OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 27 October 1993 *

Summary

* Original language: Dutch.

Mr President,
Members of the Court,

1. The High Court of Justice of England and Wales, Queen's Bench Division, Commercial Court ('the national court') seeks a preliminary ruling in this case on the basis of Articles 41 of the ECSC Treaty and 177 of the EEC Treaty on a number of questions concerning the interpretation of the competition rules of the ECSC and EEC Treaties. The reference arises in connection with an action for damages brought by H. J. Banks & Company Ltd ('Banks') against British Coal Corporation ('British Coal') in which Banks alleges that certain provisions of the ECSC Treaty or the EEC Treaty have been infringed.

In order to deal with those questions properly, it seems to me, it is necessary to begin with an outline of the fairly complex background to the dispute.

I — Background

2. Banks is a private company engaged in the production of coal by means of, *inter alia*, opencast mining methods of extraction under licences granted to it by British Coal. British Coal is a statutory corporation which is wholly owned by the Government and which pursuant to the Coal Industry Nationalization Act 1946 (hereinafter 'CINA 1946') was vested with title to the vast majority of unworked coal in Great Britain. [1] British Coal is under a statutory-duty to work and get coal in Great Britain to the exclusion of any other person (save as otherwise provided by the CINA 1946). [2] It must also secure the efficient development of the coal-mining industry. [3] Pursuant to the CINA 1946, British Coal is empowered to grant, either conditionally or unconditionally, licences for the extraction of coal to third parties. [4] It has been the practice of British Coal to grant licences on one of two bases: (i) on a royalty-paid basis ('the royalty licence') whereby the licensee pays a royalty per tonne of coal produced and may sell the coal to any person without restriction; and (ii) on a royalty-free basis ('the delivered licence') whereby the licensee is obliged by the terms of the licence agreement to sell and deliver the coal to British Coal at a specified price. British Coal no longer grants licences of that type. [5]

The principal user of coal in the United Kingdom is the Electricity Supply Industry

1 — In 1946 British Coal was still known as the National Coal Board. Following the Coal Industry Act 1987, it was renamed British Coal Corporation.

2 — Section 1(1)(a) of the CINA 1946. It is apparent from the figures given by the Commission in its Decision of 23 May 1991 (see paragraph 3, below) that total coal production in the United Kingdom in 1989-90 amounted to approximately 96 million tonnes, of which British Coal produced some 93 million tonnes (that is to say approximately 97% of the total); see also paragraph 23 below.

3 — Section 1(1)(b) of the CINA 1946.

4 — Section 36 of the CINA 1946.

5 — Still according to the figures set out in the Commission decision referred to in footnote 2, total production of coal under licence in 1989-90 amounted to approximately 3 million tonnes.

('the ESI'). That sector was privatized after 1 April 1990. Since then the main generators of electricity, and thus the main purchasers of coal, in England and Wales have been National Power plc and PowerGen plc (hereinafter 'National Power' and 'PowerGen'). Shortly before privatization, in 1989-90, British Coal conducted negotiations with those two undertakings with a view to concluding contracts for the supply of coal ('coal supply contracts') in which British Coal was guaranteed for a number of years (from 1 April 1990 to 31 March 1993) specified quantities of coal at fixed prices.

3. It was precisely those coal supply contracts which led to the initiation of a procedure before the Commission and subsequently to proceedings before the Court of First Instance, which are in several respects related to the issues pending in the dispute in the main proceedings. On 28 March 1990 the National Association of Licensed Opencast Operators ('NALOO'), of which Banks is a member, and the Federation of Small Mines of Great Britain ('FSMGB') made a formal complaint to the Commission. [6] They complained that (i) British Coal had abused its dominant position as supplier of electricity-generating coal to secure favourable terms for itself under the coal supply contracts, particularly as regards volume and price, which had a detrimental effect on its competitors, namely the small licensed coal producers (contrary to Article 66(7) of the ECSC Treaty); (ii) that the generating companies concerned, namely National Power and PowerGen, abused their dominant position by discriminating against the members of the complainant associations in comparison with British Coal as regards the purchase of coal (contrary to Article 86 of the EEC Treaty); and (iii) that the contracts on the basis of which British Coal licensed third parties to extract coal and, in particular, the level of royalty payable in respect thereof were contrary to Articles 60 and 65 ECSC Treaty and, to the extent that the latter provision is not applicable, Article 85 of the EEC Treaty.

In October/November 1990 British Coal, in conjunction with the ESI and the Government, made an offer to NALOO and FSMGB with a view to settling the complaint. British Coal offered, *inter alia*, to reduce the royalty payable under royalty licences to £ 5.50 per tonne for the first 50 000 tonnes and £ 6 per tonne thereafter. Both NALOO and FSMGB refused the offer; nevertheless, British Coal reduced the royalty and backdated the reduction to 1 April 1990.

6 — On 5 June 1990, a similar complaint was submitted by the South Wales Small Mines Association ('SWSMA').

On 23 May 1991 the Commission adopted a decision. [7] That decision is expressly stated to deal only with the situation in England and Wales arising from the entry into operation of the coal supply contracts from 1 April 1990 between British Coal, on the one hand, and National Power and PowerGen on the other. [8] In the decision, the Commission comes to the conclusion that: (i) Articles 60 and 65 of the ECSC Treaty are not applicable and such parts of the complaint as are based on those articles are therefore rejected; [9] according to the Commission, Article 60 applies only to the pricing practices of sellers and not to the imposition of a royalty on production, [10] while Article 65 does not apply to the coal supply contracts between British Coal, on the one hand, and National Power and PowerGen on the other, since the latter two are not undertakings for the purposes of Article 80 of the ECSC Treaty; [11] (ii) the complaint made under Articles 63 and 66(7) of the ECSC Treaty and Articles 85 and 86 of the EEC Treaty is justified in so far as it concerns the situation after 1 April 1990 when the coal supply contracts entered into operation; [12] (iii) if the terms of the United Kingdom authorities' offer made in October 1990 are incorporated into contracts by National Power and PowerGen in accordance with the decision, the licensed coal producers will no longer be discriminated against in comparison with British Coal; hence the complaint, in so far as it is based on Articles 63 and 66(7) of the ECSC Treaty and Articles 85 and 86 of the EEC Treaty, is no longer valid and is therefore rejected; [13] and finally (iv) with regard to the complaint made under Article 66(7) of the ECSC Treaty concerning the royalties levied by British Coal, the new royalty levels proposed by the United Kingdom authorities on 24 October 1990 and subsequently implemented by British Coal with retroactive effect from 1 April 1990 are not unreasonably high, with the result that this complaint as well is no longer valid and is rejected.

4. On 9 July 1991 NALOO brought an action before the Court of First Instance under Article 33 of the ECSC Treaty for the annulment of the decision in so far as it concerns NALOO's complaint in relation to the levels of royalty paid under royalty licences and the sums paid by British Coal under delivered licences. The action was registered as Case T-57/91 and is now pending before the Second Chamber of the Court of First Instance. In its application NALOO alleges, *inter alia*, that the Commission failed to take any or any due account of the material and relevant evidence made available to it by NALOO, and that the Commission failed to apply the ECSC Treaty correctly. NALOO also seeks an order from the Court of First Instance requiring the Commission to re-open the investigation into the level of royalty payable under royalty licences and the price paid for coal under delivered licences. On 30 January 1992 British Coal

7 — The decision has not been published in the Official Journal. It is drafted in the form of a letter addressed to NALOO, FSMGB and SWSMA and is signed by Sir Leon Brittan, Vice-President of the Commission.

8 — As stated in the first paragraph of the decision (no number) and in point 79 thereof.

9 — Point 80 of the decision.

10 — Point 47 of the decision.

11 — Point 69 of the decision.

12 — Point 81 of the decision.

13 — Point 82 of the decision. In point 67, the Commission states that the decision is based on the assumption that those contracts will result in the elimination of discrimination between British Coal and the licensed mines, and that it reserves the right to reopen the case if that assumption should appear to have been unfounded.

was granted leave to intervene in the proceedings by the Court of First Instance. By decision of 14 July 1993, the President of the Court of First Instance stayed the proceedings at first instance, in accordance with Article 47 of the Protocol on the Statute of the Court of Justice of the ECSC, until such time as the Court of Justice has delivered judgment in the present case.

5. Following the Commission's decision various licensed coal producers, including Banks, brought an action for damages against British Coal before the national court. Their actions are based upon breaches of Articles 4(d), 60, 65 and 66(7) of the ECSC Treaty. In the main proceedings Banks claims more particularly that British Coal has infringed those provisions in relation to the level of royalty paid to it under royalty licences and the prices paid by it under delivered licences. In its view, the level of royalty set by British Coal under royalty licences is excessive and not such as to enable Banks to make a reasonable profit, while the prices paid by British Coal pursuant to the delivered licences are unreasonably low. Since the aforesaid articles of the ECSC Treaty have direct effect, according to Banks, it considers that they confer rights on it which the national court must protect by an award of damages. If British Coal is correct in its contention that the ECSC Treaty does not apply to the extraction of unworked coal or to the licences granted in respect thereof, Banks seeks leave to contend that Articles 85 and 86 of the EEC Treaty apply in that respect. Its claim for damages relates to the whole of the period from 1986 to 1991.

British Coal on the other hand contends before the national court primarily that (i) the ECSC Treaty does not apply to the issues arising in this case; (ii) its conduct does not constitute an infringement of Articles 4(d), 60, 65 or 66(7) of the ECSC Treaty; (iii) those articles do not have direct effect in English law and do not give rise to rights and duties under private law, and the Commission has exclusive power, at least in the first instance, to determine whether there has been an infringement of those provisions; and (iv) if the said articles have direct effect they can only do so following a Commission decision and/or the completion of all procedures referred to in those provisions and/or

the exhaustion of all remedies available to Banks under the ECSC Treaty.

6. The national court takes the view that, in the particular circumstances of the present case, a reference made at an early stage of the proceedings is the best way to clarify the relevant issues of both law and procedure in order to save time and costs. It submits the following questions to the Court of Justice:

'(1) Do Articles 4(d), 60, 65 and/or 66(7) of the ECSC Treaty apply to licences to extract unworked coal and to the royalty and payment terms therein?

(2) If the answer to Question 1 is that such provisions do not apply:

(i) do Articles 85 and 86 EEC apply to the circumstances set out in Question 1;

(ii) is the answer to (i) affected by Article 232(1) EEC?

(3) Are Articles 4(d), 60, 65 and/or 66(7) ECSC directly effective and such as to give rise to rights enforceable by private parties which must be protected by national courts?

(4) Does the national court have the power and/or the obligation under Community law to award damages in respect of breach of the said articles of the ECSC and the EEC Treaties for loss sustained as a result of such breach?

(5) To what extent (if at all) do the answers to Questions 3 and 4 depend upon:

(i) a prior determination by the Commission; and/or

(ii) the exhaustion of remedies (if any) in relation thereto available under the ECSC Treaty; and/or

(iii) the completion of the steps or procedures indicated in the relevant provisions?

(6) If the Commission has taken a decision pursuant to a complaint, as it did in the

Decision of 23 May 1991, to what extent is a national court bound by that decision:

(i) with regard to the issues of fact decided by the Commission; and

(ii) with regard to the Commission's construction of articles of the ECSC Treaty?'

II — Is the ECSC Treaty or the EEC Treaty applicable?

7. The first issue facing the Court is whether the extraction of unworked coal falls in principle within the scope of the ECSC Treaty rather than within that of the EEC Treaty, and consequently whether Articles 4(d), 60, 65 and 66(7) of the ECSC Treaty rather than Articles 85 and 86 of the EEC Treaty are capable of applying to licences to extract such coal and to the royalty and payment terms therein. Before considering whether those provisions are applicable in this case (see paragraph 10 et seq. below), I shall examine the question whether the ECSC Treaty is applicable in principle to the products at issue in the main proceedings and the operations and transactions relating thereto.

8. The answer to that question is to be found in Article 232(1) of the EEC Treaty, which provides as follows:

'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.'

In laying down that rule the authors of the EEC Treaty clearly sought to avoid any conflicts with regard to the delimitation of the scope of the EEC Treaty from that of the ECSC Treaty. [14] In substance, Article 232(1) of the EEC Treaty amounts to a confirmation of the principle 'lex specialis derogat lege generali.' [15] As the Court stated in its judgment in *Gerlach*, it follows from that provision that:

'the rules of the ECSC Treaty and all the provisions adopted to implement that Treaty

14 — The same purpose underlies Article 232(2) of the EEC Treaty, which provides that the provisions of the EEC Treaty are not to derogate from those of the Treaty establishing the European Atomic Energy Community.

15 — At the same time, that provision constitutes an exception to the principle of international law 'lex posterior derogat priori': see C. Vedder, 'Article 232', in Grabitz, *Kommentar zum EWG-Vertrag*, Munich, Beck, p. 1, no 1.

remain in force as regards the functioning of the common market in coal and steel, despite the adoption of the EEC Treaty.' [16]

Conversely, it also follows from that provision that, in so far as certain matters are not regulated by the ECSC Treaty or its implementing rules, the EEC Treaty or its implementing rules *may* in fact be applicable, even though the products concerned fall in principle within the scope of the ECSC Treaty. In *Deutsche Babcock Handel* the Court confirmed that Article 232(1) fulfils that second function as well:

'The very terms of that provision 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.' [17]

Let me add at once 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. [18]

9. That is also the case here: in my view, licences to extract unworked coal and the royalty and payment terms stipulated therein do indeed fall within the scope of the ECSC Treaty. Article 80 of the ECSC Treaty makes it absolutely clear that both parties in the main proceedings, Banks and British Coal, are undertakings to which the ECSC Treaty applies: 'for the purposes of this Treaty, "undertaking" means any undertaking engaged in *production in the coal or the steel industry* within the territories referred to in the first paragraph of Article 79 ... .' [19] It is clear from the judgment in *Vloeberghs* that the mining (or extraction) of coal must evidently be regarded as 'production in the coal ... industry' within the meaning of the aforesaid definition, *whether or not* that activity is included in the nomenclature of Annex I to the ECSC Treaty. In that judgment the Court stated, with regard to the concept of undertaking in Article 80, that:

'*in addition to extraction*, the Treaty regards as production activities only those which it expressly recognizes as such. To decide

16 — Judgment in Case 239/84 *Gerlach* v *Minister for Economic Affairs* [1985] ECR 3507, at paragraph 9.

17 — Judgment in Case 328/85 *Deutsche Babcock Handel* v *Hauptzollamt Lubeck-Ost* [1987] ECR 5119, at paragraph 10.

18 — See E.-U. Petersmann, 'Article 232', in von der Groeben — Thiesing — Ehlermann, *Kommentar zum EWG-Vertrag*, IV, Baden-Baden, Nomos, 1991, pp. 5715-16.

19 — Emphasis added. The first paragraph of Article 79 of the ECSC Treaty specifies the territories to which the ECSC Treaty applies.

whether a particular activity constitutes a "production" activity it is necessary to refer to the nomenclature of Annex I to the Treaty.' [20]

The extraction or mining of coal thus undoubtedly constitutes 'production' within the meaning of Article 80 of the ECSC Treaty, [21] evidently on condition that the products involved are 'fuels' as defined in Annex I to the Treaty. The latter point is not open to challenge since that annex — in which the terms 'coal' and 'steel' are defined for the purposes of the application of the ECSC Treaty (see Article 81 thereof) — refers in the first place to hard coal under OEEC Code No 3100, which is the type of coal produced in Great Britain. The United Kingdom's argument that *unworked* coal cannot be regarded as a product of that kind, inasmuch as by definition it is not yet capable of being the subject of trade between Member States and hence there can be no common market in it, cannot in any way detract from that point. In *Société des Fonderies de Pont-à-Mousson* the Court made it quite clear that the terms 'production' and 'product', within the meaning of Article 80 of the ECSC Treaty and point 1 of Annex I thereto respectively, are not restricted to the manufacture of goods which are in a fit state to be marketed. [22] The Court inferred from the scheme of Annex I to the ECSC Treaty — which classifies under the heading 'iron and steel' a very large number of products that are frequently transformed into products which are technically different — that 'an intermediate and even in a way short-lived product' is governed by the ECSC Treaty. [23] Unworked coal which is intended with a view to marketing to be screened and possibly washed (and which has in that sense a short life) is therefore a product within the meaning of Annex I to the ECSC Treaty. In any event the United Kingdom itself goes on to concede in its written observations that the conditions on which undertakings are licensed to extract unworked coal may in appropriate cases affect trade between Member States in the extracted coal or its derivatives. [24]

20 — Judgment in Joined Cases 9/60 and 12/60 *Vloeberghs* v *High Authority* [1961] ECR 197, at p. 212 (emphasis added). See the definition given by Advocate General Lagrange in *Société des Fonderies de Pont-à-Mousson* of the term 'production' within the meaning of Article 80 of the ECSC Treaty, namely 'everything comprised in the whole processing cycle of the most highly-worked product from the extraction of the raw material to the finishing stage at which it is considered that the line must be drawn': Case 14/59 [1959] ECR 215, at p. 240.

21 — See also the Opinion of Advocate General Roemer in Joined Cases 9/60 and 12/60, according to whom it follows from Annex I to the ECSC Treaty 'that even in the sphere of coal one speaks of "production", even as regards lignite in respect of which no alteration is involved but merely the extraction of a raw material. The mere extraction of coal therefore constitutes "production" within the meaning of the Treaty': [1961] ECR 197, at p. 222.

22 — Judgment in Case 14/59 [1959] ECR 215, at p. 227.

23 — Ibid., at p. 228.

24 — I do not find it necessary to consider in detail the other two arguments which the United Kingdom adduces in support of the view that unworked coal does not constitute a product within the meaning of Annex I to the ECSC Treaty: (i) the first argument, to the effect that this follows from the fact that raw materials referred to in OEEC Code No 1490 are excluded from the definition in Annex I, is untenable since according to Note 1 of that annex that code relates only to 'other raw materials not elsewhere classified for *iron and steel* production' and thus not for the production of fuels, including hard coal; (ii) nor, in my view, is the second argument, derived from a communication issued by the Commission in 1986 concerning the interpretation of the expressions 'hard coal' and 'run-of-mine brown coal' (Communication 86/C254/02, OJ 1986 C 245, p. 2), pertinent: in my view, it cannot be inferred from the fact that the Commission decided to regard certain fuels produced in Spain as hard coal within the meaning of the aforesaid annex that, in so doing, it precluded such coal — unworked — from constituting a product within the meaning of Annex I to the ECSC Treaty.

III — Which articles of the ECSC Treaty are applicable here?

10. In its order for reference the national court refers to four provisions of the ECSC Treaty, namely Articles 4(d), 60, 65 and 66(7), in raising the question of which of those provisions apply to licences to extract unworked coal and to the royalty and payment terms therein. I shall consider each of those provisions in numerical order and the arguments relied upon for or against their applicability.

A — *Article 4 of the ECSC Treaty*

11. The relevant passages of Article 4 of the ECSC Treaty are as follows:

'The following are recognized 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;...

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

The parties' views with regard to the applicability of that article to these proceedings differ widely. According to Banks, discriminatory and restrictive practices relating to the production of coal, including the grant of licences to extract coal, are covered by the provisions in question. British Coal and the United Kingdom, on the other hand, contend that Article 4(d) cannot be applied alone, but only in conjunction with the other articles referred to in the reference for a preliminary ruling. That view is also taken by the Commission: Article 4(d) of the ECSC Treaty must, in its view, be read in conjunction with the other Treaty provisions and is not in itself sufficiently precise and complete to apply to the licences under consideration in this case.

12. What are we to make of that? There can be no possible doubt regarding the fundamental nature of Article 4 in the context of the ECSC Treaty. That is already apparent from Article 2 of the ECSC Treaty, which makes the attainment of the ECSC's objectives dependent on 'the establishment of a

common market as provided in Article 4.' [25] Since its earliest judgments, in Cases 1/54 and 2/54, the Court has emphasized the essential nature of Article 4 (and of Articles 2 and 3) of the ECSC Treaty: they constitute 'fundamental provisions establishing the common market and the common objectives of the Community.' [26]

In addition, the case-law of the Court contains several indications when it comes to answering the question whether Article 4 of the ECSC Treaty can be applied on its own or only — as its wording suggests if construed accordingly — 'as provided in this Treaty'.

13. The first important judgment in that connection is *Industries Sidérurgiques Luxembourgeoises*. While the Court acknowledged that some of the practices mentioned in Article 4 are also referred to in other provisions of the ECSC Treaty, it emphasized on the basis of Article 84 thereof [27] that:

'the provisions contained in all those instruments are equally binding and there is no question of contrasting them with one another but only of considering them in conjunction with one another so as to apply them appropriately.' [28]

After recalling the fundamental nature of Article 4 (and of Articles 2 and 3) in the context of the ECSC Treaty, the Court considered that:

'for the same reasons, the provisions of Article 4 are sufficient of themselves and are directly applicable when they are not restated in any part of the Treaty.

Where, however, the provisions of Article 4 are referred to, restated or elaborated on in other parts of the Treaty, the texts relating to one and the same provision must be considered as a whole and applied simultaneously.' [29]

25 — Article 4 is expressly referred to in several other provisions of the ECSC Treaty as well, namely Articles 58(2) and 60(1) (see paragraph 17 below), the second subparagraph of Article 66(2), the second paragraph of Article 86, the third paragraph of Article 88 and the first and third paragraphs of Article 95 of the ECSC Treaty.

26 — Judgment in Case 1/54 *France* v *High Authority* [1954] ECR 1, at p. 9, and in Case 2/54 *Italy* v *High Authority* [1954] ECR 37, at p. 45. That was confirmed by the Court, *inter alia*, in its judgment in Joined Cases 7/54 and 9/54 *Industries Sidérurgiques Luxembourgeoises* v *High Authority* [1956] ECR 175, at p. 195; see also the more recent judgment in Joined Cases 154/78, 205/78, 206/78, 226/78 to 228/78, 263/78 and 264/78, 39/79, 31/79, 83/79 and 85/79 *Valsabbia* v *Commission* [1980] ECR 907, at paragraph 82.

27 — According to that article, the words 'this Treaty' must be understood as meaning 'the provisions of the Treaty and its annexes, of the Protocols annexed thereto and of the Convention on the Transitional Provisions.'

28 — Judgment in *Industries Sidérurgiques Luxembourgeoises*, cited in footnote 26, at p. 194.

29 — Judgment in *Industries Sidérurgiques Luxembourgeoises*, cited above, at p. 195.

The Court has repeatedly reaffirmed that interpretation of Article 4 of the ECSC Treaty, in particular in its judgments of 21 and 26 June 1958 concerning applications for annulment which certain undertakings and associations of undertakings had brought against some of the provisions of Decision No 2/57 of the High Authority. [30] In those judgments, moreover, the Court expressly stated that since Article 4 also establishes the fundamental objectives of the Community, it must 'always' be observed, its provisions are 'binding' and 'these provisions can stand by themselves and accordingly, in so far as they have not been adopted in any other provision of the Treaty, they are directly applicable.' [31]

14. Further guidance on the question of the relationship between Article 4 and other, more specific, provisions of the ECSC Treaty is provided by the judgment in *Geitling* and Opinion 1/61. In the *Geitling* case, the Court expressly rejected the contention that since Article 65 of the ECSC Treaty ranks as a *lex specialis* it excludes the application of Article 4(b):

'Articles 4(b) and 65 of the Treaty govern the different aspects of economic life in their respective fields of application.

Those two articles do not exclude neither do they annul each other; they serve to bring about the objectives of the Community. They are thus complementary in this respect.

In certain cases their provisions can cover facts justifying a simultaneous and concurrent application of the said articles.' [32]

The Court decided that the clause at issue in that case, contained in an agreement concluded between coal producers concerning selling agencies, did not qualify for exemption on the basis of Article 65(2) of the ECSC Treaty and was also capable of giving rise to discrimination within the meaning of Article 4(b).

30 — Decision No 2/57 of 26 January 1957 making a financial arrangement to ensure a regular supply of ferrous scrap to the common market, OJ No 4 of 28 January 1957, p. 61. In that decision, the High Authority introduced on the basis of Article 53 of the ECSC Treaty a number of equalization schemes for scrap.

31 — Judgment in Case 8/57 *Aciéries Belges* v *High Authority* [1958] ECR 245, at p. 253; judgment in Case 13/57 *Eisen- und Stahlindustrie* v *High Authority* [1958] ECR 265, at p. 278; judgment in Case 9/57 *Chambre Syndicale de la Sidérurgie Française* v *High Authority* [1958] ECR 319, at p. 327; judgment in Case 10/57 *Aubert et Duval* v *High Authority* [1958] ECR 339, at p. 346; judgment in Case 11/57 *Société d'Electriques d'Ugine* v *High Authority* [1958] ECR 357, at p. 364; and judgment in Case 12/57 *Sidérurgie du Centre-Midi* v *High Authority* [1958] ECR 375, at p. 383.

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

In Opinion 1/61 — so far the only pronouncement in which it has considered Article 4(d) of the ECSC Treaty — the Court examined, *inter alia*, the compatibility with Article 4(d) of a proposal of the High Authority and the Special Council of Ministers to amend Article 65 of the ECSC Treaty. With regard to the scope of Article 4(d), the Court first stated that:

'this prohibition is clearly intended to prevent undertakings from acquiring by means of restrictive practices a position which enables them to have or exploit markets.

This prohibition is of strict application and distinguishes the system established by the Treaty.

Article 65, which contains the provisions giving effect to this principle, states in paragraph 1 the scope of the prohibition by forbidding in general terms all agreements, and in particular those tending to fix or determine prices, to restrict or control production etc. and to share markets, products, customers or sources of supply.' [33]

The Court went on to infer from its analysis of the ground which indent (c) of the first subparagraph of Article 65(2) lays down for derogating from the prohibition in Article 65(1) that the first-mentioned provision 'establishes an objective criterion for the appraisal of cases where an agreement is in any event incompatible with the prohibition laid down by Article 4(d).' [34] For that reason, the possibility of allowing derogations from the conditions laid down by indent (c) of the first subparagraph of Article 65(2), provided for in the proposal submitted to the Court for its opinion, constituted according to the latter an infringement of the prohibition laid down in Article 4(d).

15. The conclusions I draw from that case-law with regard to the status of Article 4 of the ECSC Treaty and its relationship with other, more specific, Treaty provisions are as follows: in the first place, since that provision — together with Articles 2, 3 and 5 of the ECSC Treaty — sets forth fundamental objectives of the European Coal and Steel Community, it must *always* be observed: the Court expressly states that *all* those provisions, and therefore Article 4 as well, are *binding*. In addition, the Court has unequivocally laid down that Article 4 can stand by itself and is therefore *directly applicable* in so far as it has not been restated in any other provision of the Treaty. In other words, in so far as Article 4 covers situations which are not governed by another provision of the Treaty, it has *autonomous* effect. Finally, if the provisions of Article 4 have been restated in another provision of the ECSC Treaty,

33 — Opinion of the Court of 13 December 1961, No 1/61 [1961] ECR 243, at p. 262.

34 — Opinion No 1/61, at p. 262.

Article 4 is in no way subordinate to it but is *equally binding* and must be viewed and applied in conjunction, that is to say together, with the provision concerned. To put it another way, Article 4 continues to play a *supplementary role* also in relation to provisions of the Treaty which implement or define the scope of the prohibition contained in Article 4.

16. Since I propose to conclude that in this case other, more specific, provisions of the ECSC Treaty, more particularly Articles 65 and 66(7) — but not Article 60 — thereof, are applicable, it follows from the foregoing that, in relation to the licences to extract coal and the terms stipulated therein which are at issue in these proceedings, Article 4 has supplementary effect within, though autonomous effect outside, the scope of Articles 65 and 66(7).

B — *Article 60 of the ECSC Treaty*

17. Is Article 60 applicable to this case? That article provides as follows:

'Pricing practices contrary to Articles 2, 3 and 4 shall be prohibited, in particular:

— unfair competitive prices, especially purely temporary or purely local price reductions tending towards the acquisition of a monopoly position within the common market;

— discriminatory practices involving, within the common market, the application by a seller of dissimilar conditions to comparable transactions, especially on grounds of the nationality of the buyer.

The High Authority may define the practices covered by this prohibition by decisions taken after consulting the Consultative Committee and the Council.'

Once again there are two opposing viewpoints here. Banks maintains that Article 60 must be construed broadly and applies not only to prices and price-lists but also to conditions of sale and other practices which have a bearing on prices. Delivered licences (see paragraph 2 above) have, according to Banks, a bearing of that kind on selling prices: in contrast to the conclusion reached by the Commission in its decision, Banks considers that Article 60 covers not only dominant sellers' pricing practices but also terms as to price stipulated in favour of a dominant purchaser which are discriminatory or exploitative of the market. In its view, royalty licences (ibid) are likewise cov-

ered by Article 60 since, economically and legally, the royalty is inseparably linked to the cost of coal and therefore affects, and is a component of, the selling price of coal charged by the licensee or the licensor.

According to British Coal, the United Kingdom and the Commission, on the other hand, Article 60 of the ECSC Treaty does not apply to licences to extract unworked coal or to royalties levied upon production: that article is concerned only with the pricing practices of sellers of coal and is thus not applicable either to the royalties paid to British Coal or to the prices paid by British Coal. That also follows from the place of Article 60 within the ECSC Treaty and from the secondary Community legislation.

18. In my view, there is insufficient support in terms of the aim, context, scheme and wording of Article 60 for the very broad interpretation thereof advocated by Banks. So far as concerns the *aim* of Article 60, it was described by Advocate General Ver-Loren van Themaat — on the basis of a comparison with the United States source which inspired the provision [35] — in his Opinion in the *Bertoli* case: its aim in the predominantly oligopolistic coal and steel sector is

'to protect small undertakings against misuses of power involving price discrimination on the part of the monopolistic or oligopolistic undertakings in order to strengthen their dominant position on the market. The purpose of that legislation is therefore to counter practices in restraint of competition which are pursued by oligopolistic undertakings.' [36]

Even if the aim is not decisive as regards the precise scope of Article 60, the *context* of that provision does. It is apparent from its place within Chapter V on prices that it is aimed at unfair and discriminatory pricing practices on the part of *sellers*, in contrast to Article 63 of the ECSC Treaty which is intended to regulate discriminatory pricing practices on the part of *purchasers*, whilst Articles 61 and 62 of that Treaty relate to intervention by the High Authority with regard to the price level either by the fixing of maximum or minimum prices or by means of equalization arrangements between undertakings.

So far as concerns the *scheme* of Article 60, the Court pointed out in Cases 1/54 and 2/54 that the two paragraphs of that article are linked as regards 'purpose': [37] Art-

35 — Namely the Clayton Act 1914 and the Robinson-Patman Act 1936.

36 — Opinion in Case 8/83 *Bertoli* v *Commission* [1984] ECR 1649, at p. 1666. This also explains, according to the Advocate General, why there is no provision equivalent to Article 60 of the ECSC Treaty in the EEC Treaty: in 1958 the majority of the economic sectors which fell within the scope of the EEC Treaty were not in the nature of an oligopoly.

37 — Case 1/54 and Case 2/54, both cited in footnote 26 above, at pp. 7 and 43 respectively. Somewhat further, the Court also emphasized the instrumental nature of the rules on publication provided for in Article 60(2), which the ECSC Treaty regards as 'an appropriate means of attaining the objectives set out in the previous paragraph': see pp. 10 and 46 respectively.

i-cle 60(1) prohibits pricing practices which constitute 'unfair competitive practices and discriminatory practices', [38] whilst Article 60(2) provides for a system of compulsory publication of price-lists and conditions of sale. From that link and the explanation given by the Court in those judgments — subsequently reaffirmed in the *Rumi* judgment — concerning the functions of the rules on publication set out in Article 60(2), it is clear that only *sales practices* are meant:

'The purpose of that compulsory publication is (1) as far as possible to prevent prohibitive practices, (2) to enable purchasers to learn exactly what prices will be charged and be able themselves to check whether any discrimination has taken place and (3) to enable undertakings to have an accurate knowledge of the prices of their competitors so as to enable them to align their prices.' [39]

Finally, the *wording* of those provisions also indicates that the authors of the Treaty only had *sellers'* practices in mind: (i) the first indent of Article 60(1) prohibits temporary or local price reductions aimed at the formation of a monopoly, a prohibition which can plausibly be applied only to sellers; (ii) the second indent of Article 60(1) expressly prohibits sellers from applying within the common market dissimilar conditions to comparable transactions; and (iii) Article 60(2) governs the compulsory publication of price-lists — that is to say, according to the Court 'the prices on the basis of which undertakings state their willingness to sell their products' [40] — and conditions of sale applied by undertakings within the common market (subparagraph (a)). It is also apparent from the rules of secondary legislation adopted by the High Authority on the basis of Article 60(1) [41] and 60(2) of the ECSC Treaty [42] that Article 60 relates only to the pricing practices of sellers.

The foregoing considerations lead me to the conclusion that Article 60 is designed to bring about effective competition on the market for coal and steel by preventing oligopolistic undertakings from using, when fixing their selling prices with a view to the formation of a monopoly, unfair practices, in

38 — Judgment in Case 1/54, cited above, at p. 9; and in Case 2/54, cited above, at p. 46.

39 — The quotation is taken from the Court's judgment in Case 149/78 *Rumi* v *Commission* [1979] ECR 2523, at paragraph 10; judgments in Case 1/54, cited above, at p. 9; and in Case 2/54, cited above, at p. 46. The Court added in the last-mentioned decisions that publication is but one of the means provided for by the ECSC Treaty for the attainment of those objectives and is not sufficient on its own to ensure that those objectives are actually attained.

40 — Judgment in Case 1/54, cited above, at p. 11; and in Case 2/54, cited above, at p. 47.

41 — The final subparagraph of Article 60(1) of the ECSC Treaty (set out in paragraph 17 above) empowers the High Authority to define the practices covered by the prohibition in paragraph 1 by decisions. The High Authority did so by Decision No 30-53 of 2 May 1953 on practices prohibited by Article 60(1) of the Treaty in the common market for coal and steel (OJ 1953 No 6, p. 109; subsequently amended by Decision 1-54 of 7 January 1954, OJ 1954 No 1, p. 217; by Decision 19-63 of 11 December 1963, OJ 1963 No 187, p. 2969; by Decision 72/440/ECSC of 22 December 1972, OJ, English Special Edition 1972 (30-31 December), p. 19; and by Decision 1834/81/ECSC of 3 July 1981, OJ 1981 L 184, p. 7). The practices referred to in Articles 2, 4, 5 and 6 of that decision as prohibited within the meaning of Article 60(1) are all pricing practices of *sellers*.

42 — See, *inter alia*, Decision No 4/53 of the High Authority 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 1953 No 2, p. 3; subsequently amended by Decision No 22-63 of 11 December 1963, OJ 1963 No 187, p. 2975; by Decision 19-67 of 21 June 1967, OJ 1967 No 124, p. 2429; and by Decision 72/442/ECSC of 22 December 1972, OJ, English Special Edition 1972 (30-31 December), p. 24).

particular price reductions (first indent of paragraph 1), or discriminatory practices between different consumers in a similar situation (paragraph 1, second indent). That is not the case as regards the dispute in the main proceedings: there, a party which already has a monopoly grants production licences to other undertakings, whereby the licensee either has to pay the royalty due on production — with the result that there is no sale or purchase between the parties — or else he sells the products to the *licensor* at a fixed price — with the result that it is not the dominant undertaking which makes the sale. Article 60 of the ECSC Treaty does not apply to situations of that kind. As I shall explain, however, they may fall within the scope of Articles 65 and 66(7) of the ECSC Treaty.

C — *Article 65 of the ECSC Treaty*

19. The parties before the Court also disagree as to the applicability of Article 65 of the ECSC Treaty to licences to extract unworked coal and to the royalty and payment terms in that regard. Article 65(1) reads as follows:

'All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market shall be prohibited, and in particular those tending:

(a) to fix or determine prices;

(b) to restrict or control production, technical development or investment;

(c) to share markets, products, customers or sources of supply.'

Banks and the Commission consider Article 65 to be applicable here. Licences to extract coal constitute, in their view, agreements between undertakings within the meaning of that provision, in that they can prevent, distort or restrict normal competition. The Commission adds that the categories of agreement specified in Article 65 are not intended to be exhaustive.

British Coal and the United Kingdom, on the other hand, maintain that the licences at issue here do not fall within Article 65 of the ECSC Treaty. According to British Coal, such licences by definition increase competition and consequently cannot be prohibited

by that article. Furthermore, comparison with the Commission's practice under Article 85 of the EEC Treaty confirms that the prohibition in Article 65 does not extend to the details of the conditions, including in particular royalties or other payment terms of a licence, on which an agreement is based.

20. According to its actual wording, the prohibition in Article 65(1) of the ECSC Treaty applies to 'all agreements between undertakings', that is to say between undertakings as defined in Article 80 of that Treaty (see paragraph 9 above). It is undeniable that both Banks and British Coal, both of which — the former as a private company and the latter as a public corporation — are engaged in the production of coal, fall within that broad definition. Furthermore, the categories of prohibited agreements referred to in Article 65(1) are, as the Commission rightly points out, by no means exhaustive. A licence to extract coal must therefore be regarded as an agreement between undertakings which, in principle, falls within the scope of that provision.

Admittedly, the question whether Article 65(1) is applicable in principle is separate from the question whether the agreements in question are also in fact *in breach* of the prohibition laid down by that provision: in that regard, proof is always required that the licences and the royalty and payment terms therein tend directly or indirectly to prevent, restrict or distort normal competition within the common market.

21. So far as the latter question is concerned, I wish to make three points. In the first place, there is no support in the Court's case-law on competition for British Coal's argument that the licences in question strengthen competition and therefore by definition do not fall within the prohibition in Article 65(1). Instead, it is apparent from the case-law on licences for the exercise of industrial and commercial property rights that Article 85 of the EEC Treaty undoubtedly applies *in principle* to such licences but that their compatibility with the prohibition in Article 85(1) depends on a number of specific factors. [43] Accordingly, on the assumption that the grant of licences by an undertaking such as British Coal leads to a certain amount of competition on the United Kingdom market for coal, that does not preclude the terms on which those licences are granted from tending to *distort* competition, which is prohibited by Article 65(1).

That brings me to my second point, namely that British Coal's contention to the effect that the prohibition in Article 65(1) does not

43 — Namely the specific nature of the product concerned (in particular the fact that, as yet, there is no trade in that product in a particular Member State) and of the terms of the licences in question (in particular, the open or exclusive nature thereof): see the judgment in Case 258/78 *Nungesser v Commission* [1982] ECR 2015, at paragraph 53 et seq.

extend to the level of royalty or other payment rates is not acceptable either: [44] the thrust of that prohibition is that the terms of an agreement between undertakings subject to the ECSC Treaty must not — directly or indirectly — have a disruptive effect on competition within the common market for coal and steel. I can well imagine that the imposition of an unreasonably high royalty rate as a condition for the grant of a royalty licence, or of an unreasonably low purchase price for coal extracted under a delivered licence, is at least indirectly capable of preventing, restricting or distorting normal competition. Thus an excessively high royalty or an excessively low purchase price could discourage the licensee from extracting more coal and/or applying for fresh licences or else, as a result of profitability being too low, from making fresh investments. Such clauses may then restrict or control production or investment within the meaning of Article 65(1)(b) of the ECSC Treaty. That must evidently be assessed in the light of the overall factual circumstances of the case.

My third and final point is that the applicability of Article 65(1) of the ECSC Treaty is not affected by the possibility that Article 66(7) thereof may also be applicable to the facts of the dispute (and vice versa). The Court has already stated, with regard to the relationship between Articles 85 and 86 of the EEC Treaty, that those articles may in certain circumstances both be applicable at the same time. That brings to mind the *Hoffman-La Roche* judgment, in which the Court raised the question whether exclusive supply agreements — which were banned by the Commission on the basis of Article 86 of the EEC Treaty — fell within Article 85 of the EEC Treaty, and in particular within paragraph (3) thereof:

'I owever, the fact that agreements of this kind might fall within Article 85 and in particular within paragraph (3) thereof does not preclude the application of Article 86, since this latter article is expressly aimed in fact at situations which clearly originate in contractual relations.' [45]

The Court reaffirmed that view in the *Ahmed Saeed* judgment, where one of the questions at issue was whether the application of an airline tariff can give rise to abuse of a dominant position where the application of that tariff is the result of an agreement

44 — I fail to see how it is possible to infer from the preamble and provisions of Commission Regulation (EEC) No 2349/84 on the application of Article 85(3) of the Treaty to certain categories of patent licensing agreements (OJ 1984 L 219, p. 15) and of Commission Regulation (EEC) No 556/89 of 30 November 1988 on the application of Article 85(3) of the Treaty to certain categories of know-how licensing agreements (OJ 1989 L 61, p. 1), referred to by British Coal, that Article 85 of the EEC Treaty is inapplicable to the quantum of the consideration payable under such agreements.

45 — Judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, at paragraph 116. The Court added that the Commission is therefore at liberty, 'taking into account the nature of the reciprocal undertakings entered into and the competitive position of the various contracting parties on the market or markets in which they operate to proceed on the basis of Article 85 or Article 86.'

between two undertakings, which as such falls within the prohibition in Article 85(1):

'Those considerations do not exclude the case where an agreement between two or more undertakings simply constitutes the formal measure setting the seal on an economic reality characterized by the fact that an undertaking in a dominant position has succeeded in having the tariffs in question applied by other undertakings. In such a case, the possibility that Articles 85 and 86 may both be applicable cannot be ruled out.' [46]

That attitude has also been adopted by the Court of First Instance in the *Tetra Pak* judgment. [47] I see no cogent reason why such an approach should not be taken with regard to the relationship between Articles 65(1) and 66(7) of the ECSC Treaty as well.

D — *Article 66(7) of the ECSC Treaty*

22. Finally, the national court asks whether Article 66(7) of the ECSC Treaty is applicable to this case. That article reads as follows:

'If the High Authority finds that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the common market are using that position for purposes contrary to the objectives of this Treaty, it shall make to them such recommendations as may be appropriate to prevent the position from being so used. If these recommendations are not implemented satisfactorily within a reasonable time, the High Authority shall, by decisions taken in consultation with the Government concerned, determine the prices and conditions of sale to be applied by the undertaking in question or draw up production or delivery programmes with which it must comply, subject to liability to the penalties provided for in Articles 58, 59 and 64.'

All the parties before the Court, with the exception of the United Kingdom, take the view that Article 66(7) is applicable to licences to extract coal and to the royalty and payment terms therein. British Coal nevertheless adds that, in order for that provision to apply, proof must be furnished of the existence of a dominant position and abuse. According to the United Kingdom, on the other hand, Article 66(7) is applicable only if the Commission finds that an undertaking holds a dominant position on the market for one of the products covered by the ECSC

46 — Judgment in Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekampfung unlauteren Wettbewerbs* [1989] ECR 803, at paragraph 37.

47 — Judgment in Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309, at paragraph 21. In that judgment the Court considered, more specifically, the question of the compatibility of Article 86 of the EEC Treaty with the existence of a block exemption.

Treaty which, it reiterates, do not include unworked coal. In its view, that provision cannot apply to licences for the extraction of unworked coal in the absence of a sufficient connection between the terms on which those licences are granted and the conditions under which the extracted coal is traded.

23. This point can be dealt with briefly. It has already been demonstrated (in paragraph 9) that unworked coal is in fact a product falling within the scope of the ECSC Treaty. It is equally clear that British Coal is a 'public ... undertaking' within the meaning of Article 66(7). Furthermore, all the information available to the Court suggests that British Coal must be regarded as an undertaking which holds a dominant position in a substantial part of the common market, within the meaning of that provision: it is the largest coal producer in the United Kingdom (according to the Commission's decision, in 1989/90 it accounted for 97% of coal production in the United Kingdom) and the largest supplier of coal to the electricity generating sector (over 90% during the same period), factors which are undoubtedly connected with its statutory rights (see paragraph 2 above), namely the fact that it is vested with title to the vast majority of unworked coal in Great Britain and with the exclusive right to work and get such coal.

Article 66(7) of the ECSC Treaty is therefore applicable to British Coal, although according to the Court the mere exercise of a dominant position or the mere acquisition of such a position or of an exclusive right does not in itself constitute an abusive method of eliminating competition. [48] In order for that provision to be infringed in this case, therefore, proof must be adduced that British Coal, in granting licences and laying down royalty and payment terms in that regard, makes use of its dominant position in a manner which is contrary to the objectives of the ECSC Treaty, for instance in that its practices are discriminatory or restrictive within the meaning of Article 4(b) or (d) of the ECSC Treaty. [49]

IV — Do the Treaty provisions concerned have direct effect?

24. In Question 3, the national court seeks to ascertain whether Articles 4(d), 60, 65 and/or 66(7) of the ECSC Treaty have direct effect in that they give rise to rights enforceable by individuals which must be protected by the national courts. Once again the Court is faced with two opposing viewpoints. Banks and the Commission argue in favour of the straightforward application to the ECSC Treaty of the case-law of the Court concerning the direct effect of EEC Treaty

48 — Judgment in Case 53/87 *CICRA* v *Renault* [1988] ECR 6039, at paragraph 15 (in connection with Article 86 of the EEC Treaty).

49 — See, for the application of Article 86 of the EEC Treaty, the judgment in Case 53/87 *CICRA*, cited in the previous footnote, at paragraph 16, and in Case 238/87 *Volvo* v *Veng* [1988] ECR 6211, at paragraph 9. The Court considered that, with regard to the exercise of an exclusive right by the proprietor of an ornamental design or a registered design in respect of car body panels, that such a right may be prohibited by Article 86 if it involves, on the part of an undertaking holding a dominant position, abusive conduct such as the fixing of *unfair prices* for spare parts.

provisions, and come to the conclusion that (nearly) all the provisions referred to by the national court are directly applicable. British Coal and the United Kingdom, on the other hand, exclude any direct effect of the ECSC Treaty, save where direct effect is expressly provided for by its provisions. British Coal bases its contention primarily on the differences between the EEC Treaty and the ECSC Treaty, which emerge from a general analysis of the latter Treaty and the role conferred on the Commission in that connection. Additionally, it contends, as does the United Kingdom, that the relevant provisions of the ECSC Treaty are not sufficiently precise and unconditional to have direct effect.

A — Can ECSC Treaty provisions have direct effect at all?

25. The thrust of British Coal's contention is that the ECSC Treaty does not generally have direct effect since it differs in several fundamental respects from the EEC Treaty, in particular as regards the role of the Commission, which in the context of the ECSC Treaty is far more prominent. I disagree entirely with that view for the following reasons: the starting point for any analysis of the direct effect of provisions of Community law is, in my view, the *unity of the Community legal order*. In Opinion 1/91 the Court laid emphasis on that unity, which encompasses the various Community Treaties, in the clearest possible terms with reference to the judgment in *Van Gend en Loos*: [50]

'As the Court of Justice has consistently held, the Community Treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals .... The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.' [51]

Precisely as a result of that unity of the Community legal order, the Court has from the outset [52] striven in countless cases to achieve the greatest possible coherence [53] in interpreting the provisions of the EEC and ECSC Treaties: I need only refer to the order in *Camera Care* where, with regard to the division of tasks between the Commission and the Court regarding interim measures,

50 — Judgment in Case 26/62 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1.

51 — Opinion 1/91 [1991] ECR I-6079, at paragraph 21 (emphasis added).

52 — That is already apparent in Case 9/56 *Meroni* v *High Authority* [1958] ECR 157, at p. 13, where the Court considered that a party may question, on the basis of the grounds set out in Article 33 of the ECSC Treaty, the legality of a general decision on which the individual decision contested by him is based, and it used as a further argument in that regard the analogy with Articles 184 of the EEC Treaty and 156 of the EAEC Treaty.

53 — See the express reference to the 'coherence of the Treaties' in the judgment in Case C-221/88 *Busseni* [1990] ECR I-495, at paragraph 16.

the latter based itself on its order in *National Carbonising Company*, [54] made in the context of the ECSC Treaty; the judgment in *Foto-Frost*, in which the Court sought a link with the ECSC Treaty in connection with the question of its jurisdiction under Article 177 of the EEC Treaty to declare a measure of a Community institution invalid; [55] the judgment in *Busseni*, where the Court used the EEC Treaty as a basis for its jurisdiction to give a ruling on interpretation under Article 41 of the ECSC Treaty; [56] the parallel which the Court drew in the *Francovich* judgment between Article 5 of the EEC Treaty and Article 86 of the ECSC Treaty in support of the view that there is an obligation on the part of the Member States to make reparation for loss or damage resulting from a breach of Community law; [57] and, of particular relevance to this case, the unrestricted application by the Court in *Busseni* to recommendations within the meaning of the ECSC Treaty [58] of its case-law concerning the possibility that a directive which has not been transposed into national law may have direct effect.

It is apparent, especially from the last-mentioned judgment, that the Court has no difficulty whatsoever in applying the criteria for direct effect to the rules of the ECSC Treaty. If the Court takes such action with regard to rules of secondary Community legislation — and even with regard to Treaty rules contained in association or cooperation agreements concluded by the Community with non-member countries [59] — I see no reason why it should not do so *a fortiori* with regard to provisions of the ECSC Treaty, which are rules contained in a *Community Treaty*.

In any event, the application of the criteria laid down in the *Van Gend en Loos* judgment to the ECSC Treaty — never expressly attempted by the Court — leads to the same result. The features which the Court in that judgment regarded as crucial for direct effect are common to the EEC and ECSC Treaties and include primarily: (i) parallelism as regards the objectives of the two Treaties, in particular so far as concerns the establishment of a common market and the creation of common institutions, [60] the preamble

54 — Order in Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119, at paragraph 20, where the Court in the context of the EEC Treaty considers the same 'key principles of the Community' to be applicable as those which, according to the order in *National Carbonising Company*, were applicable in the case of the ECSC Treaty: order in Case 109/75 R *National Carbonising Company* [1975] ECR 1193, at paragraph 8.

55 — Judgment in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199. In its judgment in *Busseni*, cited in footnote 53, the Court acknowledged that the abovementioned ruling constituted 'a result corresponding to the express provision of Article 41 of the ECSC Treaty': paragraph 14 of that judgment.

56 — Judgment in *Busseni*, cited above, at paragraphs 9 to 17.

57 — Judgment in Joined Cases C-6/90 and 9/90 *Francovich* v *Italian Republic* [1991] ECR I-5357, at paragraph 36. In that regard, the Court refers to the ruling it gave in the context of the ECSC Treaty in Case 6/60 *Humblet* [1960] ECR 559.

58 — Judgment in *Busseni*, cited above, at paragraph 21: recommendations, according to the Court, are 'measures of the same kind, binding upon those to whom they are addressed as to the result to be achieved but leaving to them the choice of form and methods to achieve that result.' In paragraphs 22 and 23 of its judgment, the Court recapitulates its established case-law, in the context of the EEC Treaty, concerning the direct effect of directives.

59 — See, in particular, the judgment in Case 12/86 *Demirel* [1987] ECR 3719, at paragraph 14; judgment in Case C-18/90 *Kziber* [1991] ECR I-199, at paragraph 15.

60 — According to Article 1 of the ECSC Treaty, the European Coal and Steel Community is 'founded upon a common market, common objectives and common institutions'. Those common objectives are clarified in Article 2 of the ECSC Treaty, which bears a strong resemblance to Article 2 of the EEC Treaty.

thereto making it clear that the ECSC Treaty — if only within the restricted area of the market for coal and steel — is also addressed directly to the peoples of Europe; [61] (ii) the supranational character of the institutional framework of both Treaties, [62] in regard to which it is striking that as from the establishment of the ECSC a role (albeit a primarily supervisory and consultative one) was conferred on the nationals of the Member States through representation in the Common Assembly and the Consultative Committee; [63] and, last but not least, (iii) the role conferred on the Court of Justice in both of those Treaties by means of the preliminary rulings procedure (Articles 177 of the EEC Treaty and 41 of the ECSC Treaty) which is based on common objectives as emphasized by the Court in the *Busseni* judgment. [64]

Finally, as previously demonstrated (paragraph 13), there are precedents in the earlier case-law on the ECSC in which the Court decided that a provision of the ECSC Treaty, specifically Article 4, had direct effect or, in the words used at the time, was directly applicable ('applicabilité immédiate'). Since the establishment of the European Coal and Steel Community, moreover, a large number of academic writers have argued in favour of the direct applicability of ECSC Treaty provisions, [65] a position adopted by the Bundesgerichtshof (Federal Court of Justice) in its judgment of 14 April 1959 [66] which has also been relied upon by British Coal and the United Kingdom, chiefly in connection with Question 4.

26. The differences between the scheme of the ECSC Treaty and that of the EEC Treaty, to which British Coal refers, are genuine, but in no way outweigh the aforementioned common principles and features. Hence it is true that the ECSC Treaty provides only for partial integration, limited to the coal and steel sectors, whereas the EEC Treaty concerns practically the whole of the economy of the Member States and that — as the Court itself acknowledged in the *Busseni* judgment [67] — the Commission plays a far more prominent role in the context of the

61 — According to the fifth recital in the preamble to the ECSC Treaty, the Heads of State are 'resolved to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared.'

62 — I consider to be of particular significance in that connection the original Article 9 of the ECSC Treaty which imposed upon the Members of the High Authority the obligation to refrain 'from any act which is incompatible with the supranational character of their office' and upon every Member State 'to observe that supranational character'.

63 — See Articles 20 and 18 of the ECSC Treaty, respectively.

64 — Judgment in *Busseni*, cited above, at paragraph 13: specifically 'to ensure the utmost uniformity in the application of Community law and to establish for that purpose effective cooperation between the Court of Justice and national courts.'

65 — See W. F. Bayer, 'Das Privatrecht der Montanunion', *Rabels Zeitschrift*, 1952, (325), p. 329. Admittedly, there was some controversy in that regard: for a good survey of the relevant academic writings and a powerful argument in favour of direct effect, see K. Ballerstedt, *Übernationale und nationale Marktordnung. Eine montanrechtliche Studie*, Tübingen, Mohr, 1955, pp. 12-16.

66 — *B. G. H. Z.*, No 30, p. 74; also published in *Neue Juristische Wochenschrift*, 1959, p. 1176 and, in an English translation, in [1963] 2 CMLR 251. In that judgment the Bundesgerichtshof considers that the provisions of the ECSC Treaty are also directly binding on the undertakings referred to in Article 80 thereof.

67 — See the judgment in *Busseni*, cited above, at paragraph 15, where the Court acknowledges that 'national courts, because of the nature of the powers which the ECSC Treaty has devolved on the Community authorities, in particular the Commission, less often have occasion to apply that Treaty and measures adopted under it.'

ECSC Treaty than it does in that of the EEC Treaty. A first objection to that argument, however, is that many provisions of the ECSC Treaty are more detailed than those of the EEC Treaty (which also explains why the former is referred to as 'traité-loi', the latter as 'traité-cadre' or 'traité de procédure') [68] and many, unlike the majority of those of the EEC Treaty (which, except for the provisions on competition, are addressed primarily to the Member States), are rules of conduct addressed to undertakings. In that sense, many provisions of the ECSC Treaty are even better suited to (horizontal) direct effect than those of the EEC Treaty (see paragraph 28 et seq. below).

A second objection, concerning the powers of the Commission in the context of the ECSC Treaty, is that they are chiefly of an implementing nature and are aimed above all at ensuring that undertakings which fall within the scope of the ECSC Treaty comply with the relevant provisions of Community law (see, for instance, Article 66(7): paragraph 34 below). In other words, the High Authority is a watchdog which must enforce prompt compliance with Treaty rules (that are often sufficiently clear in themselves), rather than a policy body with sweeping political powers. It is moreover apparent from the judgment in *Van Gend en Loos* that the role thus conferred on the High Authority does not constitute a valid argument against direct effect: in that judgment the Court expressly rejected the argument that 'the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations'. [69]

B — *The criteria to be applied for ECSC Treaty provisions to have direct effect*

27. It may appear from the foregoing that the criteria for direct effect, developed in connection with the law relating to the EEC Treaty, must also be applied as such to the ECSC Treaty. Those criteria are sufficiently well known; in the *Hurd* judgment the Court summarized them as follows:

'According to a consistent line of decisions of the Court, a provision produces direct effect in relations between the Member States and their subjects only if it is clear and unconditional and not contingent on any discretionary implementing measure.' [70]

68 — Terms taken from P. Reuter, *Organisations européennes*, Paris, Presses Universitaires de France, 1970, Second Edition, p. 188. That difference in the extent of regulation can undoubtedly also be clarified by the fact that coal and steel are markets with a monopolistic or oligopolistic structure which at the time occupied a key position in the national economies: cf. P. J. G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities* (ed. W. Gormley), Deventer-Boston, Kluwer Law and Taxation, Second Edition, 1988, p. 29.

69 — Judgment in *Van Gend en Loos*, cited above, at p. 13.

70 — Judgment in Case 44/84 *Hurd* v *Jones* [1986] ECR 29, at paragraph 47.

On closer scrutiny, the case-law of the Court exhibits several minor differences as regards the wording of those conditions, [71] which, however, are noticeable primarily in the case-law concerning the direct effect of directives. [72] In its recent decisions, in particular the *Francovich* and *Marshall* judgments, moreover, the Court gives a broad interpretation of the aforesaid conditions: even the fact that Member States have several possible means at their disposal for achieving the result prescribed by a directive [73] does not preclude direct effect, according to the Court, provided the content of the rights which that directive confers on individuals 'can be determined sufficiently precisely on the basis of the provisions of the directive alone.' [74]

Both of those factors confirm, in my view, the eminently practical nature of the 'direct effect' test: provided and in so far as a provision of Community law is *sufficiently operational* in itself to be applied by a court, it has direct effect. The clarity, precision, unconditional nature, completeness or perfection of the rule and its lack of dependence on discretionary implementing measures are in that respect merely aspects of one and the same characteristic feature which that rule must exhibit, namely it must be capable of being applied by a court to a specific case. [75]

C — *Examination of the direct effect of the ECSC Treaty provisions concerned*

28. That brings me to the question of the direct effect of the ECSC Treaty provisions referred to by the national court. So far as concerns *Article 4(d)* of the ECSC Treaty, I can already rely in that regard on the judgments in *Industries Sidérurgiques Luxembourgeoises* and the judgments of 21 and 26 June 1958, referred to above (in paragraph

71 — At times the Court refers to a 'clear' and 'precise' prohibition or injunction which 'has no reservation allowing States to subject its implementation to a positive measure of domestic law or to an intervention by the institutions of the Community': see, for example, the judgment in Case 77/72 *Capolongo* v *Maya* [1973] ECR 611, at paragraph 11 (concerning Article 13(2) of the EEC Treaty); cf. the wording of the judgment in Case 57/65 *Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205, at p. 210.

72 — The requirement applied here by the Court is that provisions have, 'as far as their subject-matter is concerned, to be unconditional and sufficiently precise' in order to be capable of being relied upon by individuals before the national court: judgment in Case 8/81 *Becker* v *Finanzamt Munster-Innenstadt* [1982] ECR 53, at paragraph 25; for recent confirmation, see *inter alia* the judgment in Case 297/89 *Ryborg* [1991] ECR I-1943, at paragraph 37; and in Joined Cases C-19/90 and C-20/90 *Karella and Karellas* [1991] ECR I-2691, at paragraph 17. In recent judgments, minor differences are apparent in that regard: thus, in its judgment in Case C-345/89 *Stoeckel* [1991] ECR I-4047, at paragraph 12, the Court refers to 'sufficiently precise and unconditional', whilst in its judgments in Case C-381/89 *Syndesmos* [1992] ECR I-2111, at paragraph 39, and in Case C-200/90 *Dansk Denkavit* [1992] ECR I-2217, at paragraph 17, it refers to a provision of a directive which is 'clear, precise and unconditional'. In its earlier judgments in Case 271/82 *Auer* [1983] ECR 2727, at paragraph 16 and in Case 5/83 *Rienks* [1983] ECR 4233, at paragraph 8, the Court referred to 'clear, complete, precise and unconditional duties' which 'leave ... no discretion'.

73 — The *Francovich* judgment was concerned with a discretion which Directive 80/987/EEC (cited in footnote 100 below) left to the Member States with regard to the methods of providing guarantees for employees in the event of the insolvency of their employer, and also as regards the restriction in the amount thereof.

74 — Judgment in *Francovich*, cited in footnote 57, at paragraph 17, further applied in paragraphs 18-22; judgment in Case C-271/91 *Marshall* v *Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367, at paragraph 37.

75 — See also the views of T. C. Hartley, *The foundations of European Community Law*, Oxford, Clarendon Press, Second Edition, 1988, p. 195, and, much earlier, P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', *European Law Review*, 1983, (155), p. 177.

13): it is quite clear from that case-law that the provisions of Article 4 are 'sufficient of themselves and are directly applicable', in other words Article 4 has direct effect in so far as it has not been restated in any other provision of the ECSC Treaty. The prohibitions laid down in that article, in particular in paragraphs (b) and (d) thereof, are, as the Court has pointed out (in paragraphs 14 and 13 above), 'binding' and 'can stand by themselves'.

29. Nor do there seem to me to be any cogent objections to *Article 60(1)* of the ECSC Treaty having direct effect, even though, as was demonstrated earlier (paragraph 18), that provision is not applicable to the dispute in the main proceedings. It merely *defines*, clearly and unconditionally, the prohibitions already laid down in Article 4 with regard to the pricing practices of sellers. That is clear from the actual wording of Article 60(1) which prohibits 'pricing practices contrary to Articles 2, 3 and 4', followed by two specific expressions of that prohibition, namely unfair competitive practices which — especially as a result of purely temporary or purely local price reductions — tend towards the acquisition of a monopoly position within the common market, and discriminatory practices involving, within the common market, the application by a seller of dissimilar conditions to comparable transactions, especially on grounds of the buyer's nationality. The direct effect of that provision, contrary to British Coal's contention, is in no way impaired by the fact that under the final subparagraph of Article 60(1) the High Authority '*may* define' by decisions the practices covered by the prohibition in paragraph (1).[76] In Cases 1/54 and 2/54 the Court has expressly confirmed that the scope of the aforesaid prohibition does not depend on that factor:

'Article 60(1) *directly and categorically* prohibits certain practices; the High Authority is authorized to define them but it may not derogate from the rule that they are prohibited.'[77]

30. If the criteria for direct effect are applied to *Article 65(1)* of the ECSC Treaty, it cannot be disputed, in my view, that it too constitutes a sufficiently effective provision: the prohibition laid down therein is couched in particularly incisive terms, and is clear, unconditional and not dependent on any discretionary implementing measure of any kind. As a result of the marked similarities between that provision and Article 85(1) of the EEC Treaty — the Court itself acknowledged at the time that 'a common intention' inspired the drafting of both articles[78] — it is almost self-evident that the line of cases decided by the Court since the judgment in *BRT* in connection with Article 85(1) of the EEC Treaty also apply to Article 65(1) of the

76 — The Commission has exercised this power, as evidenced by Decision 30-53 referred to in footnote 41.

77 — Judgment in Case 1/54, cited above, at p. 10; and in Case 2/54, cited above, at p. 46 (emphasis added).

78 — Judgment in Case 13/60 *Geitling* v *High Authority* [1962] ECR 83, at p. 102.

ECSC Treaty. In that judgment the Court states that:

'as the prohibitions of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these articles create direct rights in respect of the individuals concerned which the national courts must safeguard.' [79]

31. However, the remainder of Article 65 raises a problem on which British Coal and the United Kingdom largely base their contention that Article 65(1) does not have direct effect. After laying down in the first subparagraph that any agreement or decision prohibited by paragraph (1) is automatically void and may not be relied upon before any court or tribunal in the Member States, *the second subparagraph of Article 65(4)* provides as follows:

'The High Authority shall have sole jurisdiction, subject to the right to bring actions before the Court, to rule whether any such agreement or decision is compatible with this article.'

What are we to make of that? If that subparagraph is viewed as containing a reference to Article 65 as a whole, and therefore to the applicability of the prohibition in Article 65(1) as well, then there would seem to be no question of the last-mentioned provision having direct effect. However, that leads to the unsatisfactory result that, although the agreements or decisions prohibited by Article 65(1) are *automatically* void and may not be relied upon before any national court or tribunal, *only* the High Authority has jurisdiction to declare such agreements incompatible 'with that article', and therefore with paragraph (1) thereof as well.

I share the Commission's view that such an interpretation cannot be allowed to prevail. Before going into the matter, I wish to dispose of an argument put forward by the opponents of the view that Article 65(1) has direct effect. They consider that the second subparagraph of Article 65(4) was deliberately couched by the authors of the Treaty in such terms as to prevent the unrestricted application of Article 65(1) by the national courts from jeopardizing the uniform application of the ECSC Treaty. Although that fear may have been justified initially, there have been no grounds for it since the judgment in *Busseni*, at least no more than there are with regard to Article 85(1) of the EEC Treaty. As stated earlier (paragraph 25 above), the Court decided in that judgment, by analogy with Article 177 of the EEC Treaty, that the jurisdiction to give preliminary rulings conferred on the Court in Art-

79 — Judgment of 30 January 1974 in Case 127/73 *BRT* v *SABAM* [1974] ECR 51, at paragraph 16. For subsequent confirmation, see *inter alia* the judgment in Case 37/79 *Marty* v *Lauder* [1980] ECR 2481, at paragraph 13; the judgment in Case C-234/89 *Delimitis* [1991] ECR I-935, at paragraph 45; see also the judgment of the Court of First Instance in Case T-51/89 *Tetra Pak*, cited in footnote 47, at paragraph 42.

icle 41 of the ECSC Treaty encompasses not only appraisal of validity but interpretation as well. [80] The uniform application of Article 65(1) by the national courts can therefore be safeguarded by the submission of a reference to the Court for a preliminary ruling.

32. In order to understand the true ambit of the exclusive jurisdiction conferred on the High Authority in Article 65(4) of the ECSC Treaty, it is necessary to bear in mind a distinction made in EEC competition law, more specifically in the light of Article 9 of Regulation No 17 of the Council implementing Articles 85 and 86 of the EEC Treaty, [81] as interpreted by the Court in its judgments. That distinction is between, on the one hand, the competence of the *cartel authorities* — that is, the Commission and, as long as the latter has not initiated any procedure under Regulation No 17, the national cartel authorities — to apply Article 85(1) and Article 86 on the basis of Article 9(2) or (3) of Regulation No 17 [82] and, on the other, the jurisdiction of the national *courts or tribunals* [83] 'before which the prohibitions contained in Articles 85 and 86 are invoked in a dispute governed by private law'. [84] The jurisdiction of those courts or tribunals — which according to the judgment in *BRT* are not to be regarded as 'authorities of the Member States' within the meaning of Article 9 of Regulation No 17 — 'to apply the provisions of Community law, particularly in the case of such disputes, derives from the direct effect of those provisions.' [85] According to the Court, their jurisdiction cannot be affected by Article 9 because otherwise it would mean 'depriving individuals of rights which they hold under the Treaty itself'. [86]

33. It is in the light of that distinction made in EEC competition law, and regard being

80 — Judgment cited in footnote 53. After emphasizing the common objectives of the preliminary rulings procedure set out in Articles 41 of the ECSC Treaty and 177 of the EEC Treaty (see paragraph 27 above), the Court decided in paragraph 16 as follows: 'It would therefore be contrary to the objectives and the coherence of the Treaties if the determination of the meaning and scope of rules deriving from the EEC and EAEC Treaties were ultimately a matter for the Court of Justice, as is provided in identical terms by Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty, thereby enabling those rules to be applied in a uniform manner, but such jurisdiction in respect of rules deriving from the ECSC Treaty were to be retained exclusively by the various national courts, whose interpretations might differ, and the Court of Justice were to have no power to ensure that such rules were given a uniform interpretation.' Although the *Busseni* case was only concerned with the interpretation of a measure adopted pursuant to the ECSC Treaty, namely a Commission recommendation, the Court's ruling clearly extends to ECSC Treaty provisions themselves, as is clear from paragraphs 9, 15 and 16 of the judgment.

81 — Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

82 — So far as concerns the application of Article 85(3) of the EEC Treaty, on the other hand, the Commission has sole jurisdiction, that is to the exclusion of the national *cartel authorities*: see Article 9(1) of Regulation No 17.

83 — Excluding 'in certain Member States courts especially entrusted with the task of applying domestic legislation on competition or that of ensuring the legality of that application by the administrative authorities', which courts are treated as equivalent to the cartel authorities of the Member States: see the judgment in *BRT* v *SABAM* [1974] ECR 51, at paragraph 19.

84 — Judgment in *BRT* v *SABAM*, cited above, at paragraph 14.

85 — Judgment in *BRT*, cited above, at paragraph 15.

86 — Ibid. at paragraph 17. A parallel can be drawn here with the case-law on State aid: as the Court recognized in its judgment in Case C-354/90 *Fédération Nationale du Commerce Extérieur* [1991] ECR I-5505, at paragraph 14, the exclusive role which Articles 92 and 93 of the EEC Treaty confer on the Commission, which is to hold State aid to be incompatible with the common market, differs fundamentally from the role of national courts in safeguarding rights which individuals enjoy as a result of the direct effect of the prohibition laid down in the last sentence of Article 93(3), which forbids the Member State from putting its proposed measures into effect before completion of the procedure under Article 92; pending the Commission's final decision, they must protect the rights of individuals against any breach of that prohibition.

had to the need for consistency in the interpretation of the ECSC and EEC Treaties and for the fullest possible protection of undertakings, that Article 65(4) of the ECSC Treaty must be understood. The first subparagraph thereof concerns the jurisdiction of the *national courts or tribunals*, which arises from the direct effect of Article 65(1), to declare, in civil proceedings in which that provision is relied upon, an agreement prohibited by it to be automatically void. [87] On the other hand, the second subparagraph, which confers on the High Authority sole jurisdiction to rule 'whether any ... agreement ... is compatible with this article', concerns the competence of the *Community cartel authority* to apply the provisions of Article 65 from the point of view of competition *policy*, that is in so far as their application involves a discretion. Such a discretion is available in connection with the grant of exemption from the prohibition, as laid down in Article 65(2) (and in connection with the imposition of fines and penalties, as laid down in Article 65(5). Pursuant to Article 65(4), only the High Authority has jurisdiction to grant such exemption (and to impose such fines and penalties) to the exclusion not only of the national cartel authorities but also of the national courts and tribunals since Article 65(2) (and (5)) does not have direct effect. [88]

I therefore conclude that the second subparagraph of Article 65(4) of the ECSC Treaty does not preclude either the direct effect of Article 65(1) or the resultant jurisdiction of the national courts to declare void the agreements prohibited by that provision.

34. It remains for me to consider whether or not *Article 66(7)* of the ECSC Treaty has direct effect. On this question as well the parties before the Court differ. Banks and the Commission maintain that it has direct effect, whereas British Coal and the United Kingdom take the opposite view. The arguments of the last-mentioned parties against direct effect converge to a large extent: their thrust is that, in contrast to Article 86 of the EEC Treaty which refers to 'abuse', the application of Article 66(7) of the ECSC Treaty depends on the establishment by the Commission of a practice which is 'contrary to the objectives of this Treaty'. In their view, Article 66(7) focuses on the question of

87 — Compare this provision with the corresponding provision in Article 85(2) of the EEC Treaty, which provides that any agreements or decisions prohibited pursuant to that article are automatically void. In the *Brasserie de Haecht* judgment, the Court stated with regard to that provision that 'apart from the possible intervention by the Commission by virtue of the regulations and directives referred to in Article 87, the judiciary, by virtue of the *direct effect* of Article 85(2), is competent to rule against prohibited agreements and decisions by declaring them automatically void'; the Court goes on to state that 'while the first course offers the necessary flexibility to take the peculiarities of each case into account, Article 85(2), the intention of which is to attach severe sanctions to a serious prohibition, does not of its very nature allow the court the power to intervene with the same flexibility': judgment in Case 48/72 *Brasserie de Haecht* v *Wilkin-Janssen* [1973] ECR 77, at paragraphs 4 and 5 (emphasis added).

88 — The grant of exemption naturally implies that the High Authority has first established that the agreement in question falls within the prohibition in Article 65(1). That can result in conflicts of jurisdiction with the national courts or tribunals, which have been known to arise under EEC law: see paragraph 56 et seq. below.

what action the Commission is to take in a situation of that kind. Moreover, the United Kingdom points out that, whereas Article 86 of the EEC Treaty expressly states that 'abuse' of a dominant position is 'prohibited', Article 66(7) of the ECSC Treaty eschews those terms.

35. There are indeed some notable differences between the wording of Article 86 of the EEC Treaty and that of Article 66(7) of the ECSC Treaty: the latter provision lays emphasis on the intervention of the High Authority, which is obliged, if an undertaking uses a dominant position for purposes contrary to the ECSC Treaty, to make appropriate recommendations and, in the event of non-compliance therewith, to take measures to prevent the undertaking concerned from using its position for those purposes; Article 86 of the EEC Treaty, on the other hand, directly prohibits undertakings from abusing a dominant position within the common market or in a substantial part of it.

In my view, however, the arguments in favour of Article 66(7) having direct effect must prevail. To begin with, notwithstanding the emphasis on the intervention of the High Authority, the argument that could be made on the basis of the second subparagraph of Article 65(4) (paragraph 31 above) is in any event inoperative here: Article 66(7) makes no mention whatever of *exclusive* jurisdiction on the part of the High Authority to take action in relation to an abuse of a dominant position.

Secondly, Article 66(7) is drafted in clear terms and specifies the conditions for its application: (i) public or private undertakings, (ii) which, in law or in fact, hold or acquire in the market for one of the products falling within the scope of the ECSC Treaty a dominant position shielding them against effective competition in a substantial part of the common market, (iii) must be using that position for purposes contrary to the objectives of the ECSC Treaty. That reference to the objectives of the ECSC Treaty would seem to encompass a reference to Article 4 thereof — which has direct effect — hence it is clear that the discriminatory measures/practices or the restrictive practices tending towards the sharing or exploitation of markets, which are prohibited in Article 4(b) and (d) respectively, fall within the types of conduct banned by Article 66(7). That strongly diminishes the force of the United Kingdom's argument to the effect that Article 66(7), unlike Article 86 of the EEC Treaty, is not worded in the form of a prohibition on abuse of a dominant position.

Finally, the decisive factor in my view is that Article 66(7) leaves the Commission little discretion, if any: its appraisal of an infringe-

ment is subject to specific criteria, and the action it must take to remedy the abuse, whether actual or potential, is strictly defined (issue a recommendation and, failing its implementation, adopt a decision). There is no question of any power of discretion, definition or exemption: the Commission merely has power *to apply* that provision, enabling it at most, in adopting a decision, to choose between determining prices and conditions of sale and drawing up production or delivery programmes. It is self-evident, in my view, that this does not stand in the way of direct effect, certainly not in the light of the broad interpretation thereof given by the Court in the *Francovich* and *Marshall* judgments (paragraph 27 above).

V — Power and/or obligation of the national court to award damages in respect of breach of the aforesaid Treaty provisions

A — *Examination on the basis of Community law of the right to damages for breach of Community competition rules*

36. Amongst the problems under consideration in this case, the national court's fourth question is undoubtedly the most important. Its terms, it will be remembered, are as follows: does the national court have the power and/or the obligation under Community law to award damages in respect of breach of the said articles of the ECSC Treaty (and, if applicable, the EEC Treaty) for loss sustained as a result of such breach? Before I turn to this question, it seems to me that three remarks are called for. First, in accordance with my previous findings (paragraphs 8 and 9 above), I shall start from the premise that only the ECSC Treaty is applicable to this case. Accordingly, I do not propose to examine Articles 85 and 86 of the EEC Treaty, even though I consider that the results of such an examination might well be applicable here. Secondly, I shall focus my analysis exclusively on the question of reparation for breach of provisions of Community law having direct effect. Earlier I came to the conclusion that all the provisions of the ECSC Treaty referred to by the national court and applicable in this case are capable of being relied upon directly. Thirdly, I shall confine myself to the question whether an undertaking is liable for breach of Treaty provisions having direct effect. The liability of the State for breach of Treaty provisions having direct effect, in particular the detailed rules for claiming compensation in respect of loss which an individual has sustained as a result of national legislation contrary to the Community Treaties, does not arise here: that question arises in two other cases now

pending before the Court, namely Joined Cases C-46/93 and C-48/93. [89]

37. I shall rapidly consider the views of the parties before the Court, which differ widely on this question as well. Banks maintains, *inter alia*, on the basis of the judgment in *Francovich*, [90] that the cause of action for damages is in fact based on Community law. It maintains that, in the event of a breach of Treaty provisions having direct effect, an appropriate remedy must be available before the national court; the award of damages is, in particular, essential for the enforcement of the Community rules of competition, especially since it acts as a deterrent to unlawful behaviour by undertakings. The Commission also refers to the judgment in *Francovich*, from which it deduces that the national court is under an obligation on the basis of Article 5 of the EEC Treaty and Article 86 of the ECSC Treaty to award damages; since in that judgment the Court accepted the existence of an obligation to award damages in the case of a directive whose provisions do not have direct effect, that obligation should *a fortiori* apply in the event of a breach of a Treaty provision which does have direct effect.

British Coal and the United Kingdom are far more reserved. The former concedes that a national court may award damages in respect of a breach of directly effective provisions of the EEC Treaty under the same rules as apply in the case of purely national disputes; since, however, none of the ECSC Treaty provisions at issue has direct effect, there can be no question of the award of damages in this case. According to the United Kingdom, it follows from the established case-law of the Court that it is for the national court to determine, in the light of its own legal system, and having regard to the circumstances of the case, whether a breach of a directly effective Treaty provision is remediable in damages. However, certain of the provisions referred to by the national court do not have direct effect and therefore do not give rise to any rights, with the result that the national court cannot have either the power or the obligation under Community law to award damages in respect of a breach of those provisions.

38. Is there a basis under Community law for the power or obligation of the national

89 — In Case C-46/93 *Brasserie du Pêcheur* the Bundesgerichtshof has submitted a number of questions for a preliminary ruling concerning these problems as a result of a claim for compensation by Brasserie du Pêcheur SA, a French brewery, against the German authorities in respect of damage sustained as a result of the German Biersteuergesetz (Law on Beer Duty), whose 'Reinheitsgebot' (purity requirement) was held by the Court in its judgment in Case 178/84 *Commission* v *Germany* [1987] ECR 1227 to be contrary to Article 30 of the EEC Treaty. In Case C-48/93 *Factortame* the Divisional Court of the High Court of Justice, Queen's Bench Division, has submitted a number of questions to the Court for a preliminary ruling on the same problems. Those questions arise in connection with the claims lodged by several companies and individuals against the United Kingdom authorities for compensation in respect of the damage sustained as a result of the Merchant Shipping Act 1988, a number of whose provisions have been held by the Court to be contrary to the EEC Treaty (judgment in Case C-221/89 *Factortame* [1991] ECR I-3905 and in Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585).

90 — Judgment cited in footnote 57.

court to award damages in respect of breach of a Treaty provision having direct effect? Let me point out at once that, according to settled case-law,

'the right of individuals to rely on the directly applicable provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty.' [91]

Accordingly, the direct effect of a Treaty provision in the eyes of the Court constitutes a point of departure, but is certainly not the end of the matter, in the range of instruments which Community law makes available to ensure its implementation in full and the necessary legal protection for it. Over the years, in addition to the exhortations addressed to national legislatures to comply with their obligations under Community law, the Court has, [92] in particular, clarified the role which the national court is required to play in the exercise of its jurisdiction so as to ensure that provisions of Community law produce their full effect. That role operates above all at the level of *legal protection*: as the Court stated in the *Simmenthal* judgment, every national court has 'as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law.' [93] The basis for that obligation is, according to settled case-law, as summarized by the Court in the *Factortame* judgment, Article 5 of the EEC Treaty:

'In accordance with the case-law of the Court, it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons

91 — Judgment in Case C-120/88 *Commission* v *Italy* [1991] ECR I-621, at paragraph 10; in Case C-119/89 *Commission* v *Spain* [1991] ECR I-641, at paragraph 9; and in Case C-159/89 *Commission* v *Greece* [1991] ECR I-691, at paragraph 10; see also the judgment in Case 72/85 *Commission* v *Netherlands* [1986] ECR 1219, at paragraph 20; and in Case 166/85 *Commission* v *Italy* [1986] ECR 2945, at paragraph 11. In the *Emmott* judgment as well, the Court acknowledged, with regard to its case-law concerning the direct effect of directives, that this was only a minimum guarantee: judgment in Case C-208/90 [1991] ECR I-4269, at paragraph 20.

92 — Especially in connection with proceedings against Member States for failure to fulfil their obligations: the continued existence of national provisions which conflict with Community rules leads to ambiguity with regard to the rights and obligations of individuals, which runs counter to the principles of legal certainty and legal protection. It is then for the national or regional legislative authorities to remedy the situation and to give full effect to Community law: see, *inter alia*, the judgments cited in the previous footnote in *Commission* v *Italy*, at paragraph 11, *Commission* v *Spain*, at paragraph 10, and *Commission* v *Greece*, at paragraph 11; judgment in Case 257/86 *Commission* v *Italy* [1988] ECR 3249, at paragraph 12. The Court also turns to the national legislature with regard to the imposition of penalties: where a Community rule does not itself provide for a specific mechanism for the *imposition of penalties*, the Member States are required 'to take all measures necessary to guarantee the application and effectiveness of Community law' on the basis of Article 5 of the EEC Treaty: judgment in Case 68/88 *Commission* v *Greece* [1989] ECR 2965, at paragraph 23.

93 — Judgment in Case 106/77 *Simmenthal* [1978] ECR 629, at paragraph 16.

derive from the direct effect of the provisions of Community law ... .' [94]

I shall deal forthwith with the precise scope of that obligation on the part of the national court to provide legal protection. Let me point out in the meantime that the aforesaid principle of cooperation applies without restriction in the context of the ECSC Treaty: Article 86 thereof contains, as the Court pointed out in *Francovich* (paragraph 25 above), an 'analogous provision' [95] since — barring some minor differences — it imposes on ECSC Member States, and therefore on their judicial bodies, an obligation of sincere cooperation identical to that in Article 5 of the EEC Treaty.

39. The Court has constantly refined the obligations of the national court concerning the legal protection required to ensure the application of Community law in full. The most significant milestones in that connection are the judgments in *Simmenthal*, *Factortame* and *Francovich*.

In *Simmenthal*, the Court stated that

'every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it whether prior or subsequent to the Community rule.' [96]

In *Factortame*, the Court applied that ruling to national procedural rules:

'The full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.' [97]

Finally, in *Francovich* the Court took a decisive step by inferring from the scheme and fundamental principles of the EEC Treaty (see paragraph 40 below) that 'the principle whereby a State must be liable for loss and

94 — Judgment in Case C-213/89 *Factortame* [1990] ECR 2433, at paragraph 19. See, for earlier confirmation, the judgment in Case 33/76 *Rewe* [1976] ECR 1989, at paragraph 5, and in Case 45/76 *Comet* [1976] ECR 2043, at paragraph 12; the judgment in Case 68/79 *Just* [1980] ECR 501, at paragraph 25; the judgment in Case 61/79 *Denkavit Italiana* [1980] ECR 1205, at paragraph 25; the judgment in Case 811/79 *Ariete* [1980] ECR 2545, at paragraph 12, and in Case 826/79 *Mireco* [1980] ECR 2559, at paragraph 13. For an even earlier judgment see Case 13/68 *Salgoil* [1968] ECR 453, at p. 463.

95 — Judgment in *Francovich*, cited above, at paragraph 36.

96 — Judgment in *Simmenthal*, cited above, at paragraph 21.

97 — Judgment in *Factortame*, cited in footnote 94, at paragraph 21.

damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty'. [98] In the words of the Court:

'The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.' [99]

40. The fact that the Community rules at issue in *Francovich* were contained in a directive, [100] and were found by the Court not to be directly applicable following a thorough analysis, [101] cannot of course be used as an argument for refusing to award damages in respect of a breach of *directly effective* Treaty provisions. Instead, I agree with the Commission that the existence of direct effect constitutes an *a fortiori* argument: in the *Foster* judgment in any event the Court accepted, in the case of a directly effective provision of a directive, the possibility of an individual claiming damages from the State (in very broad terms: see below) in respect of a breach of a provision of that kind. [102]

However, the question arises whether the value of the *Francovich* judgment as a precedent extends to action by an individual (or undertaking) against another individual (or undertaking) for damages in respect of breach by the latter of a Treaty provision which also has direct effect in relations between individuals. In that judgment, the Court expressly acknowledged that:

'it is a principle of Community law that *the Member States* are obliged to make good loss

98 — Judgment in *Francovich*, cited in footnote 57, at paragraph 35.

99 — Judgment in *Francovich*, cited above, at paragraph 33. In paragraph 34 the Court added that the possibility of obtaining redress is *particularly* necessary where, as in that case (which was concerned with the failure to implement a directive) 'the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.'

100 — Namely Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).

101 — See paragraphs 10 to 27 inclusive of the *Francovich* judgment. It has been argued that the Court decided against direct effect because it wished to develop a legal remedy against a Member State's failure to comply with Community directives which is unconnected with the requirement of direct effect; in that way, the Court purportedly sought to circumvent the problems connected with the non-horizontal effect of directives: J. Steiner, 'From direct effects to *Francovich*: shifting means of enforcement of Community law', *European Law Review*, 1993, (3), p. 9; see also C. W. A. Timmermans, 'La sanction des infractions au droit communautaire', in *La sanction des infractions au droit communautaire*, Fifteenth FIDE Congress in Lisbon, II, 1992, p. 24, who points out that the legal remedy developed by the Court in *Francovich* is to some extent a substitute for the doctrine of direct effect.

102 — Judgment in Case C-188/89 *Foster* [1990] ECR I-3313, at paragraph 22 and operative part.

and damage caused to individuals by breaches of Community law for which they can be held responsible.' [103]

41. In my view, that question must be answered in the affirmative, although it should be pointed out that in the present case the Court could circumvent it by a tried and tested method. As I made clear earlier (paragraph 2), British Coal is a statutory corporation wholly owned by the Government, whose statutory rights and duties include a monopoly as a matter of principle in the working and getting of coal in Great Britain. In that sense, British Coal undoubtedly falls within the very broad concept of 'State' developed by the Court in its case-law concerning the direct effect of directives, namely as

'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals ... .' [104]

However, I would by no means recommend a solution of that kind to the Court. It would allow substantial doubts to persist as to whether or not there is a basis under Community law for bringing an action for damages in respect of breach of the Community rules of competition by *private undertakings*, to which those rules apply in the first place. Furthermore, the distinction between State and individual strikes me as so precarious and so difficult to employ, in any event in industries such as coal and steel where State intervention takes on a wide variety of forms, that it is inadvisable to apply it here, by analogy with the case-law on the direct effect of directives.

42. In my view it follows from the terms in which the Court in paragraphs 31 and 32 of its judgment elicits, as a matter of principle, the rule of State liability from 'the *general* system of the Treaty and its fundamental principles' [105] that the ruling in *Francovich* also serves as a precedent for this case:

'It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which it integrated into the legal systems of the Member States and which their

103 — Judgment in *Francovich*, cited above, at paragraph 37 (emphasis added).

104 — Judgment in *Foster*, cited in footnote 102, at paragraph 20. The legal position of the State-owned undertaking involved in that case, namely British Gas Corporation, was at the material time largely comparable to that of British Coal: pursuant to the Gas Act 1972 (which replaced the Gas Act 1948, whereby the gas industry in the United Kingdom was nationalized) British Gas Corporation was vested with a monopoly of the supply of gas in Great Britain and a number of related tasks. It was only afterwards, by the Gas Act 1986, that the industry was privatized: see paragraph 3 of my Opinion in the *Foster* case [1990] ECR I-3326, at p. 3327.

105 — See the judgment in *Francovich*, cited above, at paragraph 30. Emphasis added here and in the following paragraphs.

courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions ... .

Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals ... .'

The Court then goes on to *apply* those general principles to a situation in which a Member State is in breach of Community law and thereby causes loss and damage to individuals (paragraphs 33 and 34 of the judgment [106]): since the provisions of Community law have full effect only if individuals can obtain redress from the State, the principle that the State can be held liable is, according to the Court, 'inherent in the system of the Treaty'. [107] Even the reference to Article 5 of the EEC Treaty is taken by the Court merely as an *additional* (*'further'*) basis for State liability. [108]

43. The general basis established by the Court in the *Francovich* judgment for State liability also applies where an *individual* infringes a provision of Community law to which he is subject, thereby causing loss and damage to another individual. The situation then falls within the terms stated by the Court in paragraph 31 of the *Francovich* judgment (and even earlier in *Van Gend en Loos* [109]), namely breach of a right which an individual derives from an obligation imposed by Community law on another individual. Once again, the full effect of Community law would be impaired if the former individual or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of Community law — all the more so, evidently, if a directly effective provision of Community law is infringed: in that regard the Court has already pointed out in *Simmenthal* that such provisions are:

'a direct source of ... duties *for all those affected thereby*, whether Member States or

106 — See above, paragraph 37 and footnote 86.
107 — Judgment in *Francovich*, cited above, at paragraph 35.
108 — Judgment in *Francovich*, cited above, at paragraph 36.
109 — Judgment in *Van Gend en Loos*, cited above, at p. 12.

individuals, who are parties to legal relationships under Community law.' [110]

It has been generally acknowledged for some considerable time (and, in particular, since the *BRT* judgment, paragraph 30 above) that such provisions of Community law as have direct effect in relation to individuals include Articles 85 and 86 of the EEC Treaty: as shown earlier in this Opinion the same is true of Articles 4, 65(1) and 66(7) of the ECSC Treaty. When an undertaking subject to those rules infringes them, it can be held responsible for that infringement, according to the reasoning in the *Francovich* judgment, and it must be held liable for the loss and damage resulting from that breach of Community law.

44. In a field such as competition law, moreover, there are powerful additional arguments which militate in favour of undertakings having the possibility under Community law of obtaining reparation for loss and damage which they sustain as a result of a failure by other undertakings to fulfil their obligations under Community law. I shall confine myself to two of those arguments.

To begin with, recognition of such a right to obtain reparation constitutes the *logical conclusion of the horizontal direct effect* of the rules concerned: the rulings in *Simmenthal* and *Factortame* (paragraph 39 above) offer no solution where a national court has to adjudicate not on a rule of national legislation or administrative law which it can refrain from applying, but on a situation governed by private law in which one or more undertakings infringe a rule of competition, as a result of which a third party suffers loss and damage. The only effective method whereby the national court can in those circumstances fully safeguard the directly effective provisions of Community law which have been infringed is by restoring the rights of the injured party by the award of damages. Even a declaration that the legal relationship between the parties is void — for which there is an express basis in Community law [111] — is not capable of making good the loss and damage (already) suffered by a third party.

In addition, such a rule on reparation plays a significant role in making *the Community rules of competition more operational*, particularly since the Commission, as guardian of those rules, itself acknowledges that it is dependent on the cooperation of the national

110 — Judgment in *Simmenthal*, cited above, at paragraph 15 (emphasis added).

111 — Article 85(2) of the EEC Treaty; Article 65(4) of the ECSC Treaty.

courts in enforcing them. [112] Individual actions for damages have for some time proved useful for the enforcement of federal anti-trust rules in the United States as well. [113]

tion to award damages for loss sustained by an undertaking as a result of the breach by another undertaking of a directly effective provision of Community competition law.

B — *Detailed rules governing an action for damages in respect of breach of the rules of Community law*

45. I conclude from the foregoing that the right to obtain reparation in respect of loss and damage sustained as a result of an undertaking's infringement of Community competition rules which have direct effect is based on the Community legal order itself. Consequently, as a result of its obligation to ensure that Community law is fully effective and to protect the rights thereby conferred on individuals, the national court is under an obliga-

46. The conferral of a Community basis for the aforesaid right to obtain reparation, has two important implications. To begin with, it is thus for the Court to clarify the *detailed rules* for bringing an action for damages of this kind. I shall deal with the problems involved forthwith: although the national court has submitted to the Court only the question whether in principle there is a judicial obligation to award damages, it makes sense in my view in order to resolve the dispute in the main proceedings to begin by recapitulating the conditions which, according to the Court, must be fulfilled if individuals are to have a right of action before the national court (see paragraph 48 below). Subsequently, I shall consider whether the case-law of the Court, in particular that concerning Article 215 of the EEC Treaty, is also capable of providing guidance with regard to the specific conditions for liability in competition cases, so far as concerns loss and dam-

112 — See the Commission's *Thirteenth Report on Competition Policy*, 1984, Brussels-Luxembourg, pp. 147 to 149, Nos 217 and 218; *Fourteenth Report on Competition Policy*, 1985, No 47, p. 59; and, in particular, *Fifteenth Report on Competition Policy*, 1986, pp. 52 to 55, Nos 38 to 43; see also the Commission's Answer to Written Question No 519/72, OJ 1973 C 67, p. 54, and, more recently, the answer given by Mr Andriessen on behalf of the Commission to Written Question No 1935/83, OJ 1984 C 144, p. 14. It would seem from an internal survey that approximately one-half of the complaints addressed to the Commission in connection with breaches of the Community rules of competition could be settled on the basis of a purely legal analysis and could therefore be dealt with satisfactorily by the national courts and tribunals: Fifteenth Report on Competition Policy, p. 54, No 40. With that end in view, the Commission recently drew up an important Notice 'on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty' (OJ 1993 C 39, p. 6).

113 — Individuals in the United States are entitled to recover threefold compensation for damage sustained as a result of a breach of federal anti-trust legislation (so-called 'treble damages'): both the Sherman Act and the Clayton Act provide that any individual 'injured in his business or property by reason of anything forbidden in the anti-trust laws ... shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee': see, in that regard, with numerous references, P. Areeda and L. Kaplow, *Antitrust Analysis. Problems, Text, Cases*, Boston-Toronto, Little, Brown & Company, Fourth Edition, 1988, p. 83, No 146 et seq.

age on the one hand, and reparation on the other (paragraph 49 et seq. below).

No less important, it seems to me, is the second implication: given the *primacy* of Community law, the principles developed by the Court in the *Simmenthal* and *Factortame* judgments (paragraph 39 above) are also applicable here. In other words, the national court must refrain from applying national law where it prevents the exercise of the right to obtain reparation under Community law, as defined by the Court. This means, in particular, that the conditions for liability laid down by the Court 'preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions'. [114]

47. Both of those implications illustrate the substantial progress which the Community basis of that action for damages entails for the development of Community law. It has long been held that infringements of the ECSC or the EEC rules of competition may be contested before the national court *exclusively* on the basis of the relevant national rules of private law, and that the restrictions applicable in that connection are therefore valid as such for the enforcement of those competition rules. [115] It is self-evident that a reference to national law, although providing in certain respects a powerful basis for Community law, [116] entails serious risks for the uniform and effective application of Community law if too many details are left to national law. [117] The uniform application of Community law is, however, as the Court stated in the *Zuckerfabrik* judgment, 'a fundamental requirement of the Community legal order'. [118]

The establishment of a basis under Community law itself for an action for damages in respect of breach of Community (competition) rules gives rise, moreover, to greater

114 — Judgment in *Simmenthal*, cited above, at paragraph 17.

115 — See, for instance, the Report on reparation for damage as a result of breach of Articles 85 and 86 of the EEC Treaty, Collected Studies Series on Competition, No 1, Commission, Brussels, 1966, p. 5. This was also the opinion of the Bundesgerichtshof in its judgment of 14 April 1959 (see footnote 66), though in fact it was one of the reasons why, although it recognized the direct effect of Article 60(1) of the ECSC Treaty (see footnote 66 again), that court refused to attach thereto any consequences under private law; that would lead to an assessment differing from one Member State to another, which in fact runs counter to the equality of treatment pursued by the ECSC Treaty. For a criticism of that judgment see *inter alia* J. L. Janssen Van Raay, 'Een beslissing van het Bundesgerichtshof over E. G. K. S.-recht', *Nederlands Juristenblad*, 1960, (437), pp. 444-445.

116 — Namely to the extent that it is possible for the enforcement of the Community rules to rely on the procedural and substantive system of legal protection which already exists in the Member States.

117 — The omissions and weaknesses of national law also affect the enforcement of Community law. Reference has repeatedly been made to those dangers: see, *inter alia*, J. Bridge, 'Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the Member States', *European Law Review*, 1984, (28), pp. 31-32; D. Curtin, 'The Decentralised Enforcement of Community Law Rights. Judicial Snakes and Ladders', in *Constitutional Adjudication in European Community and National Law. Essays for the Hon. Mr Justice T. F. O'Higgins*, Dublin, Butterworth, (33), p. 34; see also C. W. A. Timmermans, 'La Sanction des Infractions au Droit Communautaire', referred to in footnote 101, p. 21.

118 — Judgment in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415, at paragraph 26.

interaction between Community and national law, where the previous relationship between them was characterised by the exclusive dependence of the former on the latter as regards the machinery for enforcement. [119]

1. Minimum rules of Community law for the grant of legal redress by the national court

48. In its judgment in *Francovich* the Court expressly confirmed that in the event of an action for damages under Community law, the consequences of the loss and damage caused must be remedied 'on the basis of the rules of national law on liability'. [120] According to the Court:

'In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law ...'. [121]

The Court thus followed its earlier case-law which, in the absence of Community harmonization measures, refers to the national law of the Member States for the exercise of rights conferred by Community law. [122] Notwithstanding that premise, the case-law of the Court reveals a clear tendency to lay down a number of *minimum requirements* which the rules of national law must fulfil. I shall enumerate the most important ones.

— In the first place, the Court has acknowledged that the right to obtain an effective legal remedy against measures which are contrary to the rules of Community law — in other words the possibility of effective judicial control — is a general principle of Community law. [123] Although Community law has not itself sought to provide other possible remedies for its enforcement, in addition to the means of redress already afforded by national law, the system of legal protection established by Community law implies that 'it must

119 — See J. Bridge's article referred to in footnote 117, p. 29.

120 — Judgment in *Francovich*, cited above, at paragraph 42. In its judgment in *Russo* the Court had already held that 'if such damage (suffered by a producer) has been caused through an infringement of Community law, the State is liable to the injured party for the consequences *in the context of the provisions of national law on the liability of the State*': Case 60/75 *Russo* v *AIMA* [1976] ECR 45, at paragraph 9 (emphasis added).

121 — Ibid. On this point the Court refers, *inter alia*, to the judgment in Case 33/76 *Rewe*, cited in footnote 94, and to the judgment in Case 158/80 *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805.

122 — See the judgment in *Salgoil*, cited in footnote 94, at p. 645, as well as the other judgments cited in that footnote, namely *Rewe*, at paragraph 5; *Comet*, at paragraph 15; *Arnete*, at paragraph 12; and *Mireco*, at paragraph 13. See also the judgment in Case 179/84 *Bozzetti* [1985] ECR 2301, at paragraph 17.

123 — See the judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, at paragraph 18 (in paragraph 20 the Court refers to the 'principle of effective judicial control'); and in Case 222/86 *Heylens* [1987] ECR 4097, at paragraph 14. According to those judgments, that requirement flows from the constitutional traditions common to all the Member States and is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights.

be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning admissibility and procedure as would apply were it a question of ensuring observance of national law'. [124]

— Further, the substantive and formal conditions (including therefore the rules on jurisdiction and procedure) laid down by the national legal systems for claims based on Community law may not be less favourable than those relating to similar domestic claims and may not be so framed as to make it virtually impossible to exercise the rights conferred by Community law. [125] In the *Francovich* judgment, the Court expressly applied that ruling to the 'conditions laid down by the national law of the Member States for reparation of loss and damage', pointing out that national law must not 'make it virtually impossible *or excessively difficult* to obtain reparation'. [126]

— In addition, national rules of evidence may not make it practically impossible or excessively difficult to obtain redress as required by Community law, particularly by means of presumptions or rules of evidence which place an unreasonably heavy onus of proof on the individual in question, or by means of special limitations concerning the form of the evidence to be adduced, such as the exclusion of anything other than documentary evidence. [127]

— The fixing by national law, with loss of rights as penalty for non-compliance, of *time-limits* within which legal proceedings based on Community law have to be instituted, must be reasonable; [128] in any event they may not be relied upon by a Member State as against an individual so

124 — Judgment in Case 158/80 *Rewe*, cited in footnote 121, at paragraph 44.

125 — Those requirements of 'non-discrimination' — and 'practical possibility' — had already been laid down by the Court in the aforesaid judgments in *Rewe*, at paragraph 5, and *Comet*, at paragraphs 13 and 16; see also the judgments cited in footnote 94: *Just*, at paragraph 25; *Denkavit Italiana*, at paragraph 25, *Ariete*, at paragraph 12; *Mireco*, at paragraph 13; judgment in Case 199/82 *San Giorgio* [1983] ECR 3595, at paragraph 12; *Emmott*, cited in footnote 91, at paragraph 16. The independent significance of the second requirement is apparent from paragraph 17 of the judgment in *San Giorgio*: there, the Court pointed out that the requirement of non-discrimination cannot be construed as justifying a measure where no legal redress (specifically reimbursement of charges unduly paid) is available as regards both the relevant breach of Community law *and a similar infringement of national law.*

126 — Judgment in *Francovich*, cited above, at paragraph 43 (emphasis added). In the *Francovich* judgment the Court does not restate the requirement of direct effect, which is present in the judgments referred to in the previous footnote.

127 — See the case-law of the Court with regard to the recovery of charges levied contrary to Community law: judgment in *San Giorgio*, cited above, at paragraph 14; judgment in Case 104/86 *Commission* v *Italy* [1988] ECR 1799, at paragraph 7.

128 — Judgment in *Rewe*, cited in footnote 94, at paragraph 5; in *Comet*, cited above, at paragraph 17; and in *Emmott*, cited above, at paragraph 17.

long as that State has not complied with the relevant Community legislation. [129]

— However, Community law does not prevent the national court from ensuring, in accordance with national law, that the protection of rights guaranteed by the Community legal order does not result in the unjust enrichment of those entitled. [130]

2. Uniform conditions of liability in respect of breach of Community law

49. The case-law of the Court has yet to evolve significantly, particularly so far as concerns the detailed rules governing an action for damages. Nevertheless, it is already possible to glean a number of principles from the case-law, especially the judgments concerning the non-contractual liability of the Community under the second paragraph of Article 215 of the EEC Treaty. The relevance of the aforesaid case-law to the issue under consideration is not, in my view, open to doubt: the criteria laid down by the Court in that connection are, according to the second paragraph of Article 215 of the EEC Treaty, based on 'the general principles common to the laws of the Member States' and therefore apply to every kind of non-contractual liability. [131]

Before going into the details, I wish to comment on the value of the *Francovich* judgment as a precedent for this case. Although, as stated earlier, its value as a precedent extends unconditionally to the actual principle of Community liability (see paragraphs 42 to 43 above), that is not, in my view, purely and simply the case as regards the *conditions* for liability laid down in that judgment. That flows from the qualified position which the Court itself adopted in that judgment, when it stated that the 'conditions under which ... (State) ... liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage', [132] and subsequently confined itself to the conditions for liability in the event of non-compliance by a Member State with the obligation imposed upon it by the third paragraph of Article 189 of the EEC Treaty

129 — See, with regard to the position of a directive which has not yet been properly transposed into national law by a Member State, the judgment in *Emmott*, at paragraphs 23 and 24 and the operative part.

130 — This was decided by the Court in fiscal disputes, in which it was necessary to take account of the possibility that an undertaking had incorporated in its prices charges unduly levied and passed them on to its customers: see the judgment in *Just*, cited above, at paragraphs 26 and 27; in *Denkavit Italiana*, cited above, at paragraphs 26 and 28; in *Ariete*, cited above, at paragraph 13; and in *Mireco*, cited above, at paragraph 14.

131 — As Advocate General Mischo has already pointed out in *Francovich*, it is undesirable that the liability of the Community institutions for breach of Community law should be framed in a manner which differs fundamentally from that of the national authorities (or individuals) for breach of Community law: [1991] ECR I-5396, at paragraph 71, with reference to the judgment in Joined Cases 106/87 and 120/87 *Asteris* [1988] ECR 5515, at paragraph 18.

132 — Judgment in *Francovich*, cited above, at paragraph 38.

to take all the measures necessary to achieve the result prescribed by a directive. [133]

50. In its decisions concerning the second paragraph of Article 215 of the EEC Treaty, the Court has inferred from the general principles common to the legal systems of the Member States that the liability of the Community depends on fulfilment of three conditions, namely the existence of damage, a causal link between the damage claimed and the conduct alleged against the institution, and the illegality of such conduct. [134] In my view, those conditions for liability apply as such to actions for breach of directly effective provisions of Community competition law. I shall deal with each of them in turn.

51. *The existence of damage.* The party invoking liability must furnish proof that it has suffered damage. Admittedly, the 'loss and damage' factor is not referred to in *Francovich* as one of the conditions for State liability, [135] in all probability because there that requirement (namely non-payment of employees' wages by their insolvent employer) was evidently fulfilled, and is moreover scarcely defined in the Court's case-law concerning Article 215 of the EEC Treaty. The following criteria can, however, be elicited from that case-law. In the first place, there must be the *fact of damage.* [136] Merely speculative damage is therefore inadequate [137] although, in order to bring an action for a declaration of liability, 'imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed' [138] is enough. According to the Court, in order 'to prevent even greater damage it may prove necessary to bring the matter before the court as soon as the cause of damage is certain', a 'finding ... confirmed by the rules in force of the legal systems of the Member States, the majority, if not all, of which recognize an action for declaration of liability based on future damage which is sufficiently certain'. [139]

133 — See paragraphs 39 and 40 of the judgment in *Francovich*: according to the Court, those conditions are: (i) the result prescribed by the directive must entail the grant of rights to individuals; (ii) it must be possible to identify the content of those rights on the basis of the provisions of the directive; and (iii) there must be a causal link between the breach of the State's obligations and the loss and damage suffered by the injured parties.

134 — This has long been settled case-law: see the judgment in Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, at paragraph 10; see also the judgment in Case 281/84 *Zuckerfabrik Bedburg* v *Council and Commission* [1987] ECR 49, at paragraph 17.

135 — See paragraph 40 of the *Francovich* judgment set out in footnote 132.

136 — This is settled case-law: see, *inter alia*, the judgment in Case 153/73 *Holtz & Willemsen* v *Council and Commission* [1974] ECR 675, at paragraph 7; in Case 49/79 *Pool* v *Council* [1980] ECR 569, at paragraph 7; and in Case 50/86 *Grands Moulins de Paris* v *Council and Commission* [1987] ECR 4833, at paragraph 7.

137 — See the judgment in Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer* v *Commission* [1967] ECR 245, at p. 266, where the Court's attitude is reserved with regard to the alleged damage 'in respect of the loss of profit (which) is based on facts of an essentially speculative nature'.

138 — Judgment in Joined Cases 56/74 to 66/74 *Kampffmeyer* [1976] ECR 711, at paragraph 6; in Case 44/76 *Milch-, Fett- und Eierkontor* [1977] ECR 393, at paragraph 8; in Case 147/83 *Binderer* [1985] ECR 257, at paragraph 19; and in Case 281/84 *Zuckerfabrik Bedburg*, cited in footnote 128, at paragraph 14. Those judgments are consistent with earlier case-law: thus, in *Plaumann*, the Court had already considered that an applicant may include in the application a request for a declaration with regard to the damage which may result from the contested measure and in the course of the written and oral procedures it may specify and set a value on the amount of such damage: judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 108.

139 — Judgment in *Kampffmeyer*, cited in the previous footnote, at paragraph 6.

Secondly, in *quantifying the extent* of the damage to be made good, the Court pointed out in its recent judgment in *Mulder and Heinemann* that 'in the absence of particular circumstances warranting a different assessment, account should be taken of the loss of earnings ...'. [140] In the same judgment the Court linked that to an obligation on the part of the injured party to mitigate the damage: it acknowledged, in particular, that there was a general principle common to the legal systems of the Member States 'to the effect that the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself'. [141] In quantifying the damage it is necessary, in any event, in accordance with the aforesaid prohibition on unjust enrichment (paragraph 48), to take account of the extent to which the damage has been passed on in the selling prices of the complainant undertaking. [142]

The Court has also stated its position on the *methods of assessing the damage*: in the *Société Anonyme des Laminoirs* judgment, it considered that where the only possible method of assessing the damage resulting from a wrongful act or omission consists in imagining the position which would have arisen were it not for that act or omission, 'the sampling methods habitually used in economic surveys make it possible (for the court) to reach acceptable approximations provided that the basic facts are sufficiently reliable'. [143]

Finally, so far as concerns *proof* of damage, the Court has taken the view that 'a general feature' of the laws of the Member States relating to non-contractual liability 'is that the Court has an unfettered discretion in assessing all the evidence submitted to it'. [144]

52. *Causal connection between breach and ensuing damage.* Both the case-law based on the second paragraph of Article 215 of the EEC Treaty and the *Francovich* judgment [145] require the existence of a causal connection between the breach of Community law and the damage suffered by the injured party. Beyond that, the Court has not defined this requirement in more detail. It did point out in its judgment in *Dumortier Frères* that if the damage (in that case the closure of a factory), even though it was precipitated by the relevant breach of Community law (the absence of refunds), was not a *direct consequence of the unlawful conduct* in question, there was no liability: according to the Court, therefore, the principles common to the laws of the Member States to which the second paragraph of Article 215 of the EEC Treaty refers cannot be relied upon 'to deduce an obligation to make good every harmful consequence, *even a remote one*, of

140 — Judgment in Joined Cases C-104/89 and C-37/90 *Mulder and Heinemann* v *Council and Commission* [1992] ECR I-3061, at paragraph 26, and my Opinion [1992] ECR I-3121, at paragraph 47.

141 — Judgment in *Mulder and Heinemann*, cited above, at paragraph 33, and my Opinion, cited above, at paragraph 49.

142 — See the judgment in Case 238/78 *Ireks-Arkady* [1979] ECR 2955, at paragraph 14; in Joined Cases 241/78, 242/78 and 245/78 to 250/78 *DGV* [1979] ECR 3017, at paragraph 15; in Joined Cases 261/78 and 262/78 *Interquell Stärke-Chemie* [1979] ECR 3045, at paragraph 17; and in Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères* [1979] ECR 3091, at paragraph 15.

143 — Judgment in Joined Cases 29/63, 31/63, 36/63, 39/63 to 47/63, 50/63 and 51/63 *Société Anonyme des Laminoirs and Others* v *High Authority* [1965] ECR 911, at p. 939.

144 — Judgment in Case 261/78 *Interquell Stärke-Chemie* [1982] ECR 3271, at paragraph 11.

145 — See paragraph 40 of the *Francovich* judgment, summarized in footnote 133.

unlawful legislation'. [146] That constitutes an extension of the case-law concerning the liability of the Community on the basis of Article 40 of the ECSC Treaty: in that context, the Court has repeatedly stated that liability is in issue only where the applicant furnishes proof of a *direct causal connection* ('un lien immédiat de cause à effet') between the wrongful act or omission alleged and the damage sustained. [147]

53. *Illegality of the conduct alleged.* I can be relatively brief on this point. For this requirement to be satisfied here, it is sufficient if an undertaking infringes the directly effective provisions of Community competition law. In that regard there is no question of applying any criterion that is more favourable to those who engage in such conduct, such as that applied by the Court in Article 215 cases with a view to appraising the exercise by the authorities of a broad discretionary power, namely that a 'sufficiently serious breach of a superior rule of law for the protection of the individual has occurred' [148]: the relevant rules of competition impose on undertakings precise, directly effective obligations which are reflected in rights conferred on individuals (see paragraph 43 above). [149] Once a breach of such a provision, viewed in objective terms, is established, an action for damages can be brought on the basis of Community law without there being any possibility of the defendant relying upon the grounds of exemption contemplated by national law. Just as the Court ruled in its judgment in *Dekker* [150] with regard to the prohibition of discrimination in Articles 2(1) and (3) of Council Directive 76/207/EEC on 'equal treatment for men and women', [151] the prohibitions laid down in Community competition law cannot be made conditional on proof of fault or on the absence of any *ground of exemption*. Those prohibitions are aimed at safeguarding undistorted competition and freedom of competition for undertakings operating in the common market, the crucial factor being the effect of the prohibited practices and not the intention of those who engage in them. [152]

54. *Damages and interest.* Recent decisions exhibit a number of interesting developments

146 — Judgment in *Dumortier Frères*, cited above, at paragraph 21.

147 — See the judgment in *Vloeberghs*, cited in footnote 20, at p. 216; judgment in Case 18/60 *Worms* v *High Authority* [1962] ECR 195, at p. 206; most recently upheld in the judgment in Joined Cases C-363/88 and C-364/88 *Finsider* [1992] ECR I-359, at paragraph 25; in paragraph 45 of that judgment, the Court reiterates that there must be evidence of a sufficiently serious fault which is the direct cause of the damage relied upon.

148 — See the judgment in Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209, at paragraph 4; judgment in *Mulder and Heinemann*, cited above, at paragraph 12.

149 — In the *Francovich* judgment there was also a breach, though on the part of the authorities, of a precise obligation to transpose the directive concerned into national law within a specified period. Hence in that case as well there were no grounds for applying the more flexible criterion referred to in Article 215 of the EEC Treaty and in the text to the exercise of discretionary powers by the authorities.

150 — Judgment in Case C-177/88 *Dekker* [1990] ECR I-3941, at paragraph 19 et seq.

151 — Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

152 — Once again, therefore, the practical effect of the rules of competition would be weakened considerably if proof of fault were required: see the judgment in *Dekker*, cited above, at paragraph 24. It is otherwise as regards the question of the existence of intent or negligence as a condition for the imposition of a fine: see, in the context of the EEC Treaty, Article 15 of Regulation No 17.

specifically with regard to the question of damages. So far as concerns the application of the second paragraph of Article 215 of the EEC Treaty, the Court acknowledged in *Mulder and Heinemann* that 'the amount of compensation payable by the Community should correspond to the damage which it caused'. [153] The Court thus made it clear that reparation must be made *in full*, that is to say its aim must be to make good the loss of capital caused by the unlawful conduct (*restitutio in integrum*). [154] That principle has for some time been implicit in the case-law of the Court, as is apparent from its consistent practice with regard to the grant of interim measures, whereby the President does not regard financial loss as serious and irreparable (and therefore orders interim measures to prevent it) 'unless it could not be *wholly* recouped if the applicant were to be successful in the main action'. [155] That has also been apparent from the established case-law of the Court since 1979 — when it came to the conclusion that in the light of the principles common to the legal systems of the Member States 'a claim for interest is in general admissible' — namely that the amount of damages payable must be subject to default interest as from the date of the judgment establishing the obligation to make good the damage. [156]

In that connection, reference must also be made to the case-law regarding the award of damages as a penalty for breach of Directive No 76/207/EEC, referred to above (paragraph 53). In its judgment in *Von Colson and Kamann*, the Court considered that although that directive does not prescribe a specific form of sanction, the sanction must nevertheless be such as to guarantee real and effective judicial protection and have real deterrent effect, with the result that where a Member State decides to penalize a breach of the prohibition of discrimination contained in the directive by the award of damages, the award must in any event be adequate in relation to the damage sustained and may not be merely symbolic. [157] In its recent judgment in *Marshall*, the Court pointed out in that regard, in a situation involving discriminatory dismissal, that:

'Where financial compensation is the measure adopted in order to achieve the objec-

153 — Judgment in *Mulder and Heinemann*, cited above, at paragraph 34.

154 — It was already apparent from the comparative analysis undertaken by Advocate General Capotorti in the *Dumortier* case that this is a general principle common to the legal systems of the Member States: Opinion in Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier* v *Council* [1982] ECR 1752, at pp. 1756 to 1758 (No 4). The Advocate General inferred from his comparative analysis that within the Community there is a sufficiently clear and widespread tendency to the effect that in determining compensation in cases of non-contractual liability account is also taken of the effects of matters subsequent to the event causing the damage, such as a currency depreciation or devaluation.

155 — Order in Case C-358/90 R *Compagnia Italiana Alcool* [1990] ECR I-4887, at paragraph 26 (emphasis added); see also the order in Case 229/88 R *Cargill* [1988] ECR 5183, at paragraph 17; in Cases C-51/90 R and C-59/90 R *Comos Tank and Others* [1990] ECR I-2167, at paragraph 24; and in Case C-257/90 R *Italsolar* [1990] ECR I-3941, at paragraph 15.

156 — Judgment in *Ireks-Arkady*, cited above, at paragraph 20; in *DGV*, cited above, at paragraph 22; in *Interquell Starke-Chemie*, cited above, at paragraph 23; and in *Dumortier Frères*, cited above, at paragraph 25; expressly confirmed by the Court in *Mulder and Heinemann*, cited above, at paragraph 35.

157 — Judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, at paragraphs 23 and 24; followed in the judgment in *Dekker*, referred to in footnote 150, at paragraph 23; and in *Marshall*, cited in footnote 74, at paragraph 18: instead the directive, according to the Court, leaves the Member States freedom of choice between the various solutions appropriate for achieving the aim it pursues.

tive indicated above (that is to say, real equality of opportunity), it must be adequate, in that it must enable the damage actually sustained as a result of the discriminatory dismissal to be made good *in full* in accordance with the applicable national rules.' [158]

In addition, the Court elicited from that obligation to the effect that damage must be made good in full two important principles concerning the *detailed rules* for making reparation. In the first place, the Court considered that the fixing by law of an upper limit on the amount of compensation cannot constitute proper implementation of Directive 76/207/EEC 'since it limits the amount of compensation *a priori* to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the damage sustained as a result of discriminatory dismissal'. [159] Secondly, the Court replied in the affirmative to the question whether interest should be awarded on the principal amount from the date of the unlawful discrimination to the date when compensation is paid: 'Suffice it to say that full compensation for the damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.' [160]

In my view, the aforesaid case-law applies as such in respect of breach of prohibitions laid down by Community competition law. As stated above (paragraph 53), those prohibitions are aimed at safeguarding undistorted competition and freedom of competition for undertakings operating in the common market, with the result that a breach of that system must be made good in full.

VI — Relevance for the national court of a decision taken by the Commission in a similar competition matter

55. Questions 5 and 6 submitted by the national court (see paragraph 6 for the wording) raise the problem of the relationship between the role of the Commission as cartel authority in the context of the ECSC Treaty and that of the national court.

158 — Judgment in *Marshall*, cited above, at paragraph 26 (emphasis and words in brackets added).

159 — Judgment in *Marshall*, cited above, at paragraph 30.

160 — Judgment in *Marshall*, cited above, at paragraph 31. In paragraph 32 of the judgment and point 1 of the operative part, therefore, the Court's answer to the question raised was that as a result of Article 6 of Directive 76/207/EEC, 'reparation of the damage sustained by a person injured as a result of discriminatory dismissal may not be limited ... by the absence of interest intended to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid'.

So far as concerns Question 5, the answer flows from the examination of Questions 3 and 4: it has been established that Articles 4, 65(1) and 66(7) are directly effective provisions and that the national court is obliged on the basis of Community law to award damages with a view to providing the fullest possible redress for the parties whose rights have been impaired. Completion of the steps or procedures specified in the relevant Treaty provisions and exhaustion of any other legal remedies provided by the ECSC Treaty — in particular the action for failure to act under Article 35 of the ECSC Treaty — is not a prerequisite for such an award; that would amount to a denial of the direct effect of the aforesaid provisions and the attendant obligation on the part of the national court to protect the rights of individuals. [161]

56. Question 6 is more delicate; there, the national court is seeking guidance from the Court as to whether a decision taken by the Commission in a competition matter is binding on the national court, so far as concerns both the Commission's factual analysis and its construction of articles of the ECSC Treaty. For a proper answer, in my view, it is necessary to recapitulate the Court's case-law concerning the role of the Commission and that of the national court in enforcing the provisions of Community competition law. Although that case-law is concerned with EEC competition law, it is, in my view, in the light of the similarity between the relevant ECSC and EEC rules (paragraphs 30 to 35 above) and the need for consistency in their application, applicable as such to ECSC competition law.

A — *The role of the Commission and of the national court in enforcing Community competition rules*

57. The Court has frequently had occasion to rule on the division of tasks between the Commission and the national court with regard to the enforcement of the Community rules of competition. [162] It did so most recently and systematically in the *Delimitis* judgment:

'In that respect it should be stressed, first of all, that the Commission is responsible for the implementation and orientation of Community competition policy. It is for the Commission to adopt, subject to review by the Court of First Instance and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations. The perfor-

161 — See the judgment in *Fédération Nationale du Commerce Extérieur*, cited in footnote 86, in particular at paragraph 16.

162 — See, in particular, the judgment in *Brasserie de Haecht*, cited in footnote 87, in particular at paragraphs 4 to 12; and the judgments cited in footnote 79, namely *BRT*, at paragraphs 15 to 23, and *Marty*, at paragraphs 13 and 14.

mance of that task necessarily entails complex economic assessments, in particular in order to assess whether an agreement falls under Article 85(3). Pursuant to Article 9(1) of Regulation No 17 of the Council of 6 February 1962 ... the Commission has exclusive competence to adopt decisions in implementation of Article 85(3).

On the other hand, the Commission does not have exclusive competence to apply Articles 85(1) and 86. It shares that competence with the national courts. As the Court stated in its judgment in Case 127/73 (*BRT* v *SABAM* [1974] ECR 51), Articles 85(1) and 86 produce direct effect in relations between individuals and create rights directly in respect of the individuals concerned which the national courts must safeguard.' [163]

The competence shared between the Commission and the national court, referred to in the preceding paragraph, can give rise to conflicting decisions in connection with the specific application of the Community rules of competition. In that regard, the Court stated in the *Delimitis* judgment that:

'account should here be taken of the risk of national courts taking decisions which conflict with those taken or envisaged by the Commission in the implementation of Articles 85(1) and 86, and also of Article 85(3). Such conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission.' [164]

For that reason the Court advised the national court, 'in order to reconcile the need to avoid conflicting decisions with the national court's duty to rule on the claims of a party to the proceedings that the agreement is automatically void', to have regard to the following considerations:

— If the conditions for the application of Article 85(1) are *clearly* not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue. It may do the same if the agreement's incompatibility with Article 85(1) is beyond doubt and, regard being had to the exemption regulations

163 — Judgment in *Delimitis*, cited in footnote 79, at paragraphs 44 and 45.

164 — Judgment in *Delimitis*, cited above, at paragraph 47.

and the Commission's previous decisions, the agreement may on no account be the subject of an exemption decision under Article 85(3). [165]

— If the national court considers in the light of the Commission's rules and decision-making practices that the agreement may be the subject of an exemption decision under Article 85(3), or that there is a risk of conflicting decisions in the context of the application of Articles 85(1) and 86, it may decide to stay the proceedings or to adopt interim measures pursuant to its national rules of procedure. It may then, within the limits of the applicable national procedural rules, seek information from the Commission on the state of any procedure which the Commission may have set in motion and as to its likely course. Under the same conditions, the national court may contact the Commission where the specific application of Article 85(1) or Article 86 raises particular difficulties, in order to obtain the economic and legal information which that institution can supply to it. [166]

— The national court may in *any* event stay the proceedings and make a reference to the Court for a preliminary ruling under Article 177 of the Treaty. [167]

The Commission adopted those principles in their entirety in its recent 'Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty'. [168] Admittedly, in point 45 that notice is expressly stated to be inapplicable to the competition rules laid down by the ECSC Treaty, although the reason for that, the Commission stated at the hearing, is merely the existence of procedural differences (in particular because Regulation No 17 applies only to EEC cases) between the rules of the EEC Treaty and those of the ECSC Treaty: however, the Commission added, that does not prevent the notice from extending *mutatis mutandis* to the application of the ECSC Treaty rules.

B — *To what extent are findings of fact and/or of law in a Commission decision binding on the national court?*

58. Once again the parties before the Court are strongly divided on this point. At one end of the spectrum, Banks argues that a

165 — Judgment in *Delimitis*, cited above, at paragraph 50. In paragraph 51 the Court points out that an exemption decision may only be taken in respect of an agreement which has been notified or is exempt from having to be notified.

166 — Judgment in *Delimitis*, cited above, at paragraphs 52 and 53. The Court goes on to state that, under Article 5 of the EEC Treaty, the Commission is bound by a duty of sincere cooperation with the judicial authorities of the Member States.

167 — Judgment in *Delimitis*, cited above, at paragraph 54.

168 — See the reference thereto in footnote 112.

Commission decision is not binding on the national court as regards issues of fact or law; at the other end, British Coal maintains that a decision is binding in both respects. The views of the United Kingdom and the Commission occupy an intermediate position. The United Kingdom maintains that a Commission decision on a point of fact — for instance a finding that certain pricing practices are contrary to Chapter V of the ECSC Treaty — is binding on the national court; however, the latter cannot be bound by an interpretation of the ECSC Treaty developed by the Commission in its decisions as part of its reasoning, although a party may rely on such a decision in support of its contention and the national court may take account of the Commission's interpretation. Finally, the Commission considers that, although its decisions are not binding on the national court as regards issues of fact or law, nevertheless the national court does not have the power to declare such a decision invalid; furthermore, in order to ensure the uniform application of Community law, the national court should endeavour to respect Commission decisions in competition matters and should take whatever steps are necessary to avoid a risk of inconsistency, if necessary by means of a reference to the Court for a preliminary ruling.

59. In my view, a qualified answer is called for. The premise for it is the distinction drawn by the Court in the *Delimitis* judgment (paragraph 57 above) between the *exclusive* competence of the Commission to declare the prohibition in Article 85(1) of the EEC Treaty (or Article 65(1) of the ECSC Treaty) inapplicable on the basis of Article 85(3) of the EEC Treaty (or Article 65(2) of the ECSC Treaty), and the competence it *shares* with the national court in applying Articles 85(1) and 86 of the EEC Treaty (or Articles 65(1) and 66(7) of the ECSC Treaty). In practice this means that if the Commission declares the prohibition in Article 85(1) of the EEC Treaty or Article 65(1) of the ECSC Treaty inapplicable on the basis of its exclusive competence, the national court is bound by that *exemption* decision. Only in the event of the Commission revoking the decision in question or the Community Court declaring it void would the decision cease to be binding. [169]

60. It is otherwise where the Commission gives notice, in an administrative letter or even through formal negative clearance, [170] that it intends to take action on the basis of Article 85(1) of the EEC Treaty (or Article 65(1) of the ECSC Treaty) against certain agreements or, conversely, adopts a decision

169 — See the Opinion of Judge Kirschner, acting as Advocate General, in Case T-51/89 *Tetra Pak* [1990] ECR II-312, at pp. 345-346, No 104, who rightly adds, on the basis of the case-law of the Court concerning Regulation No 67/67, that the national court retains jurisdiction to interpret a (directly effective) block-exemption regulation in order to establish whether or not a particular agreement is covered by it: the danger of inconsistency can be countered by recourse to the preliminary ruling procedure.

170 — See in that regard the Opinion of Advocate General Reischl in *Marty* [1980] ECR 2502, at p. 2507, and the Opinion of Judge Kirschner acting as Advocate General in the *Tetra Pak* case, cited in the previous footnote, ibid.

establishing a breach of that article. So far as concerns the first possibility, the Court has determined in the 'Perfume' cases that such administrative letters

'do not have the effect of preventing national courts, before which the agreements in question are alleged to be incompatible with Article 85, from reaching a different finding as regards the agreements concerned on the basis of the information available to them.' [171]

However, the Court added:

'Whilst it does not bind the national courts, the opinion transmitted in such letters nevertheless constitutes a factor which the national courts may take into account in examining whether the agreements or conduct in question are in accordance with the provisions of Article 85.' [172]

More complex, though not fundamentally different, is the second possibility, where the Commission by decision establishes a breach of Article 85(1) of the EEC Treaty (or Article 86 thereof, or the corresponding provisions of the ECSC Treaty). Strictly speaking such a decision is, on account of its nature, binding only on those to whom it is expressly addressed. [173] In my view, however, a decision of that kind carries greater significance than the aforesaid administrative letters and negative clearance.

That transpires, in the first place, from the judgment in *Foto-Frost*, in which the national court was held to lack jurisdiction to declare a Community act invalid, such jurisdiction being reserved to the Court alone, where appropriate in proceedings initiated by a reference for a preliminary ruling by the national court. [174] In addition, the duty of cooperation which Article 86 of the ECSC Treaty or Article 5 of the EEC Treaty imposes on the national court (and which applies expressly to acts of the institutions) entails for the national court the obligation, in relation to a decision adopted by the Commission and relied upon or challenged by the parties before that court, to mitigate as far as possible in the interests of the Community the risk of a ruling that conflicts with that decision. As a body which supervises compliance with the Community rules of competition and has specialized departments for that purpose, the Commission has many years of experience with the result that its findings carry a degree of authority, although such authority is not binding. However, it is

171 — Judgment in Joined Cases 253/78 and 1/79 to 3/79 *Procureur de la République* v *Giry and Guérlain* [1980] ECR 2327, at paragraph 13; in *Marty*, cited in footnote 79, at paragraph 10; in Case 99/79 *Lancôme* v *ETOS* [1980] ECR 2511, at paragraph 11; and again in Case 31/80 *L'Oréal* [1980] ECR 3775, at paragraph 11.

172 — Ibid.

173 — In the case of individual ECSC decisions, see Article 14 in conjunction with the second paragraph of Article 15 of the ECSC Treaty; for EEC decisions, see the fourth paragraph of Article 189 of the EEC Treaty.

174 — Judgment in *Foto-Frost*, cited in footnote 55; see also the judgment in *Bussem*, cited in footnote 53, at paragraph 14.

self-evident that no obstacles may be placed in the path of third parties seeking to challenge before the national court findings which the Commission has arrived at in a decision of that kind. [175]

61. If, on the basis of the parties' arguments, the national court comes to the conclusion that the issues of fact and/or law decided by the Commission are incorrect or insufficient, or if at any rate it has serious doubts in that regard, [176] then in the light of the *Delimitis* judgment (paragraph 57 above) it must take the following course of action: in the case of findings which carried no weight in the final decision and do not therefore underlie the reasoning of the Commission, the national court is at liberty to adopt a different interpretation: in those circumstances the risk of conflicting decisions and the resultant impairment of the principle of legal certainty is extremely small. [177] On the other hand, in the case of findings which have an influence on the final decision arrived at by the Commission, the national court is well advised, in accordance with the provisions of its national procedural law, to suspend the proceedings in the case and to seek the necessary information from the Commission or make a direct reference to the Court for a preliminary ruling concerning the validity of the decision in question or the interpretation of the relevant Community competition rules.

Conclusion

62. I propose that the Court answer the questions submitted as follows:

(1) Licences to extract unworked coal and the royalty and payment terms stipulated therein fall within the scope of the ECSC Treaty. They are subject to Articles 4, 65(1) and 66(7), though not Article 60, of the ECSC Treaty.

175 — Evidently this does not apply to the addressee of the Commission decision or to persons to whom it is quite clearly of direct and individual concern: the only course of action open to them, if they wish to challenge the findings of fact or of law made in the decision, is to bring an action for annulment under Article 173 of the EEC Treaty.

176 — See the condition laid down by the Court in the *Zuckerfabrik* judgment, cited in footnote 118, for suspension by a national court of the enforcement of a national administrative act based on a Community regulation: judgment in *Zuckerfabrik*, at paragraphs 23 and 33 and point 2 of the operative part.

177 — These are then findings which, since they were not necessary in order to substantiate the operative part (in line with the Court's case-law concerning Article 190 of the EEC Treaty: see paragraphs 15 to 17 of my Opinion of 29 June 1993 in Case C-137/92 P *BASF*, not published in the ECR), cannot be the subject of an action for annulment: see the judgment of the Court of First Instance in Case T-138/89 *NBV and NVB* [1992] ECR II-2181, at paragraph 31.

(2) Articles 4, 65(1) and 66(7) of the ECSC Treaty have direct effect.

(3) The national court is obliged in principle, under Community law, to award damages for loss sustained as a result of breach of a directly effective competition rule laid down by the ECSC Treaty.

(4) The national court is not bound by a Commission decision involving the application of Articles 65(1) and/or 66(7) of the ECSC Treaty. However, on the basis of the duty of cooperation contained in Article 86 of the ECSC Treaty, the national court has to mitigate as far as possible the risk of a ruling that conflicts with a Commission decision. If the national court comes to the conclusion that the Commission's findings of fact and/or law which have an influence on the latter's final decision are incorrect or insufficient, or has serious doubts in that regard, it is well advised, in accordance with the provisions of its national procedural law, to suspend the proceedings in the case and, if appropriate, seek the necessary information from the Commission and/or make a reference to the Court of Justice for a preliminary ruling concerning the validity of the decision in question or the interpretation of the relevant Community competition rules.