

In Case 4/73

J. NOLD, KOHLEN- UNO BAUSTOFFGROSSHANDLUNG, a limited partnership governed by German law, having its registered office in Darmstadt, represented by Manfred Lütkehaus, advocate of the Essen Bar, with an address for service in Luxembourg at the chambers of Andre Elvinger, 84 Grand-Rue

applicant,

v

COMMISSION OF THE EUROPEAN [UNION], represented by its Legal Adviser, Dieter Oldekop, acting as agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Pierre Lamoureux, 4 boulevard Royal

defendant,

supported by

RUHRKOHLE AKTIENGESELLSCHAFT, a limited company having its registered office in Essen

and

RUHRKOHLE VERKAUFs-GESELLSCHAFT MBH, a private limited company having its registered office in Essen, represented by Otfried Lieberknecht, advocate of the Düsseldorf Bar, with an address for service in Luxembourg at the chambers of Alex Bonn, 22, cote d'Eich,

interveners

Application for annulment of the Decision of the Commission of 21 December 1972, authorizing new terms of business of Ruhrkohle AG,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sorensen, Presidents of Chambers, P. Pescatore (Rapporteur), H. Kutscher, C. O. Dalaigh and A. J. Mackenzie Stuart, Judges,

Advocate-General: A. Trabucchi

Registrar: A. Van Houtte

gives the following

JUDGMENT

Law

- 1 By application lodged on 31 January 1973, the undertaking J. Nold, a limited partnership carrying on a wholesale coal and construction materials' business in Darmstadt, requested -in the final version of its conclusions -that the Court should annul the Commission's Decision of 21 December 1972 authorizing new terms of business of Ruhrkohle AG (OJ 1973, L 120, p. 14) and, as a subsidiary matter, that it should declare that Decision null and inapplicable insofar as it relates to the applicant.

The applicant objects essentially to the fact that the Decision authorized the Ruhr coal selling agency to render direct supplies of coal subject to the conclusion of fixed two-year contracts stipulating the purchase of at least 6000 metric tons per annum for the domestic and small-consumer sector, a quantity which greatly exceeds its annual sales in this sector, and that the Decision thereby withdrew its status of direct wholesaler.

As to admissibility

- 2 The Commission has not contested the admissibility of the application.

On the other hand, Ruhrkohle AG and Ruhrkohle-Verkauf GmbH, the interveners, have contended that the action is inadmissible on the ground that the applicant lacks a legal interest.

They consider in fact that if the applicant wins its case and obtains the annulment of the Decision of 21 December 1972, the Court's judgment would have the effect of reviving the trading rules in force before those which constitute the subject-matter of the Decision in issue.

The applicant does not satisfy the requirements of the previous rules, so that it would, whatever the outcome of the action, lose its status of direct wholesaler.

- 3 This plea cannot be accepted.

In fact, if the contested Decision is annulled on the grounds of the objections raised, the Commission would, in all likelihood, have to replace the authorized trading rules by new provisions more in keeping with the applicant's position.

Accordingly, it cannot be denied that the latter has an interest in seeking the annulment of the Decision in issue.

On the substance

- 4 The applicant has not specified, with regard to the grounds for annulment set out in Article 33 of the ECSC Treaty, those upon which it is basing its action against the contested Decision.

- 5 In any case, an appreciable part of its argument must be dismissed directly, to the extent that the objections raised therein do not relate to the provisions of the disputed Decision of the Commission but to the applicant's relationship with the interveners.
- 6 To the extent that the objections do concern the Commission's Decision, the applicant's written and oral arguments invoke in substance the grounds of infringement of an essential procedural requirement and infringement of the Treaty or of any rule of law relating to its application.

These grounds are adduced, more particularly, as regards the new conditions laid down for the right to direct supplies from the collieries, from the lack of reasoning of the contested Decision, from discrimination against the applicant, and from alleged breaches of its fundamental rights.

1. As to the objections of lack of reasoning and discrimination

- 7 By a Decision of 27 November 1969 the Commission authorized, on the basis of Article 66 (1) and (2) of the ECSC Treaty, the merger of most of the mining companies of the Ruhr into a single company, Ruhrkohle AG.

Under Article 2 (1) of this Decision the new company was obliged to submit to the Commission for authorization any change in its terms of business.

An application to this effect was submitted by Ruhrkohle AG to the Commission on 30 June 1972.

The Commission's authorization was granted by the Decision of 21 December 1972, which is the object of the dispute.

The rules approved by that Decision laid down new conditions stipulating the minimum quantities that dealers must undertake to purchase in order to acquire entitlement to direct supply from the producer.

In particular, direct deliveries are subject to the condition that a dealer shall conclude a two-year contract to take not less than 6000 metric tons per annum for the domestic and small consumer sector.

- 8 It is objected that the Commission allowed Ruhrkohle AG arbitrarily to fix this requirement so that, having regard to the quantity and nature of its annual sales, the applicant has lost its entitlement to direct supplies and is relegated to the position of having to deal through an intermediary, with all the commercial disadvantages which this involves.

Firstly, the applicant considers it to be discriminatory that, unlike other undertakings, it should lose its entitlement to direct supplies from the producer and should thereby be in a more unfavourable position than other dealers who continue to enjoy this advantage.

Secondly, it invokes Article 65 (2) which, in a similar case to that envisaged under Article 66 authorizes joint-selling agreements only if such arrangements will make for 'a substantial improvement in the production or distribution' of the products concerned.

- 9 In the reasoning given in its Decision the Commission emphasized that it was aware that the introduction of the new terms of business would mean that a number of dealers would lose their entitlement to buy direct from the producer, due to their inability to undertake the obligations specified above.

It justifies this measure by the need for Ruhrkohle AG, in view of the major decline in coal sales, to rationalize its marketing system in such a way as to limit direct business association to dealers operating on a sufficient scale.

The requirement that dealers contract for an annual minimum quantity is in fact intended to ensure that the collieries can market their products on a regular basis and in quantities suited to their production capacity.

- 10 It emerges from the explanations given by the Commission and the interveners that the imposition of the criteria indicated above can be justified on the grounds not only of the technical conditions appertaining to coal mining but also of the particular economic difficulties created by the recession in coal production.

It therefore appears that these criteria, established by an administrative act of general application, cannot be considered discriminatory and, for the purposes of law, were sufficiently well-reasoned in the Decision of 21 December 1972.

As regards the application of these criteria, it is not alleged that the applicant is treated differently from other undertakings which, having failed to meet the requirements laid down under the new rules, have likewise lost the advantage of their entitlement to purchase direct from the producer.

- 11 These submissions must therefore be dismissed.

2. As to the objection based on an alleged violation of fundamental rights

- 12 The applicant asserts finally that certain of its fundamental rights have been violated, in that the restrictions introduced by the new trading rules authorized by the Commission have the effect, by depriving it of direct supplies, of jeopardizing both the profitability of the undertaking and the free development of its business activity, to the point of endangering its very existence.

In this way, the Decision is said to violate, in respect of the applicant, a right akin to a proprietary right, as well as its right to the free pursuit of business activity, as protected by the Grundgesetz of the Federal Republic of Germany and by the Constitutions of other Member States and various international treaties, including in particular the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocol to that Convention of 20 March 1952.

- 13 As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of [Union] law.

The submissions of the applicant must be examined in the light of these principles.

- 14 If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their

right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder.

For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest.

Within the [Union] legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the [Union], on condition that the substance of these rights is left untouched.

As regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.

- 15 The disadvantages claimed by the applicant are in fact the result of economic change and not of the contested Decision.

It was for the applicant, confronted by the economic changes brought about by the recession in coal production, to acknowledge the situation and itself carry out the necessary adaptations.

- 16 This submission must be dismissed for all the reasons outlined above.
- 17 The action must accordingly be dismissed.

Costs

- 18 Under Article 69 (2) of the Rules of Procedure the unsuccessful party

shall be ordered to pay the costs.

The applicant has failed in its pleas.

The Order of the President of 14 March 1973 and the Order of the Court of 21 November 1973 reserved the costs relating to the application to suspend the operation of the contested Decision and the application to intervene.

By the Order of 21 June 1973 the Court ordered the applicant to bear the costs incurred, at that date, by the companies Ruhrkohle AG and Ruhrkohle-Verkauf GmbH in the main action and in the interim procedure.

On those grounds

THE COURT

hereby:

- 1. Dismisses the action as unfounded;**
- 2. Orders the applicant to bear the costs of the action including the costs reserved by the Orders of 13 February and 21 November 1973 and those awarded by the Order of 21 June 1973.**

Lecourt	Donner	Sorensen
Pescatore	Kutscher	O Dalaigh
		Mackenzie Stuart

Delivered in open court in Luxembourg on 14 May 1974.

A. Van Houtte
Registrar

R Lecourt
President

Robert Schütze European Union Law Lisbonised Cases