JUDGMENT OF THE COURT
4 FEBRUARY 1959[1]

Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community

Case 17/57

Procedure — Action for failure to act — Putting the High Authority on notice

Proceedings may be brought under Article 35 only inasmuch as the applicant has first raised the matter with the High Authority in accordance with the provisions of the first paragraph of that article. This initial requirement is necessary not only because the time-limit set for the party concerned commences to run with effect from the request submitted to the High Authority but also because of the need for notification which, by impugning the inaction of the High Authority, forces it to take a decision within a limited period regarding the legality or otherwise of its inaction (Article 35 of the ECSC Treaty).

Procedure — Application for annulment — Basis of action — Change

The basis of an action cannot be changed, even by way of an alternative, in the reply.

Obligations of the States — Failure to fulfil such obligations — Powers of the High Authority

If, after giving a State the opportunity to submit its comments, pursuant to Article 88, the High Authority receives undertakings from the State which convince it that the State has not failed to fulfil an obligation under the Treaty, it has no alternative but to discontinue the action taken. Article 88 of the Treaty confers no power on the High Authority to take, in respect of Member States, decisions registering approval but only decisions recording failure to fulfil an obligation under the Treaty (Article 88 of the ECSC Treaty.

In Case 17/57

GEZAMENLIJKE STEENKOLENMIJNEN IN LIMBURG, an association of undertakings within the meaning of Article 48 of the Treaty, of 16 Dr. Poelstraat, Heerlen (Netherlands), represented by H. H. Wemmers, President, and P. A. A. Wirtz, appointed by the annual meeting of members of the association, assisted by W. L. Haardt, Advocate at the Hoge Raad of the Netherlands, and W. C. L. van der Grinten, Lecturer at the Catholic University of Nijmegen, with an address for service in Luxembourg at 83, boulevard Grande-Duchesse Charlotte,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by W. Much, subsequently by R. Baeyens, Legal Advisers to the High Authority, acting as Agents, assisted by C. R. C. Wijkerheld Bisdom, Advocate at the Hoge

1 — Language of the Case: Dutch.

Raad of the Netherlands, with an address for service at the offices of the High Authority at 2, place de Metz,

defendant,

Application for annulment of the decision of the High Authority concerning the Federal German Government in respect of the tax-free bonus granted to miners working underground and known as the 'Bergmannsprämie'.

THE COURT

composed of: A. M. Donner, President, O. Riese and J. Rueff (Judge-Rapporteur) Presidents of Chambers, L. Delvaux, Ch. L. Hammes, N. Rossi and N. Catalano, Judges,

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

gives the following

JUDGMENT

Facts

I – Summary of the facts

The facts underlying the application are as follows:

By letter dated 4 February 1956, the Federal Minister for Economic Affairs informed the President of the High Authority that his Government was contemplating adoption of the following measures:

amendment of the directives in force for the evaluation of underground plant in the coalfields;

a reduction of the tax on turnover;

suspension of old-age insurance contributions to the miners' provident fund;

grant of a shift bonus which would not be subject to income tax.

Following this notification, the High Authority, by letter of 2 May 1956, set in motion the procedure provided for under Article 88 of the Treaty establishing the European Coal and Steel Community. Under this procedure there was an exchange of letters and documents between the High Authority and the Federal Minister for Economic Affairs, in the course of which:

without raising any objection to a measure which provided an incentive for underground workers, the High Authority commented critically on the payment of part of the shift bonus out of public funds without the imposition of a countervailing charge on the coalmining undertakings;

to offset the continuance of the measure which the High Authority considered to be illegal, the Government of the Federal Republic then proposed to introduce a compensatory charge by discontinuing the payment to the miners' pension fund, there having been no objection on the

part of the High Authority to this repayment;

the High Authority raised no objection to the principle of such offsetting, but expressed reservations concerning the date proposed for putting it into effect.

These views are expressed in the letter addressed on 21 June 1957 by the President of the High Authority to the Minister for Economic Affairs of the Federal Republic. It contains the following sentence: 'In consequence, the High Authority regards the discontinuance of the repayment to the miners' pension fund as an appropriate and adequate charge imposed upon the mining industry to offset the shift bonus, which ought to be paid by the undertakings'.

On 11 July 1957, the applicant wrote requesting the High Authority to inform it of the decision which the High Authority had taken concerning the problem created by the shift bonus.

On 7 August 1957 the High Authority replied informing the applicant that 'the problem of the bonus paid to German miners has now been solved'. 'The solution consists of a higher contribution to social insurance by the mining undertakings'. The High Authority also referred to the *Bulletin Mensuel d'Information,* which it is responsible for publishing, the speech of its Vice-President, Mr Etzel, to the Common Assembly during the debates of the previous 27 June and to the paper submitted on 1 July by one of its members to the Consultative Committee.

In reply to this letter the applicant wrote again to the High Authority on 22 August 1957, stating that it 'believes the decision adopted concerning the Federal German Government is *prima facie* contrary to the Treaty' and that it was contemplating 'instituting proceedings against the decision before the Court of Justice of the ECSC'.

It accordingly asked the High Authority to 'inform us of the official decision which it has taken in the matter or to publish the said decision'.

The High Authority had not replied to this letter when the application was lodged before the Court of Justice on 14 September 1957.

Furthermore, in a letter of 11 September 1957, the Minister for Economic Affairs of the Netherlands Government asked the President of the High Authority for a 'copy of the final decision taken in the matter'. On 7 October 1957, the President of the High Authority replied that the 'addition of the charge to the costs of the coal industry prevented the method of financing the miners' bonus from distorting competition. For this reason, the High Authority need not proceed to take a decision under Article 88 of the Treaty in respect of this method of financing. Since no decision has been taken, it is impossible to provide the Netherlands Government with a copy of it', it concluded.

II – Procedure

By application dated 13 September 1957, registered on 14 September under No 1944, De Gezamenlijke Steenkolenmijnen in Limburg (the 'Association of United Coalfields of Limburg', hereinafter called 'the Association') sought annulment of the decision of the High Authority in respect of the tax-free bonus granted to underground miners on the ground that the decision had not been published by the High Authority.

The applicant association claimed that the Court should:

'annul the contested decision;

declare that the High Authority shall record in a decision that, by financing out of public funds a tax-free bonus granted to miners working underground, the Federal Republic of Germany has failed to fulfil its obligations under the Treaty and that it must accordingly annul this measure;

make any other order which the Court deems necessary;

order the High Authority to pay the costs'.

In its statement of defence, lodged on 15 November 1957, the High Authority contends that the Court should:

'1. Note that the High Authority, in accordance with Article 32 (2) of the Rules of Procedure of the Court, has an address for service in Luxembourg at 2, place de Metz;

2. Rule that the application of 13 September 1957 of the Gezamenlijke Steenkolenmijnen in Limburg is inadmissible or, in the alternative, dismiss the application;

3. Order the applicant to pay the costs.'

The application was submitted in due form and the procedure followed the normal course.

Before the hearing, the Court, by letter dated 20 November 1958, requested the parties to confine their oral arguments to the subject of admissibility.

In consequence, a reference is made in this judgment to the submissions and arguments of the parties only so far as they refer to the admissibility of the application.

At the hearing on 27 November 1958, the Advocate-General delivered his opinion to the effect that the application should be dismissed and that the costs should be borne by the applicant.

III – Submissions and arguments of the parties concerning the admissibility of the action

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

The High Authority contends that, both as regards the first head of claim and the second, the application of the Association is inadmissible, whatever interpretation is placed on the conclusions of the applicant.

First head of claim

The High Authority first contends that, on the basis of the two following possibilities, which are considered in turn, there is no decision which can be the subject of an application for annulment:

(1) The possibility that the contested decision represents confirmation of the contested regulations.

The *applicant* maintains that the decision was set out by the letter which the President of the High Authority sent on 21 June 1957 to the Minister for Economic Affairs of the Federal Republic of Germany. It summarizes it thus:

> 'The High Authority consents to the financing by the Federal Republic of Germany of the Bergmannsprämie out of public funds in view of the Federal German Government's promise to discontinue in future the contribution to the pensions fund provided for under (b) and financed out of public funds'.

Communication of the decision was effected by the letter which the Vice-President of the High Authority sent to the applicant on 7 August 1957 informing it 'that the problem of the bonus paid to German miners has now been solved'.

On the other hand, the *defendant* contends that the letter of 21 June 1957 cannot be regarded as a decision.

In support of this view, it produces the whole of the correspondence exchanged between it and the Minister for Economic Affairs of the Federal Republic of Germany and documents relating to the contested regulations. It concludes therefrom:

> (1) that the letter of 21 June is in fact a reply to a proposal made by the Federal Government on 18 June 1957;
>
> (2) that the sole object of this reply was once more to explain to the Federal Government
>
> 'the conditions on which, henceforth, the High Authority could regard the discontinuance of the contribution of the State, proposed by the Federal Government, as amounting to a countervailing charge for the German coalmining industry'.

On subsequent consideration of the question from its own point of view, the High Authority insists that it did not intend to take a decision and that the Federal Government did not regard its letter as one.

Finally, the defendant proceeds to interpret the Treaty instead of the facts and contends

that 'it was impossible, in law, for the High Authority to give formal approval to the measures adopted by the Federal Government. Under the Treaty, no such a power may be exercised as against a government'.

In its reply, the *applicant* acknowledges that the word 'approval' does not in fact appear in the letter written by the High Authority on 21 June. It declares its willingness to abandon the word and to use the word 'resolution' in its place.

It also unreservedly recognizes that 'there is no question of a decision within the meaning of Article 88 of the Treaty', but it still insists that 'it in no way follows that the contested resolution does not constitute a decision'.

Going on to consider the concept of decision on the basis of the precedents established by the Court and of legal opinion, the applicant claims that the resolution the annulment of which it is seeking constitutes an act of the High Authority. According to the applicant, 'it is a basic principle that the acts of the High Authority shall be subject to review with the result that they can be the subject of an application before the Court'.

In answer to the concept of decision submitted by the applicant, the *High Authority* suggests another interpretation which is also based on case-law and learned opinion. It endeavours, in particular, to demonstrate that the letter of 21 June 1957 'does not endow the Federal Government with any new legal rights or obligations and does not contain any rule applicable in the future which has henceforth the force of law'.

Moreover, the High Authority emphasizes the need, in describing an act, to have regard to its form as well as its underlying purpose. In its view, 'the High Authority did no more than declare that a particular situation, which its letter mentions as being merely a possibility, is not contrary to the Treaty. In so doing it neither sought nor produced any legal effect'.

(2) The possibility that the contested decision constitutes an express refusal to take a decision within the meaning of Article 88.

In its statement of defence, the High Authority advances alternative arguments to the effect that it is impossible to treat the application of the Association as an action for failure to act.

In its view, there can be no implied decision of rejection on the part of the High Authority, since it never received an express request for a decision, whereas, in the case of an action for failure to act, the second paragraph of Article 22 of the Protocol on the Statute of the Court of Justice expressly requires the applicant to produce documentary evidence of the date on which the request was lodged.

Nor, again, can the letter addressed by the Vice-President of the High Authority to the applicant on 7 August constitute an express refusal in the form of a decision. In fact the letter contained nothing more than the answer to the following question:

> 'So that we may know where we stand in this matter, we should be grateful if you would be good enough to let us know the decision you have taken regarding it.'

In its reply, the *applicant* comments on the alternative arguments of the High Authority. First of all it states that it did not intend to base its application on Article 35 of the Treaty but on Article 33 because, it explains,

> 'In the unlikely event of the Court's ruling that, as claimed by the High Authority, it took no decision in this case, the applicant could always avail itself of the abovementioned means of redress and follow the procedure in Article 35.'

Nevertheless it adds:

> 'if the Court were to hold that the contested decision constitutes a refusal to take a decision (as the applicant has contended for in the alternative in submission No 7) and if the Court were to find that, in the case of such refusal, Article 35 and not Article 33 ought to be applied, the proceedings must be regarded as having been brought under Article 35. As far as the applicant is concerned, the letter of the High Authority of 7 August 1957 would in that case contain the refusal. It would then be better to couch the contested decision in the following terms:

"The High Authority refuses to condemn the Federal Republic for . . . etc.", and in those circumstances the applicant would ask the Court to regard its application as being brought against that decision.'

This alternative claim is challenged from two points of view by the *High Authority* in its rejoinder, in which it criticizes the applicant, first for thus expressing 'in wholly different terms the decision against which it brought proceedings' and, second, for impugning a negative resolution which in no way constitutes a decision of refusal, either express or implied, and, moreover, is not the subject of any formal request for action.

The High Authority goes on to expound the alternative argument that, even on the assumption that the consent which it gave to the German Government amounted to a decision against which proceedings could be brought, it would still not be an individual decision concerning the applicant.

This argument affects the admissibility of the application only in so far as the application for annulment, based on an infringement of the Treaty, is concerned.

As far as the applicant is concerned, the decision is an individual one because it 'approves a special measure adopted by the Federal Republic'. The measure concerns it inasmuch as 'now or in the future, it operates to the serious disadvantage of the coalmining undertakings' which are affiliated to it.

On the other hand, the High Authority takes the view that its consent 'would, as regards its practical effect, concern the whole of the common market in coal and would thereby, in fact, amount to a general decision'. Moreover such consent would have 'repercussions on the conditions of competition affecting all coal producers of the Community.' It does not, in consequence, concern the applicant individually.

The Association denies that a decision can be considered to be individual and to concern a party only 'if its practical consequences exclusively affect the rights and interests of that party'.

Second head of claim

The *defendant* relies in particular on the opinion of the Advocate-General in Joined Cases 7 and 9/54 in contending that, when seised of proceedings for annulment, the Court of Justice 'can decide no more than that the High Authority is under a duty to take a particular step'.

In reply, the *applicant* states that there is no such restriction under any provision of the Treaty and that 'its concept is that which accords most closely with the provisions of Article 34 of the Treaty under which, if the Court declares a decision or a recommendation void, it shall refer the matter back to the High Authority, which "shall take the necessary steps to comply with the judgment".' The applicant concludes by stating 'in fact, this provision makes it clear that the Court can also take the steps which have to be taken by the High Authority'.

In its rejoinder the *High Authority* replies that 'on the contrary, Article 34, on which the applicant relies, argues in favour of the Authority's contention'.

No formal objection has been raised concerning the admissibility of the action in so far as it involves an application for annulment based on a submission of misuse of powers. In its statement of defence, the *defendant* confined itself to the following comments:

'As far as misuse of powers is concerned, the High Authority does not wish to contest admissibility, although it is very doubtful whether this submission is adequately formulated and substantiated.'

Law

Admissibility

A – Application for annulment under Article 33

In the application initiating the proceedings, the applicant expresses the view that the letter addressed to it by the High Authority on 7 August 1957 is only a notifica-

tion of the contested decision within the meaning of the first paragraph of Article 33 of the Treaty establishing the European Coal and Steel Community, since the substance of the decision was brought to its notice by the statement of defence at a later date.

The applicant considers that the contested decision was set out in the High Authority's letter of 21 June 1957 to the Federal Government.

In consequence, consideration must be given to the question whether the letter is a decision which can be the subject of proceedings under Article 33 of the Treaty.

In order to carry out the tasks assigned to it, the High Authority is empowered by Article 14 of the Treaty to take decisions in accordance with the provisions of the said Treaty.

The decision (if any) referred to in the application could have been taken only in pursuance of Article 88 of the Treaty.

Article 88 of the Treaty strictly defines the conditions in which the decisions for which it provides may be taken, but provides for such a decision only when 'the High Authority considers that a State has failed to fulfil an obligation under this Treaty', in which case the High Authority is bound to record this failure in a reasoned decision 'after giving the State concerned the opportunity to submit its comments' and setting it a time-limit for the fulfilment of its obligation.

If, after giving a State the opportunity to submit its comments, pursuant to Article 88, the High Authority receives undertakings from the State which convince it that the State had not failed to fulfil an obligation under the Treaty, it has no alternative but to discontinue the action taken. Article 88 of the Treaty confers no power on the High Authority to take, in respect of Member States, decisions registering approval, but only decisions recording failure to fulfil an obligation under the Treaty.

In its letter of 21 June 1957, the High Authority confined itself to informing the Federal Government that, if certain conditions were fulfilled, it would no longer consider that the said Government had failed to fulfil an obligation under the Treaty.

In these circumstances, the letter of 21 June 1957 cannot be regarded as containing a decision recording a failure within the meaning of Article 88 and it cannot in consequence, be the subject of the action provided for under Article 33 to have decisions or recommendations of the High Authority declared void.

B — Application for annulment under Article 35

In the absence of a decision of the High Authority to record a failure within the meaning of Article 88 of the Treaty, the only complaint which the applicant could have made against the High Authority was of abstention within the meaning of Article 35 of the Treaty.

In its reply, the applicant states that 'in the unlikely event of the Court's ruling that, as claimed by the High Authority, it took no decision . . . the proceedings must be regarded as having been brought under Article 35'.

In any case, the basis of an action cannot be changed, even by way of an alternative, in the reply.

Moreover, proceedings may be brought under Article 35 only inasmuch as the applicant has first raised the matter with the High Authority in accordance with the provisions of the first paragraph of that article.

This initial requirement is necessary not only because the time-limit set for the party concerned commences to run with effect from the request submitted to the High Authority but also because of the need for notification which, by impugning the inaction of the High Authority, forces it to take a decision within a limited period regarding the legality or otherwise of its inaction.

The applicant's letter of 11 July 1957 to the High Authority requesting to be informed of the decision which it had taken in the matter in question cannot be regarded as fulfilling the requirement provided for in the first paragraph of Article 35 of the Treaty, nor does the letter of 22 August, in which the applicant merely stated that it was contemplating instituting proceedings against the decision which it believed the High Authority to have taken, constitute fulfilment of that requirement.

In consequence, the action of the Gezamenlijke Steenkolenmijnen in Limburg is inadmissible either under Article 33 or under Article 35.

Costs

Under Article 60 of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs. The applicant in this action has failed to establish admissibility.

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, 33, 35 and 88 of the Treaty;
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 Coal and Steel Community and the rule concerning costs.

THE COURT

hereby:

1. **Dismisses the application as inadmissible;**

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

Donner Riese Rueff

Delvaux Hammes Rossi Catalano

Delivered in open court in Luxembourg on 4 February 1959.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 27 NOVEMBER 1958[1]

Mr President,
Members of the Court,

The applicant association, which is an association under Netherlands law and a coal producers' association within the meaning of Article 48 of the Treaty of 18 April 1951, asks you to declare void on the ground both of infringement of the Treaty and of misuse of powers (and here I quote the application) 'the decision of the High Authority concerning the tax-free bonus granted to underground miners and known as the Bergmannsprämie (miner's bonus) and also as Schichtprämie (shift bonus) which coal-mining undertakings of Western Germany have been paying to their underground miners since 15 February 1956 and which is financed out of public funds by the Federal Republic of Germany'. 'The decision', the application adds, 'has not been published by the High Authority'.
The conclusions of the application claim that, in addition to declaring the contested decision void, the Court should

> 'declare that the High Authority shall record in a decision that, by financing out of public funds a tax-free bonus granted to miners working underground, the Federal Republic of Germany has failed