ORDER OF THE PRESIDENT OF THE COURT
17 July 2001 *

In Case C-180/01 P-R,

Commission of the European Communities, represented by A. Whelan, acting as Agent, and J.E. Flynn, Barrister, with an address for service in Luxembourg,

appellant,

APPLICATION for suspension of operation of the judgment of the Court of First Instance of the European Communities (Second Chamber) of 7 February 2001 in Case T-89/98 *NALOO* v *Commission* [2001] ECR II-515,

the other parties to the proceedings being:

National Association of Licensed Opencast Operators (NALOO), established in Newcastle upon Tyne (United Kingdom), represented by M. Hoskins, Barrister, and A. Dowie, Solicitor, with an address for service in Luxembourg,

applicant at first instance,

* Language of the case: English.

British Coal Corporation, established in London (United Kingdom), represented by D. Vaughan QC, D. Lloyd Jones QC and C. Mehta, Solicitor,

International Power plc, formerly National Power plc, established in London, represented by D. Anderson QC, M. Chamberlain, Barrister, and S. Ramsay, Solicitor,

and

PowerGen (UK) plc, formerly PowerGen plc, established in London, represented by K.P.E. Lasok QC and N.P. Lomas, Solicitor,

interveners at first instance,

THE PRESIDENT OF THE COURT

after hearing Advocate General S. Alber,

makes the following

Order

1 By application lodged at the Registry of the Court of Justice on 23 April 2001, the Commission of the European Communities brought an appeal pursuant to Article 49 of the ECSC Statute of the Court of Justice against the judgment delivered by the Court of First Instance on 7 February 2001 in Case T-89/98

NALOO v *Commission* [2001] ECR II-515 ('the judgment under appeal'), by which the Court of First Instance annulled Decision IV/E-3/NALOO of the Commission of 27 April 1998 rejecting a complaint of the National Association of Licensed Opencast Operators ('NALOO') alleging that the Central Electricity Generating Board ('the CEGB') and British Coal Corporation ('British Coal') had applied discriminatory pricing and abusive royalties to coal extracted under licence.

2 By separate document lodged at the Court Registry on 22 May 2001, the Commission applied to the Court under Article 39 CS for suspension of the operation of the judgment under appeal in so far as it places the Commission under an obligation to investigate and reach a conclusion on the allegations, made by NALOO in its complaints of 29 March 1990 and 15 June 1994, of discriminatory pricing and excessive royalties applied to coal extracted under licence in the years 1986/87 to 1989/90.

3 NALOO lodged its written observations on the application for interim relief on 21 June 2001. British Coal, International Power plc ('International Power') and PowerGen (UK) plc ('PowerGen') lodged their written observations on 25 June 2001.

4 Since the parties' written submissions contain all the information necessary for deciding the application, there is no need to hear oral argument from the parties.

Background to the dispute

5 Prior to the privatisation of its activities by the Coal Industry Act 1994, British Coal owned, under the Coal Industry Nationalisation Act 1946, practically all

coal reserves in the United Kingdom and enjoyed the exclusive right to extract coal. It was, however, empowered to grant licences for the extraction of coal to private operators in return for payment of royalties fixed at a uniform rate.

6 By an arrangement concluded in May 1986 ('the 1986 Understanding'), the CEGB purchased 72 million tonnes of coal from British Coal during the year 1986/87 at an average delivered price of 172 pence per gigajoule at the pit-head.

7 Under the Electricity Act 1989, the CEGB was privatised on 1 April 1990 and its assets transferred primarily to National Power plc, now International Power, and PowerGen, two companies established for the purpose. Those companies also concluded coal supply contracts with British Coal, from 1 April 1990 ('the supply contracts').

8 In March 1990 British Coal reduced the royalty from £11 to £7 per tonne of coal extracted with effect from 1 April 1990.

9 In a complaint to the Commission dated 29 March 1990, supplemented, *inter alia*, on 27 June and 5 September 1990 ('the 1990 complaint'), NALOO maintained that, first, the 1986 Understanding and the supply contracts concluded between British Coal and the electricity generating undertakings and, second, the level of royalty applied by British Coal to operators extracting coal under licence were contrary to Article 63(1) and Article 66(7) of the ECSC Treaty.

10 By decision of 23 May 1991 ('the 1991 Decision') the Commission rejected the 1990 complaint in so far as it related to the situation from 1 April 1990. The action for annulment brought by NALOO against that decision was dismissed by judgment of the Court of First Instance of 24 September 1996 in Case T-57/91 *NALOO* v *Commission* [1996] ECR II-1019.

11 On a reference for a preliminary ruling from the High Court of Justice of England and Wales, Queen's Bench Division, before which an action for damages had been brought against British Coal by H.J. Banks & Company Limited, a private producer of coal under licence and NALOO member, the Court of Justice ruled, in its judgment of 13 April 1994 in Case C-128/92 *Banks* [1994] ECR I-1209, at paragraph 19, that Articles 4(d), 65 and 66(7) of the ECSC Treaty do not confer rights which individuals may rely on directly before national courts.

12 At paragraph 21 of that judgment the Court also ruled that, since the Commission has sole jurisdiction to find that Articles 65 and 66(7) of the Treaty have been infringed, the national courts may not entertain an action for damages in the absence of a Commission decision adopted in the exercise of that jurisdiction.

13 On a further reference for a preliminary ruling from the High Court, before which an action for damages had been brought against National Power plc and PowerGen by Barbara Hopkins and other producers of coal under licences, the Court of Justice ruled, in its judgment of 2 May 1996 in Case C-18/94 *Hopkins and Others* [1996] ECR I-2281, at paragraph 29, that Articles 4(b) and 63(1) of the Treaty do not create rights which individuals may rely on directly before national courts.

14 In particular, individuals cannot contend before national courts that discrimination systematically practised by purchasers is incompatible with Article 63(1) of

the Treaty as long as it has not been the subject of a recommendation addressed to the Governments concerned (*Hopkins*, paragraph 27).

15 By contrast, whenever the provisions of a recommendation based on Article 63(1) of the Treaty appear, as regards their subject-matter, to be unconditional and sufficiently precise, those provisions may be relied upon directly by individuals before the national courts on the same conditions as directives (*Hopkins*, paragraph 28).

16 In the light of those judgments in *Banks* and *Hopkins*, the High Court dismissed the actions for damages brought by H.J. Banks & Company Limited and Mrs Hopkins and Others.

17 It is apparent from the judgment under appeal that on 15 June 1994 NALOO, submitting that the relevant provisions of the Treaty did not have direct effect and relying on the Commission's exclusive jurisdiction, sent a complaint, described as a supplemental complaint ('the 1994 complaint'), to the Commission. By that complaint it requested the Commission to confirm that the prices and royalties for coal extracted under licence applied by the CEGB and British Coal respectively in breach of Article 63(1) of the Treaty and Articles 4(d), 65 and 66(7) of the Treaty between 1973 and 1 April 1990, a period which it subsequently confined to the financial years 1984/85 to 1989/90, were unlawful.

18 The Commission rejected the 1994 complaint by Decision IV/E-3/NALOO of 27 April 1998 ('the 1998 Decision'), which was notified to NALOO on 1 May 1998.

19 The Commission found, in substance, that:

— Articles 63(1) and 66(7) of the Treaty are prospective provisions, enabling the Commission to bring current infringements to an end for the future. Those provisions do not enable it to investigate a complaint lodged on 15 June 1994 relating to past infringements of the Treaty alleged to have been committed prior to 1 April 1990;

— Article 65 of the Treaty is not applicable to British Coal's unilateral fixing of allegedly unreasonable royalties;

— finally, even if the Commission could examine the 1994 complaint under Articles 4(d) and 66(7) of the Treaty and if Article 65 were applicable, NALOO had not supplied sufficient evidence of the existence of the alleged infringements. The indications provided by NALOO could not possibly be taken into consideration by the Commission as the starting point of an investigation, particularly in the light of the judgment of the Court of First Instance in Case T-57/91.

The judgment under appeal

20 The Court of First Instance found first of all, at paragraph 52 of the judgment under appeal, that the Commission had to be considered, as regards the infringements alleged by NALOO for the years 1986/87 to 1989/90, to have received a single complaint, the 1994 complaint being merely an expansion of that of 1990.

21 The Court observed, at paragraph 58 of the judgment under appeal, that the Commission understood 'existing infringements' of Articles 63(1) and 66(7) of the Treaty to mean infringements still occurring on the date on which the complaint against them is lodged. Since the initial part of NALOO's complaint was lodged in 1990 and the supplemental complaint, lodged in 1994, merely amplified the former, the Court deduced, at paragraph 59 of the judgment under appeal, that the Commission, on its own analysis, was notified of existing infringements.

22 The Court held furthermore, at paragraphs 61 and 63 of the judgment under appeal, that it followed from paragraph 19 of *Hopkins*, cited above, and the principle of effective judicial protection that the combined provisions of Articles 4(b) and 63(1) of the Treaty, on the one hand, and of Articles 4(d) and 66(7) of the Treaty, on the other, empowered the Commission in any event to consider both portions of NALOO's complaint requesting the Commission to find that the electricity generating undertakings and British Coal had applied discriminatory pricing and unreasonable levels of royalty respectively with regard to coal extracted under licence in the years 1986/87 to 1989/90.

23 At paragraph 64 of the judgment under appeal, the Court concluded that Articles 63 and 66(7) of the Treaty conferred on the Commission power to investigate NALOO's complaint in so far as it raised infringements of those articles alleged to have been committed during the years 1986/87 to 1989/90.

24 The Court also held, at paragraph 76 of the judgment under appeal, that the principle of legal certainty did not preclude investigation of NALOO's complaint as regards the years 1986/87 to 1989/90.

25 The Court ruled, at paragraphs 80 and 82 of the judgment under appeal, that, in order to assess the legality of the 1998 decision, it was unnecessary to rule on the

question whether the Commission was empowered to adopt measures other than recommendations, on the legal effects in national law of recommendations, or on the applicability of Article 65 of the Treaty to the royalties at issue.

26 As to the Commission's obligation to investigate NALOO's complaint, the Court noted, at paragraph 85 of the judgment under appeal, that the Commission has sole jurisdiction to consider 'alleged' infringements and concluded therefrom that, since the Commission had power, in this instance, to consider NALOO's complaint relating to the infringements alleged to have occurred in the years 1986/87 to 1989/90, it was bound to undertake that examination.

27 The 1998 decision, in which NALOO's complaint was examined in the alternative, was finally annulled for failure to state reasons as regards both the response to the part of the complaint raising discriminatory pricing (paragraphs 103 to 115 of the judgment under appeal) and the response to the part raising unreasonable royalties (paragraphs 116 to 124 of the judgment under appeal).

The application for interim relief

Arguments of the parties

28 To establish a prima facie case for its application for interim relief, the Commission contends that the finding, in the judgment under appeal, that it is obliged to examine any complaint made to it is inconsistent with the case-law of the Court of Justice and the Court of First Instance and, moreover, that the judgment under appeal gives no reasoning in this respect.

29 Relying on *Hopkins*, cited above, the Commission submits that it was not, in any event, competent to take action in respect of allegations of past infringements unless it was necessary to do so for the effective future application of Article 4(b) of the Treaty read with Article 63(1) thereof or Article 4(d) read with Article 66(7), which was not the case here.

30 Commission competence cannot be founded on the formal criterion of whether an alleged infringement was still current when the complaint raising it was made. Thus, the fact that the alleged infringement raised in the 1990 complaint persisted for a further two days after that complaint was lodged, coming to an end on 1 April 1990, cannot be of decisive importance. In any event, the Commission contests the finding of the Court of First Instance that the 1994 complaint merely supplemented the 1990 complaint.

31 The Commission also alleges that the Court of First Instance failed to address pleas raised by it and the interveners concerning the scope of the Commission's powers, leaving the Commission uncertain as to the nature or effect of the action that it should take if NALOO's complaint were to be upheld.

32 With regard to urgency, the Commission, which points out that it considers itself not competent to deal with NALOO's complaint, submits that, should it issue a recommendation in the circumstances of the case, it would be acting beyond its powers under the Treaty. It is clear from the Court's settled case-law (orders in Cases 31/77 R and 53/77 R *Commission* v *United Kingdom* [1977] ECR 921, paragraphs 17 and 20, and in Joined Cases C-239/96 R and C-240/96 R *United Kingdom* v *Commission* [1996] ECR I-4475, paragraph 69) that the rules allocating powers as between the Community institutions and as between those institutions and the Member States are of such importance that a manifest breach

of them could in itself constitute irreparable harm justifying the application of the Treaty rules on interim measures.

33 According to the Commission, the circumstances of the case make such interference with the division of powers all the more certain. First, the Commission would have to consider making use of the compulsory powers available to it in order to investigate NALOO's complaint and to carry out the necessary verification and, in so doing, adopt measures lacking any legal basis in the Treaty, action which would adversely affect the legal interests of the persons concerned and, what is more, irreparably harm the legal order. Second, if the Commission were to adopt a recommendation on the basis laid down by the judgment under appeal, it is highly likely that actions for damages would immediately be brought in the national courts against British Coal, International Power and PowerGen. The possibility of proceedings being brought in the courts of a Member State on the basis of measures illegally adopted by a Community institution entails the risk of harm, which is by nature irreparable, to the allocation of powers as between the Community and the Member States.

34 The Commission also submits that it would itself suffer serious and irreparable harm to the functioning of its services. Given that the matters alleged lie in the past and that the statistical information supplied by NALOO is unreliable, consideration of NALOO's complaint raises difficulties as regards both identifying the persons concerned and obtaining reliable figures. The Commission's human and financial resources are finite and limited; those used for investigating NALOO's complaint would be unavailable for other work, which is, in the Commission's assessment, of higher priority and more pressing. Financial resources used in pursuing the complaint would be lost for good.

35 The primary submission of International Power and British Coal is that, even if operation of the judgment under appeal were not suspended, the Commission

would not be obliged to consider NALOO's complaint as regards the period from 1986/87 to 1989/90 before the appeal has been considered. Given the lack of clarity of the judgment under appeal, the fact that the complaint concerns events which occurred before 1990, and that NALOO is seeking to obtain a decision in order to bring proceedings for damages before the national courts, it would not be contrary to the obligation to comply with the judgment under appeal within a reasonable time to wait until the Court has decided the appeal.

36 As regards urgency, PowerGen, together with International Power and British Coal in secondary submissions, essentially support the Commission's arguments.

37 International Power also contends that the condition relating to urgency must be applied with particular flexibility when the obligation whose suspension is sought is not definitive, does not have immediate binding force but falls to be performed only 'within a reasonable time', and concerns only one person, which means that it is not general in nature. That is the case here with the obligation to take the necessary steps to comply with the judgment under appeal, an obligation which concerns only the Commission.

38 British Coal maintains that the judgment under appeal has created great uncertainty as to the steps which the Commission may take. If the Commission were to examine NALOO's complaint, the judgment to be delivered on the appeal would have no effect. British Coal adds that its cooperation with the Commission in connection with examination of the complaint would be futile and cause it a significant waste of resources.

39 PowerGen observes that the Commission's consideration of NALOO's complaint would probably be completed before the Court delivered its judgment. That complaint would give rise to a complex investigation because the Commission would have to reconstruct the situation in the market between 1986 and 1990.

Nor are there any clear indications as to the type of measure the Commission should adopt. In the present case the harm that would be caused to the Commission and PowerGen could not be the subject of financial compensation, a fact which would give rise to an almost hopelessly involved situation, recognised as a form of irreparable damage in the order in Joined Cases 42/59 TO and 49/59 TO *Breedband* v *High Authority and Others* [1962] ECR 167, at 169.

40 NALOO, on the other hand, contends that the application should be dismissed. It submits that the harm pleaded would arise only if the Commission completed the investigation of its complaint and issued a recommendation before the Court gave judgment on the appeal. However, the Commission does not suggest that completion of the procedure is imminent, but on the contrary pleads the complexity of investigating the complaint. Since the Commission took four years to deal with the 1994 complaint, there is no reason to suppose that the end of the procedure is close.

41 As regards the powers of investigation conferred on the Commission by Article 47 of the ECSC Treaty, the Commission merely indicates that it envisages the possibility of making use of them. Any use of those powers would not be illegitimate, even if the Court ultimately set aside the judgment under appeal, because the obligation to investigate the complaint flows directly from the judgment under appeal.

42 NALOO observes with regard to the prejudice which would be caused to the interests of the other undertakings that any information obtained by the Commission could be used only for the purpose of investigating NALOO's complaint and that the Commission is bound by the obligation of professional secrecy.

43 As for harm caused to the working of the Commission, NALOO states that there is no basis to suggest that the Commission would be unable to fulfil its other duties as a result of examining NALOO's complaint.

Findings

44 First, the parties disagree as to the conclusions which the Commission must draw from the judgment under appeal, in particular as to the steps which it must take in order to comply with the judgment within a reasonable time.

45 However, it is not for the court hearing an application for interim relief to specify detailed methods for giving effect to a judgment of the Court of First Instance against which an appeal has been brought (Case C-254/95 P-R *Parliament* v *Innamorati* [1995] ECR I-2707, paragraph 18).

46 In accordance with Article 53 of the ECSC Statute of the Court of Justice, an appeal against a judgment of the Court of First Instance does not generally have suspensory effect. However, under the second paragraph of Article 39 CS the Court of Justice may, if it considers that circumstances so require, order that application of the judgment under appeal be suspended.

47 It follows from Article 83(2) of the Rules of Procedure that suspension may be granted under the second paragraph of Article 39 CS only if there are circumstances giving rise to urgency and pleas of fact and law establishing a prima facie case for such relief are put forward.

48 It should be examined whether those conditions are satisfied in the present case.

49 As regards whether pleas establishing a prima facie case for suspending the operation of the judgment under appeal have been put forward, suffice it to state

that the appeal brought against it raises fundamental questions concerning the powers of the Commission in the context of applying the competition law provisions in the ECSC Treaty, the answer to which does not emerge clearly from the Court's case-law.

50 NALOO indeed acknowledges that the pleas set out by the Commission in its appeal are not entirely without substance.

51 Accordingly, the application for interim relief cannot be dismissed on that ground.

52 As regards the condition relating to urgency, it is to be remembered that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice (see, in particular, the orders in Case 27/68 R *Renckens* v *Commission* [1969] ECR 274, at 276, in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 46, and in Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441, paragraph 36). For the purpose of attaining that objective, urgency must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim relief (see, to that effect, the order in Case C-65/99 P(R) *Willeme* v *Commission* [1999] ECR I-1857, paragraph 62).

53 It is for the party claiming serious and irreparable damage to establish its existence (see, to that effect, the order in Case C-329/99 P(R) *Pfizer Animal Health* v *Council* [1999] ECR I-8343, paragraph 75). While it is not necessary for it to be absolutely certain that the damage will occur, a sufficient degree of probability being enough, the applicant is none the less required to prove the facts which are considered to found the prospect of such damage.

54 In the present case, it is clear that the Commission has not in any way established that suspending operation of the judgment under appeal would be necessary for the full effectiveness of the definitive future decision given on appeal. In particular, the Commission has not shown that the damage pleaded would not be purely hypothetical, that it is sufficiently serious in qualitative or quantitative terms, or that it would be irreparable.

55 So far as concerns prejudice to the interests of the undertakings which would be subject to the measures adopted by the Commission if it were to investigate NALOO's complaint, it should be pointed out, first, that the pursuit of administrative proceedings relating to the application of competition law, organised with a view to permitting undertakings to make known their point of view and to enlighten the Commission, does not involve any obligation for the undertakings other than that of participating, with a view to the defence of their rights, in that procedure. That obligation is not of such a nature as to cause them, either as regards their legal position or as regards their interests, serious and irreparable damage of such a kind as to justify the relief sought (see the order in Joined Cases 60/81 R and 190/81 R *IBM* v *Commission* [1981] ECR 1857, paragraph 10).

56 In addition, the use of the powers of investigation, referred to by the Commission, remains a mere possibility and the difficulties which the Commission could encounter in examining NALOO's complaint depend on the extent of cooperation from the operators concerned, which is still uncertain at this stage.

57 Next, as to the risk that NALOO would bring legal proceedings following the adoption of measures by the Commission, it must be stated that the mere commencement of an action for damages does not appear capable of causing serious and irreparable harm. Furthermore, the commencement of such an action remains at present purely hypothetical. That possibility is dependent on the prior adoption of a positive final decision at the end of a procedure which, according to the Commission, is very complex and whose conclusion does not appear to be imminent in the light of the evidence adduced in the present proceedings for interim relief.

58 Finally, general assertions concerning the practical or administrative difficulties which immediate compliance with the judgment under appeal would create for the working of the Commission cannot form the basis for suspension of the operation of that judgment.

59 It follows from the foregoing considerations that the urgency of the application for suspension of the operation of the judgment under appeal has not been established and that the application must therefore be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. **The application for interim relief is dismissed.**

2. **Costs are reserved.**

Luxembourg, 17 July 2001.

R. Grass — G.C. Rodríguez Iglesias

Registrar — President