

OPINION OF ADVOCATE GENERAL
FENNELLY

delivered on 7 December 1995 *

Introduction

1. This preliminary reference raises a variety of issues relating to the interpretation of the Treaty establishing the European Coal and Steel Community (hereinafter 'the ECSC Treaty'), the relationship of that Treaty with the Treaty establishing the European Community (hereinafter 'the EC Treaty'), the direct applicability of Treaty provisions, the status of Commission measures before national courts, and the availability of a remedy in damages for encroachment on the rights of individuals under directly applicable Treaty provisions. However, these issues are interrelated, and the manner in which earlier issues are addressed affects the relevance of later ones in the context of the instant case. The decision of the Court in a similar case, *Banks v British Coal Corporation*,¹ provides guidance on many of these issues.

Facts and Procedure

2. This reference to the Court for a preliminary ruling under Article 177 of the EC

Treaty and Article 41 of the ECSC Treaty,² made by Mr Justice Cresswell of the High Court of Justice of England and Wales (Queen's Bench Division, Commercial Court), arises from an action brought by a number of small mineowners in South Wales against PowerGen plc and National Power plc. The plaintiffs in the main proceedings are members of the South Wales Small Mines Association (SWSMA), which is part of the Federation of Small Mines of Great Britain (FSMGB), both of which organizations represent the interests of owners of small deep mines. The plaintiffs mine coal under licences granted by the British Coal Corporation (hereinafter 'British Coal').³ PowerGen plc and National Power plc (hereinafter 'PowerGen' and 'National Power' respectively) are electricity producers, and are two successors of the Central Electricity Generating Board (hereinafter 'the CEGB'), which was charged with providing electricity in England and Wales, and which was divided up and largely privatized with effect from 1 April 1990.⁴ The plaintiffs claim that National Power and PowerGen assumed certain rights and liabilities of the CEGB arising before that date, including liability for the

* Original language: English.

1 — Case C-128/92 [1994] ECR I-1209.

2 — For the sake of clarity, provisions of the Treaties are cited in an abridged form in the text. For example, Article 86 of the EC Treaty is cited as Article 86 EC, and Article 63 of the ECSC Treaty is cited as Article 63 ECSC.

3 — Under section 36(2)(a), Coal Industry Nationalisation Act, 1946.

4 — The other two successors of the CEGB are the National Grid Company plc and Nuclear Electric plc.

sums claimed in damages in these proceedings.⁵

3. British Coal is a statutory corporation which owns most coal reserves in Great Britain,⁶ and by far the largest coal supplier to the electricity supply industry there.⁷ It was joined as a third party in the main proceedings at the request of National Power, which claims an indemnity or contribution in respect of any liability to the plaintiffs.

4. The litigation concerns the terms on which the CEGB purchased coal from the small mineowners in the period from 1985 to 31 March 1990, which they claim were, in terms of security of contract, volumes taken and price, far inferior to the conditions accorded to the main supplier, British Coal. British Coal had long-term contracts with the CEGB for the sale of certain quantities of its coal at higher prices. In 1986, British Coal notified the Commission of the terms of its agreements with the CEGB. New agreements concerning prices were reached between British Coal, and National Power and PowerGen, with effect from 1 April

1990. Following notification to the Commission and publication of a summary,⁸ these were the subject of a comfort letter from the Commission, dated 24 October 1990.

5. Only the largest three of the small mineowners sold directly to the CEGB; the other plaintiffs supplied coal to blenders, who mixed coal of varying qualities (including some from British Coal) to achieve the most suitable combustible composition, and could then sell it on, in greater bulk than could the small mineowners, to the CEGB. The CEGB also bought a small amount of imported coal.

6. The difference in the treatment of British Coal and of the plaintiffs is alleged to have been greatly out of proportion to the economies of scale and security afforded to the CEGB by the former. British Coal is alleged to have influenced this discriminatory purchasing strategy. These and other practices⁹ were the subject of a complaint to the Commission by the FSMGB and the National Association of Licensed Open Cast Operators (NALOO) in March 1990, based on Articles 85 and 86 EC and Articles 63(1), 65 and 66(7) ECSC. This was followed by a complaint by the SWSMA on 5 June 1990,

⁸ — OJ 1990 C 191, p. 9.

⁹ — The complaint also addressed British Coal's policies in respect of the licensing of independent mine operators. This aspect of the complaint formed the subject-matter of Case C-128/92 *Banks*. The plaintiffs in that action argued unsuccessfully for the direct applicability of Articles 60, 65 and 66(7) ECSC; see further the discussion at paragraph 26 below.

⁵ — The plaintiffs rely on section 66(1), Electricity Act, 1989.

⁶ — By the Coal Industry Nationalisation Act, 1946.

⁷ — The electricity supply industry also uses oil, gas, nuclear and renewable energy sources.

under Article 3 of Council Regulation No 17/62,¹⁰ invoking only Article 86 EC against the alleged abuse of a dominant position (or of a jointly dominant position after 1 April 1990) by the CEEB and its successor companies.

7. The Commission initially indicated in a letter of 28 August 1990 to the United Kingdom Permanent Representation that it thought the FSMGB/NALOO complaint to be well founded in a number of respects, including the alleged systematic discrimination by PowerGen and National Power between British Coal and the small mine-owners. In this regard, it stated that it would consider making an appropriate recommendation to the United Kingdom authorities under Article 63(1) ECSC. The United Kingdom Department of Energy subsequently made offers to the NALOO, the FSMGB and the SWSMA on behalf of British Coal, PowerGen and National Power with a view to settling the issues raised in the complaints. The offers were conditional on withdrawal of the complaints and waiver of any right to damages for the period before 1 April 1990. These terms were rejected, but the proposed, more favourable coal purchase terms were unilaterally implemented, retroactive to 1 April 1990, by the electricity companies.

8. The Commission rejected both complaints in a letter dated 23 May 1991. It

considered that the complaints made under Articles 63 and 66(7) ECSC and Articles 85 and 86 EC were justified, in so far as they concerned the situation after 1 April 1990 when the new coal supply contracts entered into operation, but that the new purchase conditions offered by the United Kingdom Government would remedy the breach.¹¹ The decision did not address the CEEB's coal purchase contracts of the period before 1 April 1990. Included in the Commission's decision were findings that Article 63 ECSC applied to the contracts, and that National Power and PowerGen were jointly dominant purchasers of coal in England and Wales, where there were few other industrial purchasers.

9. The instant proceedings were commenced on 11 June 1991, in the Commercial Court of the Queen's Bench Division of the High Court of Justice of England and Wales. Damages were sought from all four of the CEEB's successor companies for alleged breaches of Article 86 EC by the CEEB with regard to its coal purchase contracts in the period from 1985 to 31 March 1990. The action was later struck out as against two of them (the National Grid Company plc and Nuclear Electric plc), because of the manner

10 — Council Regulation No 17/62, the First Regulation implementing Articles 85 and 86 of the Treaty; OJ, English Special Edition 1959-62, p. 87.

11 — The Commission's decision, set out in the same letter, that British Coal's amended licensing arrangements were not in breach of Article 66(7) ECSC is at present the subject of an annulment action by the NALOO in the Court of First Instance, Case T-57/91. This case was stayed by the President of the Court of First Instance, in accordance with Article 47 of the Protocol on the Statute of the Court of Justice of the ECSC, until the delivery of the judgment of the Court of Justice in Case C-128/92 *Banks*, and is now under consideration.

in which the CEBG's liabilities had been allocated at the time of the reorganization of the electricity supply industry. The plaintiffs later obtained leave from the High Court to extend the scope of the action to include claims based on Articles 4 and 63(1) ECSC.

infringement thereof, and that the decision did not determine whether the plaintiffs' claims were governed by Article 86 EC or Article 63 ECSC, or the proper interpretation of Article 232(1) EC, or that there was unlawful discrimination contrary to either Article 86 EC or Article 63(1) ECSC during the relevant period;

10. The parties' principal submissions before the national court are as follows:

- (i) the plaintiffs assert that the CEBG engaged in unlawful discrimination against them during the relevant period; National Power and PowerGen deny any unlawful discrimination contrary to Article 86 EC, or to Articles 4 or 63(1) ECSC;
 - (ii) the plaintiffs argue that Article 86 EC and Article 63 ECSC can apply simultaneously to the same subject-matter, and that National Power and PowerGen are bound by the determination to this effect in the Commission decision of 23 May 1991; National Power and PowerGen respond that any unlawful discrimination on the part of the CEBG would fall exclusively within the scope of Article 63 ECSC, that the operative part of the Commission decision of 23 May 1991 was the rejection of the complaint, so that the defendants would not have been able to challenge any determination therein of the applicable law or of any infringement thereof, and that the decision did not determine whether the plaintiffs' claims were governed by Article 86 EC or Article 63 ECSC, or the proper interpretation of Article 232(1) EC, or that there was unlawful discrimination contrary to either Article 86 EC or Article 63(1) ECSC during the relevant period;
 - (iii) the plaintiffs submit that Article 86 EC applies even if Article 63 ECSC does not apply, that Article 4 ECSC is directly effective and can give rise to an action for damages in a national court, and that Article 63 ECSC, read with Article 4 ECSC, or in isolation, is directly effective and can give rise to an action for damages in a national court; National Power and PowerGen have contradicted all of these submissions.
11. The High Court of Justice of England and Wales made an order for reference seeking a preliminary ruling from the Court on 13 January 1994 on five questions; a sixth was added on 12 May 1994. The following is the text of the questions:
- (1) Where a purchaser of coal for its own use, not being an undertaking within the meaning of Article 80 ECSC, is alleged to have discriminated as to price, volume and other terms and conditions

of purchase in respect of coal produced by two or more undertakings within the meaning of Article 80 ECSC, is such an allegation to be considered under the ECSC Treaty, the EC Treaty, or both?

(d) does Community law require a remedy in damages for breach of any such duty to be available to any person to whom such a duty is owed and, if so, on what conditions?

(2) If and to the extent that such an allegation [as that mentioned in the first question] is to be considered under the ECSC Treaty:

(3) If and to the extent that such an allegation [as that mentioned in the first question] is to be considered under the EC Treaty:

(a) do Articles 4 and 63(1) impose any duty upon such a purchaser?

(a) does the purchaser owe a duty under Article 86 EC enforceable in the national courts to a producer of coal and, if so, in what circumstances? In particular, is such a duty owed to a producer which sells its coal to an independent blender for mixing with coal from other sources to produce a blend which the blender then sells to the purchaser?

(b) is such a duty enforceable in the national court?

(c) is any enforceable duty owed to a producer of coal and, if so, in what circumstances? In particular, is any such duty owed to a producer which sells its coal to an independent blender for mixing with coal from other sources to produce a blend which the blender then sells to the purchaser?

(b) does Community law require a remedy in damages for breach of any such duty to be available to any person to whom such a duty is owed and, if so, on what conditions?

- (c) in determining whether an alleged abuse has the requisite effect on trade between Member States, is the relevant effect to be judged solely by reference to the potential markets for the coal produced by the parties alleging infringement of Article 86 and sold by them to blenders or to the purchasers for its own use, or by reference to other matters and, if so, which?
- (4) To what extent, if at all, do the answers to Questions 2 and/or 3 above depend upon:
- (a) a prior determination by the Commission, the making of a recommendation addressed to a Member State and/or the subsequent breach of the national implementing measures; and/or
- (b) the completion of any other steps or procedures and, if so, which?
- the electricity generators, determinative of issues of fact or law raised in the present proceedings before the national court, having regard to the particular circumstances in which that decision was made?
- (6) Where a producer of coal, being an undertaking within the meaning of Article 80 ECSC, is alleged to have induced or participated in the alleged discrimination described in Question 1 to the prejudice of other coal-producing undertakings by reason of the prices and conditions under which the first undertaking sold its coal to the purchaser referred to in Question 1, is such an allegation to be considered under the ECSC Treaty, the EC Treaty, or both?
- As I have already said, these questions are very closely interrelated, so the answers to some will determine the relevance of others to the present case. In particular, the response given to the first question will largely condition the response to those that follow.
12. An undertaking (hereinafter an 'ECSC undertaking') is defined by Article 80 ECSC as 'any undertaking engaged in production in the steel and coal industry ... , and also, for the purposes of Articles 65 and 66 and of
- (5) To what extent, if any, is the decision of the Commission contained in its letter dated 23 May 1991, in so far as that decision concerned the supply of coal to

information required for their application and proceedings in connection with them, any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries'. It is clear that the plaintiffs, and British Coal, are ECSC undertakings. Equally clearly, National Power and PowerGen are not; nor, of course, was the CEGB.

(i) The scope of Article 63(1) ECSC

14. Article 63(1) ECSC states the following:

The first question

13. This question can only be answered after addressing a number of subsidiary questions, which I shall consider in the following order:

(i) What is the scope of Article 63(1) of the ECSC Treaty? Does it govern in whole or in part the facts of the instant case as outlined by the referring judge?

(ii) What is the relationship of Article 63(1) with Article 4(b) of the ECSC Treaty? Is Article 4(b) capable of independent application, either simultaneous or residual?

(iii) Does Article 232(1) of the EC Treaty permit in the instant case the application, either simultaneous or residual, of Article 86 of that Treaty?

'If the Commission finds that discrimination is being systematically practised by purchasers, in particular under provisions governing contracts entered into by bodies dependent on a public authority, it shall make appropriate recommendations to the Governments concerned.'¹²

15. The plaintiffs propounded two important limitations on the interpretation of this article. First, they argue that Article 63(1) is concerned only with *price* discrimination, and not with matters such as the volume of coal to be supplied, or the term of supply contracts. Although it is not so limited by its terms, it is located in Chapter 5 (entitled 'Prices') of Title III. Secondly, they submit that, in the context of Chapter 5 as a whole, and in the light of Article 63(2) and (3), in particular, the term 'purchaser' in Article 63(1) ECSC means only 'purchaser for resale'. On this basis, the article would not

12 — A recommendation is defined by Article 14 ECSC in terms equivalent to an EC directive: it 'shall be binding as to the aims to be pursued but shall leave the choice of the appropriate methods for achieving these aims to those to whom the recommendations are addressed'.

apply at all to purchasers for their own use, such as the defendants.

16. I am not convinced by either of these arguments. A title is indicative of the character of a chapter but does not determine its substantive scope. The provisions of Chapter 5 sometimes expressly refer only to prices, and sometimes to matters ancillary to price, such as conditions of sale.¹³

17. More importantly, it is impossible to assess whether a particular price constitutes discrimination (in the sense of an objectively unjustifiable activity) without reference to the other terms of the contracts being compared. It is for this reason that I do not view the statement of the Court in *Banks*, that the position of Article 60 in Chapter 5 of Title I-II of the ECSC Treaty 'shows that it relates only to unfair and discriminatory product pricing practices',¹⁴ as limiting the scope of Article 63(1). Furthermore, the Court was chiefly concerned in its discussion of Article 60 ECSC with the fact that British Coal was engaged in granting licences to extract coal, and not in the sale of products.

¹³ — See Articles 60(2)(a) and 63(2)(a) of the ECSC Treaty.

¹⁴ — Case C-128/92 *Banks*, paragraph 13 of the judgment.

18. The definition of discriminatory practices in Article 60(1) ECSC, as the 'application ... of dissimilar conditions to comparable transactions' is equally serviceable for Article 63, although I would also include the converse situation, where similar conditions are applied to transactions that are not comparable,¹⁵ as well as requiring that differences in conditions should be proportionate to differences between transactions.¹⁶ For the purposes of Article 63(3) (which empowers the Commission to extend to distributive undertakings and agencies rules laid down under Article 60(1)), transactions have been deemed to be comparable where:

'(a) they are concluded with purchasers:

— who compete with another, or

— who produce the same or similar goods, or

¹⁵ — See Case 106/83 *Sermide v Cassa Conguaglio Zuccheri* [1984] ECR 4209, paragraph 28 of the judgment; Case 106/81 *Kind v EEC* [1982] ECR 2885, paragraph 24.

¹⁶ — See e. g. Article 11(1), Commission Recommendation No 1835/81/ECSC of 3 July 1981 to the Member States on the obligation to publish price lists and conditions of sale and on prohibited practices in the steel trade; OJ 1981 L 184, p. 9: 'Different conditions which make appropriate allowance for differences in the services rendered or in the carrying out of transactions, applied by a steel dealer to comparable transactions, shall not be considered dissimilar conditions [which are prohibited by Article 9]'.
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— who carry out similar functions in distribution; and

- (b) they involve the same or similar products; and
- (c) their other *relevant commercial characteristics* do not differ to a material extent'.¹⁷

other words, every contract term has its price. In a market relationship, parties can agree to accept very onerous or disadvantageous terms regarding delivery schedules, volume, security, and so on, if they can use their bargaining power to secure adequate compensation for increased inconvenience, costs and risk. Article 63 is concerned with ensuring that such bargaining takes place free of economically irrelevant impediments, and thus with ensuring that prices which reflect the other substantive contract terms (that is, non-discriminatory prices) prevail in the market. If differences in substantive terms are not reflected in price, this is just as much a form of price discrimination as the application of dissimilar prices to essentially similar transactions. I conclude, therefore, that it is not possible to treat price as an isolated aspect of purchase contracts, or to confine the scope of Article 63(1) to price discrimination without regard to alleged discrimination in relation to volume and contract duration.

19. This approach holds good for Article 63 as a whole. Relevant commercial characteristics of a purchasing contract such as the term of the contract and the quality and volume of goods to be supplied must be taken into account in considering whether the prices specified are discriminatory.¹⁸ In

20. The plaintiffs' second argument on the interpretation of Article 63 asks the Court to read the word 'purchasers' as if it were qualified by the words 'for resale'. Such an important interpolation would need cogent supporting reasons, particularly as it would tend to narrow the scope of the article and of the Commission's powers thereunder. Article 63, unlike Articles 60, 65 and 66 ECSC, is particularly addressed to purchasers. Once the scope of the article extends beyond ECSC undertakings, there appears to be no reason to distinguish between purchasers for

17 — Article 10, Commission Recommendation No 1835/81/ECSC (emphasis added).

18 — The relationship of price with volume and contract duration is also indicated by Article 2 of Commission Decision 72/442/ECSC of 22 December 1972; OJ English Special Edition 1972 (I), p. 24, amending Decision No 4-53 of 12 February 1953 on the publication of price lists and conditions of sale applied by undertakings in the coal and iron ore industries; OJ English Special Edition 1952-58 (I), p. 8, which relates to quantity and loyalty bonuses.

resale and purchasers for their own use;¹⁹ and it would be inconsistent with the wide-ranging prohibition of discrimination in Article 4(b), which I discuss further below.

21. It is true that Article 63(2) ECSC, in so far as it concerns purchasers, concerns only purchasers for resale, as has been suggested by the plaintiffs. That paragraph enables the Commission to require, in part, that undertakings (that is, producers, for the purposes of Article 63) pass on to their customers (that is, purchasers),²⁰ through their conditions of sale, an obligation to comply with rules made by the Commission in application of Chapter 5 of Title III of the Treaty. Similarly, Article 63(3) expressly empowers the Commission to extend the prohibition on unfair competitive, discriminatory and other pricing practices (by sellers) in Article 60(1) ECSC to 'distributive undertakings and agencies in the coal and steel sectors'. The subject-matter of these paragraphs can be of relevance only to distributive undertakings and agencies. They should not therefore detract from the more extensive scope of a provision such as Article 63(1), containing an obligation capable of more general application to all purchasers.

22. Having reached these conclusions on the scope of Article 63(1) ECSC, it is evident to me that the facts alleged by the plaintiffs in the instant case fall within it. I will mention further below the effect of Article 63(1) in the absence of Commission action. It is sufficient to state at this point that, had the Commission found that the systematic discrimination alleged by the applicants was indeed taking place during the relevant period, and that it was not justified by the objective and economically relevant differences in the situations of British Coal, on the one hand, and of the small mineowners and blenders, on the other, as coal suppliers to the CEEB, it would have been obliged by Article 63(1) to make appropriate recommendations to the Government of the United Kingdom.

(ii) The relationship of Article 63(1) with Article 4(b) of the ECSC Treaty

23. Article 4 of the ECSC Treaty recognizes as being 'incompatible with the common market for coal and steel' a number of forms of behaviour, which should 'accordingly be abolished and prohibited within the Community', including '(b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates and conditions ...'. Two initial remarks may be made about this provision.

19 — Article 80 ECSC defines distributors as ECSC undertakings only for the purposes of Articles 65 and 66 of that Treaty.

20 — The term 'acheteurs' is used in the authoritative French text of the Treaty in both paragraphs (1) and (2) of Article 63, whereas Article 63(1) employs the term 'purchaser' in English, and Article 63(2) the term 'customer' at one point and 'purchaser' at another. It is clear that the English terms are synonymous, both from the context and from this comparison of the language versions.

24. I must consider, firstly, the ambit of Article 4(b) ECSC. The material scope of Article 4(b) is wider, in one sense, than that of Article 63(1) ECSC, as it is not expressly limited to *systematic* discrimination. Otherwise, it covers the same ground as Article 63(1), as it also concerns discrimination in general, while instances of discrimination in prices and delivery terms or transport rates and conditions are offered merely as notable examples. On the other hand, Article 4(b) addresses discrimination by sellers (between purchasers and between consumers) as well as by purchasers (between producers and, implicitly, between upstream purchasers for onward sale). Therefore, Article 4(b) reflects the concern expressed in Article 60 ECSC with discrimination on the part of sellers as well as that found in Article 63 with that by purchasers. Its broad personal scope is also illustrated by the absence of any restriction of its terms to ECSC undertakings as defined in Article 80. If it is to be taken at face value, it does extend the prohibition on discrimination to a wide range of purchasers not otherwise subject to the terms of the ECSC Treaty, in a fashion similar to Article 63(1) ECSC as construed above, which offers some further support to that construction.

25. The Court made the following statement in *Banks* about the relationship of Article 4(d) ECSC, on the one hand, with Articles 65 and 66(7) ECSC, on the other:

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.’²¹

This statement is equally applicable to the relationship of Article 4(b) ECSC and Article 63(1). Article 63(1) ECSC contains specific rules relating to the discriminatory measures and practices condemned in Article 4(b). Therefore, their terms should be read together, which undermines further the case for restricting the application of Article 63(1) to purchasers for resale, or to simple price discrimination.

26. Furthermore, Article 4 ECSC is expressed in terms of a prohibition while Article 63(1) grants competence to the Commission to take certain action against systematic discrimination practised by purchasers. A prohibition more readily meets the requirement for direct applicability, that provisions be sufficiently clear and unconditional to confer directly on individuals rights which the national courts must protect, than does a provision which is dependent on the regulatory role of the Commission. The decision of the Court in *Banks* gives clear guidance concerning this distinction. The Court concluded that Articles 65 and 66(7) ECSC do not confer rights which are

‘Article 4 applies by itself only in the absence of more specific rules; if they have been

²¹ — Case C-128/92 *Banks*, paragraph 11 of the judgment; see also Joined Cases 7/54 and 9/54 *Industries Siderurgiques Luxembourgeoises v High Authority* [1955] ECR 175, and Case 13/57 *Wirtschaftsvereinigung Eisen-und Stahlindustrie v High Authority* [1958] ECR 265.

directly enforceable by private parties in proceedings before the national courts, because they confer sole jurisdiction on the Commission to rule on the compatibility with Article 65 of agreements and concerted practices tending to distort normal competition within the common market, and to verify under Article 66(7) whether undertakings in a dominant position are using that position for purposes contrary to the objectives of the ECSC Treaty. This exclusive jurisdiction is clearly described in Article 65(4), second indent, but was implied in the case of Article 66(7) from the provision made therein for Commission action.²² As Article 4(d) ECSC was not applicable by itself in that case (but had to be read, as has been seen, with Articles 65 and 66(7)), it could not have direct effect either.²³ The decision of the Court may imply that Article 4(d) ECSC may be directly enforced in proceedings in national courts, in cases which fall outside the terms of more specific rules such as those in Articles 65 and 66(7), but this is not certain.

does not apply by itself but only in conjunction with the specific rules set out in Article 63(1). Speculation about whether Article 4(b) is directly applicable in residual cases, involving, for example, discrimination by purchasers which is not systematic, is not material to the present case as described by the referring national court. I conclude, therefore, that Article 4(b) ECSC applies together with Article 63(1) ECSC to the instant case, and that neither article confers rights which, in the absence of action by the Commission, are directly enforceable in a case such as the present by private parties in proceedings before the national courts.

(iii) The relationship of Article 63(1) ECSC with Article 86 EC

27. Article 63(1) ECSC resembles Article 66(7) in that it does not contain an express prohibition, but merely enables the Commission to take action against activity incompatible with the common market for coal and steel. The decision of the Court in *Banks* suggests that the Commission's role under Article 63(1) should also be read as an exclusive one. As I have already said, the facts alleged in the instant case are entirely within the scope of application of Article 63(1) ECSC. Thus, Article 4(b) ECSC

28. Article 86 of the EC Treaty states, in part:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

22 — Case C-128/92 *Banks*, paragraphs 17 and 18 of the judgment.

23 — Paragraph 16 of the judgment.

Such abuse may, in particular, consist in:

30. Article 232(1) of the EC Treaty states:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

'The provisions of this Treaty shall not affect the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by that Treaty for the functioning of the common market in coal and steel.'

...

- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive advantage; ...'

31. The Court has interpreted Article 232(1) EC on a number of occasions. In *Deutsche Babcock v Hauptzollamt Lübeck-Ost*,²⁴ the Court addressed the question whether an EEC measure, Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties,²⁵ could apply to products governed by the ECSC Treaty. The Court stated that the terms of Article 232(1) EEC 'require that it should be interpreted as meaning that in so far as matters are not the subject of provisions in the ECSC Treaty or rules adopted on the basis thereof, the EEC Treaty and the provisions adopted for its implementation can apply to products covered by the ECSC Treaty'.²⁶ The Regulation in question deals with a matter which was not the subject of provisions of the ECSC Treaty itself or of provisions adopted thereunder, as Article 72 ECSC merely grants the Council

29. The relationship of Article 63(1) ECSC with Article 86 EC can be elaborated, for present purposes, by posing the following question: does Article 232(1) EC permit in the instant case the application, either simultaneous or residual, of Article 86 EC? It is its possible simultaneous application, in particular, which is of interest.

²⁴ — Case 328/85 [1987] ECR 5119.

²⁵ — OJ 1979 L 175, p. 1.

²⁶ — Case 328/85 *Deutsche Babcock*, paragraph 10 of the judgment.

powers to fix minimum and maximum rates for customs duties, leaving it to each Member State to determine, within the limits so fixed, its tariffs according to its own national procedure. '[T]he collection and repayment of customs duties are not governed by that Treaty. Consequently, in the absence of specific rules, neither the ECSC Treaty nor the implementing decisions adopted thereunder prevent the application of Regulation No 1430/79.'²⁷

*the ground the EEC Treaty provisions are not to have effect.'*²⁸

He observed that no rules had been adopted under the ECSC Treaty to deal with the repayment or remission of import or export duties, and considered that the EEC Regulation on the subject did not impinge on the powers of the governments of the Member States in matters of commercial policy (Article 71 ECSC) or on the rights of Member States under the ECSC Treaty, or affect their retained fiscal powers.²⁹ The Court did not expressly address this latter question in *Deutsche Babcock*.

32. The same approach was adopted in his Opinion in *Deutsche Babcock* by Advocate General Sir Gordon Slynn. He stated:

'It would have been perfectly simple to provide that nothing in the EEC Treaty related to coal and steel products or to the coal and steel industry if that had been intended. This was not done. Instead the limitation imposed is that the provisions of the EEC Treaty shall not "affect the provisions" of the earlier Treaty, in particular as regards the matters specified. I read that as meaning that the EEC Treaty may apply to coal and steel except to the extent that matters are dealt with in the ECSC Treaty or in rules made under it; *in so far as the latter has occupied*

33. Advocate General Van Gerven quoted the judgment of the Court in *Deutsche Babcock* in his Opinion in *Banks*, but added that 'the ECSC Treaty contains a large number of specific provisions in a field such as competition law — some of which are relevant here — so that in cases which are centred on issues arising in that field, the subsidiary application of the rules of the EEC Treaty is of much lesser significance'.³⁰ This statement does not, in principle, exclude the possible application of the competition provisions of EC law in ECSC contexts, if only in exceptional, residual cases. However, the analysis

28 — Case 328/85 *Deutsche Babcock*, p. 5131 (emphasis added).

29 — P. 5132.

30 — Case C-128/92 *Banks*, paragraph 8 of the Opinion.

27 — Paragraphs 12 and 13 of the judgment.

subsequently outlined by the Advocate General, which was largely followed by the Court, may have such an *a priori* exclusionary effect.

34. He proceeded to consider whether the subject-matter in *Banks* — licences to extract unworked coal and the royalty and payment terms stipulated therein — fell within the scope of the ECSC Treaty.³¹ Only after he had concluded that it was within the scope of the ECSC Treaty did he ask which particular provisions of that Treaty applied to the facts of the case.³²

35. The Court also posed the preliminary question in *Banks* whether the subject-matter fell within the scope of the ECSC Treaty. Having given a positive response to this question, '[i]t follows that the legal framework of the main proceedings is the ECSC Treaty'. The Court then examined which provisions of the ECSC Treaty were applicable to the practices of the undertakings in question.³³

36. The concept of an ECSC 'legal framework' tends more generally to exclude the application of EC Treaty provisions by inhibiting more detailed analysis of the correspondence — or the lack of it — of provisions of the two Treaties. If the Court's

approach is intended to be of general application, it appears at first sight to be slightly different from that of the Court and of Advocate General Sir Gordon Slynn in *Deutsche Babcock*. This is essentially a matter of the level of generality at which Article 232(1) EC is applied. The decision in *Banks* does not appear, however, to disturb Advocate General Sir Gordon Slynn's statement, that Article 232(1) EC does *not* provide 'that nothing in the EEC Treaty relate[s] to coal and steel products or to the coal and steel industry'.³⁴

37. In *Deutsche Babcock*, the Court was prepared to allow an EC measure to fill a gap in the legal regime under the ECSC Treaty. While ECSC rules existed in the field of customs duties, none dealt with repayment of excess customs duties.

38. If the judgment of the Court in *Banks* is read with the Opinion of Advocate General Van Gerven (with which it is consistent on this point), it may be taken as establishing that where a particular subject-matter is, in principle, within the scope of the ECSC Treaty, and is in a field governed by a large number of specific provisions (a preliminary observation made by the Advocate General), those provisions afford a complete system for the legal analysis of questions or disputes arising in that field. To employ Advocate

31 — Paragraph 9 of the Opinion.

32 — Paragraphs 10 to 23 of the Opinion.

33 — Case C-128/92 *Banks*, paragraphs 9 to 14 of the judgment; the quotation is from paragraph 10.

34 — Case 328/85 *Deutsche Babcock*, p. 5131.

General Sir Gordon Slynn's metaphor, they have 'occupied the ground'; there is no gap to be filled in the ECSC competition regime, at least in so far as it applies to ECSC undertakings.

39. The decisions in *Deutsche Babcock* and *Banks* can be reconciled by the following synthesis. Drawing on the judgment in *Banks*, where the ECSC Treaty and measures adopted thereunder provide specific provisions of sufficient coherence and scope in a particular field for it to be deemed to constitute a complete system, or 'framework', provisions of EC law may not be applied in addition to such ECSC provisions even if they are more extensive in the protection provided or the remedies available. The equilibrium achieved within a complete system between the Community institutions, the Member States, individuals and undertakings, and the general interest, would be disturbed by the intervention of different EC rules. On the other hand, having regard to *Deutsche Babcock*, in general fields where the ECSC Treaty and measures adopted thereunder do not provide a complete regulatory system, provisions of EC law may apply in the absence of specific ECSC rules or Member State competences.

40. It should be noted that even on the second hypothesis — an incomplete system — Article 232(1) EC has not been interpreted as meaning that two sets of rules, ECSC and EC, can apply simultaneously to the same particular subject-matter if their terms are not clearly contradictory. Nor has this been

expressly excluded; this question did not arise directly in *Deutsche Babcock*, as a conflict would have arisen immediately had materially different ECSC and EC repayment rules existed.³⁵ This would not necessarily occur in other cases, where the application of EC rules could apparently supplement, rather than cut across, the powers of the institutions or the Member States, or substantive ECSC rules. The plaintiffs argue in the present case that Article 232(1) EC is intended to avoid any direct conflict between EC provisions and any specific ECSC provisions. Relying on the French text of that article, they assert that the application of EC rules will not affect, in the sense of 'modify', the application of the ECSC Treaty where those rules complement and do not modify the application of specific ECSC rules,³⁶ and further, that in the absence of any direct conflict, EC and ECSC rules may apply to the same factual circumstances.

41. I do not agree. I consider particular subject-matter, or factual circumstances, to be comprehensively regulated under the ECSC Treaty if specific rules exist governing the precise question to which it is sought to extend 'complementary' EC rules. This

35 — The Court has relied on Article 232(1) EC to exclude such patent conflicts in two other cases: Case 239/84 *Gerlach v Minister for Economic Affairs* [1985] ECR 3507, and Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom v Commission* [1982] ECR 2545.

36 — Article 232(1) EC provides as follows, in French: 'Les dispositions du présent traité ne modifient pas celles du traité instituant la communauté européenne du charbon et l'acier ...' (emphasis added). Note to French translator: The text in English, emphasis on 'affect', could usefully be inserted at this point instead of the French, which will already have appeared in the main text.

permits in at least some cases a concrete answer to the otherwise rather metaphysical question of when a regulatory system can be considered to be complete. It will always be difficult to judge whether a regulatory system is complete if it is entirely silent on a point, as the omission may be either conscious or unconscious. The judicial task is easier when the system in question contains rules governing, to a greater or lesser extent, all aspects of the field in question. More specifically, the Court can be content with finding that the particular subject-matter before it is regulated in respect of the questions raised by the case in hand. Thus, a system may be found to regulate (and thus, to regulate completely) a specific issue, even if there are doubts as to whether other subject-matter in the same field is addressed equally comprehensively, and irrespective of whether a different, more extensive set of rules can be found in a competing system.

42. In my view, Article 63(1) ECSC provides the specific rules by which systematic discrimination by purchasers in the common market for coal and steel is regulated. In accordance with the test derived from *Deutsche Babcock* and *Banks* in the foregoing discussion, the application of Article 86 EC is therefore excluded in the instant case: Article 63(1) ECSC regulates completely systematic discrimination by purchasers.

43. The present case differs in its facts from *Banks* in a number of respects. First, the purchasers involved are non-ECSC undertakings, who, therefore, are not subject to the competition provisions in Chapter 6 of Title III of the ECSC Treaty. Secondly, the plaintiffs do not seek the application of a provision of the EC Treaty which is *in substantive terms* virtually the analogue of the relevant ECSC provision; *Banks*, on the other hand, concerned alleged anti-competitive behaviour which is discountenanced in almost precisely similar terms (although pursued by very different enforcement methods) in Articles 65 and 66(7) ECSC, and Articles 85 and 86 EC, respectively.

44. The plaintiffs (supported in large part by the Commission at the oral hearing) have relied upon these features of the instant case to argue that Article 63(1) ECSC leaves gaps in the ECSC regime in respect of anti-competitive behaviour by non-ECSC purchasers of ECSC products, which can be filled by the application of EC competition rules, in particular, Article 86 EC. They rely especially on the remarks of Advocate General Roemer in *Geitling v High Authority*.³⁷ The plaintiffs make a related argument that a wrong should not be suffered to go without a remedy.

37 — Case 2/56 [1957-58] ECR 3.

45. Advocate General Roemer stated in *Geitling* that 'not every restriction on competition within the meaning of Article 65 is necessarily discrimination prohibited by Article 4(b)', and that '[t] here can indeed exist discriminatory practices which do not have an appreciable influence on competition'.³⁸ He went on to observe that 'cartels and undertakings having a dominant position on the market can also restrict competition by discrimination', and that '[i]t is possible, according to what I have said, that the prohibitions on discrimination and on cartels partially overlap so the two provisions can complement each other perfectly'.³⁹ I agree entirely with these remarks, while emphasizing that discrimination practised from a position of dominance is very likely to affect competition.

ECSC products is subject to a complete system of regulation under the ECSC Treaty. There is certainly a case to be made that anti-competitive behaviour by such purchasers, other than systematic discrimination, falls outside ECSC competition rules (although some might be governed by Article 4(d) ECSC), and so should be subject to those set out in the EC Treaty. I refrain from reaching any such conclusion, however, as it would not assist the plaintiffs. The plaintiffs' situation lies within the field of application of Article 63(1) ECSC, as the anti-competitive behaviour which they allege is constituted by systematic discrimination. These specific rules occupy the ground in respect of this category of market activity, and preclude the application of the competition provisions of the EC Treaty, even if the latter are more extensive, in particular, with regard to the enforcement possibilities and potential remedies in national courts.

46. For present purposes, three categories of market activity can thus be identified: systematic discrimination which constitutes anti-competitive behaviour; systematic discrimination which does not constitute such behaviour; and anti-competitive behaviour other than systematic discrimination.⁴⁰ The plaintiffs effectively allege that the CEEB's purchasing policy during the period 1986 to 1990 fell into the first category. There is no need, in the present proceedings, to consider whether the field of anti-competitive behaviour by non-ECSC undertakings purchasing

47. It is true that such systematically discriminatory and anti-competitive behaviour on the part of purchasers which were ECSC undertakings would be subject to a more extensive regime of ECSC rules, in both Chapters 5 and 6 of Title III of that Treaty. However, the fact that the Commission could take action against such behaviour in those circumstances under two provisions, which overlap and complement each other, rather than under one, as in the present case, does not assist the plaintiffs either. Neither Article 63(1) nor Article 66(7) ECSC is

38 — P. 27.

39 — Pp. 27 and 28.

40 — The terms 'systematic discrimination' and 'anti-competitive behaviour' are employed to describe activities condemned by Article 63(1) ECSC, and by Articles 85 and 86 EC, respectively.

directly applicable; in each case their application depends on action by the Commission. It is scarcely conceivable that the Commission would fail to take action under Article 63(1) against systematic discrimination which was incompatible with the common market for coal and steel (reading that provision in the light of Article 4 ECSC), while deciding that *the same behaviour* constituted the use of a dominant position for purposes contrary to the objectives of the Treaty, and that action should be taken against it under Article 66(7) ECSC.

48. The Commission may prefer to rely in a given case on one provision rather than the other because of the different enforcement mechanisms they afford — a recommendation to the Member State Governments concerned under Article 63(1) as opposed to a recommendation to the relevant undertakings under Article 66(7) — but too much importance should not be attributed to the existence of this choice. The fact that the Commission is not competent directly to address recommendations to non-ECSC purchasers who are engaged in anti-competitive systematic discrimination, but can make them only to the governments concerned, does not mean that the role of the Commission under Article 63(1) ECSC requires *in such cases*⁴¹ to be supplemented by the

possibility of Commission action,⁴² or of individual recourse to national courts, pursuant to Article 86 EC. The competition regime in such cases would then be more extensive than that applicable to ECSC undertakings, in terms of the number of competent authorities and of the powers at their disposal, rather than less so.

49. Furthermore, such a bid to replicate the degree of rigour in regulating anti-competitive behaviour of the combination of Articles 63(1) and 66(7) ECSC would replace a system in which the Commission has exclusive (though varying) competence with one in which that competence is shared with the national courts. While such a shared jurisdiction is normal under the EC Treaty, the discretionary role of the Commission is much more central in regulating the common market in coal and steel than in the general common market. This role would be disturbed by an innovation such as that under discussion. Thus, even if the sole application of Article 63(1) ECSC to a case like the present were to be considered anomalous (and I do not think it is), the application of Article 86 EC to a case governed by Article 63(1) would be at least equally so.

41 — I continue to reserve my position on cases where anti-competitive behaviour by non-ECSC purchasers of coal or steel is comprised of activity other than systematic discrimination.

42 — The Commission is competent to make an order terminating an infringement of Article 86 EC, and to impose fines for such infringements; see Articles 3(1) and 15(2), respectively, of Regulation No 17/62.

50. I must now direct my attention to the argument that the exclusion of the application of Article 86 EC would suffer a wrong to go without a remedy, in breach of the maxim *ubi jus ibi remedium*.⁴³ I have already made it clear that the allegedly anti-competitive and systematically discriminatory conduct of the CEEB during the period 1986 to 1990 was within the scope of application of Article 63(1) ECSC. If the Commission does not act in such a case, it may be because it believes that the requirements of that article have not been satisfied. It is in any event open to an aggrieved person to take action against the Commission under Article 35 ECSC in respect of its perceived failure to fulfil its obligations under Article 63(1).

past wrongs did not sway the Court in that case to find the instruments at the disposal of the Commission under the ECSC Treaty to be inadequate. The plaintiffs claim that the absence of a right to damages amounts to lack of a remedy. But this argument still begs the question: 'what is the *jus*'? It is not self-evident that a remedy in damages must be provided for each case of economic loss arising from malfunctioning markets. The wrongs cited depend on the interpretation of the Treaty. The ECSC Treaty envisages a method of market control and supervision quite distinct from that under the EC Treaty. Wrongs would not be suffered to go without a remedy, contrary to any general principle of Community law on the matter, by the sole applicability of Article 63(1) ECSC, to the facts of the instant case.

51. It is implicit in the decision in *Banks* that the Court considers exclusive Commission jurisdiction, and the possibility of Article 35 ECSC action where that jurisdiction is not exercised, to afford sufficient safeguards to individuals in the field of competition in the common market for coal and steel. The absence of a national remedy in damages for

52. I conclude, therefore, in response to the first question posed by the national court, that where a purchaser of coal for its own use, not being an undertaking within the meaning of Article 80 ECSC, is alleged to have discriminated as to price, volume and other terms and conditions of purchase in respect of coal produced by two or more undertakings within the meaning of Article 80 ECSC, such an allegation is exclusively governed by Article 63(1) of the ECSC Treaty, read in conjunction with Article 4(b) of that Treaty.

⁴³ — Advocate General Darmon stated in Case C-228/92 *Roquette Frères v Hauptzollamt Geldern* [1994] ECR I-1445, paragraph 51 of his Opinion, that '[t]he principle of the right to effective judicial protection by a court is not only a component of the constitutional law of the Member States and a right guaranteed by the European Court of Human Rights. The case-law of the Court has declared it to be a fundamental principle of Community law.' He cited, in particular, the requirement stated by the Court in Case 20/88 *Roquette Frères v Commission* [1989] ECR 1553, paragraph 15 of the judgment, that remedies available should effectively ensure protection for aggrieved individuals.

The second question

even if the recommendation is not directly effective.⁴⁵

53. I have already indicated my view above that the Commission has exclusive competence to apply Article 63(1) ECSC, so that it cannot by itself be directly effective before national courts. This emerges from the extension of the reasoning in *Banks* to Article 63(1).⁴⁴ Thus, no duty enforceable in a national court is imposed upon purchasers in the absence of Commission action by way of a recommendation. The Member State to which any such recommendation is addressed will have a choice of the appropriate methods for achieving its aims, which may include possible recourse to national courts for non-compliance. In the absence of implementation by the Member State concerned, the possibility of direct effect for the recommendation itself could be addressed, by reference to the same criteria as apply to EC directives.

54. As regards damages, national law may give rise to an action for damages for non-compliance with the national implementing measure. If the recommendation is not implemented, an action for damages may, none the less, be possible in certain circumstances against the Member State concerned,

55. The Court did not indicate in *Banks* whether a Commission decision under Articles 65 or 66(7) ECSC could have retroactive effect; it did, however, refer to the Commission finding that those articles 'have been infringed',⁴⁶ which may imply that the Commission finds a breach of a pre-existing prohibition, rather than establishing a prohibition *ex nunc*, by any measure it adopts. An express prohibition is stated in Article 65(1), with the effect that offending agreements or decisions are automatically void: thus, the sole jurisdiction of the Commission may not necessarily mean that its determinations cannot have effect retroactive to the moment of agreement or decision. On the other hand, Article 66(7), like Article 63(1), appears not to outlaw the relevant behaviour in the absence of Commission action. The general principle of legal certainty and against retroactive penal or civil obligations⁴⁷ would not apply if the Commission's role is to establish a breach of a pre-existing prohibition. The availability of damages for breach of Article 63(1) before the date of any Commission recommendation on the subject naturally depends on whether or not the recommendation can have such retroactive effect. Even though Article 63(1) must be read with the prohibition expressed in Article 4, I believe,

45 — See e. g. Joined Cases C-6/90 and C-9/90 *Francovich v Italian Republic* [1991] ECR I-5357.

46 — Case C-128/92 *Banks*, paragraph 21 of the judgment.

47 — See e. g. Case 63/83 *Regina v Kirk* [1984] ECR 2689, paragraphs 21 to 23 of the judgment; Case C-337/88 *Società Agricola Fattoria Alimentare* [1990] ECR I-1, paragraph 13; Case C-331/88 *Regina v Minister for Agriculture, ex parte Fedesa* [1990] ECR I-4023, paragraph 45.

44 — Case C-128/92 *Banks*.

on balance, that the nature of a recommendation is not conducive to such an effect.

The fourth question

56. The question of damages is moot in any event, in all its guises, as no Commission recommendation has been made in respect of the facts of the instant case. Therefore, no issue of damages arises.

59. I have already indicated my view that Article 63(1) ECSC cannot have effect in the absence of a Commission recommendation. Since there was none, the remaining aspects of the question are hypothetical, and do not require an answer.

The fifth question

57. I conclude that all four queries expressed in the second question should be answered in the negative, in the absence of a Commission recommendation under Article 63(1) ECSC.

The third question

58. This question is founded on a contingency which I have already concluded should be rejected, that is, the application of the EC Treaty, and, in particular, of Article 86 EC, to the facts of the instant case. It is therefore unnecessary to answer this question.

60. The Court stated in *Banks* that decisions taken by the Commission pursuant to its sole jurisdiction under Articles 65 and 66(7) ECSC are binding in their entirety pursuant to Article 14 ECSC, and are thus binding on national courts. However, national courts may still ask the Court of Justice to rule on the validity or interpretation of those decisions.⁴⁸ This statement applies equally to a finding by the Commission that systematic discrimination is being practised by purchasers, leading to it making appropriate recommendations to the governments concerned.

61. It may, however, be more relevant for present purposes to express my view that the

⁴⁸ — Case C-128/92 *Banks*, paragraph 23 of the judgment.

statements in the Commission's letter of 23 May 1991 do not constitute findings in respect of the period from 1985 to 31 March 1990 which is the subject of the instant proceedings. It states quite clearly that '[i]t deals with the position in England and Wales, in the light of the new situation arising from the entry into operation of the coal supply contracts between British Coal Corporation, National Power and PowerGen on 1 April 1990. Other matters, [such as] ... the situation before 1 April 1990 ... are not dealt with.'⁴⁹ While very similar practices are alleged against the CEBG for the relevant period, any number of factors might have led the Commission, in the exercise of its wide power of appreciation in this field, to take a different view in relation to this earlier period.

62. More importantly, there is clearly no Commission recommendation in existence in respect of the CEBG's coal purchasing policy in the period from 1985 to 31 March 1990. Were such a recommendation to be made, the findings on which it was founded would be binding, and there would be no need to try to extend to an earlier period the findings contained in a decision applicable to a later period. I have already concluded that national courts have no jurisdiction to enforce Article 63(1) ECSC, which is exclusively applicable to the facts of the instant case, in the absence of a Commission recommendation. In such circumstances, the

present question is not relevant. Therefore, it is not necessary to give a definitive answer to this question.

The sixth question

63. This question relates to the purported role of British Coal in inducing or participating in the systematic discrimination asserted against the CEBG. A Commission recommendation to the government concerned could require, in part, action to be taken against the activities of a subsidiary party to systematic discrimination, even if that party were not itself a purchaser. In the alternative, or simultaneously with such a measure, an ECSC undertaking with a position on the coal market like that of British Coal could be subject to the provisions of Article 66(7) ECSC. It could well be found by the Commission to have a dominant position shielding it against effective competition in a substantial part of the Common Market.⁵⁰ In that event, any efforts to use that position to induce customers to discriminate in favour of such an undertaking, and against its weaker competitors, could be held by the Commission to constitute use of that dominant position for purposes contrary to the objectives of the ECSC Treaty, leading to the making of appropriate recommendations to that undertaking to prevent its position from being so used.

49 — The Commission's letter of 28 August 1990 to the United Kingdom Permanent Representation is also confined to dealing with contracts entered into by PowerGen and National Power.

50 — British Coal is responsible for 97% of total coal output in the United Kingdom.

64. The fact that the systematic discrimination by National Power and PowerGen, allegedly induced or participated in by British Coal, is, in my view, governed exclusively by Article 63(1) ECSC also inclines me towards the exclusive application of the ECSC Treaty to this question, for two reasons. Firstly, the reasons which led to that conclusion apply equally here (and, as regards the application of Article 66(7) ECSC, emerge directly from the decision in *Banks*): the ECSC Treaty provides a specific (and complete) set of rules governing the conduct in question, which vest the Commission with sole jurisdiction. The application of the EC Treaty, whether by the Commission or by the national courts, should therefore be excluded. Secondly, the fact that those directly responsible for the discrimination asserted by the plaintiffs are subject to ECSC rules constitutes a subsidiary argument for the conduct of their 'accomplices' to be governed by the same Treaty regime. This does not mean that such an argument must be determinative in all cases, but it is in the present circumstances.

65. I therefore conclude that the allegation mentioned in the sixth question is to be considered solely under the ECSC Treaty.

Costs

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

Conclusion

67. I conclude that the questions referred by the High Court of Justice of England and Wales should be answered as follows:

- (1) where a purchaser of coal for its own use, not being an undertaking within the meaning of Article 80 ECSC, is alleged to have discriminated as to price, volume and other terms and conditions of purchase in respect of coal produced by two or more undertakings within the meaning of Article 80 ECSC, such an allegation is exclusively governed by Article 63(1) of the ECSC Treaty, read in conjunction with Article 4(b) of that Treaty;

- (2) Articles 4 and 63(1) ECSC impose no duty upon such a purchaser, enforceable in a national court and giving rise to a possible remedy in damages for breach of any such duty, in the absence of a Commission recommendation under Article 63(1) ECSC;
- (3) in the light of the answers to Questions (1) and (2), Article 86 EC has no application to the present case;
- (4) the answer to Question (2) depends upon the Commission making a recommendation to the Member State Government concerned;
- (5) the Commission's letter dated 23 May 1991 does not affect the disposition of the present proceedings, in the light of my conclusions about the respective roles of the Commission and the national court in such cases; and
- (6) allegations that a producer of coal, being an undertaking within the meaning of Article 80 ECSC, has induced or participated in the alleged discrimination described in the first question, to the prejudice of other coal-producing undertakings, by reason of the prices and conditions under which the first undertaking sold its coal to the purchaser referred to in Question (1), are to be considered exclusively under the ECSC Treaty.