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Case C-390/98, *H.J. Banks & Co. Ltd* v. *The Coal Authority, Secretary of State for Trade and Industry ("Banks II").* Judgment of the Full Court of 20 September 2001, [2001] ECR I-6117.

1. Introduction

Although as of 23 July 2002 the Treaty establishing the European Coal and Steel Community (ECSC) is no longer in operation, the *Banks II* judgment is still of great significance after this date for a number of reasons. Regarding European substantive law, the Court of Justice makes interesting statements as to the concepts of State aid, special charges and non-discrimination between producers of coal and steel products. The ECJ also clarifies the relationship between the granting of State aid and processes of privatization of a sector of the economy (in this case, the privatization of the coal industry in the United Kingdom in the 1990s).

The Court's judgment furthermore contains institutional law issues, in particular regarding the doctrine of direct effect of Community law. In fact, it rules for the first time that, following Community legislative developments, a Treaty provision no longer produces direct effects and hence can no longer be relied upon by private individuals in the national courts of the Member States.

Logically, in this annotation we will focus on the aspects of *Banks II* which are still relevant after 23 July 2002. As of that date, the so-called first pillar of the European Union consists of two Community Treaties only. Basically the entire ECSC *acquis* has been fully incorporated into the EC Treaty, including rules on coal and steel adopted at secondary level.[1]

2. The facts and relevant legislation

As from 1 October 1995, Banks, a private company which extracts opencast coal in the United Kingdom, stopped paying the British Coal Authority

1. In general on the "death" of this very first, "supranational", Community Treaty, see e.g. Obwexer, "Das Ende der Europäischen Gemeinschaft für Kohle und Stahl", (2002) EuZW, 517; Hosman, "Bij het afscheid van het EGKS-verdrag: Droom en werkelijkheid", (2002) SEW, 134.

(BCA) the mining royalties due under certain licences. The Banks company is a member of the National Association of Licensed Opencast Operators (NALOO). The Coal Authority brought the matter before the competent British court, but in its defence, and in support of its counterclaim against the Coal Authority for repayment of the mining royalties already paid, Banks argued that the royalties demanded constituted a form of *discrimination* within the meaning of Article 4(b) ECSC. Banks pointed out that its main competitors were not required to make such payments to the BCA.

This provision of the (former) ECSC Treaty stipulated: "The following are recognized as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: . . . (b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier".

In the alternative, Banks argued that the mining royalties were caught by Article 4(c) ECSC, which prohibits "subsidies or *aids* granted by States, or *special charges* imposed by States, in any form whatsoever". The unlawful aid/special charge would exist in the form of exemption from the royalties for the other coal companies, the main competitors of the Banks company.

3. The national court's request for assistance

The Court of Appeal (England and Wales) (Civil Division) decided to refer the following questions to the Court of Justice for a preliminary ruling. First it asked whether the difference of treatment between Banks and its main competitors constituted discrimination between producers, a special charge, and/or aid within the meaning of Article 4(b) and 4(c) ECSC (quoted above). Secondly, does Article 4(b)(c) ECSC or Article 9 of Commission Decision 3632/93/ECSC produce *direct effects* and confer on private undertakings the right, enforceable in national courts, to contest a claim for mining royalties made by a public body and to claim restitution of royalties paid to it? This Commission Decision applied to the period at issue, and laid down specific rules for granting aid by Member States to its national coal industry. It authorized, under certain strict conditions and in restrictively listed cases, the grant of subsidies or aid to the coal industry which were therefore regarded as Community aid compatible with the proper functioning of the common market.[2]

2. Commission Decision No 3632/93/ECSC of 28 Dec. 1993 establishing Community rules for State aid to the coal industry (O.J. 1993, L 329/12), commonly referred to as "the

Finally the British court asked whether the fact that Banks did not challenge certain previously adopted Commission Decisions on the granting of aid to the coal industry directly under Article 33 ECSC (action for annulment) precluded Banks from raising alleged breaches of Article 4(b) or 4(c) ECSC in proceedings in the *national* courts at a later stage. Similarly, since Banks did not bring a direct action for failure to act against the Commission (under Art. 35 ECSC), in order to require the Commission to deal with the issues now raised in the proceedings before the British court, does this omission preclude Banks from raising the same issues at a later stage before this national court?

4. The judgment of the court[3]

4.1. *The concepts of State aid, special charges and discrimination between producers*

Regarding the concept of *aid*, the ECJ emphasized that this concept is wider than that of a *subsidy* because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (para 30).[4] As regards the concept of a *special charge*, the Court had already held that a charge may be presumed to be "special" and therefore prohibited by the ECSC Treaty if, by affecting unequally the production costs of comparably placed producers, it introduces into the distribution of production distortions which do not result from changes in productivity (para 32).[5] An aid therefore consists of a *mitigation* of the charges which are normally included in the budget of an undertaking, taking account of the nature or general scheme of the system of charges in question. A special charge is, on the contrary, an *additional* charge over and above these normal charges (para 33).

In the Court's view, a single measure therefore cannot at the same time constitute both an aid and a special charge within the meaning of Article 4(c)

Coal Aid Code". An *EC Regulation* has now replaced it, see further the comments under point 5.1.

3. Since the reasoning of A.G. Fennelly on the most important points did not break new ground, the Opinion is only referred to where relevant *infra*.

4. Cf. e.g. Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg* v. *High Authority*, [1961] ECR 1, at p. 19, and Case C-200/97, *Ecotrade* v. *Altiforni e Ferriere di Servola*, [1998] ECR I-7907 (para 34).

5. See Joined Cases 7 & 9/54, *Groupement des Industries Sidérurgiques Luxembourgeoises* v. *High Authority*, [1956] ECR 175, at p. 196.

ECSC. Where there is differential treatment of undertakings in the application of charges, which does not appear to be justified by the nature or general scheme of the system, it is necessary to determine what is the normal application of the system of charges, in relation to the nature or general scheme of that system (para 34).

As regards the third concept, that of *discrimination between producers*, the Court reiterated that discrimination consists in particular in treating like cases differently, involving a disadvantage for some operators in relation to others, without that difference in treatment being justified by the existence of substantial objective differences.[6] A measure relating to certain charges may constitute a form of discrimination between producers, even if it does not have the characteristics either of an aid or of a special charge.[7] Conversely, an aid does not necessarily constitute a discriminatory measure and neither can it be entirely ruled out – although this is very unlikely – that a measure imposing a special charge may not be discriminatory (paras. 35–36).

4.2. *Application of the three concepts to the facts of the case*

In applying the three concepts (aid, special charge, discrimination between producers) to the facts of the case, the Court made a distinction between two periods, both situated *after* the privatization of the coal and steel industry in Britain had taken place.

The first period began to run on 31 October 1994, the restructuring date on which the British Coal Authority acquired ownership of all the coal deposits, previously owned by the British Coal Cooperation (BCC) when the British coal industry was still a nationalized sector of the economy. That period ended when the shares of the State companies succeeding BCC as operator were transferred to the private undertakings to which tenders were awarded. The second period began when these private undertakings actually took possession of the shares of the State companies which had succeeded BCC.

During the first period, BCC and the State companies which succeeded it benefited, in the Court's opinion, from an *aid*, but consequently the royalties paid by Banks did not constitute a *special charge*, within the meaning of the ECSC Treaty. The amount of the aid corresponded to the amount of the mining royalties which the BCA would normally have claimed from British Coal and the subsequent State companies (para 44). As regards the existence of *discriminatory measures*, it is for the national court to assess whether sub-

6. Cf. e.g. Joined Cases 17 & 20/61, *Klöckner-Werke and Hoesch* v. *High Authority*, [1962] ECR 325 and Case 250/83, *Finsider* v. *Commission*, [1985] ECR 131 (para 8).

7. See also *Groupement des Industries Sidérurgiques Luxembourgeoises*, cited *supra* note 5 at p. 197.

stantial objective differences in situation between Banks and the other coal companies might justify operational advantages in favour of the latter and cause that advantage to escape classification as a discriminatory measure. However, the mere fact that it was necessary to facilitate the *privatization process* of British Coal would be insufficient, in the Court's view, to constitute such a justification, unless that consideration were linked to distinctive operating features not already taken into account in the context of specific compensatory measures (para 45).

As for the second period, when private companies took over control of Britain's coal and steel sector, the Court of Justice came to a different conclusion. In its view the facts of the case did not reveal the existence of aid or special charges, or discrimination between producers (within the meaning of Article 4(b) and 4(c) ECSC), since access to the various means of acquiring the lease and licence rights was not discriminatory and the procedure was open and competitive (paras. 47–51).

4.3. *Direct effect of the prohibitions of State aid and discrimination between producers?*

The national court furthermore asked whether Article 4(c) ECSC, which prohibits subsidies or aids granted by the Member States, or special charges imposed by Member States, and Commission Decision 3632/93/ECSC establishing Community rules for State aid to the coal industry, have *direct effect.* The Court first explicitly admitted that it might initially have been inferred from its judgment in the *Steenkolenmijnen Limburg* case that Article 4(c) ECSC, insofar as it covers aid, was fully independent in its application and therefore, indeed, a directly effective Treaty provision.[8] However, that interpretation, in the Court's view, *no longer* holds good. Since 1965, acting on the basis of Article 95(1) ECSC, the Commission has adopted successive general decisions, known as Aid Codes, authorizing, under certain conditions and in specifically listed cases, the granting of subsidies or aid by Member States to the coal industry, which is therefore regarded as Community aid compatible with the proper functioning of the common market (paras. 64–65). One of those Commission Decisions is applicable to this dispute at hand, namely Decision No 3632/93 (referred to above). That decision defined the concept of aid to the coal industry, laid down the criteria for granting aid and provided detailed procedural rules regarding the notification of the financial measures which Member States intend to take in favour of the coal industry and the examination and authorization of aid by the Commission. This Commission

8. *De Gezamenlijke Steenkolenmijnen* cited *supra* note 4.

Decision, insofar as it concerns the compatibility of subsidies or aid with the common market, has thus *implemented* Article 4(c) ECSC and, consequently, the Court found that this Treaty provision no longer has independent application and therefore no longer enjoys direct effect.

The Court subsequently examined whether the obligation to *notify* planned State aid produces direct effects to the advantage of private individuals. Now the Court came to a different conclusion. Under Article 9 of the Commission Decision on State aid to the coal industry (no. 3632/93) the Member States are required to notify the Commission of all the financial measures which they intend to take in favour of the coal industry, and they are not authorized to put planned aid into effect until it has been approved by the Commission. That latter provision corresponds to Article 93(3) of the *EC Treaty* (now Article 88(3) EC), according to which the Member States cannot put planned aid measures into effect before the procedure has resulted in a final Commission decision. This provision of the EC Treaty produces rights in favour of individuals which the national courts are required to protect.[9] Consequently, also Article 9 of the said Commission Decision produces the same direct effects in favour of private individuals (paras. 69–70).

Regarding the possible direct effect of the prohibition of *discrimination between producers*, the Court noted that several provisions of the ECSC Treaty other than Article 4(b) specifically prohibit certain types of discrimination. However, none of those provisions concerns discrimination between producers. The ECSC Treaty thus does not contain more specific rules, Article 4 (b) applies independently, and the prohibition of discrimination between producers therefore directly confers rights on individuals, which the national courts must protect (para 90).

4.4. *Repayment of the mining royalties to Banks?*

In the present case however, the possible finding of the existence of unlawful aid, on the ground that it was not authorized by the Commission at the time when it was granted, and/or of discrimination between producers, in that only some producers were subject to the payment of royalties whereas others were exempt, cannot lead to producers who have been made subject to those royalties being retrospectively exonerated from them. It is settled case law that persons liable to pay an obligatory contribution cannot rely on the argument

9. See e.g. Case 120/73, *Lorenz*, [1973] ECR 1471.

that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that contribution.[10]

The Court mentioned another reason why Banks will not get its money back. Banks is not claiming that the aid given to its competitors should be repaid (since it was given in the form of an exemption), but it is asking to be exonerated from the mining royalties as well. In principle, where a company which has benefited from aid has been sold at the market price, the purchase reflects the consequences of the previous aid, and it is the *seller* of that company that keeps the benefit of the aid. In that case, the previous situation is to be restored primarily through repayment of aid by that seller (para 78). However, repayment of the aid could be effective only if the seller of the companies is not identifiable, from an economic standpoint, with the provider of the aid, as in that case he would be repaying *himself*. In the present case, the *British State* appears to be both the seller and the provider of the aid, since the royalties from which British Coal were exonerated would normally have been paid to that same State (para 79). Therefore, in the Court's view, this special relation cannot lead to other operators – such as the Banks company – being retrospectively exonerated from the mining royalties. The Court came to the same conclusion as regards the finding of discrimination (para 92).

4.5. *TWD perils*

In its third question the national court asked whether the fact that Banks did not bring an action for annulment against a number of Commission Decisions, adopted in 1994–1995, and dealing with aid to the coal industry, precluded Banks from raising alleged breaches of Article 4(b) or (c) ECSC, or of Decision No 3632/93, before the national courts at a later stage.

The Court first referred to its *TWD Textilwerke Deggendorf* line of case law: the beneficiary of an aid measure may not plead the invalidity of a Commission decision ordering a Member State to recover the aid paid to that beneficiary before the national court, where that beneficiary failed to bring an action for the annulment of the Commission decision under Article 230 EC and could undoubtedly have done so (para 111).[11] In the present case, however, the action of Banks before the national courts does not call into question the validity of those previous decisions of the Commission. The fact that Banks did not bring an annulment action against those older decisions therefore does not preclude Banks from pleading, in proceedings

10. Case C-437/97, *EKW and Wein*, [2000] ECR I-1157 and Case C-36/99, *Idéal Tourisme*, [2000] ECR I-6049. In Joined Cases C-430 & 431/99, *Sea-Land Service*, [2002] ECR I-5235 the Court relied upon this case law.

11. Case C-188/92, *TWD Textilwerke Deggendorf* v. *Germany*, [1994] ECR I-833.

before the national courts, infringement of Article 4(b) ECSC or infringement of Decision No 3632/93 (para 112).

As for the action for failure to act, the ECJ pointed out that national courts have jurisdiction to assess whether there has been a breach of Article 4(b) ECSC and of Article 9 of Decision No 3632/93. The obligation on the national courts to apply those provisions cannot be limited simply because a complaint has been referred to the Commission raising similar questions on which the latter has not yet ruled, even if the complainant, a party to the proceedings before the national courts, could have brought an action under Article 35 of the ECSC Treaty (paras. 117–118). The fact that Banks did not bring an action to compel the Commission to adopt a position on the disputed royalty system is thus not capable of depriving Banks of the right to plead infringement of Article 4(b) ECSC and Decision No 3632/93 before the national courts.[12]

Regarding the procedural rules for the recovery of the mining royalties, the Court refers to its *Rewe*/*Comet* case law, in particular to the second limitation to the principle of national procedural autonomy. Insofar as procedure laid down by national law applies to the recovery of unlawful aid, the relevant provisions of national law must be applied in such a way as not to render the recovery required by Community law virtually impossible.[13] Moreover, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law (paras. 121–122).[14]

5. Comments

The facts of the *Banks II* case are situated at the end of 1994, in the period after the privatization of the British coal industry and the case therefore deals with the Coal Industry Act 1994. It is the last judgment of the European Court dealing with the compatibility of this Act, and thus with the *privatized* UK coal regime, with the *ECSC* Treaty. But its compatibility with the *EC Treaty* may still come before the Court of Justice since – as was pointed out above – the ECSC rules now have been incorporated in the EC Treaty.

Most case law of the Court of Justice relating to the coal sector in Britain, such as *Banks I* and *Hopkins*, is concerned with the *nationalized* British coal regime, and therefore the former Coal Industry Nationalization Act 1946 was at stake. In those cases the ECJ ruled, in particular, on the competences of the

12. This was also the conclusion reached by A.G. Fennelly.

13. Case 33/76, *Rewe*, [1976] ECR 1989. See, specifically with regard to State aid, Case 94/87, *Commission* v. *Germany*, [1989] ECR 175 (para 12) and Case C-5/89, *Commission* v. *Germany*, [1990] ECR I-3437 (para 12).

14. Case C-5/89, *Commission* v. *Germany*, at para 18.

European Commission and the national courts under Articles 63(1), 65 and 66(7) ECSC. The Court concluded that these provisions do *not* have direct effect since they leave the Commission a wide margin of discretion.[15] In the *NALOO* cases the Court of First Instance treated the charging of mining royalties by the British Coal Corporation for the extraction of coal under the 1946 Act as a "normal" commercial practice, provided those royalties were not excessive.[16]

5.1. *The concept of State aid*

In the Court's view, the concept of aid within the meaning of the ECSC Treaty is a wider concept than that of a special charge. An aid consists of a mitigation of the charges which are normally included in the budget of an undertaking, whereas a special charge is an additional charge over and above these normal charges. As a result, a single measure cannot at the same time constitute both an aid and a special charge and therefore a choice has to be made.

Here the Court clearly uses its case law under the EC Treaty regarding the definition of State aid, such as *Ecotrade*[17] and *Italy* v. *Commission*.[18] As indicated by the Advocate General (point 23 of the Opinion), despite the apparent equivalence of the definitions of aid under the ECSC and EC Treaties, the combination of the notion of aid in the ECSC Treaty with that of special charges will, in practice, affect how aid is identified in cases where public authorities act in their sovereign or public capacity.

Specifically with regard to State aid to the national *coal* industries, the relevant rules are now to be found in Regulation 1407/2002/EC.[19] As a result of the expiry of the Coal and Steel Treaty, the Commission Decision which applied to the facts of the *Banks II* case, ceased to operate as from 23 July 2002. The substantive rules do not, however, seem to have undergone major changes. The EC Regulation stipulates, for example, that the competitive imbalance between Community coal and imported coal has forced the coal industry to embark on substantial restructuring measures involving major cutbacks in activity over the past few decades. Therefore, State aid cannot

15. Case C-128/92, *Banks* I, [1994] ECR I-1209; Case C-18/94, *Hopkins* v. *National Power*, [1996] ECR I-2281.

16. Case T-57/91, *NALOO* v. *Commission*, [1996] ECR II-1019. See also Case T-89/98, *NALOO* v. *Commission*, [1998] ECR II-515. The President of the Court rejected a request from the Commission for provisional measures, see Case C-180/01 P-R, *Commission* v. *NALOO*, [2001] ECR I-5740.

17. Case C-200/97, *Ecotrade*, [1998] ECR I-7907.

18. Case 173/73, *Italy* v. *Commission*, [1974] ECR 709.

19. Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry, O.J. 2002, L 205/1.

completely be ruled out: it may be considered compatible with the proper functioning of the common market if it complies with the conditions set out in that same Regulation. One of those conditions is that aid to the coal industry shall cover only costs in connection with coal for the production of electricity, the combined production of heat and electricity, the production of coke and the fuelling of blast furnaces in the steel industry.[20]

5.2. *Privatization*

Although the facts of the *Banks II* case relate to the situation after privatization, the Court pays attention to the move from a nationalized sector of the economy to an "ordinary" private sector. These considerations are of a more general nature and therefore not only of relevance to the coal industry but for privatization processes in general.

As regards the existence during the first period of discriminatory measures (see 4.2 above), it is for the national court to assess whether substantial objective differences in situation between British Coal and other operators, such as Banks, might justify the operational advantage in favour of the former and cause that advantage to escape classification as a discriminatory measure. However, the mere fact that it was necessary to facilitate the privatization process of British Coal would be insufficient to constitute such a justification, unless that consideration were linked to distinctive operating features not already taken into account in the specific compensatory measures, such as those authorized by the Commission in its Decision 94/995.[21] In that decision, the Commission considered that the British measures concerning *inter alia* liabilities for *environmental damage* were compatible with the aims of Decision 3632/93 (on State aid to the coal industry).

The statement of the Court that the mere fact that it was necessary to facilitate the privatization process of British Coal would be insufficient to constitute an objective justification for a measure discriminating between producers is in line with the Court's case law on privatization and nationalization processes in general. Often this case laws places Article 295 EC ("This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership") at the focus of attention.[22] In its recent *Golden Share*

20. See Art. 2 of Regulation 1407/2002/EC.

21. Commission Decision 94/995/ECSC of 3 Nov. 1994 ruling on financial measures by the United Kingdom in respect of the coal industry in the 1994/95 and 1995/96 financial year, O.J. 1994, L 379/6.

22. See Case 182/83, *Fearon*, [1984] ECR 3682; Case C-302/97, *Konle*, [1999] ECR I-3099.

judgments[23] the Court confirmed, contrary to what Advocate General Ruiz-Jarabo Colomer had said in his Opinion,[24] that the right to property in itself does not justify a strong influence of the State in private companies that have been privatized. The free movement of capital, at issue in these *Golden Share* cases, could only be restricted by mandatory and proportional requirements of public interest.[25] In the *Banks* case, such public interest requirements related, *inter alia*, to environmental protection, which is also apparent from the terms of Decision 94/995.

5.3. *Loss of the status of directly effective Treaty provision*

The Court explicitly admits, for the first time, that a clear and unconditional Treaty provision – Article 4(c) ECSC, prohibiting State aid and special charges without any reservations – no longer enjoys direct effect due to the fact that subsequently secondary legislation was adopted that was more "flexible" than the Treaty provision. This secondary legislation consists of the Aid Codes of the Commission which, since 1965, have been adopted on the basis of Article 95(1) ECSC, a general legal basis for "unforeseen cases" and therefore comparable to Article 308 EC. These Aid Codes authorize, although under certain conditions and in specifically listed cases, the granting of subsidies or aid by Member States to the coal industry. As a result, the Treaty prohibition on State aid no longer applies independently and therefore no longer has direct effect.[26] Probably this Treaty provision was deprived of its direct effect ever since 1965, the year when the Commission started to adopt its benevolent secondary legislation on State aid to the coal industry. The Court's judgment in any event clearly illustrates that the direct applicability of Community law is not only determined on the basis of a purely legal analysis of Treaty Articles but is, apparently, also influenced by considerations of a political/economic nature.

23. Case C-367/98, *Commission* v. *Portugal*, [2002] ECR I-4731; Case C-483/99, *Commission* v. *France*, [2002] ECR I-4781; Case C-503/99, *Commission* v. *Belgium*, [2002] ECR I-4809; see annotation by Fleischer in this *Review* 493–501.

24. Opinion, point 91.

25. See case C-367/98, paras. 48 and 49. For further discussion of the *Golden Shares* cases, see Szyszczak, (2002) LIEI, 255; Mortelmans, (2002) SEW, 341–347. More generally, see Flynn, "Coming of age: The free movement of capital case law 1993–2002", 39 CML Rev., 773.

26. Cf. *De Gezamenlijke Steenkolenmijnen* cited *supra* note 4. In this respect the Court explicitly makes an analogy with the *Banks I* case (in relation to Arts. 65 and 66(7) ECSC) and *Hopkins* (in relation to Art. 63(1) ECSC) (both cases cited *supra* note 15). See paras. 66–68 of the *Banks II* judgment. See also Steindorff, "Guest Editorial – State subsidies for steel: A record of failure?", CML Rev. 1994, 959–967 and Quigley and Collins, *EC State Aid Law and Policy* (Hart Publishing, 2003), 238–249.

We have considerable difficulties with this finding of the Court. Its ruling essentially means that "clear, precise and unconditional" provisions of *primary* Community law (State aid to the coal industry is prohibited) can be made conditional at a later stage by adopting measures at *secondary* level which contain less stringent rules than the Treaty does (under certain conditions and if the Commission agrees, State aid to the coal industry is acceptable). But this way of thinking and reasoning is clearly in violation of the idea of a fairly strict *hierarchy* of Community norms. In the current system, the Treaties contains the "supreme" legal norms which, therefore, cannot be annulled by the Court. Secondary legislation on the other hand provides us with the subordinate rules/norms, and which may, precisely for this reason, be annulled by the Court.[27] If the political institutions and/or the Member States consider that a primary law norm should no longer give rights to private individuals directly – Banks should no longer be entitled to rely on the prohibition of State aid in front of the British courts – then the *Treaty itself* should be amended. In our view, secondary legislation cannot be used for the purpose of depriving Treaty provisions of their directly effective nature.

For this purpose the *simplified* procedure for amending the ECSC Treaty could have been used. Under former Article 95(3)(4) ECSC, amendments on specific points to the ECSC Treaty could be made on a joint proposal from the High Authority/Commission and the Council, acting by a ten-twelfths majority of its members, after the Court had given its opinion, and after the European Parliament had approved the joint proposal. The EC/EU Treaty does not (yet) contain such simplified Treaty amendment procedure so that all amendments to the EC/EU Treaties require the ratification of all Member States in accordance with their national ratification procedures (Art. 49 TEU).

The practical consequences of the Court's view that Article 4(c) no longer enjoys direct effect are, however, rather limited. This is because since the expiry of the ECSC Treaty *Articles 87 and 88 of the EC Treaty* apply to State aid to the coal (and steel) industry. These provisions of the EC Treaty do not have direct effect either, with the exception of the final sentence of Article 88 EC on the duty to notify planned State aid.[28] It could therefore be said that the *Banks II* judgment has even facilitated the move from the ECSC regime (initially direct effect of the prohibition on State aid but since 1965 no direct effect anymore) to the EC regime on State aid (no direct effect of the EC provisions on State aid either). On the other hand, the prohibition on cartels, laid down in Article 81(1) EC, is clearly moving in the opposite direction: it

27. Using, in particular, the action for annulment under Art. 230 EC. See also Mortelmans, "The relationship between the Treaty rules and Community measures for the establishment and functioning of the internal market – Towards a concordance rule", 39 CML Rev., 1303–1346.

28. Case 78/76, *Steinike*, [1977] ECR 595; Case 6/64, *Costa* v. *ENEL*, [1964] ECR 1.

will be given direct effect in its entirety, including the *third* paragraph, once the new competition Regulation has entered into force (1 May 2004).[29]

In addition to Articles 87 and 88 EC, Regulation 1407/2002/EC now deals with the issue of aid to the coal industry and, as regards the procedural regime, Article 88 EC and implementing Regulation 659/1999/EC are relevant.[30]

5.4. *The role of the Commission and national courts in competition cases*

In the *Banks II* case the Court furthermore briefly addresses the issue of the division of tasks between the national courts and the Commission with respect to the enforcement of the EC rules on competition. This is done, rather confusingly, within the context of the Court's statements on the action for failure to act.

The Court rules that even if the Commission and the national courts may simultaneously have jurisdiction to apply certain provisions of the ECSC Treaty, they do not necessarily have the same powers to uphold the various claims made by individuals on the basis of those provisions. In this context, the Court explicitly mentions the Communication of the Commission on cooperation between national courts in applying Articles 81 and 82 of the EC Treaty.[31]

An individual who has lodged a complaint with the Commission based on such provisions cannot therefore be required to pursue his action with the Commission in all circumstances, where appropriate by bringing proceedings under Article 35 ECSC, *until* the Commission adopts a position on his complaint, where the Commission shows no intention to deal with the complaint and where, as circumstances develop, the individual may have an interest in giving or be obliged to give priority to an action before the national courts (para 119).

5.5. *Concluding remarks*

The Court has placed the *Banks II* case in a broader *Community* context – and not just the ECSC framework – by using its EC case law for defining the

29. Council Regulation (EC) No 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003, L 1. Very much has already been written about this new Regulation on competition, in particular regarding the decentralized application of Art. 81(3) EC. See e.g. Ehlermann, "The modernization of the EC antitrust policy: A legal and cultural revolution", 37 CML Rev., 537.

30. Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, O.J. 1999, L 83/1. See in general on this Sinnaeve and Slot, "The new Regulation on State aid procedures", 36 CML Rev., 1153–1194.

31. Commission Notice 93/C 39/05 on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, O.J. 1993, C 39/6.

concept of aid within the meaning of the Coal and Steel Treaty (para 33), for the analysis of illegal State aid (paras. 70–74), in applying the *TWD* case law (para 111) and for analysing the relationship between the Commission and national courts in enforcing the rules on competition (paras. 119–122).

In this way the Court has greatly facilitated the move of the coal (and steel) industry from the ECSC regime to the general EC Treaty regime. This positive aspect does not detract from the fact that the judgment in *Banks II* should also be criticized, in particular the part where the Court accepts that the direct effect of a primary Community law provision may be ended due to the subsequent adoption of rules at secondary level. It is to be hoped that the Court will not give similar rulings in the future.

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