II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 December 1992

relating to a proceeding under Article 85 of the Treaty and Article 65 of the ECSC Treaty

(IV/33.151 — 'Jahrhundertvertrag')

(IV/33.997 — VIK-GVSt)

(Only the German text is authentic)

(93/126/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community,

Having regard to Council Regulation No 17 of 6 February 1962, the first Regulation implementing Articles 85 and 86 of the EEC Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 6 and 8 thereof,

Having regard to the applications for negative clearance or exemption submitted on 1 June 1989 and 2 July 1991 by the Gesamtverband des Deutschen Steinkohlenbergbaus pursuant to Articles 2 and 4 of Regulation No 17,

Having regard to the summary of the notification published pursuant to Article 19 (3) of Regulation No 17 [2],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions in accordance with Article 10 (3) of Regulation No 17,

Whereas :

I. FACTS

A. The 'Jahrhundertvertrag'

(1) The 'Jahrhundertvertrag' (century contract) is a set of agreements by which German electricity-generating utilities and industrial producers of electricity for in-house consumption (auto-generators) have undertaken to purchase a specific amount of German coal up to 1995 for the purpose of generating electricity. The agreements form part of an overall plan to support the German coalmining industry, and their conclusion was actively promoted by the Federal Minister for Economic Affairs, whose responsibilities include coalmining and energy. The Jahrhundertvertrag is applicable only to companies in the former territory of the Federal Republic of Germany before the accession of the new Länder.

(2) This Decision concerns the two agreements which form the basis of the Jahrhundertvertrag. The first is the 'Supplementary agreement on the sale of German coal up to 1995' concluded on 23 April

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 159, 29. 6. 1990, p. 7 ; OJ No C 116, 30. 4. 1991, p. 6 ; OJ No C 249, 26. 9. 1992, p. 3.

1980 between the 'Gesamtverband des deutschen Steinkohlenbergbaus' (General Association of the German Coalmining industry — GVSt), whose registered office is in Essen, and the 'Vereinigung Deutscher Elektrizitätswerke e.V.' (Association of the German Public Electricity Supply Industry — VDEW), whose registered office is in Frankfurt/Main, and the second is the 'Supplementary agreement on the sale of German coal to industrial producers of electricity up to 1995', concluded on 20 April 1980 between the GVSt and the 'Vereinigung Industrielle Kraftwirtschaft e.V.' (Association of Industrial Producers of Electricity — VIK), whose registered office is in Essen. The agreement between the GVSt and the VDEW was notified to the Commission by the GVSt on 1 June 1989 in response to a request for information by the Directorate-General for Competition, and the agreement between the GVSt and the VIK was notified on 2 July 1991.

1. *The parties to the agreements*

(3) The GVSt is an association of undertakings which, according to its statutes, represents the interests of coalmining companies in the Federal Republic of Germany. Its membership consists of four regional coalmining associations. There are six coalmining companies in Germany, three of which form a single group.

The VDEW represents the interests of public electricity supply companies. Its membership is made up of such companies. Not all of its members generate electricity from coal, and some do not generate any electricity. The supplementary agreement concluded with the GVSt concerns a total of 44 VDEW members.

The VIK represents the interests of industrial undertakings in relation to energy supplies, including the interests of undertakings which generate their own electricity.

2. *The agreement between the GVSt and the VDEW*

(4) The 'Supplementary agreement on the sale of German coal up to 1995' of 23 April 1980 enlarges upon, and replaces, the 'Agreement on the sale of German coal to the public electricity supply industry in the years 1978 to 1987' concluded on 10 May 1977 between the GVSt and the VDEW. The agreement lays down the arrangements for German coal-purchasing by the electricity supply companies during the period from 1 January 1981 to 31 December 1995. Under the terms of general commitments entered into *vis-à-vis* their respective associations, the German electricity supply companies which generate electricity from coal and the German coalmining companies have undertaken respectively to purchase and to supply certain amounts of coal, although exact figures are not given. In an annex to the supplementary agreement, known as the 'principles of agreement', certain aspects of those purchasing and supply commitments are dealt with and the total volume of coal to be purchased is specified. According to the principles of agreement, responsibility for fulfilling the purchasing and supply commitments lies with the electricity supply companies and the coalmining companies respectively. Individual coal supply contracts have been concluded between the individual coalmining companies (six in total) and the individual electricity supply companies (44 in total).

The principles of agreement provide for the purchase of a total of 511,5 million tonnes of coal equivalent (tce) during the currency of the agreement. The purchasing commitments cover periods of five years at a time. The total amount specified for the period from 1 January 1981 to 31 January 1985 is 151 million tce (average annual amount 30,2 million tce), for the period 1 January 1986 to 31 December 1990, 173 million tce (average annual amount 34,6 million tce), and for the period 1 January 1991 to 31 December 1995, 187,5 million tce (37,5 million tce). The electricity supply companies must make annual minimum purchases of one-fifth less 15 % of the total amount specified for a five-year period. The coalmining companies are committed to supplying each year up to one-fifth plus 15 % of this total amount.

Although the supplementary agreement provides in principle for the purchase of German coal, in a protocol to Article 1 (1) of the principles of agreement it is stated that, subject to an annual maximum of 50 000 tce, 50 % of the amount delivered each year by Houillères du Bassin de Lorraine is deemed to be a delivery for the purposes of the agreement.

(5) Following negotiations between the German Government and the parties to the Jahrhundertvertrag, it was agreed as part of the 1989 round of coal talks that the amounts of coal originally specified would be reduced. The combined purchasing commitments of the electricity supply companies and auto-generators would accordingly come to 40,9 million tce a year during the third five-year period. The share of this total falling within the scope of the agreement between the GVSt and the VDEW would be 34,4 million tce a year, which is the amount forming the basis of the notification made by the GVSt.

In fact, the electricity supply companies did not purchase in full the amounts stipulated for the period 1986 to 1990 under the agreement, buying only 168 million tce. In 1989 the total amount purchased was 32,9 million tce, and in 1990, 33,5 million tce.

(6) Under Article 3 of the principles of agreement, the electricity supply companies and the coalmining companies are authorized to transfer purchasing and supply commitments to other electricity supply companies and coalmining companies. In the event of a change in the area supplied by an electricity supply company, the purchasing commitment is adjusted to take account of the increase or decrease in electricity sales. Under a protocol to Article 2 (4) of the principles of agreement, the coalmining companies are required, if their own output does not suffice to meet their supply commitments, to make up the difference with German coal only.

(7) Prices are fixed as follows : the coalmining companies receive the price for power-station coal set by the Federal Minister for Economic Affairs under Article 3 (7) of the third Electricity-from-coal Law of 12 December 1974 and the guidelines prevailing at the time, although the price may not exceed the list price minus the relevant low-grade coal discounts, where low-grade coal is supplied.

3. *The agreement between the GVSt and the VIK*

(8) The agreement between the GVSt and the VIK was concluded in parallel with the agreement described above. Concerned with the purchase of German coal by auto-generators, it enlarges upon, and replaces, the 'Agreement on the sale of German coal to industrial producers of electricity' concluded on 22 and 23 August 1977 between the GVSt and the VIK. The details of the purchasing and supply commitments are laid down in the 'principles of agreement' annexed to the supplementary agreement.

In point 4 of the supplementary agreement, the VIK and the GVSt undertook to prevail upon their members to conclude without delay individual contracts on coal procurement up to 31 December 1995. The VIK thus stated in the agreement that it would advise its members forthwith to conclude with German coalmining companies private, long-term individual contracts covering their requirements of German coal for burning in power stations, so as to comply with the principles of agreement. The VIK did issue a recommendation along those lines to its members. The GVSt stated in the agreement that it had received commitments from six coalmining companies to the effect that they would comply with the obligations laid down in the principles of agreement and conclude private, individual coal supply contracts with VIK members.

Under point 6 of the supplementary agreement, the VIK and the GVSt were each to establish, after one year, to what extent the purchasing commitments had been met. According to the GVSt, the parties have not complied with this provision and have not made the requisite findings. The reason put forward was that, in the opinion of the mining companies, the competitive situation was such that the parties' identities, the quantities involved and the contract terms could not be divulged to others. Provision had been made in the agreement for such findings because the closest possible concordance was being sought with the parallel agreement with the VDEW.

(9) The principles of agreement provide for an average annual delivery of 8,8 million tce for the period 1980 to 1988 and of 9,8 million tce for the period 1989 to 1995. The members of the GVSt and of the VIK concluded individual supply contracts for German coal on the strength of the supplementary agreement and the principles of agreement.

Article 3 of the principles of agreement provides that, without prejudice to the overall commitment entered into, the annual purchasing commitment of each auto-generator must amount to at least 1/15 of total purchasing commitments less 15 %. The coalmining companies undertake to supply each year up to 1/15 of the total purchasing commitment plus 15 %. Any increase or decrease in the amounts purchased by an auto-generator must be balanced out within the periods 1981 to 1985, 1986 to 1990 and 1991 to 1995. An amount of up to 15 % of the annual purchasing commitment may be carried forward from one period to the next.

The GVSt stated in the course of the proceeding that individual supply contracts had not been concluded on the scale originally envisaged, at most three quarters of the abovementioned quantities being so covered. During the period 1986 to 1990, 6,7 million tce had been sold on average, and in 1990 6,3 million tce had been sold. Taking as a basis the total amount of 40,9 million tce laid down at the political level as part of the 1989 round of coal talks, an annual amount of 6,5 million tce was being notified for the period 1991 to 1995. That amount included contracts with auto-generators who were not members of the VIK.

(10) The price clause is similar to that of the agreement between the GVSt and the VDEW.

4. *The outcome of the various negotiations*

(11) Following negotiations between the Commission, the German Government and the German coalmining industry, it was agreed that until 1995 the purchasing commitments of the electricity supply companies and auto-generators should not exceed an annual maximum of 40,9 million tce and that in 1995 not more than 37,5 million tce should consist of newly mined coal. The remainder could be obtained from other sources, e.g. pit-head stocks.

5. *The market for coal and electricity in Germany*

(12) Coal production in the Community and in Germany has fallen over the past few decades. In 1990 76,55 million tonnes of coal were produced in the Federal Republic (as compared with 94,94 million tonnes in 1980), while in the Community as a whole production totalled 197,35 million tonnes (against 260,33 million tonnes in 1980). Imports into the Community totalled 125,82 million tonnes in 1990, and intra-Community imports came to 10 million tonnes. That same year, imports into the Federal Republic totalled 9,32 million tonnes, including 0,68 million tonnes from other Member States. Exports totalled 5,27 million tonnes, of which 4,90 million tonnes went to other Member States, mainly as coking coal.

The price of German coal is a good deal higher than price levels on the world market. In 1990 the average cost per tonne of coal equivalent mined in Germany came to approximately ECU 131 (range ECU 100 to 175); the average cost for British coal came to approximately ECU 87 (60 to 160), and for Spanish coal, approximately ECU (80 to 250). The average (cif) price of world market coal imported into the Community in 1989 was approximately ECU 50.

(13) In 1990 gross electricity generation in the Federal Republic of Germany (including the new Länder) came to 549,8 TWh. The share of that total accounted for by the electricity supply companies was approximately 84,7 %, and that of auto-generators, approximately 15,24 %. In 1990 gross electricity consumption came to approximately 550 TWh, of which some 449 TWh were consumed in the old Länder and some 101 TWh in the new Länder.

In 1990 28,24 TWh were imported into the Federal Republic (including the new Länder) and 28,4 TWh were exported. The net balance has fluctuated slightly in the past: in some years there has been a positive electricity trade balance, while in others there has been a negative one. Between 1985 and 1990, there was a negative balance of at most 1,25 % of gross electricity consumption.

(14) At the time of the notification, the share of coal in electricity generation was approximately 30 %. Including the Länder which acceded on 3 October 1990, the shares of the various primary energy sources in electricity generation in the whole of 1990 can be estimated as follows: lignite, 31,1 %; nuclear energy, 27,7 %; coal, 25,6 %; water power, 3,6 %; natural gas, oil and other energy sources, 12 % (source: Federal Ministry for Economic Affairs).

6. *State aid for the generation of electricity from coal*

(15) Since the price of German coal is considerably higher than the price of coal on the world market, the use of coal of German origin for electricity generation is possible only with help from the State. This takes the form of, firstly, direct compensatory payments and, secondly, the restriction of imports of third-country coal and the issuing of import licences. The conditions governing the

granting of import licences are laid down in the Law on Tariff Quotas for Solid Fuels [1] and the system of direct State aid is governed by the law to promote the use of Community coal in the electricity industry (third electricity-from-coal Law) of 1974 [2]. A precondition for the grant of aid and the issue of import licences is in both cases the furnishing of proof of the conclusion of long-term agreements on the purchase of Community coal by the electricity generators. These provisions are therefore worded in such a way as to place the purchase of German coal on a par with the purchase of coal from other Member States. In practice, however, the coal for the purchase of which aids or import licences are granted is, with the exception of coal supplied by Houillères du Bassin de Lorraine, exclusively German.

The direct aid is intended to offset the extra cost to the electricity industry of purchasing German coal and takes the form of grants from the 'Ausgleichsfonds zur Sicherung des Steinkohleneinsatzes' (compensation fund for safeguarding the use of coal). The reference price for determining the amount of the aid is, in respect of a certain quantity, the world market price for heavy fuel oil, and in respect of another quantity, the world market price for coal. The compensation fund was set up under the third electricity-from-coal Law as an administered Federal special fund. The fund is financed by an equalization levy, known as the 'Kohlepfennig', payable by electricity supply companies which supply electricty to final consumers and private generators who produce electricity for their own consumption. The equalization levy is calculated as a percentage of the proceeds from electricity sales and is charged by the electricity supply companies to the final consumer.

For a further part of the quantities of coal purchased, the electricity generators receive each year import licences for the purchase of third-country coal. Article 3 (3) of the tariff quotas Law provides that, for the amount in respect of which no aid is granted, authorization to import third-country coal will be given on a one-for-one basis.

Unlike in the old German Länder, in the new Länder no aid is granted for the use of coal to generate electricity, and the importation of coal from third countries is not subject to any restrictions.

(16) In the agreement between the GVSt and the VDEW, maintenance of the statutory rules on aid and of the rules on the procurement of third-country coal is made an explicit prerequisite of the purchasing and supply commitment. A similar clause is to be found in the individual coal supply contracts. In the agreement between the GVSt and the VIK, it is stated that the auto-generators and the coalmining companies operate on the assumption that these rules will remain in force. In the individual supply contracts, the granting of subsidies is likewise made either a precondition or an express term of the contract.

B. Commission aid decisions

(17) The conditions governing the grant of State aid to the coalmining industry are laid down in Commission Decision No 2064/86/ECSC of 30 June 1986 establishing Community rules for State aid to the coal industry [1]. Under that Decision, aid to the coalmining industry may be authorized by the Commission if it helps to achieve at least one of the following objectives: the improvement of the competitiveness of the industry, resulting in better security of supply; the creation of new capacity provided it is economically viable; and the solution of the social and regional problems associated with developments in the industry. The Decision covers the period from 1 July 1986 to 31 December 1993.

(18) For 1987, the Commission authorized compensatory payments by the Federal Republic of Germany totalling DM 3,793 billion, by virtue of Commission Decision 87/451/ECSC [2] and Commission Decision 89/296/ECSC [3]. The compensatory payments amounting to DM 4,7 billion notified for 1988 were authorized by the Commission by Decision 89/296/ECSC. Under that Decision, the German Government was required to submit to the Commission before 30 September 1989 a plan for the reduction of the compensatory payments made under the compensation scheme or of any other

(1) Edition of 15 September 1980, *Federal Law Gazette* Part I, p. 1945.
(2) Revised edition of 19 April 1990, *Federal Law Gazette* Part I, p. 917.

(1) OJ No L 177, 1. 7. 1996, p. 1.
(2) OJ No L 241, 25. 8. 1987, p. 10.
(3) OJ No L 116, 28. 4. 1989, p. 52.

measure having equivalent effect. The Commission also stated in the Decision that the compensatory payments had to be gradually reduced in conjunction with a plan for the restructuring, modernization and rationalization of the coalmining industry. By letter dated 26 November 1991 the German Government informed the Commission of the outcome of the 1991 round of coal talks and stated that this constituted a restructuring plan for the German coalmining industry. The GVSt has brought an action against Decision 89/296/ECSC before the Court of Justice of the European Communities. The German Government is intervening in the action on behalf of the GVSt.

With the further authorization of a subsequent payment amounting to DM 200 million by virtue of Commission Decision 90/632/ECSC [1], the total authorized compensatory payments for 1988 come to DM 4,9 billion. The Commission, by Commission Decisions 90/632/ECSC and 90/633/ECSC [2], authorized compensatory payments amounting to DM 4,9 billion for 1989, and compensatory payments of DM 4,6 billion for 1990. The German Government has contested those Decisions as well. By Decision 93/66/ECSC of 25 November 1992, the Commission authorized further payments for 1991 and 1992 [3].

C. The arguments of the parties to the agreements

(19) The GVSt takes the view that the supplementary agreements are elements of a Member State's strategy for safeguarding energy, and as such do not fall under the competition rules of the EEC Treaty and the ECSC Treaty. Facts and value judgments had to be taken into account which, in the current state of the law, did not come within the Community's ambit since there was no fully-fledged Community energy policy.

In any case, so the GVSt argues, the supplementary agreements do not restrict competition within the common market, nor do they affect trade between Member States. There is hardly any intra-Community trade in coal. When the Jahrhundertvertrag was concluded, no coal was supplied by other producers in the Community. Moreover, coal from Houillères du Bassin de Lorraine was also used to generate electricity. The alternative to German coal was coal imported from outside the Community and not coal from other Community countries. As fas as the alternative primary energy sources — oil and natural gas — were concerned, their use for electricity generation was already restricted by national law. Coal did not compete with nuclear energy, since coal was used for medium-load electricity generation and nuclear energy for base-load generation. In addition, the importing of electricity from France showed that some cross-frontier trade existed.

With regard to the agreement concluded with the VIK, the GVSt takes the view that this is not caught by Article 85 of the EEC Treaty as the recommendation issued is not legally binding on VIK members.

Article 65 (1) of the ECSC Treaty was not applicable, as the mining companies were able to enter into the supply commitments arising from the supplementary agreements only jointly, and not singly. The mining companies were therefore in this respect to be regarded as a consortium.

The GVSt is further of the opinion that the two supplementary agreements are not caught by Article 85 of the EEC Treaty, since the application of the competition rules of the EEC Treaty is precluded by Article 90 (2). Were it otherwise, the competition rules would obstruct the performance of the tasks assigned by law and by the Federal Government to the electricity generators and to the mining companies for the purpose of safeguarding electricity supplies. The system of coal-purchasing commitments on the part of the electricity supply companies preserved a national energy source that was independent of developments on the international commodity markets, particularly the oil market.

In 1980 the mining companies undertook very extensive investments on the strength of the agreements.

What is more, the agreements were necessary for the prevention of social strife. The process of cutting back production capacity and jobs in coalmining begun in the 1950s was continuing and would continue further. Any speeding-up of the process of restructuring this sector of the economy might result in tensions in the regions concerned that would be difficult to control.

[1] OJ No L 346, 11. 12. 1990, p. 18.
[2] OJ No L 346, 11. 12. 1990, p. 20.
[3] OJ No L 21, 29. 1. 1993, p. 33.

(20) However, two of the electricity supply companies affected by the purchasing commitments criticize the Jahrhundertvertrag. They state that they accepted the individual coal purchasing commitments only through fear that they would otherwise not be allowed to go ahead with the construction of planned nuclear power stations. The coal-purchasing commitments were excessive and precluded procurement from other potential sources in Europe. The supplementary agreement adversely affected both their competitiveness and intra-Community trade. A reduction in the purchasing commitments would, they believe, not have any effect on security of supply.

D. Comments by third parties

Following publication of the notice pursuant to Article 19 (3) of Regulation No 17, the Commission received the following comments from third parties.

(21) On the GVSt-VDEW agreement: The Land Governments of North Rhine-Westphalia and the Saarland and the 'Industriegewerkschaft Bergbau und Energie' (Industry-wide Trade Union for Coalmining and Energy) take the view that, pursuant to Article 90 (2), the competition rules of the EEC Treaty cannot be applied to the supplementary agreements, as this would obstruct the performance, in law and in fact, of the particular tasks assigned to the electricity supply companies. The supplementary agreements were, in addition, necessary for reasons of labour relations and security of energy supply.

By contrast, the Government of the Land of Baden-Württemberg considers that the purchasing commitments associated with the supplementary agreements are inconsistent with an internal energy market based on as much competition and intra-Community trade as possible. There is, it maintains, an urgent need for a significant reduction in the purchasing commitments of the electricity supply companies.

(22) The following observations were made following publication of the Notice concerning the GVSt-VIK agreement: A German metal company and the 'Wirtschaftsvereinigung Metalle' stated that the system of coal aid by means of the Kohlepfennig (coal levy) leads to economic disadvantages for German electricity consumers and that the supplementary agreement infringes Article 85 of the EEC Treaty. Several British coal producers and the Confederation of United Kingdom Coal Producers considered that the agreement violates Article 65 of the ECSC Treaty as coal can be mined in the Community at a lower price than that envisaged by the agreement. The 'Verein Deutscher Kohleimporteure' (Association of German Coal Importers) stated its view that intercommunity trade was affected by the supplementary agreement.

II. LEGAL ASSESSMENT

A. Article 85 (1)

Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

1. *The agreement between the GVSt and the VDEW*

(a) Agreements between undertakings

(23) The 'supplementary agreement' is an agreement between undertakings or associations of undertakings within the meaning of Article 85 (1) of the EEC Treaty. Under an agreement between their associations, the electricity supply companies and the coalmining companies have, through the commitments they have entered into, laid down rules on the sale of German coal that are directly binding not only on the associations but also on their members.

(b) Restriction of competition

(24) The supplementary agreement restricts competition in two ways:

— the electricity supply companies grouped together within the VDEW have jointly committed themselves towards the GVSt and its members to making long-term purchases of preformulated amounts of German coal. The fact that the purchasing commitment can be adjusted in line with requirements makes it clear that the arrangement is an exclusive one. This restricts competition among the electricity supply companies for primary energy sources. The electricity supply companies have through their parallel commitments jointly deprived themselves of the possibility of using coal of other origin or other primary energy sources such as natural gas, oil and nuclear energy. Even if the actual supplier is not specified, they must always cover their coal requirements by purchasing from the members of the GVSt, although

neither the total quantity to be purchased nor the price is known for certain. The fact that German law regulates the use of oil and natural gas for electricity generation does not preclude the application of Article 85 (1) of the EEC Treaty. In the first place, the specific restriction of competition stems, not from German law, but from the supplementary agreement. Although conclusion of the supplementary agreement was encouraged by the German Government, it was not required by any German law. In the second place, by virtue of Article 5 of the EEC Treaty, a provision of national law may not authorize conduct that enables undertakings to circumvent Article 85. The Council Directive 75/405/EEC of 14 April 1975 concerning the restriction of the use of petroleum products in power stations [1] likewise does not preclude the application of Article 85. The use of oil for electricity generation and hence also the possibility of trade between Member States is not completely ruled out by it. As regards the use of natural gas for electricity generation, the Community-law restrictions in this field were removed by Council Directive 91/148/EEC of 18 March 1991 [2], with the result that natural gas is available without restriction as a primary energy source,

— the purchasing commitment also means that, to the extent that electricity is generated from the coal purchased in pursuant of that commitment, electricity imports from other Member States are precluded.

(c) Effect on trade between Member States

(25) The supplementary agreement is liable to affect trade between Member States because the commitment to purchase German coal precludes imports of coal and other primary energy sources from other Member States. The fact that the volume of intra-Community trade in coal is rather small does not make this point any less valid. It may actually be due to an existing restriction of competition and is not necessarily proof that no competition can take place. A comparison of the average cost of mining German and British coal (Federal Republic: ECU 131/tce; United Kingdom: ECU 87/tce) shows that highly attractive alternatives to German coal are available to German electricity generators. Under the third electricity-from-coal Law, the grant of aid is not restricted to the use of German coal but is also possible for the use of coal from other Member States. The same applies to the issuing of import licences under the Tariff Quotas Law. The volume of intra-Community trade in coal may be small, but that is not the case with other primary energy sources such as natural gas and oil. Consequently, if there were no commitment to purchase coal, there could conceivably be trade opportunities for these other primary energy sources.

There is an indisputable effect on trade between Member States to the extent that electricity imports from other Member States are precluded. The GVSt's objection that cross-frontier trade in electricity does exist does not invalidate this assessment. The fact that trade already exists does not mean that the development of further trade is not affected by a restriction of competition.

2. *The agreement between the GVSt and the VIK*

(a) Agreements between undertakings and decisions by associations of undertakings.

(26) The GVSt and the VIK are associations of undertakings within the meaning of Article 85 (1) of the EEC Treaty. The 'supplementary agreement' is an agreement between associations of undertakings. The recommendations issued by the associations concerning the conclusion of long-term coal supply contracts are in the nature of decisions by associations of undertakings. The argument advanced by the GVSt that the relevant recommendation was not binding on VIK members does not alter this fact. As the Court of Justice held in *Verband der Sachversicherer e.V. v. Commission* [3], regardless of what its precise legal status may be, a recommendation of an association which constitutes the faithful reflection of the association's resolve to coordinate the conduct of its members in accordance with the terms of the recommendation amounts to a decision by an association of undertakings within the meaning of Article 85 (1) of the

[1] OJ No L 178, 9. 7. 1975, p. 26.
[2] OJ No L 75, 21. 3. 1991, p. 52.

[3] Case 45/85 [1987] ECR 405, paragraph 32.

EEC Treaty. The GVSt itself states that, in addition to the 34,4 million tce purchased under the GVSt-VDEW agreement, a further 6,5 million tce has to be purchased by auto-generators to make up the annual total of 40,9 million tce. This explains the GVSt's statement that the two agreements form a composite whole. Irrespective of whether it was legally binding, the recommendation was therefore intended to coordinate the conduct of the mining companies and of the auto-generators. That it had the desired effect can be seen from the fact that contracts covering the intended total amount and making express reference to the recommendation were concluded between industrial undertakings and coalmining companies.

(b) Restriction of competition and effect on trade between Member States

(27) With regard to the restriction of competition and the effect on trade between Member States, the same considerations apply as are set out in paragraph (25).

B. Application of Article 85 not precluded by Article 90 of the EEC Treaty

(28) The application of Article 85 of the EEC Treaty is not precluded by Article 90 (2) of the EEC Treaty. It can be assumed that the electricity supply companies fall within the scope of Article 90 of the EEC Treaty in so far as they provide basic supplies of electricity. In principle, the competition rules of the EEC Treaty also apply to undertakings entrusted with the operation of services of general economic interest unless the application of those rules prevents them from performing the particular tasks assigned to them.

The GVSt takes the view that the application of Article 85 would prevent the performance, in law or in fact, of those tasks. However, it is not evident that the basic security of public electricity supplies is ensured only by the notified agreement, with its fixed coal procurement amounts and its consequent preclusion of the procurement of other primary energy sources. This view also seems to prevail among German electricity generators. In a VDEW publication [1] it is stated that, in the opinion of the great majority of those concerned, the current coal procurement amounts are not essential from the point of view of security of supply.

(29) Moreover, as is stipulated in the second sentence of Article 90 (2), the development of trade must not be affected to such an extent as would be contrary to the interests of the Community. Were is otherwise, then compliance with the conditions laid down in Article 90 (2) would be measures exclusively against national criteria and hence ultimately left to the discretion of the Member States. The need for national measures must therefore be measured rather against Community criteria.

(30) Against the background of the further development of the internal market, the proportion of input energy used for electricity generation which is obtained on a priority basis from domestic energy sources and is thus shielded from competition must be limited to the minimum necessary to safeguard basic electricity supplies. The Commission takes the view that at the end of 1995 this proportion should not exceed 20 % of the input energy used to cover gross electricity consumption [2]. In the light of statements made by the German Government and the GVSt, the Commission considers that the coal purchasing commitments to which the two supplementary agreements relate are within these limits. In 1990 gross electricity consumption in the Federal Republic of Germany was 550 TWh. On the basis of this total consumption of 550 TWh in 1990 and an annual increase in consumption of 1,5 %, total consumption in 1995 can be estimated at about 593 TWh. If it takes an average of 310 grammes tce to generate 1 kWh (*source*: Federal Ministry for Economic Affairs), the amount of fuel that will be needed in 1995 to generate 20 % of gross electricity consumption is 36,77 million tce. This amount approximates to the 37,5 million tce of newly mined coal which in 1995 is to cover the puchasing commitments under the two supplementary agreements. The fact that the actual purchasing commitment of 40,9 million tce exceeds this amount can be accepted as a transitional arrangement lasting until 1995 as part of an adjustment process. The cut-back in output is already helping to put an end to a situation which is unacceptable for the purposes of competition law.

[1] *Potentiale zur CO_2-Minderung in der Elektrizitätswirtschaft* (Possibilities of reducing carbon dioxide in electricity generation).

[2] Proposal for a Council Directive concerning common rules for the internal market in electricity (OJ No C 65, 14. 3. 1992, p. 4 Article 13 (5)).

C. Article 85 (3)

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) may be declared inapplicable in the case of any agreement or decision which contributes to improving the production or distribution of goods, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives of afford those undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The supplementary agreements meet the conditions for exemption under Article 85 (3) up until 31 December 1995.

1. *Improving the production or distribution of goods*

(31) The supplementary agreements contribute to improving electricity generation and coal production in as much as they lay down a supply and purchasing obligation limited to a specific period and specific quantities. Electricity cannot be produced for storage. Production and demand must be in constant equilibrium. Electricity supply and distribution is therefore a branch in the energy sector in which it is of particular importance to safeguard the procurement of primary energy sources. The supplementary agreements make such an energy source available in the form of coal. The supplementary agreements thus promote security of energy supply in the Federal Republic of Germany.

2. *Allowing consumers a fair share of the resulting benefit*

(32) The requirement that consumers shall be allowed a fair share of the resulting benefit is met. Electricity users have a high degree of interest in a secure supply of energy. The increased security of energy supply afforded by the supplementary agreements represents a benefit for both industrial and private consumers.

3. *Need for the restriction*

(33) The supplementary agreements are necessary — within the limits of the authorization granted — as a means of ensuring certainty in the planning of secure electricity supplies. The electricity supply companies, the auto-generators and the coalmining companies need to be able to carry out fairly long-term planning in order to run their undertakings with confidence. At the time of the closing of the contracts the energy sources suitable for electricity generation were, according to numerous experts, subject to considerable price fluctuations and supply risks on the world market.

Secure applies of electricity by the electricity industry presuppose secure supplies of energy sources. If they are to be able to cover the requirements of the electricity supply companies and auto-generators as economically as possible, the coalmining companies also need to have some idea of future sales. The security of supply of energy sources that is necessary in order to safeguard electricity supplies can be provided by the coalmining companies only if there is an appropriate sales guarantee for coal. A quantitative framework on the scale indicated meets this requirement.

(34) The interests of security of supply cannot, however, justify purchasing commitments which exceed actual requirements. The carrying-forward of purchasing commitments from one period to the next, provided for in both supplementary agreements, can no longer contribute to security of supply and would represent an unjustifiable tying of customers. Such an arrangement would not therefore qualify for exemption. Consequently, exemption is possible only in so far as the annual purchasing commitments forming the basis of the notifications made by the GVSt of 34,4 million tce (GVSt-VDEW agreement) and 6,5 million tce (GVSt-VIK agreement) are authorized as purchasing commitments in respect of an annual maximum amount. Unfulfilled purchasing commitments may accordingly not be carried forward by the parties to subsequent periods. This does not prevent electricity generators and coalmining companies from concluding new, short-term supply contracts in the event of sudden extra demand.

4. *No possibility of eliminating competition*

(35) The supplementary agreements do not offer the opportunity of eliminating competition for a substantial part of the products in question. Even though the amount of electricity generated from the coal purchased accounts for a substantial part of the market, the electricity supply companies and auto-generators are still able to use other domestic or imported energy sources to generate the remaining amount of electricity. Direct imports of electricity are not excluded either. Furthermore, the

supplementary agreements do not concern the entire territory of the Federal Republic of Germany, but only its former territory before the accession of the new Länder.

D. Article 65 (1) of the ECSC Treaty

Article 65 (1) of the ECSC Treaty prohibits 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, and in particular those tending to fix or determine prices, to restrict or control production, technical developments or investment, or to share markets, products, customers or sources of supply.

1. *Undertakings*

(36) The members of the associations affiliated to the GVSt are undertakings within the meaning of the ECSC Treaty as they satisfy the conditions of Article 80 of that Treaty inasmuch as they are engaged in production in the coal industry. The GVSt is therefore an association of undertakings within the meaning of Article 65 (1) of the ECSC Treaty.

The undertakings belonging to the VDEW and the VIK do not satisfy the conditions of Article 80 of the ECSC Treaty. The competition rules of the ECSC Treaty are therefore not applicable to the agreements concluded between the GVSt and the VDEW and between the GVSt and the VIK as such, but only to agreements between the mining companies and to decisions by the GVSt.

2. *Agreements between undertakings and decisions by associations of undertakings*

(a) Supplementary agreement between the GVSt and the VDEW

(37) The coalmining companies grouped within the GVSt have jointly committed themselves to supplying certain amounts of coal under the supplementary agreement concluded between the GVSt and the VDEW. This constitutes firstly an agreement to supply a certain amount — namely the amount laid down by the associations in the supplementary agreement — as a group and an agreement to endorse the contents of the agreement between the associations. Secondly, it is an agreement to divide this amount among the German coalmining companies. The individual coalmining companies made their entering into commitments conditional on their determining their separate shares in that total amount. The decision by the GVSt to conclude the agreement with the VDEW is moreover, a decision by an association of undertakings.

(b) Supplementary agreement between the GVSt and the VIK

(38) Similar agreements between the coalmining companies grouped together within the GVSt also form the basis of this agreement. In point 2 of the supplementary agreement it is stated that the coalmining companies are to give 'commitments' to comply with the principles of agreement. These shared commitments are necessarily based on an understanding between the undertakings and hence on an agreement to supply a certain total amount and to endorse the contents of the supplementary agreement. Secondly, the coalmining companies have concluded an agreement to the effect that the consignments making up the total amount are to be divided among them alone.

3. *Restriction of competition*

The agreements between the coalmining companies restrict competition in a number of ways.

(a) Supplementary agreement between the GVSt and the VDEW

(39) As a result of the agreement among the coalmining companies to endorse the agreement between the associations, all individual supply contracts with the electricity supply companies are concluded on the basis of the terms of the supplementary agreement. Competition between the coalmining companies is precluded to that extent. This constitutes a common control of marketing and a sharing of markets within the meaning of Article 65 (1) of the ECSC Treaty.

As a result of the agreement on the total amount of coal to be supplied, supplies by coal producers from other Member States are precluded by that amount. The German market for coal is thereby sealed off from supplies from other Member States. As was stated above, supplies from other Member States are perfectly feasible given the higher cost of German coal. The market-partitioning effect is also apparent from the protocol to Article 2 (4) of the supplementary agreement between the GVSt and the VDEW, according to which the coalmining companies undertake, if their own output does not suffice, to make up the difference with German

coal only. A coalmining company is therefore restricted, even where it has to purchase coal from other sources in order to meet its supply commitments, to German coalmining companies and cannot procure supplies from other companies.

(40) The agreement on the size of the shares in the total amount means that competition between German coalmining companies is entirely precluded as far as the task of supplying that total amount is concerned. The argument advanced by the GVSt to the effect that the supplementary agreement could not fall within the scope of Article 65 because the scale of the commitment was such that the coalmining companies had to conclude the supplementary agreement jointly, is misconceived. It is an attempt to justify a restriction of competition by that restriction itself, and amounts to saying that a restrictive agreement is justified by the very fact that the restriction of competition can come about only through several competitors' reaching an agreement.

(b) Supplementary agreement between the GVSt and the VIK

(41) The same considerations apply to the understanding between the coalmining companies which forms the basis of the agreement between the GVSt and the VIK. The arrangements fixing the total amount and the other terms of the supplementary agreement constitute an agreement on the conditions of sale for coal and a division of the market. Competition between the coalmining companies is therefore precluded to that extent. The GVSt's contention that the coalmining companies competed for supply contracts with the auto-generators does not make this assessment any less valid. This 'competition' took place on the basis and within the framework of a restrictive agreement that had already been concluded.

Moreover, the agreement has a market-partitioning effect. Article 3 of the principles of agreement provides that the individual contracting parties may conclude agreements with one another, and with the electricity supply companies covered by the GVSt-VDEW agreement, on the transfer of purchasing commitments or purchasing rights, provided that doing so does not lead to any reduction in the total amounts laid down in the GVSt-VIK and GVSt-VDEW agreements. The coalmining companies have thereby jointly ensured that, even in the event of changes in individual supplier-purchaser relationships, supplies are always obtained from German coalmining companies.

E. Article 65 (2) of the ECSC Treaty

Pursuant to Article 65 (2) of the ECSC Treaty the Commission may authorize specialization agreements or joint-buying or joint-selling agreements and agreements which are strictly analogous in nature and effect to those agreements, provided the requirements of that paragraph are met. Those requirements are that the agreement must make for a substantial improvement in the production or distribution of the products in question, that it must be essential in order to achieve these results and is not more restrictive than is necessary for that purpose, and that it is not liable to shield a substantial part of the products against competition within the common market.

(42) The Commission is of the opinion that those requirements are met in this case. The agreements between the coalmining companies are strictly analogous to an agreement on specialization and joint buying and selling. These agreements on the fixing of a total amount and the apportionment of that amount are a necessary precondition for the conclusion of the two supplementary agreements. They enable the coalmining companies to carry out the long-term sales planning that is essential to their business operations. Nor do they appear to be more restrictive than is necessary for the said purpose of improving production and supply. However, the agreements concluded by the coalmining companies can be authorized only in so far as the agreements on the purchasing commitments covered by the supplementary agreements are authorized as agreements on an annual maximum amount. The carrying-forward of unfulfilled purchasing commitments to subsequent periods is therefore ruled out. In view of the need to ensure certainty in respect of planning, the agreements can also be considered acceptable from the point of view of the requirements that a substantial part of the products may not be shielded against competition. Moreover, the agreements do not concern the entire territory of the Federal Republic of Germany, but only its former territory before the accession of the new Länder.

F. Articles 6 and 8 of Regulation No 17

(43) Pursuant to Article 6 (1) of Regulation No 17, this Decision will apply from the date of notification, i.e. 1 June 1989 in the case of the GVSt-VDEW agreement, and 2 July 1991 in the case of the GVSt-VIK agreement.

G. Relationship to the Commission's aid decisions

(44) The decision to authorize the agreements between the GVSt and the VDEW and between the GVSt and the VIK is without prejudice to the legal assessment by the Commission of the aid granted by the German Government to the German coalmining industry. In particular, the German coalmining companies and the German Government may not derive from the exemption decision any right to receive or to grant aid. The parties to the agreements have made the coal-purchasing commitments subject to the grant of aid and the possibility of procuring coal from third countries. The authorization under the rules on restrictive agreements cannot, therefore, prejudice future decisions on the admissibility of the grant of aid. This applies both to decisions adopted on the basis of general Decision No 2064/86/ECSC and to decisions concerning the period after 1993, for which a general legal basis has yet to be created. The exemption decision is also without prejudice to future decisions on the admissibility of aid to the coalmining industry, because the quantity receiving direct assistance under the third electricity-from-coal Law is already smaller than the exempted purchasing commitment,

HAS ADOPTED THIS DECISION:

Article 1

Article 85 (1) of the EEC Treaty is declared inapplicable pursuant to Article 85 (3) to the 'Supplementary agreement on the sale of German coal up to 1995' concluded between the Gesamtverband des deutschen Steinkohlenbergbaus and the Vereinigung Deutscher Elektrizitätswerke e.V., on condition that the purchasing commitment does not exceed an annual maximum of 34,4 million tonnes of coal equivalent [no carry-over from one period to another being permitted].

The supplementary agreement is authorized, subject to the same condition, under Article 65 (2) of the ECSC Treaty.

The exemption and the authorization are granted for the period from 1 June 1989 to 31 December 1995.

Article 2

Article 85 (1) of the EEC Treaty is declared inapplicable pursuant to Article 85 (3) to the 'Supplementary agreement on the sale of German coal to industrial producers of electricity' concluded between the Gesamtverband des deutschen Steinkohlenbergbaus and the Vereinigung Industrielle Kraftwirtschaft e.V., on condition that the purchasing commitment does not exceed an annual maximum of 6,5 million tonnes of coal equivalent [no carry-over from one period to another being permitted].

The supplementary agreement is authorized, subject to the same condition, under Article 65 (2) of the ECSC Treaty.

The exemption and the authorization are granted for the period from 2 July 1991 to 31 December 1995.

Article 3

This Decision shall be without prejudice to the assessment of the compatibility of aid to the German coalmining industry with the rules of the ECSC Treaty.

Article 4

This Decision is addressed to: Gesamtverband des Deutschen Steinkohlenbergbaus, Friedrichstraße 1, D-W-4300 Essen 1; Vereinigung Deutscher Elektrizitätswerke e.V., Streesemannallee 23, D-W-6000 Frankfurt/Main; and Vereinigung Industrielle Kraftwirtschaft e.V., Richard-Wagner-Straße 41, D-W-4300 Essen 1.

Done at Brussels, 22 December 1992.

For the Commission

Leon BRITTAN

Vice-President