letter sent by the defendant on 18 December 1957 to the OCCF, and published in the Journal Officiel of 1 February 1958, p. 45 *et seq.*, in so far as that letter is to be considered as a decision within the meaning of Articles 14 and 15 of the ECSC Treaty;
2. Order the defendant to pay the costs.'

The *defendant* contends that the Court should:

'1. Take formal note that all the documents and communications relating to this case shall be sent to the High Authority, 2 place de Metz, Luxembourg;
2. Dismiss the application as unfounded;
3. Order the applicants to pay the costs.'

II–Statement of the facts

The facts of the case may be summarized as follows:

By its Decision No 22/54 of 26 March 1954, the High Authority established an equalization system to prevent Community prices for ferrous scrap from being aligned on the higher prices for scrap imported from third countries.

This equalization system was continued by Decisions Nos 14/55 and 2/57 but, from 1 April 1955, the proceeds of the contribution were used to finance, besides equalization, the granting of premiums for the increased use of cast iron. The implementation of the system in practice was entrusted to the Office Commun des Consommateurs de Ferraille (OCCF) (Joint Bureau of Ferrous Scrap Consumers) and the Caisse de Péréquation des Ferrailles Importés (CPFI) (Imported Ferrous Scrap Equalization Fund), agencies operating under the control of the High Authority.

Under Decision No 2/57, the contribution of each undertaking is obtained by applying, for each accounting period, a basic rate to its consumption of bought scrap, and, if necessary, a supplementary rate to its excess consumption of bought scrap. An undertaking's total consumption of scrap is defined as being the sum of the tonnages of the total amount of own resources and the amounts of bought scrap received, plus any decrease in stocks or minus any increase in stocks, and minus any deliveries of scrap sold and/or transferred. And by subtraction, the consumption of bought scrap is equal to the total consumption minus the total amount of own resources and the decrease in stocks.

Following these definitions, certain undertakings interpreted the term 'own resources'

as meaning 'scrap which has not been bought' and entered as own resources in their accounts with the Equalization Fund all the tonnages received by them from subsidiary undertakings having a different company name, but in which they possessed a controlling interest. In other words, in the view of those undertakings, 'group scrap' is 'own resources scrap' and therefore is not taken into consideration for the purposes of paying the contribution imposed on the consumption of bought scrap.

By a letter of 30 October 1957, the OCCF then asked the High Authority to take a decision on this question under the second paragraph of Article 15 of Decision No 2/57. In its reply of 18 December 1957, published in the Journal Officiel of 1 February 1958, the High Authority took the view that the question was misconceived and asserted in support of this view that there already existed a well-established opinion linking the concept of 'own resources' to the legal concept of 'ownership'.

This application is for the annulment of the aforesaid letter of 18 December 1957.

III – Submissions and arguments of the parties

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

1. *Admissibility*

The *defendant* acknowledges that according to the case-law of the Court (Cases 8/55 and 9/55) a letter from the High Authority can be contested as well as a formal decision. But it asserts that the criterion in question applies equally to all the undertakings in the Community and that consequently the letter in dispute is of a general nature. It follows from this that under the second paragraph of Article 33 of the Treaty the applicants can put forward only the submission of misuse of powers affecting them.

By a letter of 26 March 1958, the agent *ad litem* of the applicant gave notice that, by mistake, the application did not cite Walzwerke AG as the second applicant, and asked for that undertaking to be allowed to institute proceedings. The defendant stated that it had no objection on this point.

The *applicants* take the view that, in so far as the letter can be considered as a decision within the meaning of Articles 14 and 15 of the Treaty, it is a decision concerning the applicants which is individual in character, and that consequently the applicants can avail themselves of all the grounds listed in Article 33 of the Treaty.

2. *The substance of the case*

First submission: lack of competence

The *applicants* state that Decisions Nos 22/54, 14/55 and 2/57, which provide for equalization in respect of all scrap which has been *bought*, that is, solely in respect of scrap on the market, were adopted with the unanimous assent of the Council of Ministers and therefore can be amended only by following the same formalities. By the contested letter, the High Authority purports to bring in for equalization scrap which has not been bought; thus it is amending the aforesaid decisions without seeking the assent of the Council.

The *defendant* takes the view that the submission based on lack of competence cannot be admitted (see *supra:* 'Admissibility') and therefore replies to the arguments put forward by the applicants in support of that submission only in the alternative.

It asserts that the contested letter cannot be considered as amending its previous Decisions Nos 22/54, 14/55 and 2/57 and that therefore there was no occasion for the Council of Ministers to intervene. On the request of OCCF, the High Authority confirmed and clarified the interpretation of the concept of 'own resources' which the OCCF had hitherto been following. An interpretation in accordance with the habitual meaning of the word and the material context is not an amendment.

The exemptions granted in the contested letter also do not constitute an amendment of the previous decisions. Indeed, it is for any higher administrative authority to

determine the limits of a decision by applying objectively defined and universally valid criteria. Unity of location is a criteria which fulfils these conditions.

Second submission: infringement of an essential procedural requirement

The *applicants* state that under Article 15 of Decision No 2/57, in the absence of a unanimous decision by the Board of the OCCF, the question of the definition of bought scrap had to be settled by a decision of the High Authority governed by the rules of Article 15 of the Treaty, which imposes an obligation to state the reasons on which decisions are based. The letter complained of, which is in reality a decision, does not state the reasons on which it is based.

The *defendant* takes the view that the submission based on infringement of an essential procedural requirement cannot be admitted (see *supra:* 'Admissibility') and replies to the arguments in support of this submission only in the alternative.

The defendant asserts that the complaint of inadequacy of the reasons stated is without foundation. The third paragraph of the letter complained of sets out the reasons on which the letter is based, which are founded on the concept of ownership and on logical and literal interpretation. A more detailed statement of reasons would have been required only if the letter had diverged from the normal meaning of words. According to the general principles of law, the reasons given are sufficient.

Third submission: infringement of the Treaty or of rules of law relating to its application

The *applicants* allege that Decisions Nos 22/54, 14/55 and 2/57, which are rules of law relating to the application of the Treaty (first paragraph of Article 33), are infringed in several respects by the letter complained of.

1. According to those decisions, only *bought* scrap is assessable.

2. Those decisions designate as bearing the contribution all undertakings within the meaning of Article 80 of the Treaty. Undertakings under that article are undertakings constituting a whole and not the different operational departments, even if they are autonomous in law. The contested letter abandons the criterion of 'the undertaking' for that of the 'company name'.

3. According to the aforementioned decisions, only consumers who *buy* scrap on the market can benefit from equalization. The applicant consumers, however, cannot benefit from equalization because they receive scrap belonging to the undertaking forming a whole at notional prices which are independent of the market. It is contrary to the very nature of equalization to include in it consumers who cannot benefit from it.

4. By retroactively bringing in for equalization scrap which has not been bought, the letter complained of goes against the general principle of law according to which administrative decisions should not be applied retroactively. And the general principles of law must be included in the rules relating to the application of the Treaty.

5. In order to define the concept of *bought* scrap, the letter complained of refers to the criterion of the legal person. It thus infringes Articles 3(b) and 4(b) of the Treaty, which forbid discriminations, because, without sufficient grounds, it treats essentially identical situations in a different way.

6. Under the provisions of German tax law, a group of industrial works which are autonomous in civil law but which are affiliated in fact are regarded by virtue of that affiliation as constituting a single economic unit. These fiscal principles must be applied in the same way to the equalization contribution. Moreover, the High Authority admitted this in the case of Hoogovens, whose movements of scrap have been recognized as own production because the Netherlands Government regards the two companies Hoogovens and Breedband, which are separate in law, as a single economic unit from the fiscal point of view.

The *defendant* takes the view that the submission based on infringement of the Treaty cannot be admitted in this case (see *supra:* 'Admissibility'). Therefore it replies to the

applicants' arguments in support of that submission only in the alternative.

According to the defendant, the applicants are confusing economic unity and legal unity. Only the latter is decisive for the application of the decisions concerning ferrous scrap equalization. According to Decision No 2/57 (Article 2) those liable to pay the contribution are 'the undertakings referred to in Article 80 of the Treaty *which consume ferrous scrap*', that is, those working directly with iron and steel but not the holding companies or parent companies which exercise an influence over them. When that provision speaks of an undertaking, it can mean only the legal person who consumes the ferrous scrap. Although German law recognizes for tax purposes the existence of organic, financial and economic links between a parent company and one or more subsidiary companies, that recognition is always limited to definite sectors and the legal independence of the controlled companies is not affected thereby. The courts have also expressly refused to extend the theory of organic union *(Organtheorie)* to that of a subsidiary *(Filialtheorie)*. Therefore, it is *a priori* impossible to take the view that the recognition for tax purposes in German law of an organic subordination can justify the application of particular rules of law within the framework of the ECSC Treaty.

The defendant asserts that, if it gave way to the demands expressed by the applicants, which unduly extend the concept of 'own resources' beyond its proper meaning, it would result in discrimination on its part. Indeed, in the place of 'own-resources' the defendant would have to introduce in a fresh decision the concept of 'group scrap'. Thus, in order to effect the equalization of the prices of assessable scrap and of imported scrap, which has to be subsidized, the defendant would have to carry out a fresh apportionment of the contributions in favour of groups and to the detriment of those plants which are not part of a group.

The different treatment applied, on the one hand, to concentrations forming a single legal person and, on the other, to undertakings linked as regards organization, economy and finances, rests on a legal foundation, ownership at the time of recovery, which cannot be of a discriminatory nature.

As to the exemptions granted to Hoogovens and Breda, they are based upon the criterion of the existence of a single industrial unit, locally integrated. This criterion is capable of objective application in all cases of a similar nature.

The criterion defined in the letter complained of is not an administrative measure having retroactive effect, but only the statement of what the administration had always held as its rule. It is true that the expression 'own resources' (Eigenentfall) does not appear in Decisions Nos 22/54 and 14/55, but in interpreting and applying Decision No 2/57 it would be impossible to take 'own resources' to mean anything other than did the previous decisions, which referred to bought scrap and which therefore, logically, took the view that own resources were not assessable. On the other hand, the extensive interpretation defended by the applicants could not be applied unless it had been precisely defined in the decision itself.

Fourth submission: misuse of powers

The *applicants* take the view that the defendant committed a misuse of powers:

1. By neglecting the objective of non-discrimination laid down by Articles 3(b) and 4(b) of the Treaty;
2. By using its powers of defining conceps contained in the decisions imposing the contribution upon bought scrap in order to bring into the equalization system additional tonnages of scrap in respect of which the aforesaid decisions do not provide for any equalization.

The *defendant* answers that it has not misused the powers conferred upon it by the Treaty. Its conduct sprang from proper administrative, economic and legal considerations. It had in view at all times the objectives which are laid down for it and it did not use its powers to pursue aims extraneous to the Treaty.

Furthermore, the infringements of the Treaty upon which the applicants seek to

rely under the heading of misuse of powers can be alleged only as such, that is, as infringements of the Treaty and not under the heading of misuse of powers.

The defendant also points out that it is doubtful whether in the present case any misuse of powers which may have been committed also 'affects' the applicants. On this point it leaves the matter to the wisdom of the Court.

As to its answer to the various arguments which the applicants put forward in support of misuse of powers, the defendant refers to the explanations which it gave in the first three submissions.

IV – Procedure

Although the name of the second applicant, Walzwerke AG, does not appear in the application, this omission was corrected before the expiry of the period prescribed in Article 33 of the Treaty, the defendant having raised no objection on this point.

Grounds of judgment

Admissibility

The letter of the High Authority dated 18 December 1957 sets out a general principle in so far as it relates to the definition of the concept of 'own resources' with regard to scrap.

The letter was published in the Journal Officiel of 1 February 1958 and thus brought to the attention of all the undertakings in the Community.

It was described as a 'decision' by the Market Division, in a letter dated 19 February 1958 in answer to a formal request from the Deutsche Schrottverbrauchergemeinschaft sent to the High Authority on 6 February 1958.

However, contrary to the applicants' arguments, the said letter of 18 December 1957 cannot in law be considered as a decision within the meaning of the Treaty.

Although it is true that the said letter of 18 December 1957 followed a request from the OCCF, in the absence of unanimity among the members of that agency on the meaning of the term 'own resources', for the High Authority to define that concept in accordance with the second paragraph of Article 15 of Decision No 2/57, the High Authority replied that the question thus expressed by the OCCF 'was misconceived' in view of the fact that 'from the beginning' that agency 'had by implication adopted the concept of own resources in accordance with the semantic value of the expression' and that this criterion had to be maintained.

It follows that the High Authority had no intention of adopting a decision, as it had been formally requested to do, but merely to reaffirm principles which it considered, rightly or wrongly, to follow logically from the basic Decision No 2/57.

This finding is confirmed by the fact that an amendment to Decision No 2/57 would have required, under Article 53(b) of the Treaty, the prior unanimous assent of the Council of Ministers, a condition which was not fulfilled in the present case. Moreover, there is no reason to suppose that the High Authority would knowingly have infringed this imperative provision.

These considerations are not invalidated by the fact that, in answer to a formal request from the Deutsche Schrottverbrauchergemeinschaft, sent to the High Authority on 6 February 1958, the Market Division replied by a letter of 19 February 1958 that the letter of 18 December 1957 was indeed a 'decision'.

In fact, by its very wording, this answer from the Market Division expresses the opinion of an official of the High Authority and does not necessarily, in itself alone and in the present case, convey the intentions of the High Authority. It must be noted however, that that answer could have prompted, or even decided, the applicants to bring proceedings against this alleged decision, with the legitimate concern of safeguarding their interests.

However, the various subjective factors set out above cannot in themselves be decisive for the purpose of determining the nature of the letter of 18 December 1957 in question, since the nature of an administrative measure depends above all on its subject-matter and its content.

The said letter appears as being a directive of an internal character sent by a superior to services coming under its authority and intended to direct the activity of those services.

Therefore, if that letter could give rise to immediate duties, it could do so only on the part of the addressee organization and not of undertakings consuming ferrous scrap. Furthermore, this situation is corroborated by the fact that that letter of 18 December 1957 was published in the Journal Officiel only on 1 February 1958.

Accordingly, the letter of 18 December 1957 is not a decision within the meaning of the ECSC Treaty.

Consequently, the application is not admissible.

Costs

Under Article 60 of the Rules of Procedure of the Court of Justice of the ECSC, the unsuccessful party shall be ordered to pay the costs; in the present case the applicants were unsuccessful on the issue of admissibility.

However, since the defendant by its letter of 19 December 1958 prompted, or even decided, the applicants to bring proceedings against the alleged decision contained in the letter of 18 December 1957, an order must be made that the parties bear their own costs.

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 and 80 of the Treaty establishing the ECSC;
Having regard to the Protocol on the Statute of the Court of Justice of the ECSC;
Having regard to the Rules of Procedure of the Court of Justice of the ECSC,

THE COURT

hereby:

Dismisses the application as inadmissible;

Orders the parties to bear their own costs.

Donner Riese

Delvaux Hammes Catalano

Decided in Luxembourg on 6 July 1959.

Delivered in open court in Luxembourg on 17 July 1959.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE

(see Case 20/58, page 84)