JUDGMENT OF THE COURT
23 October 1997 *

In Case C-160/94,

Commission of the European Communities, represented by Richard B. Wainwright, Principal Legal Adviser, and Blanca Rodríguez Galindo, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, assisted by David Anderson, Barrister, with an address for service at the British Embassy, 14 Boulevard Roosevelt,

intervener,

v

Kingdom of Spain, represented by Alberto José Navarro González, Director General for Institutional and Community Legal Matters, and Gloria Calvo Díaz, Abogado del Estado, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

defendant,

* Language of the case: Spanish.

supported by

French Republic, represented by Catherine de Salins, Head of Subdirectorate in the Directorate for Legal Affairs, Ministry of Foreign Affairs, and Jean-Marc Belorgey, Chargé de Mission in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8b Boulevard Joseph II,

and

Ireland, represented by Michael A. Buckley, Chief State Solicitor, acting as Agent, assisted by John D. Cooke SC and Jennifer Payne, Barrister, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

interveners,

APPLICATION for a declaration that, by reserving to itself exclusive import and export rights for electricity, the Kingdom of Spain has failed to fulfil its obligations under Articles 30, 34 and 37 of the EC Treaty and Article 48 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and M. Wathelet (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward (Rapporteur), J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: G. Cosmas,
Registrars: H. von Holstein, Deputy Registrar,
D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 May 1996, at which the Commission was represented by Richard B. Wainwright and Fernando Castillo de la Torre, of its Legal Service, acting as Agent, the United Kingdom of Great Britain and Northern Ireland by Nicholas Green, Barrister, the Kingdom of Spain by Gloria Calvo Díaz, the French Republic by Marc Perrin de Brichambaut, Director of Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, and Jean-Marc Belorgey, and Ireland by Paul Gallagher SC and Jennifer Payne,

after hearing the Opinion of the Advocate General at the sitting on 26 November 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 15 June 1994 the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by reserving to itself exclusive import and export rights for electricity, the Kingdom of Spain had failed to fulfil its obligations under Articles 30, 34 and 37 of the EC Treaty and Article 48 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23, hereinafter 'the Act of Accession').

2 In Spain, Article 1(1) of Law No 49/84 of 26 December 1984 on the unified operation of the national electricity system (BOE No 312 of 29 December 1984, hereinafter 'the 1984 Law') provides:

'The unified operation of the national electricity system over the high-voltage networks is a public State service, the purpose of which is to optimize the system as a whole on the basis of the functions and activities set out in Article 2 of this Law. The service shall be managed by a State company in accordance with the present Law and the provisions adopted for its implementation.'

3 Article 2(1) of the 1984 Law defines the functions and activities which the public service comprises, which are, in particular:

'...

(e) to operate and maintain ... all international connection facilities ...;

...

(i) to engage in such international trade as is considered appropriate in order to ensure the supply of electric energy, to reduce production costs on a national scale or, for reasons of national interest, to allocate to each undertaking its share of such international trade and monitor the conduct thereof;

...'.

4 By Royal Decree No 91/85 of 23 January 1985 (BOE No 24 of 28 January 1985, hereinafter 'the 1985 Royal Decree'), adopted in implementation of the 1984 Law, those functions and activities were entrusted to a State undertaking, Red Eléctrica de España SA (hereinafter 'Redesa').

5 Taking the view that, under the abovementioned provisions of Spanish legislation, taken together, exclusive rights to import and export electricity are reserved to the State, which exercises them through Redesa, and that those rights are contrary to Articles 30, 34 and 37 of the Treaty and to Article 48 of the Act of Accession, the Commission initiated against the Kingdom of Spain the procedure provided for by Article 169 of the Treaty.

6 Article 48 of the Act of Accession provides:

'1. Without prejudice to paragraphs 2 and 3 of this article, the Kingdom of Spain shall, from 1 January 1986, progressively adjust State monopolies of a commercial character within the meaning of Article 37(1) of the EEC Treaty, bearing in mind, where appropriate, Article 90(2) of the EEC Treaty, so as to ensure that by 31 December 1991 at the latest no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States.

...

2. The Kingdom of Spain shall, from 1 January 1986, abolish all exclusive export rights.

...'.

7 Article 48(3) of the Act of Accession is not applicable to electricity.

8 By two orders of 14 December 1994, the President of the Court granted leave to the French Republic and to Ireland to intervene in support of the forms of order sought by the Kingdom of Spain; by order of the same date he granted leave to the United Kingdom of Great Britain and Northern Ireland to intervene in support of the forms of order sought by the Commission.

9 In support of its application, the Commission asserts that the 1984 Law, in conjunction with the 1985 Royal Decree, establishes a system under which the State alone, acting through the State-owned Redesa, is authorized to import and export electricity. It maintains that those exclusive rights are contrary to Articles 30 and 34 of the Treaty respectively, and in both cases to Article 37 thereof, as made applicable to the Kingdom of Spain by Article 48 of the Act of Accession, and cannot be justified under either Article 36 or Article 90(2) of the Treaty.

10 The Spanish Government denies, *in limine*, that the 1984 Law and the 1985 Royal Decree give Redesa exclusive rights to import and export electricity.

11 It states, first, that the supply of electricity was declared a public service by royal decree in 1924, without the various supply activities, namely generation, transmission and distribution, thereby falling within the exclusive competence of the State.

12 It goes on to say that it was precisely in order to cope with the problems arising from the existence of numerous undertakings generating and distributing electricity, particularly from the point of view of security of supply and the emergence of large and costly surpluses, that the 1984 Law was adopted. It is clear, however,

from the preamble to that Law, its title and its provisions, in particular Article 1(1), that it was not intended to bring all such supply activities within a single operation but rather to unify and ensure the continuity of the operation of the various electricity undertakings in accordance with criteria of economic efficiency, while observing the property rights of the undertakings concerned and their freedom to run their own plants. Thus, Redesa is entrusted only with the unified operation of the national electricity system through the transmission network.

13 The Spanish Government contends, finally, that Article 2(1)(i) of the 1984 Law does not in itself create any exclusive right in respect of international trade but merely gives Redesa an opportunity to engage in such trade where, and only where, the public-interest requirements expressly indicated in that provision are satisfied.

14 The Commission replies that it is clear from Article 2(1)(e) and (i) of the 1984 Law that Redesa has exclusive import and export rights, even if those rights are not expressly mentioned. It also points out that the Kingdom of Spain has not cited a single example to show that there has been any international trade, as referred to in subparagraph (i), by undertakings other than Redesa.

15 However, the Commission's objection cannot be upheld.

16 The Commission alleges in its application that, by the combined provisions of the 1984 Law and the 1985 Royal Decree, the Kingdom of Spain has established a statutory monopoly on the import and export of electricity in favour of the Spanish State, which it exploits through Redesa.

17 However, the Commission, upon which, in an action to establish the failure of a Member State to fulfil its obligations under Article 169 of the Treaty, the burden of proof falls, has not demonstrated the existence of any Spanish legislative provisions that grant such exclusive rights to Redesa.

18 In the first place, as worded, the provisions relied on by the Commission entrust Redesa only with the unified operation of the national electricity system over the high-voltage networks. In the light of the preamble to the 1984 Law and the context in which it was adopted, as described by the Spanish Government without being contradicted by the Commission, that unified operation involves coordination of the activities by which the various electricity-generating and distribution undertakings contribute to the country's electricity supply rather than concentration thereof in the hands of a single operator.

19 It is not an argument to the contrary that Redesa is made responsible, by Article 2(1)(e) of the 1984 Law, for operating all international connection facilities, since such operation does not mean that undertakings other than Redesa cannot, for the purpose of importing and exporting electricity, have access to the transmission network managed by Redesa, including the international connection facilities.

20 Secondly, Article 2(1)(i) of the 1984 Law, in providing that, under certain conditions, Redesa is to allocate to each undertaking its share of international trade, necessarily implies that those undertakings may participate in such trade and does not restrict their freedom to do so where those conditions do not apply.

21 Finally, since the Commission's complaint relates only to the existence of a statutory monopoly on imports and exports of electricity, allegedly deriving from the legislation in issue, its argument that the Kingdom of Spain has not cited any instance of an undertaking other than Redesa actually importing or exporting electricity is irrelevant.

22 Accordingly, the Commission's action must be dismissed and it is unnecessary to examine the other pleas in law and arguments of the parties.

Costs

23 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they are applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, Member States and institutions which intervene are to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Commission of the European Communities to pay the costs;

3. Orders the United Kingdom of Great Britain and Northern Ireland, the French Republic and Ireland, as interveners, to bear their own costs.

Rodríguez Iglesias Gulmann Ragnemalm Wathelet

Mancini Moitinho de Almeida Kapteyn Murray

Edward Puissochet Hirsch Jann Sevón

Delivered in open court in Luxembourg on 23 October 1997.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President