II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 29 October 1975

adopting interim measures concerning the National Coal Board, National Smokeless Fuels Limited and the National Carbonizing Company Limited

(Only the English text is authentic)

(76/185/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 66 (7) thereof,

Having regard to the application of the National Carbonizing Company Limited to the European Court of Justice and the order of the President of the Court of Justice of 22 October 1975,

I

Whereas :

National Carbonizing Company Limited ('NCC') of Nottingham, United Kingdom, is a public limited company producing *inter alia* industrial and domestic hard coke at two plants at Barnsley and Rotherham.

NCC has approximately 7 % of the total hard coke market in the United Kingdom. This includes 9 % of the market for domestic hard coke.

The National Coal Board ('NCB') is a publicly owned enterprise having a virtual monopoly of coal production in the United Kingdom and about 95 % of the market for coal there. Its wholly owned subsidiary, National Smokeless Fuels Limited ('NSF') produces *inter alia* industrial and domestic hard coke at 13 plants. NSF has approximately 84 % of the market for industrial and domestic hard coke and 88 % of the market for domestic hard coke in the United Kingdom.

NCC buys all the coal it requires for coke production from NCB. As NSF is price-leader for industrial and domestic hard coke in the United Kingdom, NCC is unable to sell its identical products above NSF's prices.

In July 1973 NCB increased its prices for coking coal but NSF did not increase the price charged for domestic coke. If unaccompanied by other measures this change in the price structure would have reduced the margin within which independent coke producers have to operate in the United Kingdom. This difficulty was avoided by NCB introducing a rebate equivalent to 100 % of the increase in the price of coal. This rebate was given only on coal used to produce domestic coke for sale in the United Kingdom.

There were further price increases for coking coal on 1 May 1974, 1 November 1974 and 1 April 1975 accompanied by increases in the prices of industrial and domestic coke. On each occasion the rebate on coal for the production of domestic coke for sale in the United Kingdom was altered but the full amount of these later coal price increases was not rebated. Other costs of coke production were also increasing.

As a result, in the period from July 1973 to April 1975 the price of coking coal increased by £ 4·40 per ton. The price of coal to make one ton of coke increased therefore by £ 6·29. At the same time the costs of production for NCC increased by £ 4·10 per ton of coke. The total increase of the costs for one ton of coke was therefore £ 10·39. The price of coke was increased by £ 6·70 within the same period.

By letter dated 21 July 1975 to the Commission, NCC made *inter alia* the following complaints:

1. that the fact that NCB charged different prices for coal for domestic coke production depending on whether the coke was to be sold in the United Kingdom or not was a violation of the ECSC Treaty and in particular Article 60,
2. that the prices charged by NCB and NSF respectively for coal for domestic coke production and for domestic coke constituted in the circumstances a violation of Articles 60 and 66 (7) ECSC Treaty, in substance on the grounds that the margin between these two prices had become insufficient to allow domestic coke producers to operate economically.

In its letter NCC stated that if no solution could be arrived at, NCC's two plants would have to be closed. NCC also stated that the UK Government had not given any assistance.

The services of the Commission first contacted NCB on 23 July 1975. On 12 September 1975 the services of the Commission wrote to NCC saying that the grant of the rebate only in respect of domestic coke sold in the United Kingdom was contrary to the ECSC Treaty and that, following the intervention of the Commission, NCB had undertaken to give the rebate immediately in respect of all domestic coke destined for sale in the Community.

On 15 October 1975 the services of the Commission informed NCC orally of the provisional conclusions they had reached in respect of their complaint on the basis of the information then available.

The conclusions were that, though NCB/NSF had a dominant position in the UK for both coal and coke, there had been no violation of the ECSC Treaty by NCB or NSF.

By letter and telex dated 16 October 1975 the services of the Commission informed NCC in writing of the outcome of the consideration they had given to the issues.

In this letter the services of the Commission accepted that an undertaking which is in a dominant position as regards the production of a raw material (in this case coking coal) and therefore able to control its price to independent manufacturers of derivatives (in this case, coke) and which is itself producing the same derivatives in competition with these manufacturers, may abuse its dominant position if it acts in such a way as to eliminate the competition from these manufacturers in the market for the derivatives. From this general principle the services of the Commission deduced that the enterprise in a dominant position may have an obligation to arrange its prices so as to allow a reasonably efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term.

However, on the basis of the facts available to them the services of the Commission concluded that NCB/NSF, while subject to this obligation, appeared not to have acted contrary to it. It is against this conclusion that NCC has sought relief from the Court of Justice of the European Communities.

On 16 October 1975 NCC applied to the Court of Justice under Article 35 of the ECSC Treaty claiming that the Commission had acted improperly in failing to adopt measures putting an end to violations of the Treaty by *inter alia* NCB. NCC simultaneously applied to the Court of interim measures enabling NCC to produce domestic coke 'on an economic basis'.

On 22 October the President of the Court of Justice made an order ruling that:

> 'it is for the Commission to take the measures of conservation which it considers strictly necessary, and subject to all appropriate guarantees, for the purpose of keeping in operation the two NCC plants threatened with closure and only for the shortest time which it considers to be necessary for the completion of the proceedings in the main action'.

This order makes it clear that the Commission has power under the ECSC Treaty to adopt interim measures even if the services of the Commission do not consider that, on the basis of the facts known to them, a violation of the Treaty has been committed.

The order makes it clear that the prerequisites for interim measures in the matter are fulfilled. What remains to be laid down are the nature and the scope of these measures, including an adequate guarantee.

For this purpose a hearing was held on 24 October, at which NCC and NCB/NSF were represented. Interim measures and the question of the guarantee were discussed.

II

The purpose of interim measures in the present instance is to ensure the survival of NCC as an independent coke producer pending the outcome of the case before the Court.

In view of the losses being incurred by NCC this survival can only be ensured by ordering NCB to forego temporarily such part of the price of coking coal supplied to NCC as will allow the latter to break even for the likely duration of the case, which in view of the urgency of the matter can be estimated at 12 weeks.

According to statements made by NCC to the Commission, a reduction of the price of coking coal supplied by NCB to NCC by £ 2·79 per ton on the quantities needed for the period mentioned would achieve this result. The total sum which NCB would thus forgo temporarily would amount to approximately £ 280 000, excluding interest.

In view of the temporary nature of the interim measures and the correlation between the price reduction ordered and the amount to be guaranteed, no detailed examination of the amount of the price reduction requested by NCC need at present be undertaken.

As to the guarantee to be given by NCC, the Commission has to consider the possibility that the disappearance of one of the few remaining competitors of an enterprise in a dominant position is the result of financial, industrial or commercial factors peculiar to that competitor, e.g. its industrial and commercial competitiveness and its financial strength. For this reason the enterprise in a dominant position must be given a guarantee of such nature and scope as to ensure that the ultimate cost of the interim measures will not be borne by it if it has committed no violation of the Treaty.

The most appropriate way to achieve this is to require the claimant firm to guarantee fully and effectively the immediate payment of any sums which the enterprise in a dominant position has had to forego as a result of the interim measures but which the final outcome of the case before the Court shows to be due to it.

An adequate and appropriate guarantee of repayment could take various forms, as does the security given in similar circumstances in cases before national courts. It could, for example, be by bank guarantee, by the deposit of cash in a blocked bank account, a recognized debt owed by NCB to NCC, or a guarantee by a third party of unquestionable solvency and liquidity. The guarantee must be secure and adequate in amount, should be simple and ensure reasonably convenient and prompt repayment in a reasonably liquid form. The Commission would not however oppose any form of guarantee acceptable to NCB.

The price reduction applies only to coal sold to NCC for the production of domestic coke. Since the benefit to NCC is subject to repayment and since the guarantee will apply only to it, the reduction need not be given to other enterprises buying coal from NCB for domestic hard coke production. Any legal rights which these enterprises may have can be considered on an appropriate occasion.

The price reduction does not apply to coal for making products other than domestic hard coke. As the price reduction is subject to repayment and is to be given only for a relatively short period, no significant distortion of competition is expected.

Either party may reapply to the Commission if any serious doubt or difficulty arises in the application of any part of this Decision.

III

The order of the Court insists that interim measures be adopted 'only for the shortest time which it considers to be necessary for the completion of the proceedings in the main action'. As the interim measures involve substantial cost which must ultimately be borne either by NCC or by NCB, it is necessary to ensure that everything is done to minimize the time required to complete the proceedings in the main action. To this effect any supplementary information needed to identify and clarify the issues before the Court should be made available as quickly as possible.

It is therefore appropriate that all the information which the independent professional advisers of NCC and NSF may reasonably require to consider these issues should be made available to them. All information so made available must also be made available to the Commission, as the defendant before the Court, without prejudice to the Commission's rights to ask for the production of further information if the case so requires and subject to the powers of the Court under the rules of procedure.

The professional advisers are obliged not to disclose to any employee or officer of their respective clients, any business secrets of the other company or companies, in accordance with normal practice when information is exchanged in such circumstances on a 'professional advisers only' basis which is familiar in the United Kingdom.

The Commission therefore, in order to limit the cost of the interim measures and to ensure that they are not rendered useless by delay, and to avoid further difficulties due to the delays in obtaining information which have already occurred, orders the parties to exchange the information in question as a necessary part of the interim measures of protection. This solution also avoids the risk of delay due to the Commission having to avoid disclosing to one party what another party might regard as its business secrets, in the course of the procedure before the Court,

HAS ADOPTED THIS DECISION:

Article 1

The National Coal Board shall reduce the effective price of coal supplied to the National Carbonizing Company Limited and used for the production of domestic hard coke to be sold for use within the Community, by £ 2·79 per ton with effect from 22 October 1975. This obligation shall end on 15 January 1976 and shall be limited to £ 280 000, on which interest shall run at 12 % compounded.

Article 2

The obligations of the National Coal Board under Article 1 shall be conditional upon the National Carbonizing Company Limited having provided a guarantee for the immediate repayment to the National Coal Board of the amount corresponding to the total price reductions under Article 1 plus interest. The guarantee shall take the form of an unconditional undertaking by a third party of unquestionable solvency and liquidity for the repayment of the amount in question. Any other form of guarantee shall require the approval of the National Coal Board.

Article 3

If the National Carbonizing Company Limited shall give a guarantee for the repayment of less than £ 280 000 plus interest, the obligations of the National Coal Board shall be proportionately reduced.

Article 4

The amount, if any, to be repaid by the National Carbonizing Company Limited to the National Coal Board shall be governed by the final decision by the institutions of the Community on the question whether, and if so to what extent, the pricing policy of the National Coal Board and National Smokeless Fuels Limited constitutes a violation of the Treaty.

Article 5

The National Carbonizing Company Limited, the National Coal Board and National Smokeless Fuels Limited shall immediately make available to the independent professional advisers of the others, and to the Commission, all financial and other information reasonably required for the purpose of the case before the Court.

Article 6

This Decision is addressed to the National Coal Board, London, National Smokeless Fuels Limited, Harrow, Middlesex and the National Carbonizing Company Limited, Mansfield, Notts.

Done at Brussels, 29 October 1975.

For the Commission

The President

François-Xavier ORTOLI