JUDGMENT OF THE COURT
11 FEBRUARY 1955[1]

Associazione Industrie Siderurgiche Associate (I.S.A.) v High Authority of the European Coal and Steel Community

Case 4/54

1. *Application for annulment*
See summary of judgment in Case 3/54, para. 1

2. *Decisions of the High Authority — Statement of reasons — Reference to opinions obtained*
Under Article 15 of the Treaty, the High Authority is bound to state in its decisions the reasons for which it decided to promulgate the rules in question and is bound to refer to the fact that the opinions required by the Treaty have been obtained. On the other hand, the Treaty does not require that it should mention, still less that it should try to refute, the divergent opinions expressed by the consultative bodies or by some of their members; failure to do so cannot be regarded as proof, or even the merest evidence, in support of the submission of misuse of powers.
(Treaty, Arts. 15 and 33)

In Case 4/54

ASSOCIAZIONE INDUSTRIE SIDERURGICHE ASSOCIATE (I.S.A.) whose registered office is in Milan, represented by its President, Emilio Pozzi, assisted by Pietro Gasparri, Professor at the Faculty of Law in the University of Perugia, of the Rome Bar, with an address for service in Luxembourg, care of Guido Rietti, 15, Boulevard Roosevelt,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Nicola Catalano, acting as Agent, assisted by Jean Coutard, Advocate at the Conseil d'Etat and the Cour de Cassation, Paris, with an address for service in Luxembourg at its offices, 2, Place de Metz,

defendant,

APPLICATION for the annulment of Decisions Nos 1/54, 2/54 and 3/54 of the High Authority of 7 January 1954,

THE COURT

composed of: M. Pilotti, President, P. J. S. Serrarens and Ch. L. Hammes

1 — Language of the Case: Italian.

(Presidents of Chambers), O. Riese, L. Delvaux, J. Rueff and A. van Kleffens, Judges,

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

gives the following

JUDGMENT

Facts

On 18 February 1954 the applicant lodged at the Court Registry an application for the annulment of Decisions Nos 1/54, 2/54 and 3/54 of the High Authority of 7 January 1954 published as follows: No 1/54 in the Official Journal, English Special Edition 1952—1958, p. 14; No 2/54 in the Official Journal, English Special Edition 1952—1958, p. 15; and No 3/54 in the Journal Officiel de la Communauté Européenne du Charbon et de l'Acier, 13 January 1954, p. 219.

The application was submitted within the required period, in accordance with the third paragraph of Article 33 of the Treaty and with Articles 84 and 85 of the Rules of Procedure of the Court.

Under the first paragraph of Article 12 of the applicant's articles of association the President directs and represents the association in its internal and external relations.

The applicant has established that Mr Pozzi is its President.

The applicant's lawyer has been properly appointed.

It appears from the documents produced by the parties as well as from the decisions at issue that the facts of the case are as follows:

Under the terms of Article 60 of the Treaty, the High Authority on 2 May 1953 adopted Decisions Nos 30/53 and 31/53 which define the practices prohibited by Article 60 (1), and contain rules for the steel market relating to the publication of price-lists and conditions of sale (Official Journal, English Special Edition 1952—1958, pp. 9—12); under the terms of these decisions, undertakings were under an obligation to publish their price-lists before carrying out any transactions and keep strictly to the prices stated therein—any variation in relation to the aforementioned lists constituting, according to these texts, a prohibited discriminatory practice.

On 7 January 1954, the High Authority amended and supplemented these rules by Decisions No 1/54, 2/54 and 3/54 against which the present proceedings are now brought.

Under this new system, a variation from published prices no longer amounts to a prohibited practice if the seller can show that the transaction in question does not fall within the categories of transactions covered by his price-list, or that the prices or conditions have been departed from uniformly in all comparable transactions (Decision No 1/54);—moreover, in the case of the steel market, and the steel market alone, an average margin of 2.5% was introduced, within which a variation from the lists was allowed in the case of all transactions concluded within the preceding sixty days, without the need for prior publication of new lists (Decision No 2/54);—lastly, for purposes of verification, steel undertakings must submit fortnightly reports on all variations made (Decision No 3/54).

The applicant claims that the Court should:

'Declare the contested decisions void within the meaning of the second paragraph of Article 33 of the Treaty and make an order as to costs in accordance with Article 60 of its Rules of Procedure'.
During the public hearing, the application was reduced to one for the annulment of Article 1 of Decision No 1/54, of Articles 1, 2 and 3 of Decision No 2/54 and of Decision No 3/54.
The applicant relies on the following submissions in support of its application:

A. Misuse of powers;
B. Infringement of the Treaty.

The application was served on the High Authority on 19 February 1954 in accordance with Article 33 (2) of the Rules of Procedure of the Court.
The statement of defence was lodged at the Court Registry within the period laid down by Article 31 (1) of the Rules of Procedure.
The High Authority's Agent and Counsel were duly appointed.
In its statement of defence, the High Authority contended that the Court should:

'(a) declare the application submitted by the Associazione Industrie Siderurgiche Associate (I.S.A.) on 18 February 1954 and served on 19 February 1954 to be inadmissible ('improponibile'); or

(b) Alternatively, dismiss the application as unfounded and in any event order the applicant to pay the costs of the action'.

The statement of defence was served on the applicant on 20 March 1954 in accordance with Article 33 (2) of the Rules of Procedure of the Court.
The reply was lodged at the Court Registry within the period laid down in the order of the President of the Court of Justice of 20 March 1954 and was served on the High Authority on 4 May 1954 in accordance with Article 33 (2) of the Rules of Procedure.

In its reply the applicant asks

'that the Court be pleased to annul these decisions upon completion of the measures of inquiry which it may see fit to order of its own motion and of those which the applicant reserves the right to request after the defendant's rejoinder and in any event after the Court has made an order for the production in its entirety of the text of the minutes of the Consultative Committee and of the Council of Ministers and of any other document which may provide information concerning the events and developments which led to the contested decisions'.

The High Authority's rejoinder was lodged at the Court Registry within the period laid down in the order of the President of the Court of 4 May 1954, as extended by the order of 2 June 1954, and was served on the applicant on 13 July 1954 in accordance with Article 33 (2) of the Rules of Procedure.
In its rejoinder, the High Authority requests, in the alternative, that the Court should

'in accordance with Article 29 (3) of the Rules of Procedure of the Court if appropriate declare inadmissible the new submissions contained in the reply.'

After the rejoinder had been lodged on 12 July 1954, the written procedure was terminated, in accordance with the first paragraph of Article 34 of the Rules of Procedure.
In accordance with the first paragraph of Article 34 of the Rules of Procedure of the Court, the President on 12 July 1954 appointed Judge O. Riese as Judge-Rapporteur.
In his preliminary report, the Judge-Rapporteur reported that in this case a preparatory inquiry was not necessary.
In accordance with the final paragraph of Article 34 of the Rules of Procedure, after hearing the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.
In accordance with Article 45 (2) of the Rules of Procedure of the Court, the President of the Court fixed the date of the oral procedure for 3 November 1954.
Hearings were held in open court on 8, 9, 10 and 11 November 1954.

In the course of those hearings, the parties presented oral argument.

At the hearing on 8 November 1954 the applicant lodged conclusions to the effect that the High Authority should be invited to make available to the Court all documents relating to the case and that the applicant's lawyer should have access to them under the seal of professional secrecy.

In the course of the hearing held on 11 November 1954, the Advocate General, in accordance with the procedure laid down in Article 11 and the final paragraph of Article 21 of the Protocol on the Statute of the Court of Justice, gave his opinion that the application should be dismissed.

At the hearing on 11 November 1954, the President in accordance with Article 50 (2) of the Rules of Procedure declared the oral procedure closed.

In support of their submissions and conclusions the parties put forward the arguments summarized hereunder:

1. Admissibility

(a) Defendant's arguments

The High Authority contests the admissibility ('proponibilità') of the application. Under the provisions of the second paragraph of Article 33 of the Treaty, associations of undertakings may institute proceedings against a general decision of the High Authority only if such a decision involves a misuse of powers affecting them. In those circumstances a misuse of powers presupposes that the contested decision is general only in appearance and that in reality it refers individually to the applicant undertaking or undertakings, the High Authority having thus exercised its powers for a purpose other than that provided for by the Treaty. Even if the applicant's contentions are accepted, this does not apply in the present case. If this interpretation is not accepted the applicant must nevertheless be refused the right to bring proceedings because it has not submitted proof of the existence of a 'misuse of powers affecting it'. It is not enough for the applicant to allege the existence of a 'misuse of powers affecting it'; the application is 'proponibile' only if this misuse of powers has actually been committed.

(b) *Applicant's arguments*

The applicant contends that the interpretation placed by the High Authority on Article 33 is incorrect. The article clearly states that undertakings can institute proceedings against general decisions within the strict meaning of those words. If the High Authority's argument were accepted, this would amount to saying that the authors of the Treaty had restricted the right of associations and undertakings to act against general decisions to the grossest cases of misuse of powers. Such an argument is incompatible with the status of the High Authority; furthermore, it makes the right of individuals to appeal against the general decisions of the High Authority practically worthless. It is inconceivable that the authors of the Treaty should have wished to grant to undertakings a degree of legal protection less than that which they enjoy under their own national law, in particular Italian law.

If there is an allegation of a misuse of powers affecting the applicant, actions by associations or undertakings against a general decision of the High Authority are admissible regardless of proof of the actual existence of this wrong.

There is misuse of powers where the High Authority allows itself to be influenced by considerations other than those by which it ought to be influenced and where, moreover, it ignores considerations which it ought to take into account. A misuse of powers was committed 'affecting' the applicant when, as a consequence of the contested decision, it suffered direct and special damage. Such damage can arise from the fact that the decision in question threatens the economic position of the applicant by, for example, abolishing safeguards which were previously available to it. All these conditions are present in this case, as is made clear in the applicant's statements on the substance of the action.

In any event, even if the High Authority's view were accepted, the application would not be on that account 'improponibile', because the contested decisions conflict

with Article 30 of the Convention on the Transitional Provisions, the object of which is the special protection of the Italian steel industry.

2. Substance

A. *Misuse of powers in relation to Article 60 of the Treaty; infringement of that article*

(a) Applicant's arguments

The contested decisions involve a misuse of powers and are contrary to the Treaty. The High Authority has misused the powers vested in it by Article 60 (1) and 2 (a), so as to produce legal results which are in conflict with the Treaty and, in particular, to evade the principle of non-discrimination. Under Article 60 the duty to publish is not merely a means of keeping a check on discrimination but there is a close legal connexion between the duty to publish and the prohibition of discrimination. The conclusion may also be drawn from paragraph (2) (a) that the provision in paragraph (1) prohibiting the variation of prices from one transaction to another applies in each case so long as the price-list in question remains in force. In contrast to that system variations are in future prohibited only in the case of transactions concluded simultaneously, a situation of no practical importance. The criterion of comparable transactions is thus deprived of all meaning. The Treaty is based on the absolute principle that any variation from the price-lists is illegal. The mean variation of 2.5% granted to producers makes it possible, in particular cases, to grant appreciably higher discounts, which may be as much as 25%; it thus makes possible those 'purely temporary or purely local' price reductions which are expressly prohibited under Article 60 (1). Furthermore, paragraph (2) (a) vests in the High Authority power to determine the extent and the manner of publication but no power to make the price-lists other than compulsory.
Since, under paragraph (2) (b), alignment is permitted only on the 'price-lists' of competitors it is also clear that, under the Treaty, only the published prices are legal. In future there can be no alignment since the price charged by competitors is unknown.
Decision No 2/54 was, indeed, held out to be only a set of rules on the publication of prices and conditions of sale but, in reality, it contains a definition of discriminatory practices which could be adopted only after consultation with the Council of Ministers.

(b) Defendant's arguments

In claiming that the High Authority decided to publish a definition of discriminatory practices under cover of the rules on publication, the applicant is in fact not raising a complaint of misuse of powers but complaints of infringement of the Treaty, lack of competence and infringement of an essential procedural requirement. These are grounds which, under the provisions of the second paragraph of Article 33, the applicant is not entitled to invoke.
Moreover the allegation that Decision No 2/54 in fact contains a definition of discriminatory practices and the allegation that the High Authority may not in principle allow any variation were made for the first time in the reply and they are in consequence admissible under Article 29 (3) of the Rules of Procedure of the Court.
Furthermore, the High Authority did not allow itself to be influenced by the intensions attributed to it by the applicant, nor do the contested decisions constitute an infringement of the Treaty. A breach of the rules on publication, which are no more than a means and do not constitute an end in themselves, and a breach of the principle of non-discrimination are two very different infractions. As the applicant itself accepts, the High Authority has the power to lay down rules on the scope of publication; this gives it the right to allow, within certain limits, variations from the price-lists and to prescribe the timelimit for entry into force of new price-lists. This is all that Decision No 2/54 contains; in any case, it does not try to give a definition of prohibited practices and does not abolish the principle that the price-lists are compulsory. Moreover there was, on the sub-

ject of Decision No 2/54, a wide-ranging discussion with the Council of Ministers, which is for all intents and purposes the same as a 'consultation', although consultation was unnecessary.

The applicant has misconceived the criterion of 'comparable transactions'. If, during a given period, an undertaking applies prices which vary from one transaction to another this does not constitute discrimination if in the meantime the situation on the market has changed.

Discounts cannot be confined to certain transactions or sales in certain countries but must be applied without distinction to all comparable transactions. Consequently, to take the example given by the applicant, variations of 25% remain unlawful.

The freedom of action granted to undertakings by Decision No 2/54 is in practice very restricted and ensures that, in rectifying their price-lists, undertakings do not wait until the maximum of 2.5% is reached.

There is no point in the reference to 'purely temporary or purely local' price reductions since the rule in question is concerned with another objective altogether, which is that of preventing monopoly positions. Furthermore, the possibility apprehended by the applicant existed to the same extent under the old arrangements.

The Treaty allows alignment on the prices actually charged; 'price-list' is not the same as 'published price-list'. The same possibility of alignment exists as in the past; this is proved by the fact that undertakings continue to make the widest use of this power. The market in steel, which is highly organized, enables every producer to find out the prices applied by his competitors.

B. *Misuse of powers in relation to Article 64 of the Treaty*

(a) Applicant's arguments

The High Authority made improper use of its powers in order to evade the obligation to impose penalties in accordance with Article 64 for the numerous infringements committed by certain undertakings of the obligation to abide by the price-lists. The High Authority has not only the power but also the duty to impose sanctions on the offenders.

(b) Defendant's arguments

The High Authority did not have the intention attributed to it by the applicant. On the contrary the new rules are designed, *inter alia*, to make it easier to detect any infringements. Moreover the Treaty confers discretion on the High Authority to decide whether it wished to impose any penalties. It cannot do so with fairness unless it possesses accurate information on the various infringements and is thus in a position to punish all offenders.

C. *Misuse of powers in relation to Article 30 (2) of the Convention on the Transitional Provisions; infringement of that article*

(a) Applicant arguments

The contested decisions deprive the article of any real meaning. Its provisions are intended to protect the Italian steel industry and especially the Italian small-scale and medium-scale undertakings which are organized in the applicant association. Since it prohibits alignment on the prices of Italian undertakings it follows *a fortiori* that it does not permit offers lower than those prices whereas such offers are now permitted thanks to the power to approve, in particular cases, discounts which are even appreciably higher than 2.5%.

(b) Defendant's arguments

Article 30 (2) of the Convention on the Transitional Provisions merely prohibits alignment on the parities of Italian undertakings. The new rules have not changed the position. It is difficult for foreign undertakings to sell their products in Italy at prices lower than those of Italian undertakings because of the need to add transport costs to the prices and in view of the maintenance of Italian protective duties. If, despite all this, a foreign producer is in a position to sell more cheaply than Italian undertakings this would only be a normal

consequence of competition to which Italian undertakings, like everyone else, must adapt themselves.

D. *Absence of an explanation for the different views taken by the Council of Ministers and the Consultative Committee as evidence of misuse of powers*

(a) Applicant's arguments

In their opinions, the Council of Ministers and the Consultative Committee declared their opposition on some important points to the drafts submitted by the High Authority. The introduction, proposed by the members of these bodies, of a fixed and uniform margin would have provided a number of advantages over the arrangements for a mean margin introduced by the contested decisions. In the statement of reasons on which the contested decisions were based, the High Authority did not even mention this different point of view, far less offer an explanation on the subject. This represents a breach of the principles of sound administration; even if, taken on its own, this omission does not constitute a misuse of powers, it is nevertheless evidence of it.

(b) Defendant's arguments

The Council of Ministers gave its assent to Decision No 1/54. The Consultative Committee, with one dissentient, and the Council unanimously recognized the High Authority as in principle having power to introduce a margin of variation. It was only on one subsidiary matter that the Consultative Committee, in declaring itself in favour of a uniform margin instead of a mean margin, expressed a different opinion. Moreover, under the terms of Article 15, and on any reasonable view, the Authority is under no obligation to comment, in the statement of reasons on which its decisions are based, on the conflicting opinions expressed by consultative bodies.

By judgment delivered on 21 December 1954 in the case of the *French Government* v *The High Authority* (Case 1/54) the Court annulled Article 1 of Decision No 2/54.

By its Decision No 1/55 of 4 January 1955, published in the Journal Officiel 1955, p. 542, the High Authority revoked Decision No 3/54.

Law

The Court's judgment in the present case has taken the following points of the law into account:

1. Admissibility

(a) The Court finds that by virtue of Article 2 (b) of its articles of association the applicant is an association fulfilling the conditions required by the second paragraph of Article 33 and by Article 48 of the Treaty.

(b) The contested decisions are general decisions. The Court rejects the defendant's argument that the admissibility of proceedings brought by undertakings or associations of undertakings against general decisions is subject to proof of the existence of a misuse of powers affecting them. Under the provisions of the second paragraph of Article 33 of the Treaty, undertakings or associations of undertakings 'may ... institute proceedings ... against general decisions ... which they *consider* to involve a misuse of powers affecting them.' From this wording,

which is perfectly clear, for an application to be admissible it is enough for the applicant formally to allege that there has been a misuse of powers affecting it just as it is sufficient as regards the admissibility of an application from a State, for it to allege the existence of one of the four grounds for annulment set out in the first paragraph of Article 33 of the Treaty. The allegation must indicate the reasons for which the applicant considers that there has been a misuse of powers affecting it. Those conditions have been fulfilled in this case. In the case of proceedings instituted by an association of undertakings it is sufficient for it to claim that there has been a misuse of powers affecting one or more undertakings which are members of the association. In the present case the applicant claims, with supporting arguments, that there has been a misuse of powers affecting the undertakings which it represents in terms of Article 30 of the Convention on the Transitional Provisions as well as of Articles 60 and 64 of the Treaty, and, again, as a consequence of lack of a sufficient statement of the reasons on which the decisions in question were based.

The Court does not consider that the Treaty provides for or imposes any further condition for an application to be admissible such as, for example, proof that a misuse of powers affecting the applicant has actually been committed. Such proof is necessary to establish that the application is well founded but this question goes to the substance and does not affect admissibility.

(c) The Court agrees with the Advocate General's view that the three decisions in dispute may be contested in a single action.

2. Substance

For the foregoing reasons the Court considers that the action has lost its purposes as regards the application for annulment of the first article of Decision No 2/54 of the High Authority and also as regards the application for annulment of Decision No 3/54. As for the application for annulment of Decision No 1/54 and of Articles 2 and 3 of Decision No 2/54, it is without foundation.

In these circumstances the Court is not called upon to give a decision on the definition of misuse of powers within the meaning of the second paragraph of Article 33 of the Treaty or on the interpretation of the words, 'to involve a misuse of powers *affecting them*', employed therein.

1. Since Article 1 of Decision No 2/54 of the High Authority was for all purposes annulled by judgment of 21 December 1954 in the case of the *French Government* v *The High Authority,* this application for annulment has on this point no longer any purpose.

In these circumstances it is not necessary to consider whether, on this point, the

application is or is not well founded or to give an express ruling thereon in the judgment since a decision which has already been annulled or withdrawn in the meantime cannot compromise the rights or interests of the applicant. In consequence, the present judgment must be confined to stating that no decision is called for on the application for annulment of Article 1 of Decision No 2/54 of the High Authority.

2. The same conclusion must be reached as regards Decision No 3/54 since the High Authority withdrew it by its Decision No 1/55 of 4 January 1955 (Journal Officiel of 11 January 1955, p. 542). It must in consequence also be stated that no decision is necessary in respect of Decision No 3/54 of the High Authority.

3. As regards Decision No 1/54 of the High Authority, the applicant relied on the same grounds as those invoked against the High Authority by the Government of the Italian Republic in Case No 2/54. The Court rejected those grounds in the judgment which it delivered in that case when it held that the provisions in question infringed neither the Treaty nor the Convention on the Transitional Provisions and did not constitute a misuse of powers. No new ground has been adduced capable of leading the Court to a different decision, whatever interpretation might be placed on the concept of 'a misuse of powers affecting them' within the meaning of Article 33 of the Treaty.

While Decision No 1/54 of the High Authority declared not to be discriminatory variations from the prices contained in the price-list of an undertaking in the case of an exceptional transaction or when similar variations are applied to all comparable transactions, it expressly maintains the obligation to comply with the rules concerning the publication of price-lists; this provision in no way compromises the legal position of the Italian steel industry and does not tend to legitimize previous infringements.

4. In the judgment delivered on 21 December 1954 in the case of the *Italian Government* v *The High Authority* it was held that Articles 2 and 3 of Decision No 2/54 of the High Authority constitute neither an infringement of the Treaty or of the Convention on the Transitional Provisions nor a misuse of powers.

While the provision in Article 3 of Decision No 2/54, which reduces to one day the period within which new price-lists may become applicable, obliges Italian undertakings to react more quickly to changes in the price-lists of their competitors, it does not seriously undermine the special protection provided for their benefit.

5. It is clear from the foregoing considerations that none of the contested provisions referred to in 3. and 4. above infringes the Treaty or the Convention on the Transitional Provisions.

There is in consequence no need to deal with the question whether and under what conditions undertakings and associations of undertakings may challenge a general decision of the High Authority on the ground that it infringes the law.

6. The applicant regards as a departure from the rules of sound administration and in consequence as evidence tending to establish a misuse of powers the fact that, in stating the reasons on which the contested decisions were based, the High Authority failed to comment on the divergent opinions expressed within the consultative bodies. The Court does not share this view. Under Article 15 of the Treaty, the High Authority is bound to 'state the reasons' on which its decisions are based and to 'refer to' any opinions which were required to be obtained. It follows from this that it must state the reasons for which it decided to promulgate the rules in question and that it is bound to refer to the fact that the opinions required by the Treaty have been obtained. On the other hand, the Treaty does not require that it should mention, still less that it should try to refute, the divergent opinions expressed by the consultative bodies or by some of their members. The omission complained of cannot, in consequence, be regarded as proof or even the merest evidence, in support of the submission of misuse of powers.

7. The Court dismisses the conclusions claiming production of all the documents relating to the case; those produced by the defendant suffice in this case to explain to the Court the objectives being pursued by the High Authority.

Costs

The defendant having failed in its principal contention that the application is inadmissible (improponibile) the Court considers it fair that the parties should bear their own costs as provided under Article 60 (2) of the Rules of Procedure.

On those grounds,

Upon reading the pleadings;
Upon hearing the parties;
Upon hearing the opinion of the Advocate General;
Having regard to Articles 31, 33, 48, 60 and 80 of the Treaty;
Having regard to the Protocol on the Statute of the Court;
Having regard to the Rules of Procedure of the Court including those relating to costs,

THE COURT

hereby:

Declares that there is no need for a decision on the application for annulment

of Article 1 of Decision No 2/54 of the High Authority or of Decision No 3/54 of the High Authority;

Dismisses the application for annulment of Decision No 1/54 of the High Authority and of Articles 2 and 3 of Decision No 2/54 of the High Authority;

Orders each of the parties to bear its own costs.

Pilotti Serrarens Hammes

Riese Delvaux Rueff van Kleffens

Delivered in open court in Luxembourg on 11 February 1955.

M. Pilotti
President

O. Riese
Judge-Rapporteur

A. Van Houtte
Registrar

OPINION OF MR ADVOCATE GENERAL LAGRANGE
(see Case 3/54 page 72)