OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 18 MAY 1960 [1]

Contents

Mr President,
Members of the Court,

In Joined Cases 41/59 and 50/59 concerning the applications of Hamborner Bergbau AG and Friedrich Thyssen Bergbau AG the Court has decided to restrict the oral procedure to the questions of admissibility. Accordingly in my opinion I shall discuss only the admissibility of the applications and of the objection of illegality raised by the applicants.

The first application is directed against a letter of 24 July 1959 from the Levy Office of the High Authority and the second application is against the implied refusal of the applicants' request of 6 August 1959.

The undertakings' right of action, the proof of their lawful representation afforded by their constitutional documents and excerpts from the company register and proof that they are properly represented in the case do not call for any particular remarks. It should be noted that in the second case Friedrich Thyssen Bergbau AG withdrew its application in accordance with the rules before the High Authority lodged its statement of defence.

I — Application for annulment, Case 41/59

1. *Observance of the time-limit for instituting proceedings*

The contested letter was delivered to the applicants on 27 July 1959. The joint application of the undertakings was received at the Court on 1 September 1959. Since in accordance with annex II to the Rules of Procedure of the Court of Justice applicants habitually resident in Germany have an extension of six days to the procedural time-limit. The application has been lodged in time.

2. *Legal status of the letter of 24 July 1959*

The letter was sent to the applicants by the Levy Office of the High Authority 'on behalf of the High Authority'. This letter does not constitute a reply by a subordinate de-

1 — Translated from the German.

partment of the High Authority, not binding on the latter, but must rather be viewed as a message from the High Authority itself, as the applicants have rightly emphasized in the proceedings. The General Rules of Organization of the High Authority of 5 November 1954 (JO 1954, p. 515) enable the President of the High Authority to delegate to heads of departments power to implement the decisions of the High Authority and thus, in addition, power authoritatively to issue such decisions (cf. Article 15).

The dispute turns to an important degree on the question whether the High Authority's letter constitutes a decision. The letter makes two points:

(a) The levy for the financial year 1959 to 1960 cannot be refunded to the applicants since the Treaty and the decision imposing the levy do not make provision for this;

(b) The undertakings must therefore give instructions to continue the payment of the levy.

The letter constitutes a reply to a request of the applicants of 17 July 1959 and without a knowledge of this letter it is impossible properly to interpret the letter of the High Authority. In their request the applicants asked in view of their poor position on the market, which had already necessitated the closure of mining installations, not merely for a respite from payment of the levy for the financial year 1959 to 1960 but rather for a refund. They state that they have already given instructions to the Ruhrkohlentreuhand GmbH to suspend payment of the levy.

The High Authority claims that the first part of its letter does not contain the refusal of the request for a refund, that is, it does not constitute the exercise of a right for the establishment of a legal situation and is instead a mere finding that no provision has been made in law arising from the Treaty for the refund which was requested. Accordingly this part of the letter does not constitute a decision within the meaning of the Treaty but information as to the legal position. But if it is maintained that this does not constitute an administrative measure against which an action will lie, this view is mistaken. In the letter there is a clearly expressed refusal of the request for the alteration of an existing legal duty, the duty to pay, and the legal reasons for this. As the High Authority indeed concedes, this assertion gives rise to a difficulty from the point of view of the applicants. For the applicants the High Authority's communication creates the outward impression that it contains a refusal of a measure creating rights. With regard to the admissibility of this refusal it is sufficient to maintain, as the applicants have logically submitted, that the High Authority has failed to exercise its powers and that it has thus given rise to legal effects. If the High Authority had quite failed to reply to the applicants' request it would have been sufficient to render admissible an application for failure to act for the applicants to specifically maintain that for failure to act for the applicants to specifically maintain that the High Authority had a duty or a power to act. The procedural situation does not differ because the negative decision follows from an express statement of the High Authority and not from its silence. In that this is a procedure concerning the admissibility of the application and not its justification there is no occasion to consider whether the High Authority is empowered or obliged to grant the request for the refund of the existing debt.

In view of its contents the positive refusal of the request for a refund constitutes *vis-à-vis* the applicants a negative individual decision of the High Authority which can be contested by an application for annulment. To this extent it is thus possible to concur with the appicants' line of argument.

Does the second part of the letter constitute a decision by its legal nature, as the applicants claim? The High Authority disputes this view on the basis that the words which the applicants consider as a request for payment do not create rights and thus do not constitute an administrative measure. The High Authority considers that these words merely refer to the obligations of the applicants, laid down in the Treaty and in the

general decisions on the levy as continuing and specific obligations on the undertakings. It points out that its declaration that it was necessary to continue the payments does not provide a basis for enforcement.

There is reason to consider whether, besides administrative measures creating rights or obligations and altering the legal position, declaratory measures of the High Authority, such as an authorative finding that an obligation to make payments exists, also constitute administrative measures which may be contested. Nevertheless I consider that this view is not supported by the facts. The question is whether in using those words in the passage the High Authority had the *intention* of taking a decision and whether such intention was adequately expressed. In this connexion we must return to the request which gave rise to the High Authority's reply. From this it is clear that the sole subject-matter of the request and of the negotiations was the question whether on special grounds stated separately by the applicants they could be granted a refund. This was the only matter which called for comment by the High Authority. It does not appear that, apart from the request of the applicants, the High Authority had occasion to examine and settle the obligation to pay the levy which was not at issue and it certainly does not appear that it had occasion to consider the question, of quite another nature, whether the general imposition of the levy for the financial year 1959 to 1960 was regularly established with regard to its substance. The incidental manner in which it was stated that it would be necessary to continue payment as before militates against this view. This statement is merely a logical, and perhaps even superfluous, consequence of refusing the request for a refund in which procedures and forms of payment are mentioned in a purely technical sense. Only questions which manifestly had to be settled and which were specifically examined and considered by the High Authority could form the subject-matter of a decision, which however was not so in the case of the right of the High Authority to impose the levy. The conclusion must accordingly be as follows: the finding with regard to continuing the payment in the forms previously employed and by the methods previously used does not constitute an independent factor in the context of the decision contained in this letter and still less does it constitute an independent decision. In this matter the applicants' line of argument must be rejected.

The applicants counter this appraisal of the wording of the High Authority's letter with various legal considerations of a general nature. They characterize the interpretation as narrow and state that it entails an inadmissible or inappropriate diminution of their rights. This interpretation leaves them with no alternative but to provoke an enforceable and contestable decision as to their obligation to pay by interrupting their current payments. However, if they wished to avoid incurring penalties under Article 50, this course was not open to them since the general decisions on the levy provide in cases of dilatoriness for surcharges which are payable without a specific individual decision by the High Authority *vis-à-vis* the undertakings.

The applicants' arguments are really directed against the legal form of the general decisions on the levy and, ultimately, against the system of legal protection whose mandatory limits are also binding on the Court, as you know.

Unlike national law the Treaty has no general clause regarding the submission of applications against the institutions of the Community. At the time when the ECSC Treaty was drafted, the Member States settled on the system with specified opportunities for instituting proceedings and with precise conditions as to persons and subject-matter. Further, the Treaty makes no provisions for applications for injunctions whereby the imminent application of a general decision may be warded off. Nevertheless the view of the applicants would ultimately lead to this if the widest possible criteria were applied in establishing the conditions for applications for annulment

The fact that in obtaining an individual decision in accordance with Article 92 the applicants must take the risk of surcharges in

respect of delay for which provision is made in the general decision cannot bring about a re-assessment of the available remedies since the Treaty does not contain any specific provisions for this. It is possible that closer examination of the legal situation would show that rendering the undertakings liable to pay the surcharges owing for delay, such surcharges being payable without a particular individual decision of the High Authority, is incompatible with the system of Article 36 of the Treaty. In this case the legal protection accorded by the Treaty would not have been infringed, as the applicants have complained. However in the present context there is no reason to conduct such an examination.

3. *Submissions*

After establishing the context and content of that part of the High Authority's letter which, it is alleged, may be regarded as a contestable decision we turn to the question which of the applications is to be considered as admissible.

In their submissions the applicants are concerned almost exclusively with that part of the High Authority's letter which they regard as a demand for payment. All the arguments in the application concern the question whether the demand for payment is inadmissible because in any event the general decisions on the levy which form the basis of the demand for payment are illegal. Arguments regarding the validity of the individual levy were not advanced until the second statement of case in Case 50/59. Nevertheless the applicants have explained in the oral procedure that they intend their application for annulment to be considered as directed against the decision of the High Authority in its entirety. It would thus be wrong to conclude from the submissions in their application that only the demand for payment is at issue. In these circumstances the question is whether the submissions of the applicants are admissible since, as we have seen, according to the clearly specified content of the decision only the annulment of the decision of refusal is considered as a possible objective of the application.

(a) Is the objection of the illegality of General Decision No 33/59 admissible?

According to the case-law of the Court of Justice it is possible to contest an individual decision on the indirect basis that the statement of law which it contains is founded upon a general decision which is for its part unlawful.

The High Authority does not raise doubts as to the admissibility in principle of the objection of illegality. The High Authority is, however,of the view that the contested individual decision is not *based* on the general decision and the general decision did not give rise to the individual decision.

This question will be solved by comparison of the legal content of the individual decision, on the one hand, and of the general decision which has been invoked, on the other. We have seen that only the refusal of the request for a refund in the contested letter is in the nature of a decision. This is the only respect in which the contents of the letter are relevant to the proceedings. On the other hand, it is clear that General Decision No 33/59 makes no provision for a refund, either directly or indirectly by reference to other decisions. It only contains (by reference) provisions relating to liability to the levy (the rate of the levy, when it is payable and the consequences of delay). The essential contents of the general decision thus have no bearing whatsoever on the statement recorded in the contested decision of the High Authority that provision was not made for an individual refund of the levy. Since there are no other findings in the nature of a decision in the High Authority's letter and, further, as no other questions form the subject-matter of the procedure it is impossible to consider the lawfulness of the essential contents of General Decision no 33/59 in the present proceedings.

In so far as the application for annulment is based on the lawfulness of General Decision No 33/59 the statements in the application are irrelevant and thus inadmissible. The objection of the High Authority, that the lawfulness of the general decision ac-

cordingly cannot be considered because it is based on financial, social and economic considerations, need not be examined further: the objection of illegality is of as little effect as the High Authority's objection.

(b) The admissibility of the submission that the refund may be granted

The High Authority points out that the applicants only advanced their arguments in this connexion in the reply and it therefore considers them out of time and inadmissible.

In accordance with Article 42 (2) of the Rules of Procedure of the Court of Justice no fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure.

It cannot be disputed that these arguments of the applicants that the refund may be granted are based on particular reasons which differ completely from the submissions on the admissibility of imposing the levy. It could have been expected, on the basis of the procedure prior to the application, that proceedings would be directed primarily against the refusal of the refund. It could indeed have been envisaged that this point would be mentioned in their application *as an alternative* in case their main argument against the admissibility of the levy was unsuccessful. As has already been said, the applicants nevertheless based their application exclusively on the objection of illegality and it was only in the reply in Case No 50/59 that they made submissions as to the admissibility of the refund on grounds of natural justice. There can be no question of basing these submissions on grounds which were only introduced in the course of the written procedure. There is accordingly no alternative but to reject as inadmissible the submission which has been made out of time.

4. *Conclusion*

Application No 41/59 is indeed directed against a decision of the High Authority which is open to an action. However the decision merely consists of the refusal of the refund requested on the grounds of natural justice. By implication it is impossible successfully to contest this finding of the High Authority with the objection that General Decision No 33/59 is unlawful. The submissions in the reply concerning the refusal of the refund cannot be considered as they are out of time. Application No 41/59 should accordingly be dismissed as inadmissible.

II — Action for failure to act, Case 50/59

This application is based upon the fact that the High Authority failed to answer the applicants' requests of 6 August 1959. As is stated in the application, it was lodged *as a precaution* to counter the objection of the High Authority that the letter of 24 July 1959 does not contain a binding request for payment. In its reply the applicant explained that it had only brought an action for failure to act *as an alternative* in case the Court of Justice considered that the letter of 24 July did not constitute a decision. Nevertheless this last statement does not subsequently render the submission of the application conditional, with the result that if the condition is fulfilled this part of the application is treated as though it had not been submitted.

When the applicants made their request of 6 August 1959 they sought to obtain a binding reply from the High Authority to the question posed in the letter of 24 July 1959, that is, an answer constituting a decision within the meaning of the second paragraph of Article 15 of the Treaty.

This demand can be considered as a purely *formal* application: the applicants request a formal decision regarding their application for a refund in order that they may contest the refusal of the High Authority.

The applicants have no legal interest in this claim since not only express and formal decisions can be contested but also the mere silence of the High Authority which is held to constitute a decision of refusal (cf. Article 35 of the Treaty). However, the principal

reason why they have no legal interest is that the reply of the High Authority of 24 July already constitutes a binding answer which, in accordance with Article 33 of the ECSC Treaty, may be contested.

If the request of 6 August is considered as repeating the substance of the applicants' request which was intended to obtain the refund of the levy on special grounds, the applicants have likewise no legal interest in pursuing this claim. The High Authority settled a similar request by the applicants a short time previously. The applicants have not submitted that new facts have arisen, the only factor which could justify renewing the request. It must therefore be considered inadmissible to bring the matter before the High Authority once again.

On this view of the facts it is unnecessary to decide whether the applicants' request of 17 July 1959 properly raised the matter with the High Authority within the meaning of Article 35. It is sufficient to find that the High Authority replied to this request and that this reply contained a decision which could be contested. Since it is established that the application is based on this ground comment on the observance of the time-limit for lodging applications is superfluous.

Accordingly, the second application should also be dismissed as inadmissible.

Since the main head of both applications, the request for a declaration that the High Authority's measure is void, is inadmissible it is unnecessary to comment specifically on the conclusions seeking a declaration that the contested decisions contain an error rendering the Community liable.

III – Costs

With regard to the *costs* the Court may order that the parties bear their own costs in whole or in part 'where the circumstances are exceptional'. 'The Court may order even a successful party to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur.' It must be considered whether, in view of the vagueness of the High Authority's written explanation, which was raised in the course of the procedure, the Court should in this case exercise this power.

Regard should be had to the reasons why the applications are inadmissible. The applicants have conceded that the decision of 24 July could have been contested. Nevertheless they adopted an erroneous point of view on the scope of the objection of inadmissibility and they were late in submitting certain arguments on the question of the refund on the grounds of natural justice. The High Authority cannot be made liable for the costs attendant on these circumstances. I further consider that in its decision the High Authority gave no grounds for thinking that the 'demand note' represents a decision against which an application may be made. In Case 41/59 I thus see no reason to render the High Authority partly liable for the costs.

Case 50/59, the action for failure to act, was lodged by the applicants with a view to obtaining a decision which could be contested. This aplication is based on a mistaken appraisal of the remedies available under the Treaty and on a false interpretation of the High Authority's decision of 24 July 1959 for which the High Authority was not responsible. In this matter too there accordingly appears no reason to order the High Authority to bear the costs. The decision as to costs must therefore be made pursuant to Article 69 (2).

IV – Summary

In conclusion I suggest that the Court of Justice should dismiss Applications Nos 41/59 and 50/59 and order the applicants to bear the costs of the proceedings.