II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 March 1986

authorizing agreements made in relation to the activities of the Northern Ireland Coal Importers' Association (NICIA)

(86/152/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 65 thereof,

Having regard to the application filed on 7 April 1982 and the revised applications filed on 8 November 1982 and 10 February 1984 by the Northern Ireland Coal Importers' Association (NICIA),

Whereas :

I. FACTS

1. The Northern Ireland Coal Importers' Association (NICIA) was founded in 1937 by 34 Northern Irish coal importers. Until 1958 the Association, among its other activities, also used to agree the prices to be charged for coal in Northern Ireland. In that year, however, the Association gave an undertaking to the Restrictive Trade Practices Court in Belfast to discontinue this practice, and since then it has played no further part in the prices at which its members sell to their customers.

   The Commission first heard of NICIA when the Northern Ireland Consumer Council wrote to it on 16 October 1981 requesting the Commission to investigate competitive conditions on the domestic coal market in Norther Ireland.

2. The application filed on 7 April 1982, the annexed rules and regulations and a memorandum explaining various agreements between the members revealed, *inter alia,* the following facts :

   (a) NICIA's members are coal wholesalers in Northern Ireland who purchase domestic solid fuels for sale in Northern Ireland directly from the British National Coal Board or other producers or who used to do so but are now obliged for reasons connected with the logistics of transporting coal to Northern Ireland to purchase their requirements from importing members.

   The Association has 32 members, of which 22 are direct importers and 10 non-importing.

   (b) Applicants for membership must be proposed and seconded by existing members and elected by the Association's Council, for which a two-thirds majority is required. As the two largest members, the Belfast groups Cawoods (headed by Cawoods Fuels (NI) Limited) and Kellys (headed by John Kelly Limited), have four votes each of the 13 votes on the Council, with the other members having only five votes between them, a new member can only be elected with the support of one of the members with four votes.

   (c) On 10 December 1980 Cawoods and Kellys entered into bulk buying contracts for house coal covering the period 1 November 1980 to 31 March 1984 with the National Coal Board, under which they agreed to purchase almost all their requirements of domestic bituminous coal and smokeless fuels including Phurnacite from

the Board. On most types of fuel the NCB granted the two firms an 'alignment' discount off its published prices designed to match, as nearly as possible, the prices of cheaper American imports. During the currency of the agreements this discount varied between £ 6 and £ 16 a tonne (12 to 25 %), depending on the type of fuel and the prevailing exchange rate.

3. On the basis of their bulk buying contracts with the NCB, Cawoods and Kellys entered into subcontracts with 13 importing members of NICIA under which the latter agreed to purchase virtually all their requirements of domestic bituminous coal and smokeless fuels including Phurnacite from Cawoods or Kellys, as the case may be. The subcontractors thereby obtained a share of the NCB contracts at the same prices, including the discount, as Cawoods and Kellys had secured. To keep up their performance record as customers of the NCB, the subcontractors are invoiced individually by the NCB, acting through coal factors (*del credere* agents), for their coal purchases. Only the discount on all coal bought under the contracts is paid to Cawoods and Kellys which distribute it to the subcontracting importers in proportion to their purchases under the subcontract.

Coal is still the main fuel used for domestic heating purposes in Northern Ireland. With only 2 ½ % of the population, it consumes 10 % of all house coal sold in the United Kingdom.

In the year ending 31 March 1982, NICIA members supplied around 80 % of the Northern Ireland market for domestic solid fuels, obtaining 90 % of their requirements from the NCB. The remaining 20 % of the market was supplied by importers outside NICIA, mainly with American coal.

4. The functions of the Association include the following :

— Ascertaining and collating its members' annual requirements of coal and coordinating them with the varying availability of supplies from the National Coal Board. For this purpose discussions are held with the NCB, usually twice yearly.

The reasons for having the Association provide this service are, on the one hand, the differing requirements of individual importers for the various types of house coal produced by the NCB because of differences in their customers' preferences and, on the other, the natural uncertainties of coal production which make it difficult to foresee how much of the various types will be produced and available in the year ahead. The NCB produces a number of different qualities and sizes of house coal. The amount it produces of each type is not absolutely within the Board's control. Not all the types of coal have a ready market in Northern Ireland as certain types are preferred by consumers and hence by their coal merchants. While the NCB is keen to sell all the coal it produces whatever the type, coal wholesalers endeavour to obtain as much as possible of the types the market demands. The situation is complicated by the fact that after a winter in which consumption in different parts of Britain has varied because of the weather, the NCB as the dominant supplier may limit supplies to some areas in favour of others where stocks have been exhausted.

Instead of holding a large number of separate difficult negotiations, the members of NICIA negotiate jointly with the NCB about their requirements for the coming year. They agree with the Board an approximate programme of deliveries, which is worked out in detail as the year advances, and share the supplies of the various types of coal between them. This coordination is encouraged by the dependence of NICIA members on the NCB as dominant supplier, which means that they cannot obtain supplies of the same fuel at short notice from other sources to make up a shortfall,

— Arranging sufficient shipping space to transport coal ordered by members to Northern Ireland as members require it : In 1981/82 some 60 % of the coal delivered to NICIA members was carried in ships belonging to Cawoods and Kellys. NICIA provides this service through a specially created Shipping Committee. The Committee coordinates shipping arrangements to ensure that the coal available for members in the ports each day is shipped in such a way that all the members receive the amounts they have ordered for the period concerned. In addition, at times of short-term interruptions in supply due to bad weather, strikes, etc., the Committee distributes the coal available in such a way as to reduce each member's deliveries proportionately. Without, through this activity, depriving importers of the right to conclude contracts of carriage with shipping lines or agents independently, the Shipping Committee reduces the transportation problems, resulting from

Northern Ireland's separation from the British mainland by the Irish Sea, which the members would otherwise inevitably experience if they attempted to organize the transport of their supplies individually, and which could have an incalculable effect on competition between them.

On cost grounds the coal is purchased fob British ports. Without NICIA's intermediary role, each importer would have to check with the NCB that his order had arrived at the port of loading and book suitable space on a vessel to ensure that his deliveries arrived when he wanted them, bearing in mind tide patterns, and avoid the ship incurring demurrage charges. Even then, especially in the most critical months for supplying Northern Ireland, it could easily happen that voyage times varied because of bad weather, fog, etc. This might cause uncontrollable distortions of competition. The Shipping Committee helps to prevent such distortions of competition.

The Shipping Committee also has a cost-cutting function, in that it can gain for NICIA members the benefit of the lower freight rates that go with larger shiploads, without the high interest charges an individual importer would have to incur for holding large stocks. Through the Shipping Committee, the members can both avoid having to finance large stocks and save on freight charges by, if appropriate, combining several members' orders in larger shiploads,

— Operation of an allocation system at times of emergency shortages, whereby for the duration of the shortage the members' entitlement to the supply available is reduced to their average percentage of the tonnages purchased by all NICIA members from the NCB over the past three years. It is also provided that members managing to obtain supplies from other sources at such times must put them into the general pool for distribution by NICIA among all its members. The subcontracts which Cawoods and Kellys have with other importers contain a clause whereby in the event of supply difficulties the allocation system operated by NICIA would apply.

There are no written agreements on the performance of any of these functions by NICIA.

5. NICIA also plays an active part in the running of the Coal Advisory Service which it operates jointly with the National Coal Board and whose objects are to further the use of solid fuels for domestic heating purposes by means of advertising and technical advisory and back-up services. NICIA has eight votes on the Executive Committee of the Coal Advisory Service against the National Coal Board's nine.

6. By letter dated 28 March 1983, the Commission's Directorate-General for Competition informed NICIA, stating reasons, that the agreements entered into and the practices engaged in under the auspices of the Association were prohibited by Article 65 (1) of the Treaty and in their present form could not be authorized under Article 65 (2).

7. To meet the Commission's objections, NICIA members amended their agreements in many respects and on 10 February 1984 filed a revised application for authorization. Under the new rules and regulations, the admission of new members is based an objective criteria. A selection procedure liable to have effects restrictive of competition is no longer applied. Membership is now open to any importing wholesaler in Northern Ireland having the necessary knowledge and facilities for carrying on business in the coal trade. The most important of these requirements are minimum sales of 1 000 tonnes per annum (though up to three small firms can become joint members), sufficient financial standing and staff, and suitable facilities for handling, discharging and distribution of coal and capacity to hold adequate stocks. Firms newly entering the business can become provisional ('associate') members for two years (in exceptional cases four years).

Previously Cawoods and Kellys had announced that they would henceforth no longer conclude subcontracts but would offer potential customers NCB coal on the 'best possible commercial terms.'

New contracts effective from 1 February 1984 which Cawoods and Kellys have made with the National Coal Board also no longer provide that they must cover almost all their requirements of bituminous house coal and smokeless fuel from the Board.

The result of these changes is that NICIA's functions are now clearly separated from the commercial policies of Cawoods and Kellys and, apart from its participation in the Coal Advisory Service which it operates jointly with the NCB, consists solely in :

— ascertaining and collating its members' annual requirements of fuel and coordinating them with the varying availability of supplies from the National Coal Board,

— arranging sufficient shipping space to transport coal ordered by members to Northern Ireland according to their requirements,

— distributing the coal available at times of short-term interruptions of supply due to bad weather, strikes, etc., in such a way as to reduce each member's deliveries proportionately,

— operation of an allocation system at times of emergency shortages, whereby for the duration of the shortage the members' entitlements to the supply available is reduced to their average percentage of the tonnages purchased by all NICIA members from the NCB over the past three years and of a scheme whereby members managing to obtain supplies from other sources at such times must put them into a general pool for distribution by NICIA among all its members.

II. LEGAL ASSESSMENT

8. **Article 65 (1)**

Article 65 (1) of the Treaty provides that all agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market shall be prohibited, and in particular those tending :

(a) to fix or determine prices ;

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

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

9. The agreements between the members of NICIA fall within the scope of this provision for the following reasons :

The members are engaged in the distribution of coal in the common market within the meaning of Article 80 of the Treaty. They collaborate closely with one another in the purchase and shipping of domestic solid fuels, thereby relinquishing some of the individual freedom which is a normal feature of competition between undertakings in the same sector. Even without any contractual obligation to do so, all the members have a strong incentive to coordinate their purchasing by using the services provided by NICIA. The reason is that these services are capable of maintaining coal supplies to Northern Ireland, despite difficult conditions, at the standard necessary to face the fierce competition from oil, gas and electricity. Whilst they cannot overcome some inherent disadvantages in using coal as a fuel, the services provided by NICIA ensure that Northern Ireland is kept supplied with the types of coal consumers there prefer in a manner which is sufficiently reliable to avoid the danger of consumers switching to more convenient fuels. For the sake of such benefits, even the two members who are by far the largest, Cawoods and Kellys, accounting for 40 % and 33 % respectively of all the members' coal purchases from the NCB, forgo the use, whether against one another or against the smaller importers, of all the competitive advantages which their market position and ownership of their own ships give them in obtaining supplies of NCB coal. The smaller importers have even more cause to use these services of NICIA which restrict competition, facing as they do competition not only from other forms of energy but also from their two large rivals in the coal trade.

A further restriction of competition lies in the fact that members have agreed that at times of serious and lasting shortage they will not only allocate supplies between them according to a binding reference system, but will also pool for general distribution among all the members any additional supplies they manage to obtain from other sources. They thus share products.

The agreements between the coal wholesalers who are members of NICIA are therefore prohibited agreements under Article 65 (1).

10. **Article 65 (2)**

Under Article 65 (2) of the Treaty, the Commission may authorize joint buying or selling agreements in respect of particular products where it finds that :

(a) such joint buying or selling will make for a substantial improvement in the production or distribution of those products ;

(b) the agreement in question is essential in order to achieve these results and is not more restrictive than is necessary for that purpose ; and

(c) the agreement is not liable to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the common market, or to shield them against effective competition from other undertakings within the common market.

If the Commission finds that certain agreements are strictly analogous in nature and effect to those referred to above, having particular regard to the

fact that this paragraph applies to distributive undertakings, it may authorize them also when satisfied that they meet the same requirements.

11. The agreements made in relation to the activities of NICIA are strictly analogous to joint buying agreements. The collective nature of these agreements arises from the fact that under them NICIA ascertains and collates the members' annual requirements, negotiates and agrees them with the NCB and later arranges for and coordinates actual deliveries and arranges shipping space through its Shipping Committee and, if necessary, allocates the deliveries proportionately between the members.

12. The agreements may, howver, make for a substantial improvement in the distribution of house coal in Northern Ireland. As Northern Ireland is separated from the mainland of Britain by the Irish Sea, solid fuels can only be supplied there by sea. The varying qualities and quantities of coal available from the National Coal Board coupled with the logistical problems of transporting coal to Northern Ireland, make it difficult for wholesalers to purchase their supplies independently. Without joint buying, consumers could be affected by temporary interruptions of supply. In these circumstances, collective planning of requirements and the allocation and coordinated transport of deliveries assure better and more dependable supplies to the consumer.

13. Although not of itself a restriction of competition, NICIA's involvement in the Coal Advisory Service also contributes, more generally, to improving distribution. In the struggle for market share it has long been customary for the suppliers of the various energy forms to provide consumers with technical advice. In Northern Ireland, with no primary energy carried by pipeline available coal competes with town and bottled gas, heating oil and heavily subsidized electricity. Given the different calorific values and prices of the alternative energies, the differing efficiencies of heating systems and the different degrees of comfort they provide, such direct promotion work is justified.

The service also, for a charge, includes the installation and maintenance of solid-fuel heating appliances, thereby helping to ensure that the fuel is used efficiently.

In so far as such pomotional activities are successful, they contribute to improving distribution. Therefore, a favourable view can be taken of NICIA's involvement in the Coal Advisory Service. On the other hand, it is obvious that the participation in such advisory services of firms holding a dominant position may have damaging consequences on competition. The members of NICIA obtain over 90 % of their house coal from the National Coal Board, which accordingly enjoys a dominant position. NICIA and the National Coal Board cooperate closely in the Coal Advisory Service. Its main aim is to promote the sale and efficient use of solid fuels in the home. It is natural that National Coal Board fuels will tend to receive most attention in the Service. However, that should not be allowed to place fuels supplied by other producers in the Community at a competitive disadvantage. To prevent such damage, an appropriate condition must be attached to the authorization.

14. The NICIA agreements which are strictly analogous to joint buying arrangements are necessary for the said improvement in distribution. The beneficial effects in terms of the supply and maintenance of the market could not be assured without the cooperation between the Northern Irish coal wholesalers and the resultant improvement in their position *vis-à-vis* their dominant supplier. Nor do the agreed restrictions on competition go further than is necessary to obtain the objects of the agreements. In particular, the agreements do not restrict the members' right to deal individually with the National Coal Board or to use the shipping line or system (bulk or container) of their choice.

15. The agreements for which authorization is sought are not liable to give the members of NICIA the power to determine the prices of which coal is sold in Northern Ireland, to control the marketing of coal or to shield them against effective competition from other undertakings within the common market.

Nevertheless, the members of NICIA have a market share of 80 % in Northern Ireland with the two largest alone holding 50 %. Potentially, such a market position could be used by the parties to enter into further agreements restrictive of competition whose effects could upset the conclusion stated in the previous paragraph.

The Commission must ensure that the parties act in accordance with the authorization given by this Decision and with the provisions of the Treaty. For this purpose, the parties and NICIA as a body must be required to inform the Commission immediately whenever a member leaves or a new member

joins the Association or an applicant is refused membership and of all changes and additions to the present agreements, such changes and additions not to be applied before the Commission has declared them to be unobjectionable or has granted authorization under Article 65 (2).

16. It is likely that some members — and indeed non-members — of NICIA will continue to buy their coal from Cawoods and/or Kellys because of the substantial rebates granted to these firms by the National Coal Board in view of their market position and the potential competition from American coal. However, such transactions are no longer connected with membership of NICIA. If, despite the expiry of the subcontracts, Cawoods or Kellys were to use their market position to exercise an anti-competitive influence over members or non-members to whom they resell coal, separate proceedings could be brought against such practices.

17. The agreements for which authorization is sought are of indefinite duration. Nevertheless, the Commission considers it appropriate that the authorization should be limited to 31 December 1990.

18. Subject to the above conditions and time limit, the agreements fulfil the requirements for application of Article 65 (2) and may therefore be authorized.

HAS ADOPTED THIS DECISION :

Article 1

The agreements entered into by the Northern Ireland Coal Importers' Association concerning joint buying of solid fuels from the National Coal Board, London, are hereby authorized pursuant to Article 65 (2) of the Treaty until 31 December 1990.

Article 2

The authorization referred to in Article 1 shall be subject to the following conditions :

1. NICIA shall not take part, in connection with its involvement in the Coal Advisory Service, in any activities having the object or effect of arbitrarily placing at a disadvantage fuels from the Community other than those supplied by the National Coal Board.

2. The undertakings concerned shall inform the Commission immediately whenever a member leaves or a new member joins the Association or an applicant is refused membership.

3. The undertakings concerned shall inform the Commission immediately of all planned changes and additions to the agreements. Such changes and additions shall not be put into effect until the Commission has confirmed that they are in conformity with the authorization given by this Decision or has authorized them under Article 65 (2).

Article 3

This Decision is addressed to the following undertakings :

— National Coal Board
Hobart House
Grosvenor Place
London SW1X 7AE

— Cawoods of Northern Ireland Limited
Cawood House
24 Arthur Street
Belfast

— John Kelly Limited
2 High Street
Belfast BT1 2BH

— John Kelly Limited
Circular Road
Coleraine
County Londonderry

— Howdens Limited
Coal Importers
Bank Quays
Larne

— John Kelly Limited
Governor's Place
Carrickfergus

— John Kelly Limited
Bay Road
Londonderry

— Newbuildings Coal
Victoria Mills
New Buildings
Londonderry

— Lanes (Derry) Limited
15 Bay Road
Londonderry

— Belfast Co-operative Society Limited
20 York Street
Belfast

— James Kingsberry Limited
28 Arthur Street
Belfast

— W. Dalzell & Sons Limited
Circular Road
Coleraine

— Mrs I. Murphy
Red Bay
Cushendall
County Antrim

— L. O'Connor, Esq.
1 Bay Terrace
Glenarriffe
County Antrim

— F. V. Harty & Co. Limited
47 Merchants Quay
Newry
County Down

— Frederick Wolseley Limited
32 Queens Quay
Londonderry

— James Perry & Sons
6 Leestone Road
Kilkeel
County Down

— Robert Neill & Sons Limited
137 Main Street
Bangor BT20 4AH
County Down

— Nicholl Morgan Limited
Bay Road
Londonderry

— Moore & Dunwoody Limited
37 Merchants Quay
Newry
County Down

— Hanna Brothers
Suncrest
Dougans Road
Kilkeel
County Down

— James McKee & Sons
Coal Importers
114 The Harbour
Kilkeel
County Down

— R. Cousins & Sons
Harbour House
Annalong
County Down

— C & O Milligen
Coal Importers
The Square
Strangford
County Down

— M. J. O'Rourke & Co. (Newry) Limited
Albert Basin
Newry
County Down

— East Downshire Limited
3 The Quay
Dundrum
Newcastle

— Mr P. Flynn
195 Main Street
Dundrum
Newcastle

— James Morrow
Coal Importer
Cross Street
Killyleagh

— Amalgamated Solid Fuel Importers Limited
The Harbour
Carrickfergus

— Belfast Fuel Company
Dargan Road
Belfast

Done at Brussels, 21 March 1986.

For the Commission

Peter SUTHERLAND

Member of the Commission