COMMISSION DECISION

of 29 July 1998

on aid granted by Germany to the companies Sophia Jacoba GmbH and Preussag Anthrazit GmbH for 1996 and 1997

(notified under document number C(1998) 2476)

(Only the German text is authentic)

(1999/184/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 88 thereof,

Having regard to Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry [1],

Whereas:

I

On 23 October 1996 and 5 November 1996 the British company Celtic Energy Ltd lodged two formal complaints with the Commission through the Office of the United Kingdom Permanent Representative to the European Union. Those complaints concern the German mining companies Sophia Jacoba GmbH and Preussag Anthrazit GmbH.

By letters of 5 October 1995 and 30 September 1996, Germany notified the financial support it intended to grant for the years 1996 and 1997 in accordance with Article 9(1) of Commission Decision No 3632/93/ECSC.

Following these complaints and its own subsequent investigations, the Commission sent a letter of formal notice to Germany on 2 August 1997 in which it officially communicated the content of the complaints and asked for information concerning the actions of the companies and the German authorities. In its letter, the Commission also indicated the principles of law which might have been infringed by Germany and the companies Sophia Jacoba GmbH and Preussag Anthrazit GmbH.

Germany replied to the letter of formal notice on 6 October 1997.

The Commission invited comments from the other Member States and interested parties in a communication published in the *Official Journal of the European Communities* [2]. Comments were received from the United Kingdom (letter of 23 September 1997), several competitor companies and the German coal producers, and duly forwarded to Germany.

On 13 March 1998, 15 May 1998 and 12 June 1998 respectively, the companies Consolidated Coal plc, Evans & Reid Coal Co., Ltd and Betws Anthracite Ltd also lodged complaints about the sale of German sized-anthracite in the Community market and more particularly in the United Kingdom. Preussag Anthrazit GmbH, for its part, sent the Commission a paper through a firm of solicitors setting out its position on the letter of formal notice.

Since these complaints and the paper were forwarded to the Commission after the date set in the letter of formal notice and the Commission could not grant Germany further legal hearing, they were not taken into account for the purposes of this Decision.

The complaints in question relate to the sale in 1996 and 1997 by Sophia Jacoba GmbH and Preussag Anthrazit GmbH of sized anthracite subsidised in the Community. The extremely favourable prices (compared with the production costs) offered by these companies on the Community market and primarily in the United Kingdom are said to have been possible only through the use of State aid paid by Germany under Decision No 3632/93/ECSC. This aid which, according to the complaint, covers a substantial part of the companies' production costs, is said to have been used for an unauthorised purpose.

According to the complainant, such practices lead to distortions of competition in the Community anthracite market. In addition, the same product is sold in other Member States by the companies concerned at higher prices than in the United Kingdom.

[1] OJ L 329, 30. 12. 1993, p. 12.

[2] OJ C 258, 23. 8. 1997, p. 2.

After examining Germany's reply to the letter of formal notice and the comments by the other interested parties, the Commission considered that this reply did not constitute sufficient grounds, as will be explained in this Decision, to refrain from taking further action on the complaint.

In the meantime, there were numerous meetings and contacts between the Commission and representatives of the companies and Member States concerned in order to analyse the problem in greater depth. The Commission also sent its representatives to the United Kingdom (26 to 30 January 1998) and Germany (10 and 11 February 1998) to meet the main representatives of the anthracite industry in Germany, Wales, England and Northern Ireland. The purpose of these meetings was, on the one hand, to ascertain the facts and in particular to assess the situation on the geographical markets most affected together with the manner in which the aid is being used and, on the other, to analyse the respective price policies and the legal arguments in order to determine whether the German aid is compatible with the common market.

II

The Community anthracite market mirrors fairly clearly the difficulties facing the Community coal industry: decline in demand, particularly in the household market, growing competition from imports from third countries and high production costs in certain production sectors, with substantial variations in costs between the individual production sectors.

According to the information supplied by Germany and the United Kingdom, the average production costs of the main German anthracite producer, Preussag Anthrazit GmbH, amount to DEM 300 per tonne or ECU 152, compared with average costs of GBP 30, or ECU 43, for Celtic Energy Ltd, the main UK producer. This difference is largely due to the favourable geological conditions under which the UK producer can operate, whereas Preussag Anthrazit GmbH works coal at depths of up to 1 500 m. The production costs of DEM 373 for Sophia Jacoba GmbH in 1996 are not representative, as it ceased production in March 1997. Its production costs in 1995 amounted to DEM 307 per tonne.

Anthracite has the highest carbon content of all types of coal. It is a high-grade, almost smokeless fuel with a low proportion of volatile components. It has a low flammability, but gives off constant, intense heat. Because of these properties, it has always been highly suitable for use in industry and above all in the home.

The raw anthracite undergoes several processing stages to separate the fines, a product of low commercial value (DEM 60 to 70 tonne) of particle size 0 to 5 mm, which accounts for around 60 % of pit production and at best finds a market in the power industry, from the nuts or sized anthracite. The latter accounts for 20 to 30 % of pit production, has a high commercial value (DEM 190/t) and is sold to industry and domestic households.

Consequently, the marketing of anthracite traditionally concerned mainly sized anthracite.

The market for sized anthracite is geographically limited to the traditional coalmining regions of the Community in Belgium, Germany, Spain, France and the United Kingdom.

German anthracite has a good reputation in the Community market owing to the regularity of deliveries, the quality and the competitive prices. Deliveries to the United Kingdom began in 1971 in the case of Sophia Jacoba GmbH and in the middle of the seventies in the case of Preussag Anthrazit GmbH.

The market in the United Kingdom for deliveries from Germany comprised the east of the country from the Humber to the south coast and — in the case of Sophia Jacoba GmbH — Northern Ireland.

The two German companies were able to open up a market in the United Kingdom as the State-owned National Coal Board (subsequently British Coal) had done little prospecting for storage sites in these areas, and they offered very favourable prices.

When the British Coal Corporation was privatised in 1994, Celtic Energy Ltd, a private company, took over several pits in Wales, most of which produce anthracite. Following the acquisition of these open-cast mines, Celtic Energy Ltd embarked on a completely new policy, as it decided to expand its business in England and opened a distribution centre for its products in Hull, the main British port of entry for German anthracite. As already mentioned, eastern England was traditionally the main market in Britain for Sophia Jacoba GmbH and Preussag Anthrazit GmbH.

In order to capture part of the English market, Celtic Energy Ltd decided in 1995 to sell its products in England at the same prices as in Wales, which it was able to do by meeting the costs of transport.

As a result, Sophia Jacoba GmbH and Preussag Anthrazit GmbH decided to lower their prices, triggering a process of mutual undercutting of prices which continued until the end of 1997.

The Commission's investigations have shown that Preussag Anthrazit GmbH's prices for anthracite in the United Kingdom were, at least in the period 1996-1997, systematically lower than the prices of the companies which succeeded the National Coal Board as reference producers within the meaning of Article 2 of Commission Decision No 72/443/ECSC of 22 December 1972 on alignment of prices for sales of coal in the common market ([1]), as last amended by the Act of Accession of Austria, Finland and Sweden. In January 1996 the grade 'beans' (Nuß IV) was on sale on the east coast of Britain at a price of GBP 93 per tonne from Preussag Anthrazit GmbH and GBP 101 per tonne from Celtic Energy Ltd. The prices in October 1997 for the same grade were GBP 94 and GBP 103.40 respectively. By way of comparison, anthracite from the People's Republic of China was being sold at GBP 94 in January 1996 and at GBP 102.7 in October 1997. In 1995, sized anthracite from both Preussag Anthrazit GmbH and Celtic Energy Ltd was selling for GBP 105, while the same product from China was selling for GBP 94.

Preussag Anthrazit GmbH offers major reductions on its list prices in the various Member States. A study by an independent expert shows that the lowest (pithead) prices charged by the company for sales in the United Kingdom in summer 1996 ranged from DEM 153 per tonne (Nuß IV) to DEM 183 per tonne (Nuß II) compared with (pithead) list prices of DEM 400 for sized anthracite of grade Nuß IV (14/23) and (Nuß II (37/55). By way of comparison, the pithead prices for grade (Nuß IV were around DEM 248 for deliveries to France, DEM 265 to Belgium and DEM 95 to Spain.

In the case of Sophia Jacoba GmbH, Nuß V anthracite (6/14), which had a pithead list price of DEM 361 per tonne, was sold in winter 1995/96 in the United Kingdom at (pithead) prices of DEM 160 per tonne compared with DEM 202 per tonne (pithead price) for the same grade in France ([2]).

Preussag Anthrazit GmbH's concern about the competition from the Welsh producers can be seen from the 1995 company report, which states that Welsh anthracite, which has reasserted itself on the market following the privatisation of British Coal, was a cause for concern' ([3]). Sophia Jacoba GmbH comes to the same conclusion in its 1995 company report ([4]).

Furthermore, the 1996 company report states that 'Preussag Anthrazit GmbH was able to increase its market share on the home market and some foreign markets for household fuel by means of an elastic price policy' ([5]).

This policy proved effective in practice, as the information available shows that the company's exports rose from 279 000 tonnes to 358 000 tonnes between 1995 and 1996, an increase of 20 %. Sales in the United Kingdom apparently increased by 49 % from 66 000 tonnes to 98 000 tonnes between 1995 and 1996. The corresponding increase in France and Belgium was 13 % and 8 % respectively. In 1997 the volumes dropped to 68 000 tonnes and to zero at the beginning of 1998.

Sophia Jacoba GmbH's sales in the United Kingdom rose from 25 700 tonnes to 37 500 tonnes in 1996. According to the company, no deliveries were made in 1997, the year in which its only pit was closed.

This growth in exports is all the more remarkable as it took place in difficult market conditions. Firstly, there is growing competition from third countries such as Vietnam, the People's Republic of China or Russia, the quality of whose products is wholly acceptable for the Community market.

Secondly, the main market for sized anthracite, i.e. households, is very demanding. Although private consumers are loyal to their suppliers, they are attracted to cheaper, more user-friendly energy sources such as natural gas or fuel oil.

It can be concluded from the above that the prospects for the Community sized-anthracite market are less than promising, and that the market is in steep structural decline.

III

In its letter of formal notice to Germany, the Commission expressed the view that Sophia Jacoba GmbH and Preussag Anthrazit GmbH pursued their corporate policy on the market for sized anthracite in the Community and more particularly in the United Kingdom with the aid of subsidies which were used indirectly for purposes not provided for in Commission Decision No 3632/93/ECSC and 96/560/ECSC of 30 April 1996 on German aid to the coal industry in 1995 and 1996 ([6]).

([1]) OJ L 297, 30. 12. 1972, p. 45.
([2]) The classification of sized anthracite ranges from a particle size of 5/12 mm (Nuß V, grains) to a particle size of 45/74 mm (large nuts). The category Nuß IV corresponds to a particle size from 10/15 to 14/22 mm. The designation Nuß II relates to a particle size from 30/50 mm to 35/55 mm.
([3]) Preussag Anthrazit, company report October 1994/September 1995, p. 13.
([4]) Sophia Jacoba GmbH, company report 1995, p. 5.
([5]) Preussag Anthrazit, company report October 1995/September 1996, p. 13.
([6]) OJ L 244, 25. 9. 1996, p. 15.

The letter stressed that the interests of Celtic Energy Ltd, whose production is clearly more competitive, could be damaged by the competition from Sophia Jacoba GmbH and Preussag Anthrazit GmbH. The two latter companies' conduct could be seen as infringing the second paragraph of Article 2 of the ECSC Treaty, according to which the Community 'shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity'. Their conduct could be regarded as infringing Article 3(b) and (g) of the ECSC Treaty. Furthermore, Article 4(b) of the ECSC Treaty states that the application by a seller of dissimilar conditions to comparable transactions is prohibited pursuant to the second indent of Article 60(1) of the ECSC Treaty, particularly if buyers are treated differently on grounds of nationality.

The Commission reasoned that the aid, which according to Germany was aid to the marketing of coal for power generation, is in reality aid to secure the companies' survival by covering a substantial part of their fixed production costs. It also took the view that this aid in actual fact benefited the whole of production. Production as a whole would no longer be competitive if the aid ceased, irrespective of the market on which the individual products were sold.

The Commission considered Germany's distinction between subsidised and non-subsidised production, depending on the market for the anthracite, to be artificial and unfounded, and that it facilitated, through State aid, pricing which did not cover production costs.

In its reply to the letter of formal notice, Germany addressed the cross-subsidies argument, contending that the aid was granted to support sales of coal for power generation and to the steel industry, and that deliveries to other consumption sectors were not subsidised at all.

Germany stresses that the subsidies under the Fifth Law on coal for power generation ([1]) are intended to cover the difference between production costs and the price of coal from third countries.

Germany justifies the conduct of the companies concerned, without providing supporting evidence, by arguing that it can make economic sense to maintain or expand production temporarily beyond the volume that can be sold without incurring a loss. If, according to Germany, the resulting additional production leads to a reduction in the average costs of overall production, the additional output can bring about an improvement in the average costs. It further argues that the results of comparing the average costs of overall production with the sales proceeds in the British market will be misleading unless account is taken of this context.

On the basis of the information supplied by Germany, the Commission notes that 1.1 million tonnes of sized coal were sold in the Community in 1996 and 770 000 tonnes in 1997 at prices which did not cover the average production costs. The average price of the sized anthracite sold by Sophia Jacoba GmbH and Preussag Anthrazit GmbH in the Community is in fact some DEM 100 per tonne lower than the average costs of production as a whole.

With regard to the argument that it is in a company's interests to produce as long as the prices cover the variable costs and possibly also a proportion — however small — of the fixed costs, the Commission considers that, in applying this marginal costs principle, Germany is explicitly acknowledging that most, if not all, of the fixed costs are covered by that part of the output whose sales proceeds cover the costs of production, i.e. by the anthracite fines (2,3 million tonnes in 1996 and 1,4 million tonnes in 1997), which according to Germany is the only production sector in receipt of aid.

The Commission considers that the proceeds of sales overall, whether of fines or sized coal, would not cover the costs of production without the subsidies. The companies' sales as a whole have been running up losses for several years owing to the high level of production costs. Germany's contention that the production costs are covered by the proceeds is explained by the fact that the accounts do not make a clear distinction between the companies' earnings and State aid. In other words, the companies treat the aid as part of their turnover and do not distinguish between the consumption sectors, regardless of whether they are subsidised or — as Germany claims in the case of the industrial and household sectors — non-subsidised.

Preussag Anthrazit GmbH's profit and loss account for the 1997 financial year shows sales revenue of DEM 530,27 million ([2]), in which more than DEM 270 million in aid is included. The company report for 1996 gives turnover of DEM 473,74 million, but the breakdown of sales revenue in point 12 of the appendix to the profit and loss account gives no indication — as for the 1997 financial year — of the aid totalling DEM 278 million authorised by the Commission for 1996. The sales

([1]) BGBl. 1995 I, p. 1638.

([2]) Annual accounts and notifications of deposit, Annex to the Federal Gazette No 85 of 8 May 1998.

revenue of Preussag Anthrazit GmbH based on actual turnover for 1996 and 1997 therefore amounts to only DEM 200 million and 260 million respectively. The Commission refers in this connection to Article 2(3) of Decision No 3632/93/ECSC, according to which all aid received by undertakings must be shown together with their profit and loss accounts as a separate receipt, distinct from turnover. Germany has not complied with this requirement and thus infringed the principle of transparency and use of aid for its intended purpose.

The marginal costs argument may appear conclusive for a company operating under competitive conditions; however, it no longer holds good where a company covers more than 50 % of the costs of its overall production from State aid, and virtually all fixed costs are borne exclusively by the production which, according to Germany, is subsidised. Were there to be effects of scale as Germany claims, they would be possible only because of the subsidies. Moreover, the level of subsidy is so great that the company would have to close immediately if the subsidies ceased.

Germany's argument according to which Preussag Anthrazit GmbH covers the fixed costs of its allegedly non-subsidised production from other resources, leading to an erosion of the company's assets, is therefore unfounded and also difficult to square with the profits for 1996 and 1997. It does not appear logical either that the company could have an interest in operating its entire production at a loss.

Since the loss-bringing sale of anthracite, which Germany claims is not subsidised, concerns a relatively large volume of production and has been going on for several years, and since it is unlikely that the ratio of market prices to production costs will improve in future, the Commission considers that such a practice is possible only because Germany keeps the company viable with State aid.

This view is corroborated by the fact that Germany notifies the aid for Preussag Anthrazit GmbH under Article 3 of Decision No 3632/93/ECSC. Unlike Article 4, which concerns aid for the reduction of activity, Article 3 provides for the continuation of production for an indeterminate period on the basis of improved economic viability in view of the conditions prevailing on the world market. If, as Germany maintains, the companies had refrained from taking all permissible measures to preserve their assets, which, in view of the foregoing, would be a policy amounting to their closure, this would conflict with its notification of the aid to Preussag Anthrazit GmbH for 1996 and 1997 as operating aid pursuant to Article 3 of Decision No 3632/93/ECSC.

As already mentioned, on examining Preussag Anthrazit GmbH's profit and loss accounts for 1996 and 1997 the Commission found an annual surplus of DEM 12,59 million and DEM 39,72 million respectively, despite losses from the allegedly non-subsidised sales of DEM 65 million in 1997 and DEM 56,6 million in 1996.

Germany also claims that the aid is compatible with Decision No 3632/93/ECSC, as it forms part of a national programme to secure energy supplies, which contributes to improved security of supply in Germany and the Community, and the Decision explicitly authorises such measures. The Commission would stress in this context that the Decision makes no such provision, and this objective cannot therefore be used as a criterion for authorising aid. Reliance on this criterion would also conflict with the provisions of the second paragraph of Article 2 of the ECSC Treaty.

It is clear from the above that the State aid granted under Decision No 3632/93/ECSC and 96/560/ECSC enabled the beneficiary companies to sell sized anthracite at prices which do not cover the costs of production, and that these sales in part conflict with the provisions of Article 2 and of Article 4(b) of the ECSC Treaty.

Germany states that the aid is calculated on the basis of the average costs of overall production, determined in accordance with the guidelines for company accounts in the coal industry (RBS) [1]. It explains that this approach is appropriate as the different types and grades of coal can only be produced simultaneously (co-production) and the costs consequently cannot be calculated by marketing sector (power generation and heating), so that any allocation of costs (e.g. according to technical or profitability criteria) would ultimately be arbitrary. According to Germany, cost components cannot be shifted between the different market sectors in this system. The point of departure for calculating the aid is the average costs of overall production.

[1] Issued by the General Association of the German Coal Industry.

The Commission's view is that the anthracite fines and the sized anthracite are co-products owing to the homogeneous nature of the unprocessed product and the undifferentiated production costs. The considerable difference in the commercial value of the two products, which can be as much as 500 %, should basically favour a method of cost allocation which takes account not only of the quantities produced, but also of the market value of products of such divergent quality as anthracite fines and sized anthracite. In actual fact, the average pithead prices charged by the two German companies concerned are DEM 60 to 70 per tonne for anthracite fines and DEM 190 per tonne for sized anthracite.

The Commission considers that allocating costs purely on a volume basis without distinguishing between the two products, which results in average costs of over DEM 300 per tonne, gives a disproportionate weight to the book costs of the (low-value) anthracite fines, because account is not taken of the commercial value of the products based on their physical properties. As a result, the volume of aid is set too high.

It could be deduced from this that a system of cost allocation based on the respective contribution of the products to turnover calculated in terms of market prices, which would take account of the unit value of the products and not only of volume, would create a more logical relationship between the unit costs, the commercial value of the products and the necessary subsidies.

Germany's argument regarding the protection of legitimate expectations is not applicable here, as the Commission's decisions require a Member State to ensure that it honours its commitments, without specifying how this is to be done. The Commission never intimated that the cost allocation system used in Germany is sufficient proof of aid being used for the intended purpose. Consequently, in the event of improper use of aid, neither Germany nor the companies concerned can plead the protection of legitimate expectations in respect of a requirement to repay aid on grounds that the Commission did not act.

IV

The Commission noted in its letter of formal notice that the application of dissimilar conditions to comparable transactions by a seller, particularly if buyers are treated differently on grounds of nationality, is prohibited under the second indent of Article 60(1) of the ECSC Treaty and therefore infringes Article 4(b).

With regard to the alignment mechanism provided for in Article 60(2) of the ECSC Treaty, the Commission found in its letter of formal notice that the direct or indirect use of State aid for the purpose of systematic alignment of a product price on the prices of producers not receiving aid, cannot be considered to be in conformity with the ECSC Treaty.

As already demonstrated, Sophia Jacoba GmbH and Preussag Anthrazit GmbH could not in the long term have maintained their price policy, consisting in selling sized anthracite in the United Kingdom at different prices from those in the other Member States and at prices below those of the British producers of sized anthracite, without the aid granted under Decision No 3632/93/ECSC.

Germany argues that High Authority Decision No 30/53 of 2 May 1953 on practices prohibited by Article 60(1) of the Treaty in the common market for coal and steel [1], as last amended by Commission Decision No 1834/81/ECSC [2], and Decision 72/443/ECSC do not make the authorisation to align prices conditional on the companies not receiving any aid. Germany also argues that a general ban on price alignment for companies in receipt of State aid should have been enshrined in the above Decisions.

The Commission considers that the use of aid granted pursuant to Decision No 3632/93/ECSC to align prices on those of competitors within the meaning of Article 60(2) of the ECSC Treaty is not provided for in the Decision and does not contribute to the achievement of any of the objectives set out in Article 2(1) thereof.

Section III of the preamble to Decision No 3632/93/ECSC states that the objectives of the Decision must be achieved with strict adherence to the rules of competition in order to avoid distortion of competition and discrimination between coal producers, purchasers or consumers in the Community as a result of the aid. By the same token, the fourth paragraph of Section I of the preamble stresses that the aid rules must be in the common interest and in no way disturb the functioning of the common market.

[1] OJ 6, 4. 5. 1953, p. 109/53.
[2] OJ L 184, 4. 7. 1981, p. 7.

It is worth pointing out that the ECSC Treaty provides for a total ban on aid as a fundamental principle, although price alignment is permitted (Article 60 ff). Furthermore, the Commission's decisions on State aid to the coal industry relate exclusively to the principle of non-discrimination between buyers (Article 4(b)) and not to Article 60 ff and the price alignment rules. It is normal practice for the Commission, in its decisions on State aid, to impose conditions relating to the conduct of the recipients in order to limit any distortions of competition.

Finally, contrary to the Commission's position, Germany considers that Article 4(b) of the ECSC Treaty cannot be applied simultaneously with Article 60(2) of the Treaty. Germany refers in this connection to the judgment of the Court of Justice of the European Communities in Case C-128/92 Banks v British Coal ([1]).

It is true that, according to the case law of the Court of Justice, Article 4(b) can be applied independently only if more specific rules are lacking; if these rules have been incorporated in other provisions of the Treaty or if they are specified there in greater detail, the texts relating to one and the same rule must be viewed as a whole and applied simultaneously.

The 'more specific rules' in this case concern decisions on State aid to the coal industry, which refer only to Article 4(b) and specifically exclude any discrimination between purchasers and consumers in order to minimise any distortion of competition because of the aid, but which in line with this reasoning do not permit the aid to be used for price alignment.

The price alignment mechanism is, moreover, closely linked to the sale of production on the Community market. As Decision No 3632/93/ECSC does not provide for aid to marketing, it cannot be quoted in defence of alignment of prices on those of Community competitors.

Furthermore, a rule which was created to ensure market transparency and compliance with the provisions of the ECSC Treaty cannot be invoked in order to infringe the very principles which it sets out to protect.

Finally, the Commission's view that the beneficiaries cannot rely on the price alignment rules is not based on the above legal considerations alone. It also notes that, with regard to the main point of the complaint, Preussag Anthrazit GmbH at least did not adhere to the alignment rules. Even though the company could in theory cite these rules as a possible defence, its actual conduct in terms of how it used the State aid in practice is not in conformity with the common market.

In its letter of formal notice to Germany, the Commission explained the grounds for the assumption that the corporate policy of Sophia Jacoba GmbH and Preussag Anthrazit GmbH could result in the application of dissimilar conditions to comparable transactions.

Germany replied that market and competitive conditions in the common market vary over time and from one region to another. Furthermore, the offers related to products of differing grade. Germany therefore considered that the sales of anthracite by Sophia Jacoba GmbH and Preussag Anthrazit GmbH in the different Member States were not comparable.

Article 2(1) of Decision No 30/53 states that the application by a seller in the common market of dissimilar conditions to comparable transactions is to be regarded as a prohibited practice within the meaning of Article 60(1) of the Treaty. The preamble to Decision No 3632/93/ECSC states that State aid may not cause any discrimination between coal purchasers or consumers in the Community.

The Commission has found from its investigations that there are substantial price differences between products of the same quality and with the same delivery times sold in the various Member States by Sophia Jacoba GmbH and Preussag Anthrazit GmbH. The magnitude of these price differences cannot be explained by differences in freight costs alone.

According to Article 3 of Decision No 30/53, transactions are comparable within the meaning of Article 60(1) where they are concluded with purchasers exercising the same commercial function and they concern identical or similar products whose other essential commercial properties do not significantly differ.

Germany also contends that the company Sophia Jacoba GmbH and the sellers of sized anthracite from Preussag Anthrazit GmbH have been practising price alignment for their exports to the British market for years, but never undercut their competitors so that distortion of the market never occurred.

([1]) [1994] ECR I-1209.

The Commission would point out that companies wishing to use the price alignment mechanism are required to notify the Commission in the manner prescribed in Article 60(2) of the ECSC Treaty and the derived legislation, which one of the two companies, Preussag Anthrazit GmbH, failed to do.

With regard to the conduct of the sellers of the sized anthracite produced by Preussag Anthrazit GmbH, to which Germany refers, Article 7, second paragraph, of Decision No 30/53 states that undertakings are to be responsible for infringements by their agents, selling agencies or Commission agents. It follows that the responsibility for the price alignment cited by Germany with regard to sales by Preussag Anthrazit GmbH lies entirely with that company.

As already explained, it emerges from the information available to the Commission that that company undercut its competitors' prices.

Furthermore, since the price alignment cited by the company in its defence was not notified, the Commission was unable to take the measures provided for in the final subparagraph of Article 60(2).

The Commission considers that the discrimination found comes under Article 4 of the ECSC Treaty and cannot be justified by the price alignment rules. By using the aid for the purposes described, the companies have infringed the specific conditions of Decision No 3632/93/ECSC and 96/560/ECSC, with the result that the aid cannot be considered compatible with the common market.

V

The ruling by the Court of Justice in Case C-364/90 Italy v Commission [1] established the principle that the burden of proof of the compatibility of aid lies with the Member State seeking to apply the derogation.

In the light of the arguments advanced by Germany and the beneficiaries of the Commission's finding that the companies had failed to provide proof that the aid had been used properly and of the companies' price conduct, the Commission was unable to dispel the doubts explained in the letter of formal notice regarding the compatibility of the aid and to conclude that the aid is compatible with the common market and has not been used improperly.

The Commission therefore considers that the aid amounting to DEM 99,5 million which it authorised for 1996 in Decision 96/560/ECSC, of which DEM 42,9 million went to Sophia Jacoba GmbH and DEM 56,6 million to Preussag Anthrazit GmbH, was used to support the production and sale of anthracite for the industrial and household sectors and that the prices charged did not cover the production costs.

It is clear from the Commission's investigations, the volumes of anthracite sold and the prices charged that part of this aid — DEM 13,55 million, i.e. DEM 3,75 million for Sophia Jacoba GmbH and DEM 9,8 million for Preussag Anthrazit GmbH — led to distortion of competition incompatible with the common market in the Community market for sized anthracite for industry and households, in contravention of Decision No 3632/93/ECSC. The companies in question must therefore repay those amounts to Germany.

Pursuant to Article 1 of Commission Decision 98/687/ECSC of 10 June 1998 on German aid to the coal industry for 1997 [2], the Commission has postponed its decision on operating aid of DEM 65 million to Preussag Anthrazit GmbH pursuant to Article 3 of Decision No 3632/93/ECSC and aid for the reduction of activity of DEM 12 million to Sophia Jacoba GmbH pursuant to Article 4 of that Decision, i.e. total aid of DEM 77 million. By reserving its decision on those aid payments, the Commission has made clear its belief that those sums support the production of anthracite for the industrial and household sectors in the Community and its sale at prices which do not cover the production costs.

The Commission's investigations have shown that part of that aid, namely DEM 6,8 million for Preussag Anthrazit GmbH, led to distortion of competition incompatible with the common market in the Community market for sized anthracite for industry and households, in breach of Decision No 3632/93/ECSC. As the aid in 1997 was paid in anticipation of a Commission decision, Germany must require the company concerned to repay the sum of DEM 6,8 million pursuant to Article 9(5) of the Decision.

[1] [1993] ECR- I-2097.

[2] OJ L 324, 2. 12. 1998, p. 30.

The balance of the aid intended for Sophia Jacoba GmbH and Preussag Anthrazit GmbH for 1997 (DEM 70,2 million) can be regarded as compatible with the objectives of Decision No 3632/93/ECSC, in particular Articles 3 and 4 thereof, in view of the justification based on those Articles given in the annual decisions approving Germany's measures in support of the coal industry.

On the basis of the principle put forward by Germany that aid payments are to be limited to coal production destined for power generation and the Community steel industry, Germany undertakes to ensure that sales of sized anthracite in the industrial and household sectors will be made at prices which cover the costs of production,

HAS ADOPTED THIS DECISION:

Article 1

The aid amounting to DEM 3,75 million to Sophia Jacoba GmbH and DEM 9,8 million to Preussag Anthrazit GmbH granted by Germany pursuant to Decision 96/560/ECSC was used improperly in breach of that Decision.

Article 2

The aid of DEM 70.2 million to the coal industry paid by Germany for 1997 in anticipation of a Commission decision pursuant to Articles 3 and 4 of Decision No 3632/93/ECSC, namely operating aid of DEM 58,2 to Preussag Anthrazit GmbH pursuant to Article 3 of the Decision and aid of DEM 12 million to Sophia Jacoba GmbH pursuant to Article 4 of the Decision, is hereby authorised.

Aid of DEM 6,8 million paid by Germany to Preussag Anthrazit GmbH in anticipation of a Commission decision was used improperly in breach of Decision No 3632/93/ECSC.

Article 3

Germany shall recover the amounts referred to in Article 1 and the second paragraph of Article 2 from the beneficiary companies.

Repayment shall be made in accordance with the procedures and rules of German law concerning liabilities to the State, with interest at the reference rate used in the assessment of regional aid, from the time the aid was paid until repayment in full.

Article 4

Germany shall inform the Commission within two months after notification of this Decision of the measures it has taken to comply with this Decision.

Article 5

When making the annual statement of aid actually paid in accordance with this Decision, Germany shall supply all the information pursuant to Article 9(3) of Decision No 3632/93/ECSC which is necessary in order to verify the criteria of Articles 3 and 4 of that Decision and to verify compliance with the present Decision.

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 29 July 1998.

For the Commission

Monika WULF-MATHIES

Member of the Commission