OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 21 September 2000 [1]

I — Introduction

1. The present case raises a number of important questions regarding the interpretation of the Treaty establishing the European Coal and Steel Community (hereinafter 'the ECSC Treaty'). First, it is necessary to determine the respective fields of application of that Treaty's prohibitions of discrimination, of special charges imposed by States and of aids and subsidies granted by States. Secondly, the Court is asked to decide whether or not those prohibitions are directly effective and, thus, enforceable before national courts. Thirdly, the Court is called upon to determine the effect on national proceedings of a variety of Commission measures and documents dealing with matters which are, in part at least, closely related to the subject-matter of those proceedings, and of the failure by one of the parties to those proceedings to seek a remedy before the Court of First Instance regarding either the Commission's response or its failure to act in response to an earlier complaint made by a trade association of which it is a member.

1 — Original language: English.

II — Legal and factual context

(a) Community law

2. Article 4 of the ECSC Treaty provides, in part, as follows:

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

...

(b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or

transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier;

(c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever;

(d) restrictive practices which tend towards the sharing or exploiting of markets.'

3. Article 88 of the ECSC Treaty provides, in part:

'If the High Authority considers that a State has failed to fulfil an obligation under this Treaty, it shall record this failure in a reasoned decision after giving the State concerned the opportunity to submit its comments. It shall set the State a time-limit for the fulfilment of its obligation.'

4. By virtue of Article 95 of the ECSC Treaty, the Commission adopted Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry [2] (hereinafter 'the Coal Aid Code'). Article 1 of the Coal Aid Code states that aid to the coal industry may be considered Community aid and hence compatible with the proper functioning of the common market only if it complies with the terms of Articles 2 to 9 of the Code. Articles 2 to 7 set out substantive criteria for assessment by the Commission of different types of aid. Article 9(1) requires Member States to send, by 30 September each year (or three months before the measures enter into force) at the latest, 'notification of all the financial support which they intend to grant to the coal industry in the following year'. Article 9(4) of the Coal Aid Code states, in part:

'Member States may not put into effect planned aid until it has been approved by the Commission on the basis, in particular, of the general criteria and objectives laid down in Article 2 and of the specific criteria established by Articles 3 to 7. If the Commission has taken no decision within three months of receipt of notification of the measures planned, the measures may be implemented 15 working days after transmission to the Commission of notice of intent to implement them ... .'

2 — OJ 1993 L 329, p. 12.

(b) National law

5. The Coal Industry Nationalisation Act, 1946 (hereinafter 'the 1946 Act') transferred ownership of nearly all the coal reserves in the United Kingdom to the National Coal Board, which later became the British Coal Corporation (hereinafter 'BCC'). Section 1 of the 1946 Act conferred upon BCC the exclusive right to extract and work coal in the United Kingdom; by way of exception, section 36 authorised BCC to grant coal-extraction licences (hereinafter 'section 36 licences') to third parties in return for payment of production-related royalties or for delivery of coal to BCC at an agreed price. Opencast mining licences were restricted to the annual extraction of 25 000 tonnes of coal from the relevant site; this limit was raised to 250 000 tonnes in 1990.

6. The Coal Industry Act, 1994 (hereinafter 'the 1994 Act') was enacted with a view to privatising BCC's coal-mining operations. It created a new regulatory body, the Coal Authority, to which title to all mines and coal deposits vested in BCC was transferred on 31 October 1994. Under section 26 of the 1994 Act, the Coal Authority grants operating licences and leases in return for royalties; unlike BCC before it, it does not itself have the right to engage in mining activities, as the Act is intended to separate the former producing and licensing functions of BCC. In respect of licences, the Coal Authority charges an initial application fee to cover administrative costs and an annual licence fee, in accordance with a fixed schedule of charges; these licences are not subject to tonnage restrictions. A lease is also required in order to acquire property rights in coal vested in the Coal Authority, which is obliged by section 3(4) to seek the best terms reasonably available. [3] Payment is possible by way of a lump sum or of production-related rents. Pre-existing section 36 licences were maintained, with royalties being paid to the Coal Authority, although these can be exchanged for licences granted under the 1994 Act. Only two section 36 opencast licences are currently in force. All sums levied by the Coal Authority must be passed on to the Secretary of State for Trade and Industry (hereinafter 'the Secretary of State').

7. The Secretary of State was authorised by the 1994 Act to restructure BCC. Upon the transfer of its coal deposits to the Coal Authority, he granted licences to BCC in the name of the Coal Authority and required the Coal Authority to grant leases of coal to BCC, for no consideration, to enable it to continue its existing mining activity. The Coal Authority held back substantial coal reserves, formerly vested in BCC, for allocation to producer under-

3 — See further the discussion at paragraphs 24 and 25 below.

takings as the need should arise. Between December 1994 and April 1995, the Secretary of State transferred BCC's mining business, without consideration, to a number of successor companies owned by the Crown. One of these was Central and Northern Mining Limited (hereinafter 'CNML'), to which the English part of BCC's business was transferred, with the benefit of the corresponding licences and leases. Following an open competitive tendering process, for which bidders were obliged to pre-qualify, CNML, including its existing licences and leases, was sold to RJB Mining plc (hereinafter 'RJB') at the end of 1994. The sale was approved by the Commission, acting on the basis of Article 66(2) of the ECSC Treaty, by a decision of 21 December 1994. [4]

(c) Factual background

8. H.J. Banks and Company Limited (hereinafter 'the defendant') is a company established in the United Kingdom which extracts coal by the opencast method. It is a member of the National Association of Licensed Opencast Operators (hereinafter 'Naloo'). Mr H. Banks is the chairman of both Naloo and of the defendant. The defendant has obtained 19 licences and leases under the 1994 Act, of which one is a converted section 36 licence. On 31 October 1995, the defendant held a number of section 36 licences, pursuant to which it paid a royalty of GBP 2 per tonne of coal worked and carried away. It received copies of the offer documents for CNML but did not tender.

9. On 19 August 1994, Naloo lodged a complaint with the Commission (hereinafter 'the complaint') about State aid enjoyed by BCC since 1973 and the excessively burdensome conditions and charges imposed by BCC on its competitors. It also referred to the impending privatisation of BCC, alleging that BCC's successor companies would derive an improper advantage from the continuing effects of unlawful aid paid to BCC in the past. The summary at the beginning of the complaint refers to, *inter alia*, 'asset sales below cost'. In the section entitled 'Background', Naloo states that 'any opencast royalty over [GBP 0.40] per tonne is discriminatory and unreasonably high'. Section 5 of the complaint states that 'whilst Naloo recognises BCC's right to recoup the cost of administration the royalty level clearly goes beyond this... . Royalty income per tonne from opencast has at some times in the past exceeded

4 — This decision was not published in the Official Journal.

BCC's own profits per tonne on its open-cast coal extraction'.

10. In subsection 6.3 of the complaint, headed 'The transitional arrangements [for privatisation]', Naloo anticipated that royalty payments would eventually be abolished and that old licences could be converted into new, non-royalty licences, but added that the Government had indicated that royalties would be payable up to privatisation and perhaps after the entry into full operation of the Coal Authority. This could result in an annualised rate of royalty payments of GBP 5 million on 2.5 million tonnes of annual licensed open-cast coal production. Naloo concluded:

'BCC and/or the new companies will thereby be relieved of a substantial cost which will continue to be carried by the rest of their competitors.'

In the following subsections, Naloo submits that the current privatisation proposals would perpetuate and compound the effects of State aid over the years, through the sale of BCC's assets free of debts and liabilities. It asks the Commission to investigate the privatisation arrangements having regard to the historical context of past aid to BCC and to 'the aid which constitutes an inherent part of the privatisation package'.

11. Following notification by the United Kingdom of a number of aid proposals, the Commission adopted Decision 94/995/ECSC of 3 November 1994 ruling on financial measures by the United Kingdom in respect of the coal industry in the 1994/95 and 1995/96 financial years. [5] The aid and financial measures in question, which were authorised by the Commission pursuant to the Coal Aid Code, related to liability for environmental damage, various social benefits and rights of former BCC employees and restructuring costs, including a sum not exceeding the difference between the loans on BCC's balance sheet and the eventual proceeds of the privatisation process.

12. The Director-General and the acting Director-General of the Commission's Directorate-General for Energy responded to the State aid aspects of Naloo's complaint by letters of 4 May 1995 and 14 July 1995 respectively. They pointed out that the aid paid to BCC in the past had been authorised under successive Coal Aid Codes in order to permit a vast restructuring programme. As regards the privatisation process, RJB had bought CNML at

5 — OJ 1994 L 379, p. 6.

their market value, in an open and competitive tendering process, and so did not benefit from any State aid. The Director-General stated expressly in his letter of 4 May 1995 that other issues, 'such as the licensing activities of British Coal', were part of a separate investigation by other Commission services. In his letter of 14 July 1995, the acting Director-General stated that 'the subjects of royalty and coal supply contracts' were still under investigation by the Directorate-General for Competition.

(d) The main proceedings

13. The defendant stopped paying royalties to the Coal Authority under its section 36 licences as of 31 October 1995. The Coal Authority took proceedings in the High Court of England and Wales to recover the unpaid royalties. The defendant then counter-claimed for the royalties already paid pursuant both to its section 36 licences and to those granted under the 1994 Act and for damages. It argued that these royalties constituted either discriminatory treatment prohibited by Article 4(b) of the ECSC Treaty or, in the alternative, special charges prohibited under Article 4(c). The High Court ruled in favour of the Coal Authority, without examining the substance of the case, on the basis that the defendant's defence and counter-claim were an abuse of process: it had failed to bring an action for annulment against the Commission's decisions of 4 May 1995 and 14 July 1995 rejecting the similar complaints of Naloo, of which it was a member.

14. The defendant appealed to the Court of Appeal. It submitted that Naloo's complaint had concerned the transitional period of BCC's activity under the 1994 Act, and not the post-privatisation period which was the subject of the national proceedings. Furthermore, the Commission's correspondence to date had not addressed any such aspect of the complaint.

15. The Court of Appeal took the view that it was necessary for it to reach a view as to whether the complaint dealt, in part, with the issues covered by the defendant's defence and counter-claim before making a reference to the Court, but was divided on this point: one Lord Justice of Appeal thought that it did, one that it did not and the third that the continued requirement to pay royalties in the post-privatisation period, when this was not required of its principal competitor, RJB, was raised 'to some limited extent' in Naloo's complaint. It referred the following questions to the

Court for a preliminary ruling pursuant to Article 41 of the ECSC Treaty.

'1. Is the difference of treatment referred to in the judgments of the Court of Appeal capable of constituting:

— "discrimination between producers" within Article 4(b) of the ECSC Treaty;

— a "special charge" within Article 4(c) of the same Treaty; and/or

— "aid" within Article 4(c) of the same Treaty or within Article 1 of Commission Decision No 3632/93/ECSC (OJ 1993 L 329, p. 12)?

2. Do paragraphs (b) or (c) of Article 4 of the ECSC Treaty or paragraphs (1) or (4) of Article 9 of Commission Decision No 3632/93/ECSC (OJ 1993 L 329, p. 12) produce direct effects and confer on private undertakings the right, enforceable in national courts, to defend a claim for mining royalties made by a public body and to claim restitution of royalties paid to it, in particular in the absence of a Commission Decision made pursuant to Article 67 or Article 88 of the ECSC Treaty or Commission Decision No 3632/93/ECSC or otherwise to the effect that the matters alleged constitute "discrimination", a "special charge" or "aid"?

3. If so, may a national court determine that there is "discrimination" within the meaning of paragraph (b) of Article 4 of the ECSC Treaty or a "special charge" within the meaning of paragraph (c) thereof or "aid" within the meaning of paragraph (c) thereof or of Article 1 of Commission Decision No 3632/93/ECSC notwithstanding:

— Commission Decision No 94/995/ECSC (OJ 1994 L 379, p. 6);

— the Commission Decision of 21 December 1994 authorising the acquisition of Central and Northern Mining Limited by RJB Mining plc;

— the communications sent by DG XVII of the Commission to Naloo dated 4 May and 13 July 1995?

4. As a matter of Community law, does the fact that Banks or Naloo did not:

(a) challenge, under Article 33 of the ECSC Treaty, Commission Decision 94/995/ECSC or the Commission Decision of 21 December 1994 authorising the acquisition of Central and Northern Mining Limited by RJB Mining plc or the letters sent by Directorate-General XVII of the Commission to Naloo dated 4 May and 14 July 1995; and/or

(b) invoke the procedure provided for in Article 35 of the ECSC Treaty in order to require the Commission to deal with the issues now raised in the proceedings before the national court

preclude Banks from raising alleged breaches of Article 4(b) or 4(c) of the ECSC Treaty, or of Commission Decision No 3632/93/ECSC in proceedings in the national courts?'

III — Observations before the Court

16. Written and oral observations were submitted by the defendant, the Coal Authority, the United Kingdom and the Commission. For the most part, I shall refer to matters raised in their observations, where relevant, in my discussion of the questions referred by the Court of Appeal. It suffices to say at this stage that the defendant denies that its grievance is, essentially, that RJB received State aid; it argues, instead, that the royalties to which it was subject should have been adjusted in the light of the market price paid by RJB for CNML, including its mining rights, and that failure to do so means that it is subject either to unlawful discrimination or to payment of a prohibited special charge. The Coal Authority, on the other hand, qualifies the defendant's case as one regarding the grant of State aid, which has already been answered by the Commission measures and documents referred to in the third question.

IV — Analysis

The first question

17. The charge of abuse of process, the subject, in particular, of the third and fourth questions, has arisen in the present case from the allegations purportedly made by Naloo in its complaint to the Commission regarding the grant of State aid, after privatisation, to BCC/CNML's successor companies. For this reason, as well as because both aid and special charges appear to be particular forms of prohibited discrimination between undertakings by public authorities, [6] it is useful to commence by analysing the terms of Article 4(c) of the ECSC Treaty (and, by extension, those of the Coal Aid Code) before examining, in the alternative, the possible application of Article 4(b) of the Treaty.

18. As the Court stated in *Ecotrade* v *AFS*, [7] in the context of the ECSC Treaty, 'the concept of aid ... embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are *normally* included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect'. This definition is taken up in an adapted form in Article 1(2) of the Coal Aid Code. It has also been adopted under the EC Treaty. [8] In other circumstances, aid has been identified by reference to the criterion 'whether the recipient undertaking receives an economic advantage which it would not have obtained under *normal* market conditions'. [9]

19. The application in practice of these definitions of aid will vary according to whether the State or other public authority acts in the exercise of its sovereign or public functions or, on the other hand, acts simply as a market participant. This has given rise to two different notions of 'normality'. In the former case, in areas such as tax, social security or insolvency, Community law has no a priori conception of what the 'normal' level of charges or benefits should be, or, as arose, for example, in *Ecotrade*, of the circumstances in which companies should be wound up; the Court will simply examine whether a given national regime distinguishes between undertakings, to the advantage of certain among them relative to the generally applicable norm. Hence, it is necessary to determine whether a given measure is general in nature, or is specific (and advantageous) to a particular undertaking or sector. This presupposes, inevitably, a degree of comparability between the respective circumstances of the favoured undertakings or sectors and of the others. The application of the aid rules under the

6 — See, for example, Case 304/85 *Falck* v *Commission* [1987] ECR 871 (hereinafter '*Falck*'), paragraph 27, and paragraph 21 below.

7 — Case C-200/97 [1998] ECR I-7907 (hereinafter '*Ecotrade*'), paragraph 34, emphasis added; see also Case 30/59 *Steenkolenmijnen* v *High Authority* [1961] ECR 1 (hereinafter '*Steenkolenmijnen*'), p. 39.

8 — See, for example, Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 41.

9 — See Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60, emphasis added.

EC Treaty does not necessarily turn on the question whether the specifically favoured economic actors are in a minority relative to those subjected to the 'normal' or general regime; any distinction between undertakings or sectors to the benefit of certain among them may be construed as an aid to those treated more favourably. [10]

20. In the case of State commercial activity, in fields such as public investment and public disposal of assets, Community law does prescribe a standard (although it is one whose concrete application will be determined by the circumstances of any given case): that of the 'ordinary economic agent' or the private commercial actor in a market economy. [11] Thus, a dichotomy can be identified between, essentially, descriptive and prescriptive approaches to identifying 'normality' according to the type of alleged aid being scrutinised.

21. The Court has not so far adopted a general definition of special charges. In *Industries Sidérurgiques Luxembourgeoises* v *High Authority*, [12] the Court stated that 'a charge may be presumed to be special and therefore abolished and prohibited by the Treaty if, by affecting unequally the production costs of comparably placed producers, it introduces into the distribution of production distortions which do not result from changes in productivity', but observed that it was not possible to consider this criterion as being decisive. A charge which affected equally all consumers of solid fuels in a particular context was obviously not a special charge according to this criterion. In *Pont-à-Mousson* v *High Authority*, the Court held that a disputed charge could not be regarded as 'special' because it was of a general nature, applicable to all Community undertakings consuming ferrous scrap. [13] At a minimum, it appears to me that charges covered by Article 4(c) of the ECSC Treaty should be 'special' in the sense of not being of general application and that they treat 'comparably placed producers' differently.

22. The Commission submits that, by virtue of the juxtaposition of the terms 'aid' and 'special charge' in Article 4(c) of the ECSC Treaty, the notion of a special charge should be construed as being the converse of that of a subsidy or aid. Thus, a special charge could be defined as a special economic disadvantage entailing the imposition of costs which an undertaking would

10 — Regarding the situation under the ECSC Treaty, see paragraphs 22 and 23 below.

11 — See, for example, Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 19; Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 10.

12 — Joined Cases 7/54 and 9/54 [1954/56] ECR 175 (hereinafter '*Industries Sidérurgiques Luxembourgeoises*'), page 196.

13 — Case 14/59 [1959] ECR 215, page 234.

not normally have to bear. [14] This proposal seems to me to be consistent both with the terms and scheme of Article 4(c) of the ECSC Treaty and with the case-law. I would also take the view that the prohibition in Article 4(c) should relate to charges which are essentially of a public nature. This is prompted by the reference to charges 'imposed by States' and would provide, by reference to the public, non-market character of the interventions addressed, a logical unifying theme for the prohibitions set out therein. This does have the effect, however, of reducing the symmetry between aid and special charges: the charging of artificially low prices by public commercial enterprises would fall within the prohibition of aid (to the purchaser undertakings) in Article 4(c) of the ECSC Treaty but the charging of excessive or discriminatory prices would not constitute a special charge but rather prohibited discrimination or the exploitation of the public undertaking's dominant market position.

23. Furthermore, despite the apparent equivalence of the definitions of aid under the ECSC and EC Treaties, the combination of the notion of aid in the ECSC Treaty with that of special charges will, in practice, affect how aid is identified in cases where public authorities act in their sovereign or public capacity. Unlike the situation under the EC Treaty, the ECSC envisages two possible types of departure from the 'normal' regulatory regime, namely, on the one hand, the imposition of higher (special) charges on certain undertakings and, on the other, the alleviation of charges to which their competitors would otherwise be subject or the grant of direct subsidies or material benefits (aid). Although both are prohibited, categorisation of a national rule as one or the other will have different effects: beneficiaries of unlawful aid must reimburse it, whereas public authorities should presumably be obliged to repay special charges to undertakings which have paid them. Furthermore, whereas the Coal Aid Code (and similar measures affecting the steel sector) provides for certain forms of aid to be ruled compatible with the common market, no such regime yet exists as regards special charges. Thus, when applying Article 4(c) of the ECSC Treaty to a scheme of public charges which are alleged to be imposed unequally, it is not sufficient simply to establish such inequality of application to comparable undertakings, as it would be under the EC Treaty. It is also necessary to identify what is the standard or the norm, that is, what is the rule and what the exception, in order to determine whether one group of undertakings has been subjected to special charges, or another has benefited from aid. Depending on the case, this may entail a descriptive approach (for example, ascertaining the regime to which the majority of undertakings are subject) or a prescriptive analysis (determining what should be regarded as normal in the circumstances). Temporal aspects, such as the creation of an exception to a pre-existing regime of general application, may also be relevant.

14 — It may also be possible to classify as 'special' charges of a public character which are deemed, without comparing them to a general regime, to be objectively 'excessive' in character. However, as this is not the case made in the main proceedings, I do not address that possibility here; see further paragraph 31 below.

24. I now turn to the facts of the present case. One important preliminary matter is to assess whether the payments which are the subject of litigation before the national court are public or commercial in character. Payments of a public nature may be analysed, as appropriate, in the light of the definitions of aid and of special charges set out above; payments of a purely private and commercial character for the enjoyment of property rights cannot constitute special charges, although exoneration of a competitor from payment of such royalties could constitute an aid. [15] The position is not, in fact, very clear. Section 2 of the 1994 Act requires the Coal Authority to exercise a licensing function in respect of coal-mining operations which should endeavour to secure, *inter alia*, the maintenance and development of an economically viable coal-mining industry in Great Britain and the promotion of competition between coal-mining undertakings. The grant of such licences is subject to payment of an initial application fee to cover administrative costs and of annual licence fees calculated in accordance with a predetermined schedule of charges. In the light of the criteria governing the Coal Authority's licensing function, these licence fees seem to me to be, at least partially, public in character. On the other hand, under Article 26(2) of the 1994 Act, an applicant for a licence must also acquire rights in relation to the coal to be mined. Since the property rights in unworked coal and coal mines are vested in the Coal Authority, an applicant will normally need to obtain property rights through the grant of a lease by the Coal Authority. Section 3(4) of the 1994 Act requires the Coal Authority to seek the best terms reasonably available for the disposal of any such interests. However, in carrying out its property management and disposal functions, the Coal Authority is also subject to a number of duties, including that of coordinating its practice with the carrying out of its licensing functions. This may have an effect in practice on the otherwise private, commercial character of the Coal Authority's leasing functions.

25. The Commission and the Court of First Instance appear to have treated the charging of royalties by BCC for the extraction of coal from mines licensed under section 36 of the 1946 Act as normal commercial practice, provided those royalties were not excessive, [16] but much less detailed information has been provided about the criteria determining the grant of licences and the calculation of royalties under that legislative regime. It appears that section 36 licences combined the licensing and leasing functions governed separately by the 1994 Act. In the event that the case must ultimately be resolved by reference to the prohibition of special charges, it will be for the national court to determine whether, and in what degree, these payments are, in fact, public or private in

15 — This is a concrete example of the asymmetrical application of the prohibitions of aid and of special charges referred to in paragraph 22 above.

16 — See paragraph 83 of the Commission Decision of 23 May 1991 challenged in Case T-57/91 *Naloo* v *Commission* [1996] ECR II-1019. See also the Commission letters of 28 August 1990 and 30 October 1990, referred to at paragraphs 37 and 47, respectively, of the judgment in that case, as well as paragraph 191 of that judgment.

character, in the light of its interpretation of the Coal Authority's functions under the applicable legislation. For analytical purposes, I shall treat them as if they are hybrid in character, that is, that they are composed of charges which are partly public and partly commercial in character.

(i) Aid

26. I commence the substantive analysis by reference to the question of aid. The Court of Appeal has framed its first question so as to ask whether the 'difference of treatment' described is 'capable of constituting', *inter alia*, 'aid'. I will, therefore, take as a working hypothesis for my discussion that the purchase price paid by RJB for CNML involved a substantial discount on the fees and charges which would otherwise be payable for the mining licences and leases which it obtained. None the less, this circumstance is far from leading to an affirmative answer to the question posed. When a public authority disposes of assets in an open, transparent and competitive context, the Treaty aid rules cannot compel it to sell them at what might, on the basis of alternative analyses, be considered to be their 'full value'. That might simply result in the assets being unsaleable. In a situation of depressed demand, rapid technological innovation, intense competition or high perceived risk, the market price which can be obtained for a package of assets such as a functioning coal-mining undertaking, through an open and undistorted bidding process, may be significantly below that actually paid or which would ordinarily be paid to acquire or develop the assets in question in the first place. In circumstances where no doubt has been cast upon the open and competitive character of the sale process, I would agree, therefore, with the conclusion of the Commission's Director-General for Energy that the market value was obtained for BCC's regional coal-mining businesses, without any element of State aid, 'even if the development costs previously incurred by British Coal... were greater than their eventual sale price.' [17] In a composite transaction, it is not necessarily possible to distinguish the price paid for different elements of the package, such as physical assets, existing supply contracts and mining rights in respect of coal reserves. To insist, in such conditions, that a theoretical 'full value' be paid for Coal Authority licences and leases would probably only have the effect of reducing the amount nominally paid for other elements of the package. Furthermore, if BCC had, in fact, paid any relevant licence fees and lease-related payments in a lump sum to the Coal Authority in advance of privatisation, it is by no means apparent that the purchase price would have been different. It seems that neither the debt nor the cash reserves of BCC were transferred to CNML, so that any disimprovement in BCC's financial position through such payments would not have affected the value of

17 — Letter of 4 May 1995 to Naloo's solicitors. The remarks quoted relate to the sale of certain disused collieries but they apply equally, in my view, to his assessment of the sale of the regional businesses in the following paragraph.

the package of productive assets (including mining rights) actually sold. [18]

(ii) Special charges

27. The defendant claims that it is subject to a special charge and/or discrimination because the Coal Authority continued, after privatisation, to require it to pay royalties, lease payments and licence fees (some of which, at least, are charged at a standard, apparently non-negotiable rate) which took no account of the discount at which licences and leasehold rights were disposed of in the privatisation process. It does not seem to me that this can be easily understood as a case of the application of a special charge, even in so far as it relates to those elements in the payments which have a public character. Although I concluded above that the hypothetically discounted price obtained for such rights upon the sale of CNML was 'normal' for the purposes of discussing State aid, that is not enough, in my view, to qualify it as the norm for such charges, to which the payments subsequently required of the defendant must then be considered an exception.

28. There could hardly be any suggestion, for example, that the Coal Authority should be obliged to alter its charges if the assets (including the mining rights) of an insolvent private coal-mining undertaking were sold at a relatively low price at the behest of its creditors. Both before and after the privatisation of CNML, undertakings taking out individual licences for individual sites and acquiring the corresponding leasehold interest in the relevant coal reserves have been subject to the same process for determining charges. [19] Those processes for the grant of licences and the calculation of the charges applicable are, in the descriptive sense, normal for the grant of mining rights in individual sites. [20] Furthermore, Community law does not suggest that such processes are not normal in the prescriptive sense, that is, that they are not an appropriate way for public authorities to award such rights of a public character, or that such public charges should automatically vary in accordance with their market value to undertakings which, in other circumstances, are in a position to bid for them. [21] Thus, it cannot be said that one price (that paid for CNML's rights) was normal and the other abnormal. The situations are not comparable. RJB paid, as part of a wider transaction, a price which must be assumed to take into account the absence of a future obligation to pay royalties on existing coal-producing assets. The situation would be different if the Coal Authority were

18 — It would simply have increased the aid payable by the United Kingdom to make up the difference between the loans on BCC's balance sheet at the end of the 1994/95 financial year and the eventual proceeds of the sale of the regional coal companies, approved by the Commission in Decision 94/995/ECSC, op. cit. The defendant does not complain of aid to BCC as such, as it is no longer a competing coal producer.

19 — The differences that may exist between the 1946 and 1994 regimes as regards undertakings other than BCC and its successors are not pertinent to the present dispute, not least because old section 36 licences can be exchanged for licences negotiated under the more recent legislation. I examine further below (at point (iii) Discrimination) the manner in which private property rights in coal reserves are disposed of, to the extent that they are separable from the award of mining licences of a public character.

20 — The situation of BCC before privatisation was not comparable as it was entrusted by the 1946 Act with the licensing function and with the allocation of coal reserves owned by itself as well as with the function of mining.

21 — I leave aside for the moment the question of the calculation of the rate charged for private rights, as this could not, in any event, be categorised as a special charge.

simply to waive licence fees in some cases, or to charge a lower or higher fee in some cases than in others, where comparable applications were made to it. What is missing in the present case is the element of comparability between the two means of acquiring such rights — the normal application process and the CNML privatisation — which would lead one to conclude that those who avail of the more expensive means of acquisition are subjected to abnormally high charges which can be characterised as special for the purposes of the ECSC Treaty. In the circumstances, it is not, therefore, necessary to address the possible significance of facts such as the much greater scale of the operations of the regional companies spun off from BCC relative to that of the defendant and the other members of Naloo.

(iii) Discrimination

29. Much of what I have said immediately above regarding the characterisation of the public charges payable by the defendant as special charges applies equally as regards the assessment of those which are private in character under the rubric of discrimination. It is, to say the least, difficult, when presented with two such diverse methods of disposing of the Coal Authority's private interest in coal reserves, to conclude that one is discriminatory simply because it does not result in the charging of a price which is effectively equivalent to that offered and accepted under the other. The grant of a leasehold interest in coal reserves by negotiation regarding specific sites and the sale of such an interest through disposal of the entire assets of a coal-mining undertaking are not so readily comparable as to give rise to any immediate suspicion of discrimination if the effective price paid differs as between the two cases.

30. It might be possible to argue that the sale of CNML was organised in such a way as effectively, and without justification, to exclude smaller mining companies such as the defendant from the bidding process. This argument would not necessarily be defeated by the fact that the defendant prequalified for part of the privatisation process. However, the defendant does not seem to make any such case in these proceedings and no such question has been referred by the Court of Appeal.

31. As I already suggested above, it may also be possible to contend that the price paid by the defendant for licences and coal-reserve leases is, objectively, too high having regard to the current market value of coal, costs and so on; the price paid by RJB for CNML could provide useful data for such an inquiry, without it having to be couched in terms of discrimination. It is immaterial whether any such argument could possibly be considered either under

the special charges provision of Article 4(c)[22] or under Article 4(d) (possibly read in conjunction with Article 66(7) of the ECSC Treaty).[23] However, the Court has not been asked about the possible application of the latter provision and, in either case, although such an argument would have elements in common with the defendant's position in the present case, this does not seem to be part of its contentions. I do not, therefore, propose to address it further.

32. I conclude, therefore, in the light of the foregoing discussion, of the contentions of the parties in the main proceedings and of the factual evidence before the Court, that the difference alleged by the defendant in the amounts effectively charged for coal-mining licences and coal-reserve leases is not capable of constituting discrimination between producers within Article 4(b) of the ECSC Treaty, a special charge within Article 4(c) of that Treaty, or aid within Article 4(c) of the same Treaty or within Article 1 of the Coal Aid Code.

The second question

33. The answer I propose to the first question would, if accepted by the Court, render superfluous the other questions referred by the Court of Appeal. In the event that the Court takes a different view, and, in particular, because of the previously comparatively unexplored issue of the definition of special charges within Article 4(c) of the ECSC Treaty, I propose, none the less, to examine the second question in some depth and briefly to survey the other two.

34. The Court stated in *Banks I*[24] that, in order to respond to the question whether certain provisions of the ECSC Treaty — Articles 4(d), 60, 65 and/or 66(7) — were 'directly effective and such as to give rise to rights enforceable by private parties which must be protected by national courts', it was necessary to see whether those provisions 'are clear and unconditional provisions which confer directly on individuals rights which the national courts must protect'. The Court observed that 'Article 4 [of the ECSC Treaty] applies by itself only in the absence of more specific rules; if they have been adopted or are governed by other provisions of the Treaty, texts relating to the same provision must be considered as a whole and applied together'.[25] Article 60 of the ECSC Treaty was not relevant in that case, but the Court concluded that Arti-

22 — See footnote 14 above.

23 — Article 4(d) would not, in that case, be directly effective; see the discussion of Case C-128/92 *Banks* [1994] ECR I-1209 (hereinafter '*Banks I*') in paragraph 34.

24 — Op. cit., paragraphs 7 and 15.

25 — *Banks I*, op. cit., paragraph 11; the Court cited in this regard *Industries Sidérurgiques Luxembourgeoises*, op. cit., and Case 13/57 *Eisen- und Stahlindustrie* v *High Authority* [1957/58] ECR 265.

cles 65 and 66(7) give effect to Article 4(d).[26] The Court concluded that, '[a]s Article 4(d) is not applicable by itself, it cannot have direct effect'.[27] Articles 65 and 66(7) reserve to the Commission the sole power to make the necessary determinations regarding, respectively, agreements between undertakings and the abuse of a dominant market position.[28] Thus, Articles 4(d), 65 and 66(7) did not confer rights directly enforceable by private parties in national judicial proceedings.[29]

35. It is clear from the judgment in *Banks I* that provisions of the ECSC Treaty shall be directly effective and enforceable before national courts if they comply with the criteria already identified by the Court when addressing the same issue in respect of provisions of the EC Treaty and that, no matter how clear and unconditional their terms may appear to be when read on their own, the provisions of Article 4 of the ECSC Treaty will not be deemed to have direct effect where their application is dependent upon the exercise of decision-making powers conferred exclusively upon the Commission by more specific provisions governing the same field. On the other hand, it cannot, in my view, be stated with any certainty, on the basis of an *a contrario* reading of the judgment in *Banks I*, that the Court would have held Article 4(d) to be directly effective in the absence of the provisions of Articles 65 and 66(7) of the ECSC Treaty.

36. As regards the possible direct effect of Article 4(b) and (c) of the ECSC Treaty, I would like, first of all, to state that, in my view, those provisions are, taken on their own, capable of direct effect. I have already taken this view in my Opinion in *Ecotrade*,[30] as regards the prohibition of aid in Article 4(c). I see no reason not to reach the same conclusion as regards all three prohibitions for the purposes of the present case.

37. It is necessary, therefore, to determine whether whichever (if any) of those provisions may apply to the facts of the present case is applicable on its own, or is supplemented by more specific rules with which it must be considered and applied as a whole. I start by referring to the power of the Commission under Article 88 of that Treaty to record in a reasoned decision the failure of a Member State to fulfil an obligation and to set a time-limit for its fulfilment. This provision cannot, in my view, be considered to be a 'more specific rule' which prevents the application by itself of any other rule of the Treaty, such as Article 4. Firstly, it is of general application to the whole range of obligations created by or under the ECSC Treaty, without any specific connection with any obligation in

26 — Ibid., paragraphs 12 and 13.
27 — Ibid., paragraph 16.
28 — Ibid., paragraphs 17 and 18.
29 — Ibid., paragraph 19.

30 — Cited in footnote 7 above, paragraph 17 of the Opinion.

particular. It sets out a procedure for enforcing obligations whose character and substantive content (or the means of determining which) are defined elsewhere. Secondly, if all provisions of the ECSC Treaty were required to be read in conjunction with Article 88, direct effect would never be possible under that Treaty, but the Court clearly implied the contrary in *Banks I*.

38. There does not seem to be any serious dispute about the fact that the ECSC Treaty does not contain any provisions more specific than Article 4(b) regarding the type of discrimination alleged in the present case, viz. price-discrimination between producers by the Coal Authority. Articles 60 and 63 of the ECSC Treaty relate, respectively, to discriminatory pricing by sellers and discrimination by purchasers. Article 65 of the ECSC Treaty, which prohibits agreements which distort normal competition, may apply concurrently with Article 4(b) to the same facts and the two provisions are, to that extent, complementary. [31] However, the facts of the present case do not relate to an agreement between undertakings. Article 66(2) of the ECSC Treaty requires the Commission to observe 'the principle of non-discrimination laid down in Article 4(b)' when assessing proposed mergers. However, this entails taking into account the size of like undertakings in the Community for the purposes of determining whether the concentration will result in the undertakings concerned having excessive market power — it has no apparent connection with the discriminatory charging practices alleged by the defendant against the Coal Authority.

39. Article 4(c) of the ECSC Treaty has been the subject of more vigorous debate, regarding two other sets of rules: Article 67 of the ECSC Treaty, in respect of both aid and special charges; and the Coal Aid Code, with regard to aid.

40. The Court stated in *Steenkolenmijnen* [32] that Articles 4 and 67 of the ECSC Treaty have basically the same objective of ensuring normal competitive conditions, but that they make different fields subject to different procedures. Because of the discretion entrusted to the Commission and the Member States by Article 67(2) and (3) to seek to counteract Member State action which is liable to have serious repercussions on conditions of competition in the coal or steel industries through counterbalancing aid or other mitigating measures, the Court concluded that it could not relate to the same measures which Article 4 declares to be abolished and prohibited. It interpreted Article 67 as relating to residual aspects of national economic policy which were not directly affected by the partial integration achieved under the ECSC Treaty but which might,

31 — Case 2/56 *Geitling* v *High Authority* [1957/58] ECR 3, at p. 20.

32 — Op. cit., page 22.

none the less, have repercussions on competitive conditions in the sectors governed by that Treaty. The different means made available to the Commission under Article 67 were consistent with this approach, as it could not dictate Member State policy in fields outside the Community's jurisdiction. [33]

41. The Commission has submitted that this approach should be reconsidered by the Court in the light of developments in Community law since 1961. These have led to a definition of aid under the ECSC Treaty which would also encompass, for example, national measures which favour ECSC undertakings relative to undertakings in other sectors of the economy; adherence to the existing approach would thus reduce Article 67 to a dead letter. The Commission also adverts to my own brief discussion of the direct effect of Article 4(c) of the ECSC Treaty in *Ecotrade* [34] to suggest that the same measure might fall to be considered under either Article 4(c) or Article 67, depending on the circumstances, without this excluding the direct effect of Article 4(c).

42. Regarding my comments in *Ecotrade*, I would note that I simply observed that the facts of that case could not be said to fall within the scope of application of Article 67(2) or (3) and that the obligation under Article 67(1) to keep the Commission informed of national measures liable to affect competition could not, on its own, affect the application of the prohibition in Article 4(c). Thus, on any view, the direct effect of Article 4(c) in that case could not be affected by any obligation to read it together with Article 67. [35] It was not, therefore, necessary to examine afresh the ruling in *Steenkolenmijnen* summarised above regarding the relationship between Articles 67 and 4(c) of the ECSC Treaty, nor should my remarks be understood as necessarily casting doubt upon it.

43. As for the more general case made by the Commission, it does not convince me. Even if the conception of aid has widened in the years since the ruling in *Steenkolenmijnen*, with the result that the two provisions' perceived fields of application have changed in relative importance, the distinction drawn by the Court between the absolute prohibition of aid and special charges in Article 4(c) and the implicit presumption of the lawfulness of the State

33 — Ibid., pages 23 to 25. For a recent application of this *dictum*, see Case T-37/97 *Forges de Clabecq* v *Commission* [1999] ECR II-859, paragraph 141. The Court took a different view of the relationship between these two provisions in *Industries Sidérurgiques Luxembourgeoises*, op. cit., page 195, treating Article 67(3) as a particular application of Article 4(c).

34 — Op. cit., paragraph 17 of my Opinion.

35 — The situation was, thus, different from that in *Banks I*, op. cit., in which Articles 4(d), 65 and 66(7) were applied together, and in Case C-18/94 *Hopkins and Others* v *National Power and Powergen* [1996] ECR I-2281, which concerned the interpretation of Articles 4(b) and 63(1) of the ECSC Treaty.

measures with which Article 67 is concerned remains compelling.

44. Turning now to the Coal Aid Code, its provisions cannot, in my view, be considered, in the circumstances of the present case, to create more specific rules with which the prohibition of aid in Article 4(c) of the ECSC Treaty must be read, requiring the two to be construed as a whole and applied together. The Coal Aid Code was adopted on the basis of Article 95 of the ECSC Treaty, which confers upon the Commission, in all cases not provided for in that Treaty, power to adopt, with the unanimous assent of the Council, measures necessary to attain one of the objectives of the Community set out in Articles 2, 3 and 4 of that Treaty. I do not think that the mere fact that Article 95 of the ECSC Treaty could potentially be used in the future to circumscribe further the field of application of the prohibitions in Article 4(b) and (c) is relevant to the question whether the latter provisions are directly effective. On the other hand, measures already adopted on that basis in the fields governed by Article 4 may be relevant. I have already had occasion to consider the scope of an aid code adopted for the steel industry on the basis of Article 95 in my joint Opinion in *Wirtschaftsvereinigung Stahl* v *Commission* and *British Steel* v *Commission*. [36] I concluded, having regard, in particular, to the Court's judgment in *Netherlands* v *High Authority*, [37] that, by virtue of its residual character, Article 95 of the ECSC Treaty was not a permissible legal base for a mere restatement of the Member States' existing obligations under the Treaty. [38] Thus, the aid code at issue 'could not lawfully contain and should not, therefore, in case of ambiguity, be construed as containing a *general* prohibition of types of State aid other than those which it expressly permits'; [39] such an aid code could only be interpreted 'as establishing a "positive" list of types of aid which, when they comply with the conditions set out therein, may be deemed compatible with the common market by the Commission without further recourse to the Council'. [40]

45. If the Court accepts this approach to those cases, then, by the same reasoning, the requirements in Article 9(1) and (4) of the Coal Aid Code that Member States notify to the Commission by a certain date all the financial support which they intend to grant to the coal industry in the following year and refrain from putting into effect planned aid until it has been approved by the Commission cannot be understood as imposing, *by virtue of those provisions*, a prohibition on the grant of non-notified aid. Article 9 can, in my view, lawfully lay down procedures for the exercise by the Commission of the power conferred by the Coal Aid Code to rule that certain types of aid are compatible with the common

36 — Case C-441/97 P and Case C-1/98 P, respectively, Opinion of 27 January 2000.

37 — Case 9/61 [1962] ECR 213.

38 — Opinion in *Wirtschaftsvereinigung Stahl* v *Commission* and *British Steel* v *Commission*, op. cit., paragraph 45.

39 — Ibid., paragraph 47.

40 — Ibid., paragraph 46.

market and Member States may be required to comply with those procedures in order to benefit from such exceptional approval of aid schemes which would otherwise be prohibited by Article 4(c) of the ECSC Treaty. Furthermore, the provision made in Article 9(4) for Member States lawfully to implement an aid scheme in the absence of a Commission decision within three months of receipt of notification, combined with the wide terms in which the types of aid eligible for approval are defined in Articles 2 to 7 of the Coal Aid Code, make it seem unlikely that a national court could determine, on the basis of the underlying prohibition in Article 4(c) of the ECSC Treaty, that a particular notified scheme on which the Commission had not pronounced its view was, in reality, unlawful. The position is different, however, as regards non-notified aid. The Court has recently confirmed that the Commission is not competent under such an aid code even to approve aid which is notified after the expiry of the relevant deadline without returning to the Council for its assent in accordance with Article 95 of the ECSC Treaty. [41] An aid scheme which has been notified late or, as in the present case, has not been notified at all falls outside the scope of the relevant aid code. In these circumstances, the prohibition of such aid flows directly from Article 4(c) of the ECSC Treaty, which does not require any further measures adopted on the basis of Article 95 of the ECSC Treaty in order to have effect. In fact, this would be so even if the Commission has the power lawfully to rule that aid notified either late or not at all is compatible with the common market. [42] In the absence of a Commission decision to this effect, national courts must draw the necessary consequences regarding the status of non-notified aid directly from Article 4(c) of the ECSC Treaty.

The third question

46. In my view, there is nothing in Commission Decision 94/995 or in the Commission decision of 21 December 1994 authorising the acquisition of CNML by RJB which is pertinent to the defendant's contentions in the present case.

47. Thus, the decision authorising the privatisation of CNML in accordance with Article 66(2) of the ECSC Treaty does not advert, either directly or by implication, to the price paid for CNML and so cannot be understood as affecting the question of the grant of State aid to RJB. It is silent as to the general question of charges for licences and leases. Reference is made to other licensed mining undertakings only in order to establish that they offer intense competition as regards supplies to the electricity

41 — Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843 (judgment of 13 July 2000), paragraphs 49, 54 and 55; see also Case 214/83 *Germany* v *Commission* [1985] ECR 3053, paragraphs 45 to 47 and *Falck*, op. cit., paragraph 16.

42 — See Case T-110/98 *RJB Mining* v *Commission* [1999] ECR II-2585.

supply industry and could quickly make up any shortfall, to determine that RJB would not be in a position to dominate the domestic market and to indicate that sufficient reserves had been held back by the Coal Authority for RJB's competitors.

48. Commission Decision 94/995 is not directly relevant to this case either, as it relates to various forms of aid to be granted to BCC, to pensions schemes for its former workers, or to its workers and former workers themselves, rather than to aid to either CNML or RJB in the form of the grant of licences and leases either gratuitously (in the former case) or for less than the normal lump-sum charge (as alleged in the latter case). It is stated in Part IX of the Decision that the sale of BCC's mining operations by competitive tender guarantees that the assets will be sold at their market value. However, this observation is made in the context of the grant of aid to BCC, the seller, amounting to the difference between the sale proceeds and its debts. Furthermore, it is not disputed in the present case on any side that the price paid for CNML represented its market value; the dispute, rather, concerns the consequences to be drawn from its sale at the market price as regards the treatment of other licensed mining undertakings.

49. The letters sent to Naloo by the Director-General and the acting Director-General, respectively, of the Commission's Energy Directorate on 4 May 1995 and 14 July 1995 are of more direct interest. The former letter states the author's view, to which I have already referred above, that the sale by an open and competitive tendering process of BCC's regional mining undertakings obtained market value for these assets 'with no State aid to the regional coal companies and their respective purchasers'. It is not necessary to determine whether this letter can be treated either as a decision of the Commission or as an annullable act *sui generis*, because its content is entirely consistent with my view, stated above, of the law on aid as it must be applied, if the need arises, by the national court. A conflict could only arise if the Commission's premiss — regarding the open and competitive character of the sale process — were questioned in the national proceedings; this does not appear to be the case. Finally, the last sentence indicates that questions regarding licensing were being investigated by other Commission services.

50. In so far as the defendant's current contentions regarding licence and lease payments are reflected in the complaint submitted by Naloo to the Commission on 19 August 1994 — a question to which I return below — the Commission's letter of 14 July 1995 confirmed that its services had not yet taken a stand on this aspect of the complaint.

51. As a result, I conclude that the national court's analysis of the possible application of Article 4(b) and (c) of the ECSC Treaty and of the Coal Aid Code in the present case is not affected by the measures or documents referred to in the third question.

The fourth question

52. It follows from my conclusion regarding the third question that the defendant is not precluded, as a matter of Community law, from raising its present contentions before the national court because it did not seek the annulment of any of the measures or documents discussed immediately above. It is not, therefore, necessary to examine whether, or to what extent, the Court's reasoning in cases like *TWD Textilwerke Deggendorf*, [43] which concerned Article 173 of the EC Treaty (now, after amendment, Article 230 EC) and Article 177 of the EC Treaty (now Article 234 EC), apply to the somewhat different terms of Articles 33 and 41 of the ECSC Treaty, or whether the facts of the present case satisfy the conditions laid down in that case-law.

53. The second part of this question refers to the fact that neither the defendant nor Naloo instigated proceedings against the Commission under Article 35 of the ECSC Treaty for failure to act in response to those aspects of Naloo's complaint which correspond to the issues now raised in the main proceedings. This question seems to have been referred on the basis (agreed by a majority in the Court of Appeal) that the complaint referred, if only to some limited extent, to the subject-matter of the present case. As in cases such as *TWD*, this question relates to the possible influence on national proceedings, in which the national courts make the material findings of fact, of a party's omission to commence proceedings before the Court of First Instance, in the framework of which the latter court makes the factual findings necessary to determine its own jurisdiction. It is necessary to avoid a situation where the competent national court declines to grant a remedy on the basis of a party's failure to commence alternative judicial proceedings about whose admissibility legitimate doubts subsist. Thus, the Court attached importance in *TWD* to the fact that the applicant in the main proceedings in that case 'could without any doubt have challenged [the contested decision] under Article 173 of the [EC] Treaty'. [44]

54. In the circumstances of the present case, and in spite of the (less than unanimous) findings of the Court of Appeal, I do not think it possible to say *without any doubt* that the Commission was seised of a complaint corresponding, in part, to the subject-matter of the present proceedings and that its failure to act thereon could

43 — Case C-188/92 [1994] ECR I-833 (hereinafter '*TWD*').

44 — Ibid., paragraph 24.

have been the subject of Article 35 proceedings. As a result, the normal course of the main proceedings should not, in my view, be affected by the failure of Naloo or the defendant to commence such an action. It is, thus, unnecessary to address here either the question of principle whether or not the reasoning of *TWD* can be extended, in an ECSC context, to omissions to initiate proceedings for failure to act, or the questions of the relevance of the defendant's relationship with Naloo and of the information available to the defendant about the complaint and its handling by the Commission at the material time, viz. October 1995.

V — Conclusion

55. In the light of the foregoing, I recommend that the Court rule as follows in response to the questions referred by the Court of Appeal:

— The difference in the amounts effectively charged for coal-mining licences and coal-reserve leases complained of in the defence and counter-claim in the main proceedings is not capable of constituting discrimination between producers within Article 4(b) of the ECSC Treaty, a special charge within Article 4(c) of that Treaty, or aid within Article 4(c) of the same Treaty or within Article 1 of Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry.

56. In the alternative, should the Court take the view that the difference in treatment complained of is capable of coming within one of the abovementioned provisions, I would propose that the Court rule that, in the circumstances of the present case, Article 4(b) or, as the case may be, Article 4(c) of the ECSC Treaty is directly effective and enforceable before national courts. In such circumstances, I would also recommend that the Court give a positive response to the third question referred by the Court of Appeal and reply in the negative to the fourth question, in so far as those questions relate to discrimination or to special charges.