OPINION OF ADVOCATE GENERAL ALBER

delivered on 8 May 2003 [1]

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I — Introduction

1. At the material time and until its privatisation in 1994, the British Coal Corporation ('BC') owned practically all coal reserves in the United Kingdom and enjoyed the exclusive right to extract coal. The main purchaser of the coal was initially the Central Electricity Generating Board ('CEGB'). After electricity production was privatised in 1990, the main purchasers were National Power plc (now International Power plc; 'IP') and PowerGen plc (now PowerGen (UK) plc; 'PG').

2. In return for payment of a royalty, BC granted smaller companies, which had joined together to form the National Association of Licensed Opencast Operators ('NALOO'), licences to extract coal.

3. NALOO and its members considered themselves discriminated against vis-à-vis BC, because the electricity supply industry paid them significantly lower prices for coal than it paid to BC. In addition, they considered the royalty imposed by BC excessive.

4. Relevant to this case is, first, a complaint by NALOO in 1990, as a result of which the Commission contacted the United Kingdom Government and obtained an improvement in the terms for NALOO members from 1990 onwards.

5. The crux of the present dispute is now the question whether the Commission is empowered and obliged to adopt a formal finding of infringements of the provisions of the ECSC Treaty during the period prior to the adjustment of those terms (that is to say, from 1986 to March 1990). Such a finding by the Commission would be significant for NALOO because in 1994 (and 1996) the Court of Justice ruled that the pertinent provisions of the ECSC Treaty have no direct effect. The consequence of those rulings is that NALOO members could bring actions for damages before the national courts only if the Commission had made or were to make a formal finding, with retroactive effect, of infringements of the ECSC Treaty.

6. As a result of those rulings, NALOO brought a further complaint on 15 June 1994, which it described as 'supplemental'. By that description, NALOO intended the 1994 complaint to cause the 1990 complaint to be regarded as still current. The question whether the complaint brought in 1990 can be regarded, as it was by the Court of First Instance, as still current, or supplemented, in 1994, or whether the 1994 complaint constituted a new complaint is therefore also essential to the resolution of the dispute.

7. In 1998, the Commission adopted a decision on the 1994 complaint, in which it refused to make the finding sought by that complaint in respect of the earlier period from 1986 to 1990.

8. By judgment of 7 February 2001 in Case T-89/98 [2] ('the judgment under appeal'), the Court of First Instance annulled that decision. The Commission, and BC, IP and PG who where interveners in support of the Commission at first instance, have now brought these appeals against that judgment.

II — Legal background

9. Article 4 of the ECSC Treaty [3] states, in broad terms:

'The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:

(a) ...

(b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier;

(c) ...

(d) ...'

10. In cases of discrimination, Article 63(1) of the ECSC Treaty confers on the Commission the following power:

'If the Commission finds that discrimination is being systematically practised by purchasers, in particular under provisions governing contracts entered into by bodies dependent on a public authority, it shall make appropriate recommendations to the governments concerned.'

2 — *NALOO* v *Commission* [2001] ECR II-515.

3 — The ECSC Treaty, pursuant to Article 97 thereof, expired on 23 July 2002. Its provisions must, however, continue to be applied to the facts of this case. On this, see point 49 below; see, also, the Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty (OJ 2002 C 152, p. 5).

11. As regards abuse of a dominant position, Article 66(7) of the ECSC Treaty provides:

'If the Commission finds that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the common market are using that position for purposes contrary to the objectives of this Treaty, it shall make to them such recommendations as may be appropriate to prevent the position from being so used. If these recommendations are not implemented satisfactorily within a reasonable time, the Commission shall, by decisions taken in consultation with the government concerned, determine the prices and conditions of sale to be applied by the undertaking in question or draw up production or delivery programmes with which it must comply, subject to liability to the penalties provided for in Articles 58, 59 and 64.'

III — Background to the dispute

12. For the background to the dispute reference should first be made to the observations of the Court of First Instance in paragraphs 1 to 11 of the judgment under appeal. However, the following points are intended to further clarify the facts.

13. In May 1986, CEGB and BC reached an arrangement ('the 1986 Understanding') on coal prices, which also produced effects for the members of NALOO.

14. From 1987 to 1988, the royalty for coal extraction imposed on NALOO members by BC was gradually reduced from £16/t to £11/t. After the reduction to £11/t, NALOO wrote to BC, by letter of 13 May 1988, acknowledging that the royalty was reasonable and agreeing to withdraw the action it had brought in connection with the level of the royalty. On 1 April 1990, the royalty was further reduced to £7/t.

15. In contracts between National Power, PG and BC, covering the period from 1 April 1990 to 31 March 1993, prices of 170 p/GJ gross (gross calorific value) and 177.9 p/GJ net (net calorific value) were fixed for coal supplied by BC, as compared with prices ranging from 122 p/GJ to 139 p/GJ for coal supplied by the licensed producers.

16. In a complaint to the Commission of 29 March 1990, supplemented *inter alia* by observations dated 27 June 1990 and a summary of the essential arguments dated 5 September 1990, NALOO claimed that the 1986 Understanding and the supply contracts, on the one hand, and the level of royalty applied by BC, on the other were contrary to Articles 63(1) and 66(7) of the ECSC Treaty.

17. For the precise wording of the complaint and the supplementary observations reference should be made to the extracts cited in paragraphs 13 and 14 of the judgment under appeal. In paragraph 15 of that judgment, the Court of First instance went on to state:

'In the summary of its arguments of 5 September 1990 the complainant alleged that the electricity generating producers had systematically practised discrimination in their capacity as purchasers, within the meaning of Article 63 of the [ECSC] Treaty, and that the conduct of BC complained of, including fixing royalties at an arbitrary level..., was contrary to Article 60 and Article 66(7) of the [ECSC] Treaty.'

18. On the basis of paragraphs 16 to 23 of the judgment under appeal, the subsequent developments can be summarised as follows:

19. Even though, by decision of 28 June 1990, the Commission rejected NALOO's request for interim measures on the ground that conditions for licensed mines had improved, it nevertheless complained to the United Kingdom authorities, in a letter of 28 August 1990, about the discriminatory pricing policies of the electricity generating companies and the excessive royalty of £7/t charged by BC to opencast mines, in respect of which it was considering making recommendations to the United Kingdom Government.

20. By letter of 24 October 1990, the United Kingdom authorities, on behalf of BC, IP and PG, made an offer to NALOO to increase the price for coal extracted under licence and to reduce the royalty, both with retroactive effect to 1 April 1990. After NALOO rejected that offer, the proposed conditions were applied unilaterally, whereupon the Commission informed NALOO, by letter of 21 December 1990, that it considered that there was no longer any need for further action on its part.

21. On 8 February 1991, declining a request made by NALOO in a letter of 11 January 1991, the Commission informed NALOO in writing that it was not obliged 'to adopt a formal decision finding that there has been an infringement in the past merely to facilitate a possible claim for damages by a complainant'. It added that the national courts were better placed than the Commission to consider individual cases of misconduct which might have occurred in the past.

22. By decision of 23 May 1991 ('the 1991 Decision'), which is the first decision of relevance to the present case, the Commission rejected NALOO's complaint. In that decision, it pointed out that it had taken only the factual situation after 1 April 1990 into account, and had not examined the situation before that date.[4] Previously,

4 — The exact wording of the relevant passage is given in point 81 below.

NALOO had once again made clear, by letter of 14 March 1991, that what it specifically sought were findings by the Commission with regard to the 1986 Understanding between BC and CEGB.

23. NALOO's action for annulment of the 1991 Decision was dismissed by the Court of First Instance in the judgment in Case T-57/91 [5] (*'NALOO I'*), which is now final. Since in the course of the proceedings the applicant had withdrawn the part of its original application in which it sought compensation for the unreasonable royalties levied by BC before 1 April 1990, that judgment concerned only the Commission's findings in respect of prices and royalties after that date.

24. In addition, members of NALOO brought actions for damages before the High Court of Justice of England and Wales: Banks brought an action against BC in respect of the unreasonable royalties charged between 1986 and March 1990, and Hopkins and others brought an action against PG in respect of the discriminatory prices applied between 1985 and March 1990.

25. In answer to questions referred to it by the High Court for a preliminary ruling, the Court of Justice ruled that the relevant provisions of the ECSC Treaty, namely Articles 4(b) and 63, and Articles 4(d), 65 and 66(7), do not confer rights on individuals which are directly enforceable by them in proceedings before the national courts. [6] Consequently, where the Commission has not made a finding that those provisions have been infringed, the national courts may not entertain an action for damages. [7] On the basis of those rulings, the High Court dismissed the actions for damages.

26. On 15 June 1994, referring to the Court of Justice's ruling in *Banks*, NALOO lodged a 'supplemental' complaint with the Commission, which, however, rejected that complaint by Decision IV/E-3/NALOO of 27 April 1998 ('the 1998 Decision').

IV — The judgment under appeal

27. On 8 June 1998, NALOO brought an action under the second paragraph of Article 33 of the ECSC Treaty, seeking annulment of the 1998 Decision. In the judgment under appeal, [8] the Court of First Instance allowed NALOO's action. It did not start by considering the applicant's

5 — *NALOO* v *Commission* [1996] ECR II-1019.

6 — Case C-128/92 *Banks* [1994] ECR I-1209, paragraph 19, and Case C-18/94 *Hopkins and Others* [1996] ECR I-2281, paragraphs 27 to 29.

7 — *Banks*, cited in footnote 6, paragraph 21.

8 — Cited in point 8.

arguments, but instead examined the objections raised by the Commission and the interveners supporting it, by which they essentially argued that the Commission was not empowered to investigate the 1994 complaint. In particular, the Court of First Instance found that:

— The infringements of Articles 63(1) and 66(7) of the ECSC Treaty during the (business) years 1986/87 to 1989/90 were brought to the attention of the Commission for the first time not in the 1994 complaint, but in the 1991 complaint (paragraphs 46 to 52 of the judgment under appeal).

— Articles 63(1) and 66(7) of the ECSC Treaty empowered the Commission to investigate NALOO's complaint in so far as it alleged infringements during the years 1986/87 to 1989/90. At the time the (original) complaint was lodged, the (unlawful) conduct to which it referred was still continuing. The 1994 complaint merely amplified the 1990 complaint (paragraphs 56 to 64 of the judgment under appeal).

— The principle of legal certainty did not preclude examination of the complaint. In particular, the 1991 Decision, which has now become definitive, expressly did not address the earlier period. In addition, the 1998 Decision was not a mere confirmation of the 1991 Decision (paragraphs 67 to 76 of the judgment under appeal).

— The provisions relied on by the complainant empowered the Commission to investigate the complaints and, where necessary, to adopt recommendations. The question whether those provisions empower the Commission to adopt other legal measures, such as decisions, was immaterial (paragraphs 79 and 80 of the judgment under appeal).

— It was enough to examine the prices applied by BC in the light of Article 66(7) of the ECSC Treaty. It was not necessary to settle the question of the applicability of Article 65 (paragraph 82 of the judgment under appeal).

— Since the provisions in question conferred on the Commission sole jurisdiction to examine the relevant matters, it was bound to undertake that examination (paragraphs 85 and 86 of the judgment under appeal).

28. The Court of First Instance then reached the conclusion that the Commission was right to examine the complaint in the alternative by the 1998 Decision, but it annulled the decision on the ground that the Commission made a number of errors in its statement of reasons relating to that examination. First, the Commission failed to state why in that decision it did not regard the coal prices in the period before the adjustment that took effect from 1 April 1990 as discriminatory, even though, in its letter of 28 August 1990 to the United

Kingdom Government, it had taken the view that such pricing was discriminatory. Second, the Commission should have explained why the level of the royalties applied was not excessive (paragraphs 103 to 124 of the judgment under appeal).

V — The appeal

29. The Commission (Case C-180/01 P), together with IP (Case C-172/01 P), BC (Case 175/01 P) and PG (Case C-176/01 P), who intervened in the case at first instance in support of the Commission, have appealed against the judgment of the Court of First Instance. The appeals brought by IP and PG concern only the findings of the Court of First Instance relating to infringement of Article 63(1) of the ECSC Treaty as a result of the application of discriminatory prices. NALOO, as the other party to the proceedings, has also submitted observations.

30. By order of 5 July 2001, the President of the Court of Justice joined the cases for the purposes of the written and oral procedure and the judgment.

31. By order of 17 July 2001, the President of the Court of Justice rejected the Commission's application, made by separate document lodged on 22 May 2001, to suspend operation of the judgment under appeal pursuant to Article 39 of the ECSC Treaty.

32. Following the structure of the judgment under appeal, the grounds of appeal may be grouped together and summarised as follows:

— The Court of First Instance was wrong to treat the 1990 and 1994 complaints as a single complaint. It failed to recognise that the 1990 complaint had been conclusively dealt with by the definitive 1991 Decision, and thus violated the principle of legal certainty.

— Contrary to what the Court of First Instance held, in 1994 the Commission was not empowered to take action in respect of the infringements alleged to have taken place in the years 1986/87 to 1989/90.

— The Court of First Instance incorrectly held that the Commission had an obligation to investigate the complaint in so far as it related to infringements prior to 1 April 1990.

— The Court of First Instance erred in law in its findings regarding the lawfulness of the decision (inadequate statement of reasons).

33. In addition, BC claims that the Court of First Instance made an error of pro-

cedure by failing to address a number of its arguments. The parties' arguments will be examined individually in the legal assessment of the grounds of appeal.

34. As regards the substance of the case, the appellants IP, BC and the Commission claim that the Court should:

(1) set aside the judgment of the Court of First Instance of 7 February 2001 in Case T-89/98, and

(2) dismiss NALOO's action.

35. PG claims as to the substance that the Court should:

(1) set aside the judgment of the Court of First Instance of 7 February 2001 in Case T-89/98 in so far as it relates to the application of Article 63(1) of the ECSC Treaty, and

(2) dismiss NALOO's action in that respect.

36. As regards costs, the following applications have been made:

IP claims that the Court should order NALOO or the Commission to pay the costs incurred by it in Case T-89/98 and in the present proceedings.

BC claims that the Court should order NALOO or the Commission to pay the costs incurred by it in Case T-89/98 and in the present proceedings.

PG claims that the Court should order the Commission and NALOO to pay the costs incurred by it.

The Commission claims that the Court should order NALOO to pay the costs.

37. NALOO contends that the Court should:

(1) dismiss the appeals,

in the alternative, annul Commission Decision IV/E-3/NALOO of 27 April 1998, and

(2) in either case, order the appellants to pay the costs incurred by NALOO.

VI — Legal assessment

A — *Admissibility of the appeals*

1. Submissions of the appellants IP, BC and PG

38. IP, BC and PG explain in detail why they are entitled to bring an appeal against the judgment of the Court of First Instance. As interveners in support of the Commission, they are 'parties', within the meaning of the second paragraph of Article 49 of the ECSC Statute of the Court of Justice, who have been unsuccessful in their submissions.

39. The judgment under appeal directly affects them (second sentence of the second paragraph of Article 49 of the ECSC Statute). [9] They were involved in the Commission procedure at various stages and submitted observations in respect of NALOO's complaints. In addition, annulment of the decision by the Court of First Instance imposes an obligation on the Commission to investigate the allegations, first made in the 1990 complaint and then reiterated in the 1994 complaint, concerning both the coal prices applied by IP and PG or their predecessors in title prior to 1 April 1990 and the royalties charged by BC at the time. The undertakings would be directly affected if the new investigation led the Commission to fault their conduct during that earlier period, thus possibly providing grounds for actions for damages by NALOO members.

2. Assessment

40. Interveners at first instance are also to be regarded as parties who may bring an appeal within the meaning of the first sentence of the second paragraph of Article 49 of the ECSC Statute. [10] Since IP, BC and PG were interveners in support of the Commission in the proceedings before the Court of First Instance they are

9 — In that regard, the appellants refer to Case C-265/97 P *VBA* v *Florimex and Others* [2000] ECR I-2061 and Case C-266/97 P *VBA* v *VGB and Others* [2000] ECR I-2135, in which the Court of Justice ruled, without any further discussion, that the appeals brought in similar circumstances were admissible.

10 — On that point, see Case C-244/91 P *Pincherle* v *Commission* [1993] ECR I-6965, paragraph 16, and the order of 14 February 1996 in Case C-245/95 P *Commission* v *NTN Corporation and Koyo Seiko* [1996] ECR I-553, paragraph 7, which relate to the identically worded provision of the EC Statute.

in principle entitled to bring an appeal where they are also directly affected by the decision of the Court of First Instance (second sentence of the second paragraph of Article 49 of the ECSC Statute).

41. In order to ascertain the effects of the judgment for the appellants, it is necessary to compare their situation before and after delivery of the judgment under appeal.

42. In the contested decision, the Commission stated that Articles 63(1) and 66(7) of the ECSC Treaty did not empower it to act on a complaint lodged in 1994 concerning infringements alleged to have taken place in the years between 1973 and 1990. [11] The Commission also took the view that NALOO had not proven its allegations of infringement of Article 66(7). If that decision had been the end of the matter, there would not have been any foundation for damages claims by NALOO members against the appellants: according to the case-law of the Court of Justice, actions in respect of such claims may be brought before the national courts only where the Commission has already made a finding of infringement of the relevant provisions of the ECSC Treaty.

43. The Court of First Instance annulled the contested decision *inter alia* on the ground that the Commission had an obligation to examine the complaint and that it had not stated adequate reasons for its rejection of the complaint. Pursuant to the second sentence of the first paragraph of Article 34 of the ECSC Treaty, the Commission is obliged to take the necessary measures to comply with the judgment. It would therefore have to conduct a fresh examination of the 1994 complaint, having regard to the Court of First Instance's interpretation of the law.

44. That does not mean, however, that the Commission would necessarily uphold the complaint. Nor is it at all clear whether the national court subsequently seised of the matter would award damages to NALOO members on the basis of any findings that might be made by the Commission in respect of the period before 1 April 1990.

45. Nevertheless, the appellants are directly affected by the judgment because as a result of the annulment of the Commission decision there is now at least some risk that they could be ordered to make payments. To cater for that risk, the undertakings concerned might need already to make sufficient financial provision on their balance sheets.

46. The appeals are therefore admissible.

11 — See points 19 and 32 of the contested decision.

B — *Substance of the appeals*

1. Preliminary observations

(a) Effects of the expiry of the ECSC Treaty

47. There is some question as to the consequences for the resolution of this dispute of the fact that the ECSC Treaty, pursuant to Article 97 thereof, expired on 23 July 2002. The parties have not addressed that matter in any depth.

48. On the one hand, it seems that it is now no longer possible for the Commission to make recommendations to a Member State or an undertaking on the basis of the lapsed provisions of the ECSC Treaty. [12]

49. On the other hand, a decision contested in an action for annulment is to be assessed on the basis of the elements of fact and of law existing at the time when it was adopted. [13] This rule also applies in appeal proceedings, with the consequence that reference must still be made to the now lapsed provisions of the ECSC Treaty.

50. In the event that the contested decision is annulled, it is for the Commission to decide whether and, where appropriate, on what legal basis it can undertake a fresh examination of the alleged infringements referred to in NALOO's complaint.

(b) The extent to which the judgment under appeal relies on the findings disputed in the grounds of appeal

51. The Court of First Instance based its annulment of the contested decision on a failure to state reasons. By contrast, the findings in paragraphs 44 to 85 of the judgment under appeal are not in fact reasons for the annulment of the decision, but rather, as the Court of First Instance stated in paragraph 86, they explain why the Commission was right to examine the 1994 complaint in the alternative by the 1998 Decision.

12 — According to settled case-law, in the absence of transitional provisions, new rules (in this case the EC Treaty) apply immediately to the future effects of a situation which arose under the old rules: Case C-512/99 *Germany* v *Commission* [2003] ECR I-845, paragraph 46, and Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50.

13 — Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; Case 114/83 *Société d'initiatives et de coopération agricoles* v *Commission* [1984] ECR 2589, paragraph 22, and Case T-251/97 *T. Port* v *Commission* [2000] ECR II-1775, paragraph 38.

52. Against that background, one might ask oneself to what extent those observations — which essentially seem to affirm the Commission's decision — are essential grounds of the judgment under appeal by which the contested decision was annulled. If that judgment appeal were not based on the findings in paragraphs 44 to 86, then the Court of Justice would not need to examine the grounds of appeal relating to those findings, but could instead confine its examination to the fourth ground of appeal.

53. However, it cannot be denied that there is a certain relationship between the Court of First Instance's finding of a failure to state reasons, which led to annulment of the decision, and the observations which precede that finding. The question whether Articles 63(1) and 66(7) of the ECSC Treaty in any way empower or oblige the Commission to take action in a case like this is relevant to determining the standards with which the reasons given in the decision must comply. Therefore, in order to provide a comprehensive assessment of the legal issues raised in this case, all the grounds of appeal should be examined.

2. Incorrect classification of the 1990 and 1994 complaints as a single complaint, and violation of the principle of legal certainty

(a) Arguments of the parties

54. All the appellants submit that the Court of First Instance erred in law in considering that there was a single complaint by NALOO, which was lodged in 1990 and supplemented in 1994. NALOO counters by stating that the appellants' submissions in that regard constitute an inadmissible challenge of the Court's appraisal of the evidence and, that in any event, the relevant findings in the judgment under appeal are factually correct.

55. IP considers that the Court of First Instance was correct to find that the 1990 complaint also related to the earlier period from 1986 onwards. By contrast, BC takes the view that NALOO's complaint concerning the level of the royalties related only to the period from 27 December 1987 to 31 March 1990.

56. NALOO contends that BC's submission in that regard is inadmissible, since it was first raised in the appeal proceedings. In addition, it is clear from the original 1990 complaint and the supplementary observations of 27 June 1990 that NALOO had complained of the past pricing in general and had not limited its complaint to the period after 27 December 1987.

57. IP, BC and PG dispute the Court of First Instance's finding in paragraphs 70 to 72 that the 1991 Decision neither rejected nor refused to examine the part of the complaint that related to the period before 1 April 1990 and that there was thus no

challengeable decision relating to that period. In fact, the correspondence exchanged between NALOO and the Commission after the 1991 Decision had been adopted shows instead that, contrary to NALOO's express request, the Commission refused to carry out such an examination. [14]

58. The Commission continues to maintain that in the 1991 Decision it did not itself adopt a position on the allegations relating to the period before 1 April 1990. However, it considers that in its letter of 21 February 1991 or its letter of 4 September 1991 it did adopt a decision rejecting that part of the complaint.

59. That leads IP, BC, PG and the Commission to conclude that the refusal to examine that part of the complaint is no longer open to challenge because NALOO failed to institute proceedings pursuant to the second paragraph of Article 33 of the ECSC Treaty and because it withdrew its action in *NALOO I* in so far as it related to the alleged infringements in the period before 1 April 1990. If the Commission's refusal did not constitute an express decision, NALOO would in any event have had to follow the procedure provided for in Article 35 of the ECSC Treaty. A fresh examination by the Commission of the 1990 complaint, which had become devoid of purpose after its rejection by the Commission, would violate the principle of legal certainty. [15]

60. NALOO contends that the appellants' argument that the 1990 complaint has become devoid of purpose is inadmissible because it challenges the factual appraisal made by the Court of First Instance. The finding by the Court of First Instance that the 1991 Decision did not contain a rejection of the complaint in so far as it related to the period before 1 April 1990 is an appraisal of evidence which likewise cannot be challenged in appeal proceedings.

61. Consequently, the argument that a measure had been taken which could have been challenged by NALOO can also not be sustained. Even if in 1991 the Commission had in fact refused to investigate past infringements, that would not preclude their examination by the Commission at a later date. NALOO can also not be criticised for failing to institute proceedings against the Commission under Article 35 of the ECSC Treaty, since the Commission itself had suggested that NALOO pursue actions for damages before the national courts.

62. IP, BC and the Commission further submit that complaints relating to the past conduct of an undertaking may only be made within a reasonable time, as otherwise that undertaking's capacity to mount a defence would be adversely affected. [16] In 1994 (and certainly by 2001) IP and BC were already scarcely in a position to

14 — By way of comparison, IP and BC refer to the findings of the Court of Justice in Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, paragraphs 27 to 32.

15 — IP and BC refer to the judgment in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833.

16 — IP and BC refer to Case 59/70 *Netherlands* v *Commission* [1971] ECR 639, paragraphs 12 to 22, Case 180/88 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* [1990] ECR I-4413, and Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761.

prepare a reasonable defence in respect of the allegations relating to the period before 1 April 1990.

63. While it was not until 1994 that the Court of Justice ruled in *Banks* that a Commission decision relating to the alleged infringements was a precondition for an action for damages before the national courts, that ruling was merely an interpretation of the existing law. NALOO cannot rely on an earlier, erroneous interpretation of the law (even on the part of the Commission), to justify its failure to institute proceedings against the part of the 1991 Decision in which the Commission refused to examine infringements alleged to have occurred prior to 1 April 1990.

64. By contrast, NALOO states that since no particular time-limit is prescribed, it lies within the Commission's discretion — just as is the case for the initiation of proceedings for failure to fulfil Treaty obligations under Article 226 EC — to decide when to take action in respect of infringements of Articles 63(1) and 66(7) of the ECSC Treaty. The principle of protection of legitimate expectations has not been violated. Immediately after the 1991 Decision was adopted, the actions for damages which ultimately led to the judgments in *Banks* and *Hopkins* in 1994 were brought before the national courts. It had therefore been clear in the period from 1990 to 1994 that the contentious issues remained unresolved.

65. PG and the Commission submit that the 1994 complaint was a new complaint, which was based on the altered situation following *Banks*, and which contained new information. Even if the complaints relate to the same period of time and the same legal provisions, those complaints, which were lodged four years apart, cannot be regarded as a single complaint. The complaints sought different remedies, namely the making of a recommendation (the 1990 complaint), and the adoption of a decision or a formal finding (the 1994 complaint).

66. PG adds that in *NALOO I* the Court of First Instance itself regarded the 1994 complaint as a new complaint. Given the definitive nature of that judgment, in the judgment under appeal the Court was bound to classify the 1994 complaint as a new complaint. The fact that the 1991 Decision had become definitive prevented the Commission from regarding the later 1994 complaint as a continuation of the 1990 complaint. It was only because NALOO raised new matters of fact that the Commission was empowered to adopt any decision at all which went beyond an unchallengeable confirmation of the 1991 Decision.

67. By contrast, NALOO maintains that it is of no relevance that in the judgment in *NALOO I* and the order in Case

T-367/94 [17] the Court of First Instance described the 1994 complaint as a new complaint, since those cases did not concern the period before 1 April 1990.

68. Lastly, PG and BC dispute the Court's finding that the alleged infringements were still taking place when the complaint was lodged. Since the 1994 complaint was not a continuation of the earlier complaint but a new one, the infringements cannot still have existed at the time of that complaint (that is to say, in 1994 rather than 1990).

(b) Assessment

69. The question whether there was a single complaint or more than one complaint brought in succession is essential to the reasoning subsequently employed in the judgment under appeal. Were it the case that — contrary to what was held by the Court of First Instance — the Commission had already rejected the complaint in 1991 and, accordingly, received another complaint in 1994, it would be necessary to consider whether the Commission was entitled reexamine the matter, and whether the 1998 Decision is in fact a challengeable measure at all and not merely a reiteration of the 1991 Decision.

70. In addition, that issue plays an important role in the Court of First Instance's consideration of the Commission's powers under Articles 63(1) and 66(7) of the ECSC Treaty. In the 1998 Decision, the Commission stated that pursuant to those provisions it was empowered to take action only in respect of *existing* infringements. [18] Starting from the premiss of a single complaint dating back to 1990, the Court of First Instance described the infringements as existing infringements. [19] That would be incorrect if the 1990 complaint had in fact been rejected and the 1994 complaint was therefore to be regarded as a new complaint.

71. In paragraph 51 of the judgment under appeal, the Court of First Instance initially justifies its classification of the 1990 and 1994 complaints as a single complaint by stating only that they concern the same provisions and allege the same infringements by the same parties during the same period.

72. However, that justification alone is not convincing. A further prerequisite for regarding the 1994 complaint as a continuation of the 1990 complaint is, namely, that at the time the supplemental complaint was lodged in 1994, the first complaint was not already devoid of purpose as a result of its earlier rejection by the Commission.

17 — Order of the Court of First Instance of 29 April 1998 in Case T-367/94 *British Coal* v *Commission* [1998] ECR II-705. In that order, the Court of First Instance dismissed an action brought by BC against the Commission's implied refusal to reject NALOO's 1994 complaint outright, on the ground that it manifestly lacked any foundation.

18 — See point 13 of the contested decision, cited in paragraph 56 of the judgment under appeal.

19 — See paragraph 59 of the judgment under appeal. As a result of the subsequent reasoning in paragraphs 60 to 64 of that judgment, it is not entirely clear to what extent, in the opinion of the Court of First Instance, the continued existence of the infringement at the time the complaint was brought was in fact decisive for the question whether the Commission was entitled to exercise its powers.

73. The Court of First Instance deals with that point in its consideration of the plea of violation of the principle of legal certainty in paragraphs 70 to 73 of the judgment under appeal. The question whether in 1994 there was still any complaint pending at all, to which NALOO could establish a link, is central to the classification of the two complaints as a single complaint. Prior to making that classification it is also necessary to determine what object, if any, the 1990 complaint actually had.

(i) Object of the 1990 complaint

74. In paragraphs 46 and 48 of the judgment under appeal, the Court of First Instance found, after evaluating NALOO's complaint of 29 March 1990 and the supplementary letters, that in 1990 allegations of infringements in the years from 1986/87 to 1989/90 were referred to the Commission. The substance of that finding has not been challenged by the parties. There is merely a submission by BC that the allegations as to the level of the royalty related only to the period after 27 December 1987.

75. In that regard, the following should be noted. Assuming that the Commission is in fact empowered and obliged to investigate past infringements — an assumption which still has to be examined — then it could of its own motion broaden its investigation to include periods of time which were not referred to in NALOO's complaint. For that reason, it is not clear what BC could gain from the setting aside of the Court of First Instance's finding relating to the temporal scope of the complaint.

76. Leaving that matter aside, it must be recalled that pursuant to the first sentence of Article 32(d)(1) of the ECSC Treaty and the first sentence of the first paragraph of Article 51 of the ECSC Statute, appeals are limited to points of law. The finding as to the period of time to which NALOO's complaint related is, however, an appraisal of the facts, the Court of Justice's examination of which is limited to whether the Court of First Instance made a manifest error of fact that can be ascertained from the documents in the file without any further evaluation of the evidence. [20]

77. BC has not made any submission pleading that the Court of First Instance made such an error. On the contrary, BC concludes, essentially on the basis of the fact that certain passages of the complaint refer to a royalty of £11/t, which was not applied until 27 December 1987, that NALOO's complaint did not embrace the levels of royalty imposed prior to that time. In that respect, BC has made an assessment of the complaint which differs from that of the Commission, and thus also the Court of First Instance, without, however, explaining why the Court's understanding of the complaint is manifestly incorrect and thus constitutes an error of fact. This ground of appeal must therefore be rejected.

(ii) Characterisation of the Commission's 1991 Decision and letter

78. At issue here is whether the Court of First Instance's finding in paragraph 71 of

20 — See Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraphs 25 and 72.

the judgment under appeal that in the 1991 Decision, the Commission did not take a decision on the part of the 1990 complaint relating to the period before 1 April 1990 is correct in law. It is also necessary to consider whether the Court failed to recognise that in so far as that period is concerned, the complaint was rejected by either the Commission's letter of 8 February 1991 or its letter of 4 September 1991, as the Commission maintains.

79. Those issues can be examined by the Court of Justice in appeal proceedings. While they do indeed concern the assessment of the content of the 1991 Decision and the letters referred to above, their main focus is the examination of the legal effects of the Commission's actions. [21]

80. In the letter of 8 February 1991, the Commission stated that it was not obliged to adopt a formal decision finding that there had been infringements in the past in order to facilitate a possible claim for damages by a complainant. It also explained that it had not fully investigated the effects of the 1986 Understanding and therefore expressed no opinion on it, because, after reaching an agreement with BC's predecessor in title, NALOO had withdrawn an action against the United Kingdom Office of Fair Trading which it had instituted before the national courts. The Commission made similar statements in the letter of 4 September 1991.

21 — *SFEI*, cited in footnote 14, paragraphs 25 and 26.

81. The introduction to the 1991 Decision states:

'This letter which sets out a Commission decision deals with certain aspects [of the complaint lodged] by [NALOO].... It deals with the position in England and Wales, in the light of the new situation arising from the entry into operation of [the supply contracts] between [BC], [NP] and [PG] on 1 April 1990. Other issues, particularly those regarding the situation... before 1 April 1990... are not dealt with.'

82. The question arises whether any of those actions was intended to produce legal effects and must therefore be regarded as a decision within the meaning of the second paragraph of Article 14 and the first paragraph of Article 33 of the ECSC Treaty. [22]

83. At the outset it should be noted that the characterisation of the passage cited above as a decision is not called into question merely — as the Court of First Instance believes — by the alleged circumstance that it appears solely in a covering letter accompanying the decision. In fact, as the Commission itself states — see point 81 —

22 — In its case-law, the Court of Justice commonly applies this criterion as a precondition for classification of a measure as a decision under the EC Treaty. See Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 27.

it sent only a single letter, in which the decision was incorporated. It was therefore not a mere covering letter. In any event, in legal terms it would make no difference whether the passage in question appeared in the decision itself or in a covering letter.

84. Considered in isolation, the Commission's statements could be regarded as a simple declaration of its inactivity or as a delimitation of the subject-matter of the decision by exclusion of the contentious earlier period. However, if the factual and legal context are also taken into consideration, the Commission's actions must be regarded as constituting a rejection of the complaint.

85. It follows from the case-law of the Court of Justice [23] that 'an institution empowered to find that there has been an infringement and to inflict a sanction in respect of it and to which private persons may make complaint, as is the case with the Commission in the field of competition, necessarily adopts a measure producing legal effects when it terminates an investigation initiated upon a complaint by such a person'.

86. While that observation relates to cases governed by the competition law laid down in the EC Treaty, which is more strongly shaped by procedural rules laid down in secondary law, it may nevertheless be applied, by analogy, to the present case.

87. In that regard, it should first be recalled that NALOO repeatedly asked the Commission to also examine the effects of the 1986 Understanding. By that request, which was already contained in the letter of complaint of 29 March 1990, NALOO made clear that what it sought was in fact an investigation into the situation since 1986/87. After the Commission confined itself, in its provisional findings of 1 April 1990, to addressing the situation after 1 April 1990, NALOO reiterated, in its letter of 11 January 1991, its request relating to the 1986 Understanding. Finally, NALOO again brought up the matter in its letter of 14 March 1991.

88. Even though the Commission stated in its letter of 8 February 1991 that 'we have... not investigated... fully' the situation before 1 April 1990, it had nevertheless at least commenced an investigation in response to NALOO's complaint. On the basis of the knowledge gained from that investigation, the Commission contacted the United Kingdom authorities by letter of 28 August 1990 and informed them of its (provisional) opinion that the pricing

23 — *SFEI*, cited in footnote 14 above, paragraph 27. See, also, Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 28.

policy of the electricity producers was discriminatory and the royalty charged by BC was too high.[24] That investigation related to the situation before the introduction of the new terms which took effect from 1 April 1990, since those terms took effect only retrospectively, following a corresponding offer by the United Kingdom authorities on 24 October 1990.

89. By declining to adopt a position with respect to a part of the complaint and by stating that it would not continue the investigation into the matters complained of, the Commission rejected that part of the complaint by a measure which constituted a decision. The Commission's statement did in fact produce legal effects because, by that statement, the Commission conclusively refused to take any further action in respect of the complaint in so far as it related to the period before 1 April 1990, and terminated the investigation that it had started.

90. The question whether the rejection decision was already contained in the Commission's letter of 8 February 1991, or whether it was contained in the subsequent 1991 Decision has, however, not yet been conclusively resolved. Since NALOO did not institute proceedings in respect of either of those measures, that question can ultimately remain open.

91. However, there are a number of arguments in favour of regarding the letter of 8 February 1990 as already constituting a decision on the complaint in so far as it related to the period before 1 April 1990. In that letter, the Commission had already unequivocally stated its position with regard to that period of time. It had also raised the prospect of a formal decision only in respect of the terms applied after 1 April 1990. On the other hand, the argument could be made that a complainant is entitled to expect a single decision covering all the periods of time referred to in its complaint.

92. Since the decision to reject the part of the complaint relating to the period before 1 April 1990 was in any event contained either in the letter of 8 February 1991 or in the decision of 23 May 1991, the Commission's letter of 4 September 1991 was merely confirmation of the decision which had already been made.

93. The first ground of appeal should thus be accepted in so far as it is directed against the finding of the Court of First Instance that the Commission was acting on a single complaint, first lodged in 1990 and supplemented in 1994, when it adopted the contested decision. Since the first complaint had already been rejected by a decision and had thus been dealt with, the second complaint could no longer be regarded as a continuation of the first one.

24 — For the precise wording of the letter, see the extracts cited in paragraph 17 of the judgment under appeal.

(iii) Findings relating to the principle of legal certainty

94. The question arises whether the finding that the adoption of the 1998 Decision was not contrary to the principle of legal certainty is incorrect in law. It is true that the Court of First Instance based its finding on the incorrect premiss that the complaint had not already been rejected in 1991 by a challengeable decision.

95. However, there would be no need to set aside the Court of First Instance's findings with respect to the principle of legal certainty if it transpired that, for reasons other than those given by the Court of First Instance, the principle of legal certainty did not in principle preclude adoption of the 1998 Decision. [25]

96. It is settled case-law that a decision which has not been challenged by the addressee within the time-limit laid down by Article 230 EC becomes definitive against him. [26] This applies, by analogy, to decisions under the ECSC Treaty. That rule is based on the consideration that the purpose of having time-limits for bringing legal proceedings is to ensure legal certainty by preventing Community measures which produce legal effects from being called in question indefinitely. [27] It is common ground that NALOO did not challenge the Commission measures referred to above and that in *NALOO I* it withdrew at least the part of its action of relevance in this regard.

97. It follows from the case-law cited above that a decision of the Commission that merely confirms a previous decision produces no legal effects and is therefore not a measure that can be the subject of an action for annulment. In such a case an action for annulment would be inadmissible. [28]

98. However, a measure is only to be regarded as a mere confirmation of a previous decision if it contains no new factor as compared with the previous decision and was not preceded by a re-examination of the circumstances of the person to whom that decision was addressed. [29]

99. When applying that test, it is necessary to distinguish between two different situ-

25 — On the power of the Court of Justice to uphold a judgment where it proves to be well founded for reasons other than those given by the Court of First Instance, see Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28, Case C-320/92 P *Finsider* v *Commission* [1994] ECR I-5697, paragraph 37, and Case C-210/98 P *Salzgitter* v *Commission and Germany* [2000] ECR I-5843, paragraph 58.

26 — Case 20/65 *Collotti* v *Court of Justice* [1965] ECR 847, *TWD Textilwerke Deggendorf*, cited in footnote 15, paragraph 13, and Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 57.

27 — *AssiDomän*, cited in footnote 26, paragraph 61.

28 — Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 4, Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 1473, paragraph 16, and Case C-180/96 *United Kingdom* v *Commission*, cited in footnote 22, paragraph 28.

29 — Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraph 14.

ations. In one,[30] the Commission has already examined a complaint on the matter once and rejected it because it does not consider the allegations to be sound. If the complainant then lodges a fresh complaint which does not contain any significant new facts, the Commission is not obliged to reexamine the matter. Its rejection of the complaint on that ground is merely confirmation of the earlier decision and cannot be challenged.

100. The present situation differs from the one set out above. Here, the Commission essentially declined to examine the first complaint on the matter on grounds of expediency and pointed out that it was not obliged to adopt a decision in order to facilitate an action for damages. In the second (and contested) decision, the Commission, aware of the rulings in *Banks* and *Hopkins*, did not revisit that argument, but instead maintained essentially that it was not empowered to take action on the basis of a complaint alleging past infringements of Article 63(1) and 66(7). In the alternative, it stated that the alleged infringement of Article 66(7) had not been proven.

101. Where, in response to a further complaint alleging the same infringements, the Commission — relying on new legal arguments — rejects that complaint, this does not constitute a mere confirmation of the first decision. Similarly, there is no violation of the principle of legal certainty where the Commission carries out a fresh examination of the same factual situation and corrects its legal assessment.

102. The fact that, as a result of restructuring in the sector and staff turnover, it may be difficult for the undertakings concerned to adopt a position on the alleged past infringements after such a long time is not of itself decisive in that regard. Such circumstances, which lie within the sphere of responsibility of the undertakings concerned, cannot affect the Commission's exercise of its powers under the ECSC Treaty.

103. On the other hand, the Commission's power to investigate an infringement cannot endure indefinitely. Even though the present case does not concern the imposition of a fine, Commission Decision No 715/78/ECSC of 6 April 1978 concerning limitation periods in proceedings and the enforcement of sanctions under the Treaty establishing the European Coal and Steel Community[31] can be used as a guideline for determining the period within which the Commission may still act.

104. For a case such as the one at issue here, that decision prescribes a limitation period of five years (Article 1(1)(b)) which can be extended, as a result of inter-

30 — On this see Case 232/85 *Becker v Commission* [1986] ECR 3401.

31 — OJ 1978 L 94, p. 22.

ruptions, to a maximum of ten years (second sentence of Article 2(3)). To this must be added periods in which the limitation period is suspended because the matter is pending before the Court of Justice (or the Court of First Instance). The limitation period for proceedings would have started to run on 1 April 1990 — the day on which the alleged infringement ceased (second sentence of Article 1(2)).

105. Assuming that, in any event, the procedure that led to the adoption of the contested decision effected an interruption in the limitation period, then at the time the decision of 22 April 1998 was adopted the limitation period had not expired. The limitation period has now been suspended since the date when the action against that decision was lodged.

106. If, as a result of the judgment of the Court of Justice in the present case, the Commission were to again adopt a new decision on the basis of a fresh examination of the complaint, it might, however, have to have regard, in its assessment, to the protection of the legitimate expectations of the undertakings concerned.

107. Accordingly, the principle of legal certainty did not preclude adoption of the contested decision, even though the same infringements had already been the subject-matter of an earlier decision. Furthermore, the contested decision was also not confirmation of an earlier decision and therefore not open to challenge.

108. Consequently, the findings made by the Court of First Instance relating to the principle of legal certainty are correct as to their conclusion — even though they are based on the incorrect premiss that there was a single complaint. It was also correct of the Court of First Instance not to characterise the contested decision as a confirmation of an earlier decision and thus not to examine of its own motion the admissibility of the action.

109. The first ground of appeal must therefore be rejected in so far as it alleges violation of the principle of legal certainty.

3. The Commission's power to take action in respect of the alleged infringements in the years from 1986/87 to 1989/90

(a) Arguments of the parties

110. All the appellants submit that Article 63(1) and the first sentence of

Article 66(7) of the ECSC Treaty empower the Commission solely to adopt recommendations, which by nature have only prospective effect. IP, BC and PG argue that those provisions do not empower the Commission to make findings relating to past infringements which have now ceased.

111. The Commission takes the view, unlike the other appellants, that the key issue is not whether an infringement has already ceased but whether it has continuing effects which are capable of being remedied by the adoption of a recommendation.

112. By contrast, NALOO considers that the Court of First Instance was right to take the view that the Commission can make findings in respect of past infringements of the provisions in question.

113. The appellants also submit that the Court of First Instance was wrong to consider that the question as to the form of measure that the Commission is entitled to adopt on the basis of that provision was not relevant to the case and to address instead the issue of the Commission's power to investigate infringements. They submit that the power to investigate cannot be considered independently of its aim, which is to prepare the adoption of a recommendation.

114. Conversely, NALOO submits that the Court's approach was correct. In an action relating to a refusal to carry out an investigation, there is no need for the Court to determine what form of legal measure, if any, the Commission can adopt at the end of the investigation. That must be decided by the Commission itself.

115. IP and PG add that under Article 14 of the ECSC Treaty the power to adopt decisions includes the power to make recommendations, since decisions represent the more significant encroachment on national sovereignty. Conversely, however, the power to adopt decisions is not included in the power to make recommendations. Where decisions are provided for, they are expressly referred to in the relevant Treaty provisions.

116. IP, BC and PG also object to the Court of First Instance's interpretation of paragraph 19 of the judgment in *Hopkins*. [32] In that passage, the Court of Justice set out the procedural avenues open to the Commission when taking action against continuing discrimination and the ways in which adversely affected undertakings could obtain judicial protection. However, it did not state that the Commission was empowered to make findings or recom-

32 — Cited in footnote 6.

mendations relating to past discrimination which had already ceased. It is only by way of a recommendation concerning discrimination which is still being practised that the Commission can take account of the effects which that discrimination had on market actors prior to its involvement. Affected undertakings can then rely on a finding of infringement, contained in a recommendation, before the national courts. The Commission is not however empowered to make a finding separately from a recommendation, in order to facilitate an action for damages.

117. NALOO submits that in *Hopkins* the Court of Justice was called upon to give a ruling in proceedings concerning an action for damages in respect of past infringements and that its observations relate to precisely such a case as this.

118. IP and PG add that even where, pursuant to Article 63(1), the Commission makes findings of price discrimination in a recommendation directed to a Member State, these cannot be invoked against the undertaking concerned because, just like EC directives, ECSC recommendations have no horizontal effect *vis-à-vis* third parties.

119. According to IP, BC and PG, the principle of effective judicial protection does not give rise to a right to require the Commission to make findings in respect of the past as a prerequisite for bringing an action for damages. That principle was already unsuccessfully relied on in *Hopkins* as justification for the contention that Article 63 is directly applicable.

120. By contrast, NALOO submits that in *Hopkins* the Court of Justice referred to the effective judicial protection which the ECSC Treaty provides to victims of price discrimination, and concluded that Article 63(1) provides for the making of findings relating to past infringements. [33]

121. BC and IP consider that the rules of the ECSC Treaty ensure effective judicial protection, without there being any necessity for the Commission to make findings of past infringements of Article 63(1) or Article 66(7). Instead, the undertaking concerned must lodge a complaint with the Commission in good time. Then, if the discrimination does not cease, the Commission will make a recommendation to the Member State. The party concerned can then rely directly on that recommendation against that State before the national courts. If the Commission does not take action, the complainant can institute legal proceedings and, in certain circumstances, bring an action for damages.

33 — NALOO refers to paragraph 22 of the judgment in *Hopkins* (cited in footnote 6).

122. Compensation cannot be sought for every case of past loss arising from malfunctioning markets. [34] Therefore, the circumstance that NALOO members could not succeed in actions for damages before the national courts because the Commission had made no finding in respect of events in the past does not constitute a gap in the system of legal remedies. The legal systems of the Member States do not in general recognise a right to damages for breach of competition rules.

123. Even if a finding of past discrimination were made, no legal consequences would ensue from Article 63(1). Instead, the Commission would have to make a detailed recommendation stating how the discrimination should be brought to an end for the future. For example, the discrimination could be ended by reducing the prices paid to BC or by raising the prices applicable to NALOO members. The existing system is thus based only on preventive protection and not on compensation for damage.

124. At the hearing, PG once again stated that the ECSC Treaty related primarily to undertakings in the coal and steel sectors. The aim of that treaty was not to provide grounds for claims for damages against undertakings in other sectors — such as PG and IP — which do not even have a right to bring actions under that treaty.

125. Finally, BC and NALOO have differing opinions as regards Article 65 of the ECSC Treaty. BC considers that the Court of First Instance incorrectly left open the question of the applicability of Article 65, whereas it should have held that it was not applicable. NALOO submits that if the Court of Justice finds that Article 66(7) does not empower the Commission to make findings relating to past situations, it should in any event hold that Article 65 is applicable.

126. The Commission complains that Court of First Instance annulled the decision in its entirety although it neither examined nor rejected the Commission's findings as regards the applicability of Article 65 of the ECSC Treaty.

(b) Assessment

127. As a preliminary point, it should be noted that the findings made by the Court of First Instance with respect to the Commission's power to open investigations, which here derives from Articles 63(1) and 66(7) of the ECSC Treaty, are incorrect in so far as they are based on the assumption that the infringements still existed on the date the complaint was lodged (para-

34 — IP cites the Opinion of Advocate General Fennelly in Case C-18/94 *Hopkins* [1996] ECR I-2281 at 2284, point 51.

graphs 59 and 60 of the disputed judgment). It follows from the observations made in relation to the first ground of appeal that the 1994 complaint is to be regarded as a new complaint because the Commission had already rejected the 1990 complaint by way of a decision in 1991. It is undisputed that when the new complaint was lodged in 1994 the alleged infringements had ceased.

128. However, that does not suffice to overturn in their entirety the Court's findings relating to the Commission's powers, as those findings are not based only on the assumption that the infringements were still continuing. Instead, the Court of First Instance inferred from *Hopkins* [35] that the combined provisions of Articles 4(b) and 63(1) of the ECSC Treaty, on the one hand, and of Articles 4(d) and 66(7) of the ECSC Treaty, on the other, in any case empowered the Commission to examine NALOO's complaint in so far as it related to the allegedly discriminatory pricing and unreasonable levels of royalty in the years 1986/87 to 1989/90. [36] The Court of First Instance also appears to have reached that conclusion independently from the first part of the grounds given by it.

129. Therefore, it is now necessary to determine what power each of the provisions in question conferred on the Commission in respect of infringements which had already ceased at the time the complaint was lodged.

(i) Powers of the Commission under Article 63(1) of the ECSC Treaty

130. The starting point for a consideration of the Commission's powers is, first, the wording of Article 63(1) of the ECSC Treaty. The use of a present indicative tense ('... that discrimination *is being* systematically practised by purchasers...' suggests that the infringements complained of must still be taking place at the time the Commission makes its findings.

131. Moreover, account should be taken of the fact that that provision empowers the Commission solely to make recommendations to the governments concerned, a power which does not include the power to adopt decisions. It is clear from the fifth paragraph of Article 14 of the ECSC Treaty that decisions are regarded as a more serious encroachment on the sovereignty of the Member States than recommendations, with the consequence that the power to adopt decisions also includes the power to make recommendations, which constitute the weaker measures. One can therefore also draw the converse conclusion that in situations where only recommendations are provided for, the Commission is not *ipso facto* entitled to adopt a decision.

35 — Cited in footnote 6.

36 — Paragraphs 61 to 63 of the judgment under appeal.

132. The fact that Article 63(1) expressly provides only for the making of recommendations is — contrary to the view taken by the Court of First Instance — decisive. While it is true that the present case concerns the Commission's refusal to carry out a more extensive investigation, rather than review of a measure already taken by the Commission, the fact that Article 63(1) refers only to recommendations is a feature of the express terms of the provision which cannot be ignored when interpreting that provision.

133. The appellants base their arguments on the assumption that the sole purpose of recommendations is to set objectives for their addressees, who are to meet those objectives in the future by methods of their choosing. They argue that if the discrimination practised by the purchasers has already ceased, the Commission plainly cannot, by way of a recommendation, instruct the Member State to put an end to that abusive conduct. Consequently, according to its express terms, the aim of that provision is to empower the Commission only to take action with prospective effect.

134. The question arises whether that interpretation is consistent with the findings of the Court of Justice in *Hopkins*. In paragraph 19 of that judgment the Court of Justice observed:

'In order to ensure the effectiveness of the prohibition laid down in Article 4(b), the powers conferred by Article 63(1) on the Commission must be such as to enable it, not only to oblige the authorities of the Member States to bring to an end for the future any systematic discrimination which the Commission has found to exist, but also, on the basis of that finding, to draw all the consequences as regards the effects which such discrimination may have had in relationships between purchasers and producers within the meaning of Article 4(b) even before the Commission took action. That same finding may be relied on by the persons concerned before the national courts.'

135. It follows that in a recommendation the Commission may require the Member State not only to put an end to the discrimination for the future but also to remedy the effects of any past discrimination. Such an order would not be inconsistent with the prospective nature of a recommendation. The Member State would be given guidelines for future action to be taken in order to redress the negative effects of an unlawful situation in the past.

136. For example, the Commission could have required the Member State to ensure that the sellers who were adversely affected by price discrimination were compensated for the economic loss sustained by them. If the State, or an organ of the State, was responsible for the discrimination,[37] the State could, in certain circumstances, have been required to pay compensation.

37 — At least so far as the material time — from 1986 to 1 April 1990 — is concerned, the purchase of coal for electricity generation was in any event the responsibility of the State-owned CEGB. Furthermore, the Government also appears to have had decisive influence on the pricing policy, which is apparent from the fact that in 1990 it conducted negotiations with NALOO on prices, which it ultimately set unilaterally.

137. It is also clear from the subsequent observations of the Court of Justice in *Hopkins* that the Court was primarily concerned with the situation where the State itself is either directly or indirectly responsible for the discrimination. In that regard, at the end of paragraph 19 it pointed out that the findings made in the recommendation may be relied on by the persons concerned before the national courts. In addition, in paragraph 28 the Court made express reference to the case-law on the direct effect of directives. However, according to settled case-law, directives have direct effect in principle only between individuals and the State and not between private persons. [38]

138. The appellants submit that the reference made by the Court of Justice in *Hopkins* to Commission findings relating to the past must be understood as meaning that the Commission can take action in respect of past infringements only by issuing a recommendation in which it also instructs the Member State to remedy discrimination in the future.

139. This is not however a correct interpretation of that judgment. The misunderstanding may be attributable to the fact that in point 11 of the contested decision, the Commission incorrectly reported the relevant passage of *Hopkins*, in so far as it stated that the *Commission* may draw consequences from discrimination which occurred before it took action. However, the Court of Justice in fact held that in a recommendation the Commission can oblige the *Member State* to draw consequences from past infringements.

140. The question remains whether the Court of Justice assumed that an obligation to remedy the effects of discrimination can only be imposed on a Member State in tandem with the obligation to put an end to the discrimination for the future. The passage of *Hopkins* cited does not provide any support for such an interpretation. On the contrary, the Court of Justice refers to both possibilities (putting an end to the discrimination for the future and remedying the effects of past discrimination) together.

141. The appellants' argument is clearly based on the assumption that given its prospective nature a recommendation can only be directed at putting an end to (still existing) discrimination, and on the further assumption that isolated findings relating to the past can only be made in the form of decisions, which Article 63(1) does not empower the Commission to adopt. The appellants have failed to recognise that in a recommendation the Commission may also require that the effects of past discrimination be remedied and make the findings relating to the past which are necessary for such a recommendation.

38 — Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20, Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraphs 20 and 21, and the order of 24 October 2002 in Case C-233/01 *Riunione Adriatica di Sicurtà* [2002] ECR I-9411, paragraph 19.

142. It should also be borne in mind that the discrimination had already been over for years when a preliminary reference was sought from the Court of Justice in the *Hopkins* case. The Court's observation that the Commission can oblige the Member State to draw the necessary consequences from past discrimination would therefore have been of no practical relevance to that case if that obligation could only be imposed in tandem with an obligation to put an end to existing discrimination. It follows that the Court of Justice must be presumed to have considered that the abovementioned measures may be taken independently of each other.

143. The question arises whether the statements of the Court of Justice in paragraph 19 of *Hopkins* could perhaps be seen in a different light when read in the whole context of that judgment. At first sight, the passage cited above is inconsistent with the Court's statement in paragraph 27 of *Hopkins* that individuals cannot contend before the national courts that discrimination is incompatible with Article 63(1) as long as the alleged discrimination has not been the subject of a recommendation addressed to the governments concerned. If, in consequence, individuals cannot rely on the direct applicability of that provision then it seems doubtful that it can be invoked against a purchaser applying discriminatory conditions before the Commission has taken any action. However, that would be the precise implication were the Commission to make a finding of past infringements of Article 63(1) and to require the Member State to remedy their effects.

144. This apparent inconsistency can however be resolved if the following considerations are taken into account. The prohibition in Article 63(1) has direct effect inasmuch as purchasers are deemed to act unlawfully when they apply discriminatory prices. The Commission's findings are therefore not constitutive in nature but merely declaratory and can, accordingly, also cover infringements in the past. However the Commission has discretion to determine the legal consequences arising from the unlawful conduct. Only where, having regard to gravity and the duration of the infringement and the situation on the market concerned, the Commission considers it appropriate to require the Member State to remedy the effects of the infringement can individuals rely on such a recommendation before the national courts.

145. Finally, it is still necessary to consider whether the interpretation of paragraph 19 of *Hopkins* applied here is compatible with Article 63(1). As mentioned at the outset, the wording of that provision implies the infringement must still be taking place at the time the Commission takes action.

146. When interpreting that provision, account must be taken not only of its wording, but, above all, of its effectiveness, which was also taken into consideration by the Court of Justice in the passage cited

above. The prohibition on discriminatory practices contained in Articles 4(b) and 63(1) would not have sufficient deterrent effect if the undertakings concerned were only ever required to change their conduct for the future after the Commission had addressed a corresponding recommendation to the Member State, and past infringements were not punishable. [39]

147. Discrimination against certain market actors results in a distortion of competition. The undertaking which receives preferential treatment acquires an advantage over its competitors, which — where that advantage is financed by State resources — could also be regarded as State aid. It has long been recognised in the Court's case-law that in order to restore the previously existing (competitive) situation, the Commission can require the recovery of unlawfully granted aid, although there is no express provision for this in Article 88 EC. [40] That is also the case for aid falling within the scope of the ECSC Treaty. [41] That legal principle can also be applied to the present situation. Accordingly, it is in the interests of the effectiveness of Articles 4(b) and 63(1) that, in order to restore competition, the Commission can require Member States to take action in respect of past infringements of the prohibition on discrimination.

148. The conclusion must therefore be that under Article 63(1) the Commission was empowered to impose an obligation on the Member State, by way of a recommendation, to take measures to remedy the effects of infringements of the prohibition on discrimination committed by purchasers. The Commission was empowered to take such action even where the infringements had ceased at the time the Commission made the relevant recommendation. However, in such a case, the Commission must take account of the protection owed to any legitimate expectations held by the undertakings concerned. The Commission's power also included the right to carry out the relevant investigations relating to past periods of time. Consequently, the ground of appeal relating to the finding by the Court of First Instance in that regard must be rejected.

149. There is therefore no need to consider whether the principle of effective judicial protection for the sellers who were discriminated against also confers such a power on the Commission.

(ii) The Commission's powers under Article 66(7) of the ECSC Treaty

150. The Court of First Instance reached an analogous conclusion in respect of Article 66(7) of the ECSC Treaty. In that regard, it should be noted that in *Hopkins*, the Court of Justice dealt only with Article 63(1). It should also be pointed

39 — In that regard, it is unclear, however, whether the Commission could in certain circumstances, punish such infringements by the imposition of a fine pursuant to Article 64 of the ECSC Treaty.

40 — Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 13, and Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 26.

41 — Case C-390/98 *Banks* [2001] ECR I-6117, paragraphs 73 to 75.

out that, in contrast to Article 63(1), Article 66(7) empowers the Commission to make recommendations addressed not to the Member States but to the undertakings concerned. Just like Article 63(1), the first sentence of Article 66(7) precludes, in the first instance, the adoption of decisions. [42]

151. The wording of Article 66(7) suggests, in even clearer terms, that that provision is concerned with the remedying of an unlawful situation for the future. The Commission's recommendation is intended to prevent the undertaking concerned from using its dominant position for purposes contrary to the objectives of the treaty. Similarly, the fact that where a recommendation is not complied with, the second sentence of Article 66(7) empowers the Commission itself to intervene directly, by way of a decision, in the formulation of business conditions, supports the proposition that the Commission's power is solely as to the future.

152. On the other hand, the same considerations apply here as in respect of Article 63(1). The wording of the provision does not preclude the Commission from instructing an undertaking, in a recommendation, to remedy, with retroactive effect, the consequences of its abusive conduct.

153. That power would indeed be wider in scope than the Commission's powers to impose penalties for infringements of Article 82 EC. However, Article 66(7) of the ECSC Treaty differs from Article 82 EC in two significant respects, which serve to justify those more extensive powers. First, individuals cannot directly rely on Article 66(7) of the ECSC Treaty before national courts and, accordingly, cannot bring actions for damages if no action has been taken by the Commission. [43] Second, the first sentence of Article 66(7) does not provide for any other penalty — such as the imposition of a fine — for past infringements which have already ceased. While the second sentence of Article 66(7) refers to Articles 58, 59 and 64 of the ECSC Treaty, which concern the imposition of fines, the Commission can resort to those provisions only where there has been an infringement of a decision within the meaning of the second sentence of Article 66(7). It cannot, however, directly impose a fine for past infringements, as is possible under Article 82 EC in conjunction with Article 15(2) of Regulation No 17.

42 — On this, see point 132 et seq. above.

43 — *Banks* cited in footnote 6, paragraph 19. By contrast, on the direct applicability of Article 82 EC, see Case 127/73 *BRT* [1974] ECR 51, paragraphs 15 to 17, and Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 45.

154. Accordingly, in order to ensure the effectiveness of the provision, the Commission must remain empowered under Article 66(7) to take action in respect of infringements even after they have ceased and to be entitled to require an undertaking, by way of a recommendation, to remedy the effects of the infringement.

155. The fact that recommendations pursuant to Article 66(7) must be made to the undertakings themselves does not preclude the Commission from being empowered to carry out investigations of infringements which have already ceased and, where appropriate, to make recommendations. However, when exercising its discretion in deciding whether to make a recommendation and what aims such a recommendation should impose on the addressee, the Commission must have regard to the principles of legal certainty and protection of legitimate expectations. [44]

156. This ground of appeal must therefore also be rejected in so far as it challenges the finding of the Court of First Instance relating to the Commission's powers under Article 66(7) of the ECSC Treaty.

44 — On the application of Commission Decision No 715/78 concerning limitation periods in proceedings and the enforcement of sanctions under the ECSC Treaty in that regard, see point 103 et seq. above.

(iii) Failure to consider the applicability of Article 65 of the ECSC Treaty

157. In the contested decision, the Commission came to the conclusion that Article 65 of the ECSC Treaty does not apply to the fixing of royalties because that provision, like Article 81 EC, covers only agreements restricting competition, whereas the unilateral abuse of a dominant position falls within the scope of Article 66(7) of the ECSC Treaty. The Court of First Instance left open the question of the applicability of Article 65 because, in its view, BC's conduct in any event came within the scope of Article 66(7).

158. The approach taken by the Court of First Instance would be correct only if Article 65 provided for the same legal consequences as Article 66(7). That is not so, however. Under Article 65(5) the Commission can impose fines directly on undertakings which have entered into agreements that are anti-competitive, and therefore void, whereas pursuant to the second sentence of Article 66(7) it can do so only as a penalty for failure to comply with a Commission decision. Furthermore, under Article 65 the Commission can adopt decisions declaring an agreement void. Therefore, the Court of First Instance erred in law in leaving open the question of the applicability of Article 65.

4. The Commission's obligation to investigate the complaint in so far as it related to the years 1986/87 to 1989/90

(a) Arguments of the parties

159. For the Commission, the most important ground of appeal is its claim that, in paragraph 85 of the judgment under appeal, the Court of First Instance incorrectly, and without providing adequate reasons, found that the Commission had an obligation to investigate the complaint. The Commission submits that such an obligation cannot be inferred from the order in Case T-367/94 *British Coal Corporation* v *Commission*,[45] the only case cited by the Court of First Instance in support of its observation. Similarly, the fact that because Articles 63(1) and 66(7) of the ECSC Treaty are not directly applicable, the Commission alone is responsible for ensuring the application of those provisions does not provide grounds for an obligation to take action.

160. The Commission submits that the Court of First Instance confused the Commission's obligation to examine a complaint with care — an obligation which it, the Commission, does not in any way deny — with the supposed obligation to open an investigation where a complaint has been made. It is apparent from the subsequent passages of the judgment that the Court of First Instance did not in fact intend only to refer to the former obligation. In particular, the Court's assertion that the Commission did not explain why there was no infringement of Article 63(1) makes clear that it did in fact assume that there was an obligation on the Commission to investigate the complaint.

161. The other appellants share the Commission's opinion. In addition, they submit that there is no Community interest in the Commission's carrying out investigations relating to the distant past and that that alone is reason enough for there to be no such obligation on the part of the Commission.

162. According to NALOO, the Commission has an obligation to decide on the complaint. Since it has exclusive jurisdiction to apply Articles 63(1) and 66(7), without any action on its part a claim for damages cannot succeed before the national courts and effective judicial protection is, consequently, not ensured.

(b) Assessment

163. According to settled case-law,[46] the Commission is obliged to examine complaints with care, as it itself accepts. By

45 — Cited in footnote 17.

46 — *Rendo and Others* v *Commission*, cited in footnote 23, paragraph 27, the order in Case C-59/96 P *Koelman* v *Commission* [1997] ECR I-4809, paragraph 39, and Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 79.

contrast, the complainant is not entitled — at any rate so far as complaints alleging infringements of the competition rules in the EC Treaty are concerned — to require the Commission to open an investigation or to require it to definitively penalise the alleged infringements by way of a decision. [47] Instead, it is for the Commission to decide, with due exercise of its discretion, whether and to what extent it is necessary to take action in respect of the complaint, although it must, where appropriate, state the reasons why it has decided not to take further action in respect of the complaint. [48]

164. When evaluating the matter in the exercise of its discretion, the Commission must weigh up various interests. The Community interest in taking action against the infringement is of particular significance. In addition, the Commission can also take into account the interests of the market actors affected by the restriction of competition and, in particular, the interests of the complainant.

165. The question arises whether, as the Commission submits, the Court of First Instance misunderstood those principles and instead assumed that the Commission had an obligation to open an investigation. In paragraph 85 of the judgment under appeal, the Court of First Instance stated: 'Since [the Commission] has power... to consider NALOO's complaint relating to the infringements alleged to have occurred in the years 1986/87 to 1989/90, the Commission was bound to undertake that examination...'. [49]

166. In that passage, the Court of First Instance was merely referring to the Commission's obligation to examine a complaint with care ('to consider [the] complaint'/'to undertake that examination'). It did not state that the Commission was obliged to take further action. That is also clear from its citation of the order in Case T-367/94. The passage of that order cited by the Court refers only to the obligation to examine a complaint — backed up by numerous supporting references to the case-law.

167. Whether, in its review of the reasons stated in the decision, the Court may in fact have indirectly imposed more stringent requirements is an issue which must be addressed in the assessment of the fourth ground of appeal.

168. NALOO submits that the Commission has an obligation to adopt a decision in respect of the alleged infringements of

47 — Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 17, *Koelman*, cited in footnote 46, paragraph 39, Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147, paragraph 62.

48 — On this, see points 179 and 217 below.

49 — ... [not relevant to the English text].

Articles 63(1) and 66(7), in order to enable the affected parties to bring actions for damages. With that argument, NALOO goes beyond the findings of the Court of First Instance in the judgment under appeal, but it has not challenged the judgment on that point by lodging an appeal of its own. Consequently, an examination of that argument by the Court of Justice would constitute an inadmissible extension of the subject-matter of the appeal proceedings.

169. Since the Court of First Instance correctly described the Commission's obligations, this ground of appeal must accordingly be rejected. The Commission's additional obligation to state reasons for its decision will be considered in more detail in the assessment of the fourth ground of appeal. [50]

5. The lawfulness of the contested decision

(a) Arguments of the parties

170. IP and PG consider that the decision contains an adequate statement of reasons in so far as the Commission refused to investigate the price discrimination allegedly practised in the past because it was not empowered to do so.

50 — See points 179 and 217 et seq. below.

171. The Commission submits that the judgment under appeal is flawed because the Court of First Instance found that the decision contained inadequate reasoning with respect to the issue of price discrimination. The Commission did not carry out any investigation of that part of the complaint because it considered that it was not empowered to investigate past infringements. Accordingly, it cannot be criticised for not stating why there was no such discrimination.

172. As regards the level of royalties, the Commission and BC contend that the Court of First Instance incorrectly found that in the 1991 Decision and the written correspondence that preceded it, the Commission had already found that the royalties were too high. While in the 1991 Decision the Commission did indeed find that the level of royalty which was applied from 1 April 1990 onwards was not excessive, that does not mean that every other level of royalty is unreasonable. The opinion given in the letter of 28 August 1990 that the royalty of £7/t appeared to be unreasonable was, as the Court of First Instance held in *NALOO I*, merely a tentative statement. NALOO itself acknowledged in its letter of 13 May 1988 that the previous royalty of £11/t was reasonable.

173. Similarly, the Commission has never investigated the profitability of licensed opencast operators because NALOO has never supplied any information on its

members' production costs. In *NALOO I*, the Court of First Instance found that NALOO's extrapolation from the later terms to the earlier ones was not sufficient evidence of excessive royalties.

174. BC adds that the Court of First Instance shifted the burden of proof as to the existence of the infringements from the complainant to the Commission when it required the Commission to explain why the royalties were not excessive.

175. By contrast, NALOO submits that as evidence of the excessive royalties it relied on an analysis of the profitability of BC's opencast mines that the Commission itself had also used as a basis for its 1991 Decision. That is disputed by the Commission. It states that it referred to the profitability of BC's opencast mines only as evidence for the relative improvement in the situation of the licensed operators, and not as a starting point for determining the legality of the level of royalties.

176. NALOO goes on to state that at the time of the 1991 Decision, the Commission had been in possession of the relevant figures for the period before 1 April 1990 and had concluded that from that date onwards the royalties were no longer excessive. That necessarily implies a finding that the previous royalties were excessive. The Court of First Instance was therefore right to find that there was a lack of reasoning because, despite being aware of those facts, the Commission referred to the lack of evidence of an infringement of Article 66(7) as grounds for the rejection of the complaint.

177. In any event, NALOO supplied adequate evidence in the 1994 complaint. The criticism by the Court of First Instance in *NALOO I* of the methodology underlying the evidence supplied in that case does not apply to the method used in 1994.

(b) Assessment

(i) Discriminatory prices

178. It is true that the Commission has an obligation to provide an explanation for its rejection of the complaint which is amenable to review. [51]

51 — Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 89 et seq.

179. Yet, as the Commission correctly submits, in the contested decision it did not make any findings as to whether there had been an infringement of Article 63(1) in the years 1986/87 to 1989/90, because it considered that it was not empowered to do so. On the basis of its understanding of the law, the Commission did provide adequate reasons for the rejection of the complaint. In particular, it could not have had any obligation to explain why no discrimination had taken place if it lacked any power to investigate such infringements in the period at issue.

180. However, as has already been observed, Article 63(1) of the ECSC Treaty also confers on the Commission the power to make recommendations to Member States in respect of past infringements. In the contested decision, the Commission therefore misinterpreted the scope of that provision and did not properly exercise the discretion accorded to it to decide whether or not to open an investigation of the alleged infringement.

181. Accordingly, while the decision does not contain inadequate reasons, as the Court held in the contested decision, it does contain an error in law. The Commission would only have been obliged to explain why there had been no price discrimination if it had in fact carried out an investigation of the alleged infringements. The Commission did not carry out such an investigation. The provisional, and merely indirect, findings regarding the situation before 1 April 1990, which it may be possible to infer from the 1991 Decision and the Commission's letter of 28 August 1990 to the United Kingdom Government, cannot be regarded as the result of an investigation opened in response to NALOO's complaint, because the decisive complaint in that regard was not lodged until 1994.

182. Furthermore, the Commission was not obliged to open an investigation. The principles governing the Commission's obligations when dealing with complaints [52] which have been developed in the case-law on the EC Treaty also apply by analogy to procedures under the competition rules in the ECSC Treaty. That presumption is not called into question by the fact that Article 63(1) of the ECSC Treaty does not have direct effect and, as a result, the sellers who have been discriminated against cannot institute proceedings before national courts unless a relevant measure has been taken by the Commission. As Advocate General Fennelly correctly observed in his Opinion in *Hopkins*, there need not be a remedy in damages provided for each case of economic loss arising from malfunctioning markets. [53]

183. In making its discretionary decision, the Commission must certainly take into account the significance of the fact that action on its part is a precondition for the creation of rights in favour of individuals.

52 — See the rulings cited in footnotes 46 and 47.

53 — Cited in footnote 34, point 51.

This is to be balanced, however, against the Community interest in applying the scarce resources available to the administration primarily to the investigation of existing infringements.

184. In conclusion, the Court of First Instance did indeed err in law by holding that the contested decision was vitiated by a failure to state reasons. However, that part of the judgment under appeal need not be set aside if it transpires that, on grounds other than those given by the Court of First Instance, the judgment is correct. [54] Since the part of the decision which relates to infringement of Article 63(1) must be annulled on the ground that the Commission incorrectly interpreted that provision, the judgment under appeal must be upheld in that regard.

(ii) The level of royalty

185. The Court of First Instance found that the contested decision was vitiated by a failure to state reasons because the Commission had not explained why it was able to conclude at the outset that the royalty rate applied in the years 1986/87 to 1989/90 was not excessive, even though it was considerably higher than the rate applied from 1 April 1990.

186. In that regard, it must be observed that the Commission did not, on the basis of the 1994 complaint, open an investigation of the royalties applied in the years in question, as it would have been empowered, but not obliged, to do. Nor did the Commission make any findings in the contested decision concerning the reasonableness of the royalties: in particular, it did not 'conclude at the outset' that the royalties were not excessive. Where there is no finding, the Commission also need not provide any explanation. Therefore the Court of First Instance erred in law in holding that the statement of reasons was inadequate in that regard.

187. The question arises, however, whether the judgment is correct as to its conclusion because that part of the decision must be annulled for other reasons. The Commission did indeed misinterpret the scope of Article 66(7) of the ECSC Treaty by considering that that provision did not empower it to take action in respect of infringements which had already ceased. [55] However, unlike its rejection of the part of the complaint relating to allegations of price discrimination, it did not base its rejection of the part relating to the allegedly unreasonable royalties solely on its supposed lack of jurisdiction. Instead, it added that the evidence produced by NALOO was insufficient, and thus exercised its discretion to decide whether an investigation should be opened. The incorrect interpretation of Article 66(7) was therefore not decisive to the outcome of its examination.

54 — See the case-law cited in footnote 25.

55 — On this, see point 151 et seq. above.

188. In conclusion, the fourth ground of appeal must succeed in so far as it relates to the Court of First Instance's observations concerning the inadequate statement of reasons relating to the examination of the royalties.

6. BC's procedural complaints

189. BC challenges the judgment on the ground that the Court of First Instance failed to address a number of its arguments. As a preliminary point, it should be noted that the Court is not obliged to examine each argument raised by an intervener where such arguments are not material to its decision. As regards the individual points raised by BC, the following observations should be made.

190. BC submits that the Court of First Instance did not examine its arguments relating to the complainant's obligation to bring proceedings, where appropriate, pursuant to Article 35 of the ECSC Treaty. However BC did not raise that argument in the proceedings at first instance. It merely cited a passage from Advocate General Fennelly's Opinion in *Hopkins*,[56] which refers to the possibility of bringing such proceedings — but not to an obligation to do so.

56 — Point 51 of the Opinion (cited in footnote 34).

191. BC raised the argument concerning the alleged lateness of NALOO's complaint in connection with its argument on the infringement of the principle of legal certainty, which was addressed by the Court of First Instance.

192. The Court of First Instance did not need to examine the argument that there was no Community interest in taking action against the infringement because the Commission, which alone is competent to determine whether there is a Community interest, did not raise that matter in the contested decision.

193. Nor was it necessary for the Court of First Instance to consider the issue of the complainant's burden of proof because, since the Court annulled the decision on the ground of a failure to state reasons, that issue was no longer decisive.

194. BC's complaint must therefore be rejected in so far as it is based on the arguments discussed above. The other points raised by BC need not be considered again here, as they have already been dealt with in the examination of the other grounds of appeal.[57]

57 — On the question as to what legal measures the Commission is empowered to take under Article 66(7), see points 151 and 132 et seq. above (which discuss the same issues in relation to Article 63); as regards the failure to examine the applicability of Article 65 of the ECSC Treaty, see point 158 et seq. above.

C — *The consequences of the successful grounds of appeal for the judgment under appeal*

195. While the first ground of appeal must be substantially accepted, since the Court of First Instance erred in law in finding that the complaints constituted a single complaint and in its findings relating to the principle of legal certainty, the incorrect findings do not affect the outcome of its examination. By classifying the two complaints as a single complaint, the Court of First Instance was able to hold that at the time of the complaint the alleged infringements continued to exist. According to the Court of First Instance, that was a precondition for the Commission remaining empowered to take action on the basis of Articles 63(1) and 66(7).

196. However, it follows from the interpretation of those provisions advocated here that the continued existence of the infringements is not decisive. Even if the 1994 complaint must be regarded as an autonomous complaint, the Commission is not prevented, on that basis, from investigating infringements of Article 63(1) or Article 66(7) in the years 1986 to 1990 and, where appropriate, from making recommendations to the Member State or the undertakings.

197. There is therefore no need to set aside the judgement in that respect. Instead, it would be enough for the Court of Justice to replace the grounds of the judgment.

198. However, the judgment must be set aside in so far as the Court of First Instance held that there was no need to examine the applicability of Article 65 of the ECSC Treaty. In addition, the judgment must also be set aside in so far as it annuls the part of the decision relating to the level of the royalty.

D — *Final judgment in the dispute*

199. Where the Court of Justice sets aside the judgment of the Court of First Instance, it can, under Article 54 of the ECSC Statute, either give final judgment in the matter itself or refer the case back to the Court of First Instance for judgment. Since the state of the present proceedings so permits, the Court of Justice can give final judgment in the matter.

1. The plea relating to Article 65 of the ECSC Treaty

(a) Arguments of the parties

200. NALOO takes the view that the agreements between BC and the licensed mining operators, in which the royalties are fixed, fall within the scope of Article 65 of

the ECSC Treaty. As grounds for that view, it refers to the Opinion of Advocate General Van Gerven in *Banks*[58] and to the judgment in that case.[59] As that provision is also applicable to past situations, the Commission erred in law in failing to investigate NALOO's allegations.

201. The Commission counters by stating that although the nature of licensing agreements is such that they may in principle be capable of restricting competition and could, as a result, come within the scope of Article 65, an agreement fixing the level of royalties does not constitute an agreement restricting competition for the purposes of that provision. Nor did the Court of Justice in *Banks* hold that that was the case. The lawfulness of the level of the royalty must be determined solely by reference to Article 66(7).

202. BC shares the Commission's view and makes a comparison with Articles 81 and 82 EC. In the Court's previous case-law, the lawfulness of agreements fixing excessively high prices and royalties has been determined by reference to Article 82 EC.

58 — Opinion in Case C-128/92 *Banks* [1994] ECR I-1209, at I-1212, paragraphs 19 to 21.

59 — Cited in footnote 6, paragraphs 12 to 14.

(b) Assessment

203. Like Article 81 EC, Article 65 of the ECSC Treaty prohibits agreements between undertakings that prevent normal competition within the common market. As examples, paragraph 1 of that provision refers to agreements fixing prices, agreements relating to production, technical development or investment, and agreements to share markets. A common feature of all those types of agreement is that a number of undertakings reach an agreement to the detriment of other market actors, in particular their customers, and thereby restrict competition.

204. Therefore, as Advocate General Van Gerven pointed out in the passage in his Opinion in *Banks* cited by NALOO, a licence agreement can in principle fall within the scope of that provision where, for example, it serves to partition the market or to prevent access by third parties to specific products.

205. The fixing of a royalty to be paid as consideration for a licence to extract coal from reserves is not a comparable situation. If, as a result of its dominant position, one of the contract parties succeeds in pushing through an excessive royalty, then while the end result is indeed an agreement which is disadvantageous to the other contract

party, it does not directly restrict competition to the detriment of third parties. The breach of competition rules does not stem from the collusion of two or more market actors, but instead from the unilateral actions of an undertaking that, as a consequence of its dominant position, can dictate the terms of the contract.

206. Advocate General Van Gerven pointed out, with reference to the judgment in *Ahmed Saeed*, [60] that an agreement in which the dominant position of an undertaking comes to the fore can certainly simultaneously fall within the scope of Articles 81 and 86 EC. For that it is however necessary that the requirements for application of both provisions are met.

207. In that regard, a clear distinction must be made between the requirements for application of Articles 65 and those for application of Article 66(7) of the ECSC Treaty, since those two provisions provide for different legal consequences. Only in the case of infringements of Article 65 may the Commission directly impose fines and declare the agreements void.

208. Where an agreement does not restrict competition for third parties then, while it may constitute abuse of a dominant position by one of the contract parties, it does not come within the scope of Article 65. Accordingly, this plea must be rejected.

2. Evidence of an infringement of Article 66(7) of the ECSC Treaty

(a) Arguments of the parties

209. NALOO submits that the Commission was wrong to reject its complaint on the ground that there was insufficient evidence of an infringement of Article 66(7).

210. It considers that the evidence submitted was adequate. In its 1991 Decision, the Commission had already found that there had been royalty discrimination in the year 1989/90, a finding from which it could have drawn conclusions in respect of the preceding years. It cannot be inferred from the fact that in *NALOO I* the Court of First Instance rejected a prospective extrapolation that a retrospective calculation, based on the Commission's findings, is inadequate.

211. The Commission made clear in numerous exchanges that it was not going to examine the substance of the complaint because it was not empowered to investi-

60 — Case 66/86 *Ahmed Saeed Flugreisen and Others* [1989] ECR 803, paragraph 37.

gate past infringements. It conveyed the impression that the opportunity would remain open to NALOO to submit further evidence, should the Commission revise its opinion of the legal situation.

212. The Commission denies that it made findings relating to any such infringement in the 1991 Decision and criticises the confusing term 'royalty discrimination' latterly introduced by NALOO. Its submits that the retrospective calculation is just as inadequate as evidence of unreasonable royalties as the prospective extrapolation.

213. BC refers to the burden of proof, which lay with NALOO as the complainant. It considers that the extrapolatory method relied on by NALOO in its complaint is unsuited to its purpose.

(b) Assessment

214. It should be noted at the outset, that the onus is on the complainant to provide sufficiently clear evidence of the existence of a breach of the competition rules. [61]

215. It should also be pointed out that the Commission has a broad discretion in considering whether the evidence supplied by the complainant is sufficient for it to open an investigation of the alleged infringements. When assessing the Community interest in opening an investigation, the Commission must take account of the circumstances of the case, and in particular of the legal and factual particulars set out in the complaint; it should also have regard to the likelihood of being able to prove the infringement, and to the additional effort required to gather that proof. [62]

216. The Commission's discretion is not, however, unlimited. In particular, it is obliged to provide an explanation for its rejection of the complaint which is amenable to review. [63]

217. In the present case, the Commission explained the rejection of the complaint by stating that NALOO had merely deduced the infringement by extrapolation from BC's business figures for the year 1989/90 to the preceding years. The Commission

61 — Case T-224/95 *Tremblay and Others* v *Commission* [1997] ECR II-2215, paragraph 63, and *Automec* v *Commission*, cited in footnote 46, paragraph 79.

62 — See *Automec* v *Commission*, cited in footnote 46, paragraph 86.

63 — *Ufex and Others* v *Commission*, cited in footnote 51, paragraph 89 et seq.

also relied on the fact that in *NALOO I*, [64] the Court of First Instance pointed out that the onus lay on the members of NALOO, and not the Commission, to provide specific data on the operating costs of its members. The Commission thus provided an adequate explanation for its rejection of the complaint which was sufficient for the purposes of review.

218. Given the clear statement in *NALOO I* that a mere extrapolation which, moreover, was not based on the operating costs incurred by NALOO's members, but on BC's costs was inadequate, NALOO could also not seriously have believed that it had supplied the Commission with adequate evidence. The fact that *NALOO I* was concerned with a prospective extrapolation whereas in the 1994 complaint NALOO relied on a retrospective extrapolation is not a material distinction.

219. As this plea must also be rejected, the part of the action which still had to be examined here must be dismissed.

64 — Cited in footnote 5, paragraph 260 et seq.

VII — Costs

220. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, it shall make a decision as to costs.

221. Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the appellants in Cases C-172/01 P and C-176/01 P have been substantially unsuccessful and NALOO has applied for costs, they must be ordered to pay the costs of those appeals. Conversely, in Case C-175/01 P NALOO has been substantially unsuccessful and must therefore be ordered to pay the costs.

222. The decision on costs in Case C-180/01 P and on the costs of the proceedings before the Court of First Instance must be taken on the basis of Article 69(3) and (4) of the Rules of Procedure, which provides that where each party succeeds on some heads and fails on others, the Court of Justice may order the parties to bear their own costs, and also order the interveners to bear their own costs.

VIII — Conclusion

223. On the basis of the above considerations, I propose that the Court should:

(1) Set aside the judgment of the Court of First Instance of the European Communities of 7 February 2001 in Case T-89/98,

— in so far as in that judgment, the Court of First Instance declines to examine the applicability of Article 65 of the ECSC Treaty to the fixing of royalties for coal extraction, and

— in so far as that judgment annuls the part of Commission Decision IV/E-3/NALOO of 27 April 1998 by which the Commission rejects the complaint relating to the level of royalty charged for coal extraction in the years 1986/87 to 1989/90.

(2) For the rest, dismiss the appeals.

(3) Dismiss the action,

— in so far as NALOO claims that the Commission ought to have applied Article 65 of the ECSC Treaty to the fixing of royalties for coal extraction, and

— in so far as NALOO seeks annulment of the part of Commission Decision IV/E-3/NALOO of 27 April 1998 by which the Commission rejects the complaint relating to the level of royalty charged for coal extraction in the years 1986/87 to 1989/90.

(4) In Case C-172/01 P, order International Power plc to pay its own costs in the proceedings before the Court of Justice and those incurred by NALOO in these proceedings. The Commission is to pay its own costs,

(5) In Case C-175/01 P, order NALOO to pay its own costs in the proceedings before the Court of Justice and those incurred by the British Coal Corporation and the Commission in these proceedings.

(6) In Case C-176/01 P, order PowerGen (UK) plc to pay its own costs in the proceedings before the Court of Justice and those incurred by NALOO in these proceedings. The Commission is to pay its own costs.

(7) In Case C-180/01 P, order each party to pay its own costs in the proceedings before the Court of Justice.

(8) Order the Commission and NALOO each to pay their own costs in the proceedings before the Court of First Instance. International Power plc, PowerGen (UK) plc and the British Coal Corporation are each to pay their own costs as interveners in the proceedings before the Court of First Instance.