

On those grounds,

Upon reading the pleadings,

Upon hearing the parties;

Upon hearing the opinion of the Advocate-General;

Having regard to articles 2, 3, 4, 5, 33, 53 and 65 of the ECSC Treaty;

Having regard to the Protocol on the Statute of the Court of Justice;

Having regard to the Rules of Procedure;

THE COURT

hereby:

- 1. Dismisses the applications brought by the applicant as unfounded;**
- 2. Orders the defendant to bear the costs of Case 15/59;**
- 3. Orders the applicant to bear the costs of Case 29/59.**

Delivered in open court in Luxembourg on 12 February 1960.

Donner

Delvaux

Riese

Hammes

Catalano

A. Van Houtte

A. M. Donner

Registrar

President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 17 DECEMBER 1959¹

*Mr President,
Members of the Court,*

The applicant undertaking, Société Métallurgique de Knutange, produces pig iron in nine blast-furnaces (50 to 100 000 metric tons per month) and basic Bessemer steel (50 to 100 000 metric tons per month) in six converters. It also makes heavy sections and merchant steel. But instead of using the ferrous scrap so found (the 'own arisings' which we have heard about so often) in a Martin steel mill or an electric steel mill, as is often the case, it prefers to sell it. As it it-

self states in its letter of 3 March 1959, these arisings consist of heavy scrap which is 'highly sought after'.

However, the undertaking needs to use light scrap in order to enrich the smelting beds of its blast-furnaces, and this it has to buy. Even so, sales are usually greater than purchases, and although the undertaking has been assessed at the basic rate for payment of the equalization contribution on imported ferrous scrap, it was not, prior to the first three months of 1958, assessed at the additional rate, which only applies, as

¹ — Translated from the French.

you know, to the *excess in consumption* of bought scrap compared with the *consumption over the reference period* of bought scrap.

Why did such an excess occur during the three-month period in question? This has been explained to you: it was because of the need to carry out repairs to a blast-furnace, and once this blast-furnace had been stopped, it became apparent that these repairs involved more than had at first seemed likely, and the furnace was out of action for about six months instead of six weeks. To avoid slowing down its production, the undertaking found it necessary to make larger purchases of ferrous scrap than usual during this three-month period, such that purchase went above sales, and this resulted in an assessment for a contribution at the additional rate.

The undertaking has come before you to contest the decision of the High Authority refusing to exonerate it from the said contribution.

Two applications, you will remember, have been brought on this subject: the first (15/59) is directed against what the applicant believed to be a decision of the High Authority. It was signed by an official of that institution. The second (29/59) is directed against the measure which, this time, was undeniably a decision of the High Authority. It was dated 22 April 1959.

As regards the *first application*, the High Authority has argued that it should be dismissed as inadmissible because, it says, no decision had in fact been adopted. Nevertheless, now that the Court has ordered that the two applications be joined, the High Authority has withdrawn its objection of inadmissibility and states that it is 'willing to bear the additional costs of the proceedings inherent in two applications'.

Certain rules relating to the bringing of applications for annulment, amongst which the necessity for a decision adopted previously is certainly to be included, are governed by strict principles and relate to public order. Therefore these statements of the

High Authority ought not to be taken into account. Must the first application therefore be dismissed as inadmissible? I think that another solution must be considered. This consists in taking the view that there was indeed a decision, but that it was void as attributable to an official who had absolutely no authority to take it in the name of the High Authority. I think that this second solution is legally more correct and justifies your ordering the defendant to bear the costs.

As regards the substance, which I shall examine in respect of the second application, my explanations will be very brief.

The applicant does not criticize the contested decision itself, which refuses to exonerate it from the contribution at the additional rate for the first three-month period of 1958. Nor does it criticize the amount of that contribution as calculated, which in any event has not yet been decided definitively. Finally, it does not deny that the *principle* that it is assessable is indeed in conformity with Decision No 2/57, which is the legal basis for the assessment. But it puts forward a defence of illegality to the effect that Decision No 2/57 disregarded certain general principles and certain principles of the Treaty, in that it established *different rules* for determining the consumption over the reference period and for determining the consumption used as a basis for the contribution at the additional rate. The 'consumption of bought scrap over the reference period' for each undertaking, which is the basis for calculating the excess consumption under Article 5 of Decision No 2/57, is, as is stated in Article 6, 'half the consumption of bought scrap over a period of six calendar months falling within seven consecutive months, chosen by the undertaking between 1 January 1953 and 31 January 1957'. It is therefore, reduced to three months, an *average* consumption, whereas the consumption of bought scrap with which this must be compared is an *effective* consumption, namely the consumption found over what is called the 'accounting period' which consists of three months. Thus, the periods to be compared are indeed of the same length (three months for each of them), but

of the two figures to be compared, one is a figure for effective consumption whereas the other is a theoretical figure. Therefore it can happen that an undertaking is assessed, as in the present case, for a three-month period to contribute at the additional rate even though its real consumption of bought scrap over six months including that three-month period has not exceeded—or has even remained below—the consumption over the reference period.

I do not see why these considerations can be of such nature as to show that there is something illegal in decision No 2/57.

The determination of the reference period and the determination of the accounting period serve two different purposes. As regards the reference period, the purpose is to discover by a fair, but necessarily arbitrary, method the *average* consumption of bought scrap by the undertaking before the introduction of the new system intended to encourage the economizing of scrap. The High Authority could have determined the reference period itself on the basis of objective criteria. It has preferred a system leaving the undertakings a choice on this matter. But, of course, it was therefore necessary to temper this liberty by extending the chosen period over a certain time so as to arrive at an average, and hence the choice of a period of six months. It is otherwise with the so-called accounting period. Here the purpose is to encourage the undertakings to economize on ferrous scrap. It is therefore necessary for the period to be sufficiently short to prevent periods of high consumption being offset to an unreasonable extent by periods of low consumption, yet sufficiently long, even so, to offset certain peaks in consumption, and also long enough not to weigh the undertakings down with accountancy obligations. A period of three months was deemed reasonable as regards this and, of course, the average consumption over the reference period, calculated on six months, had therefore to be divided by two.

It is not even necessary to point out, as does the High Authority, the advantages given to the undertakings both as regards the

choice of their reference period and as regards determining the amount of consumption over the reference period, an amount from which scrap sold or disposed of is not deducted (an advantage from which the applicant derives particular benefit and which results from the last part of article 4 (1) of Decision No 2/57. The rules established by Decision No 2/57, both as regards determining the consumption over the reference period and as regards fixing the accounting period, were established as the representative of the High Authority has pointed out during the oral procedure with utmost clarity, by virtue of what is called in accepted usage its 'powers of discretion'.

I must clear up a source of confusion on this point: power of discretion does not mean arbitrary power. The High Authority must respect the Treaty and the general principles of law, particularly when it adopts regulations and in doing so makes use of legislative power. Yet it enjoys a margin of discretion within the limits which you have already had occasion to trace in some important judgments. In the present case we are concerned merely with rules concerning the *basis* for the contribution: rules of this sort necessarily comprise rule of thumb features to a certain extent and their application can be sometimes favourable to the undertaking paying the contribution, and sometimes unfavourable, on a particular point. What matters is that these consequences should not reveal the existence of some legal defect. I do not see any in this case.

Therefore, in my opinion there is no point in inquiring into whether the applicant undertaking could have benefited from such and such advantage or possibility offered by Decision No 2/57 in order to escape payment of any contribution at the additional rate during the first half of 1958, for example by asking for a derogation under Article 7 or by reducing its production of pig iron during the three-month period in question. None of this has any connexion with the legality of Decision No 2/57, which is the only question in dispute.

I must reply to one last argument, which was only put forward during the oral proce-

ture. It is based on Article 9 of Decision No 2/57 on rebates on the contribution at the additional rate granted to each undertaking, particularly in the case where the *specific input* is reduced 'compared', says the text, '*to the specific input over its reference period*'. Thus, in this case the comparison is to be made with the six-month reference period as a whole. I do not see the force of the

argument: it is obvious that the specific input *for the reference period* is calculated over six months, as is the consumption itself for the reference period: it is in respect of that reference period that the rebate is granted if the percentage obtained for the accounting period is lower. It is not necessary to divide by two here, because a percentage is involved, and not a tonnage.

I am of the opinion that:

- as regards Case 15/59, the contested decision should be annulled, and that the High Authority should bear the costs;
- as regards Case 29/59, the application should be rejected and that the costs should be borne by the Société Métallurgique de Knutange.

ORDER OF THE COURT 30 JUNE 1959

In the action between

SOCIÉTÉ MÉTALLURGIQUE DE KNUTANGE, a limited liability company whose registered offices are at 16 boulevard Malesherbes, Paris, represented by its Chairman and Managing Director, Jean Latourte, assisted by Jean-Pierre Aron, Advocate at the Cour d'Appel, Paris, with an address for service in Luxembourg at the office of the Chambre Syndicale de la Sidérurgie Française at 49 boulevard Joseph-II,

applicant,

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, Professor Giulio Pasetti, acting as Agent, with an address for service in Luxembourg at its offices, 2 place de Metz,

defendant,

concerning the request made under Article 69 of the Rules of Procedure of the Court of 4 March 1953, or under Article 91 of the Rules of Procedure of 3 March 1959, by the High Authority, the defendant, with regard to the application brought against it by the Knutange undertaking and requesting that the said application be dismissed as inadmissible.