JUDGMENT OF THE COURT

20 September 2001 *

In Case C-390/98,

REFERENCE to the Court under Article 41 of the ECSC Treaty by the Court of Appeal (England and Wales) (Civil Division) for a preliminary ruling in the proceedings pending before that court between

H.J. Banks & Co. Ltd

and

The Coal Authority,

Secretary of State for Trade and Industry,

on the interpretation of Article 4(b) and (c) of the ECSC Treaty and of Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ 1993 L 329, p. 12),

* Language of the case: English.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet (Rapporteur), P. Jann, L. Sevón, R. Schintgen and F. Macken, Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— H.J. Banks & Co. Ltd, by M. Hoskins, Barrister, instructed by Eversheds, Solicitors,

— the Coal Authority, by D. Vaughan QC, and D. Lloyd Jones, Barrister, instructed by C. Mehta, Solicitor,

— the United Kingdom Government, by R. Magrill, acting as Agent, assisted by R. Plender QC, and A. Robertson, Barrister,

— the Commission of the European Communities, represented by N. Khan and P.F. Nemitz, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of H.J. Banks & Co. Ltd, represented by M. Hoskins, of the Coal Authority, represented by D. Vaughan and D. Lloyd Jones, of the United Kingdom Government, represented by R. Magrill, assisted by R. Plender and A. Robertson, and of the Commission, represented by K.-D. Borchardt, acting as Agent, assisted by N. Khan, Barrister, at the hearing on 6 June 2000,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2000,

gives the following

Judgment

1 By order of 31 July 1998, received at the Court on 3 November 1998, the Court of Appeal (England and Wales) (Civil Division) referred to the Court for a preliminary ruling under Article 41 of the ECSC Treaty four questions on the interpretation of Article 4(b) and (c) of the ECSC Treaty and of Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ 1993 L 329, p. 12).

2 The questions have been raised in proceedings between, on the one hand, H.J. Banks & Co. Ltd ('Banks'), established in the United Kingdom, and, on the other, the Coal Authority and the Secretary of State for Trade and Industry ('the Secretary of State').

The Community legislation

3 Article 4 of the ECSC Treaty provides:

'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;

...'

4 However, Decision No 3632/93, applicable to the periods at issue in the main proceedings and commonly referred to as 'the Coal Aid Code', authorises, under certain conditions and in restrictively listed cases, the grant of subsidies or aid by

Member States to the coal industry which are therefore regarded as Community aid compatible with the proper functioning of the common market.

The national legal context

5 Banks is a private company which extracts opencast coal. It is a member of the National Association of Licensed Opencast Operators ('NALOO'), the chairman of which is Mr H. Banks, the chairman of Banks.

6 Until 1994, the United Kingdom coal industry was governed by the Coal Industry Nationalisation Act 1946 ('the CINA'), which had transferred to the National Coal Board, which subsequently became the British Coal Corporation ('British Coal'), the ownership of nearly all coal reserves in the United Kingdom.

7 Save where provided otherwise, the CINA conferred upon British Coal the exclusive right of extracting and working coal in the United Kingdom. However, Section 36 of the CINA authorised British Coal to grant to third parties, on payment of royalties, licences for opencast coal extraction ('Section 36 licences').

8 The Coal Industry Act 1994 ('the Coal Industry Act'), which was enacted to privatise the coal industry, created a new regulatory body, the Coal Authority, to which ownership of all British Coal's deposits, whether worked or not, was transferred as from 31 October 1994 ('the restructuring date'). The Coal Authority does not, however, itself have the right to carry on mining activities, its function being to grant licences authorising the working of coal and laying down the conditions therefor, and to grant the necessary leases in respect of the

various property rights concerned. The Coal Authority is entitled to demand royalties in return for those licences and leases. The Section 36 licences were, however, maintained, the royalties payable thereunder being henceforward levied by the Coal Authority. Section 36 licence holders were, however, given the option of converting them into licences and leases under the Coal Industry Act. The Coal Authority must pay on all sums levied to the Secretary of State.

9 The Coal Industry Act also empowered the Secretary of State to adopt a restructuring scheme in respect of the property, rights and obligations of British Coal, which would, in particular, enable him to transfer such property, rights and obligations to successor companies. On the basis of that power, the Secretary of State initially adopted a restructuring scheme which left British Coal with the assets enabling it to carry on its existing activity. In parallel, pursuant to specific provisions of the Coal Industry Act and in the name of the Coal Authority, the Secretary of State granted British Coal the operating licences it needed as from 31 October 1994 and asked the Coal authority to grant it the corresponding leases. Those licences and leases were granted for no consideration. Then, after a short period, the Secretary of State adopted five restructuring plans in December 1994 and April 1995, whereby the operating business of British Coal was distributed amongst various companies belonging to the Crown ('the State companies succeeding British Coal'). The English part of British Coal's business, including the corresponding licences and leases, was transferred, without consideration, to Central and Northern Mining Ltd ('CNML').

10 Following an open competitive tendering process for privatisation, in which Banks did not wish to tender, the shares of CNML were then acquired by RJB Mining (UK) plc ('RJB'). Under the terms of sale, RJB is not required to make any subsequent payment for the right to work coal under the licences and leases taken over from CNML.

11 Banks is the holder of both Section 36 licences and licences and leases under the Coal Industry Act. Under the Section 36 licences, it is required to pay a royalty of GBP 2 per tonne of coal which it works and carries away. According to public documents emanating from the Coal Authority, the licences which the latter grants under the Coal Industry Act give rise to the levying, in addition to initial administrative costs and a charge for the grant, of an annual royalty linked to the tonnage of coal produced. For leases under the Coal Industry Act, the holders are required, after negotiation with the Coal Authority, to pay a capital sum, a flat-rate periodic rent, a periodic rent linked to the tonnage of coal extracted, or a levy arising from the combination of two or three of the above.

Background to the main proceedings

12 On 19 August 1994, NALOO lodged a complaint with the Commission of the European Communities ('the NALOO complaint'), complaining of preferential treatment accorded by the British authorities to British Coal to the detriment of small private opencast mine operators. In that complaint, NALOO called into question, first, State aid which, it maintained, had been enjoyed by British Coal since 1973, and, secondly, the conditions and special charges which, it maintained, British legislation allowed British Coal to impose on its competitors. In NALOO's submission, the royalties which opencast mine operators had to pay to British Coal were excessive.

13 In its complaint, NALOO also raised the negative effects of the imminent privatisation of British Coal. In paragraph 6.3 of its complaint, entitled 'Transitional arrangements [for privatisation]', NALOO indicated that the final abolition of royalties was planned, as was the possibility of converting the former licences into new licences not giving rise to the payment of royalties. It added, however, that the Government had indicated that royalties would be due until privatisation and, possibly, after the entry into operation of the Coal Authority. According to NALOO, the provisional maintenance of the royalties could result

in an annualised rate of royalty payments of GBP 5 million by opencast mine operators under licences to British Coal and its successor companies. NALOO concluded:

'[British Coal] 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.'

14 In the following paragraphs of its complaint, NALOO argued that the latest privatisation proposals would perpetuate and compound the effects of the illicit State aid granted over the years through the sale of British Coal assets free of all debts and obligations. It urged the Commission to 'investigate the... privatisation arrangements with a view to assessing [them] both against the historical context in which aid was granted to [British Coal] and in relation to the aid which constitutes an inherent part of the privatisation package'. NALOO considered that 'no direct or indirect aid [may] be incorporated in the privatisation arrangements in a manner which would discriminate against established undertakings'.

15 On 3 November 1994, 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 year (OJ 1994 L 379, p. 6). The national measures examined by the Commission were concerned with covering liabilities for environmental damage arising from coal extraction by British Coal, various social benefits, the right of former British Coal employees to free deliveries of fuel, and certain costs of restructuring British Coal. In that decision, the Commission considered that the aid concerned was compatible with the aims of Decision No 3632/93 and with the proper functioning of the common market.

16 On 21 December 1994, on the basis of Article 66(2) of the ECSC Treaty, concerning the control of concentrations between undertakings, the Commission

adopted a decision authorising the acquisition of CNML by RJB ('the decision of 21 December 1994') *[XXIVth Report on Competition Policy (1994), p. 445]*.

17 Finally, by letters of 4 May and 14 July 1995, the Commission (Directorate-General XVII, Energy) replied to NALOO's complaint of 19 August 1994 concerning the question of State aid. In the first letter, the Commission referred to decisions authorising aid to the United Kingdom coal industry taken between 1974 and 1994 and referred in general terms to the difference in situation between British Coal and the private sector. It considered that the conditions of sale in 1993 of 28 mines belonging to British Coal had not involved aid by reason of the open and competitive nature of those sales. It stated that the conditions of sale of the State companies succeeding British Coal, through an open and competitive tendering process, guaranteed the absence of aid in that sale. It justified Decision 94/995, referred to in paragraph 15 of this judgment, and indicated that a certain number of British Coal's operating sites had been put aside for allocation to the Coal Authority for future licensing. In the second letter, sent in response to a reaction by NALOO to the first letter, the Commission essentially confirmed the content of the latter. In both letters, the Commission indicated that the aspects of the NALOO complaint concerning royalties continued to be under investigation by the 'Competition' Directorate-General within its own area of competence.

The main proceedings

18 As from 1 October 1995, Banks stopped paying the Coal Authority the royalties due under its Section 36 licences. The Coal Authority then brought the matter before the High Court of Justice (England and Wales), Queen's Bench Division (Commercial Court).

19 In its defence, and in support of its counterclaim against the Coal Authority and the Secretary of State for repayment of the royalties paid under the Section 36

licences and those paid pursuant to the Coal Industry Act licences and leases, and for damages, Banks argued that the royalties demanded constituted a form of discrimination within the meaning of Article 4(b) of the ECSC Treaty, since its main competitors such as RJB were not required to make such payments. In the alternative, Banks argued that the royalties in question were caught by Article 4(c) of the ECSC Treaty, prohibiting special charges imposed by Member States in any form whatsoever.

20 By a summary judgment of 3 March 1997, the High Court rejected Banks's counterclaim and ordered it to pay the Coal Authority the royalties in question, amounting to approximately GBP 1 million, plus interest. In its judgment, the High Court did not rule on the compatibility of the disputed royalties with the relevant provisions of the ECSC Treaty. It took the view that Banks was no longer entitled to challenge their compatibility with the Treaty before the national courts, since it had not brought an action for annulment against the letters of 4 May and 14 July 1995 in which, according to the High Court, the Commission had rejected the similar complaints of NALOO.

21 Banks appealed against that judgment to the Court of Appeal.

22 Before that court, Banks argued, first, that the Commission's letters of 4 May and 14 July 1995 did not constitute a dismissal of NALOO's complaint, and, secondly, that its current complaints did not form part of that latter complaint. The NALOO complaint challenged the compatibility of the disputed royalties with the ECSC Treaty only in respect of the transitional period during which British Coal carried on its operational business under the Coal Industry Act. For their part, the Coal Authority and the Secretary of State maintained that NALOO's complaint was rejected by the Commission in Decision 94/995 and in its decision of 21 December 1994. Having failed to challenge those decisions, Banks was no longer entitled to challenge the validity of the system of royalties in question.

23 It is clear from the order for reference that the Court of Appeal is divided on the question whether NALOO's complaint also related to the period after the operational activities of British Coal were taken over by the private undertakings, such as RJB, which had tendered. The Court of Appeal nevertheless considers that, in any event, the case brought before it raises the question whether, notwithstanding the various decisions on British coalmines which the Commission adopted in 1994 and 1995 and have not been challenged in court, Article 4(b) and (c) of the ECSC Treaty have direct effect.

24 In those circumstances, the Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'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 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 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 3632/93/ECSC notwithstanding:

— Commission Decision 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 14 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 3632/93/ECSC in proceedings in the national courts?'

The first question

25 By its first question, the national court asks whether the difference in treatment between coal undertakings subject to royalty payments in consideration for the right to operate coal mines and coal undertakings which are or have been exempt from such royalties is capable of constituting discrimination between producers within the meaning of Article 4(b) of the ECSC Treaty, a special charge within the meaning of Article 4(c) of the ECSC Treaty and/or an aid within the meaning of Article 4(c) of the ECSC Treaty and Article 1 of Decision No 3632/93/ECSC establishing Community rules for State aid to the coal industry.

26 Banks argues that the difference in treatment in question constitutes discrimination between producers and a special charge prohibited by Article 4(b) and (c) of the ECSC Treaty, unless the Member State concerned demonstrates that that situation reflects substantial objective differences between the two categories of undertaking. The difference in treatment it complains of cannot, however, constitute aid without confusing the autonomous concepts of aid and special charges referred to in Article 4(c) of the ECSC Treaty.

27 The Coal Authority and the United Kingdom Government explain that, following a public tender procedure, the undertakings exempted from royalties purchased the assets of the State companies which succeeded British Coal and that such assets included the right to work the coal at the sites leased to those companies. Consequently, the Government argues, the exemption from royalties enjoyed by those undertakings does not constitute either discrimination between producers, or a special charge, or aid. The Coal Authority considers that the disputed exemption is only capable of constituting aid and must therefore be examined in the light of the combined provisions of Article 4(c) of the ECSC Treaty and of Decision No 3632/93. The Coal Authority adds that, in any event, Article 4(c) of the ECSC Treaty, in so far as it concerns special charges, is irrelevant in this case since Banks is challenging not its obligation to pay the royalties but the exemption enjoyed by certain undertakings.

28 The Commission considers that the difference in treatment referred to by the national court is capable of constituting discrimination between producers, a special charge, and aid.

29 As to these arguments, a distinction needs to be made at the outset between the concept of aid, which appears in Article 4(c) of the ECSC Treaty and Article 1 of Decision No 3632/93, the concept of a special charge, which also appears in Article 4(c) of the ECSC Treaty, and the concept of discrimination between producers, which appears in Article 4(b) of the same treaty.

30 The concept of aid is wider than that of a subsidy because it 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 (see, for example, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 19, and Case C-200/97 *Ecotrade* v *Altiforni e Ferriere di Servola* [1998] ECR I-7907, paragraph 34).

31 Thus, under Article 1 of Decision No 3632/93, which covers all aids to the coal industry, whether specific or general, the term 'aid' covers:

— 'any direct or indirect measure or support by public authorities linked to production, marketing and external trade which, even if it is not a burden on public budgets, gives an economic advantage to coal undertakings by reducing the costs which they would normally have to bear';

— 'the allocation, for the direct or indirect benefit of the coal industry, of the charges rendered compulsory as a result of State intervention, without any distinction being drawn between aid granted by the State and aid granted by public or private bodies appointed by the State to administer such aid'; and

— 'aid elements contained in financing measures taken by Member States in respect of coal undertakings which are not regarded as risk capital provided to a company under standard market-economy practice'.

32 As regards the concept of a special charge, which appears in Article 4(c) of the ECSC Treaty, the Court of Justice has held that in the first analysis, without its being possible to consider this criterion by itself as decisive, a charge may be presumed to be special and therefore abolished and prohibited by the ECSC 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 (Joined Cases 7/54 and 9/54 *Groupement des Industries Sidérurgiques Luxembourgeoises* v *High Authority* [1956] ECR 175, 196).

33 It follows from the above that, for the purposes of Article 4(c) of the ECSC Treaty and Decision No 3632/93, an aid consists of a mitigation of the charges which are normally included in the budget of an undertaking, taking account of the nature or general scheme of the system of charges in question (see, to that effect, regarding the meaning of aid in the context of the EC Treaty, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33), whereas a special charge is, on the contrary, an additional charge over and above those normal charges.

34 It follows that a single measure cannot at the same time constitute both an aid and a special charge within the meaning of Article 4(c) of the ECSC Treaty. Where there is differential treatment of undertakings in the application of charges, which does not appear to be justified by the nature or general scheme of the system, it is necessary to determine what is the normal application of the system of charges, in relation to the nature or general scheme of that system.

35 As regards the concept of discrimination, appearing in Article 4(b) of the ECSC Treaty, it should be noted that, in accordance with consistent case-law, discrimination consists in particular in treating like cases differently, involving a disadvantage for some operators in relation to others, without that difference in treatment being justified by the existence of substantial objective differences (see, in particular, Joined Cases 17/61 and 20/61 *Klöckner-Werke and Hoesch* v *High Authority* [1962] ECR 325, and Case 250/83 *Finsider* v *Commission* [1985] ECR 131, paragraph 8).

36 A measure relating to charges may, in certain cases, constitute a form of discrimination within the meaning of Article 4(b) of the ECSC Treaty, even if it does not have the characteristics either of an aid or of a special charge within the meaning of Article 4(c) of the same Treaty (see, to that effect, in relation to special charges, *Groupement des Industries Sidérurgiques Luxembourgeoises*, p. 197). Conversely, an aid does not necessarily constitute a discriminatory measure and neither can it be entirely ruled out that a measure imposing a special charge may not be discriminatory.

37 It is in the light of those principles that a situation such as that at issue in the main proceedings must be examined.

38 The description of the facts and of the dispute appears to require a distinction to be made between two periods corresponding to different situations.

39 The first period began on 31 October 1994, the restructuring date, on which the Coal Authority acquired ownership of all the coal deposits, worked or not, previously owned by British Coal. That period ended when the shares of the State companies succeeding British Coal as operator were transferred to the private undertakings to which tenders were awarded; that is to say, as regards the English part of British Coal's operating business, at the time when RJB took possession of CNML's shares. During that period, British Coal and then the State companies which succeeded it carried on an operational business as holders of licences and leases granted without consideration under the Coal Industry Act.

40 The second period began when the private undertakings to which tenders were awarded, such as RJB, took possession of the shares of the State companies which succeeded British Coal as operator and continues to this day, as the order for

reference shows. Since the beginning of that period, RJB has enjoyed the licences and leases which it obtained by its acquisition through tender of the assets and the rights and obligations linked to the operating business in England of British Coal and its successor CNML.

The first period

41 The information supplied by the national court shows that, since 31 October 1994, the date on which ownership of all the deposits, worked or not, was transferred to the Coal Authority, the system of working coal in England and Wales rests upon the granting of licences and leases to all the operators, including British Coal and the undertakings, first public and then private, which succeeded it [see Section 11(6)(a) of the Coal Industry Act].

42 The information from the national court also shows that, during the first period, the licences and leases were granted to British Coal and the State companies which succeeded it without any consideration, whereas all the other operators obtained licences and leases only on payment of royalties.

43 It therefore appears — taking account of the system established by the Coal Industry Act as described in the documents before the Court, and especially of the obligation on the Coal Authority, under Section 3(4) of that Act, to grant leases 'on the best terms reasonably obtainable', and taking account also of the temporary nature of the powers of the Secretary of State to grant leases and, in the name of the Coal Authority, licences, both without consideration, to British Coal and the State companies which succeeded it — that the normal situation arising from the nature and general scheme of the system is represented by the

payment by the operators of consideration for the licences and leases granted to them.

44 In those circumstances, British Coal and the State companies which succeeded it benefited during the first period from an aid within the meaning of Article 4(c) of the ECSC Treaty. The amount of that aid corresponds to the amount of the royalties which the Coal Authority would normally have claimed from British Coal and the State companies which succeeded it, had the Secretary of State not exercised his powers.

45 As regards the existence during the first period of discriminatory measures within the meaning of Article 4(b) of the ECSC Treaty, it is for the national court to assess whether substantial objective differences in situation between, on the one hand, British Coal and the State companies which succeeded it and, on the other, the other operators, might justify that operational advantage in favour of the former and cause that advantage to escape classification as a discriminatory measure. The mere fact that it was necessary to facilitate the privatisation process of British Coal would be insufficient to constitute such a justification, unless that consideration were linked to distinctive operating features not already taken into account in the context of specific compensatory measures, such as those authorised by the Commission in Decision 94/995.

46 The answer to be given to the national court must therefore be that a situation such as that at issue in the main proceedings from the restructuring date until the transfer to the successful private tendering undertakings of the shares of the State companies which succeeded British Coal as operator implies the existence of aid, within the meaning of Article 4(c) of the ECSC Treaty, but not of special charges within the meaning of that provision. The same situation may constitute discrimination between producers, within the meaning of Article 4(b). That would be the case if significant objective differences in situation between, on the one hand, British Coal and the State companies which succeeded it as operator, and, on the other hand, the other operators, did not justify the differentiated treatment applied to the two categories of producers.

The second period

47 As far as the second period is concerned, it should be noted that, since the time of the transfer, to the successful private tendering undertakings, of the shares of the State companies which succeeded British Coal, no operator has obtained, or is currently obtaining, its licences and leases without consideration. There are many parallel methods of acquiring and paying for the lease and licence rights.

48 The undertakings wishing to participate in the tender procedures for the State companies which succeeded British Coal had the opportunity to acquire those rights as a component of the rights and obligations of the companies sold, at auction, for an unlimited period. The documents before the Court do not suggest that those procedures were not open, competitive and undiscriminatory. Moreover, as emphasised in paragraph 11 of this judgment, the other operators themselves, according to the documents before the Court, had the opportunity to choose between various means of acquiring rights in relation to the leases, particularly between the payment of a capital sum, the payment of a flat-rate rent, or the payment of a rent linked to the tonnage of coal extracted, or indeed the combination of two or three of those methods.

49 No formula appears, a priori, to be more advantageous in principle than another. The possible advantage of one formula rather than another will depend on a number of economic, technical, commercial and financial parameters relying largely upon forecasts which it is for the various operators to assess as accurately as possible in the context of their competition with each other. Bearing in mind the realities of the market, the choices made may reveal themselves to be more or less judicious and benefit or penalise one competitor in relation to another. However, such an advantage or disadvantage results directly from the operation of competition and the accuracy of the various operators' forecasts.

50 Since the various formulae are, or were, accessible to all the operators without discrimination, no distortion of competition can be inferred from such a system

where several means of acquiring a single type of right coexist. Moreover, the order for reference does not contain any evidence to indicate that access to the various formulae was, or would be, discriminatory.

51 The answer to be given to the national court must therefore be that a situation such as that at issue in the main proceedings, as from the time of the transfer of the shares of the State companies which succeeded British Coal as operator to the successful private tendering undertakings, does not reveal the existence of aid or special charges, within the meaning of Article 4(c) of the ECSC Treaty, or discrimination between producers within the meaning of Article 4(b) of the same Treaty, since access to the various means of acquiring the lease and licence rights was not, and is not, discriminatory.

The second question

52 By its second question, the national court asks essentially whether Article 4(b) and (c) of the ECSC Treaty or Article 9(1) and (4) of Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry directly produce rights in favour of individuals which the national courts are required to safeguard, and whether Banks may rely on those provisions in order to defend non-payment or claim repayment of the royalties to which it has been made subject.

53 Banks and the Commission submit that that question should be answered in the affirmative. They argue that, in the absence of more specific rules in the ECSC Treaty, the provisions of Article 4(b) of that Treaty, in so far as they cover discrimination between producers, and those of Article 4(c) thereof, in so far as they cover special charges, apply independently and are sufficiently precise and unconditional. They add that Article 9(4) of Decision No 3632/93 does not authorise Member States to implement planned aid until after it has been

approved by the Commission and consider that, by analogy with the similar provision in the last sentence of Article 93(3) of the EC Treaty (now the last sentence of Article 88(3) EC), this provision also has direct effect.

54 The Coal Authority and the United Kingdom Government maintain, on the other hand, that the provisions in question do not have direct effect.

55 According to the Coal Authority, the predominant role entrusted to the Commission by the ECSC Treaty necessarily means that the provisions of the latter do not have direct effect. Moreover, the provisions of Article 4 of the ECSC Treaty cannot apply independently since they are applicable only 'as provided in this Treaty' and are, furthermore, neither sufficiently precise nor unconditional.

56 The Coal Authority, supported by the United Kingdom Government, also argues that the Commission, in order to apply Article 4(c) of the ECSC Treaty, did establish more specific rules by adopting Decision No 3632/93, which confers on that institution a discretionary power to assess the compatibility of aid with the common market. Moreover, Article 88 of the ECSC Treaty obliges the Commission to adopt decisions where Member States fail to fulfil their obligations, so that the implementation of the provisions of Article 4(b) and (c) of the ECSC Treaty necessarily had to take place via the adoption of such decisions.

57 As the Court has held many times, the provisions of Article 4 of the ECSC Treaty apply independently only in the absence of more specific rules; if they have been adopted or are governed by other provisions of the ECSC Treaty, texts relating to the same provision must be considered as a whole and applied together (*Groupement des Industries Sidérurgiques Luxembourgeoises*, p. 195; Case C-128/92 *Banks* v *British Coal* [1994] ECR I-1209, paragraph 11; Case C-18/94 *Hopkins and Others* v *National Power and Powergen* [1996] ECR I-2281, paragraph 16).

58 Moreover, in order to determine whether a provision of the ECSC Treaty is directly effective and directly produces rights in favour of individuals which the national courts must protect, it is necessary to ascertain whether that provision is clear and unconditional (*Banks*, paragraph 15).

59 If a provision of Article 4 of the ECSC Treaty is not independently applicable, it cannot have direct effect (*Banks*, paragraph 16; *Hopkins*, paragraph 26).

60 Therefore, and bearing in mind the reply given to the first question, which excludes the existence of special charges in a situation such as that at issue in the main proceedings, it is necessary to examine whether the provisions of Article 4(b) of the ECSC Treaty, in so far as they cover discrimination between producers, and those of Article 4(c) of the same Treaty, in so far as they cover aid, refer to other more specific provisions of the ECSC Treaty or measures of secondary law and, if not, whether those provisions are clear and unconditional. It will also have to be examined whether the provisions of Article 9(1) and (4) of Decision No 3632/93 have direct effect.

61 The Court must reject at the outset the argument of the Coal Authority and the United Kingdom Government that Article 88 of the ECSC Treaty constitutes a specific rule which prevents the provisions in question of Article 4 from being applicable independently.

62 Article 88 of the ECSC Treaty provides in particular that, if the Commission considers that a State has failed to fulfil an obligation under the ECSC Treaty, it is to record that failure in a reasoned decision after giving the State concerned the opportunity to submit its comments.

63 Such a provision, which is general in character, clearly cannot constitute a more specific rule for the purposes of the case-law referred to in paragraph 57 of this judgment. Moreover, to recognise Article 88 of the ECSC Treaty as having such scope would, in contradiction with that case-law, amount to depriving all the provisions of Article 4 of the ECSC Treaty of independent effect.

Article 4(c) of the ECSC Treaty, in so far as it covers State aid, and Article 9(1) and (4) of Decision No 3632/93

64 Although it might initially have been inferred from the judgment in *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* that Article 4(c) of the ECSC Treaty, in so far as it covers aid, was fully independent in its application and directly effective, that interpretation no longer holds good.

65 Since 1965, acting on the basis of the first paragraph of Article 95 of the ECSC Treaty, the Commission has adopted successive general decisions, known as aid codes, authorising, under certain conditions and in specifically listed cases, the granting of subsidies or aid by Member States to the coal industry, which is therefore regarded as Community aid compatible with the proper functioning of the common market.

66 The decision applicable to this dispute is Decision No 3632/93, which expires on 23 July 2002. That decision defines the concept of aid to the coal industry (Article 1), lays down the criteria for granting aid (Articles 2 to 7) and provides detailed procedural rules regarding the notification of the financial measures which Member States intend to take in favour of the coal industry and the examination and authorisation of aid by the Commission (Articles 8 and 9).

67 Thus, Article 4(c) of the ECSC Treaty, in so far as it concerns the compatibility of subsidies or aid with the common market, is implemented by Decision No 3632/93, so that, to that extent, that provision has no independent application and therefore no direct effect.

68 Articles 8 and 9 of Decision No 3632/93 confer an exclusive power on the Commission to assess the compatibility of aid with the criteria laid down by that decision. It follows that, in the absence of a Commission decision, individuals cannot challenge the compatibility of an aid measure before the national courts (see, by analogy, in relation to Articles 65 and 66(7) of the ECSC Treaty, *Banks*, paragraphs 17 and 18, and, in relation to Article 63(1) of the ECSC Treaty, *Hopkins*, paragraph 27).

69 However, Article 9(1) of Decision No 3632/93 requires Member States to notify the Commission of all the financial measures which they intend to take in favour of the coal industry, whereas the first sentence of Article 9(4) does not authorise them to put planned aid into effect until it has been approved by the Commission.

70 That latter provision corresponds essentially to the final sentence of Article 93(3) of the EC Treaty, according to which the Member State concerned cannot put planned aid measures into effect before the procedure has resulted in a final Commission decision. This provision of the EC Treaty has direct effect and produces rights in favour of individuals which the national courts are required to protect (see, for example, Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 8). The first sentence of Article 9(4) of Decision No 3632/93 must therefore be recognised as having the same effect.

71 In order to be in a position to determine whether a State measure established without taking account of the preliminary examination procedure laid down by

Article 9 of Decision No 3632/93 should or should not be made subject to that procedure, a national court may have occasion to interpret the concept of aid, referred to in Article 4(c) of the ECSC Treaty and Article 1 of that decision.

72 It follows from the above that Article 4(c) of the ECSC Treaty, in so far as it concerns the compatibility of aid with the common market, does not have direct effect. However, the first sentence of Article 9(4) of Decision No 3632/93 is directly effective and directly produces rights in favour of individuals, which the national courts must protect. For that purpose, national courts may have occasion to interpret the concept of aid within the meaning of Article 4(c) of the ECSC Treaty and Article 1 of Decision No 3632/93.

73 As the Court has held in the context of the EC Treaty, the validity of acts entailing implementation of aid measures is affected by failure, on the part of the national authorities, to observe the prohibition in the last sentence of Article 93(3) of that Treaty (now Article 88(3) EC) on implementing aid without Commission authorisation. National courts must afford individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures (Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *French State* [1991] ECR I-5505, paragraph 12).

74 As the Court has also held, withdrawal of an unlawful aid measure by way of recovery is the logical consequence of a finding that it is unlawful (Case C-142/87 *Belgium* v *Commission* (*'Tubemeuse'*) [1990] ECR I-959, paragraph 66; *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* v *French State*, paragraph 12; Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 16; Case C-39/94 *SFEI and Others* v *La Poste* [1996] ECR I-3547,

paragraph 68). However, it is necessary to determine the potential scope of the direct effect of the first sentence of Article 9(4) of Decision No 3632/93 in a situation such as that at issue in the main proceedings.

75 In that regard, restoring the situation prior to the payment of aid which was unlawful or incompatible with the common market is a necessary requirement for preserving the effectiveness of the provisions of the Treaties concerning State aid and the national court must examine, in the light of the circumstances, whether it is possible to uphold the individuals' claims so as to help restore that previous situation (see, to that effect, *Tubemeuse*, paragraph 66).

76 In the case at issue in the main proceedings, Banks is not claiming that aid should be repaid, but is asking to be exonerated from royalties. It should be noted in this regard that repayment of the aid might in any case prove impossible.

77 The fact that the State companies which succeeded British Coal were acquired subsequently in the context of an open and competitive tendering procedure under market conditions suggests that the element of aid enjoyed by British Coal and those State companies does not exist in relation to the private undertakings which won tenders, such as RJB. Since those undertakings bought the companies in question under non-discriminatory competitive conditions and, by definition, at the market price, that is to say at the highest price which a private investor acting under normal competitive conditions was ready to pay for those companies in the situation they were in, in particular after having enjoyed State aid, the aid element was assessed at the market price and included in the purchase price. In such circumstances, the undertakings to which the tenders were granted cannot be regarded as having benefited from an advantage in relation to other market operators (see, to that effect, Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 40). Private undertakings such as RJB, to which tenders were awarded, could not therefore be asked to repay the aid element in question.

78 Nevertheless, in principle, where a company which has benefited from aid has been sold at the market price, the purchase price reflects the consequences of the previous aid, and it is the seller of that company that keeps the benefit of the aid. In that case, the previous situation is to be restored primarily through repayment of the aid by the seller.

79 However, in a situation such as that at issue in the main proceedings, repayment of the aid by the seller of the companies which benefited from it could be effective only if the latter is not identifiable, from an economic standpoint, with the provider of the aid, as in that case he would be repaying himself. In the case at issue here, the State appears to be the provider of any such aid, since the royalties from which British Coal and the State companies which succeeded it were exonerated would normally have been paid to the State. If the sums arising from the privatisation have in the end been allocated to the State, it is both seller and aid provider. The same applies if the sums arising from the privatisation were allocated to British Coal, the existence of which appears to have been maintained in order to ensure the performance of a certain number of obligations connected with its past business, or to any other body not carrying on business in a competitive market and if they thus avoided the State having to meet the corresponding costs. In that case, the previous situation cannot be restored by repayment of the aid.

80 However, that cannot lead to other operators being retrospectively exonerated from the royalties in question. Persons liable to pay an obligatory contribution cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that contribution (see, to that effect, the judgments in Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraphs 51 to 53, and Case C-36/99 *Idéal Tourisme* v *Belgian State* [2000] ECR I-6049, paragraphs 26 to 29). Therefore, even in particular circumstances such as those referred to in paragraphs 77 to 79 of this judgment, in view of the classification of the measure in question as aid, claims such as those made by Banks in the main proceedings cannot be accepted. That is, however, without prejudice to any actions which British Coal's former competitors might

bring, if the conditions were met, for compensation for any damage caused to them by the competitive advantage enjoyed by British Coal and the State companies which succeeded it.

Article 4(b) of the ECSC Treaty, in so far as it concerns discrimination between producers

81 Several provisions of the ECSC Treaty other than Article 4(b) specifically prohibit certain types of discrimination. However, none of those provisions concerns discrimination between producers.

82 Moreover, Article 65(1) of the ECSC Treaty prohibits all agreements between undertakings tending, within the common market, directly or indirectly to prevent, restrict or distort normal competition, and Article 65(4) gives the Commission sole jurisdiction to ensure compliance with that provision.

83 However, in its judgment in Case 2/56 *Geitling* v *High Authority* [1957] ECR 3, at page 20, the Court of Justice rejected the argument that the provisions of Article 65, as *lex specialis*, excluded the fundamental provisions of Article 4(b). The Court held that Articles 4(b) and 65 of the ECSC Treaty did not exclude or annul each other; that they served to bring about the objectives of the Community and were complementary in that respect, and that, in certain cases, their provisions could cover facts justifying a simultaneous and concurrent application of those articles.

84 Therefore, the fact that an instance of discrimination falls within Article 65 of the ECSC Treaty does not exclude the independent application of Article 4(b).

85 Article 66(1) of the ECSC Treaty makes concentration operations between undertakings subject to prior authorisation by the Commission. Article 66(2) provides in particular that, in its assessment of an operation and in accordance with the principle of non-discrimination laid down in Article 4(b), the Commission is to take account of the size of like undertakings in the Community, to the extent that it considers justified in order to avoid or correct disadvantages resulting from unequal competitive conditions.

86 Although it refers to Article 4(b) of the ECSC Treaty, Article 66 of the same Treaty cannot be regarded as implementing that provision. Article 66 does not specify the conditions for applying the principle of non-discrimination laid down in Article 4(b), but merely provides that, when it assesses the compatibility of a concentration operation with the ECSC Treaty, the Commission must take account of that principle.

87 Finally, Article 67 of the ECSC Treaty looks at various ways in which the action of Member States may result in conditions of competition being adversely affected.

88 However, Articles 4 and 67 of the ECSC Treaty concern two distinct areas, the first abolishing and prohibiting certain actions by Member States in the field which the ECSC Treaty places under Community jurisdiction, the second intended to prevent the distortion of competition which exercise of the residual powers of the Member States inevitably entails (*De Gezamenlijke Steenkolenmijnen in Limburg*, at p. 25). Article 67 of the ECSC Treaty thus covers general measures which Member States may adopt in the context of their economic and social policy and measures taken by Member States which apply to industries other than coal and steel but which are capable of having significant repercussions on the conditions of competition in those industries.

89 It follows that Article 67 of the ECSC Treaty is not designed to implement Article 4(b) either.

90 It follows from the above that the ECSC Treaty does not contain more specific rules than Article 4(b), in so far as that provision covers discrimination between producers. Therefore, that provision applies independently.

91 In recognising measures or practices establishing discrimination between producers as incompatible with the common market, and thus abolished and prohibited, Article 4(b) of the ECSC Treaty lays down a precise and unconditional obligation. The Court has accordingly stated that the abolitions and prohibitions formulated in Article 4 of the ECSC Treaty are laid down with particular force (*De Gezamenlijke Steenkolenmijnen in Limburg*, at p. 21). It follows that Article 4(b) of the ECSC Treaty, in so far as it concerns discrimination between producers, directly confers rights on individuals, which the national courts must protect.

92 However, in a situation such as that in the main proceedings, where the discrimination, if any, would consist in the grant of unlawful aid in the form of exemption from royalties, the finding of such discrimination cannot, in view of the considerations set out in paragraph 80 of this judgment, lead to a ruling upholding claims by competitors of the aid beneficiary for retrospective exoneration from those royalties.

93 The reply to be given to the second question must therefore be that Article 4(b) of the ECSC Treaty, in so far as it concerns discrimination between producers, and the first sentence of Article 9(4) of Decision No 3632/93 directly confer rights upon individuals which the national courts must protect. On the other hand, Article 4(c) of the ECSC Treaty, in so far as it concerns the compatibility of aid

with the common market, does not itself create such rights. However, the national courts have jurisdiction to interpret the concept of aid for the purposes of Article 4(c) of the ECSC Treaty and Article 1 of Decision No 3632/93, with a view to drawing the consequences from any infringement of the first sentence of Article 9(4) of that decision.

94 Further, as to the second question, in a situation such as that in the main proceedings, the finding of the existence of unlawful aid, on the ground that it was not authorised by the Commission at the time when it was granted, and, as the case may be, of discrimination between producers within the meaning of Article 4(b) of the ECSC Treaty, in that some producers were subject to the payment of royalties whereas others were exempt, cannot lead to producers who have been made subject to those royalties being retrospectively exonerated from them.

The third question

95 By its third question, the national court asks whether, in the event of the second question being answered in the affirmative, a national court is entitled to hold that there has been discrimination, within the meaning of Article 4(b) of the ECSC Treaty, or aid within the meaning of Article 4(c) of that Treaty and Article 1 of Decision No 3632/93, notwithstanding:

— the adoption of Decision 94/995;

— the adoption of the Decision of 21 December 1994; and

— the sending of the letters of 4 May and 14 July 1995.

96 Despite the negative answer given to the second part of the national court's second question, and bearing in mind the interest which the defendant in the main proceedings may have in nevertheless securing a finding of the existence of discrimination and aid within the meaning set forth above, the Court considers that it may be useful to reply to the third question.

97 The Coal Authority and the United Kingdom Government, which have proposed that the second question should be answered in the negative, consider that in any event, in the circumstances of the case at issue in the main proceedings, a national court may not apply Articles 4(b) and (c) of the ECSC Treaty directly.

98 In their submission, NALOO's complaint referred in particular to the application of the disputed system of royalties subsequent to the privatisation of British Coal. That complaint was rejected by the Commission in its decisions contained in the letters of 4 May and 14 July 1995. Therefore, those decisions, which were not challenged before the Court of First Instance of the European Communities, bound national courts. According to the Coal Authority, NALOO's complaint was also rejected by the Commission in its Decision of 21 December 1994 and, albeit by implication, in Decision 94/995.

99 Banks and the Commission maintain, however, that the decisions by the Commission referred to by the national court do not prevent the latter from determining, in an appropriate case, the existence of discrimination between producers or aid within the meaning of Article 4(c) of the ECSC Treaty and Decision No 3632/93. Banks, which considers that NALOO's complaint did not

relate to the application of the disputed system of royalties subsequent to the privatisation of British Coal, and the Commission, which is of the opposite opinion, agree in taking the view that the Commission did not adopt a position on that question in the decisions at issue.

100 As regards these issues, it is clear from the Court's answer to the second question that the national courts have jurisdiction to make a finding of the existence of discrimination between producers, within the meaning of Article 4(b) of the ECSC Treaty, and of aid, within the meaning of Article 4(c) of the ECSC Treaty and Article 1 of Decision No 3632/93.

101 The question whether the Commission decisions referred to by the national court are capable of affecting the exercise of that jurisdiction arises only if, in those decisions, the Commission actually stated its position on the compatibility of the disputed system of royalties with the ECSC Treaty. It is therefore necessary, as a preliminary, to examine the content of those decisions.

102 First, by its Decision 94/995, the Commission authorised a series of aid measures for the 1994/95 and 1995/96 financial years designed to cover liabilities for environmental damage resulting from the extraction of coal by British Coal, various social benefits and fund rights of former British Coal workers to deliveries of free fuel, and certain costs of restructuring British Coal.

103 It cannot therefore be argued that by that decision, which concerns specific aid measures envisaged for two particular financial years, the Commission ruled one way or the other on the royalty system in question.

104 Second, by its Decision of 21 December 1994, adopted on the basis of Article 66(2) of the ECSC Treaty, the Commission authorised the acquisition of CNML by RJB. That decision authorising a concentration deals only with the position of the RJB/CNML undertaking on the market. The Commission did not therefore make any ruling in that decision as to the compatibility with the ECSC Treaty of the royalty system in question. Indeed the notification of the planned concentration did not even refer to that issue.

105 Third, by its letters of 4 May and 14 July 1995, the Commission replied to NALOO's complaint in relation to the aspects of that complaint denouncing unlawful State aid, the examination of which fell within the responsibility of the Commission's Directorate-General for Energy. However, an examination of the file shows that, in those letters, the Commission did not adopt a position on the disputed system of royalties in relation to the rules on State aid.

106 It follows from the above that the Commission did not adopt a position, in any of the decisions referred to by the national court, as to the compatibility of the royalty system in question with the ECSC Treaty.

107 The answer to be given to the third question must therefore be that a national court is entitled to make a finding of the existence of discrimination between producers, within the meaning of Article 4(b) of the ECSC Treaty, or of aid, within the meaning of Article 4(c) of the ECSC Treaty and Article 1 of Decision No 3632/93, by reason of the royalty system in question, and it may do so despite the adoption by the Commission

— of Decision 94/995,

— of the Decision of 21 December 1994, and

— of the decisions contained in the letters of 4 May and 14 July 1995.

The fourth question

108 By the first part of its fourth question, the national court asks whether the fact that Banks or NALOO did not bring any annulment action under Article 33 of the ECSC Treaty against Decision 94/995, the Decision of 21 December 1994, or the letters of 4 May and 14 July 1995 precludes Banks from raising alleged breaches of Article 4(b) or (c) of the ECSC Treaty, or of Decision No 3632/93, before the national courts. By the second part of the fourth question, the national court asks whether Banks is entitled to raise those alleged breaches before the national courts when neither it nor NALOO brought an action under Article 35 of the ECSC Treaty to require the Commission to adopt a position on those alleged breaches.

The first part of the fourth question

109 Banks and the Commission maintain, in particular, that the decisions by the Commission referred to by the national court do not relate to the royalty system

in question and cannot therefore preclude Banks from raising the incompatibility of that system with the relevant ECSC Treaty provisions before the national courts.

110 By contrast, the Coal Authority and the United Kingdom Government consider that, since it did not bring an annulment action against the Commission decisions referred to by the national court, Banks is no longer entitled indirectly to call the validity of those decisions into question before the national courts.

111 In that respect, it should be remembered that, in its judgment in Case C-188/92 *TWD Textilwerke Deggendorf* v *Germany* [1994] ECR I-833, delivered in the context of the EC Treaty, the Court held that the beneficiary of an aid measure may not plead the invalidity of a Commission decision ordering a Member State to recover the aid paid to that beneficiary where the beneficiary failed to bring an action for the annulment of the Commission decision under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) and could undoubtedly have done so. The Court held that to decide otherwise would in effect enable the beneficiary of the aid to circumvent the definitive nature which, under the principle of legal certainty, a decision must have once the time-limit for bringing an action laid down by Article 173 of the EC Treaty has expired (see also Case C-178/95 *Wiljo* v *Belgian State* [1997] ECR I-585, paragraph 21, and Case C-239/99 *Nachi Europe* v *Hauptzollamt Krefeld* [2001] ECR I-1197, paragraph 30).

112 However, for the ruling in *TWD Textilwerke Deggendorf* to be capable of being transposed to the case in the main proceedings, it would be necessary at the very least for Banks's action before the national courts to call into question the validity of the previous decisions of the Commission which it could have challenged. As it is, as the Court found in paragraph 107 of this judgment, the Commission did not adopt a position, in any of the decisions referred to by the national court, as to the compatibility of the disputed royalty system with the ECSC Treaty.

113 It follows that the fact that Banks or NALOO did not bring an annulment action against those decisions does not preclude Banks from pleading, in proceedings before the national courts, infringement of Article 4(b) of the ECSC Treaty in so far as it concerns discrimination between producers, or infringement of the first sentence of Article 9(4) of Decision No 3632/93.

The second part of the fourth question

114 The Coal Authority and the United Kingdom Government consider that, if the Commission did not reject NALOO's complaint by the decisions referred to by the national court, Banks should have initiated the procedure under Article 35 of the ECSC Treaty. They submit that, because it failed to do so, Banks is no longer entitled to raise the same complaints as those contained in the NALOO complaint before the national courts.

115 Banks and, with some hesitation, the Commission take a different view.

116 It should be noted that the national court has taken as its hypothesis, which has been borne out by the facts, that the Commission had not yet adopted a position on the royalty system in question. The national court asks whether, in that case, the fact that Banks or NALOO did not bring an action under Article 35 of the ECSC Treaty to compel the Commission to adopt a position on that system is capable of depriving Banks of the right to plead infringement of Article 4(b) or (c) of the ECSC Treaty and of Decision No 3632/93 before the national courts.

117 As the answer to the second question has shown, the national courts have jurisdiction to assess whether there has been a breach of Article 4(b) of the ECSC Treaty, in so far as it concerns discrimination between producers, and of Article 9(4) of Decision No 3632/93.

118 The obligation upon the national courts to apply those provisions cannot be limited simply because a complaint has been referred to the Commission raising similar questions on which the latter has not yet ruled, even if the complainant, a party to the proceedings before the national courts, could have brought an action under Article 35 of the ECSC Treaty.

119 Even if the Commission and the national courts may simultaneously have jurisdiction to apply certain provisions of the ECSC Treaty, they do not necessarily have the same powers to uphold the various claims made by individuals on the basis of those provisions (see, in that respect, in the context of the EC Treaty, Commission Notice 93/C 39/05 on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ 1993 C 39, p. 6)). An individual who has lodged a complaint with the Commission based on such provisions cannot therefore be required to pursue his action with the Commission in all circumstances, where appropriate by bringing proceedings under Article 35 of the ECSC Treaty, until the Commission adopts a position on his complaint, where the Commission shows no intention to deal with the complaint and where, as circumstances develop, the individual may have an interest in giving or be obliged to give priority to an action before the national courts.

120 In those circumstances, the principle referred to by the Commission in its observations, to the effect that reference to that institution under Article 35 of the ECSC Treaty cannot be delayed indefinitely, especially where the Commission's wish to refrain is obvious (see Case 59/70 *Netherlands* v *Commission* [1971] ECR

639, paragraphs 14 to 19), has no bearing on the possibility for the complainant to rely before a national court upon Article 4(b) of the ECSC Treaty, in so far as it concerns discrimination between producers, and Article 9(4) of Decision No 3632/93.

121 As the Court has already held in the context of the EC Treaty, it is for the courts or tribunals of the Member States, pursuant to the principle of cooperation laid down by Article 5 of the EC Treaty (now Article 10 EC) — which essentially corresponds to the first and second paragraphs of Article 86 of the ECSC Treaty — to ensure the legal protection arising for individuals from the direct effect of Community law. In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions, or render the exercise of rights conferred by Community law virtually impossible or excessively difficult (see *inter alia* Case C-312/93 *Peterbroeck* v *Belgian State* [1995] ECR I-4599, paragraph 12).

122 In the area of State aid, in so far as procedure laid down by national law applies to the recovery of unlawful aid, the relevant provisions of national law must be applied in such a way as not to render the recovery required by Community law virtually impossible (see, *inter alia*, in the context of the EC Treaty, Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 12, and Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 12) and a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law (see, *inter alia*, Case C-5/89 *Germany* v *Commission*, paragraph 18). The same principles must be applied where individuals legitimately claim measures other than recovery of State aid after they have established the existence of an infringement of Article 4(b) of the ECSC Treaty, possibly in the form of discrimination between producers, or of an infringement of Article 9(4) of

Decision No 3632/93, in the form of the granting of aid without Commission approval.

123 It follows from all the foregoing considerations that the fact that Banks or NALOO did not bring an action under Article 35 of the ECSC Treaty to compel the Commission to adopt a position on the disputed royalty system is not capable of depriving Banks of the right to plead infringement of Article 4(b), in so far as it concerns discrimination between producers, and infringement of the first sentence of Article 9(4) of Decision No 3632/93, before the national courts.

124 The answer to be given to the fourth question must therefore be that the fact that Banks or NALOO

— did not bring an annulment action under Article 33 of the ECSC Treaty against Decision 94/995, the Decision of 21 December 1994 or the decisions contained in the letters of 4 May and 14 July 1995,

— did not bring an action under Article 35 of the ECSC Treaty to compel the Commission to adopt a position on alleged infringements of Article 4(b) of the ECSC Treaty, in so far as it concerns discrimination between producers, or of the first sentence of Article 9(4) of Decision No 3632/93,

does not preclude Banks from pleading those infringements before the national courts.

Costs

125 The costs incurred by the United Kingdom Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Court of Appeal (England and Wales) (Civil Division) by order of 31 July 1998, hereby rules:

1. A situation such as that at issue in the main proceedings from the restructuring date until the transfer to the successful private tendering undertakings of the shares of the Crown-owned companies which succeeded British Coal Corporation as operator implies the existence of aid, within the meaning of Article 4(c) of the ECSC Treaty, but not of special charges within the meaning of that provision. The same situation may constitute discrimination between producers, within the meaning of Article 4(b) of the same Treaty. That would be the case if significant objective differences in situation between, on the one hand, British Coal Corporation and the Crown

companies which succeeded it as operator, and, on the other hand, the other operators, did not justify the differentiated treatment applied to the two categories of producers.

A situation such as that at issue in the main proceedings, as from the time of the transfer of the shares of the Crown-owned companies which succeeded British Coal Corporation as operator to the successful private tendering undertakings, does not reveal the existence of aid or special charges within the meaning of Article 4(c) of the Treaty, or discrimination between producers, within the meaning of Article 4(b) of the Treaty, since access to the various means of acquiring the lease and licence rights was not, and is not, discriminatory.

2. Article 4(b) of the Treaty, in so far as it concerns discrimination between producers, and the first sentence of Article 9(4) of Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry directly confer rights upon individuals which the national courts must protect. On the other hand, Article 4(c) of the Treaty, in so far as it concerns the compatibility of aid with the common market, does not itself create such rights. However, the national courts have jurisdiction to interpret the concept of aid for the purposes of Article 4(c) of the Treaty and Article 1 of Decision No 3632/93, with a view to drawing the consequences from any infringement of the first sentence of Article 9(4) of that decision.

In a situation such as that in the main proceedings, the finding of the existence of unlawful aid, on the ground that it was not authorised by the Commission at the time when it was granted, and, as the case may be, of discrimination between producers within the meaning of Article 4(b) of the Treaty, in that some producers were subject to the payment of royalties whereas others were exempt, cannot lead to producers who have been made subject to those royalties being retrospectively exonerated from them.

3. A national court is entitled to make a finding of the existence of discrimination between producers, within the meaning of Article 4(b) of the Treaty, or of aid, within the meaning of Article 4(c) of the Treaty and Article 1 of Decision No 3632/93, by reason of the royalty system at issue in the main proceedings, and it may do so despite the adoption by the Commission

— of 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,

— of the Decision of 21 December 1994 authorising the acquisition of Central and Northern Mining Ltd by RJB Mining (UK) plc, and

— of the decisions contained in the letters of 4 May and 14 July 1995 sent to the National Association of Licensed Opencast Operators in reply to the complaint by that association of 19 August 1994.

4. The fact that H.J. Banks & Co. Ltd or the National Association of Licensed Opencast Operators

— did not bring an action for annulment under Article 33 of the ECSC Treaty against Decision 94/995, the Decision of 21 December 1994 authorising the acquisition of Central and Northern Mining Ltd by RJB Mining (UK) plc or the decisions contained in the letters of 4 May and 14 July 1995 sent to the National Association of Licensed Opencast Operators,

— did not bring an action under Article 35 of the ECSC Treaty to compel the Commission to adopt a position on alleged infringements of Article 4(b) of the Treaty, in so far as it concerns discrimination between producers, or of the first sentence of Article 9(4) of Decision No 3632/93,

does not preclude H.J. Banks & Co. Ltd from pleading those infringements before the national courts.

Rodríguez Iglesias Gulmann La Pergola

Wathelet Skouris Edward

Puissochet Jann Sevón

Schintgen Macken

Delivered in open court in Luxembourg on 20 September 2001.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President