ORDER OF THE PRESIDENT OF THE THIRD CHAMBER OF THE COURT OF FIRST INSTANCE

24 March 1997 *

In Case T-367/94,

British Coal Corporation, a company incorporated under English law, having its registered office in London, represented by David Vaughan QC and David Lloyd Jones, Barrister, and Cyrus Mehta, Solicitor, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Julian Currall, of its Legal Service, and Rosemary Caudwell, a national official seconded to the Commission under an arrangement for the exchange of officials, 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,

defendant,

* Language of the case: English.

APPLICATION for the annulment of the Commission's implied decision refusing to reject a complaint against the applicant lodged on 15 June 1994 by the National Association of Licensed Opencast Operators (NALOO),

THE PRESIDENT OF THE THIRD CHAMBEROF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

1 By application lodged at the Registry of the Court of First Instance on 31 March 1995, PowerGen plc, a company incorporated under English law, having its registered office in London, represented by K. P. E. Lasok QC and L. G. D. Marr and N. P. Lomas, Solicitors, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe, sought leave to intervene in Case T-367/94 in support of the form of order sought by British Coal, pursuant to Article 34 of the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community (hereinafter 'the Protocol'), applicable to the Court of First Instance by virtue of Article 46 thereof, and Article 115 of the Rules of Procedure of the Court of First Instance.

Likewise, by application lodged at the Registry of the Court of First Instance on 10 April 1995, National Power plc, a company incorporated under English law, having its registered office in Swindon (United Kingdom), represented by Nicholas Forwood QC, David Anderson, Barrister, Sally Barrett-Williams, Barrister, and Gary Chapman, Solicitor, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt, sought leave to intervene in support of the form of order sought by British Coal pursuant to the same provisions.

2 Lastly, by application lodged at the Registry of the Court of First Instance on 4 April 1995, the National Association of Licensed Opencast Operators (hereinafter 'NALOO'), a company incorporated under English law and having its registered office in Newcastle upon Tyne (United Kingdom), represented by Nicholas Green, Barrister, and David Wilson, Solicitor, with an address for service in Luxembourg at the Chambers of Victor Gillen, 13 Rue Aldringen, sought leave to intervene in support of the form of order sought by the Commission, pursuant to the same provisions.

3 By complaint lodged with the Commission on 15 June 1994, NALOO took issue with the restrictions on competition for which British Coal and the Central Electricity Generating Board (hereinafter 'the CEGB'), to which PowerGen and National Power are successors, had been allegedly responsible from 1 January 1973, the date on which the United Kingdom acceded to the Communities, to 31 March 1990.

4 NALOO essentially contested the legality, under Articles 4(d), 65 and 66(7) of the ECSC Treaty (hereinafter 'the Treaty'), of the royalties charged by British Coal on coal extracted by NALOO members from opencast mines belonging to British Coal. NALOO also claimed that the CEGB had purchased coal for electricity generation from NALOO members at discriminatory prices, contrary to Article 63 of the Treaty and Articles 85 and 86 of the EC Treaty.

5 In its complaint, NALOO therefore essentially requested the Commission:

— to exercise its jurisdiction under Articles 4(d), 65, 66(7) and 86 of the Treaty and to adopt a decision confirming the infringements charged against British Coal, in the light of the heads of complaint specified;

— to intervene with regard to the CEGB, pursuant to Article 63 of the Treaty and Article 86 of the EC Treaty.

6 On 1 August 1994, British Coal submitted to the Commission its observations on the complaint and made an application to that institution, pursuant to Article 35 of the Treaty, in which it sought, principally, a declaration that the Commission lacked jurisdiction to examine the complaint in regard to the royalties charged by British Coal during the period prior to 1 April 1990 and, in the alternative, rejection of that complaint on grounds of law, without any examination on the merits. British Coal stated that if the Commission did not adopt the requested decision within two months of the date of notification of its letter of formal notice, British Coal would bring proceedings before the Court of First Instance against the implied decision of refusal to be inferred from the institution's silence.

7 By letter of 3 October 1994, the Commission informed British Coal that it was not entitled to require the Commission to take a decision in a particular sense and that the fact that a complaint was not rejected within the period laid down by the person complained against was not a matter which could give rise to proceedings under Article 35.

8 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 10 November 1994, British Coal brought proceedings under Article 35 of the Treaty in which it sought annulment of the implied decision of refusal to be inferred from the Commission's failure to reject NALOO's complaint.

9 In its application to intervene, PowerGen states that, unlike British Coal, it did not initiate proceedings because it is not an undertaking or an association of undertakings within the meaning of Article 80 of the Treaty, although it is subject to Article 63(1) thereof. PowerGen is none the less a legal person and has therefore status to intervene in these proceedings (order of 3 May 1961 in Case 13/60 *Geitling and Others* v *High Authority* [1962] ECR 143).

10 PowerGen points out that it submitted observations in response to NALOO's complaint that are effectively the same as those of British Coal and that this complaint is based on one set of facts raising common issues of law. The Court will therefore be required to resolve issues of law which are of direct relevance to PowerGen's position.

11 PowerGen further points out that the present case will also address issues of law clearly related to those raised in *Hopkins*, a reference for a preliminary ruling in which judgment was given on 2 May 1996 (Case C-18/94 *Hopkins and Others* v *National Power and PowerGen* [1996] ECR I-2281), which concerned the conditions under which the CEGB obtained coal from the owners of small mines between 1985 and 31 March 1990. In particular, the questions of the Commission's jurisdiction and the alleged existence of legal remedies having retroactive effect arise in an identical manner in *Hopkins* and in the present case.

12 National Power, for its part, submits that it has an interest in the outcome of the dispute in so far as NALOO's complaint is not directed solely at British Coal but also alleges that there has been an infringement of Article 63 of the Treaty and Article 86 of the EC Treaty by the CEGB, to which National Power is a successor. In the same way as British Coal, National Power argues that there is no basis to the complaint and that it should therefore be rejected in regard to National Power.

13 If British Coal's application were to be decided in its favour, the Commission would be unable to take a decision against National Power. If the case were to be decided against British Coal, the submissions regarding jurisdiction which National Power has made to the Commission in its observations on NALOO's complaint would be rejected.

14 In its application to intervene, NALOO submits that if British Coal were to succeed, this would severely prejudice the chances of NALOO members ever being able to recover damages in the English courts for the vast losses they have sustained as a result of British Coal's conduct, as described in the complaint.

15 The applications to intervene were served on the parties, in accordance with Article 116 of the Rules of Procedure.

16 In the observations which, by document dated 24 April 1995, it submitted on PowerGen's application to intervene, the Commission states that the fact that PowerGen is not an undertaking within the meaning of the Treaty is not an objection to its application to intervene in the present proceedings pursuant to Article 34 of the Protocol.

17 The Commission does, however, question whether PowerGen has demonstrated a sufficient interest in the outcome of British Coal's application, which is concerned solely with the royalty rate charged on licensed opencast extraction. PowerGen, it submits, does not explain how the outcome of the application to annul the Commission's implied decision of refusal to dismiss NALOO's complaint against British Coal under Articles 4, 65 and 66(7) of the Treaty will assist PowerGen in respect of the allegations made by NALOO that the CEGB infringed Article 63 of the Treaty and Articles 85 and 86 of the EC Treaty by applying discriminatory prices to the coal produced by private producers in comparison with the price paid to British Coal.

18 The Commission accepts that PowerGen is concerned by the complaint and acknowledges that it also puts forward the argument that the Commission does not have jurisdiction to re-open the matters raised in that complaint. However, the Commission doubts whether this fact is sufficient to give PowerGen an interest in the outcome of these proceedings.

19 In any event, PowerGen cannot, by its intervention, extend the scope of British Coal's application so as to encompass aspects of the complaint brought against PowerGen under entirely separate provisions.

20 By a document of 2 May 1995, the Commission lodged substantially identical observations on National Power's application to intervene.

21 In its observations on the applications to intervene, lodged on 28 April 1995, British Coal did not raise any objection in relation to the three applications to intervene but merely requested that certain documents be treated confidentially *vis-à-vis* PowerGen and National Power.

The applications to intervene

22 The three applications to intervene were lodged in accordance with Article 115 of the Rules of Procedure of the Court of First Instance.

23 Article 34 of the Protocol allows intervention only on the part of natural or legal persons establishing an interest in the result of a case. Under Article 34, submissions made in an application to intervene must be limited to supporting or requesting the rejection of the submissions of one of the parties.

24 It follows that the interest of the applicants seeking leave to intervene in the result of this case cannot be established by an indirect interest concerning a similarity of situations but must, on the contrary, be defined in regard to the actual subject-matter of the case, as circumscribed by the form of order sought by British Coal in its application instituting proceedings.

25 In this regard, it is only in so far as NALOO's complaint is directed against British Coal and, consequently, contests the legality, under the combined provisions of Articles 4(d), 65 and 66(7) of the Treaty, of the royalty which it charged that British Coal can validly seek annulment of the Commission's implied refusal to reject that complaint.

26 Articles 4, 65 and 66(7) of the Treaty constitute the legal framework for the examination of licences to extract unworked coal and of their royalty and payment terms (Case C-128/92 *Banks* v *British Coal Corporation* [1994] ECR I-1209, paragraph 14).

27 PowerGen and National Power can have a direct and present interest in the annulment of the Commission's implied refusal to reject NALOO's complaint only in so far as a judgment annulling that refusal would have the effect of preventing examination of that complaint in regard to the legality of the purchase prices for coal which the CEGB paid to NALOO members.

28 The practices in restraint of competition for which NALOO criticizes British Coal, on the one hand, and the CEGB, on the other, are not only distinct but also do not share the same legal framework. It is, in fact, the combined provisions of Articles 4(b) and 63(1) of the Treaty which constitute the legal framework for dealing with discrimination practised by purchasers against producers as regards price, volume and other terms and conditions for the purchase of coal (*Hopkins*, cited above, paragraph 24).

29 In those circumstances, the submissions in the applications to intervene made by PowerGen and National Power do not support the submissions of British Coal, within the meaning of Article 34 of the Protocol (see order of 12 April 1978 in Joined Cases 116/77, 124/77 and 143/77 *Amylum and Others* v *Council and Commission* [1978] ECR 893, paragraph 7 et seq.).

30 The applications to intervene submitted by PowerGen and National Power must therefore be dismissed.

31 In contrast, NALOO does have a direct and present interest in the result of the case, since the application seeks the annulment of a decision favourable to it, that is to say, the implied refusal to reject its complaint, in so far as that complaint is directed at British Coal's breach of Articles 4(d), 65 and 66(7) of the Treaty. A judgment dismissing British Coal's claims would be such as to enable NALOO to retain its legally protected right to obtain, as a complainant, a decision ruling on its complaint pursuant to the above provisions.

32 NALOO's application to intervene must for that reason be upheld.

The requests for confidential treatment

33 Since the applications to intervene submitted by PowerGen and National Power must be dismissed, it is unnecessary to rule on the requests submitted by British Coal for the confidential treatment of certain procedural documents in their regard.

On those grounds,

THE PRESIDENT OF THE THIRD CHAMBER
OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The applications by PowerGen and National Power to intervene are dismissed.

2. It is unnecessary to rule on the requests submitted by British Coal for confidential treatment in regard to PowerGen and National Power.

3. NALOO is granted leave to intervene in support of the form of order sought by the Commission.

4. A period shall be fixed within which the intervener shall set out in writing the pleas in law supporting the form of order which it seeks.

5. The costs are reserved.

Luxembourg, 24 March 1997.

H. Jung — B. Vesterdorf

Registrar — President