JUDGMENT OF THE COURT (Fifth Chamber)

2 October 2003 *

In Joined Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P,

International Power plc, formerly National Power plc, established in London (United Kingdom), represented by D. Anderson QC and M. Chamberlain, barrister, instructed by S. Ramsay, solicitor,

British Coal Corporation, established in London, represented by D. Vaughan QC and D. Lloyd Jones QC, instructed by C. Mehta, solicitor,

PowerGen (UK) plc, formerly PowerGen plc, established in London, represented by K.P.E. Lasok QC, instructed by P. Lomas, solicitor,

and

Commission of the European Communities, represented by A. Whelan, acting as Agent, assisted by J.E. Flynn, barrister, with an address for service in Luxembourg,

appellants,

* Language of the case: English.

APPEALS against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 7 February 2001 in Case T-89/98 *NALOO* v *Commission* [2001] ECR II-515, seeking to have that judgment set aside,

the other party to the proceedings being:

National Association of Licensed Opencast Operators (NALOO), established in Newcastle upon Tyne (United Kingdom), represented by M. Hoskins, barrister, instructed by A. Dowie, solicitor, with an address for service in Luxembourg,

applicant at first instance,

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur) and A. Rosas, Judges,

Advocate General: S. Alber,

Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 6 February 2003, at which International Power plc was represented by D. Anderson and

M. Chamberlain, British Coal Corporation by D. Vaughan and D. Lloyd Jones, PowerGen (UK) plc by K.P.E. Lasok, the National Association of Licensed Opencast Operators (NALOO) by C. Quigley, barrister, and the Commission by A. Whelan and J.E. Flynn,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2003,

gives the following

Judgment

1 By applications lodged at the Registry of the Court of Justice on 20 and 23 April 2001, International Power plc (formerly National Power plc; 'IP') in Case C-172/01 P, British Coal Corporation ('BC') in Case C-175/01 P, PowerGen (UK) plc (formerly PowerGen plc; 'PG') in Case C-176/01 P, and the Commission of the European Communities in Case C-180/01 P, each brought an appeal pursuant to Article 49 of the ECSC Statute of the Court of Justice against the judgment delivered by the Court of First Instance on 7 February 2001 in Case T-89/98 *NALOO* v *Commission* [2001] ECR II-515 ('the judgment under appeal'), by which the Court of First Instance annulled Commission Decision IV/E-3/NALOO of 27 April 1998 ('the 1998 Decision'). By that decision, the Commission rejected a complaint lodged on 15 June 1994 by the National Association of Licensed Opencast Operators ('NALOO').

Background to the dispute

2 It is apparent from the judgment under appeal that prior to the privatisation of its activities in 1994 BC owned practically all coal reserves in the United Kingdom and enjoyed the exclusive right to extract coal. It was, however, empowered to grant licences for the extraction of coal to private operators in return for payment of a royalty.

3 In April 1987 BC reduced that royalty from GBP 16 to 13.50 per tonne (GBP/t) with effect from 1 March 1987. In 1988, after NALOO, which had requested the opening of an enquiry and then brought an action before the national courts concerning that royalty, accepted that a royalty of GBP 11/t was reasonable, BC applied that rate with retroactive effect to 27 December 1987. In March 1990 BC reduced the royalty to GBP 7/t with effect from 1 April 1990.

4 By an arrangement concluded in May 1986 ('the 1986 Understanding'), the Central Electricity Generating Board ('the CEGB') purchased 72 million tonnes of coal from BC during the year 1986/87 at an average delivered price of 172 pence per gigajoule (p/GJ) at the pit-head.

5 In accordance with the 1989 Electricity Act, the CEGB was privatised on 1 April 1990 and its assets transferred primarily to IP and PG.

6 On the entry into force of the coal supply contracts concluded by BC and those electricity producers for the period 1 April 1990 to 31 March 1993 ('the supply

contracts'), IP and PG proposed a basic price for BC of 170 p/GJ gross (gross calorific value) and 177.9 p/GJ net (net calorific value), as against 122 to 139 p/GJ at the pit-head for licensed producers.

7 In a complaint to the Commission dated 29 March 1990, supplemented, *inter alia*, on 27 June and 5 September 1990 ('the 1990 complaint'), NALOO maintained that, first, the 1986 Understanding and the supply contracts and, second, the level of royalty applied by BC to licensed coal producers were contrary to Articles 63(1) and 66(7) of the ECSC Treaty.

8 In the summary of its arguments which it submitted on 5 September 1990 the complainant complained that the electricity generating producers had, in their capacity as purchasers, systematically practised discrimination within the meaning of Article 63 of the ECSC Treaty, and contended that the conduct of BC of which it complained, including fixing its royalties for coal extraction at an arbitrary level, was contrary to Articles 60 and 66(7) of that treaty.

9 By letter of 24 October 1990 the United Kingdom authorities offered NALOO, on behalf of BC, IP and PG, both an increase in the price for coal extracted under licence and a new reduction in the royalty, to apply with retroactive effect to 1 April 1990.

10 After NALOO rejected those suggestions, the United Kingdom Government informed it by letter of 22 November 1990 that that Government had decided to apply the proposed new conditions unilaterally.

11 By letter of 21 December 1990 the Commission informed NALOO that the 1990 complaint did not call for further action on the part of the Commission.

12 In a letter of 11 January 1991 to the Commission NALOO objected, *inter alia*, that it had clearly intimated that it wished the Commission to examine the 1986 Understanding.

13 By letter of 8 February 1991 the Commission replied 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 stated that therefore it regarded itself as not being under an obligation to take cognisance of the situation before 1 April 1990. The Commission added that the national courts were better placed than it to consider individual cases which might have occurred in the past.

14 NALOO stressed once again, in a letter of 14 March 1991, the importance it attached to achieving a clear statement of the law applicable to the 1986 Understanding.

15 By decision of 23 May 1991 ('the 1991 Decision') the Commission rejected the 1990 complaint in so far as it related to the situation after 1 April 1990.

16 The covering letter for the 1991 Decision stated:

'This letter which sets out a Commission decision deals with certain aspects [of the 1990 complaint].... 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], [IP] and [PG] on 1 April 1990. Other issues, particularly those regarding the situation... before 1 April 1990... are not dealt with.'

17 The 1991 Decision stated as follows:

'56. At the time of the entry into operation of the... supply contracts, the licensed mines... were paid the equivalent of between 122 p/Gj and 139 p/Gj at the mine by the electricity generating companies.... There was therefore discrimination against the licensed mines after 1 April 1990.

57. The price now offered by [IP] and PG to the licensed mines with effect from 1 April 1990 is equivalent [to] 157 p/Gj net at the mine, compared with 177.9 p/Gj paid to [BC].

...

61. Not all of the elements to be taken into account when considering the difference in price can be precisely quantified. However, the actual differential of 20.9 p/Gj or 12% between [BC] coal and licensed coal delivered directly to [IP] and PG is not so large as to constitute discrimination justifying further intervention by the Commission. Nor have the complainants put forward convincing arguments for a lower figure.

...

72. The level of royalty cannot be considered in isolation. The relationship between the price received for the coal and the costs, including the royalty, of producing that coal must be such as to enable efficient companies to make a profit and must not impose a significant competitive disadvantage on them.

...

73. In so far as the opencast mines are concerned the royalty has been reduced from 11.00 [GBP/t] before 1 April 1990 to 5.50 [GBP/t] (6.00 [GBP/t] a tonne after the first 50 000 tonnes) while the price the small mines receive has increased by over 23%.

74. The price now available for licensed coal, 157 p/Gj, or approximately 40.00 [GBP/t] is over 20% or 8.00 [GBP/t] higher than the price that was given to the small mines when the... supply contracts came into operation. This, coupled with a reduction in royalty of at least 5.00 [GBP/t], will result in a large improvement in the gross profit margins of the licensed opencast mines. In 1989/90 the average sales revenue achieved by [BC] on its opencast operations was 41.50 [GBP/t] or about 160 p/Gj, that is to say approximately the same level as the price now available to the licensed mines. [BC] made a profit of... on this production. Although there are differences, notably of scale, between the opencast mines of [BC] and those of NALOO members, this would appear to confirm that the current royalty for opencast coal is not sufficiently high as to be unlawful. Thus the royalty will not prevent efficient companies from making a profit [or] impose a significant competitive disadvantage.

...

XV. CONCLUSIONS

79. This decision deals with the situation in England and Wales arising from the entry into operation of the... supply contracts on 1 April 1990 between [BC] on one hand and [IP] and PG on the other.

...

81. The Commission considers that the [complaint] made under Articles 63 [and] 66(7) [of the ECSC Treaty]... [was] justified, in so far as [it] concerned the situation after 1 April 1990 when the... supply contracts entered into operation.

82. If the terms of the UK authorities' offers dated 24 October 1990 are incorporated into contracts on the basis set out in this decision, the licensed mines will no longer be discriminated against in comparison with [BC]. On this basis those parts of the [complaint] under Article 63... [and] Article 66(7) [of the ECSC Treaty], in so far as it concerns purchase conditions... are no longer valid, and in so far as [it relates] to the present situation are rejected.

83. With regard to the part of the [complaint] under Article 66(7) [of the ECSC Treaty] concerning the royalty levied by [BC], the new royalty levels set out in the UK authorities' letter dated 24 October 1990 and subsequently implemented by [BC] with effect from 1 April 1990 are not unreasonably high. That part of the [complaint] concerning royalty payments under

Article 66(7) [of the ECSC Treaty] is therefore no longer valid and in so far as it relates to the present situation is rejected.'

18 On 9 July 1991 NALOO brought an action before the Court of First Instance under the second paragraph of Article 33 of the ECSC Treaty for the annulment of the 1991 Decision, in so far as that decision found that the new royalty of GBP 5.50 or 6.00/t was not unlawful. During the proceedings, NALOO abandoned its claims for repayment of excessive royalties applied by BC prior to 1 April 1990.

19 That action for annulment was dismissed by judgment of the Court of First Instance of 24 September 1996 in Case T-57/91 *NALOO* v *Commission* [1996] ECR II-1019 ('*NALOO I* '), which has become *res judicata.*

20 On a reference for a preliminary ruling from the High Court of Justice of England and Wales, Queen's Bench Division, made in proceedings concerning an action for damages brought against BC by H.J. Banks & Co. Ltd, a private undertaking producing coal under licence and a NALOO member, the Court of Justice ruled, in its judgment of 13 April 1994 in Case C-128/92 *Banks* [1994] ECR I-1209, in paragraph 19, that Articles 4(d), 65 and 66(7) of the ECSC Treaty do not confer rights which individuals may rely on directly before national courts.

21 In paragraph 21 of that judgment, the Court also ruled that since the Commission has sole jurisdiction to find that Articles 65 and 66(7) of the ECSC Treaty have been infringed, national courts may not entertain an action for damages in the absence of a Commission decision adopted in the exercise of that jurisdiction.

22 In response to a further reference for a preliminary ruling from the High Court, made in the context of proceedings concerning an action for damages brought against IP and PG by various licensed coal producers, the Court ruled, in its judgment of 2 May 1996 in Case C-18/94 *Hopkins and Others* [1996] ECR I-2281, in paragraph 29, that Articles 4(b) and 63(1) of the ECSC Treaty do not create rights which individuals may rely on directly before national courts.

23 In that regard, the Court observed in paragraph 27 of *Hopkins and Others*, cited above, that individuals cannot contend before national courts that discrimination systematically practised by purchasers is incompatible with Article 63(1) of the ECSC Treaty unless it has been the subject of a recommendation addressed to the governments concerned.

24 It added, in paragraph 28 of *Hopkins and Others* that, by contrast, whenever the provisions of a recommendation based on Article 63(1) of the ECSC Treaty appear, as regards their subject-matter, to be unconditional and sufficiently precise, those provisions may be relied upon directly by individuals before the national courts on the same conditions as directives.

25 In the light of the judgments in *Banks* and *Hopkins and Others*, the High Court dismissed the actions for damages which had given rise to the rulings in those judgments.

26 It is apparent from the judgment under appeal that NALOO submitted a complaint dated 15 June 1994 ('the 1994 complaint'), which it described 'as supplemental', in which it argued that the relevant provisions of the ECSC Treaty did not have direct effect and that the Commission had exclusive competence to deal with the matter. NALOO requested the Commission to confirm that the prices and royalties for coal produced under licence applied by the CEGB and BC

respectively in breach of Article 63(1) of the ECSC Treaty and Articles 4(d), 65 and 66(7) of that treaty, in the period from 1973 to 1 April 1990 (which it subsequently confined to the financial years 1984/85 to 1989/90) were unlawful. In that regard, NALOO suggested that the Commission rely on the guidelines set in 1990 by the United Kingdom authorities, the electricity generating undertakings, BC, and subsequently the Commission itself in the 1991 Decision.

27 By the 1998 Decision, the Commission rejected the 1994 complaint.

28 In that decision, the Commission found, in substance, that:

— Articles 63(1) and 66(7) of the ECSC Treaty are prospective provisions, enabling the Commission to bring current infringements to an end for the future. Those provisions do not enable it to investigate a complaint lodged on 15 June 1994 which alleges past infringements of the ECSC Treaty purportedly committed prior to 1 April 1990;

— Article 65 of the ECSC Treaty is not applicable to BC's unilateral fixing of allegedly unreasonable royalties for coal extraction;

— finally, even if the Commission were empowered to examine the complaint under Articles 4(d) and 66(7) of the ECSC Treaty and if Article 65 of that treaty were applicable, NALOO had not supplied sufficient evidence to establish the existence of the alleged infringements. The information

provided by NALOO could not possibly be taken into consideration by the Commission as the starting point for an investigation, particularly in the light of the *NALOO I* judgment.

29 By application lodged at the Registry of the Court of First Instance on 8 June 1998, NALOO sought the annulment of the 1998 Decision under the second paragraph of Article 33 of the ECSC Treaty.

30 By order of 17 March 1999, BC, IP and PG were granted leave to intervene in support of the form of order sought by the Commission in those proceedings.

The judgment under appeal

31 By the judgment under appeal the Court of First Instance annulled the 1998 Decision.

32 The Court of First Instance held, in paragraph 52 of the judgment under appeal, that, as regards the infringements alleged to have been committed in the years 1986/87 to 1989/90, the Commission had to be considered to have received a single complaint, the 1994 complaint being merely an expansion of that of 1990.

33 The Court of First Instance observed, in paragraph 58 of the judgment under appeal, that the Commission understood the term 'existing infringements' used in Articles 63(1) and 66(7) of the ECSC Treaty to mean infringements still occurring on the date on which the complaint against them is lodged. Since the initial part

of NALOO's complaint was lodged in 1990 and the supplemental part of that complaint, lodged in 1994, merely expanded upon the initial complaint, the Court deduced, in paragraph 59 of the judgment under appeal, that the Commission, on its own analysis, had received a complaint relating to existing infringements.

34 The Court of First Instance also held, in paragraphs 61 to 63 of the judgment under appeal, that it followed from paragraph 19 of *Hopkins and Others*, and from the principle of effective judicial protection 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 that treaty, on the other, in any event empowered the Commission to consider the two parts of NALOO's complaint in which it requested the Commission to find that the electricity generating undertakings and BC had applied discriminatory pricing and unreasonable levels of royalty to coal produced under licence in the years 1986/87 to 1989/90.

35 Furthermore, the Court of First Instance held, in paragraphs 67 and 68 of the judgment under appeal, that the Commission could not rely on the principle of legal certainty against NALOO, given that it had been notified from the outset, by the 1990 complaint, of the infringements alleged to have occurred in the years 1986/87 to 1989/90.

36 The Court of First Instance added, in paragraphs 69 to 72 of the judgment under appeal, that it could not be argued that NALOO had failed to avail itself of the legal remedies open to it to challenge any previous decisions rejecting the part of the 1990 complaint relating to infringements prior to 1 April 1990, since the 1991 Decision did not constitute a decision in respect of that part of the complaint.

37 In paragraphs 74 and 75 of the judgment under appeal, the Court of First Instance considered that the 1998 Decision likewise could not be regarded as merely confirming another decision, as it undoubtedly contained new factors taken into account in the assessment, relating to the absence of proof of the alleged infringements.

38 The Court of First Instance held, in paragraphs 79, 80 and 82 of the judgment under appeal, that, in order to assess the legality of the 1998 Decision, it was unnecessary to rule on the question whether the Commission was empowered to adopt measures other than recommendations in such a matter, on the legal effects in national law of recommendations, or on the applicability of Article 65 of the ECSC Treaty to the royalties for coal extraction.

39 In paragraph 85 of the judgment under appeal, the Court of First Instance observed that the Commission has sole jurisdiction to consider alleged infringements in the area in question and concluded that, since the Commission was empowered, in this instance, to consider NALOO's complaint relating to the infringements alleged to have occurred in the years 1986/87 to 1989/90, it was bound to undertake that examination.

40 After finding, in paragraph 86 of the judgment under appeal, that the Commission had been right to examine NALOO's complaint in the alternative in the 1998 Decision, the Court of First Instance held, in paragraphs 103 to 124 of the judgment under appeal, that that decision had to be annulled for failure to state reasons as regards both the response to the part of the complaint alleging discriminatory pricing and the response to the part alleging unreasonable royalties.

Procedure before the Court of Justice and forms of order sought

41 By separate document lodged at the Court Registry on 22 May 2001, the Commission applied to the Court under Article 39 CS for suspension of operation of the judgment under appeal.

42 By order of 17 July 2001 the President of the Court of Justice dismissed that application.

43 By order of the President of the Court of Justice of 5 July 2001 Case C-172/01 P, Case C-175/01 P, Case C-176/01 P and Case C-180/01 P were joined for the purpose of the written procedure, the oral procedure and the judgment.

44 IP, BC, PG and the Commission claim that the Court should set aside the judgment under appeal and dismiss NALOO's application as unfounded.

45 IP and BC also claim that NALOO and/or the Commission should be ordered to pay the costs incurred before both the Court of First Instance and the Court of Justice. PG claims that the Commission and NALOO should be ordered to pay the costs.

46 The Commission requests that NALOO be ordered to pay the Commission's costs and that the costs incurred by the appellants in Case C-172/01 P, Case C-175/01 P and Case C-176/01 P should be paid by those appellants or by NALOO.

47 NALOO contends that the appeals should be dismissed or, in the alternative, that the 1998 Decision should be annulled.

48 It also requests that the appellants be ordered to pay its costs.

The appeals

Admissibility of the appeals lodged by IP, BC and PG

49 IP, BC and PG contend that the judgment under appeal affects them directly and that they are, therefore, authorised to bring an appeal contesting it in accordance with Article 49 of the ECSC Statute of the Court of Justice.

50 BC explains that its appeal relates only to the parts of the judgment under appeal which concern the royalties for coal extraction. IP and PG state that, for their part, their appeals are limited to challenging those parts of the judgment which concern the application of allegedly discriminatory prices.

51 Under the second paragraph of Article 49 of the ECSC Statute of the Court of Justice, interveners other than the Member States and the Community institutions may bring an appeal only where the decision of the Court of First Instance directly affects them.

52 In that regard, it need only be noted that in order to comply with the judgment under appeal the Commission would be obliged to conduct a fresh examination of the 1994 complaint. It is possible that at the end of that examination the Commission would adopt a measure disadvantageous to IP, BC and PG, which could then run the risk of being exposed to an action for damages before the national courts.

53 It follows that the decision of the Court of First Instance directly affects IP, BC and PG, and that the appeals brought by them are admissible.

Substance

54 At the outset it should be remembered that in the 1998 Decision the Commission reached three distinct conclusions, which were the subject-matter of NALOO's action (see paragraph 28 of this judgment).

55 First, the Commission took the view that Articles 63(1) and 66(7) of the ECSC Treaty did not empower it to investigate the 1994 complaint. Second, it found that Article 65 of that treaty was not applicable to the royalties for coal extraction. Third, it found, in the alternative, that, as regards the royalties, NALOO had not adduced sufficiently conclusive evidence to establish the existence of the alleged infringements.

56 By the judgment under appeal, the Court of First Instance annulled the 1998 Decision in its entirety.

57 The appeals challenge the Court of First Instance's findings with regard to those three conclusions.

58 It is therefore appropriate to group together the grounds of appeal on the basis of the components of the 1998 Decision.

59 As regards the question whether the Commission was empowered to examine the 1994 complaint, the appeals challenge, first, the Court of First Instance's finding that the 1994 complaint was merely an amplification of the 1990 complaint, second, the conclusions that the Court of First Instance drew from the judgment in *Hopkins and Others* and, third, the Court of First Instance's assessment of the impact of the requirement for legal certainty.

60 As the Advocate General observed in point 128 of his Opinion, the Court of First Instance's conclusion that it followed from the judgment in *Hopkins and Others* that the Commission was in any case empowered to examine the 1994 complaint is a matter that is separate from the question whether that complaint was merely an amplification of the 1990 complaint.

61 It is therefore appropriate to begin by examining the grounds of appeal which challenge that conclusion.

The grounds of appeal concerning the assessment by the Court of First Instance of the Commission's powers

— Arguments of the parties

62 BC submits that the Court of First Instance erred in law in holding that the contentious aspects of the royalties for coal extraction constituted existing infringements for the purposes of Article 66(7) of the ECSC Treaty and in considering that the Commission was therefore empowered to act with regard to the position before 1 April 1990.

63 Similarly, IP and PG submit that Article 63(1) of the ECSC Treaty did not empower the Commission to investigate, in 1994, a complaint concerning discrimination which allegedly took place before 1 April 1990.

64 According to BC, Articles 63, 65 and 66(7) of the ECSC Treaty empower the Commission to intervene only in order to remedy an existing unacceptable situation for the future.

65 Likewise, IP and PG submit that the Commission has only the powers expressly conferred on it by the ECSC Treaty and those necessary for it to exercise its functions under that treaty. Article 63(1) of that treaty provides only for the adoption of recommendations. According to IP, it can be inferred from the words

'discrimination is being systematically practised', used in that provision, that the recommendations can only concern the future and cannot be adopted in relation to conduct that has already been brought to an end when a finding is made.

66 Moreover, IP and PG infer from Article 14 of the ECSC Treaty that the power to adopt recommendations does not include the power to adopt decisions. The Commission is therefore not entitled to take decisions in the field of application of Article 63(1) of the ECSC Treaty.

67 BC, IP and PG submit that NALOO admitted that there was no longer any need in the present case to make a recommendation. Accordingly, the Court of First Instance was not entitled to abstain from considering whether the Commission was entitled adopt a decision or make a finding of the kind sought by NALOO. The result of that examination would clearly have had to be negative.

68 BC, IP and PG argue that the statements in paragraphs 17 and 19 of the judgment in *Hopkins and Others* must be placed in the context of the adoption of a recommendation under Article 63(1) of the ECSC Treaty. Interpreted correctly, they run counter to the conclusion that the Commission is empowered to investigate infringements that have already been brought to an end.

69 IP and PG submit that, in any event, even if the Commission could still make a finding of discrimination under Article 63(1) of the ECSC Treaty, such a finding could not give rise to a right to bring an action in damages for systematic discrimination alleged to have taken place in the past. Recommendations adopted under that provision do not have horizontal direct effect and therefore cannot give rise to such a right.

70 According to IP and PG, that interpretation of Article 63(1) of the ECSC Treaty does not undermine the principle of effective judicial protection. The system of judicial protection provided for by that treaty in competition matters is both complete and exhaustive and applies to existing and future infringements.

71 For the Commission, which notes in its reply that its point of view differs in this regard from that of the other appellants, the key issue is whether the infringement has some continuing effect that is capable of being remedied by means of a recommendation, which is a prospective instrument. The determining factor in that regard was the radical change in the situation after 1 April 1990 and not the lack of contemporaneousness of the alleged infringement and the submission of the complaint.

72 As to NALOO's argument based on the judgment in *Hopkins and Others*, the Commission submits that the Court of Justice's reasoning concerning the possibility of obliging the Member States to draw, from a finding of systematic discrimination, all the consequences as regards the effects which such discrimination may have had even before the Commission took action cannot be interpreted as meaning that the Commission was required, in the circumstances of the case that gave rise to that judgment, to make a finding of an infringement in order to enable an action for damages to be brought before a national court.

73 In order to emphasis the relevance of *Hopkins and Others* to the present context, NALOO points out that the request for a preliminary ruling which gave rise to that judgment was submitted to the Court of Justice in the context of an action for damages in the High Court. In paragraph 9 of that judgment, the Court of Justice expressly noted that the action had been brought on 1 June 1991 in respect of the period from 1985 to 31 March 1990. It is therefore clear that the Court of Justice considered the questions referred for a preliminary ruling in the context of a retrospective claim. The statement in paragraph 19 of that judgment

thus means that the Commission can use its powers in respect of discrimination which has been brought to an end. First, the Court of Justice was expressly considering provisions which applied to a claim based on discrimination by purchasers that had been brought to an end before that claim was made. Secondly, the Court held in paragraph 22 of that judgment that the ECSC Treaty deals exhaustively with discrimination practised by purchasers and provides victims of such discrimination with effective judicial protection.

74 According to NALOO, the same reasoning applies to Article 66(7) of the ECSC Treaty. Although Articles 63(1) and 66(7) of that treaty are expressed in the present tense, Articles 4(b) and (d) of the treaty lay down an absolute prohibition whose application is not limited in time.

75 NALOO objects to the proposition that the Commission has competence to deal with complaints under Article 63(1) of the Treaty only where the discrimination is still being practised at the time when the Commission adopts its decision. According to NALOO, the application of that proposition would lead to wholly arbitrary results.

76 Moreover, NALOO submits that in the context of an application for annulment of the 1998 Decision under Article 33 of the ECSC Treaty, the Court of First Instance was justified in finding that is was unnecessary to rule on the question whether the Commission was authorised to adopt legal measures other than recommendations under Articles 63(1) and 66(7) of that treaty.

— Findings of the Court

77 In paragraphs 61 to 63 of the judgment under appeal, the Court of First Instance concluded from the judgment in *Hopkins and Others* 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 that treaty, on the other, in any event empowered the Commission to examine NALOO's complaint with regard to the situation prior to 1 April 1990.

78 In that regard, it should be recalled that in paragraph 19 of *Hopkins and Others*, the Court of Justice observed that in order to ensure the effectiveness of the prohibition laid down in Article 4(b) of the ECSC Treaty, the powers conferred on the Commission by Article 63(1) of that treaty 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.

79 NALOO is correct in its submission that that interpretation of Article 63(1) of the ECSC Treaty was given by the Court of Justice in reply to a question referred by a national court in a case where the alleged discrimination had already ended.

80 The Court of First Instance was justified in deducing from that interpretation that Article 63(1) of the ECSC Treaty empowers the Commission to take action in respect of systematic discrimination which has already ended.

81 While it is true that a recommendation adopted under that provision may only instruct a Member State to take specific action with regard to the future, such action may, as the Advocate General notes in point 135 of his Opinion, consist of remedying the effects of past discrimination.

82 The fact that Article 63(1) of the ECSC Treaty refers, in the present tense, expressly to discrimination which 'is being' systematically practised cannot be interpreted as making the contemporaneousness of the infringement a condition for the adoption of a recommendation by the Commission.

83 In order for the prohibition of discrimination in Article 4(b) of the ECSC Treaty to have practical effect, the Commission must actually be able to oblige Member States to eliminate the consequences of discrimination which may have already been brought to an end.

84 The Commission's power to oblige the authorities of the Member States to draw from a finding of systematic discrimination all the consequences as regards the effects which such discrimination may have had even before the Commission took action likewise cannot be limited to situations in which it is also able to oblige those authorities to put an end to that discrimination for the future.

85 To apply a condition requiring that the infringement be contemporaneous with the Commission's exercise of its powers would result in arbitrary distinctions between undertakings which put an end to an infringement after a complaint has been lodged, and which thus would have to bear all the consequences of their conduct including, as the case may be, the obligation to pay damages, and undertakings which put an end to the offending conduct before a complaint is lodged, which would not have to bear any consequences.

86 The fact that, as the Court stated in paragraph 29 of *Hopkins and Others*, Article 63(1) of the ECSC Treaty does not have direct effect does not militate against that interpretation. The prohibition of discrimination in Article 4(b) of that treaty applies even though, prior to any action being taken by the Commission, the national courts are not empowered to impose a penalty in respect of such discrimination.

87 It must also be pointed out that Commission recommendations relating to discrimination which has already ended may be relied upon before national courts on the same conditions as directives (*Hopkins and Others*, paragraph 28).

88 Therefore, where those conditions are met, individuals have the possibility to obtain, before the national courts, compensation for any damage they may have suffered.

89 The conclusions reached in respect of Article 63(1) of the ECSC Treaty apply, by analogy, to Article 66(7) of that treaty.

90 As the Advocate General observed in point 153 of his Opinion, individuals cannot rely directly on Article 66(7) of the ECSC Treaty before national courts if no action has been taken by the Commission (*Banks*, paragraph 19). Moreover, that provision does not provide for any penalty for infringements which have already ceased. Therefore, in order to ensure the practical effect of Article 4(d) of that treaty, the Commission must have the power to adopt recommendations in respect of conduct which has already ceased. The power to adopt decisions, also provided for in Article 66(7), does not suffice in that regard, since it is subject to the prior adoption of a recommendation.

91 It follows that the assessment by the Court of First Instance of the Commission's powers under Articles 63(1) and 66(7) of the ECSC Treaty was well founded and the grounds of appeal relating to that assessment must be rejected.

Grounds of appeal relating to the assessment by the Court of First Instance of the single object of NALOO's complaints and to the principle of legal certainty

— Arguments of the parties

92 IP, BC and PG contend that the Court of First Instance erred in law by finding that the 1991 Decision had neither rejected nor refused to examine the part of the 1990 complaint relating to the period before 1 April 1990. It is clear from that decision as well as from other documents exchanged between NALOO and the Commission, particularly from the Commission's letters of 8 February and 4 September 1991, that the Commission had explicitly refused to examine that part of the complaint. The Commission also refers to those two letters.

93 The appellants submit that that refusal is reviewable under Article 33 or possibly Article 35 of the ECSC Treaty. Since NALOO failed to bring such review proceedings, the Commission's refusal became definitive. In those circumstances, the principle of legal certainty precludes the revival of the 1990 complaint with regard to the period before 1 April 1990.

94 IP, BC and PG contend, moreover, that the request that the situation prior to that date be examined should, in any case, have been made within a reasonable period. It was not open to NALOO to leave issues in abeyance before the

Commission for a period in excess of three years before reviving them. The mistaken understanding of the law shared by NALOO and the Commission that national courts have jurisdiction to make findings of infringements and to award damages should not be considered an excusable error, which would justify the reopening of the file.

95 All of the appellants contend that the Court of First Instance erred in law by holding that the 1994 complaint was a mere amplification of the 1990 complaint. In their view, it is, on the contrary, a new complaint.

96 In addition, IP and PG contend that by rejecting the complaint of price discrimination, the Commission, in its 1998 Decision, took into account no new evidence whatsoever and the decision was, on that point, merely confirmatory.

97 NALOO submits that the 1991 Decision cannot be regarded as containing a decision regarding the situation prior to 1 April 1990. First, that is confirmed by the assessment of the evidence by the Court of First Instance, against which no appeal lies. Second, the Commission's statement that that situation had not been examined did not constitute a definitive expression of the intentions of that institution enabling NALOO to be certain that a definitive decision regarding that period had been adopted. The correspondence between the Commission and NALOO do not call that conclusion into question.

98 The fact that NALOO did not challenge the position adopted on that point by the Commission in accordance with Article 33 or 35 of the ECSC Treaty did not prevent the Commission from then investigating the part of NALOO's complaint which concerned the situation prior to 1 April 1990.

99 NALOO contends that the application of the principle of legal certainty depends on the circumstances of the case. In reality, the part of the 1990 and 1994 complaints concerning the period prior to 1 April 1990 remained a live issue as a result, in particular, of the actions brought before the national courts in the cases that gave rise to the judgments in *Banks* and *Hopkins and Others*.

100 With regard to the question whether the 1994 complaint merely amplified that of 1990, NALOO submits that the grounds of appeal put forward by the appellants are inadmissible because they relate to the assessment of the evidence by the Court of First Instance. NALOO states that following the *Banks* judgment its representatives and those of the Commission had a meeting and decided that the situation prior to 1 April 1990 had to be examined. Taking account of the specific circumstances of the case, the 1990 complaint should not, in that regard, be considered to have lapsed.

— Findings of the Court

101 The observations of the Court of First Instance relating to the principle of legal certainty were based on the premiss that the 1994 complaint was merely an amplification of the 1990 complaint.

102 Even assuming that that premiss is, as the appellants submit, wrong in law, it would not follow that the principle of legal certainty prevents the Commission from examining the 1994 complaint.

103 First of all, the Court must reject the argument put forward by IP and PG that, as regards discriminatory pricing, the 1998 Decision merely confirmed the 1991 Decision. The adoption of a particular position can be regarded as a mere confirmation of an earlier decision only where it contains no new factors as compared with that decision (see, in particular, Case 23/80 *Grasselli* v *Commission* [1980] ECR 3709, paragraph 18).

104 In the present case, if, in its 1991 Decision, the Commission did in fact refuse to examine the situation prior to 1 April 1990, it did so on grounds of expediency. It did not make a finding as to the existence or not of infringements of Articles 63(1) and 66(7) of the ECSC Treaty. On the other hand, in its 1998 Decision, the Commission confirmed that it was not empowered to take action on the basis of those two provisions, that Article 65 of the ECSC Treaty did not apply to royalties for coal extraction and, in the alternative, that the infringement of Articles 65 and 66(7) of that treaty had not been proven. The rejection of the 1994 complaint for those reasons cannot be considered as a mere confirmation of the position which may have been adopted in the 1991 Decision with regard to the situation prior to 1 April 1990.

105 Second, the Community legislature has not laid down any limitation period in respect of the Commission's power to adopt recommendations under Articles 63(1) and 66(7) of the ECSC Treaty.

106 In order to fulfil their function, limitation periods must be fixed in advance, and the fixing of their duration and the detailed rules for their application comes within the powers of the Community legislature (see, in particular, Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 139).

107 However, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers (*Falck and Acciaierie di Bolzano* v *Commission*, cited above, paragraph 140).

108 In the present case, the reason given by the Commission for not examining the 1990 complaint in so far as it related to the period prior to 1 April 1990 was that it was not obliged to take action merely to facilitate an action for damages brought by a complainant before the national courts. The Commission was of the opinion that such an action was possible without any intervention on its part. That interpretation proved to be incorrect in respect of infringements of Articles 4(d), 65 and 66(7) of the ECSC Treaty when the Court of Justice ruled, in *Banks*, that the national courts could not entertain an action for damages in such cases in the absence of a Commission decision. It was in response to that judgment that NALOO lodged the 1994 complaint.

109 In those circumstances, examination by the Commission of the 1994 complaint cannot be regarded as compromising either the principle of legal certainty or the legitimate expectations of IP, BC and PG, which should have expected that the compatibility of the situation prior to 1 April 1990 with Articles 63(1), 65 and 66(7) of the ECSC Treaty would be reviewed again.

110 Moreover, in the light of the facts of the case, the 1994 complaint cannot be regarded as not having been lodged within a reasonable time. It was in fact lodged only two months after the ruling in *Banks*, from which it became clear that the Commission's reasons for refusing to examine the situation prior to 1 April 1990 were not justified.

111 It follows that the principle of legal certainty did not prevent the Commission from examining the 1994 complaint.

112 It is irrelevant in that regard whether the Court of First Instance erred in law in finding that in 1991 the Commission did not take any decision with respect to the situation prior to 1 April 1990.

113 Therefore, the grounds of appeal challenging the reasoning of the Court of First Instance with regard to the single object of NALOO's complaint and the principle of legal certainty must be rejected.

Grounds of appeal concerning the Court of First Instance's finding that the Commission was obliged to investigate the 1994 complaint

114 All of the appellants contend that the Court of First Instance erred in law in holding, in paragraph 85 of the contested judgment, that the Commission was under an obligation to investigate the 1994 complaint with regard to the infringements allegedly committed during the years 1986/87 to 1989/90.

115 It is common ground that the Commission adopted the 1998 Decision in response to the 1994 complaint. Since the Commission examined the 1994 complaint in that decision, even if it did so only in the alternative, the extent of the Commission's obligation in that regard must be assessed at the stage when the legality of that decision is examined.

116 There is therefore no need to examine separately the grounds of appeal challenging the Court of First Instance's finding that the Commission was under an obligation to investigate the 1994 complaint.

Grounds of appeal concerning the applicability of Article 65 of the ECSC Treaty to the royalties for coal extraction

117 BC submits that the Court of First Instance erred in law in failing to hold that Article 65 of the ECSC Treaty was not applicable to the royalties for coal extraction. Articles 65 and 66(7) of that treaty have quite distinct objects, just as Articles 81 and 82 EC do.

118 The Commission states that in so far as the operative part of the judgment under appeal may be understood as also concerning the part of the 1998 Decision in which the Commission finds that Article 65 of the ECSC Treaty does not apply in the present case, it must be annulled for lack of reasoning.

119 On the other hand, NALOO submits that if the Court of Justice were to hold that the Court of First Instance was wrong in finding that the Commission was empowered to consider past infringements under Article 66(7) of the ECSC Treaty, and to decide to give final judgment on NALOO's application, it should hold that Article 65 of that treaty is applicable to the royalties for coal extraction. Article 65 clearly applies to infringements which have already been brought to an end. Furthermore, the Commission's power under Article 65(4) of the ECSC Treaty is not limited to the adoption of recommendations but includes the power to adopt decisions.

120 In that regard, it must be held that, although it stated that it was not necessary to settle the question of the applicability of Article 65 of the ECSC Treaty to the royalties for coal extraction, the Court of First Instance annulled the 1998 Decision in its entirety.

121 However, in the judgment under appeal, the Court of First Instance did not give any reason for its view that the Commission's conclusion in regard to the applicability of that provision was incorrect.

122 The appeals are thus well founded in so far as they complain that the Court of First Instance annulled the 1998 Decision in its entirety without examining the question whether Article 65 of the ECSC Treaty was applicable to the royalties for coal extraction.

Grounds of appeal concerning the legality of the 1998 Decision

— Arguments of the parties

123 IP and PG submit that the Court of First Instance erred in law in holding that the 1998 Decision, in so far as it rejects the part of the 1994 complaint concerning discriminatory prices, should be annulled on the ground of lack of reasoning. That decision clearly explains that the Commission considered that it was not empowered to take action in respect of that complaint. The statement of those reasons was perfectly adequate to enable the Community judicature to exercise its powers of review.

124 The Commission takes essentially the same position.

125 As regards the royalties for coal extraction, BC and the Commission submit that the Court of First Instance erred in law in its characterisation of the 1991 Decision by departing, without explanation, from the approach which it itself took in *NALOO I*.

126 The Commission never made any finding that any particular level of royalty set by BC was excessively high. In *NALOO I* the Court of First Instance itself held that the Commission's statement, in its letter of 28 August 1990 to the United Kingdom authorities, that a royalty of 7 GBP/t appeared to be too high, was only a tentative view and not a finding.

127 BC and the Commission note, moreover, that in 1988 NALOO itself accepted that the royalty of GBP 11/t was reasonable. The Court of First Instance noted the importance of that fact in *NALOO I*.

128 Moreover, the approach taken by the Court of First Instance in the judgment under appeal effectively shifts the burden of proof of a complaint, by transferring that burden to the Commission. However, it is clearly incumbent on a complainant to produce the hard evidence needed to substantiate the complaint. By not supplying details of its members' costs, NALOO clearly failed to comply with that requirement. The Court of First Instance demanded precisely such evidence in *NALOO I*.

129 In its response, NALOO accepts that the reasoning in the judgment under appeal was superfluous in so far as it concerned the Commission's obligation to give reasons for its decision with regard to the part of the complaint relating to discriminatory pricing. However, the Court of First Instance was correct to annul the 1998 Decision because, in that decision, the Commission erred in considering that it did not have competence under Article 63(1) of the ECSC Treaty to examine past discrimination.

130 With regard to the Court of First Instance's findings as to the level of royalties, NALOO contends that they are based on the methodology which the Commission had itself adopted in the 1991 Decision. The Commission used the

profitability of BC's activities as a reference point by which to justify the legality of royalty levels under Article 66(7) of the ECSC Treaty.

131 According to NALOO, it is clear from the 1991 Decision that the Commission considered that the royalty of GBP 11/t was contrary to Article 66(7) of the ECSC Treaty. The Commission was in a position to arrive at that conclusion by taking into account BC's opencast mining results and the prices paid by the electricity generators to BC and to independent opencast mine operators. At the time the 1998 Decision was adopted, the Commission was aware of the corresponding figures for the years 1984/85 to 1990/91.

132 NALOO submits that in light of the cogent evidence available to the Commission, the Court of First Instance was correct to conclude that the Commission had failed to give adequate reasons in the 1998 Decision for its finding that the information provided by NALOO could not possibly be taken into consideration by the Commission as the starting point of an investigation.

133 In the alternative, NALOO contends that the annulment of the 1998 Decision was justified because the Commission made a manifest error of assessment.

— Findings of the Court

134 First, as regards the part of the 1998 Decision relating to discriminatory prices, the Court of First Instance annulled it on the ground that it failed to

state reasons and thereby prevented judicial review of the substance of that decision.

135 It is clear from the 1998 Decision that the Commission considered that Articles 63(1) and 66(7) of the ECSC Treaty did not empower it to investigate a complaint alleging past infringements of that treaty. That statement of reasons was evidently sufficient to allow the Court of First Instance to verify whether the 1998 Decision was, in that respect, founded in law.

136 It follows that the Court of First Instance erred in law in considering, in paragraph 114 of the judgment under appeal, that the 1998 Decision was vitiated by a failure to state reasons in regard to that issue.

137 However, if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well founded on other legal grounds, the appeal must be dismissed (see, in particular, Case C-265/97 P *VBA* v *Florimex and Others* [2000] ECR I-2061, paragraph 121).

138 In that regard, it should also be recalled that, as is clear from paragraphs 77 to 90 of this judgment, the Commission made an error of law, relied on by NALOO in its application for annulment, in so far as it considered that it was not empowered to examine the 1994 complaint.

139 The Court of First Instance was therefore right to annul the 1998 Decision in that respect.

140 Second, in paragraph 123 of the judgment under appeal, the Court of First Instance also found that the part of the 1998 Decision concerning the fixing of royalties for coal extraction by BC was vitiated by a failure to state reasons.

141 However, the Commission also justified the 1998 Decision, in the alternative, by the fact that NALOO had not provided sufficient proof that the alleged infringements actually took place. The Commission set out in detail, in points 34 to 43 of that decision, the reasons why it considered that it could not open an investigation on the basis of the information supplied.

142 More specifically, the Commission explained, relying on the findings made by the Court of First Instance in *NALOO I*, that the method proposed by NALOO for calculating a level of royalty which it considered to be reasonable was, first, inadequate, and, second, inconsistent with its own statement in a letter of 13 May 1988 addressed to BC, according to which it considered that a royalty of GBP 11/t was reasonable.

143 The Court therefore finds that the 1998 Decision contained an adequate statement of reasons in that respect.

144 It is clear from the judgment under appeal that, although it annulled the 1998 Decision relating to royalties for coal extraction on the ground of a supposed lack of reasoning, the Court of First Instance in fact criticised the Commission for making a manifest error of assessment.

145 In so doing, the Court of First Instance did not draw the necessary distinction between the requirement to state reasons and the substantive legality of the contested decision (See *VBA* v *Florimex and Others*, cited above, paragraphs 114 and 115).

146 That error in law would not, however, have any effect on the operative part of the judgment under appeal if, as NALOO maintained before the Court of First Instance, the 1998 Decision was in fact vitiated by a manifest error of assessment.

147 It is clear from paragraph 122 of the judgment under appeal that the manifest error of assessment which the Court of First Instance essentially considered the Commission to have made was the failure to make a finding as to whether the royalties for coal extraction were unreasonable on the basis of the information available to it.

148 Quite apart from the question whether under Article 66(7) of the ECSC Treaty the Commission is required to investigate a complaint, it is common ground between the parties, and the Court of First Instance itself held in paragraph 258 of *NALOO I*, that it is for the complainant to bring to the Commission's notice the matters of fact and of law underlying its complaint.

149 In paragraph 261 of that judgment, the Court of First Instance stated that it was incumbent on NALOO to collect information on the actual operating costs of its members extracting coal under licence and to forward such information to the Commission so as to enable it to assess any difference there might be between those costs and the operating costs of BC's opencast sites.

150 The Court of First Instance found, in paragraph 214 of *NALOO I*, that the evidence supplied by NALOO did not suffice to establish that the royalties charged for coal extraction were unreasonable from 1 April 1990 onwards. NALOO had proposed three methods for calculating the royalties. In paragraph 178 of that judgment, the Court of First Instance refused, in particular, to rely on a simple extrapolation of BC's operating results from the preceding year to the 1990/91 financial year.

151 In the 1998 Decision, the Commission, relying on the findings of the Court of First Instance in *NALOO I*, took the view that the only calculation method proposed by NALOO, consisting of a backwards extrapolation from a current hypothetical royalty which was regarded as reasonable, could not constitute the starting point for an investigation. It added that in 1988 NALOO had itself admitted that a royalty of GBP 11/t was fair, an admission which was inconsistent with the above method, which, when applied, showed that only a royalty of no more than GBP 4.79/t would have been reasonable.

152 The Commission's line of reasoning on that point is consistent with the guidance it was able to draw from *NALOO I* with regard to the complainant's burden of proof, and as such is not open to criticism.

153 However, in the judgment under appeal the Court of First Instance did not rule on the merits of that reasoning, but instead applied another line of reasoning to establish that the Commission was wrong to reject the 1994 complaint on the ground that it was not in a position to make a finding as to whether the royalties for coal extraction were unreasonable.

154 First, in paragraphs 117 to 120 of the judgment under appeal, the Court of First Instance referred to point 74 of the 1991 Decision as showing that the Commission had been in a position to determine the profitability of opencast operators on the basis of information which was also available to it in relation to the 1994 complaint.

155 Second, the Court of First Instance pointed out, in paragraph 121 of the judgment under appeal, that in its letter of 28 August 1990 to the United Kingdom authorities the Commission had observed that 'the royalty of 7 [GBP/t] charged by [BC] to opencast mines... appears to be too high in all these circumstances.'

156 In that regard, it must be observed that, contrary to the findings of the Court of First Instance in paragraph 118 of the judgment under appeal, the Commission did not determine, in point 74 of the 1991 Decision, the profitability of opencast operators. That point of the decision does not contain any information as to the costs incurred by the members of NALOO, costs which that association had stated that it was unable to quantify (see, on that point, *NALOO I,* paragraph 201). Given the absence of any consideration of the costs incurred by those members, it cannot be held that the Commission intended to express any view on the profitability of their opencast operations. The Court of First Instance's understanding of point 74 of the 1991 Decision is thus manifestly incorrect.

157 As to the Commission's letter of 28 August 1990 to the United Kingdom authorities, the Court of First Instance took the view in *NALOO I* that that letter did not affect its finding that NALOO had not adduced conclusive factual evidence capable of substantiating its claims regarding the allegedly unreasonable level of the royalty applied from 1 April 1990.

158 However, in the judgment under appeal, the Court of First Instance did not explain how that same letter could serve as evidence showing that the Commission was in possession of sufficient conclusive evidence with respect to the period before 1 April 1990.

159 Such an explanation would, however, have been necessary given, first, that the Court of First Instance had stated, in paragraph 206 of *NALOO I*, that the Commission made the statement in question, contained in the letter of 28 August 1990, only tentatively, and, second, that the Court of First Instance referred, in paragraphs 208 and 209 of *NALOO I*, to statements made by NALOO itself, in a letter of 13 May 1988 to BC, acknowledging that a royalty of GBP 11/t was reasonable.

160 In the 1998 Decision, the Commission referred to precisely that letter of 13 May 1988 to show that the calculation method proposed by NALOO lacked coherence.

161 It follows that neither point 74 of the 1991 Decision nor the Commission's letter of 28 August 1990 to the United Kingdom authorities supports the conclusion reached by the Court of First Instance in paragraphs 122 and 123 of the judgment under appeal that the Commission was not entitled to reject the part of the 1994 complaint relating to the royalties for coal extraction for want of sufficient proof to substantiate it.

162 Moreover, NALOO's submission that in the 1991 Decision the Commission found that the level of royalty of GBP 11/t was contrary to Article 66(7) of the

ECSC Treaty is also without foundation.

163 That submission is based on a misunderstanding of point 81 of the 1991 Decision, which relates only to the issue of price discrimination, the conclusions relating to royalties for coal extraction being found in point 83 of that decision. It is clear that the decision does not contain any finding that the royalty applied after 1 April 1990 was contrary to Article 66(7) of the ECSC Treaty.

164 Therefore, the rejection of the part of the 1994 complaint relating to the royalties for coal extraction, for the reasons set out by the Commission, cannot be challenged in law and the Court of First Instance erred in law in annulling the part of the 1998 Decision which examined, in the alternative, that aspect of the complaint.

165 It follows from the foregoing that, without there being any need to examine the other pleas raised by BC in support of its appeal, the judgment under appeal must be set aside in so far as it annuls:

— the part of the 1998 Decision in which the Commission held that Article 65 of the ECSC Treaty was not applicable to the setting of royalties for coal extraction;

— the part of that decision in which the Commission rejected the complaint relating to the level of the royalties charged for coal extraction before 1 April 1990.

166 For the rest, the appeals must be rejected.

Consequences of the partial setting aside of the judgment under appeal

167 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court sets aside the decision of the Court of First Instance, it may itself give final judgment in the matter, where the state of the proceedings so permits.

168 Following the partial annulment of the judgment under appeal, the Court must rule on the pleas raised by NALOO in its application, in which it submits, first, that the evidence it had submitted to the Commission was sufficient and the calculation method it had proposed was adequate; second, that the Commission failed to observe the principle of protection of legitimate expectations in rejecting its complaint without giving it the opportunity to submit further evidence; and, third, that the Commission erred in law in considering that Article 65 of the ECSC Treaty was not applicable to royalties for coal extraction.

169 The Court considers that the state of the proceedings is such that it can give final judgment on that part of the dispute.

The pleas relating to the Commission's assessment of the evidence submitted and the method proposed by NALOO for calculating the royalties

170 NALOO claims that the Commission did not draw the correct conclusions from the evidence supplied by NALOO and was wrong to reject the method proposed by it for calculating a fair royalty.

171 It follows from paragraphs 147 to 163 of this judgment that the 1998 Decision does not contain any errors of law or of assessment in that respect.

172 Therefore, the pleas relating to the Commission's assessment of the evidence submitted and the method proposed by NALOO for calculating the royalties must be rejected.

The plea relating to legitimate expectations

173 In its application, NALOO submits that the Commission was not entitled to adopt a decision rejecting the 1994 complaint on the ground that NALOO had not provided sufficient evidence. The acts and statements of the Commission and

its officials led NALOO to entertain legitimate expectations that no decision would be made on the substance of the 1994 complaint until all the outstanding legal issues had been settled and that NALOO would be permitted to submit further evidence if the Commission decided that it was competent to deal with the subject-matter of the 1994 complaint.

174 The Commission denies that it could have given rise to such legitimate expectations.

175 In that regard, it must be held that, even assuming that for some of the procedure before the Commission NALOO was entitled to expect that no decision would be taken on the substance of its complaint without it first being given the opportunity to submit further evidence, it is evident from the Commission's letter of 23 June 1997 to NALOO that the Commission intended to reject the part of the complaint relating to royalties for coal extraction, in the alternative for lack of conclusive evidence.

176 While it is true that in reply to that letter NALOO reiterated, in a letter of 11 August 1997, its willingness to have its experts examine the period before 1 April 1990 in order to provide further evidence, it nevertheless failed to produce such evidence at any time during the remainder of the procedure up to the adoption of the 1998 Decision, on 27 April 1998.

177 If NALOO seriously wished to convince the Commission that the Commission was empowered to act, it was required, in accordance with the duty of diligence which all complainants must observe, at the same time to obtain all the evidence necessary to substantiate its complaint.

178 That is all the more true given that NALOO had known from 24 September 1996, the date of delivery of the judgment in *NALOO I*, that a calculation method based on a mere extrapolation of BC's costs was not sufficient for that purpose.

179 Moreover, the Commission cannot, without unduly compromising the legal certainty of the undertakings whose conduct is the subject of a complaint, indefinitely extend the period granted to a complainant for the purpose of providing evidence to substantiate its complaints.

180 For those reasons, the plea relating to NALOO's legitimate expectations must be rejected.

The plea concerning the applicability of Article 65 of the ECSC Treaty to the royalties for coal extraction

181 NALOO also submits that the setting of excessively high royalties for coal extraction in the licence agreements entered into between BC and the licensed producers comes within the scope of Article 65 of the ECSC Treaty.

182 In that regard, it need only be noted that it is clear from the examination of the other pleas raised in the application that the Commission was entitled to reject the part of the 1994 complaint relating to the excessively high level of those royalties, in finding, in the alternative, that NALOO had not provided it with sufficient evidence.

183 In those circumstances, there is no need to examine the question whether Article 65 of the ECSC Treaty was applicable to those royalties.

184 It follows that the action must be dismissed:

— in so far as NALOO seeks annulment of the part of the 1998 Decision in which the Commission held that Article 65 of the ECSC Treaty was not applicable to the setting of royalties for coal extraction;

— in so far as NALOO seeks annulment of the part of that decision in which the Commission rejected the complaint relating to the level of the royalties charged for coal extraction before 1 April 1990.

Costs

185 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.

186 Under Article 69(2) of those rules, which applies to appeals by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

187 In Case C-172/01 P and Case C-176/01 P, the appeals being unfounded and NALOO having requested that the appellants be ordered to pay the costs, IP and PG must be ordered to pay both their own costs in the proceedings before the Court of Justice and NALOO's costs in those proceedings. In addition, the Commission must be ordered to bear its own costs in those two cases.

188 In Case C-175/01 P, the appeal being well founded and both BC and the Commission having requested that NALOO be ordered to pay the costs, NALOO must be ordered to pay the costs in the proceedings before the Court of Justice.

189 In Case C-180/01 P, the appeal being in part well founded and in part unfounded, each party is to bear its own costs in the proceedings before the Court of Justice.

190 Since the Commission and NALOO have each been partly unsuccessful in their pleadings in the action for annulment, they are to bear their own costs in the proceedings before the Court of First Instance. Pursuant to Article 69(4) of the Rules of Procedure, IP, BC and PG are each to bear their own costs as interveners in the proceedings before the Court of First Instance.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. Sets aside the judgment of the Court of First Instance of 7 February 2001 in Case T-89/98 NALOO v Commission in so far as it annuls:

— the part of Decision IV/E-3/NALOO of 27 April 1998 in which the Commission of the European Communities held that Article 65 of the ECSC Treaty was not applicable to the setting of royalties for coal extraction;

— the part of that decision in which the Commission of the European Communities rejected the complaint relating to the level of the royalties charged for coal extraction before 1 April 1990;

2. For the rest, dismisses the appeals;

3. Dismisses the application of the National Association of Licensed Opencast Operators (NALOO) in so far as it seeks:

   — annulment of the part of Decision IV/E-3/NALOO in which the Commission of the European Communities held that Article 65 of the ECSC Treaty was not applicable to the setting of royalties for coal extraction;

   — annulment of the part of that decision in which the Commission of the European Communities rejected the complaint relating to the level of the royalties charged for coal extraction before 1 April 1990;

4. In Case C-172/01 P, orders 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 of the European Communities is to pay its own costs;

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

6. In Case C-176/01 P, orders 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 of the European Communities is to pay its own costs;

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

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

Wathelet Edward La Pergola

Jann Rosas

Delivered in open court in Luxembourg on 2 October 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber