JUDGMENT OF THE COURT (Sixth Chamber)

10 January 2002 *

In Case C-480/99 P,

Gerry Plant and Others, represented by B. Hewson, Barrister, instructed by T. Graham, Solicitor, with an address for service in Luxembourg,

appellants,

APPEAL against the order of the Court of First Instance of the European Communities (Second Chamber) of 29 September 1999 in Joined Cases T-148/98 and T-162/98 *Evans and Others* v *Commission* [1999] ECR II-2837, seeking to have that order set aside,

the other parties to the proceedings being:

Commission of the European Communities, represented by M. Erhart and B. Doherty, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

and

* Language of the case: English.

South Wales Small Mines Association, an association governed by English law, established in Fochriw, Near Bargoed (United Kingdom), represented by T. Sharpe QC, and M. Brealey, Barrister, instructed by S. Llewellyn Jones, Solicitor, with an address for service in Luxembourg,

applicant at first instance,

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann, J.-P. Puissochet (Rapporteur), R. Schintgen and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 26 June 2001,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 20 December 1999, Mr Plant and 16 other appellants brought an appeal pursuant to Article 49 of the ECSC Statute of the Court of Justice against the order of the Court of First Instance of 29 September 1999 in Joined Cases T-148/98 and T-162/98 *Evans and Others* v *Commission* [1999] ECR II-2837 ('the order under appeal'), by which the Court of First Instance dismissed as inadmissible their action for annulment of Commission Decision No 15656 of 30 July 1998 refusing to act upon a complaint lodged by an association of coal producers concerning alleged discriminatory pricing practices ('the contested decision').

Background and procedure before the Court of First Instance

2 The section of the order under appeal headed 'Facts and procedure' states in particular:

'1 The South Wales Small Mines Association (hereinafter "SWSMA") is an unincorporated association under English law founded to represent the interests of small coal producers in South Wales.

2 Some of those small producers collectively submitted to the Commission a complaint dated 5 June 1990 in SWSMA's name concerning the alleged application of discriminatory business terms contrary to the relevant provisions of the ECSC Treaty.

3 By Decision No 15656 (hereinafter "the Decision"), which was contained in a letter of 30 July 1998, the Commission stated that it would not be acting on the complaint.

4 On 5 August 1998, the letter of 30 July 1998 containing the Decision was notified to SWSMA by registered post with form of acknowledgement of receipt.

5 By letter of 18 August 1998, confirmed on 26 August 1998, a number of small producers requested the Commission to notify them formally of the Decision, which the Commission, by letter of 24 August 1998, declined to do.

6 After learning on 16 September 1998 that SWSMA had not challenged the Decision within the prescribed time-limit, those producers, by application lodged at the Registry of the Court on 21 September 1998 (Case T-148/98), brought an action against the Commission under the second paragraph of Article 33 and Article 35 of the ECSC Treaty. The applicants stated at paragraph 2 of their application: "A copy of the Decision is annexed at Appendix 1 to this Application".

7 By application lodged at the Registry of the Court on 6 October 1998, SWSMA brought an action under the second paragraph of Article 33 of the ECSC Treaty for annulment of the Decision (Case T-162/98).

8 Pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance, the Commission raised an objection of inadmissibility in both cases by documents lodged on 23 November (Case T-162/98) and 14 December 1998 (Case T-148/98).'

3 Since the objection to admissibility raised vis-à-vis the applicants in Case T-148/98 (who appeared as former members of SWSMA) was founded on their alleged failure to comply with the time-limit for bringing an appeal prescribed by the third paragraph of Article 33 of the ECSC Treaty, the Court of First Instance, by letter from the Registry of 28 April 1999, questioned the applicants about the circumstances in which they had learned of the contested decision. The applicants replied by letter received at the Court Registry on 1 June 1999.

4 The following points are apparent from the findings of fact made by the Court of First Instance on the basis of the documents before it in the two cases.

5 The contested decision was notified to SWSMA at the only address with which it had provided the Commission. The letter containing the decision was delivered to Mr Bernard John Llewellyn, who had been secretary of SWSMA at the time when the complaint was lodged. He stated in an affidavit that he did not take any further action following receipt of the decision and, in particular, did not pass it on to SWSMA's legal adviser, Ms Sarah Llewellyn Jones of the firm of solicitors, T. Llewellyn Jones, relying on the fact that the decision was marked 'cc. T. Llewellyn'. Mr Bernard John Llewellyn thought that, since they had received a copy of the decision, SWSMA's advisers would take the appropriate action. In fact, according to SWSMA, its advisers did not receive a copy of the decision from the Commission and learned of it only on 8 September 1998.

6 Mr Mostyn Jones, one of the applicants in Case T-148/98, stated that he was given a copy of the decision by a third party on 10 August 1998. He stated, in response to the questions put by the Court of First Instance in the letter from the Registry of 28 April 1999, that he could not recall either the exact circumstances

in which he received the copy or the identity of the third party but that he thought that it was one of the persons represented by Sarah Llewellyn Jones.

7 By letters of 25 June 1999, the Registrar of the Court of First Instance asked the parties in Cases T-148/98 and T-162/98 to submit observations on the possibility of the two cases being joined for the purposes of the written and oral procedure and judgment. In those letters, the parties were invited to state whether, in the event of the two cases being joined, they would request confidential treatment in respect of parts of their pleadings or other documents produced to the Court.

8 Only the Commission replied within the prescribed period and did so by letters received at the Registry on 3 July 1999, indicating that it had no observations on the possibility of the cases being joined for the purposes of the written and oral procedure and judgment and that it would not be requesting confidential treatment.

9 PowerGen UK plc, National Power plc and British Coal Corporation applied for leave to intervene in both cases in support of the form of order sought by the Commission.

10 By letter lodged on 25 June 1999, an application for legal aid was made under Article 94 of the Rules of Procedure of the Court of First Instance on behalf of some of the applicants in Case T-148/98.

The order under appeal

11 By the order under appeal, the Court of First Instance:

— joined Cases T-148/98 and T-162/98, pursuant to Article 50 of its Rules of Procedure;

— ruled on the objections to admissibility raised by the Commission without a hearing on the substance of the case and without an oral procedure, pursuant to Article 114 of its Rules of Procedure;

— dismissed both actions as inadmissible.

The Court of First Instance also stated that it was unnecessary to rule on either the application for legal aid or the applications for leave to intervene.

12 In reaching its finding that the two actions before it were inadmissible, the Court of First Instance reasoned as follows:

'29 It must first of all be observed that it is settled case-law that the period prescribed for bringing an action for annulment is mandatory and is not subject to the discretion of the parties or the Court, since it was established in

order to ensure that legal positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice (Joined Cases T-121/96 and T-151/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1355, paragraph 38).

Case T-162/98

30 It is common ground that the Decision was duly notified to the applicant and that the applicant did not bring its action until after the expiry of the period prescribed for doing so.

31 The excusable error relied on by the applicant in order to obtain an extension of a mandatory time-limit for bringing an action concerns only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of the party concerned (Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 26).

32 It is clear from the combined provisions of the third paragraph of Article 33 and the second paragraph of Article 15 of the ECSC Treaty that the period prescribed for bringing an action for annulment begins to run from the time when the individual decision under challenge is notified to the undertaking or association of undertakings to which it is addressed.

33 Since the Decision was duly notified to the applicant, it was for the applicant to contact its advisers in order to agree with them on the steps to be taken in response to the Decision and to exercise its right of action within the period prescribed for that purpose.

34 Even if, as the applicant claims, its solicitors did not receive a copy of the Decision from the Commission, the risk of an oversight, or that a letter sent by ordinary post might be lost, should have prompted the applicant to give them appropriate instructions without delay for the defence of its interests.

35 In relying entirely on the initiative of its solicitors, the applicant therefore did not conduct itself in the manner of a reasonably diligent party.

36 In those circumstances, the fact that the Decision bears the indorsement "cc: T. Llewellyn Jones" cannot constitute an exceptional circumstance such as to render the applicant's error excusable.

37 It follows that the applicant's arguments must be rejected as unfounded and the action in Case T-162/98 dismissed as inadmissible.

Case T-148/98

...

40 Should it be the case that the one-month period for bringing an action laid down by the third paragraph of Article 33 of the ECSC Treaty, plus the ten-day extension of time on account of distance, must be calculated from 10 August 1998, the date on which one of the applicants is said to have received a copy of the Decision from a third party, that period would have expired on 20 September 1998. As that date fell on a Sunday, the expiry of

the period would, under the first subparagraph of Article 101(2) of the Rules of Procedure, have been postponed until midnight on Monday 21 September 1998. The action, which was brought by application lodged on 21 September 1998, would therefore have been brought on the last day of the prescribed period.

41 However, a party may only put forward, in support of its claims, facts which are sufficiently specific and detailed for the Court to regard them, at the very least, as credible and to enable the opposing party to contest them in an effective manner and, if appropriate, to submit evidence in rebuttal. That requirement as to the facts to be adduced, which relates to matters known only to the applicants, ensures that the Court does not come to rule on circumstances which are purely theoretical or are contrived solely for the purposes of the action.

42 The Court first of all requested the applicants to identify the third party through whom one of them allegedly received a copy of the Decision; secondly, to identify the applicant in question; and thirdly, and finally, to describe the exact circumstances in which it came to be received, and exactly how the Decision became known to the other applicants.

43 The applicants gave the following replies to those questions:

1. "The Applicant Mr Mostyn Jones he (sic) cannot recall who the third party was, he thinks he obtained it from one of the persons who Sarah Llewellyn Jones represents."

2. "Mr Mostyn Jones."

3. "The Applicant Mr Jones cannot recall the exact circumstances. The Other Applicants became aware of it by Mr Jones informing some of them of the decision and the Applicants communicating directly with one another."

44 Given that the Commission notified the Decision only to SWSMA and that the Decision was not even sent to SWSMA's solicitors, who did not learn of it until 8 September 1998, it seems unlikely that, as has been asserted, one of the applicants received a copy of the Decision on 10 August 1998 from an unidentified third party.

45 The answers given to the questions put by the Court make that lack of credibility only more apparent. What emerges from the laconic and evasive terms in which those answers are couched is that, whilst Mr Mostyn Jones remembers the exact date on which he received a copy of the Decision, that date being the alleged starting point of the period prescribed for bringing the action, he has forgotten both the identity of the person from whom, and the circumstances in which, he received it.

46 The only piece of information provided by Mr Mostyn Jones is that he thinks he obtained the document from one of the persons represented by Sarah Llewellyn Jones, SWSMA's adviser. That, however, runs counter to the statements of Bernard John Llewellyn, who says that he took no further action following the receipt by him of the letter containing the Decision, and

to the fact that the Decision did not come to the attention of SWSMA's solicitors until 8 September 1998.

47 It follows that the applicants have been unable to make out a sufficiently detailed and convincing case for their claim that the starting point of the period prescribed for initiating proceedings was such as to enable the Court to hold that their action was brought in time.

48 It necessarily follows that the action in Case T-148/98 must be held to have been brought out of time.

49 That action must therefore be dismissed as inadmissible and there is no need to consider the other pleas raised by the Commission in support of its objection of inadmissibility or to rule on the application for legal aid or the applications for leave to intervene.'

The appeal

Forms of order sought in the appeal

13 The appellants claim that the Court should:

— set aside the order under appeal in so far as it relates to Case T-148/98;

— declare that the application for annulment is admissible and that the Court of First Instance should adjudicate on the substance of the case;

— in the alternative, refer the issue of admissibility back to a freshly constituted Court of First Instance, the appellants first being afforded the opportunity to take cognisance of, and to comment on, all the evidence adduced, or observations filed, by SWSMA;

— order the Commission to pay the costs of the appeal and the application before the Court of First Instance.

14 The Commission contends that the Court should:

— declare that the appeal is inadmissible;

— alternatively, dismiss the appeal as unfounded;

— order the appellants to pay the costs.

15 SWSMA did not lodge a response.

The grounds of appeal

16 In support of their appeal, the appellants put forward three pleas in law alleging (i) that the Court of First Instance made an error of law, (ii) that it acted in breach of the rights of the defence and (iii) that the clear sense of the evidence produced before it was distorted.

17 As regards specifically their second ground of appeal, the appellants maintain that the Court of First Instance, in holding their application to be out of time, attached great importance to what it regarded as a conflict between the evidence that they had adduced and that produced by SWSMA. Thus, in holding that the appellants' claim to have learned of the contested decision as early as 10 August 1998 lacked credibility, the Court relied heavily on Mr Bernard John Llewellyn's affidavit and on the statements made by the solicitors T. Llewellyn Jones, according to which the latter only learned of the contested decision on 8 September 1998. The appellants did not have an opportunity to consider, or to comment on, the evidence put forward by SWSMA in Case T-162/98. No opportunity was afforded to them after that case was joined with their own case and before the Court made the order under appeal. They claim that the parties must be given an opportunity to take cognisance of, and to comment on, all evidence and observations submitted and that this is an elementary principle of natural justice and is inherent in the right to adversarial proceedings. They refer in that regard to the judgment of the European Court of Human Rights of 20 February 1996 in Vermeulen v Belgium, *Reports of Judgments and Decisions* 1996-I, p. 224 and to the judgment of the Court of Justice in Joined Cases 42/59 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53, at 84. The appellants state that they could have shown, had they been given the chance to do so, when they instructed their solicitors to take legal action, and produce in that regard, as an annex to their appeal, a copy of a fax of the contested decision which, in particular, bears the date 11 August 1998 in the fax reception report.

Admissibility of the appeal

The Commission's arguments

18 In its response to the appeal, the Commission contends *in limine* that the whole of the appeal is inadmissible. The Court of First Instance dismissed the action as inadmissible because it was not brought in time and did so on the basis of a purely factual analysis. Having asked the appellants certain direct questions, the Court of First Instance rejected their assertion that one of them had been in possession of the contested decision on 10 August 1998, as they claimed. That finding does not amount — save in a case in which the clear sense of the evidence has been distorted — to a question of law subject, as such, to review by the Court of Justice. The Commission points out that, pursuant to Article 32d(1) of the ECSC Treaty and Article 51 of the ECSC Statute of the Court of Justice, an appeal lies on points of law only. The Commission refers in that regard to Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraphs 10 and 42; Case C-143/95 P *Commission* v *Socurte and Others* [1997] ECR I-1, paragraph 36; and the order in Case C-55/97 P *AIUFFASS and AKT* v *Commission* [1997] ECR I-5383, paragraph 25. In particular, the ground of appeal claiming that the rights of the defence were not respected — in so far as the Court of First Instance based itself on factual evidence provided by SWSMA on which the appellants were not able to comment — is inadmissible, since it amounts to a request for re-examination of the facts. Furthermore, while an appeal may be confined to alleging, *inter alia*, a breach of procedure adversely affecting the interests of the appellant, the appeal does not show how the appellants' interests have been prejudiced by any breach of procedure.

Findings of the Court

19 Under Article 51 of the ECSC Statute of the Court of Justice an appeal may lie, *inter alia*, on the grounds of a breach of procedure before the Court of First Instance, which adversely affects the interests of the appellant.

20 The ground of appeal concerning a breach of the rights of defence is therefore admissible. Contrary to the Commission's submission, the question whether the Court of First Instance could found its dismissal of the appellants' action on factual evidence on which the appellants had not been heard is a question of law. Furthermore, examination of the extent to which such evidence actually formed the basis for the dismissal of the action by the order under appeal is a matter which falls within the power of review vested in the Court of Justice in the context of an appeal. That examination is directed to the procedure followed before the Court of First Instance and is not a re-examination of the facts relating to the substance of the case. Whether any breach of procedure has adversely affected the interests of the appellants is an issue that must be addressed in the context of the examination of the substance, and not the admissibility, of the appeal.

Substance of the appeal

The Commission's arguments

21 In response to the arguments referred to in paragraph 17 of this judgment, which seek to establish that the rights of defence were violated, the Commission contends that the appellants had every interest in showing that they had not obtained a copy of the contested decision before 10 August 1998 but that their replies to the Court of First Instance's questions on this point were laconic and evasive, and it refers in that regard to paragraph 45 of the order under appeal. Essentially, the Commission contends that the appellants themselves are responsible for the failure to establish that 10 August 1998 was the date on which they learned of the decision and that in the appeal they have still not put forward the persuasive evidence which, they complain, the Court of First Instance failed to afford them the opportunity to provide. The Commission submits that the fax bearing a reception date of 11 August 1998, produced in an annex to the appeal, is a document of little probative value. Even if the fax were to be regarded as proof of the fact that the appellants had the document on 11 August 1998 and even if they could give a credible explanation of why they did not produce it before the Court of First Instance, it would not prove that they learned of the contested decision only on 10 August.

22 In support of its contention that the appellants' interests have not been prejudiced, the Commission points out that the Court of Justice held in a competition case that the fact that the Commission had included in a decision relating to certain undertakings facts which had not come to those undertakings' notice, did not affect the validity of the decision as a whole, since those facts related to matters which were of purely secondary importance in relation to the infringements which the decision found had been committed. The Commission adds that the Court nevertheless made clear that, in such a situation, it had itself to disregard the said facts when considering the substantive validity of the decision in question (Joined Cases 100/80 to 103/80 *Musique Diffusion française* v *Commission* [1983] ECR 1825, paragraph 30).

23 In that regard, the Commission submits that the order under appeal makes it very clear that the Court of First Instance would have reached the same conclusion with regard to the admissibility of the action even if the appellants had been afforded the opportunity to make observations on the evidence put before it, in particular on Mr Bernard John Llewellyn's affidavit. It is clear from paragraph 45 of the order under appeal that, on the basis of the appellants' statements alone, the Court of First Instance reached the conclusion that the date on which the appellants alleged that they had learned of the contested decision was not credible. The information gleaned from the documents submitted by SWSMA served merely as corroboration but was in no way crucial or essential.

Findings of the Court

24 As the appellants rightly point out and as the Court made clear in *SNUPAT* v *High Authority*, cited above, it would infringe a fundamental principle of law to base a judicial decision on facts or documents of which the parties, or one of them, have not been able to take cognisance and in relation to which they have not therefore been able to state their views.

25 It is therefore appropriate to consider whether, as the appellants claim, the Court of First Instance based its decision on facts or documents of which they had not been able to take cognisance.

26 In that connection, the appellants refer to the statements of Mr Bernard John Llewellyn, mentioned in paragraph 46 of the order under appeal, according to which he took no further action on receipt of the contested decision. They also refer to SWSMA's statements, referred to in paragraphs 44 and 46 of the order under appeal, to the effect that the decision only came to the attention of its advisers on 8 September 1998.

27 It must be pointed out that that was actually the evidence on which the Court of First Instance based both its finding that the appellants had failed to establish that they had received a copy of the Commission's decision on 10 August 1998 and its finding that their action was brought out of time.

28 In paragraph 44 of the order under appeal, the Court of First Instance thus noted that the contested decision had not even been sent to SWSMA's solicitors, who did not learn of it until 8 September 1998, and went on to hold, on that basis, that the assertion that one of the applicants had received a copy of the decision on 10 August 1998 from an unidentified third party lacked credibility. In paragraph 46 of the order under appeal, the Court of First Instance refused to accept that Mr Mostyn Jones' statements that he had received a copy of the document from one of the persons represented by Sarah Llewellyn Jones had any probative value, and held that that version of events ran counter to the statements of Bernard John Llewellyn, who said that he had taken no further action following receipt of the contested decision, and to the fact that the latter did not come to the attention of SWSMA's solicitors until 8 September 1998.

29 It is not disputed that, in the course of the proceedings before the Court of First Instance, neither Mr Bernard John Llewellyn's affidavit nor SWSMA's statement

that its solicitors learned of the contested decision only on 8 September 1998 were disclosed to the appellants.

30 In fact, the only documents disclosed to the appellants during the proceedings were (i) the Commission's pleading raising an objection to admissibility and requesting the Court of First Instance to give a decision on that issue without adjudicating on the substance of the case, in accordance with Article 114(1) of the Rules of Procedure of the Court of First Instance, and (ii) the questions asked by the Court of First Instance and referred to in paragraph 3 of this judgment.

31 Neither of those documents, exchanged in Case T-148/98, mentions Mr Bernard John Llewellyn's affidavit nor SWSMA's statement concerning the date on which its solicitors learned of the contested decision.

32 Furthermore, there is nothing in the written observations produced by the appellants in response to the objection to admissibility raised by the Commission to indicate that they had become aware of the evidence mentioned in the preceding paragraph by any other means.

33 Mr Llewellyn's statements and the evidence concerning SWSMA's statement were among the documents in Case T-162/98. However, they were not disclosed to the applicants in Case T-148/98 and, *a fortiori*, could not be challenged by them in the written or oral procedure, since the two cases were joined purely for the purposes of the order under appeal, which was made without an oral procedure pursuant to Article 111 of the Rules of Procedure of the Court of First Instance.

34 As a result, since it was on the basis of the evidence mentioned in paragraph 29 of this judgment that the Court of First Instance dismissed the action brought by the applicants in Case T-148/98 as inadmissible, it committed a breach of procedure, which adversely affected the interests of the appellants in the sense contemplated in Article 51 of the ECSC Statute of the Court of Justice.

Admissibility of the action before the Court of First Instance

35 The state of the proceedings is such that a decision may be given on the objection to admissibility raised by the Commission. Specifically, in the course of both the proceedings in Case T-148/98 and in these proceedings, the parties have had the opportunity to debate the evidence put forward by the Commission in both actions in support of the objection raised by it. In the present case, the Court is of the view that it is appropriate to re-examine forthwith the admissibility of the action brought by the appellants before the Court of First Instance.

Arguments of the parties

36 In its objection to admissibility in respect of Case T-148/98, the Commission argued that the appellants were not concerned by the contested decision and that, consequently, they did not meet the conditions for bringing proceedings under Article 33 of the ECSC Treaty. It submitted that only SWSMA, which made the complaint, was concerned by the decision and that the appellants could, at most, be concerned only by a decision given in response to a complaint which they themselves had lodged. The fact that the appellants might be concerned by the conduct forming the subject-matter of the complaint did not mean that they were concerned by the decision not to act upon the complaint, since they could themselves have lodged a complaint. The Court of Justice has, furthermore, held

in Case C-70/97 P *Kruidvat* v *Commission* [1998] ECR I-7183 that the fact that an association may be directly and individually concerned by a decision does not mean that its members are also directly and individually concerned.

37 In addition, the Commission invited the Court of First Instance to consider whether all the appellants constituted undertakings within the meaning of Article 80 of the ECSC Treaty. If they did not, their action would in any event be inadmissible. In that regard, the Commission maintained that the appellants had not adduced any evidence to show that they were still engaged in coal production and submitted that, in order to be considered to be an undertaking for the purposes of Article 80 of the ECSC Treaty, an applicant would have to be engaged in that activity at the time when it instituted proceedings.

38 Furthermore, the Commission contended that the proceedings had been brought out of time for the purposes of Article 33 of the ECSC Treaty, since such proceedings must be brought within one month of the date of notification of the measure which is challenged. The Commission, pointing out that the application had been made after the expiry of the period prescribed for bringing proceedings, as calculated from the date on which SWSMA was notified of the contested decision, explained that if time started to run against each member of an association only from the time when it is established that the member personally learned of the decision, the time-limit for bringing proceedings could be very easily circumvented, which would lead to an unacceptable degree of legal uncertainty.

39 As regards their *locus standi*, the appellants submitted that they were originally members of SWSMA, an unincorporated association. It was used merely as a collective name for small coal producers to facilitate certain actions in common and for, *inter alia*, the submission and processing of the complaint made to the Commission in 1990. However, they had always had a direct personal interest in the outcome of the complaint thus lodged: the practices described in the complaint concerned each of them directly. The fact that SWSMA had for all practical purposes ceased to function and that they had left the association merely

gave them a greater interest in taking action with regard to a decision concerning them directly. They tried on several occasions, through their legal adviser, to participate in the investigation of the complaint but the Commission refused to regard them as interlocutors. The appellants also added that, as regards *locus standi*, the scope for bringing proceedings is wider under Article 33 of the ECSC Treaty than under the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC), since, while the latter provision requires applicants to be directly and individually concerned by the decision addressed to another person which they seek to have annulled, Article 33 merely requires that the decision of an individual character which they seek to have annulled should concern them.

40 As to the question whether they were undertakings within the meaning of Article 80 of the ECSC Treaty, the appellants acknowledged that they were no longer engaged in coal production but stated that they were all coal producers during the period of the facts which were the subject of the complaint (1984 to 1990). It was specifically as a result of those facts that they ceased to carry on business. In determining whether they were undertakings for the purposes of that provision, it was necessary in a case of this kind to refer to the time of the facts complained of and not to the date on which proceedings against the decision on the complaint were instituted. If that date were to be taken as the relevant factor, victims of anti-competitive practices in the coal and steel sector, who were forced to cease trading because of those practices, could never enforce their rights before the Community courts.

41 As regards observation of the time-limit for instituting proceedings, the appellants claimed that as soon as they had learned of the decision they promptly asked the Commission for notification thereof, but that the Commission refused to accede to their request. In any event, they had observed the time-limit for bringing proceedings, calculated from the date on which one of them learned of the decision, namely on 10 August 1998. The Commission could avoid legal uncertainty and the risk of actions being commenced long after the adoption of decisions by publishing the latter in the *Official Journal of the European Communities*.

Findings of the Court

42 First, as regards the question whether the appellants were concerned by the contested decision, as required by the second paragraph of Article 33 of the ECSC Treaty, and hence were entitled to institute proceedings against the decision, it is sufficient to point out that the complaint rejected by the decision concerned practices directly affecting their position and had been lodged *inter alia* on their behalf. It follows that the decision concerns the appellants.

43 In that connection, the case-law cited by the Commission, according to which the fact that an association is directly and individually concerned by a decision does not mean that its members are also directly and individually concerned, is irrelevant. For the purposes of the ECSC Treaty, the second paragraph of Article 33 does not require the appellants to be individually concerned but merely to be concerned by the decision that they are contesting.

44 As regards, next, the question whether the appellants were undertakings within the meaning of Article 80 of the Treaty, it is not disputed that they had that status at the time of the practices which were the subject of the complaint rejected by the contested decision. The fact that they subsequently ceased to be undertakings cannot deprive them of their interest in obtaining a finding that the competition rules had been infringed, an infringement whose consequences affected them at a time when they were undertakings and in respect of which they were entitled to lodge a complaint.

45 Finally, as regards the question whether the action was brought within the prescribed period, it must be observed that the contested decision was properly notified to SWSMA on 5 August 1998. Where a complaint has been lodged by an

association on behalf of its members, then, if the requirement that proceedings against a decision of the Commission adopted under the ECSC Treaty must be instituted within one month of notification or, as the case may be, publication of the decision is not to become wholly ineffective, notification to the association of the rejection of the complaint must be deemed to constitute notification to all its members. Otherwise, as the Commission rightly points out, there would be the highest degree of uncertainty as to whether the decision is final, and the date on which it becomes final would depend ultimately on the association's diligence in informing its members of the decision concerned.

46 Furthermore, it would be disproportionate and contrary to the principle of sound administration to require the Commission either to give notice of the decision individually to all the members of an association which has requested a decision or to publish every decision addressed to an association.

47 The fact that such an association amounts to no more than a 'collective name' does not alter that finding. When complainants who act together use a collective name, for practical reasons which may also be to their advantage, they must accept that the collective name is equally valid as regards both letters that they send to the Commission and those that the Commission sends to them.

48 However, in this instance it is proper to take into account the particular features of the situation in point. It is apparent from the documents before the Court of First Instance that the appellants formally notified the Commission that they were no longer represented by SWSMA. They stated that they nevertheless retained an interest in the outcome of the complaint lodged *inter alia* on their behalf. They also stated that they wished to take part in the investigation of the complaint and designated a new joint representative, Mr Graham, Solicitor. In those circumstances, the fact that SWSMA was notified cannot be relied on as against the appellants.

49 Second, the Commission refused to notify the appellants of the contested decision and did not publish it. In a situation of that kind and where it is not possible to ascertain with any certainty the date on which the appellants first knew exactly what was in the measure that they are contesting and what were the reasons on which it was based, it must be held that the period prescribed for initiating proceedings began to run, at the latest, from the date on which it can be established that the appellants had such knowledge (see, to that effect, the order in Case C-102/92 *Ferriere Acciaierie Sarde* v *Commission* [1993] ECR I-801, paragraph 18).

50 In the present case, the appellants themselves state that they learned of the contested decision on 10 August 1998, that is to say, only five days after SWSMA was notified of it and that, as early as 18 August, they asked the Commission for formal notification of the decision, which reflects their diligence. In those circumstances, the appellants' statements and their attitude do not at first sight appear to lack credibility. For its part, the Commission, which pleads the fact that the action was brought out of time, has not provided any proof that the appellants learned of the contested decision prior to 10 August 1998.

51 It should therefore be held that the period prescribed for instituting proceedings began to run vis-à-vis the appellants on 10 August 1998 and that, in those circumstances and having regard to the ten-day extension of time-limit on account of distance of which, as the Court of First Instance noted in paragraph 40 of the order under appeal, the appellants could avail themselves, the action was not brought out of time.

52 It follows that the appellants satisfied the conditions set out in the second paragraph of Article 33 of the Treaty for instituting proceedings against the contested decision and that their action was not brought out of time.

53 The objection to admissibility raised by the Commission cannot therefore be upheld and, accordingly, the appeal must be allowed in so far as the order under appeal dismisses the action in Case T-148/98 as inadmissible.

54 The order under appeal also amounts to a final decision in respect of the action in Case T-162/98. In those circumstances, the order under appeal must also be set aside in so far as it joins Cases T-148/98 and T-162/98.

55 It must also be set aside in so far as it states that it is unnecessary to rule on the application for legal aid made in Case T-148/98 or on the application for leave to intervene made by PowerGen UK plc, National Power plc and British Coal Corporation in the same case.

56 Under the first paragraph of Article 54 of the ECSC Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

57 In the present case, the state of the proceedings does not permit judgment to be given on the substance of the case. Case T-148/98 must therefore be referred back to the Court of First Instance and the costs reserved.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Sets aside the order of the Court of First Instance of 29 September 1999 in Joined Cases T-148/98 and T-162/98 *Evans and Others* v *Commission* in so far as:

   — it dismissed the action in Case T-148/98 as inadmissible;

   — it joined Cases T-148/98 and T-168/98;

   — it stated that it was unnecessary to rule on the application for legal aid made in Case T-148/98 or on the application for leave to intervene made by PowerGen UK plc, National Power plc and British Coal Corporation in the same case;

   — it ordered the applicants in Case T-148/98 to bear their own costs and, jointly and severally, to pay those incurred by the Commission of the European Communities in Case T-162/98;

— it ordered the applicant in Case T-162/98, jointly and severally with the applicants in Case T-148/98, to pay the costs incurred by the Commission of the European Communities in Case T-148/98;

2. Refers Case T-148/98 back to the Court of First Instance to enable it to give judgment on the substance of the case;

3. Reserves the costs in Case T-148/98.

Macken Gulmann Puissochet

Schintgen Cunha Rodrigues

Delivered in open court in Luxembourg on 10 January 2002.

R. Grass F. Macken

Registrar President of the Sixth Chamber