ORDER OF THE COURT
4 DECEMBER 1957[1]

J. Nold KG
v High Authority of the European Coal and Steel Community

Case 18/57

Summary

Proceedings — Undertaking — Trading undertaking — Right of action

Article 80 of the Treaty provides that '"undertaking" means any undertaking engaged in production in the coal or the steel industry ... and also, for the purposes of Articles 65 and 66 and of information required for their application and proceedings in connexion with them, any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries'.
The wording of Article 80 covers not only proceedings in which a direct application of Articles 65 and 66 to agreements and concentrations of distributing undertakings is in question, but also those which concern the application of those articles in the field of distributing undertakings.
The general conditions of admissibility set out in the second paragraph of Article 33, which differ according to the nature of the contested decisions must, however, be satisfied.
(Treaty, Articles 33, 65, 66 and 80).

In Case 18/57

J. NOLD, KG, KOHLEN- UND BAUSTOFFGROSSHANDLUNG, Darmstadt, represented by Georg Thomas, Rechtsanwalt at the Landgericht Frankfurt am Main, with an address for service in Luxembourg at the Chambers of Félicien Jansen, Huissier, 21 rue Aldringen,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Dr Robert Krawielicki, assisted by Dr Philipp Möhring, Rechtsanwalt at the Bundesgerichtshof Karlsruhe, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

Application for a suspension of application of Decisions Nos 16 to 19/57 of the High Authority of 26 July 1957,

1 — Language of the Case: German.

THE COURT

composed of: M. Pilotti, President, Ch. L. Hammes and P. J. S. Serrarens, Presidents of Chambers, O. Riese, L. Delvaux, J. Rueff and A. van Kleffens, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

makes the following

ORDER

I

On 3 October 1957 Firma J. Nold, KG, Kohlen- und Baustoffgroßhandlung (coal and construction materials wholesaler) applied for a suspension of application of Decisions Nos 16 to 19/57 of the High Authority of 26 July 1957; this application based on Article 39 of the Treaty was referred by the President to the Court under Article 33 of the Statute and Article 66 of the Rules of Procedure of the Court.
In the present application the applicant has restricted itself to asking that application of the commercial rules of the Ruhr coal-selling agencies approved by the contested decisions be suspended; if these decisions were applied it would lose the status of first-hand wholesaler with respect to the mining undertakings of the Ruhr associated in the selling agencies.
These new commercial rules terminated transitional rules which had been extended until 1 July 1957 and which had provided that wholesalers, including the applicant, might obtain supplies direct even if they did not satisfy the general conditions contained in the earlier rules approved in 1956 provided they had obtained direct supplies as first-hand wholesalers during the 1955/56 coal marketing year.
As a result of this the applicant claims to have lost certain reductions which have an effect on its prices, so that it risks losing its customers, especially since if it no longer has the status of a first-hand wholesaler it cannot be a member of the purchasing association of coal wholesalers operating in Southern Germany through the intermediary of the Oberrheinische Kohlenunion (OKU).

II

1. The High Authority alleges first of all that the application for an interim measure is inadmissible because the main action is out of time, since Article 63 of the Rules of Procedure of the Court provides that the latter must be brought before the Court before or at least simultaneously with the application for interim measures.
In fact it appears in the present case that the limited partnership J. Nold did not

have a personally liable partner when the action was brought so that it may be doubted whether it had the capacity to bring the action.
For the present proceedings, which simply ask for interim measures, without prejudice to the decision in the main action, it is necessary and also sufficient that a main action has been brought and that there is a legal representative for the purpose of the application for interim measures.
The decision on the question whether the subsequent regularization of the applicant's legal position which has in the meantime taken place can have retroactive effect of the time when the main action was brought can be reserved for the final judgment.

2. The High Authority further objects to the admissibility of the application on the grounds that the applicant is not an undertaking engaged in production.

This calls for the following observations:

Although in principle according to the rules contained in Article 33 *et seq.* of the Treaty the right to bring an action before the Court is reserved to those undertakings which are 'engaged in production in the coal or the steel industry', Article 80 provides that 'undertaking' means also, 'for the purposes of Articles 65 and 66 and of information required for their application and proceedings in connexion with them, any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries'.
It is clear from the wording of Article 80 that the proceedings referred to therein are not limited to gathering the information required for the purposes of Articles 65 and 66 and that its application is not limited to a discussion of the lawfulness or scope of a request for information.
On the other hand, the wording of Article 80, 'proceedings in connexion with them' (Articles 65 and 66), is not limited to proceedings in which a direct application of Articles 65 and 66 to agreements and concentrations is in question but covers cases such as the present, which concern the application of those articles in the field of distributing undertakings.
The general conditions of admissibility set out in the second paragraph of Article 33, which differ according to the nature of the contested decision, must be satisfied.
At the present stage of the proceedings however it is unnecessary to consider whether the present case is concerned with individual or general decisions because the applicant has expressly alleged that there is a misuse of powers with respect to it and has set out the reasons why, in its view, this is so; an action on this ground is admissible in all cases.

3. The defendant is wrong to contend that the application for an interim measure is inadmissible because it is irrelevant; it alleges that if the application of the contested decisions were suspended the earlier rules in this field, and in particular the

commercial rules authorized by Decisions Nos 5/56, 6/56 and 7/56, would enter again into force and the applicant would not be in a position to benefit from the transitional provisions of the second subparagraph of Article 9 (3) of those decisions, which preserved its status as a first-hand wholesaler.

This view cannot be upheld:

The transitional provisions extended by Decisions Nos 10 to 12/57 to 1 July 1957 lapsed on that date; from then on the rules contained in Decisions Nos 5 to 7/56 applied to the applicant and denied it the status of first-hand wholesaler.
Those decisions of 1956 have, however, as far as the commercial rules which are the subject of the present application for an interim measure are concerned, been revoked by Article 15 (2) of Decisions Nos 16 to 18/57 and replaced by those the suspension of whose application is sought in the present application. If the latter is successful the revoked decisions of 1956 will not re-enter into force and neither the revoked provisions of 1956 nor those of 1957, which would be held in abeyance, will apply to the applicant. The applicant would therefore retain its original status as a first-hand wholesaler until the final judgment.

The application is accordingly relevant.

III

A suspension of application must be granted for the following reasons:
On the one hand, the temporary maintenance of the applicant's status as a first-hand wholesaler in no way jeopardizes the Ruhr market in coal; this follows not only from the transitional provisions from which the applicant benefited under the 1956 decisions but also from the fact that in spite of the expiry of the temporary provisions the applicant continued to be treated as a first-hand wholesaler for a period of three months.
Accordingly, the suspension of application of the contested decisions until final judgment is delivered in the main action would maintain the applicant's previous position.
It is apparent from the documents produced that the loss of the status of first-hand wholesaler would represent a serious disadvantage and obstacle to the applicant, since the position of an ordinary wholesaler is in no way comparable to the advantages which the status of first-hand wholesaler gives, especially as that status would enable the applicant to fulfil the conditions required for membership of the OKU.
It is therefore appropriate to suspend application of Decisions Nos 16 to 18/57 in so far as the commercial rules contained in those decisions deprive the applicant of the status of first-hand wholesaler.

On those grounds,

Upon reading the pleadings;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 33, 39, 65 and 80 of the Treaty;
Having regard to Article 33 of the Protocol on the Statute of the Court of Justice;
Having regard to Articles 63 to 68 of the Rules of Procedure of the Court,

THE COURT

hereby:

Rules that the application is admissible and well founded;

Orders that until final judgment application of Decisions Nos 16 to 18/57 of 26 July 1957 is suspended in so far as the commercial rules provided for in those decisions deprive the applicant of the status of first-hand wholesaler.

Costs are reserved until final judgment.

Pilotti Hammes Serrarens

Riese Delvaux Rueff van Kleffens

Delivered in open court in Luxembourg on 4 December 1957.

M. Pilotti
President

Ch. L. Hammes
Judge-Rapporteur

A. Van Houtte
Registrar

OPINION OF MR ADVOCATE GENERAL ROEMER[1]

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1 — Translated from the German.