JUDGMENT OF THE COURT

17 JULY 1959[1]

Phoenix-Rheinrohr AG

v High Authority of the European Coal and Steel Community

Case 20/58

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

(a) The legal assessment of a measure by the High Authority depends above all on its subject-matter and on its content.

(b) When the High Authority sends a letter to an auxiliary agency entrusted by it with the execution of certain precise functions, informing it of certain general principles and in particular instructing it to continue a certain practice followed up till then, that letter may constitute a mere internal office directive, even if it was published in the Journal Officiel and if it refers to measures which the agency must take in regard to undertakings in the Community. In any event, this is true if it emerges from the letter that the High Authority did not intend to take a decision, but intended merely to confirm principles which it believed, rightly or wrongly, to be logically to infer from its previous decisions. The fact that a servant of the High Authority has described such a letter to a third party as a 'decision' does not invalidate the above statement (Treaty establishing the ECSC, Article 33).

In Case 20/58

PHOENIX-RHEINROHR AG VEREINIGTE HÜTTEN- UND RÖHRENWERKE, a limited company incorporated under German law, having its registered office in Düsseldorf, represented by its Board of Directors, assisted by Heinrich Lietzmann, Advocate of the Essen Bar, with an address for service in Luxembourg, at the Chambers of Willi Scheider, 2 rue du Fort-Elisabeth,

applicant,

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 at its offices, 2 place de Metz, Luxembourg,

defendant,

Application for the annulment of the decisions contained in the letter sent by the High Authority on 18 December 1957 to the Office Commun de Consommateurs

1 – Language of the Case: German.

de Ferraille (OCCF) (Joint Bureau of Ferrous Scrap Consumers), relating to the definition of the concept of 'own resources scrap' within the meaning of Decisions Nos 22/54, 14/55 and 2/57, and published in the Journal Officiel No 4 of 1 February 1958,

THE COURT

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

Advocate-General: M. Lagrange

Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I – Conclusions of the parties

The *applicant* claims that the Court should:
'1. Annul the decisions contained in the letter sent by the High Authority on 18 December 1957 to the OCCF, relating to the definition of the concept of "own resources scrap" within the meaning of Decisions Nos 22/54, 14/55 and 2/57, and published in the Journal Officiel of 1 February 1958, pages 45-58 *et seq.*;
2. Order the High Authority 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 submitted by the applicant on 17 March 1958 as unfounded;
3. Order the applicant 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 Importées (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 anulment 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 which consume scrap 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 applicant can put forward only the submission of misuse of powers affecting it.

The *applicant* regards the contested letter as a decision within the meaning of Articles 14 and 15 of the Treaty. It is a decision which is individual in character, since it is addressed solely to the OCCF, a public agency referred to by name. In this connexion, in its judgment of 23 April 1956 (Joined Cases 7 and 9/54), the Court found that a decision relating solely to a particular activity of a public agency referred to by name, namely the Office Commercial du Ravitaillement du Grand-Duché de Luxembourg (Commercial Supply Bureau of the Grand Duchy of Luxembourg), is a decision which is individual in character.

That decision which is individual in character concerns the applicant. If the principle according to which only such scrap as is recovered by an undertaking distinctly defined by its company name can be considered as own resources were applied to it, the applicant would have to pay in respect of the past and in the future further contributions for the tonnages which it recovered from its subsidiary companies in which it has a controlling interest.

Consequently, the applicant asserts that the letter in dispute can be contested on all the grounds listed in the first paragraph of Article 33 of the Treaty.

2. *The substance of the case*

First submission: infringement of and manifest failure to observe the Treaty and the rules of law relating to its application

The *applicant* develops this first submission by means of six arguments.

(1) The contested decision constitutes an administrative measure which is contradictory, incomprehensible and unacceptable as to its content and purport and which consequently offers no protection against arbitrary application and discrimination.

(2) The High Authority leaves to the Brussels agencies the power of interpreting the ill-defined concept of 'own resources' and of applying it according to their own discretion. This delegation of powers is incompatible with the Treaty (to this effect, see the Judgment of the Court in Case 9/56).

(3) By authorizing exemptions for two particular cases of an exceptional nature, Hoogovens and Breda (see the letter of the High Authority of 17 April 1958), the High Authority is guilty of discrimination.

(4) By including in the equalization system scrap which is not bought, the defendant infringes its own Decisions Nos 22/54, 14/55 and 2/57.

(5) The High Authority creates a discriminatory state of affairs by using as the criterion for comparing the situation of scrap consumers not their real economic situation, but abstract legal fictions. It considers as scrap not on the market only such scrap as is recovered by one and the same legal person, and not also such scrap as is recovered by two or more legal persons controlled by another legal person.

(6) The act of bringing in for equalization scrap which has not been bought and of doing so with retroactive effect for Decisions Nos 22/54, 14/55 and 2/57 adopted previously cannot be accepted; such inclusion is contrary to the generally accepted principle that administrative measures involving new taxes cannot be retroactive.

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 applicant's arguments in support of that submission only in the alternative.

According to the defendant, the applicant is confusing two concepts: 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 applicant, 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 other 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 a retroactive administrative measure, but only the statement of what the administration 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 applicant could not be applied unless it had been precisely defined in the decision itself.

As to the complaint that the interpretation chosen by the High Authority is contradictory and meaningless, the defendant replies that the reference to the concept of ownership is justified by the fact that in the end exemption from the general equalization contribution can be envisaged only for an undertaking's genuine 'own resources'. The exemption of scrap belonging to the undertaking liable to pay the contribution is an apt solution for reaching the desired objective, a comprehensible and fair solution, and in all probability the only correct solution.

The applicant also criticizes the discretionary powers which the High Authority allegedly surrendered to the Brussels agencies. In order for this complaint to be valid, those agencies would in this case have had to use a power not provided for by the Treaty. Such was not the case, since the letter complained of was written by the High Authority and not by the Brussels agencies. Moreover, the measures of the Brussels agencies, which are unconnected with the contested decision, must be excluded from the present action; this is true in particular of the question whether or not those agencies had authority to decide the two special cases ('Hoogovens' and 'Breda'), and the question of the legal validity of the criterion by which those two exceptional cases were decided.

Second submission: lack of competence

The *applicant* takes the view that the contested letter amends Decisions Nos 22/54, 14/55 and 2/57. Indeed:

(a) Decisions Nos 22/54 and 14/55 did not contain the concept of own resources, which the defendant purports to take into account retroactively;

(b) The High Authority includes in the equalization system scrap which was not bought;

(c) The High Authority allows for exceptions by virtue of which bought scrap is exempted from the obligation to pay contributions.

These provisions alter the very essence of the system which, in accordance with the aforementioned decisions, links the obligation to pay contributions to the fact of *buying* scrap; they go beyond mere interpretation and consequently require the assent of the Council of Ministers.

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 applicant 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 the 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 apply-

ing objectively defined and universally valid criteria. Unity of location is a criterion which fulfills these conditions.

Third submission: infringement of an essential procedural requirement

The *applicant* advances the argument that the High Authority did not state the reasons for its letter, which is nonetheless in the nature of a decision, that it did not seek the unanimous assent of the Council of Ministers and, finally, that it took a decision without describing it as such.

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 the words. According to the principles of law, the reasons given are sufficient.

Furthermore, it is incorrect to claim that the procedural requirements of the Treaty have been evaded. In view of the circumstances, a letter and not a formal decision constituted an adequate answer to the OCCF's question. Moreover, the applicant has not been prejudiced in any way by this informal procedure. The possibility of contesting this informal opinion of the High Authority by way of legal action is recognized in the case-law of the Court (Cases 8/55 and 9/55). Publication in the Journal Officiel marked the beginning and the end of the limitation period within which proceedings had to be brought. Finally, the scope of the submissions for annulment is the same, whether the contested decision is formal or not.

Fourth submission: misuse of powers

The *applicant* makes six points in support of this submission.

1. It is a generally acknowledged principle of law that an administrative authority can use its powers only to adopt clear, coherent, sensible and comprehensible decisions. By using its powers to adopt an obscure, contradictory, absurd and unintelligible decision, the High Authority failed seriously to adhere to the legal objective of its powers; it was guilty of a misuse of powers.

2. The Treaty does not recognize any arbitrary objectives. If the High Authority adopts any measures which result in arbitrary effects, it is using its powers to pursue objectives extraneous to the Treaty.

3. The High Authority completely shifted to the Brussels agencies the burden of exercising the discretionary power of assessment which belongs to the High Authority alone. It thus used its powers to upset the balance of powers which characterizes the organization of the Community.

4. In two exceptional cases the High Authority authorized the granting by the Brussels agencies of an exemption from the obligation to pay contributions. By bringing into being this discriminatory situation of exceptions, it used its powers to pursue objectives other than those authorized by the Treaty.

5. As a result of the letter complained of, the defendant is putting undertakings which seek to avoid the obligation to pay contributions under a compulsion to organize their economic grouping under *a single* company name. According to the Treaty, the High Authority must take account of economic realities. In fact, it has ignored the economic situation by failing to allow scope for economic concentration other than under a single company name. It has thus committed a misuse of powers by exercising its powers in breach of the aims of the Treaty.

6. According to Articles 3 (a) and 53 (b) of the Treaty, the powers of the High Authority are conferred upon it with a view to enabling it to ensure supply to the common *market,* and therefore solely in respect of such undertakings as take part in the ferrous scrap *market.* By bringing in for equalization scrap which is not on the market, it seeks to acquire funds from un-

dertakings which do not take part in the ferrous scrap market. It is thus using its powers for a purpose other than that in view of which they were conferred upon it.

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 applicant seeks to rely under the heading of misuse of powers can be alleged only as such infringements 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 applicant. On this point it leaves the matter to the wisdom of the Court.

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

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.

That latter 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 applicant's arguments, the said letter of 18 December 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 Schrottverbrachergemeinschaft, 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 applicant to bring proceedings against this alleged decision, with the legitimate concern of safeguarding its 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 applicant was unsuccessful on the issue of admissibility.

However, since, as the applicant has pointed out, the defendant by its letter of 19 February 1958 prompted, or even decided, the applicant 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