JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
24 September 1996 *

In Case T-57/91,

National Association of Licensed Opencast Operators, a company incorporated under English law and having its registered office in Newcastle upon Tyne (United Kingdom), represented by Nicholas Green, Barrister, of the Bar of England and Wales, and David James Malcolm Wilson, Solicitor, with an address for service in Luxembourg at the Chambers of Victor Gillen, 13 Rue Aldringen,

applicant,

v

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, assisted by Stephen Kon, Solicitor, and Leonard Hawkes, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

British Coal Corporation, a company incorporated under English law and having its registered office in London, represented by David Vaughan QC and David

* Language of the case: English.

Lloyd Jones, Barrister, of the Bar of England and Wales, together with Peter J. Sigler and Rebekah M. Gershuny, Solicitors, with an address for service at the Chambers of M. Loesch, 8 Rue Zithe,

intervener,

APPLICATION for the annulment in part of Commission Decision SG(91)D/9467 of 23 May 1991 rejecting the applicant's complaint concerning the market in coal for electricity generation,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: C. P. Briët, President, K. Lenaerts, B. Vesterdorf, P. Lindh and A. Potocki, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 February 1996,

gives the following

Judgment

Facts

1 The Coal Industry Nationalisation Act of 1946 (hereinafter 'the CINA') created the National Coal Board, which became the British Coal Corporation (hereinafter

'British Coal') under the Coal Industry Act of 1987. Under the CINA, British Coal owns practically all coal reserves in the United Kingdom and enjoys the exclusive right to work and extract coal.

2 The private sector of the British coal industry consists of some 200 small and medium-sized companies, approximately 160 of which operate underground mines and 34 of which engage in opencast coal mining.

3 The applicant, the National Association of Licensed Opencast Operators (hereinafter 'NALOO') is a trade association covering at present 16 private mining concerns established in the United Kingdom and operating mines, most of which are opencast.

4 British Coal ensures the working of its opencast sites primarily by awarding their operation to licensees. In 1989/1990, 17.5 million tonnes of coal were thus extracted from opencast mines, on behalf of British Coal, by private undertakings, including some of the members of the applicant association.

5 British Coal is also empowered under section 36(2) of the CINA to grant licences for the extraction of coal to operators in the private sector, including NALOO members. The largest private mining concerns operate more than one mine.

6 There are two types of licence:

— the royalty-paid licence ('royalty licence'), which allows the licensee to sell the coal to third parties of his choice against payment to British Coal of a royalty which is fixed for all licensees at a uniform rate for each tonne of coal;

— the delivered licence, under which the licensee delivers to British Coal the coal extracted at a price per tonne negotiated and agreed with British Coal on a site-by-site basis.

7 British Coal has, since December 1990, withdrawn the option of delivered licences other than for operators with whom it had been negotiating this arrangement prior to that date.

8 The deposits operated by British Coal amount to approximately 2 million tonnes. The 1990 Coal Industry Act increased from 25 000 tonnes to 250 000 tonnes the maximum reserves which could be granted to licensed opencast operators.

9 Of the total production of 95.2 million tonnes extracted in the United Kingdom in 1989/1990, British Coal produced 93 million, or more than 97%.

10 In 1989/1990, licensed opencast operations extracted 1 068 000 tonnes of coal under royalty licences and 773 000 tonnes under delivered licences, making a total of 1 841 000 tonnes. The total volume produced from licensed opencast mines increased from 1 210 000 tonnes in 1984/1985 to 2 095 000 tonnes in 1990/1991.

11 On 1 April 1990, the Central Electricity Generating Board (hereinafter 'the CEGB'), the State-owned electricity-generating undertaking in Great Britain, was privatised under the 1989 Electricity Act. The CEGB's assets were transferred, in England and Wales, to National Power and PowerGen, two limited-liability companies established under that Act. The CEGB's assets in Scotland were transferred to Scottish Power.

12 National Power and PowerGen are the only purchasers of coal for electricity generation in England and Wales. Approximately 95% of their annual requirements, amounting to some 75 million tonnes, are met by British Coal, the remaining 5% being met by private producers (3%) and by imports, almost exclusively effected by British Coal. In the short and medium term, British Coal will remain the major supplier of fuel for thermal electricity-generating stations in England and Wales.

13 Pursuant to an agreement concluded in May 1986 between British Coal and the CEGB, 72 million tonnes of coal were purchased in 1986/1987 at prices divided into three tranches, the weighted average of which was 172 pence per gigajoule (hereinafter 'p/Gj') at the pit head, which with associated transport costs amounted to an average delivered price of 187p/Gj.

14 As a result of the above agreement, the CEGB proposed to reduce its purchases from independent producers by 50% and insisted that the price at which it would purchase their coal would have to be competitive with the third tranche price of 133p/Gj (120p/Gj plus 13p/Gj in respect of transport costs).

15 NALOO thereupon requested the Office of Fair Trading to investigate under the 1980 Competition Act and subsequently brought judicial review proceedings when it refused to do so.

16 In a letter of 13 May 1988 which it sent to British Coal, NALOO stated that:

'If the Corporation [British Coal] will reduce all opencast royalties by £2.50 per tonne as previously agreed, NALOO will

1. withdraw the current judicial review proceedings;

2. confirm that it has no intention to have them reinstated;

3. confirm that it does not have it in mind to commence any other proceedings in connection with any related licensing or trading issue;

4. confirm that in all of the present circumstances it will accept the reasonableness of the new royalty levels.'

17 NALOO subsequently withdrew its judicial review proceedings and British Coal, in accordance with its undertakings, reduced its opencast royalties from £13.50 to £11 per tonne. Licence holders were notified on 16 June 1988 of this reduction, which was backdated to 27 December 1987.

18 In 1989/1990, British Coal negotiated with National Power and PowerGen new coal supply contracts (hereinafter 'the agreement') for the period from 1 April 1990 to 31 March 1993, guaranteeing to British Coal annual sales of 70 million

tonnes for the first two years and 65 million tonnes for the third year. The basis price was fixed at 170p/Gj gross and 177.9p/Gj net, subject to escalation (and de-escalation) formulas to take account of movements in the retail price index and the exchange rate between the pound sterling and the US dollar.

19 When the agreement entered into force on 1 April 1990, National Power and PowerGen offered to licensed producers prices ranging from 122p/Gj to 139p/Gj at the mine.

20 From 1 April 1990 until 13 December 1990, the royalty rate of £11 per tonne was reduced to £7 per tonne (£6 per tonne plus £1 per tonne for administrative costs).

21 NALOO and the Federation of Small Mines of Great Britain, which represents nine regional associations of mining companies, lodged a complaint with the Commission on 29 March 1990 in which they alleged that the agreement and British Coal's extraction licence scheme were unlawful under Community competition rules.

22 In the first place, the complainant associations claimed that the agreement was contrary to Article 63 of the ECSC Treaty in so far as the prices which the electricity generating companies were offering to British Coal, being higher than those offered to the licensed operators, constituted systematic discrimination by purchasers against the licensed producers.

23 They considered that the agreement was also contrary to Article 65 of the ECSC Treaty, or alternatively Article 85 of the EEC Treaty, in so far as it had the effect of foreclosing a preponderant part of the British market for electricity-generating coal to suppliers other than British Coal and allowing British Coal to obtain from the

electricity generating companies prices and conditions for the sale of coal which discriminated against licensed producers.

24 They maintained that the electricity generating companies were in breach of Article 86 of the EEC Treaty by abusing the joint dominant position conferred on them by their status as the sole purchasers of electricity-generating coal.

25 They also took the view that, in breach of Article 66(7) of the ECSC Treaty, British Coal was abusing its position as the dominant supplier of electricity-generating coal in order to secure favourable conditions for itself, particularly in terms of volume and price, to the detriment of its competitors, the small licensed mines.

26 The complainant associations pointed out that British Coal's system of extraction licences, including in particular the royalty, was itself subject to the competition rules and constituted a breach thereof. They referred to a description of the licensing system, attached as Annex D to their complaint, detailing the difficulties encountered by the licensed sector.

27 They alleged that the royalty imposed by British Coal on opencast coal mined under licence also breached the combined provisions of Article 4 and Article 60 of the ECSC Treaty because it was excessive, made the coal extracted under licence uncompetitive and thus constituted an unfair competitive practice involving discrimination between producers.

28 In Annex G to their complaint of 29 March 1990, they concluded that the royalty rate of £11 was too high by £8.50 per tonne (34p/Gj) and that the price of 120p/Gj offered by the electricity generating companies was too low by £8.50 per tonne

(34p/Gj). The complainants added that if the electricity generating companies brought their prices for licensed coal into line with those offered to British Coal, that is to say, 170p/Gj ex-mine, a royalty of £6 per tonne might be sustainable. Finally, they maintained that a selling price of less than 170p/Gj ex-mine would require a lower royalty.

29 The complainants accordingly requested the Commission to adopt measures to rectify these breaches of Community law and also sought the adoption of interim measures. In this respect, they requested the Commission:

— to prohibit British Coal and the electricity generating companies from operating the agreement so as to exclude the licensed producers from the market sector covered by the agreement, and to require the electricity generating companies to extend to the licensed producers the conditions defined for British Coal by the agreement;

— to require British Coal to reduce its royalty for opencast mines to a level comparable with international standards, that is to say, a maximum of £3 per tonne.

30 The complaint was sent to British Coal, which submitted its observations in reply and forwarded a non-confidential version of those observations to the complainants' counsel on 1 May 1990.

31 By letter of 25 May 1990, the complainants confirmed to the Commission the conditions under which they would be prepared, without prejudice to the maintenance of their principal demands, to withdraw their request for interim measures. In particular, they declared that they were ready to recommend an agreement based on a royalty of £6 per tonne for opencast coal, on condition that British Coal did not impose any administrative charge. The price of coal from the private

sector should be fixed at 153p/Gj ex-mine, plus 15p for transport costs, making a total of 168p/Gj for coal delivered within a maximum radius of 30 miles. Otherwise, the price should be fixed at 153p/Gj ex-mine, transport costs being agreed on a case-by-case basis.

32 In the complainants' opinion, the price of 153p/Gj was 10% below the average of prices granted to British Coal, which amounted to 170p/Gj. NALOO took the view that this price was entirely reasonable on an interim basis and would largely cover the administrative costs arising from the handling and checking of the smaller quantities sold by licensed operators.

33 In their supplemental complaint of 27 June 1990, the complainants reiterated that the electricity generating companies had manifestly infringed Article 63 of the ECSC Treaty individually and collectively in view of the discrepancy between the prices for coal which they paid to British Coal and to the licensed producers, and that the agreement was contrary to Article 65 of the ECSC Treaty or, if that provision was not applicable, to Article 85 of the EEC Treaty.

34 By decision of 28 June 1990, the Commission, without prejudice to the position that it might take on the substance, rejected the request for interim measures on the ground, *inter alia*, that, in the light of the amount of coal purchased from licensed operators, their position had not deteriorated *vis-à-vis* the situation obtaining prior to the agreement. It also took the view that the absolute prices paid to the private mines had not changed following the entry into force of those contracts, whereas the pit-head price to British Coal had been reduced from 180p/Gj in 1989/90 to 172p/Gj in 1990/91, resulting in an improvement in the relative position of the private mines. Finally, the royalties paid by the private mines had not been changed by the entry into operation of the agreement.

35 By letter of 28 August 1990, the Commission indicated to the United Kingdom's Permanent Representation to the European Communities that the differences between the price for coal paid to British Coal and that paid to other operators by

the electricity generating companies might be justified on the ground that, unlike coal sold by British Coal, that from the private mines was in general untreated, delivered by road and sold in small quantities.

36 However, it stated in that letter that those considerations were not sufficient to explain why the price difference, which apparently had previously been in the region of 12.5%, had reached current average levels of some 25% for National Power and some 40% for PowerGen. It was inclined to consider that a price of approximately 150p/Gj gross, with a suitable addition for transport, would be more appropriate.

37 It took the view that the agreement substantially deprived licensed operators of access to the market and created a situation in which they obtained low prices. It also took the view that the royalty of £7 per tonne appeared too high in all the circumstances.

38 By a document of 5 September 1990, the complainants submitted to the Commission, in response to the latter's request, a summary of their essential arguments. They complained that the electricity generating companies had systematically practised discrimination as purchasers within the meaning of Article 63 of the ECSC Treaty and had infringed both Articles 85 and 86 of the EEC Treaty.

39 They maintained that British Coal, as a party to the agreement, had sought, along with the electricity generating companies, to make it more difficult for the private sector to supply coal to those generating companies, thereby creating a barrier to entry or expansion for the private sector that British Coal did not face.

40 The complainants took the view that British Coal was in breach of Article 63 of the ECSC Treaty in so far as the rules which it had laid down for the purchase of coal from the private sector were specifically designed to increase the burden faced by that sector in supplying British Coal or, indeed, the electricity generating companies.

41 The complainants also criticized British Coal for having adopted a policy of making it more difficult for the private sector to obtain licences to mine coal, as explained in Annex D to the complaint of 29 March 1990. In that regard, they stated that British Coal had repeatedly refused requests for a proper appeal procedure for refusals or delays in granting licences. In their view, British Coal has thus used its power to grant licences in a manner likely to increase the barriers to entry to the market, preserving its dominant position.

42 They maintained that British Coal had also fixed royalties at an arbitrary level.

43 Moreover, the factors and matters complained of with regard to Article 66(7) constituted infringements of Article 60 of the ECSC Treaty.

44 Finally, the complainants added that, notwithstanding the above, Article 66(7) would encompass all of the infringements outlined above.

45 On 24 October 1990, the United Kingdom authorities, on behalf of British Coal, National Power and PowerGen, presented to the complainants an offer consisting in the main of:

— a new price equivalent to 157p/Gj net at the last point of supply, account being taken of transport costs of approximately 10p/Gj;

— a reduction in the royalties resulting in a new basic rate including administrative costs of £5.50 per tonne (£6 per tonne for amounts greater than 50 000 tonnes) for coal from opencast pits;

— retroactive application of these conditions to 1 April 1990, the date on which the agreement entered into force.

46 On 30 October 1990, the Commission informed the complainants that, subject to their comments, the conditions proposed seemed to it to be reasonable and unlikely to give it cause to seek more extensive measures on the part of the authorities and public undertakings in the United Kingdom.

47 The Commission stressed that the royalty had to be considered in the light of the price to be received for coal mined under licence. If, as appeared to be the case, the royalty on opencast coal was not so large as to prevent efficient companies from making a profit at the prices available to them or to impose a significant competitive disadvantage on such companies, there should be no objection to a particular level of royalty. The Commission stated that, since the complaint had been lodged, the royalty had been reduced from £11 to £5.50 per tonne (£6 per tonne after the first 50 000 tonnes), whereas the supply price, in England and Wales, had been increased by almost 23% or approximately £7 per tonne.

48 The complainants replied on 7 November 1990 that the offer was unacceptable. The difference between the price paid to British Coal and that paid to them remained too great, in all the circumstances then obtaining, and the royalties proposed were still too high. They stated in particular that it was clear that their members were incurring a substantial competitive disadvantage in having to pay high royalties to their competitor in a monopoly situation, while selling their coal at a price significantly lower than the price of that competitor.

49 The United Kingdom Minister for Energy informed the complainants, by letter of 22 November 1990, that the United Kingdom, British Coal, National Power and PowerGen had decided to apply immediately, and with effect from 1 April 1990, all of the conditions relating to price, purchase volumes and royalties proposed on 24 October 1990.

50 By letter of 21 December 1990, the Commission informed the complainants that the requests which they had set out on the basis of Articles 60, 63 and 65 of the ECSC Treaty and of Articles 85 and 86 of the EEC Treaty in respect of England and Wales did not call for further action on its part. It took the view that there were no grounds for further investigation on its part under Article 66(7) of the ECSC Treaty with regard to royalties in England, Wales and Scotland.

51 In particular, it noted, at paragraph 45 of its letter, that British Coal had, during the 1989/90 financial year, achieved an operating profit of £13.34 per tonne in respect of its opencast operations. Although there were differences, notably of scale, between British Coal's opencast operations and those of NALOO members, such a figure appeared to confirm that the royalty rates then being applied were not unreasonable.

52 The Commission pointed out that it would be taking a definitive position only after it had examined any written comments which the complainants might wish to submit within two weeks of receipt of its letter.

53 By letter of 11 January 1991, the complainants pointed out that they had expressed their clear desire to have other important issues dealt with, including the legality or otherwise of the pricing policy adopted by British Coal towards independent producers, which had the effect of excluding private producers from access to a substantial group of customers.

54 In particular, they contested the conclusion which the Commission reached at paragraph 45 of its letter of 21 December 1990 on the ground that the positions of British Coal and the licensed operators were not comparable.

55 By letter of 15 February 1991 to the Commission, they also stated their view that the Commission had not hitherto addressed the question of whether Article 65 of the ECSC Treaty was applicable to the licensing agreements. They requested the Commission to notify them of its views on the matter.

56 By letter of 14 March 1991, the complainants also disputed the reasonableness of the royalty rate in the United Kingdom authorities' offer of 24 October 1990 and informed the Commission that they would be submitting to it accounts from British Coal's annual reports demonstrating that that rate was excessive.

57 They stated in that letter that the Commission had hitherto confined itself to examining the legality of the extraction licence regime under Article 66(7) of the ECSC Treaty, even though they had pointed out that Article 65 was also applicable to contracts executed pursuant to that regime.

58 Finally, they criticised the Commission for not having examined the consequences of the cumulative effect of the excessive royalty rate and the discrepancy between the prices applied by the electricity generating companies as regards the private producers, on the one hand, and as regards British Coal, on the other. By reason of that cumulative effect, they argued, private coal producers, whose sales to the electricity generating companies were no longer profitable, had been obliged since 1986 to sell coal mined under delivery licences to British Coal at 'abusively low prices', thereby allowing British Coal to resell that coal to the electricity generating companies at an excessive profit. The complainants accordingly called on the Commission to require British Coal to rectify any licences which were illegal as a result.

59 On 15 May 1991, NALOO sent to the Commission a report dated 14 May 1991 prepared by Binder Hamlyn, an international accountancy firm (hereinafter 'the Binder Hamlyn Report'), designed to provide the Commission with accounting

evidence establishing that the royalty charged by British Coal over the five-year period to 31 March 1991 was excessive.

60 By decision of 23 May 1991, notified to NALOO on 29 May 1991 (hereinafter 'the contested decision'), the Commission rejected the complaints of 29 March 1990 and 27 June 1990. It explained that since British Coal, National Power and PowerGen had undertaken to modify their position, there was no longer any reason for the Commission to take proceedings against them in respect of conduct allegedly in restraint of competition under Articles 4, 60, 63, 65 and 66(7) of the ECSC Treaty and Articles 85 and 86 of the EEC Treaty.

The content of the decision

61 The contested decision dealt with the position in England and Wales in the light of the new situation arising from the entry into operation of the agreement on 1 April 1990. Examination of other issues, such as the situation prior to that date and British Coal's licensing powers, was expressly excluded from the contested decision, which dealt only with the two essential questions in the case, namely the agreement and the royalty.

62 According to the contested decision, the agreement did not fall within the scope of Article 65 of the ECSC Treaty, since that provision applied only to agreements between at least two undertakings engaged in the production or distribution of coal and steel and National Power and PowerGen were not undertakings of that kind (paragraph 69).

63 In its examination of the allegation of discrimination in the light of Articles 63 and 66(7) of the ECSC Treaty and Article 86 of the EEC Treaty, the Commission took the view that the terms of the agreement which British Coal had negotiated with

National Power and PowerGen were not in themselves unfair, as they provided for prices lower than those which British Coal had previously enjoyed and offered only partial protection against inflation, with the result that real prices would fall over the duration of the contracts. Moreover, the agreement was for a relatively short period (three years) and provided for a tonnage reduced to 70 million tonnes in each of the first two years and 65 million tonnes in the third year (paragraph 53).

64 The new differential of 20.9p/Gj, or 12%, between the price offered, with effect from 1 April 1990, by National Power and PowerGen, for coal from licensed mines (157p/Gj net at the mine) and for that provided by British Coal (177.9p/Gj) was not so large as to constitute discrimination justifying further intervention by the Commission. The complainants had themselves accepted that there was a case for a certain price differential between British Coal and the licensed producers. In addition, the Commission considered that the new price differential reflected the inability of the members of the complainant associations to supply the same volume as British Coal and the additional costs involved in dealing with a large number of small transactions. The Commission also noted that the small mines, unlike British Coal, were not exposed to variations in the £/US $ exchange rate and that it was impossible to quantify precisely all the elements to be taken into account when considering the difference in price, while the complainants also had been unable to put forward any convincing arguments for a lower figure (paragraphs 57 to 61).

65 In the Commission's view, the contracts for the purchase of coal that the electricity generating companies had already concluded with the licensed mines guaranteed to the latter a production level in excess of their total production for 1989/90. If the commitments given for the future related to lower quantities, this was in particular because the licensed mines could not make long-term commitments. In any event, the sales guaranteed to the licensed mines for 1990/91 and 1991/92 were substantially above the level that would secure them, over those two years, equivalent treatment to that of British Coal in regard to guaranteed volumes of sales. The

Commission believed that those contracts would result in the elimination of discrimination between British Coal and the licensed mines, subject to re-opening of the case if this belief were to prove unfounded (paragraphs 63, 65 and 67).

66 The contested decision went on to state that, since the licensed mines would henceforth obtain contracts giving them access to markets on terms comparable to those given to British Coal, the complainants also could not plead a breach of Article 85 of the EEC Treaty (paragraph 78).

67 The Commission took the view that Article 60 of the ECSC Treaty, which clearly applied to the pricing practices of vendors, was not applicable to the royalty (paragraph 47).

68 It also stated that:

'72. The level of royalty cannot be considered in isolation. The relationship between the price received for the coal and the costs, including the royalty, of producing that coal must be such as to enable efficient companies to make a profit and must not impose a significant competitive disadvantage on them.

...

73. In so far as the opencast mines are concerned, the royalty has been reduced from £11.00 a tonne before 1 April 1990 to £5.50 a tonne (£6.00 a tonne after the first 50 000 tonnes) while the price the small mines receive has increased by over 23%.

74. The price now available for licensed coal, 157p/Gj, or approximately £40.00 a tonne, is over 20% or £8.00 a tonne higher than the price that was given to the small mines when the coal supply contracts [the agreement] came into operation. This, coupled with a reduction in royalty of at least £5.00 a tonne, will result in a large improvement in the gross profit margins of the licensed opencast mines. In 1989/90 the average sales revenue achieved by BCC [British Coal] on its opencast operations was £41.50 a tonne or about 160p/Gj, that is to say, approximately the same level as the price now available to the licensed mines. BCC made a profit of £12.68 a tonne on this production. Although there are differences, notably of scale, between the opencast operations of BCC and those of NALOO members, this would appear to confirm that the current royalty for opencast coal is not sufficiently high as to be unlawful. Thus, the royalty will not prevent efficient companies from making a profit or impose a significant competitive disadvantage.'

69 The Commission concluded in the following terms:

'79. This decision deals with the situation in England and Wales arising from the entry into operation of the coal supply contracts on 1 April 1990 between BCC on one hand and NP [National Power] and PG [PowerGen] on the other.

80. Articles 60 and 65 ECSC are not applicable. Those parts of the complaint ... based on these articles are hereby rejected.

81. The Commission considers that the complaints made under Articles 63, 66(7) ECSC and 85 and 86 EEC were justified, in so far as they concerned the situation after 1 April 1990 when the coal supply contracts entered into operation.

82. If the terms of the UK authorities' offers dated 24 October 1990 are incorporated into contracts on the basis set out in this decision, the licensed mines will no longer be discriminated against in comparison with BCC. On this

basis, those parts of the complaints under Article 63 ECSC, Article 66(7) ECSC in so far as it concerns purchase conditions, Article 85 EEC and Article 86 EEC are no longer valid and in so far as they relate to the present situation are rejected.

83. With regard to the part of the complaints under Article 66(7) ECSC concerning the royalty levied by BCC, the new royalty levels set out in the UK authorities' letter dated 24 October 1990 and subsequently implemented by BCC with effect from 1 April 1990 are not unreasonably high. That part of the complaints concerning royalty payments under Article 66(7) ECSC is therefore no longer valid and in so far as it relates to the present situation is rejected.'

70 By letter sent to the Commission on 6 December 1991, NALOO pointed out that it had been unable to identify, in the published report and accounts of British Coal for the year which ended on 31 March 1990, the profit of £12.68 per tonne which British Coal had, according to paragraph 74 of the contested decision, achieved in respect of its opencast production. NALOO added that in its view the report and accounts for the next year, which ended on 31 March 1991, showed that British Coal's operating profit on opencast operations had fallen by £4.48 per tonne to £8.86 per tonne, as was demonstrated by the extract from British Coal's accounts set out in Annex A to the letter of 6 December 1991. By subtracting from the latter figure an interest cost of £2.07 per tonne (arrived at on the basis set out in the Binder Hamlyn Report of 14 May 1991) and £1.43 (the price differential between British Coal's receipts of £40.65 per tonne and the licensees' receipts of £39.22 per tonne), NALOO calculated a net profit of £5.36 per tonne. Even without taking into account the differential cost penalties suffered by licensees, the existence of which the Commission acknowledged at paragraph 74 of the contested decision, this, according to NALOO, illustrated that a royalty of £6.00 per tonne would result in a deficit of £0.64 per tonne. In the view of NALOO, that conclusion confirmed data which had already been submitted to the Commission in the Binder Hamlyn Report. It followed, according to NALOO, that British Coal itself could not afford to pay a royalty at that level. In the light of this further evidence demonstrating so clearly the unreasonableness of the royalty, NALOO suggested that the Commission might wish to re-open the issue and amend its decision.

71 On 1 June 1991, Hopkins (a company) and others instituted proceedings before the High Court of Justice of England and Wales against National Power and PowerGen seeking compensation for the damage which they alleged that those two electricity generating companies had caused them from 1985 to 31 March 1990. In support of their action, they relied *inter alia* on breach of Articles 4 and 63 of the ECSC Treaty (hereinafter 'the Treaty') and argued that National Power and PowerGen, as the successors to the CEGB, had discriminated against them in relation to British Coal by purchasing coal from them under terms as to price and volume which were less favourable than those offered to British Coal.

72 By orders of 13 January 1994 and 12 May 1994, the High Court stayed the proceedings and submitted to the Court of Justice for a preliminary ruling a number of questions asking, in particular, under which Treaty provisions the dispute fell to be determined.

73 By judgment of 2 May 1996 in Case C-18/94 *Hopkins and Others* v *National Power and PowerGen* [1996] ECR I-228, the Court held, *inter alia*, that the provisions of the ECSC Treaty, and in particular Articles 4(b) and 63(1) thereof, constituted the legal framework for dealing with discrimination by purchasers against producers as regards price, volume and other terms and conditions for the purchase of coal.

74 In the interim, NALOO lodged a fresh complaint with the Commission on 15 June 1994 seeking examination under Articles 4(d), 65 and 66(7) of the Treaty of the royalties levied by British Coal on licensed producers from 1 January 1973, the date on which the United Kingdom acceded to the European Communities, to 31 March 1990, a period expressly excluded by the contested decision.

75 British Coal formally requested the Commission to dismiss this fresh complaint lodged by NALOO without examining its substance. That request was rejected by an implied decision deemed to result, under the third paragraph of Article 35 of

the Treaty, from the Commission's silence at the end of two months following the formal notice. British Coal accordingly brought an action against that implied decision of refusal by application lodged at the Registry of the Court of First Instance on 10 November 1994 and registered as Case T-367/94.

Procedure

76 By application lodged at the Registry of the Court of First Instance on 9 July 1991, NALOO brought the present action for annulment under Article 33 of the ECSC Treaty.

77 By separate document lodged on 30 September 1991, the Commission, pursuant to Article 114(1) of the Rules of Procedure, raised an objection of inadmissibility, on which decision was reserved for final judgment by order of the Court of 1 October 1992.

78 By order of the Court of 30 January 1992, British Coal was given leave to intervene in support of the Commission.

79 By two orders of 31 March 1992 and 2 June 1992, the Court upheld in part NALOO's requests that certain documents be treated confidentially in relation to British Coal.

80 On 11 February 1991, Banks & Co. Ltd, a member of NALOO, brought an action against British Coal before the High Court of Justice of England and Wales seeking compensation for the damage which it claimed to have suffered by reason of

the allegedly excessive level of the royalty which it was paying to British Coal and based in particular on the breach by British Coal of Articles 4(d), 60, 65 and 66(7) of the Treaty. By order of 25 February 1992, the High Court referred to the Court of Justice for a preliminary ruling a number of questions concerning, *inter alia*, the interpretation of those provisions.

81 The Court of First Instance took the view that the answers sought from the Court of Justice would necessarily have a bearing on its own response to the issues raised in the present case. In the interests of the proper administration of justice, the Court of First Instance accordingly stayed the proceedings, pursuant to Article 47 of the Protocol on the (ECSC) Statute of the Court of Justice, by order of 14 July 1993 until the Court of Justice had delivered judgment in the request for a preliminary ruling.

82 Following delivery of the judgment on the request for a preliminary ruling (judgment of 13 April 1994 in Case C-128/92 *Banks* v *British Coal* [1994] ECR I-1209), the procedure was resumed before the Court of First Instance.

83 Following the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure without any preliminary inquiry. However, it asked the parties to reply to a number of written questions before the hearing, which was done within the period specified.

84 The parties presented argument and replied to the oral questions of the Court at the public hearing on 6 February 1996.

Forms of order sought by the parties

85 In its application, NALOO seeks:

(1) A declaration that its application is admissible under Article 33 of the Treaty;

(2) A declaration that the royalty of £5.50 or £6.00 per tonne is unlawful as being contrary to Articles 4(d), 60, 63, 65 and 66(7) of the Treaty;

(3) A declaration that the decision is void in so far as it finds that a royalty of £5.50 or £6.00 per tonne is lawful under Article 66(7) of the Treaty;

(4) A declaration that the decision is void in so far as the Commission has manifestly failed to observe the provisions of the Treaty and has ignored material facts and has thereby misdirected itself as to the law;

(5) A declaration that the decision is void in so far as the Commission has failed to respect the duty to act fairly and objectively;

(6) A declaration that the decision is void in so far as it is insufficiently reasoned, contrary to Articles 5 and 15 of the Treaty;

(7) A declaration that the finding of infringement in paragraph 81 of the decision should also have found that British Coal had infringed Articles 4, 60, 63 and 65 of the Treaty;

(8) Pursuant to the above declarations, an order annulling the decision in so far as it concerns the royalty imposed by British Coal;

(9) An order requiring the Commission to reopen the investigation into the level of royalty imposed by British Coal upon licensed coal producers and into the price paid for coal pursuant to delivered licences;

(10) An order requiring the Commission to instruct British Coal to repay the royalties found to have been overcharged and sums found to be underpaid following the investigation referred to in the preceding paragraph;

(11) An order requiring the Commission to find that the conduct of British Coal prior to 1 April 1990 was in breach of Articles 4, 60, 65 and 66(7) of the Treaty;

(12) An order requiring the Commission to pay the costs;

(13) Such further or other declarations and orders as the Court shall see fit in all the circumstances.

86 At paragraphs 6.25 to 6.28 of its observations on the objection of inadmissibility raised by the Commission, NALOO abandoned its claims for repayment of royalties overcharged and for a finding that British Coal's conduct prior to 1 April 1990 had been illegal, as set out in the tenth and eleventh heads of claim described in the above forms of order sought. As it confirmed at paragraph 75 of its reply, the applicant no longer makes any claims in relation to the period prior to 1 April 1990.

87 The Commission contends that the Court should:

(1) Declare the application inadmissible in its entirety;

(2) Alternatively, declare the application inadmissible in so far as it relates to facts and matters arising before 1 April 1990 and also in relation to the relief sought in the tenth and eleventh heads of claim and unfounded as to the remainder;

(3) In the further alternative, reject the application as unfounded;

(4) Order the applicant to pay the costs.

88 British Coal claims that the Court should:

(1) Declare the application inadmissible to the extent indicated in British Coal's observations on admissibility and on the merits;

(2) Reject the application as unfounded;

(3) Order the applicant to pay the intervener's costs.

Admissibility of the forms of order sought

89 The heads of claim set out in paragraphs (3) to (6) of the forms of order sought (see paragraph 85 above) in effect cover four of the five pleas formulated in support of the request for annulment of the contested decision.

90 Furthermore, it has consistently been held that it is not for the Community judicature to issue directions to institutions or to substitute itself for them when exercising its power of judicial review, and that it is for the institution concerned to take the necessary measures to comply with a judgment given in an action for annulment (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 28,

Joined Cases T-432/93 to T-434/93 *Socurte and Others* v *Commission* [1995] ECR II-503, paragraph 54, and Case T-548/93 *Ladbroke Racing* v *Commission* [1995] ECR II-2565, paragraph 54).

91 In so far as it requests the Court to order the Commission to reopen its investigation into the level of the royalty and British Coal's purchase prices, the applicant's ninth head of claim constitutes a request for the Court to issue directions to the Commission, which the Court has no jurisdiction to grant. The same applies with regard to the tenth and eleventh heads of claim, although the applicant has abandoned these two heads of claim.

92 Moreover, in so far as they request the Court to declare that the royalty of £5.50 or £6.00 per tonne is unlawful as being contrary to Articles 4(d), 60, 63, 65 and 66(7) of the Treaty and that British Coal's conduct also infringed Articles 4, 60, 63 and 65 of the Treaty, the applicant's second and seventh heads of claim seek precisely to secure from the Court the measures that the implementation, by the institution concerned, of a judgment annulling the contested decision might entail.

93 It follows that the second, seventh and ninth heads of claim are inadmissible.

The initial subject-matter of the action

94 As is clear from the summary of the facts, the applicant criticizes British Coal for two practices in restraint of competition: first, the excessively high rates which British Coal levied on coal extracted under royalty licences and, second, the unreasonably low prices at which British Coal purchased coal extracted from opencast mines under delivered licences (hereinafter 'British Coal's purchase prices').

95 With regard to these two practices in restraint of competition of which it claims that British Coal is guilty, the applicant develops, in support of its action, five pleas in law in favour of annulment.

96 The first plea is that there was a manifest failure to comply with Article 66(7) of the Treaty in so far as the contested decision concluded that a royalty rate of £5.50 or £6.00 per tonne was lawful under Article 66(7) and failed to hold that British Coal's purchase prices were illegal under that provision.

97 In its second plea, the applicant complains that the Commission was in manifest breach of Articles 4, 60, 63 and 65 of the Treaty by failing to examine, in the light of those provisions, whether the royalties levied by British Coal and British Coal's purchase prices were lawful, or by taking the view that those provisions were not applicable.

98 In its third plea, the applicant claims that the Commission refused to take into consideration the evidence adduced in support of its complaint, refrained from carrying out an exhaustive investigation, and infringed its rights of defence.

99 The fourth plea criticizes the contested decision on the ground that it is inadequately reasoned and the fifth plea, which reiterates the arguments set out in support of the four preceding pleas, alleges misuse of powers by the Commission in adopting the contested decision.

The objection of inadmissibility raised by the Commission

Arguments of the parties

100 In its objection of inadmissibility, the Commission argues essentially that all of the applicant's pleas seeking annulment seek to obtain from the Court an evaluation, under the second sentence of the first paragraph of Article 33 of the Treaty, of the situation arising from the economic facts or circumstances in the light of which the contested decision was adopted, without providing, as that provision requires in such a case, any relevant evidence whatever of a misuse of power or manifest failure to comply with the provisions of the Treaty.

101 It submits that the Court has jurisdiction solely to review the legality of the contested decision and not to re-examine the economic facts or circumstances on which that decision is based. All of the pleas relied on by the applicant in support of its claims request the Court to re-examine the applicant's complaint and to substitute its own assessment of the economic facts and circumstances for that of the Commission.

102 The applicant contends essentially that its main claim for annulment is covered by the first sentence of the first paragraph of Article 33 of the Treaty. It also contends that the errors committed by the Commission constitute a misuse of powers and/or are manifest, thereby justifying examination by the Court of the economic facts and circumstances.

103 It is not obliged to prove misuse of powers or the manifest nature of the Treaty breaches alleged in order for its pleas in support of annulment, seeking examination by the Court of the economic facts and circumstances, to be admissible, since this would confuse admissibility with the merits of the application (Case 3/54 *ASSIDER* v *High Authority* [1954-1956] ECR 63 and Case 8/57 *Groupement des*

Hauts Fourneaux et Aciéries Belges v *High Authority* [1957-1958] ECR 245). It suffices in this regard that the complaints of misuse of powers and manifest breach of Community law are accompanied by relevant evidence.

Findings of the Court

104 The Court notes first that the first paragraph of Article 33 of the Treaty empowers the Community judicature to hear actions seeking to have Commission measures declared void on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. However, the Community judicature may not examine the evaluation of the economic facts or circumstances in the light of which the contested decision was taken, save where the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of the Treaty or the rules relating to its application.

105 According to the case-law of the Court of Justice (Joined Cases 154/78, 205/78, 206/78, 226/78, 227/78, 228/78, 263/78, 264/78, 31/79, 39/79, 83/79 and 85/79 *Valsabbia and Others* v *Commission* [1980] ECR 907, paragraph 11), the first part of the second sentence of the first paragraph of Article 33 of the Treaty sets limits on the judicial review of choices of economic policy made by the Commission, while the second part removes those limits where the applicant alleges misuse of powers or manifest failure to comply with the Treaty.

106 It follows from the summary of the applicant's pleas in law (see above) that it has raised only the complaint of manifest failure to observe the provisions of the Treaty in its first two pleas, while the third, fourth and fifth pleas do not seek to have the Court examine the evaluation of the economic facts and circumstances in the light of which the contested decision was taken.

107 It follows that the Commission is not justified in claiming that all of the applicant's pleas in law seek to have the Court examine the economic facts and circumstances in the light of which the contested decision was taken.

108 In order that the Court may examine the evaluation of such facts and circumstances in the context of the first two pleas in law, it is necessary and sufficient that there are specific indications that support the allegation of manifest failure to observe the Treaty provisions. Any stricter requirement would confuse the admissibility of the argument with the proof of its substance; a more liberal interpretation, whereby the mere assertion of one of the claims referred to would be sufficient to open the way to review by the Community judicature of the economic evaluation, would reduce that claim to a mere formality (Case 6/54 *Netherlands* v *High Authority* [1954-1956] ECR 103, at p. 115, and *Valsabbia*, cited above, paragraph 11).

109 In the present case, there are specific indications that prima facie support the complaint that the contested decision manifestly fails to observe the Treaty provisions, in particular British Coal's share of the market in coal for electricity generation, as well as the statutory monopoly which it enjoys for granting extraction licences, its power unilaterally to fix royalties at a uniform rate for all licensed operators and, finally, its strong position attributable to its legal status and its economic strength in negotiations, on a site-by-site basis, of the prices at which it purchases coal extracted under delivered licences.

110 It is therefore possible to declare admissible the applicant's first two pleas in law in so far as they seek a review by the Court of the Commission's assessment of the economic facts or circumstances in the light of which the contested decision was adopted.

111 In carrying out that review, the Court must confine itself to determining whether the contested decision is manifestly unjustified, in the light of the conditions laid down in the Treaty and an overall assessment of the economic situation, it

being understood that the term 'manifest' presupposes a breach of the relevant legal provisions of such gravity that it appears to derive from an obvious error in the evaluation, having regard to the provisions of the Treaty, of the situation in respect of which the decision was taken (*Netherlands* v *High Authority*, at p. 115, and *Valsabbia*, paragraph 72, cited above).

112 It follows that, contrary to the Commission's arguments, the limits thus imposed on judicial review do not in any way mean that the Court lacks jurisdiction to rule on whether the decision is lawful.

113 It follows that the Commission's objection of inadmissibility regarding the applicant's pleas in support of annulment must be dismissed.

The admissibility of the pleas in support of annulment relating to British Coal's purchase prices

114 As follows from the foregoing, the applicant's claims now relate only to the level of the royalty imposed by British Coal.

115 The applicant has abandoned the tenth and eleventh heads of claim (see paragraph 86, above).

116 Furthermore, as has already been found, the second, seventh and ninth heads of claim are inadmissible (see paragraph 93, above), while the third to sixth are in fact pleas in support of annulment (see paragraph 89, above).

117 Accordingly, the five pleas in support of annulment relating to British Coal's purchase prices must be dismissed as inadmissible because they are no longer supported by the forms of order actually sought.

The substance

The remaining subject-matter of the dispute

118 NALOO abandoned, during the proceedings, the heads of claim which sought annulment of the contested decision on the ground that it did not confirm the alleged illegality of the royalties levied by British Coal prior to 1 April 1990 (see paragraph 86, above).

119 It also states in point 60 of its reply that it has 'sought to concentrate its analysis upon the central issue remaining in this application for judicial review, namely whether the Commission was correct to conclude that a royalty of £5.50/6.00 per tonne was lawful in all the circumstances.'

120 The Court notes that, after bringing its action, the applicant lodged a fresh complaint with the Commission on 15 June 1994 in which it requested examination, under Articles 4(d), 65 and 66(7) of the Treaty, of the royalties levied by British Coal from 1 January 1973 to 31 March 1990.

121 It follows that the action now concerns the annulment of the contested decision only in so far as that decision finds that the royalty rate of £5.50/6.00 per tonne levied by British Coal from 1 April 1990 is not incompatible with the Treaty provisions relied on.

122 The Court considers it appropriate first to address the first two pleas, based on manifest failure to observe the provisions of the Treaty, before going on to verify that the procedural rules were complied with, the reasons given were adequate and there was no misuse of powers, issues which constitute, in that order, the subject-matter of the last three pleas in law.

1. The first plea in law: breach of Article 66(7) of the Treaty

Arguments of the parties

123 The applicant argues that the Commission made manifest errors of factual and legal assessment in concluding that a royalty level of £5.50 or £6.00 per tonne was lawful, even though the applicant had established that this rate was excessive in so far as it prevented its members from making any, or any reasonable, profit, and imposed on them a serious competitive disadvantage as regards British Coal.

124 The Binder Hamlyn Report examined the five-year period up to 31 March 1991 and considered, first, an analysis based on British Coal's operating costs, second, the methodology which British Coal claimed to apply and, third, the method used in the contested decision, based on British Coal's operating profits.

125 The applicant states that the Binder Hamlyn Report sets out 'the results of an accountancy exercise undertaken based upon BCC's annual accounts and upon accounting data Binder Hamlyn collected from members of the applicant association', the purpose of which was to 'establish to the Commission that upon any reasonable accountancy basis the current BCC royalty was excessive', irrespective of the method used.

126 Applying the first method, the authors of the Report concluded that a reasonable royalty, taking into account the costs of levying the royalty, which British Coal calculated at £1 per tonne, and an appropriate mark-up for profit of 37%, would be £1.37 per tonne. According to the table set out in paragraph 4.7. of the Binder Hamlyn Report, the royalty of £5.50 or £6.00 per tonne levied by British Coal during the financial year to 31 March 1991 brought it a profit estimated at 400% on its costs.

127 The second method consists in calculating British Coal's average operating costs and treating this as licensees' costs, adding on a reasonable margin for the licensed sector, taking a final selling price for coal produced by the licensed sector, and, finally, determining the royalty on the basis of the difference between the licensees' costs, plus the licensees' margin, and the final selling price.

128 The margin that the applicant's members are allowed to add under this method is only about 5% to 6%, whereas it should be considerably higher given the very high risks involved and the added value arising from their work. Furthermore, the selling price for coal taken as the benchmark is wholly artificial. If one were to take the figure of 130p/Gj put forward by British Coal, the royalty ought to be negative, in view of the average opencast licensee operating costs, which are in excess of 135p/Gj.

129 Finally, the applicant contends that, on the basis of the test set out in paragraph 72 of the contested decision, the Commission decided that the royalty of £5.50 or £6.00 per tonne was lawful by determining the licensees' production costs, comparing those costs with the receipts for coal supplied and subtracting the royalty from the difference between the costs and receipts, in order to determine whether the result enabled the licensee to make a profit and whether it was not such as to impose a significant competitive disadvantage upon the licensee compared with British Coal.

130 According to the applicant, although it is clear from paragraph 72 of the contested decision that the test was the costs and profit of the licensee, the Commission none the less applied that test in paragraph 74 of the contested decision using the costs of British Coal, notwithstanding the fact that the Commission itself had recognized that British Coal and the licensed sector had different cost structures.

131 It is clear, it claims, from Annex G to the complaint of 29 March 1990 that the operating costs of licensed opencast mines are at least 20% higher than those of British Coal's opencast pits, with the result that the reduction of the royalty to £5.50 or £6.00 per tonne was not sufficient to reduce the severe competitive harm suffered by licensed producers.

132 In its letter of 28 August 1990 to the United Kingdom's Permanent Representative, the Commission had stated that the royalty of £7 per tonne then being levied appeared to be too high in all the circumstances. The applicant therefore asks how the Commission could have concluded that a minor reduction in the royalty level would remove the competitive harm, in the light of the applicant's extensive evidence to the contrary.

133 According to the Commission, supported in the main by British Coal, the applicant implicitly accepts that it is lawful for British Coal to impose a royalty and that different royalties can be applied in different situations. In order to determine whether the contested royalty was contrary to the objectives of the Treaty, the Commission applied, at paragraph 72 of the contested decision, a test based on the reasonableness or proportionality of a royalty rate of £5.50 or £6.00 per tonne (see Case 395/87 *Ministère Public* v *Tournier* [1989] ECR 2521).

134 The Commission states that it examined for that purpose whether, after 1 April 1990, and in the light of the offer made by British Coal, the applicant's members would enjoy prices comparable to those of British Coal and comparable access to the market for electricity-generating coal in return for reasonable royalties.

135 As a result of the new terms, the applicant's members would experience an increase of more than 20% over their previous gross figure in their margin on sales to the electricity generating companies. In the absence of any concrete data on the actual costs of production of any undertaking belonging to the applicant indicating that the resulting price differential would put its members at a competitive disadvantage, the Commission did not have any evidence before it to suggest that its conclusion was unreasonable.

136 In assessing whether British Coal's offer was compatible with Article 66(7) of the Treaty, the Commission took account, *inter alia*, of British Coal's legal obligation to ensure that coal is made available in the public interest, British Coal's property right in the coal, and the applicant's statements in its letters of 13 May 1988 and 25 May 1990 that royalties of £11 and £6 per tonne respectively were acceptable.

137 The Binder Hamlyn Report, the Commission argues, was not based on accounting evidence available from NALOO members themselves, but rather on three hypothetical cases extrapolated from British Coal's published accounts. The Report did not take into account the dual purpose of the royalty, namely to cover the administrative costs of licensing and collection of the royalty, and to remunerate British Coal's property right.

138 The Report makes a number of adjustments, all intended to favour the arguments of NALOO's members, without presenting any factual or statistical basis for so doing. Furthermore, the evidence on which the Report relied pre-dates the period covered by the contested decision.

139 The Commission points out that, although it recognized the differences of scale between British Coal's operations and those of NALOO members, it did not, in particular, agree that the costs of the licensed opencast operators were 20% higher than those of British Coal. In the first place, there was no evidence before it as to

what the costs of NALOO members themselves were. Second, there was evidence that the parties concerned had continued to operate profitably while paying royalties of up to £16 per tonne. In that regard, the Commission notes that licensed production has experienced a steady increase from year to year.

140 It points out that, contrary to the applicant's assertions, British Coal and licensed mines do not compete for the same reserves, since British Coal is not interested in small-scale deposits. British Coal and the small mining companies have different operating arrangements, as the applicant itself recognized in point 10 of its complaint of 29 March 1990.

141 Any economies of scale due to the larger size of British Coal operations are more than counterbalanced by the fact that the licensed opencast mines work shallow deposits where the amount of overburden to be removed for each tonne of coal extracted is very much lower. The situation of the licensed mines has changed as a result of the tenfold increase, brought about by the 1990 Coal Industry Act, of the limit on the size of the reserves which those mines can now work. The ability of NALOO members to operate sites will be reflected in the rate of coal recovered, a fact not taken into account in the Binder Hamlyn Report, which deals only with the situation prior to 1 April 1990.

142 British Coal adds that the most remarkable feature of the Report is its use of assumed differentials to calculate licensees' costs, when the information as to actual costs must have been available to NALOO and no doubt also to the authors of the Binder Hamlyn Report. British Coal finds it inconceivable that, had the actual figures of licensees' costs supported NALOO's complaint, they would not have been made available to the Commission. NALOO, it claims, preferred to draw from British Coal's published accounts artificial and inaccurate deductions and extrapolations.

143 British Coal stresses that there is no reason to believe that the licensees' fixed costs per tonne are significantly higher than its own. There is no evidence that licensees have higher costs of site acquisition than British Coal. The fact that the quantity of coal extracted per hectare from licensed sites is lower than from British Coal sites does not necessarily indicate higher costs, the principal determinant for both British Coal and the licensees being the ratio of overburden to coal won.

144 British Coal also submits that its costs are substantially higher than those of licensees and include washing, blending and contract-supervision costs. Furthermore, its overheads include contributions to deep mine overheads and other elements not incurred by licensees.

145 According to British Coal, the first method used by the Binder Hamlyn Report, that of making additions to British Coal's costs, ignores the fact that the coal being licensed is an asset belonging to British Coal. Moreover, the adoption of a profit element of 37% is arbitrary and based on the comparison of one year's operating costs and selling prices. There is no logical explanation why this margin must be applied to administration costs to determine the royalty rate. In particular, this approach employs assumptions as to British Coal's costs which are quite unjustified.

146 British Coal notes that the Binder Hamlyn Report criticizes certain alleged flaws in British Coal's methods of calculation, one of which is said to be its lack of information relating to licensees. However, even in making provision for these weaknesses, the Report does not employ actual figures from licensees but instead makes 'reasonable assumptions'.

147 Finally, the method based on British Coal's operating profits involves taking British Coal's profit and attempting to adjust this 'for the different prices obtainable by the licensed operators, and then the different costs which the licensed operators face'. This again employs an arbitrary costs differential of 15%.

148 In reply, the applicant states that it fails to see the relevance of the consideration of British Coal's statutory obligations, since no statutory provision permits British Coal to abuse its dominant position in relation to licensed producers. Nor does the Commission explain why it relies on British Coal's property rights in the coal reserves or what bearing these have on the proper level of royalty.

149 British Coal, the applicant argues, has traditionally imposed the highest possible royalty and the only reason for which this has ever been reduced is as a result of pressure of litigation or public inquiry. It is wrong to state that NALOO accepted the reasonableness of any particular royalty: any provisional acceptance of that nature would have depended on compliance with other conditions, none of which was met.

150 Contrary to what the Commission contends, the authors of the Binder Hamlyn Report operated on the basis of a cost differential of 15%, and not 20%, between British Coal's costs and those of the licensees, and the Report takes account of British Coal's property right and the administrative costs of operating the licensed system.

151 The Commission's criticism that the Binder Hamlyn Report relied on British Coal's costs and not those of NALOO is not only illogical but also inconsistent since throughout the investigation British Coal's cost structure was taken as a benchmark.

152 The Commission never required the applicant to put forward its own costings. This was explicable on a number of grounds.

153 In order to determine a flat-rate royalty level which would be reasonable for all concerned, the only sensible approach was to use the costs of the largest producer in the industry, namely British Coal. Furthermore, British Coal uses its own costs to calculate the royalty, even though it is in possession of detailed costings for the licensed sector as the operator of the system of supply licences, which require their holders to supply it with information on costs. The contested decision itself uses British Coal as a benchmark for determining the lawfulness of the royalty.

154 The Commission never objected to the method of starting with British Coal's costs and calculating the cost differential between British Coal's opencast pits and those of the licensed operators. Had the Commission at any time considered that the approach adopted both by the applicant and by itself was incorrect, it is inconceivable that it would have confirmed its validity throughout the entire proceedings and would not have requested the applicant to provide costings relating to its own members as the basis for determining whether the royalty was reasonable.

155 Finally, in so far as British Coal applies a concessionary operating scheme for private operators, in parallel with the licence contracts, its own extraction costs reflect a highly competitive costing.

156 In contrast, the costs of the applicant's members, who do not represent all of the licensed opencast operators in the United Kingdom, do not necessarily reflect those of the sector as a whole. Licensed operators are multi-faceted and it is for that reason impossible to obtain accurate average costings, since each company allocates its costs in a different manner and it was always accepted that it was impossible for NALOO to obtain accurate and meaningful costs data for the

whole of the licensed sector. Even if that had been possible, it would have taken much time, involved huge costs and required the cooperation of all licensed producers in the United Kingdom. At the time when the complaint was submitted, it was plain to the applicant and the Commission that, given the time constraints, it was not possible to undertake any such exercise.

157 Finally, and in any event, the applicant identified and quantified the cost differentials between itself and British Coal. This work was carried out by experts and was never queried by the Commission. The fact that the Commission devoted time in its statement of defence to analysing the cost differential between the licensed sector and British Coal establishes that this was the basis of negotiations between the parties throughout the investigation.

158 The Binder Hamlyn Report is more up-to-date than the data set out in the contested decision: while the Commission used pre-1 April 1990 data derived from British Coal, which ignore licensees' own costs, NALOO also used data prior to 1 April 1990 derived from British Coal's published accounts but adjusted to take account of licensees' own costings.

159 The Commission's argument that British Coal and the licensed sector do not compete for the same reserves is incomprehensible: the documents which NALOO submitted clearly establish that British Coal refuses to license reserves in which it is interested and has, moreover, made statements to that effect.

160 The Commission failed to understand the relationship between costs and coal-seam depth: the fact that a licensee can only exploit shallow sites is a major restriction, not an advantage. Consequently, the system obstructs licensees and restricts

their opportunity to spread their fixed costs. In any event, the quantitative limit of 250 000 tonnes remains a severe restriction on the competitive relationship between British Coal and the licensed sector, a fact which the Commission accepted, at least at the start of the investigation.

161 With regard to profitability, the Binder Hamlyn Report took account, in its analysis of the royalty, of the increased size of possible sites available to licensees pursuant to the 1990 Coal Industry Act.

162 Furthermore, private operators are clearly at a disadvantage in so far as British Coal does not pay royalties and obtains from the electricity generating companies a coal price which is 12% higher than that of licence holders.

163 NALOO points out that the statistics for the licensed sector do not in any way indicate that this sector has prospered. In any event, the question is not whether the licensees continued trading or prospered over a fixed period of time, but rather whether they would have prospered more and achieved greater output had the royalty been at a lower, lawful level from the outset.

164 In response to British Coal's argument that the Binder Hamlyn Report rejects the figure of 20% differential for operating costs initially put forward by NALOO, the latter states that the accountants were expressly instructed to adopt a prudent and conservative cost differential in order to strengthen the force of the conclusions reached in the Report.

Findings of the Court

165 The Court notes at the outset that, according to the contested decision, the increase to 157p/Gj of the price paid by the electricity generating companies to the licensed operators and the reduction of the royalty from £11 per tonne to £5.50 or £6.00 per tonne with effect from 1 April 1990 were apt to improve considerably the gross profits of the licensed opencast operators.

166 In those circumstances, the Commission formed the view that, in the light of the profit which British Coal had made in operating its opencast sites during the financial year 1989/90 with an undisputed income of 160p/Gj, the new royalty rate was not contrary to Article 66(7) of the Treaty, although there were differences, notably of scale, between British Coal's opencast operations and those of the licensed operators.

167 On the basis of the inventory of operating costs of licensed opencast sites set out in Annex G to its complaint of 29 March 1990 and drawn up on the basis of British Coal's official accounts for 1988/89, the applicant concluded that the royalty of £11 per tonne was too high by £8.50 per tonne (34p/Gj) and that the price of 120p/Gj then being offered by the electricity generating companies was too low by £8.50 per tonne (34p/Gj).

168 The applicant was thus seeking, by way of its complaint, to secure an overall improvement of 68p/Gj in the operating conditions for its members during the financial year 1988/1989.

169 However, the prices paid by the electricity generating companies to the licensed operators were increased from 1 April 1990 to 157p/Gj, 37p/Gj more than the abovementioned former price of 120p/Gj, whilst the royalty of £11 per tonne (44p/Gj) was reduced to £5.50 or £6.00 per tonne (24p/Gj), 20p/Gj less, with effect from the same date.

170 As a result, the applicant definitively obtained an overall improvement in the conditions governing the operation of opencast sites by its members of approximately 57p/Gj.

171 Moreover, as the Commission stated at point 53 of the contested decision, without being challenged on the matter by the applicant, the agreement provided for lower prices for British Coal than those previously obtained from the electricity generating companies, thereby resulting in a relative improvement in the situation of licensed opencast sites.

172 In those circumstances, the difference of approximately 11p/Gj (68p/Gj -57p/Gj) between the overall results definitively obtained by the applicant (37p/Gj +20p/Gj) and the objective which it had set itself (34p/Gj +34p/Gj) in Annex G to its complaint does not, in itself, appear to be such as to enable the Court to find, on first analysis, that, by adopting the contested decision, the Commission was guilty of a manifest breach of Article 66(7) of the Treaty.

173 It is necessary, however, to consider whether the evidence adduced and the arguments set out by the applicant are sufficient to alter that provisional conclusion.

174 The Court finds in this regard that the three methods employed by the applicant for calculating the royalty, in order to demonstrate that the royalty rate is excessive and to contest the legality of the decision, are based on British Coal's statistics for financial years preceding the financial year 1990/1991, which ended on 31 March 1991.

175 With regard to the first method, the authors of the Binder Hamlyn Report state at point 4.5 thereof that they based themselves on British Coal's operating costs for the financial year 1989/1990.

176 With regard to the second method, the Report notes at point 5.14 that 'since the information relating to the financial year 1990/1991 is not yet available, it has been assumed that the costs were the same as those for the financial year 1989/1990, in view of the fact that the figures were similar for the previous four financial years'.

177 In connection with the third method, the Binder Hamlyn Report also assumes that British Coal's operating profit remained constant at £13.34 from the 1989/1990 financial year to that of 1990/1991.

178 However, the applicant cannot, for the purposes of demonstrating that the royalty rate of £5.50 or £6.00 per tonne levied by British Coal since 1 April 1990 is excessive, validly rely on a simple extrapolation for the 1990/1991 financial year of the operating results for British Coal's opencast sites recorded during the previous financial year up to 31 March 1990.

179 It is clear from the applicant's letter to the Commission of 6 December 1991, mentioned above, that the operating results for British Coal's opencast sites recorded during the financial year 1990/1991 are appreciably different from those of the previous financial year, since the operating profit of its sites fell from £13.34 per tonne to £8.86 per tonne by reason of, in particular, the increase in their operating costs.

180 Moreover, far from producing the actual operating costs of its members with a view to establishing that the royalty is excessive, the applicant stated, at point 25 of its reply, that it had no accurate and meaningful costs data for the whole of the licensed sector.

181 It also stated that it did not have accurate average operating costs for individual licensed operators, since these are multi-faceted, being involved in activities such as civil engineering, transport haulage and property, and each allocates its costs in a different manner, the only 'pure' opencast operation in the United Kingdom being that of British Coal.

182 Furthermore, the applicant stated in Annex G to its complaint of 29 March 1990 that the costs of operating each site differ from the costs of operating any other site and that consequently the average costs of any one producer differ from the average costs of any other producer.

183 In the absence of any comparative elements capable of supporting the applicant's assertions, therefore, the Court cannot rely on the difference alleged by the applicant between the operating costs of British Coal's opencast sites and those of the licensed operators, and still less so when the applicant assessed the difference at 20% in its complaint and then reduced it to 15% in the Binder Hamlyn Report, without any justification other than the express instruction given to the accountants to adopt a prudent and conservative approach in order to strengthen the force of the conclusions reached in their Report.

184 Moreover, as the applicant notes at point 3.9 of its application, the majority of licensed mines are shallow and utilize in-seam drift access to reduce capital and operating costs. Similarly, at point 10 of its complaint of 29 March 1990, the applicant stressed that its members are successful in locating operating sites which make it possible to reduce to below 18: 1 the ratio of overburden to be removed against coal to be extracted. In the applicant's own view, overburden represents the main variable direct cost for opencast sites.

185 It is thus clear that the accountancy report purporting to establish that the disputed royalty rate was excessive was not drawn up on the basis of British Coal's accounts for the financial year 1990/1991 and neither did it make use of accounting data obtained from NALOO members.

186 Consequently, the Court cannot accept the applicant's contention, set out above, to the effect that the Binder Hamlyn Report establishes that the royalty is excessive irrespective of which method is used, on the basis of 'an accountancy exercise ... based upon BCC's annual accounts and upon accounting data Binder Hamlyn collected from members of the applicant association'.

187 In particular, the Court cannot attach sufficient probative value to the first method of calculation proposed by the applicant and based on the application, to the cost represented by the levying of the royalty, of the profit margin of British Coal's opencast sites.

188 In the first place, the applicant is unable to justify the mere extrapolation to the 1990/1991 financial year of the 37% profit margin of British Coal's opencast sites which the applicant identified on the basis of the 1989/1990 financial year, even though the operating results of those sites changed from one financial year to the next, as has been found above.

189 Second, even if one were to assume that the profit margin of British Coal's opencast sites was 37% during the 1990/1991 financial year, the applicant has not provided any justification or even any explanation for applying that profit margin to the cost which British Coal incurred in levying the royalty.

190 Third, the first method proposed by the applicant fails to take account of, in particular, either the overheads which British Coal necessarily incurs in extracting deep coal, even though this represents the essential part of British Coal's production, or the expenses statutorily imposed on it as a public undertaking and which the licensed operators are not required to pay.

191 Finally, the method advocated does not, contrary to the applicant's submission at point 23 of its reply, appear to take account of the factor concerning remuneration of British Coal's property right in the coal, for which the royalty also constitutes the consideration and the principle of which has not been contested by the applicant.

192 Nor can the Court regard as proven the conclusions which the applicant reaches using the second method of calculation, namely that which British Coal claims to use.

193 The table annexed to the Binder Hamlyn Report assesses at a uniform 156p/Gj the delivered costs incurred by licence holders during the two financial years 1989/1990 and 1990/1991.

194 This stability in operating costs gives rise to doubt as to whether, as the applicant asserts, the authors of the Binder Hamlyn Report took account in their calculations of the tenfold increase in the maximum size of the sites which could be granted to licensed operators under the 1990 Coal Industry Act, which should logically have resulted in variations in the operating costs of those sites from one financial year to the next.

195 Nor has the applicant been able to adduce conclusive evidence to support its assertion that, in the light of the average operating costs of licensed opencast sites, the second method of calculation resulted in a negative royalty.

196 In that regard, the applicant declared at point 25 of its reply that it was unable to produce accurate average costs data for licensed operators, either individually or as a whole.

197 Furthermore, in Annex G to its complaint of 29 March 1990, it calculates the operating costs of licence holders at more than 135p/Gj by adding 20% to the operating costs of British Coal's opencast sites during the 1988/1989 financial year, whereas the Binder Hamlyn Report calculates the operating costs of those same sites at 136p/Gj ex-mine (146p/Gj with delivery), adding only 15% to the operating costs of British Coal's opencast sites for the same 1988/1989 financial year.

198 The imprecise, and even contradictory, nature of those calculations therefore does not support the conclusions which the applicant considers itself entitled to reach by using the second method for calculating the royalty.

199 Finally, the Court also does not find conclusive evidence to support the applicant's arguments contesting the soundness of the third method, by which the Commission considered the contested amount of the royalty to be reasonable.

200 With a view to demonstrating that this third method must lead to the conclusion that the licensed operators could not make a profit with a royalty of £5.50 or £6.00 per tonne, the applicant states that the authors of the Binder Hamlyn Report took account of the profit per tonne achieved by British Coal's opencast sites by weighting it in accordance with the different prices obtained by licensed operators and the various costs which they necessarily incur.

201 This assertion is not convincing, since the applicant asserts elsewhere that it was unable to produce accurate and significant average costs data for licensed operators, whether individually or as a whole.

202 Moreover, the difference between the operating costs of British Coal's opencast sites and those of the licensed operators for the 1990/1991 financial year, calculated by the authors of the Binder Hamlyn Report at 17p/Gj, does not rest on any verifiable factual basis.

203 In that regard, the authors of the Binder Hamlyn Report calculated the same ostensible difference of 17p/Gj for the 1989/1990 financial year. Since the operating costs of British Coal's opencast sites were calculated at a uniform 111p/Gj for both the 1989/1990 and 1990/1991 financial years, as established by Annex 1 to the Report, again it does not appear, from a reading of that Report, that its authors took account of the tenfold increase in the maximum size of opencast mines which licence holders have been entitled to operate since the 1990 Coal Industry Act entered into force.

204 It follows from all of the foregoing that the applicant has not adduced conclusive factual evidence capable of supporting its claims.

205 It is necessary, none the less, to point out that, in its letter of 28 August 1990 to the United Kingdom's Permanent Representative, the Commission had expressed the view that the royalty of £7 per tonne then being levied by British Coal appeared in any event to be too high.

206 However, that statement, which was moreover expressed in a tentative manner, was made within an economic context in which the level of prices paid to licensed producers by the electricity generating companies was appreciably lower than that to which those prices were raised with effect from 1 April 1990.

207 The Commission was thus lawfully able to take the view in the contested decision that the royalty, reduced in the interim to £5.50 or £6.00 per tonne, was not so high as to be unlawful, in view of the increase to 157p/Gj of the purchase price which the electricity generating companies applied in favour of the licensed operators with effect from 1 April 1990.

208 Furthermore, the applicant itself declared in its letter of 13 May 1988 to British Coal that it would accept that the royalty on opencast sites was reasonable if British Coal were to reduce it from £13.50 per tonne, the amount then being charged, to £11 per tonne.

209 Contrary to the applicant's assertions, it is not apparent from the letter that this concession, which was given bearing in mind all of the conditions then obtaining, was subject to other conditions being satisfied.

210 It is clear from the documents before the Court and, in particular, from the applicant's replies to the questions put by the Court, that at the time when the royalty was reduced from £13.50 to £11 per tonne, the prices being paid by the electricity generating companies to the licensed operators were considerably below the level to which they were raised with effect from 1 April 1990.

211 Moreover, the applicant itself acknowledged during the proceedings before the Commission that, in view of British Coal's size, a slight difference between the prices offered to British Coal and those offered to the private sector might be reasonable and that a price difference of 5p/Gj, or indeed even 10p/Gj, might be justified.

212 Finally, the argument which the applicant, in its letter of 6 December 1991, draws *a posteriori* from the fall in British Coal's operating profit from £13.34 per tonne for the year ending 31 March 1990 to £8.86 per tonne for the year ending 31 March 1991 is not valid.

213 Quite apart from the fact that this factor could not in any event be conclusive, since it cannot be compared with the actual operating results of the licensed opencast mines, there is nothing in the documents before the Court to indicate that the Commission had access to the latter figures when it adopted the contested decision.

214 In conclusion, in the absence of sufficiently cogent evidence to the contrary, the difference still outstanding between the overall conditions actually secured by the applicant following the intervention of the Commission and the objectives which it had set itself in its complaint, in particular in Annex G thereto, is not sufficient to justify the conclusion that the Commission was manifestly in breach of Article 66(7) of the Treaty when it formed the view that the royalty of £5.50 or £6 per tonne which British Coal charged licensed opencast sites with effect from 1 April 1990 was not so high as to be contrary to that provision, bearing in mind the price increase introduced by the electricity generating companies in favour of licensed operators with effect from 1 April 1990 and the reduction in the prices paid by the electricity generating companies to British Coal.

215 It follows that the first plea in law must be dismissed.

2. The second plea in law: breach of Articles 4(d), 60 and 65 of the Treaty

Arguments of the parties

216 The applicant submits essentially that, by not applying Articles 4(d), 60 and 65 of the Treaty to the contested royalty rate, the contested decision manifestly failed to comply with those provisions.

The first part of the second plea

217 The applicant contends first that Article 4(d) of the Treaty, which prohibits restrictive practices that tend towards the sharing or exploiting of markets, lays down a prohibition that is independent of the other Treaty provisions. It constitutes a fundamental provision establishing the common market and the common objectives of the Community, from which flow the competition rules contained in Articles 60 to 67 of the Treaty.

218 In response, the Commission, supported in substance by British Coal, states that, in the contested decision, it ensured compliance with Articles 2, 3 and 4 of the Treaty, which establish the fundamental objectives thereof, and that it also observed the procedure for the application of those principles, as laid down in Article 66(7) of the Treaty, in accordance with the case-law (Case 13/57 *Wirtschaftsvereinigung Eisen-und Stahlindustrie* v *High Authority* [1957-1958] ECR 265, Joined Cases 27/58, 28/58 and 29/58 *Compagnie des Hauts Fourneaux et Fonderies de Givors and Others* v *High Authority* [1960] ECR 241, at page 252, and Case 30/59 *Steenkolenmijnen* v *High Authority* [1961] ECR 1, at p. 40). Having made relevant findings under Article 66(7) of the Treaty, the Commission claims that it was not under an obligation to consider the same matters under other Treaty articles which are less specific.

The second part of the second plea

219 Secondly, the applicant submits that Article 60 applies to the royalty-setting practices of British Coal and that the imposition of the opencast royalty has had a direct effect on British Coal's ability to purchase coal produced under delivered licences. A royalty for the production of coal has a direct effect on the price at which coal is sold by the licensee. Article 60 is in any event sufficiently broad to include simple royalty setting by a dominant producer such as British Coal.

220 Against this, the Commission and British Coal argue that both the terms of Article 60 and the secondary legislation adopted under it make it clear that Article 60 is concerned with pricing practices of vendors towards coal users. Article 60 does not apply to extraction licences or to associated royalty and payment terms. These royalties are sums paid, not by purchasers of coal but by those who work the coal, to those who own it. The fact that the royalty has an effect on price formation is not relevant under Article 60.

221 In any event, it is argued that British Coal, as a seller, does not discriminate between mines operating under royalty licences since all such mines pay the same royalty rate.

The third part of the second plea

222 The applicant notes that, while the mere existence of a clause requiring payment of a royalty is not a breach of Article 65, the imposition of an excessively high royalty pursuant to that clause may be a breach since, in those circumstances, the licensing agreement significantly restricts competition in the market. The fact that the Commission has found that there was a breach of Article 66(7) does not release it from its duty to examine British Coal's royalty-setting practices in the light of Article 65.

223 The Commission and British Coal argue that the applicant confined itself, in two letters of 15 February 1991 and 14 March 1991, to relying on Article 65 of the Treaty in the context of British Coal's licensing scheme, a matter specifically excluded from the scope of the contested decision. Article 65 was not mentioned in relation to the level of the royalty.

224 In any event, the Commission gave reasons for the contested decision under Article 66(7) of the Treaty and was not under a duty to go on to consider all other possible claims.

225 British Coal adds that the plea that the royalty was too high was rejected by the Commission pursuant to Article 66(7) of the Treaty, and it is inevitable that the Commission would have reached the same result under Article 65. In any event, the Commission has a discretion, in appropriate cases, to take its decision under either or both of Article 65 and Article 66(7) of the Treaty, as it may with respect to Article 85 and Article 86 of the EC Treaty (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, point 116). In the present case, Article 66(7) was obviously the more appropriate provision, as NALOO accepted at point 8 of its summary of submissions of 5 September 1990.

Findings of the Court

226 According to the summary of its arguments, drawn up at the Commission's request on 5 September 1990, the applicant expressly stressed that 'Article 66(7) covered all the breaches' by British Coal of the provisions relied on.

227 It follows that, by having thus induced the Commission to concentrate its investigation and legal analysis on that provision, the applicant cannot argue, in support of its application for annulment, that the contested decision dismissing its complaint did not apply Articles 4(d), 60 and 65 of the Treaty to the disputed royalty rate.

228 Moreover, according to well-established case-law, Article 4 of the Treaty applies only in the absence of more specific rules; where its provisions are restated or elaborated on in other parts of the Treaty, texts relating to one and the same provision must be considered as a whole and applied together (see, in particular, the judgments in Joined Cases 7/54 and 9/54 *Groupement des Industries Sidérurgiques Luxembourgeoises* v *High Authority* [1954-1956] ECR 175, *Wirtschaftsvereinigung Eisen-und Stahlindustrie* v *High Authority*, cited above, *Banks*, cited above, paragraph 11, and *Hopkins*, cited above, paragraph 16).

229 Since Article 66(7) of the Treaty gives effect to Article 4(d) (see paragraph 12 of *Banks*, cited above), the contested decision must be regarded as having applied those two provisions at the same time, even though only Article 66(7) is expressly mentioned as the basis for rejecting the complaint.

230 Next, Article 60 of the Treaty does not apply to coal extraction licences issued by British Coal, since the position of that provision within Chapter 5 of the Treaty makes it clear that it relates only to unfair and discriminatory product-pricing practices.

231 British Coal cannot be regarded as engaged in the sale of products where it grants licences to extract coal (see paragraph 13 of *Banks*).

232 As regards the part of the plea based on failure to apply Article 65 of the Treaty, it was only at the stage of the application that the applicant claimed that 'whilst the mere existence of a clause requiring payment of a royalty is not a breach of Article 65, the imposition of an excessively high royalty pursuant to that clause can be a breach since, in these circumstances, the agreement has a significantly restrictive effect upon competition in the market as a direct result of the manner of its operation'.

233 In its previous correspondence, the applicant relied on Article 65 only in relation to either the supply agreement between British Coal and the electricity generating companies, which is not the subject of this dispute, or the general extraction licence system, but without specifically mentioning that the disputed royalty rate might be unlawful in the light of that provision.

234 In these circumstances, regard being had to the applicant's abovementioned affirmation that Article 66(7) of the Treaty covered all the contested practices of British Coal, the applicant cannot complain that the Commission did not rule on whether the disputed royalty rate was lawful under Article 65 of the Treaty.

235 Furthermore, the Court of Justice has ruled that the Commission is entitled to conduct infringement proceedings on the basis of Article 85 or Article 86 of the EC Treaty with regard to a contract imposing on the contracting partners of an undertaking in a dominant position obligations which amount to abuse of a dominant position, and which could also fall under Article 85, in particular Article 85(3) (*Hoffmann-La Roche*, cited above, point 116).

236 Similarly, the Commission was entitled in this case to consider the disputed royalty rate in the light of Article 66(7) of the Treaty alone, which might quite properly have seemed to the Commission to be the provision most apt to cover the case.

237 It was all the more entitled to proceed in this fashion given that it had been expressly encouraged to do so by the applicant in the summary of its claims of 5 September 1990. The applicant itself confirmed at points 4.108 and 4.109 of its application that 'it is accepted by the Court that Articles 85 and 86 EEC constitute a seamless web and seek to serve the same objectives' and that 'a similar rule applies under the ECSC Treaty since all of the competition rules (including Articles 65 and 66) serve the same objectives set out in Article 4 ECSC'.

238 Furthermore, in so far as the applicant has not produced statistics to justify a finding that the royalty rate of £5.50 or £6.00 per tonne was unlawful under Article 66(7) of the Treaty, it has not provided the Commission with the information necessary to enable it to examine whether that same royalty rate was lawful under Article 65.

239 It follows from all of the foregoing that the plea based on manifest failure to comply with Articles 4(d), 60 and 65 of the Treaty must be dismissed.

3. The third plea concerning the administrative proceedings

240 The applicant sets out its third plea in three parts.

The first part of the third plea

Arguments of the parties

241 The applicant submits that the Commission is required to examine fully all the evidence, even where it rejects a complaint. In the applicant's view, it is clear from Annex G to the initial complaint of 29 March 1990 that the Commission had at its disposal information expressing in terms of pence/Gj the difference, estimated at a minimum of 20%, between the operating costs of British Coal's sites and those of the licensed opencast operators. As soon as the complaint had been lodged, it must have been obvious to the Commission that this difference constituted a 'key problem' in fact and in law.

242 The contested decision, it claims, makes no reference to the Binder Hamlyn Report and contains no indication that the Commission took account, as it claims, of all the matters mentioned in its statement of defence. The Commission thus refused to take account of material evidence presented to it by the complainants which objectively and credibly established that the position taken by the Commission in its letter of 21 December 1990 was incorrect and untenable.

243 The complaint of late submission of evidence made by the Commission in this regard is, the applicant submits, unjustified and, moreover, difficult to understand, since the Commission continues to claim that it accepted and examined this evidence.

244 Against this, the Commission and British Coal argue that a distinction must be drawn between situations in which the Commission takes a decision that a practice restricting competition is illegal and those in which it exercises its power to accept or reject a complaint.

245 In the latter case, it is for the complainant to set out the facts in support of his claim (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 79). In particular, where the Commission has exclusive competence to take a decision under Articles 65 and 66(7) of the Treaty, it is under a duty to examine the issues of fact and law indicated by the complainant in order to decide whether the competition rules have been infringed (Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, paragraph 19, and Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 18) and set out its views on the complaint when so requested, as in the present case (Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875).

246 The applicant is essentially contesting the elements of fact on which the Commission based itself in concluding that the royalty applied with effect from 1 April 1990 was reasonable. The Court's task in this regard, it is argued, is to examine the evidence originally submitted to the Commission and determine whether there are facts which would reasonably support the Commission's arguments and conclusion.

247 The applicant itself failed to provide the Commission with the financial raw material relating to individual licensees or licensees taken as a whole, even though it could easily have obtained such information. The applicant preferred to make artificial and inaccurate deductions and extrapolations from the accounts published by British Coal.

248 Even though it was under no obligation whatever to take account of the Binder Hamlyn Report, which was submitted to it only when it was about to draw up the definitive version of the draft decision, a fact of which NALOO could not have been unaware, the Commission none the less studied it and formed the view that it did not contain any information such as to make it alter its conclusions, and it informed the applicant accordingly.

249 The applicant's arguments are inconsistent in so far as it affirms its confidence in the force of the evidence submitted, thereby supporting the view that any further investigations would have been superfluous, while at the same time maintaining

that the Commission's failure to conclude that British Coal was acting unlawfully could only be due to its improper failure to carry out such further investigations.

Findings of the Court

250 The applicant submits, on the one hand, that the Commission refused to take account of relevant and conclusive information which the applicant submitted to it but declares, on the other hand, that it is unable to produce accurate information on the operating costs of licensed sites, whether individually or as a whole. In these circumstances, and given that the applicant itself considered that such information was decisive, the applicant's own statements show the plea in law to be unfounded.

251 According to points 4.40 and 4.137 of the application and point 7 of the reply, moreover, the Commission informed the applicant that '[it] considered the BH Report to be "irrelevant"', that 'no account would be taken of it in the final decision' and that 'when asked whether the Commission had examined the evidence it was replied that the evidence was "irrelevant"'.

252 Finally, the complaint essentially challenges the soundness of the contested decision. As is clear from the examination of the first two pleas in law, however, there is no evidence that the Commission manifestly failed to comply with the Treaty provisions relied upon.

253 The first part of the plea must therefore be dismissed.

The second part of the third plea in law

Arguments of the parties

254 The applicant contends that the contested decision should be annulled on the ground that the Commission did not carry out a full investigation into the production costs of the licensed sector and, in particular, failed to request clarification of the evidence submitted to it in that regard, even though it had been accepted both by the applicant and by the Commission itself, in the contested decision, that those costs were decisive in determining whether Article 66(7) of the Treaty had been infringed.

255 It also argues that the Commission failed to require British Coal to produce information to enable it to verify the force of the evidence submitted to it by the complainant undertakings. In particular, the evidence contained in the Binder Hamlyn Report was never sent to British Coal, which was in a position to submit its observations only at the stage of the judicial proceedings.

256 The Commission rejects the charge that it did not carry out a proper investigation.

257 British Coal submits that the crucial evidence which was missing was not its own evidence but the applicant's evidence of its own members' financial situation such as to justify the applicant's allegations. British Coal states that it could never have produced such evidence.

Findings of the Court

258 According to well-established case-law (see *Automec*, cited above, paragraph 79), it is for the complainant to bring to the Commission's notice the elements of fact and law underlying its complaint.

259 The applicant, which ought to have had better information at its disposal than others, stated that it was unable to produce accurate operating costs for licensed mines, either individually or as a whole.

260 Even if, as the applicant contends, one were to assume that British Coal, as the operator of the licensing system, had information relating to the operating costs of the applicant's members, it does not appear in this case that the Commission was under any obligation to request such information from British Coal.

261 On the contrary, it would have been for the applicant to collect information on the actual operating costs of its members extracting coal under royalty licences and to forward such information to the Commission so as to enable it to assess any difference there might be between those costs and the operating costs of British Coal's opencast sites.

262 There was in any event no obligation to send the Binder Hamlyn Report to British Coal.

263 It is common ground that the Commission informed the applicant that it did not regard the Binder Hamlyn Report as being relevant.

264 According to the documents in the case, British Coal, in its response to the applicant's complaint, stated that it would perhaps be more appropriate for the applicant to communicate its members' average costs, which would give a more accurate figure than the method followed in Annex G, which, as described, was hopelessly flawed.

265 All the parties are agreed that, in the same way as Annex G, the Binder Hamlyn Report is not based on the average operating costs of opencast extraction licence holders but on an extrapolation of British Coal's costs plus a flat-rate differential of 15%.

266 In those circumstances, the applicant cannot criticize the Commission for not having carried out an exhaustive investigation into the production costs of the licensed mines.

267 The second part of the plea in law must therefore be dismissed.

The third part of the third plea in law

Arguments of the parties

268 The applicant contends that the Commission has infringed its rights of defence. It claims that during the written procedure the Commission raised a number of points which had never previously been brought to the applicant's attention and on which it was never properly permitted to submit its observations. In particular, it claims that the Commission never took issue with the method based on British Coal's costs and the cost differential between British Coal's opencast sites and those of the licensed operators.

269 At no time did the Commission refer to the applicant the specific objections and criticisms which it might have had of the Binder Hamlyn Report. Had it wished to reject evidence, it ought to have informed the applicant of its reasons for so doing in order to enable the latter to state its objections.

270 Although it had announced the matter in principle in August 1990, it also neglected to organize a hearing to enable the applicant to submit its evidence in a forum to which British Coal would also have had access.

271 The Commission, on the other hand, claims that it complied scrupulously with the procedures laid down in Article 66(7) of the Treaty, which do not require that a hearing be held. In particular, it gave the applicant every opportunity to set out its views. The applicant took part in several meetings with the Commission and exchanged extensive correspondence with it. Notwithstanding the two-week time-limit for a reply imposed by the Commission in its letter of 21 December 1990, the applicant continued to correspond with the Commission for a period of some five months and made a number of submissions, many of which were completely unrelated to the terms of the original complaint.

272 Although the Binder Hamlyn Report only reached the Commission six months after the provisional decision, the Commission nevertheless examined it, but did not consider that it helped to establish the true operating costs of the licensed opencast operators. The applicant does not deny that the Commission informed it that it did not consider that the evidence contained in the Binder Hamlyn Report was capable of affecting the final decision which it was preparing. There was consequently no duty on the Commission to communicate the Report to British Coal.

273 Contrary to the assertions of the applicant, the fact that the Commission, in the contested decision, does not rely on evidence submitted to it in the context of the administrative procedure does not adversely affect the right to be heard (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 100 to 103, and Case

T-66/89 *Publishers Association* v *Commission* [1992] ECR II-1995, paragraph 65 et seq.), since the assessment of the probative value of the facts in question constitutes a distinct phase in the examination of the complaint by the Commission (Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 257).

274 British Coal challenges the contention that the applicant was not given a fair opportunity to make its case. A complainant is not entitled in law to an oral hearing or to insist on British Coal's being present at such a hearing; at most, a complainant is entitled to submit written observations on the Commission's provisional decision. The applicant, it submits, had more than adequate opportunity to put its case.

Findings of the Court

275 A procedure commenced by the Commission to ensure that the competition rules are observed by undertakings does not constitute adversarial proceedings between a complainant undertaking and the undertaking that is the object of the procedure. It follows that the two undertakings concerned are not in the same procedural situation and that the complainant cannot invoke the same rights to a fair hearing as those that the other undertaking is recognized as having and under which the latter must be in a position to set out its views on the complaints which may be upheld against it, as well as on the documents forming the basis for those complaints (Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 19).

276 It follows that a complainant undertaking cannot rely on a right to a formal hearing before the Commission has rejected its complaint.

277 Furthermore, the Commission was entitled in this case *a fortiori* to form the view that there was no need to hear the applicant in view of the fact that, on its own admission, the applicant did not have conclusive evidence to justify its allegations.

278 The applicant was also in fact given an opportunity sufficient for it effectively to make its views known before the contested decision was adopted.

279 The facts of the case, as set out above, and in particular the applicant's correspondence with the Commission, show that the applicant had ample opportunity to put forward its views on the essential question of whether the disputed royalty rate was lawful.

280 In its letter of 30 October 1990 approving the compromise offer from the United Kingdom authorities, the Commission concluded that there was no need to challenge a royalty the level of which was not so high as to prevent efficient undertakings from making a profit or impose on them a significant competitive disadvantage regarding the prices obtained for their coal. The applicant had the opportunity at an early stage to contest that conclusion in its letter of 7 November 1990 to the Commission.

281 Furthermore, as is clear from the Commission's provisional definition of its position of 21 December 1990, referred to above, which substantially reproduced its conclusions of 30 October 1990, the Commission explained that it would not be adopting a definitive position until it had examined any comments which the applicant might wish to make.

282 As the applicant itself acknowledges at points 4.133 and 4.145 of its application, it subsequently provided detailed submissions and supporting accountancy data directly relevant to the criteria set out in the provisional definition of position.

283 As it also states at points 3.59 and 3.60 of its application, 'indeed the [contested] decision is in substance similar to the letter [of 21 December 1990]' and, in that letter, the Commission 'concluded ... with regard to the reasonableness ... of the royalty, in terms which are, in terms of the legal principles evinced, identical to those set out in paragraphs 72 to 74 of the [contested] Decision'.

284 The applicant later had yet another opportunity, in its letter of 14 March 1991, to criticize the Commission's position and informed it that it would be submitting the evidence in support of its allegations as soon as it became available.

285 Finally, the applicant was subsequently in a position to submit in detail in the Binder Hamlyn Report the accountancy data which, in its opinion, demonstrated that the Commission had been wrong in the conclusions which it had reached in its letter of 21 December 1990 and which it substantially included in the contested decision.

286 In particular, the Court cannot accept the applicant's contention that the Commission at no time during the administrative proceedings disputed the method of taking British Coal's costs as a starting point and then taking account of the difference in costs between British Coal's opencast sites and those of the licensed operators.

287 On the contrary, it is clear from point 45 of its letter of 21 December 1990 that the Commission was simply taking the view at that time that the differences between the operating conditions of British Coal's opencast sites and those of the licensed opencast mines did not preclude it from classifying the disputed royalty rate as reasonable.

288 In these circumstances, the third part of the plea must therefore be dismissed.

289 It follows that the third plea in law must be dismissed in its entirety.

4. The fourth plea in law: inadequate reasons for the contested decision

290 The applicant sets out the plea in three parts.

The first part of the fourth plea in law

Arguments of the parties

291 The applicant first submits that the contested decision fails to show clearly why the Commission considered a royalty of £5.50 or £6.00 per tonne to be acceptable. It fails to allow those concerned to take cognizance of the justification for the Commission's failure to intervene to reduce the royalty further, and also fails to enable the Court to exercise its powers to review the economic facts and circumstances.

292 It claims that the Commission failed to explain, in paragraph 74 of the contested decision, why it adopted a test for determining whether the royalty was lawful under Article 66(7) of the Treaty which relied on an analysis of British Coal's costs, whereas it set out, in paragraph 72, a criterion based on an analysis of the licensees' production costs. In particular, the Commission failed to explain what was to be understood by the terms 'make a profit' and 'significant competitive disadvantage'.

293 The contested decision does not indicate why the Commission failed to take account of the differences in the cost structure between British Coal's opencast sites and those of the licensed operators, even though it was in possession of directly relevant evidence establishing the opposite and expressly accepted, at paragraph 74 of the contested decision, that there were significant cost differences.

294 Paragraph 72 of the contested decision, it contends, fails to indicate that the Commission took account of the facts and matters referred to in the statement of defence. If such was the case, it does not clearly follow from the decision, which is therefore inadequately reasoned.

295 In reply, the Commission, supported in substance by British Coal, argues that it set out clearly the reasons for its conclusions, in accordance with Articles 5 and 15 of the Treaty and in a manner consistent with the decided case-law, and that it does not have to discuss all the issues of fact or law raised during the administrative procedure (Case 14/61 *Hoogovens* v *High Authority* [1962] ECR 253, at p. 275, Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 66, Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, paragraph 17, and Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22).

296 The application ignores entirely the balanced reasoning of the Commission in the contested decision in determining the reasonableness of the royalty. In particular, the Commission took into account the need for the licensed operators to enjoy comparable pricing and access to the market for electricity-generating coal. In its plea, the applicant has simply reiterated that the Commission placed insufficient weight on the Binder Hamlyn Report.

297 British Coal also contends that the allegation that the Commission did not adhere to the test described in paragraph 72 of the contested decision lacks any foundation. The Commission explained in the contested decision that the royalty was

only one element and could not be considered in isolation. The contested decision considered the royalty in the light of all other relevant factors which applied with effect from 1 April 1990.

Findings of the Court

298 According to consistent case-law, which also applies in the area covered by the ECSC Treaty, the statement of the reasons on which a decision adversely affecting a person, such as the contested decision, are based must, first, be such as to enable the person concerned to ascertain the matters relied upon to justify the measure adopted so that, if necessary, he can defend his rights and verify whether the decision is well founded and, secondly, enable the Community judicature to exercise its power of review as to the legality of the decision (Case 8/83 *Bertoli* v *Commission* [1984] ECR 1649, paragraph 12; Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 42, and Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 30).

299 However, the Commission is not obliged, in stating the reasons for the decisions which it takes to ensure the application of the competition rules, to adopt a position on all the factual or legal issues raised by the complainants in support of their request that the Commission should find that those rules have been breached. It need only set out the facts and legal considerations which are of decisive importance in the context of the decision (*La Cinq*, cited above, paragraph 41, *Asia Motor France*, cited above, paragraph 31, and Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147, paragraph 41).

300 Finally, the requirement of a statement of reasons must be viewed in the context of the circumstances of the case, in particular the content of the measure in question, the nature of the reasons relied on and the context in which the measure was adopted (see Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 46, and Case T-46/92 *Scottish Football Association* v *Commission* [1994] ECR II-1039, paragraph 19).

301 Contrary to the assertions of the applicant, it is clear from the preamble to the contested decision that the decision did set out the essential reasons which led the Commission to regard the royalty rate of £5.50 or £6.00 per tonne as lawful. It did so with sufficient clarity as to enable the applicant to ascertain the considerations relied upon to justify the measure adopted and the Court to exercise its power of review as to the legality thereof.

302 It appears from the reasoning of the contested decision that, in conjunction with the new volumes of sales guaranteed to the licensed operators and the increase, by some 20%, in the prices which they received for their coal, the royalty rate, reduced from £11 per tonne to £5.50 or £6.00 per tonne, was not considered so high as to be unlawful, in the light of the operating profit which British Coal was at that time obtaining from its opencast sites and notwithstanding the difference in operating arrangements between British Coal's opencast sites and those of the licensed operators.

303 The applicant cannot plausibly argue that the contested decision is illogical and inconsistent since it appears that paragraph 72, to which it takes exception, merely indicates that the level of royalty cannot be considered in isolation but must be such as to enable efficient companies to make a profit and must not impose a significant competitive disadvantage on them.

304 To that extent, the Commission did not in any way exclude the possibility of referring to the operating results of British Coal's opencast mines, notwithstanding the differences, particularly those of scale, between British Coal's opencast activities and those of the licensed operators.

305 Furthermore, in order to establish that the royalty rate of £5.50 or £6.00 per tonne was not so high as to be unlawful, the Commission was able only to refer to the operating profit of British Coal's opencast sites during the most recent completed

financial year, in the absence of significant and accurate information on the operating costs of licensed sites, whether individually or as a whole.

306 The Commission's approach appears all the less open to criticism given that, as the applicant itself has pointed out, the only sensible approach was to proceed on the basis of the operating costs of the opencast sites of British Coal, the largest producer in the sector.

307 While it is true that the Commission did not explain that its recourse to the operating results of British Coal's opencast sites was due to the fact that the licensees' operating costs were unavailable, such an omission does not constitute a defect in the reasoning of the contested decision since it is clear that the applicant must have been aware of that fact.

308 The Commission was not obliged, in the contested decision, to refute specifically the conclusions of the Binder Hamlyn Report. That document was submitted by the applicant itself as an interim report; moreover, it advocates a differential of 15% between the operating costs of British Coal's opencast sites and those of the licensed opencast mines. No explanation was given for that percentage, any more than for the figure of 20% proffered by the applicant in its complaint of 29 March 1990, and which by itself had not induced the Commission to regard the disputed royalty rate as illegal in the provisional definition of its position of 21 December 1990.

309 Furthermore, the Commission informed the applicant that it regarded the Report as irrelevant.

310 The first part of this plea in law must therefore be dismissed.

The second part of the fourth plea in law

311 The applicant contends, secondly, that the contested decision also fails to explain why the Commission did not apply Articles 4, 60 and 65 of the Treaty to the disputed royalty rate.

312 The Commission and British Coal did not submit any specific arguments in response to the applicant's allegations.

313 The Court notes that, as results from the examination of the second plea in law, the applicant requested the Commission to concentrate its investigation of the complaint and its legal analysis on Article 66(7) of the Treaty alone, and therefore it cannot now criticize the Commission for not having explained why it did not consider the other Treaty provisions invoked.

314 Moreover, Article 4(d) of the Treaty must be regarded in this case as having been applied at the same time as Article 66(7). Furthermore, according to paragraph 47 of the contested decision, Article 60 of the Treaty is not applicable to the imposition of a royalty on production inasmuch as it 'clearly applies to the pricing practices of vendors'.

315 Finally, the applicant cannot criticize the Commission for failing to explain why it did not apply Article 65 of the Treaty to the disputed royalty rate, since, as is clear from the examination of the third part of the second plea in law (see paragraph 238 above), the applicant did not even provide the Commission with the information necessary to enable it to examine whether the disputed royalty rate was lawful under Article 65.

316 It follows that the second part of this plea in law must be dismissed.

The third part of the fourth plea in law

317 The applicant also criticizes the Commission for failing to explain why it did not consider it necessary to request British Coal to comment upon the arguments which the complainants had put to the Commission.

318 The Commission and British Coal did not submit any specific arguments in response to this part of the plea.

319 The Court notes that the Commission forwarded the complaint of 29 March 1990 to British Coal. By letter of 1 May 1990, British Coal itself sent to the applicant's legal advisers a version of its observations in reply, which the applicant, moreover, attached as Annex 8 to its application.

320 Furthermore, as found in the examination of the third plea, the procedure governing the examination of a complaint does not constitute adversarial proceedings between the two undertakings concerned and the Commission regarded the Binder Hamlyn Report as being irrelevant.

321 It follows that, in the circumstances of this case, the Commission was not under any obligation to forward the Binder Hamlyn Report to British Coal.

322 Consequently, the third part of this plea cannot but be dismissed.

323 In the light of these considerations, the fourth plea must be dismissed in its entirety.

5. The fifth plea in law: misuse of powers

Arguments of the parties

324 The applicant submits that the contested decision is vitiated by misuse of powers. In support of this allegation, it sets out again the arguments submitted in respect of the four preceding pleas in law.

325 The Commission, supported in substance by British Coal, contends that the applicant does not provide any evidence that the contested decision pursued an objective other than that for which the Commission was empowered to act.

326 British Coal adds that the applicant is merely repeating criticisms which it has already previously made in the context of the other pleas, without adducing anything capable in the slightest way of constituting evidence in support of its allegations.

Findings of the Court

327 According to consistent case-law, a measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose,

of achieving an end other than that stated or of evading a procedure specifically prescribed for dealing with the circumstances of the case (see Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24).

328 The arguments submitted by the applicant in support of the four preceding pleas and reiterated in the plea here under consideration cannot in any way support the claim that there was a misuse of powers.

329 The applicant does not specify for what purpose other than that mentioned in the contested decision the Commission employed or, on the contrary, refrained from exercising the powers conferred on it by the Treaty.

330 This plea in law must accordingly be dismissed.

331 It follows from all of the foregoing that the application must be dismissed in its entirety.

Costs

332 Under Article 87 of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful in its pleas seeking annulment and the Commission has applied for the applicant to be ordered to pay the costs, the latter must be ordered to pay the costs, including those incurred by the intervener British Coal.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. Declares inadmissible the second, seventh and ninth heads of claim;

2. Dismisses the remainder of the applicant's claims;

3. Orders the applicant to pay all the costs of the proceedings, including those of the intervener British Coal.

Briët Lenaerts Vesterdorf

Lindh Potocki

Delivered in open court in Luxembourg on 24 September 1996.

H. Jung
Registrar

C. P. Briët
President