# JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
7 February 2001 *

In Case T-89/98,

**National Association of Licensed Opencast Operators (NALOO)**, whose registered office is in Newcastle upon Tyne (United Kingdom), represented by M. Cran QC and M. Hoskins, Barrister, with an address for service in Luxembourg,

applicant,

v

**Commission of the European Communities**, represented by K. Leivo and M. Erhart, acting as Agents, assisted by J. Flynn, Barrister, with an address for service in Luxembourg,

defendant,

supported by

**British Coal Corporation**, whose registered office is in London (United Kingdom), represented by D. Vaughan QC, D. Lloyd Jones, Barrister, and C. Mehta, Solicitor, with an address for service in Luxembourg,

* Language of the case: English.

by

**National Power plc**, whose registered office is in Swindon (United Kingdom), represented by D. Anderson and P. Roth, Barristers, and G. Chapman, Solicitor, with an address for service in Luxembourg,

and by

**PowerGen plc**, whose registered office is in London, represented by P. Lasok, Barrister, and N. Lomas, Solicitor, with an address for service in Luxembourg,

interveners,

APPLICATION for the annulment of Decision IV/E—3/NALOO of the Commission of 27 April 1998 rejecting the applicant's complaint concerning infringement of the ECSC Treaty,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. Pirrung, President, A. Potocki and A.W.H. Meij, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the oral procedure of 14 June 2000,

gives the following

## Judgment

### Background to the dispute

1 Prior to the privatisation of its activities by the 1994 Coal Industry Act, British Coal Corporation (previously the National Coal Board, hereinafter 'BC') owned under the Coal Industry Nationalisation Act of 1946 practically all coal reserves in the United Kingdom and enjoyed the exclusive right to extract coal.

2 Under section 36(2) of the latter Act BC also granted licences for the extraction of coal to private operators in return for payment of royalties fixed at a uniform rate expressed in pounds sterling per tonne of coal extracted (£/t).

3 The 93 million tonnes of coal extracted by BC during the 1989/1990 financial year, which closed on 31 March 1990, represented over 97% of the total production in the United Kingdom. During the same year, BC delivered to the electricity generating industry some 76 million tonnes of coal, or 94% of the industry's requirements, approximately 3% of the remainder being provided by the private sector and the rest by imports.

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 1986/1987 at an average delivered price of 172 pence per gigajoule (p/GJ) at the pit-head.

5 The National Association of Licensed Opencast Operators ('NALOO') requested the Office of Fair Trading to open an investigation of the relevant market and subsequently challenged its refusal to do so before the national courts.

6 In April 1987 BC reduced the royalty from £16/t to £13.50/t with effect from 1 March 1987.

7 After NALOO undertook in a letter of 13 May 1988 to withdraw legal proceedings and to accept that a royalty of £11/t was reasonable in the light of the prevailing conditions, BC applied that rate backdated to 27 December 1987.

8 Under the 1989 Electricity Act the CEGB was privatised on 1 April 1990 and its assets transferred primarily to National Power ('NP') and PowerGen ('PG'), two limited liability companies established for the purpose.

9 In March 1990 BC reduced the royalty from £11/t to £7/t with effect from 1 April 1990.

10 On the entry into force of the coal supply contracts concluded by BC and the electricity producers for the period 1 April 1990 to 31 March 1993 ('the supply contracts'), NP 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.

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

12 In its complaint of 29 March 1990 NALOO made the following observations in particular:

'1. This formal complaint is submitted to the Commission on behalf of NALOO ..., whose members have been badly affected by the arrangements which have been in operation between BC and [the Electricity Supply Industry] since 1986 and who are most concerned at the arrangements recently announced between [BC] and the Electricity Supply Industry in England.

...

13. With regard to the position under Community Law, the Complainants submit that:

Firstly, the Agreement [the supply contracts] and its predecessor the 1986 Understanding are inconsistent with the rules of competition set out in the ECSC Treaty...

Secondly, the terms of and in particular the level at which BC sets the royalty under the licensing system is an infringement of the competition rules.

...

14. Under Article 63 [ECSC], 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 Government concerned. The discriminatory price offered to the private producers which applies to all such producers as compared to BC is self-evident and it also seems clear from the way the market has operated over the past few years that this has been and will continue to be systematic. The Agreement also appears to fall neatly into the circumstances envisaged by the Article. In view of the obligation upon the Commission under this Article, the Complainants call upon the Commission to act in this regard.

...

20. ...

Articles 2, 3 and 4 [ECSC] are drafted very broadly and suggest that a very wide range of practices may fall foul of Article 60 [ECSC]. The Complainants submit that there is a prima facie case of infringement of Article 60 in conjunction with Article 4, in that the royalty demanded by BC is excessive and designed to make private producers uncompetitive. The royalty thus

constitutes an unfair competitive practice discriminating between producers. Even upon the assumption that the existence of a royalty provision is compatible with Community law (which may be open to question) the same cannot be said of the royalty if it is set at such a level that it threatens the very existence of the private sector.'

13 NALOO went on to remark in point 2.13.3 of its observations of 27 June 1990:

'The complainant would, at this stage of proceedings, merely point out that BC has felt able on a seemingly random basis to reduce the royalty demanded, following pressure by the independent sector. This suggests that BC has never premised its royalty demands upon an objective basis other than the desire to extract as much revenue from the independent sector as possible. The Complainant submits that as this case unfolds it will become evident that the level of royalty demanded has been determined by arbitrary, discriminatory and abusive methodologies for many years'.

14 Consequently, NALOO concluded as follows in point 23 of the complaint of 29 March 1990:

'...

The Complainants accordingly would request the Commission to examine the Complainants' case thoroughly, rule on these matters and take appropriate action to remedy these breaches of the Competition Rules including under the Treaty provisions referred to above or in any other respect which the Commission considers appropriate.'

15 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 Treaty, and that the conduct of BC complained of, including fixing royalties at an arbitrary level (see the judgment in Case T-57/91 *NALOO* v *Commission* [1996]

ECR II-1019, paragraphs 38 to 43), was contrary to Article 60 and Article 66(7) of the Treaty.

16 NALOO's request for interim measures was rejected by the Commission by decision of 28 June 1990 primarily on the ground that the situation of the licensed mines had improved: although the absolute prices paid to licensed operators did not change as a result of the coming into operation of the supply contracts on 1 April 1990, the pit-head price obtained by BC fell from 180 p/GJ for 1989/1990 to 172 p/GJ for 1990/1991.

17 In a letter to the United Kingdom authorities dated 28 August 1990 the Commission made the following observations:

'We understand that [NP] and [PG] have entered into contracts with [BC]... under which... coal... will be bought... at a price very substantially exceeding the prices at which [NP] and [PG] are at present buying or contracting to buy from other coal producers in the UK.

It appears to us that this amounts to discrimination systematically practised by [NP] and [PG], and we are considering proposing that the Commission should make an appropriate recommendation to your authorities.

We understand that there may be some justification for some differences between the price paid to [BC] and that paid to other coal producers. Unlike coal sold by [BC], that from the private mines is in general untreated, delivered by road, and [sold] in small quantities. However, these considerations do not seem to us to be sufficient to explain an increase in the price difference, which apparently used to be approximately 12.5%, to the current average levels of some 25% for [NP] and

some 40% for [PG]. We are inclined to consider that a price of approximately 150 [p/GJ] gross at the mine, with suitable arrangements for transport, would be more appropriate. The present difference therefore appears too large to be justifiable, and to constitute discrimination ...

As far as [BC] is concerned, the following aspects of its activities give rise to serious questions:

(1) ...

(2) the royalty of £7/t charged by [BC] to opencast mines ... appears to be too high in all the circumstances ...'

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

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

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

21 In a communication 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.

22 By letter of 8 February 1991 the Commission replied to the effect 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 which might have occurred in the past.

23 NALOO stressed once again, in a letter of 14 March 1991, that:

'The matters the subject of the Complaint have their origins in the 1986 Understanding between BC and CEGB and it is of fundamental importance to the Complainants to obtain a clear statement of the law both in relation to that Understanding and the 1990 Agreement.'

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

25 The covering letter for the 1991 Decision stated:

'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.'

26 As grounds for rejecting the complaint the Commission made the following observations:

'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 NP 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 NP 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 a tonne before 1 April 1990 to £5.50 a tonne (£6.00 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 a tonne is over 20% or £8.00 a tonne 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 a tonne, 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 a tonne 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... a tonne 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 NP and PG on the other.

...

81. The Commission considers that the complaint[ ] made under Articles 63 [and] 66(7) ... [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) ... 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) ... 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) ... is therefore no longer valid and in so far as it relates to the present situation is rejected.'

27 Banks, a NALOO member, brought an action before the High Court against BC for damages in respect of losses allegedly suffered between 1986 and 1991 as a result of the unreasonable royalties charged by BC in breach of Articles 4(d), 65 and 66(7) of the Treaty.

28 Similarly, Hopkins and other private operators brought an action before the High Court against NP and PG for damages in respect of loss arising from the discriminatory coal pricing which the electricity generating undertakings applied between 1985 and 31 March 1990 in breach of Articles 4(b) and 63 of the Treaty.

29 In addition, NALOO brought an action on 9 July 1991 under the second paragraph of Article 33 of the Treaty for the annulment of the 1991 Decision is so far as it found that the new royalty of £5.50/6 per tonne was not unlawful. During the proceedings NALOO abandoned its claims for repayment of the unreasonable royalties charged by BC prior to 1 April 1990.

30 The application for annulment was dismissed by the judgment in *NALOO* v *Commission,* cited in paragraph 15 hereof, which now has the force of *res judicata.*

31 In Case C-128/92 *Banks* [1994] ECR I-1209 and Case C-18/94 *Hopkins and Others* [1996] ECR I-2281 the Court of Justice, in preliminary rulings on questions referred by the High Court, interpreted the provisions of the Treaty relied on by Banks and Hopkins in support of their actions for damages.

32 In those two judgments the Court held as follows:

(1) Article 4(b) and Article 63(1) of the Treaty (*Hopkins*, paragraph 29), and Article 4(d), Article 65 and Article 66(7) of the Treaty (*Banks*, paragraph 19), do not confer rights which are directly enforceable by private parties in proceedings before the national courts;

(2) individuals cannot contend before those courts that discrimination systematically practised by purchasers is incompatible with Article 63(1) of the Treaty as long as it has not been the subject of a recommendation addressed to the Governments concerned (*Hopkins*, paragraph 27);

(3) by contrast, whenever the provisions of a recommendation based on Article 63(1) of the 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 (*Hopkins*, paragraph 28);

(4) as the Commission alone has jurisdiction to find that Articles 65 and 66(7) of the Treaty have been infringed, the national courts may not entertain an

action for damages in the absence of a Commission decision adopted in the exercise of that jurisdiction (*Banks*, paragraph 21).

33 In the light of those two judgments the High Court dismissed the applications for damages brought by Banks and Hopkins.

34 NALOO submitted a 'supplemental complaint' dated 15 June 1994, arguing that the relevant provisions of the Treaty did not have direct effect and relying on the Commission's exclusive jurisdiction. In that document NALOO requested the Commission to confirm that the prices and royalties for coal extracted under licence applied by the CEGB and BC respectively in breach of Article 63(1) of the Treaty and Articles 4(d), 65 and 66(7) of the Treaty between 1973 and 1 April 1990, which it subsequently confined to the financial years 1984/1985 to 1989/1990, were unlawful. It 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.

35 The Commission rejected the complaint of 15 June 1994 by Decision IV/E—3/NALOO of 27 April 1998 ('the 1998 Decision'), which was notified to NALOO on 1 May 1998.

36 The Commission found, in substance, that:

— Articles 63(1) and 66(7) 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 relating to past infringements of the Treaty alleged to have been committed prior to 1 April 1990;

— Article 65 is not applicable to BC's unilateral fixing of allegedly unreasonable royalties;

— finally, even if the Commission may examine the complaint under Articles 4(d) and 66(7) of the Treaty and if Article 65 is applicable, NALOO has not supplied sufficient evidence of the existence of the alleged infringements. The indications provided by NALOO cannot possibly be taken into consideration by the Commission as the starting point of an investigation, particularly in the light of the judgment in Case T-57/91.

## Procedure

37 By application lodged on 8 June 1998 NALOO seeks the annulment of the 1998 Decision under the second paragraph of Article 33 of the Treaty.

38 By order of 17 March 1999 BC, NP and PG were given leave to intervene in support of the Commission.

39 On hearing the report of the Judge-Rapporteur the Court of First Instance (Second Chamber) decided to open the oral procedure. The Commission replied in writing to a question put to it by the Court of First Instance in the context of measures of organisation of the procedure.

40 The parties submitted oral argument at the hearing on 15 June 2000.

## Forms of order sought

41 NALOO asks the Court:

— to annul the 1998 Decision in so far as it relates to the complaints against the CEGB and BC;

— to order the Commission to pay the costs.

42 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

43 The interveners BC, NP and PG ask the Court to dismiss the application and order NALOO to pay their respective costs.

## The single object of NALOO's complaint

*Arguments of the parties*

44 The Commission maintains that NALOO did not refer explicitly in its complaint of 29 March 1990 to the period prior to 1 April 1990 and did not expressly request the adoption of measures relating to that period in its complaint of 15 June 1994. Accordingly, the Commission cannot make findings relating to past infringements of Articles 63(1) and 66(7) of the Treaty because those provisions are prospective.

45 NALOO contends that it first alleged, in the complaint of 29 March 1990, that the prices and royalties applied for licensed coal prior to 1 April 1990 were unlawful, and then went on to allege that not only had there been infringements prior to that date but that their harmful effects were continuing.

*Findings of the Court*

46 As indicated in the statement of the background to the dispute, NALOO had already challenged in its complaint of 29 March 1990, as supplemented by its observations and summary of 27 June and 5 September 1990, the discriminatory pricing and unreasonable royalties allegedly applied by the CEGB and BC for licensed coal following the 1986 Understanding, that is to say from the year 1986/1987, in breach *inter alia* of Articles 63(1) and 66(7) of the Treaty.

47 In the summary of the 1990 complaint contained in the decision of 28 June 1990 the Commission itself stated as follows:

'The licensing and royalties arrangements established in the Coal Industry [Nationalisation] Act ... constitute a breach of the competition rules because the dominant producer BC has the power ... through the royalty system to have a major effect on their costs and margins. In addition, the level of royalty depresses the profitability of private producers and subsidises the dominant producer, BC.

The 1986 Understanding between BC and the CEGB (NP and PG are successor companies to the CEGB) was a restriction on competition and is in violation of the competition rules because it restricted the market available to other coal suppliers and depressed the prices they were able to obtain.'

48 It was thus in 1990 that the alleged infringements relating to the period from 1986/1987 to 1989/1990 were referred to the Commission.

49 That conclusion is borne out by the 1991 Decision. If NALOO had not already referred in 1990 to the period starting as from 1986/1987 the Commission would not have invited it, in its letter of 8 February 1991 referred to above, to ask the national courts to rule on individual cases which might have arisen in the past. Nor would the defendant have included in its legal assessment, at points 73 and 74 of the 1991 Decision, the reference to the royalty of £11/t applicable up to 31 March 1990. Lastly, the Commission would likewise not have expressly restricted the scope of the 1991 Decision to the period subsequent to 1 April 1990 in points 81, 82 and 83 and in the covering letter.

50 The Commission cannot therefore now claim that NALOO did not expressly refer to the period prior to 1 April 1990 in the 1990 complaint.

51 Moreover, the 1990 complaint and the supplemental one of 15 June 1994 refer to the same provisions, namely Articles 63(1) and 66(7) of the Treaty, and allege the same infringements by the same alleged parties and against the same undertakings during a period which is the same in both complaints, between 1986/1987 and 31 March 1990.

52 The Commission must therefore be regarded, as regards the infringements alleged by NALOO for the years 1986/1987 to 1989/1990, as having received a single complaint, the complaint of 15 June 1994 being merely an expansion of that of 1990.

## Applicability of Articles 63(1) and 66(7) of the Treaty

### *Arguments of the parties*

53 The Commission, supported by the interveners, contends that because Articles 63(1) and 66(7) of the Treaty are prospective they do not empower it to make findings with regard to the past unless that is necessary in order to ensure the effectiveness of those provisions for the future.

54 NALOO objects that for the purposes of implementing Article 4(b) and (d) of the Treaty the Commission has power under both Article 63(1) and Article 66(7) of the Treaty to make findings of infringements which have come to an end before the Commission was seised of the matter.

55 NALOO points out that it referred to the period prior to 1 April 1990 in the 1990 complaint. Consequently, when the Commission was first called upon to exercise its powers under Article 63(1) and Article 66(7) of the Treaty there were still infringements which had been continuing for some years. Even on the Commission's own approach, therefore, it was competent in any event to deal with the infringements raised in the 1994 complaint.

*Findings of the Court*

56 In point 13 of the 1998 Decision the Commission, relying on *Hopkins*, observes that it is 'empowered to draw consequences as regards the past effects of an existing infringement in order to ensure the effectiveness of the prohibition laid down in Article 4(b) of Treaty'. That would be the case if discrimination were to cease after a complaint had been lodged with the Commission but before the Commission had taken action.

57 It also remarked in point 31 of the 1998 Decision that the scheme of Article 4(b) and Article 63(1) of the Treaty taken together is identical to that of Article 4(d) and Article 66(7) of the Treaty read together, and that those provisions have been construed consistently by the Court of Justice, in *Banks* (paragraphs 11 and 12) and *Hopkins* (paragraphs 16 and 17). The Commission considers that as a result, Article 4(d) and Article 66(7) must be interpreted in the same way as Article 4(b) and Article 63(1).

58 It follows that the Commission understands 'existing infringements' of Articles 63(1) and 66(7) of the Treaty to mean infringements still occurring on the date on which the complaint against them is lodged.

59 The initial part of NALOO's complaint, lodged in 1990, notified the Commission of infringements which were thus to be regarded as existing on that date, whereas the supplemental complaint, dated 15 June 1994, merely amplified the former. Accordingly, on its own analysis the Commission must be regarded as having been notified of existing infringements.

60 Consequently, the argument that the complaint of 15 June 1994 referred to infringements which were already in the past on the date when they were referred to the Commission must be rejected as unfounded.

61 In any event, the Court stated in paragraph 19 of *Hopkins*, cited above, that the powers conferred on the Commission by Article 63(1) of the Treaty 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, in order to ensure the effectiveness of the prohibition laid down in Article 4(b).

62 The Court observed that the Treaty deals exhaustively with discrimination practised by purchasers and that it provides victims of such discrimination with effective judicial protection (*Hopkins*, paragraph 22).

63 As a result, it is clear that the combined provisions of Articles 4(b) and 63(1) of the Treaty, on the one hand, and of Articles 4(d) and 66(7) of the Treaty, on the other, empower the Commission in any event to consider both portions of NALOO's complaint in so far as it requests the Commission to find that the electricity generating undertakings and BC applied discriminatory pricing and unreasonable levels of royalty respectively with regard to coal extracted under licence in the years 1986/1987 to 1989/1990.

64 Accordingly, Articles 63 and 66(7) of the Treaty confer on the Commission power to investigate NALOO's complaint in so far as it raises infringements of those articles alleged to have been committed during the years 1986/1987 to 1989/1990.

**Legal certainty**

65 The Commission submits that the adoption of measures to deal with the practices of BC and the CEGB going back to the years prior to 1 April 1990 would go against the requirements of legal certainty.

66 In a similar vein, BC points out that NALOO failed to challenge the 1991 Decision not to deal with royalty rates for the period prior to 1 April 1990. NP observes that NALOO failed to avail itself of the legal remedies available to it to ensure protection of its rights. PG considers that the Commission was bound to reject the 1994 complaint, the content of which had already been dealt with in one or more decisions which were not challenged by NALOO. In particular, the

Commission informed NALOO by letter of 4 September 1991 that it did not propose to examine the 1986 Understanding, the only practical result of which was to facilitate claims for compensation before the national courts, which could be introduced without a finding by the Commission of infringement.

67 The Court considers that, as explained above, the Commission was notified from the outset, by the 1990 portion of the complaint, of the alleged infringements relating to the years 1986/1987 to 1989/1990.

68 In those circumstances the Commission cannot rely on the principle of legal certainty as against NALOO.

69 Furthermore, it cannot be argued that NALOO failed to avail itself of the legal remedies open to it to challenge any previous decisions rejecting the 1990 portion of the complaint relating to infringements prior to 1 April 1990, so that those decisions have become final.

70 As is clear from the statement of the background to the case, the 1991 Decision was confined to excluding from the investigation the infringements alleged by the 1990 portion of the complaint relating to the situation prior to 1 April 1990. That is made clear by the first paragraph of the covering letter for the 1991 Decision, which states that 'the situation before 1 April 1990 ... [is] not dealt with'.

71 That being so, the 1991 Decision neither rejected nor refused to examine the 1990 portion of the complaint as regards the period prior to 1 April 1990 and must therefore be regarded as not constituting a decision in that respect.

72 As a result, NALOO could not validly challenge at the time, under the second paragraph of Article 33 of the Treaty, the lawfulness of the failure to investigate. It also follows that no criticism can be made of NALOO for its partial abandonment in the course of the proceedings which gave rise to the above-mentioned judgment in *NALOO* v *Commission* (see paragraph 29 above).

73 It was therefore permissible for NALOO to supplement the 1990 portion of the complaint so long as the Commission had not ruled on the infringements alleged therein to have been committed with regard to the years 1986/1987 to 1989/1990 (see paragraph 52 above).

74 Finally, the 1998 Decision, likewise, cannot be regarded as merely confirming a decision subsequent to the 1991 Decision which might have been contained in one of the letters sent thereafter by the Commission to the applicant, including the letter of 8 February 1991 referred to in paragraph 22 of this judgment and the letter of 4 September 1991 referred to by PG.

75 The 1998 Decision undoubtedly contains new factors taken into account in the assessment, relating to the absence of proof of the alleged infringements. The Court notes again, in that respect, that the 1998 Decision emphasises the point that 'NALOO ... [has] not given ... sufficient evidence as to the existence of the alleged infringements. ... the indications provided by NALOO could not possibly be taken into consideration by the Commission as a starting point of an investigation, particularly in the light of the judgment in [Case T-57/91]'.

76 For those reasons, an investigation of NALOO's complaint with regard to the years 1986/1987 to 1989/1990 is in no way incompatible with the principle of legal certainty.

## The legal nature of the measures which the Commission is empowered to adopt

*Arguments of the parties*

77 The Commission challenges NALOO's argument that the Commission has power to make a finding of infringement of Articles 63(1) and 66(7) of the Treaty not only by means of a recommendation but also by means of a decision. Those provisions define the means at the Commission's disposal and it would be exceeding the powers conferred on it by the Treaty if it were to arrogate other means to itself.

78 In addition, the interveners doubt that the measures the Commission might be led to adopt with regard to infringements in the past would be effective in national law. NP maintains that it is solely for the Member State to which a recommendation is addressed to choose the appropriate methods for achieving the specific aims identified in the recommendation. PG considers that a finding of systematic discrimination under Article 63(1) of the Treaty cannot be a direct source of rights for the beneficiary. Finally, BC observes that the mere fact that a decision has been taken under Article 66(7) does not create an opportunity for a claimant to make general claims for damages for the past.

*Findings of the Court*

79 Since Articles 63(1) and 66(7) of the Treaty empower the Commission to investigate the infringements alleged by NALOO with regard to the years 1986/1987 to 1989/1990 and on that basis to adopt recommendations if necessary, the question whether the Commission would also be authorised to

adopt legal measures other than the recommendations referred to by those two provisions is irrelevant for the purposes of this action.

80 It is therefore unnecessary to rule on that question or to settle the issue of the legal effects in national law of such recommendations.

## Applicability of Article 65

81 The Commission, supported by BC, contests NALOO's argument that Article 65 of the Treaty is applicable to the allegedly excessive royalties charged by BC, which can only be considered in the light of Article 66(7).

82 The Court considers that as the practices of BC in the years 1986/1987 to 1989/1990 complained of may be dealt with sufficiently under Article 66(7) of the Treaty, it is not necessary to settle the question of the applicability of Article 65 to the royalties at issue in order to determine the lawfulness of the 1998 Decision.

## The Commission's obligation to investigate NALOO's complaint

83 The Commission considers that it has a discretion to determine when to take action in respect of past infringements. It is plain that the terms used by the Court in paragraph 19 of *Hopkins*, which include the verb 'enable', do not impose an obligation.

84 NALOO contends that because the relevant provisions do not have direct effect the Treaty can only confer effective judicial protection, as described in paragraphs 19 and 22 of *Hopkins*, if the Commission is not merely empowered but is bound to consider infringements of Articles 63(1) and 66(7) of the Treaty read in the context of Article 4(b) and (d) committed in the past.

85 The Court need only note that the Commission has sole jurisdiction to consider 'alleged' infringements (see, to that effect, *Banks*, paragraph 21, and *Hopkins*, paragraph 31). Since it has power, in this instance, to consider NALOO's complaint relating to the infringements alleged to have occurred in the years 1986/1987 to 1989/1990, the Commission was bound to undertake that examination (see, to that effect, the order of 29 April 1998 in Case T-367/94 *British Coal* v *Commission* [1998] ECR II-705, paragraph 22).

86 The Commission was therefore right to examine NALOO's complaint in the alternative by the 1998 Decision.

## The legality of the 1998 Decision

### *The alleged failure to take into account the available evidence*

#### Arguments of the parties

87 NALOO submits that in point 72 of the 1991 Decision the Commission stated that the relationship between the sale price of 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.

88 In order to determine, for that purpose, what would be a fair and reasonable, and therefore not an excessive, royalty, the Commission relied at that time, in points 74 and 82 of the 1991 Decision, on BC's operating results for opencast mines.

89 On the basis of their results for the year 1989/1990, the Commission concluded finally that, having regard to the price increase for coal extracted under licence of 122/139 p/GJ to 157 p/GJ and the royalty reduction of £5.50/6 per tonne proposed in October 1990 with effect from 1 April 1990, the complaint, inasmuch as it was based on Article 66(7), which had been justified prior to those unilateral alterations, was no longer valid.

90 In so doing, the Commission made a clear and explicit finding that the fixing of such a royalty amounted to an abuse, both during the period from April to October 1990 and for the year 1989/1990, when the price for coal extracted under licence remained the same.

91 Furthermore, the Commission was aware when it adopted the 1998 Decision of all the figures relating, at least, to the years 1986/1987 to 1989/1990 which led it to conclude that the royalty was excessive, that is to say those relating to BC's opencast mining results, the price of coal extracted by BC and that of coal extracted under licence, together with the royalties being charged.

92 In particular, the Commission knew that the price for coal extracted under licence had not altered appreciably between the entry into force of the 1986 Understanding and the increase proposed in October 1990. Finally, the royalties levied prior to 1 April 1990 were at least equal to £7/t, the amount which was applicable from 1 April 1990 to October 1990, prior to the retroactive reduction to £5.50/6 per tonne on 1 April 1990.

93 The difference between the prices paid to BC and those paid to licensed operators prior to 1 April 1990 was manifestly such that the Commission ought to have been bound to find that the royalties collected prior to that date constituted an abuse, as indicated by the analysis carried out in points 72 to 74 of the 1991 Decision.

94 The figures show that BC would in theory have made a loss had it been operating under the conditions which it and the electricity supply industry imposed on the licensed sector. It follows that the regime comprised discriminatory pricing and abusive royalty levels to the detriment of licensed operators.

95 The Commission cannot object that the figures supplied do not constitute sufficient evidence of the alleged infringements when they are the very figures used by it in the 1991 Decision.

96 The Commission, supported by BC and PG, considers that the 1991 Decision made no express or implied finding that the combination of price levels and royalties amounted to an unlawful practice.

97 In point 81 of the 1991 Decision the Commission found that the 1990 complaint was justified as to the pre-intervention price difference and, in paragraph 82, that

the discrimination was eliminated by the post-intervention price difference. Finally, in paragraph 83, the Commission again recorded its conclusion that the retroactively adjusted royalties were not unreasonably high.

98 The only clear negative finding of the Commission was that the price difference prior to its approach to the United Kingdom authorities led to discrimination against NALOO's members. The Commission never expressly found that the royalty applied prior to that approach was unreasonably high.

99 In point 74 of the 1991 Decision the Commission was in fact only considering BC's profitability in a subsidiary way, and thus confirming that the new royalty of £5.50/6 per tonne was not unlawful.

100 Moreover, a simple table showing royalty rates, the difference in price for coal paid to BC and the licensed operators respectively, together with BC's profit does not amount to proof of their impact on licensed operators.

101 In any case, NALOO's figures have changed so much that it is impossible to establish the reliability of any one set of figures as opposed to others.

102 If NALOO's methodology is used, the data suggests that its members collectively made losses in every year under consideration and a substantial total loss over the period. That conclusion is inherently implausible.

Findings of the Court

— Discriminatory pricing

103 In its letter of 28 August 1990, referred to in paragraph 17 of this judgment, the Commission informed the United Kingdom authorities that the average price differential of 25% to 40% between the price for coal obtained at the time by BC and that obtained by the licensed operators prior to the increase to 157 p/GJ introduced in November 1990 with effect from 1 April 1990 was too great to be justified and would appear to constitute discrimination.

104 In point 56 of the 1991 Decision the Commission confirmed that the prices for coal extracted under licence applied on the entry into force of the supply contracts on 1 April 1990 until the introduction of the new price of 157 p/GJ in November 1990 was discriminatory.

105 In point 81 of the 1991 Decision the Commission therefore upheld the 1990 portion of the complaint as regards the period from April to November 1990 and observed, in point 82, that the licensed mines were no longer suffering discrimination compared with BC following the introduction of the new price for their coal.

106 As the Commission itself stated in paragraph 47 of the reply, it thus did, ultimately, find in the 1991 Decision that discriminatory pricing had been used for licensed coal during the period from April to November 1990, prior to the price increase.

107 However, as is made clear by the decision of 28 June 1990 referred to in paragraph 16 of this judgment, prices for licensed coal did not change following the entry into force of the supply contracts on 1 April 1990.

108 Those prices must therefore be regarded as having remained the same, at least for the year 1989/1990 up to the month of November 1990, before their increase.

109 Accordingly, the 1998 Decision could not lawfully reject NALOO's complaint without at least explaining the reasons which might have enabled the prices obtained for licensed coal prior to 1 April 1990 to be regarded as non-discriminatory.

110 It is clear, however, that the 1998 Decision contains no such explanation.

111 Furthermore, the Commission noted in the decision of 28 June 1990 that the pit-head price obtained by BC fell from 180 p/GJ in 1989/1990 to 172 p/GJ in 1990/1991.

112 The Commission was therefore aware that that price was greater in 1989/1990 than it was subsequently, although the price for licensed coal had remained the same.

113 Accordingly, the Commission should logically have considered at the outset that the difference between the prices obtained by BC and the licensed operators respectively had been even more unfavourable to the latter in 1989/1990 than it had been during the period from April to November 1990 before the price increase.

114 The 1998 Decision is therefore vitiated by its failure to state reasons and thereby prevents judicial review of the substance of that decision which the Court is obliged of its own motion to undertake (Case 18/57 *Nold* v *High Authority* [1959] ECR 41, at p. 52).

115 To that extent the 1998 Decision must be annulled.

— The royalties

116 In point 83 of the 1991 Decision the Commission found that the new royalty of £5.50/6 per tonne introduced in November 1990 with effect from 1 April 1990 was not abnormally high and that the 1990 complaint, in so far as it was based on Article 66(7) of the Treaty, was thus no longer 'valid'.

117 The Commission reached that conclusion after stating in point 74 of the 1991 Decision that the new rate would not prevent efficient opencast operators

from making a profit or impose a significant competitive disadvantage on them.

118 In determining the profitability of opencast operators for that purpose the Commission relied on the following factors: first, the results considered to have been achieved by BC on its opencast mines in 1989/1990, next, revenue from those sites comparable to the new price for licensed coal of 157 p/GJ and, lastly, the new royalty of £5.50/6 per tonne.

119 In those circumstances, the 1998 Decision could not lawfully reject NALOO's complaint without at least explaining the reasons which might have enabled it to be concluded at the outset that the royalties applied during the years 1986/1987 to 1989/1990 at the rate of £16, £13.50 and then £11/t, that is to say, at rates considerably higher than the new royalty of £5.50/6 per tonne, were not excessive.

120 An explanation was all the more necessary in view of the fact that, as explained above, the difference between the prices obtained by BC and those obtained by licensed operators appeared at first sight to be even more unfavourable to the latter in 1989/1990 than it was during the period from April to November 1990, before the price for licensed coal was increased.

121 In addition, it must be remembered that in the Commission's letter of 28 August 1990 (referred to above) to the United Kingdom authorities, the Commission observed that 'the royalty of £7/t charged by [BC] to opencast mines ... appears to be too high in all these circumstances.'

122 However, in rejecting NALOO's complaint the 1998 Decision merely states that the applicant had failed to provide sufficient proof of the existence of the alleged infringements and that the information supplied could not possibly be taken into consideration by the Commission as the starting point of an investigation.

123 In that respect the 1998 Decision is likewise vitiated by failure to state reasons and must therefore be annulled.

124 Accordingly the 1998 Decision must be annulled, without its being necessary to consider NALOO's plea concerning breach of the principle of protection of legitimate expectations.

## Costs

125 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 Commission has been unsuccessful it must be ordered to pay its own costs, together with those of the applicant, as requested by the latter.

126 Under the third paragraph of Article 87(4) of the Rules of Procedure the interveners will be ordered to pay their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls Decision IV/E—3/NALOO of 27 April 1998;**

2. **Orders the Commission to pay its own costs and those of the applicant;**

3. **Orders the interveners, British Coal Corporation, National Power plc and PowerGen plc to pay their own costs.**

Pirrung Potocki Meij

Delivered in open court in Luxembourg on 7 February 2001.

H. Jung — Registrar

A.W.H. Meij — President