

## II

(Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 9 April 2002

concerning the use of State aid to the French coal industry for 1994 to 1997

(notified under document number C(2002) 1329)

(Only the French text is authentic)

(Text with EEA relevance)

(2002/541/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, in particular Article 4(c) thereof,

Having regard to Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry <sup>(1)</sup>,

Having invited the interested parties to submit their comments pursuant to Article 88 of the ECSC Treaty <sup>(2)</sup>, and having regard to those comments,

Whereas:

## I. PROCEDURE

- (1) On 26 August 1997, five French undertakings, Thion & Cie, Maison Balland Brugneaux, Société Nouvelle Vinot Postry, Etablissements Lekieffre, and Charbogard (the complainants) submitted a complaint to the Commission about the undertaking Charbonnages de France.
- (2) The complaint concerns the alleged misuse of State aid which France grants on an annual basis to Charbonnages de France, after authorisation by the Commission, in the framework of Decision No 3632/93/ECSC. It is alleged that the Charbonnages de France group is selling coal at a price generally lower than that on the world market, thus precluding all competition. This price is allegedly made possible only by making use, for unauthorised purposes, of State aid granted by France to Charbonnages de France to support its coal production. According to the complainants, this practice distorts competition on the French market in imported coal intended for the industrial, residential and tertiary sectors. The complainants base their argument more particularly on the provisions of Decision No 3632/93/ECSC.

<sup>(1)</sup> OJ L 329, 30.12.1993, p. 12.

<sup>(2)</sup> OJ C 99, 10.4.1999, p. 9.

- (3) Following this complaint, and to assess whether it is justified, the Commission asked the complainants for further information. On 19 February 1998 and 19 October 1998, the complainants submitted two annexes to the complaint.
- (4) The appropriate Commission department has held talks with Charbonnages de France and the French authorities. Meetings took place on 22 January, 15 September and 2 October 1998. By letter dated 26 November 1998, France was also informed of possible infringements of Community law arising from elements of the complaint.
- (5) The information provided by the French authorities did not invalidate the complainants' allegations. On 9 February 1999, the Commission therefore sent the French Government a letter of formal notice setting out the elements of the complaint and the legal principles which might have been infringed<sup>(3)</sup>. The Commission asked France to put forward relevant arguments which, where appropriate, might enable it to be concluded that the aid given to Charbonnages de France is compatible. France replied to the Commission's letter of formal notice by letter of 8 April 1999.
- (6) The Commission's letter of formal notice concerned aid to the French coal industry authorised by Commission Decisions 95/465/ECSC<sup>(4)</sup>, 95/519/ECSC<sup>(5)</sup> and 96/458/ECSC<sup>(6)</sup> for 1994, 1995 and 1996, respectively. The Commission also assessed the amount of aid presumed to be incompatible for 1997. The aid for that year, notified by France on 31 July 1997, was authorised by Commission Decision 2001/85/ECSC<sup>(7)</sup>, except as regards a sum of FRF 35 million on which the Commission must take a decision after examining the complaint which is the subject of this Decision. The total amount of aid presumed to be incompatible for these four years has been evaluated at FRF 209,9 million. This sum is without prejudice to the possible incompatibility of certain amounts of aid which France has paid or intends to pay to Charbonnages de France for subsequent years. Furthermore, the Commission Decision is totally without prejudice to any proceedings which the complainants may have brought before the national courts or any other bodies in respect of the actions of the Charbonnages de France group which are the subject of this Decision or any other actions which may concern the years before 1994. The Decision states whether the use made of State aid to the coal industry within the Charbonnages de France group is compatible with the provisions of Decision No 3632/93/ECSC.
- (7) In its letter of formal notice to France, the Commission also invited the other Member States and interested third parties to submit their comments. In reply to this consultation, the United Kingdom sent a series of comments by letter of 7 May 1999. These comments have been forwarded to France.

## II. DESCRIPTION

### II.1. The parties concerned

- (8) The complainants import coal and resell it on the French market.
- (9) Charbonnages de France is a group consisting in particular of three public industrial and commercial undertakings. These are the industrial and commercial public undertaking Charbonnages de France (EPIC CdF), Houillères du Bassin de Lorraine (HBL) and Houillères de Bassin du Centre et du Midi (HBCM).
- (10) EPIC CdF was created by a Nationalisation Act of 17 May 1946. The Act created a monopoly for the mining of mineral fuels by EPIC CdF, HBL and HBCM. Decree No 59-1036 of 14 September 1959 defines the functions of these bodies. According to Article 27 of the Decree, EPIC CdF is a

<sup>(3)</sup> OJ C 99, 10.4.1999, p. 9.

<sup>(4)</sup> OJ L 267, 9.11.1995, p. 46.

<sup>(5)</sup> OJ L 299, 12.12.1995, p. 18.

<sup>(6)</sup> OJ L 191, 1.8.1996, p. 45.

<sup>(7)</sup> OJ L 29, 31.1.2001, p. 45.

management, coordinating, monitoring and participatory body. It is responsible for the overall management of HBL and HBCM and lays down the general rules for them to perform their task. It defines and implements the legal and financial structures and represents HBL and HBCM vis-à-vis the public authorities and any bodies with authority at national and international level. Under Article 39 of the Decree, HBL and HBCM are production, mining and sales bodies responsible in particular for running the nationalised undertakings and mines and for mining operations. HBL and HBCM are required to ensure that their mining activities are in financial balance and may in this framework issue loans under the control and authority of EPIC CdF.

- (11) The other bodies in the Charbonnages de France group are subject to various legal systems under private law. The group includes in particular an economic interest grouping, GIE CdF Energie (CdF Energie), and Société Industrielle pour le Développement de l'Energie charbon et de la Cogénération (Sidec).
- (12) CdF Energie has a monopoly for the sale of coal by the Charbonnages de France group. In practice, the grouping is more especially responsible, as part of the further business activity of its members, for the sale in France and abroad of all the solid mineral fuels produced by its members and the sale of all other solid mineral fuels which the members place on the French market. It is responsible or delegates responsibility for all purchases of imported coal which is used or sold in France by its members and the directly or indirectly controlled subsidiaries. HBL, HBCM, EPIC CdF and a subsidiary wholly owned by the Charbonnages de France group, Filianor, have holdings of 45,19 %, 25,95 %, 22,66 % and 6,20 %, respectively, in CdF Energie's capital. According to the information sent by the French authorities on 8 April 1999, a new company, CdF Energie SA, was set up at the beginning of 1999, and the winding-up of CdF Energie was set in motion at the same time.
- (13) Sidec is a limited company which funds projects relating to mainly coal-fired steam and electricity production units and which operates these installations. During the period considered in this Decision, Charbonnages de France held a 56 % share in Sidec's capital, partly through a subsidiary of the group.

## II.2. The market concerned

- (14) According to the complainants, the alleged misuse of aid paid to Charbonnages de France to cover the losses related to coal mining disrupts competition on the market for the distribution and sale of coal to consumers in the industrial, residential and tertiary sectors, except as regards internal consumption by the Charbonnages de France group and supplies to the undertaking Electricité de France and the steel industry. The internal consumption by Charbonnages de France, especially for the production of electricity by Société Nationale d'Electricité et de Thermique (SNET), is a market to which the complainants do not have access. Likewise, dealers operating in France do not supply coal to the steel industry and Electricité de France, which obtain supplies directly from producers or through traders operating internationally. The market described by the complainants, within the steam coal market, is therefore a market sector governed by its own conditions as far as competition is concerned.
- (15) In 1995, this market amounted to 4 million tonnes of coal. Sales to the various sectors of the market referred to in paragraph 14 can be broken down as follows:

*(million tonnes)*

	Coal produced in France	Imported coal
Residential and tertiary	0,66	0,52
Industry (*)	0,93	1,87
Total	1,59	2,39

(\*) Excluding the steel industry, Electricité de France, and consumption by Charbonnages de France.

- (16) All sales of coal produced in France were handled by CdF Energie, which is the sole agent for the marketing of solid mineral fuels produced by the Charbonnages de France group. Out of 2,4 million tonnes of coal from third countries, 1 million tonnes was sold by CdF Energie and 1,4 million tonnes by various dealers, including the complainants. In 1997, the market fell slightly to 3,7 million tonnes, this being 1,9 million tonnes of French coal and 1,8 million tonnes of coal from third countries.

### II.3. The measures in dispute

#### II.3(a) Lowest price guarantee

- (17) Sidec provides its industrial customers with coal-fired heating systems. The contract provides that Sidec is responsible for the financing, construction, operation and running of these systems for the production of steam or heat. The systems remain Sidec's property until the expiry of the contract, which runs for ten or 12 years and may be renewed for a further five years, this period normally enabling the cost of the investment to be recovered. In addition to providing the systems for its contractors, Sidec also supplies the coal, which is provided by CdF Energie, which has the exclusive right within the Charbonnages de France group to distribute coal.
- (18) Sidec charges its customers for the energy produced on the basis of the thermal units consumed. The selling price of the thermal units is calculated by reference to various factors, in particular: depreciation, business tax, insurance, maintenance, operation, and the storage and cost of the fuel supplied, this being coal supplied by CdF Energie.
- (19) In addition to these services, the contract between Sidec and its industrial customers provides for a 'guaranteed concession price'. The purpose of this clause is to guarantee that, throughout the duration of the contract, users of energy produced from coal will have a competitive price calculated by reference to competing fuels, mainly fuel oil. In other words, Sidec guarantees its customers that the selling price of the thermal unit produced from coal will always be no more than that of the thermal unit produced from fuel oil. The contracts include a method for calculating this reference price.
- (20) According to the complainants, the Charbonnages de France group, through this mechanism, has acquired a large share of the market in imported coal intended for industry. This commercial policy is also alleged to have guaranteed customer loyalty through the conclusion of long-term contracts. In this way, Sidec is alleged to have secured for itself a market worth almost one billion francs in combustion plants.
- (21) The guarantee originally presupposed that prices on the world market in coal and heavy fuel oil were comparable, but advantageous to coal. The first contracts date back to the early 1980s, a period characterised by high oil prices. Following the repercussions of the oil crisis in 1986, the sharp fall in the price of oil products obliged Sidec to apply the guaranteed concession price mechanisms permanently since the price of the thermal unit from fuel oil became more competitive. According to the terms of the contracts concluded by Sidec, the application of the guaranteed concession price clause involved reducing the variable factors in the price of the thermal unit produced from coal, chiefly the price of that fuel.
- (22) CdF Energie supports the application of this guaranteed concession price, as a result of which Sidec reduces the price of the thermal unit produced from coal charged to its customers. CdF Energie's profit and loss accounts show that it grants substantial reductions on its charges for coal, some of them to the benefit of Sidec. The annexes to Sidec's balance sheets and profit and loss accounts expressly state that the company invariably gives customers who buy steam guaranteed concessions on the prices of coal/oil and gas which are fully counter-guaranteed by CdF Energie, except as regards a few contracts where Sidec itself bears the cost of applying the guaranteed concession price.

(in FRF)

	1994	1995	1996	1997
Reductions/discounts/refunds granted by CdF Energie	54 219 281	58 015 980	25 354 968	18 602 297

- (23) As a result of the substantial discounts granted to Siderc, CdF Energie sells domestic and imported coal at a price lower than the international rates for industrial coal of the same type sold on the competitive market (see recital 35). These discounts therefore mean that CdF Energie sells coal to Siderc at below the cost at which it buys imported coal.
- (24) EPIC CdF, in turn, refunds to CdF Energie the amount of the discounts granted to Siderc through the application of the guaranteed concession price. These amounts appear in CdF Energie's profit and loss accounts as compensation from CdF for guaranteed concession prices. These amounts are more specifically recorded as operating income, which demonstrates the recurrent, invariable nature of this practice. In EPIC CdF's profit and loss accounts, the amounts appear as special costs. The annexes specify that these amounts relate to the cover by CdF of guaranteed concession prices granted to the group's customers in the framework of coal loyalty contracts (when the price of competing sources of energy has fallen) <sup>(8)</sup>.

(in FRF)

	1994	1995	1996	1997
Compensation for EPIC CdF for guaranteed concession price	22 466 500	35 016 000	11 000 000	10 011 701

### II.3(b) *Advance payments for commercial investments*

- (25) CdF Energie provides some of its customers with free services, such as the installation of dust extraction systems or coal storage facilities. These services are linked to these customers' commitment to buy coal from CdF Energie and are therefore a customer loyalty scheme.
- (26) These free services were financed by EPIC CdF through advance payments to CdF Energie amounting, in 1994, to FRF 33 139 626 <sup>(9)</sup>. They continued to be paid to CdF Energie during subsequent years.
- (27) It should also be noted that 'model heating systems' are made available free of charge to CdF Energie's customers. These systems are the property of CdF Energie and are financed by EPIC CdF.

### II.3(c) *Permanent advances*

- (28) CdF Energie's members contribute financially to the economic interest grouping's functioning through permanent advances. At the beginning of 1994, these advances amounted to FRF 20 446 728, this being FRF 53 586 354, the total amount of advances from CdF Energie members, minus FRF 33 139 626, the amount of advances for commercial investments. These advances continued to be paid within CdF Energie during the years that followed. The permanent advances have been made by CdF Energie's members in proportion to their shareholding in the grouping.
- (29) Other amounts were entered, as from 1994, in the 'advances from members' account in CdF Energie's balance sheet. According to France, these were, however, amounts related to maintaining CdF Energie's profitable situation. Under CdF Energie's legal structure, profits belong to the founder members. Most of the undertaking's income was therefore found to be recorded not in the normal manner as reserves, but as advances from members.

<sup>(8)</sup> EPIC CdF: Balance sheet and profit and loss account for 1995, notes on the profit and loss account, p. 19.

<sup>(9)</sup> CdF Energie: Balance sheet; profit and loss account and annex of 31 December 1995, pp. 28 and 29.

II.3(d) *The costs of coal dealer*

- (30) CdF Energie is involved in two activities which the undertaking considers to be separate, in particular in its accounts. Firstly, CdF Energie sells solid mineral fuels produced by the Charbonnages de France group, for which it receives commissions which are charged to the subsidiaries in the group and recorded as such in the profit and loss account <sup>(10)</sup>. Secondly, CdF Energie is a coal dealer. This is recorded as 'purchases of goods' and 'sales of goods' in CdF Energie's profit and loss account. It mainly concerns dealing in imported coal. CdF Energie's profit and loss account is drawn up so as to show these two main activities of commission agent and dealer <sup>(11)</sup>.
- (31) Analysis of the costs related to these two activities <sup>(12)</sup> shows that the activity as a coal dealer does not include the share of operating costs which would arise in the case of any other operator. Certain costs do not appear as such but are entered in full as 'other operating costs' under the activity as commission agent, in particular the following costs for 1995:

<i>(in FRF)</i>	
	1995
Electricity, water, gas, supply of minor equipment, office supplies	543 535
Rental of offices and parking space	3 023 546
Outside staff	3 358 696
Salaries and wages, social contributions	37 549 460

This method of recording CdF Energie's costs results, for 1995, in a substantial loss on the activity as a commission agent and a profit on the activity as a dealer

<i>(in FRF)</i>			
	Revenue	Costs	Outturn
Activity as dealer	447 845 758	420 483 327	27 362 431
Activity as Commission agent	39 618 956	62 410 011	- 22 791 055

II.4. **Basis of the letter of formal notice**

- (32) After examining the complaint submitted to it, the Commission considered in its letter of formal notice of 9 February 1999 that the contested measures described in recitals 17 to 31 could have been financed through the State aid granted by France to support coal production. According to the Commission, EPIC CdF would not have been able to pay the compensation for the guaranteed concession price and to finance commercial investments through advances if it had not received French State aid. Both EPIC CdF's accounts and the consolidated accounts of the Charbonnages de France group show losses of several billion francs a year. Only public support enables the books to be formally balanced.

<sup>(10)</sup> Commissions were charged, in 1995, to HBL, HBCM, Cokes de Drocourt, Agglonord, Agglocentre and CTBR (CdF Energie: Accounts, profit and loss account and annex as of 31 December 1995, p. 43).

<sup>(11)</sup> See also recital 16.

<sup>(12)</sup> CdF Energie: Accounts, profit and loss account and annex as of 31 December 1995, pp. 37 to 42.

- (33) With regard to the permanent advances from the members of CdF Energie, the Commission considers that these contribute financially to the operation of the grouping. They are likely to have been financed at least partially through the State aid granted for coal production, given that members of CdF Energie, more particularly the two mining companies, receive State subsidies every year through EPIC CdF. The aid intended to cover the mining companies' operating losses was therefore probably partially used to finance CdF Energie's annual operating costs.
- (34) Article 3 of Decision No 3632/93/ECSC lays down a lower price limit which must be taken into account when calculating the aid intended to cover the losses relating to coalmining, namely the price of coal on the international markets. The Decision also states that the aid is solely for the production of Community coal. It would seem that Siderc has obtained from CdF Energie supplies of both Community coal and imported coal at a price lower than that on the international market. This practice was probably possible only thanks to the State aid granted for the production of coal. The Commission therefore considers that there may have been a double infringement of Community law, more especially through the use of the guaranteed concession price mechanism. This mechanism is likely not only to have enabled coal to be served on the French market at a price below that on the international market, but also to have subsidised imported coal.
- (35) The Commission's assumption that the prices of coal sold by CdF Energie to Siderc in 1994 and during subsequent years were lower than the prices of coal on the international markets is based in particular on an analysis of the data for 1993:
- (a) the Commission has based its position in particular on the special report of Siderc's accountants which, for the financial year ending on 31 December 1993, showed that 'supplies from CdF Energie of the coal needed for industrial production by Siderc were charged at FRF 164 896 299';
  - (b) the complaint submitted by the complainants indicates that the quantities of coal supplied by CdF Energie to Siderc were likely to have been about 700 000 tonnes in 1993. In its letter of 8 April 1999, France stated that these supplies amounted to 722 300 tonnes in 1994, 741 200 tonnes in 1995 and 720 400 tonnes in 1996. These data therefore confirm the volume, as estimated by the complainants, of these deliveries in 1993;
  - (c) in the light of the data in paragraphs (a) and (b), it can be estimated that the average price charged by CdF Energie to Siderc in 1993 was about FRF 235,56 per tonne of coal (FRF 164 896 299 for 700 000 tonnes of coal). This average price was much lower than the prices prevailing on the international markets for steam coal, which were on average FRF 252,85 in 1993<sup>(13)</sup>. The complainants come to the same conclusion by comparing the prices of coal charged by CdF Energie to Siderc with, in particular, the average prices published by the Comité Professionnel du Pétrole and INSEE (Institut national français de statistiques et d'études économiques).
- (36) The Commission also states that the State aid may distort competition and cause discrimination within the Community. For 1993, the Commission found that EPIC CdF had paid CdF Energie the sum of FRF 50 680 000 as compensation for guaranteed concession prices<sup>(14)</sup>. Given the volume of sales of coal invoiced by CdF Energie to Siderc, the compensation paid to CdF Energie for the guaranteed concession prices can be estimated at about FRF 72,40 FRF per tonne (FRF 50 680 000 for 700 000 tonnes of coal; see figures in recital 35). It must therefore be concluded that the price which would have been charged by CdF Energie if no discounts had been given to Siderc under the guaranteed concession price mechanism would have been FRF 307,96 per tonne, that is to say FRF 235,56 (the amount actually charged to Siderc, see recital 35) plus FRF 72,40 (amount of discount for the guaranteed concession price). This price of FRF 307,96 is much higher than the average prices of FRF 252,85 which prevailed on the international markets in 1993. Consequently, the aid which enabled the disputed measures to be financed, in particular the compensation for the guaranteed concession price, would have given a competitive advantage to the subsidiaries of the Charbonnages de France group as compared with the coal-importing complainants.

<sup>(13)</sup> Price of steam coal imported from third countries. EU average calculated on the basis of free-at-border cif prices notified to the Commission under Decisions 77/707/ECSC (OJ L 292, 16.11.1977, p. 11) and 85/161/ECSC (OJ L 63, 2.3.1985, p. 20).

<sup>(14)</sup> CdF Energie: Accounts, profit and loss account and annex as of 31 December 1993, p. 3.

- (37) In view of the situation on the coal and energy market, in France and worldwide, the Commission considers that there are strong indications that the conclusions it reached concerning the prices charged by CdF Energie in 1993 also to apply to 1994 and the years thereafter.

### III. COMMENTS BY FRANCE

- (38) According to the French authorities, the State aid granted for the production of coal was allocated in accordance with the Commission's authorising decisions. The measures in dispute were said to have been financed from the income on the activities of the Charbonnages de France group which produce profits or dividends and which contribute to the group's consolidated results.
- (39) Furthermore, the operations carried out by EPIC CdF, CdF Energie and Sidéc 'have been economically rational and do not seem to invite criticism as regards the rules on State aid'. As regards providing coal buyers with various items of equipment free of charge, this was said to be the provision of commercial services which were related to the operators' main services and were part of normal commercial practice. The permanent advances of funds made by the CdF Energie members were said to be a normal procedure for an economic interest grouping, which is an entity without capital. The French authorities also take the view that the provision of a guaranteed concession price is not in itself disputable. 'When the contracts were concluded, the high price of fuel oil made the guaranteed concession price look symbolic and not a central factor for the choice of provider'. 'This dossier needs to be seen in the light of the situation in the early 1980s, which were marked by high oil prices and the desire to diversify energy resources'. In addition, when energy prices started to pick up again in 1988, CdF Energie is said to have tried to renegotiate the contracts so that the group would be at less of a disadvantage.
- (40) Finally, the French authorities stress that, contrary to the Commission's claims, the effects of the measures on competition have been very limited. To back up this argument, France believes that the consumer market for the industrial, residential and tertiary sectors, excluding consumption by the Charbonnages de France group itself and deliveries to the undertaking Electricité de France and the steel industry, is not the market to consider. The market should be broadened to include steam coal and limited not only to the French market since this product, which has no specific characteristics, can be used throughout the world. According to France, the market considered should also be broadened to include other energy sources which can be used for the same purposes as steam coal, namely gas and fuel oil. CdF Energie's market shares in such a broadened market were said in fact to be very limited.

### IV. COMMENTS BY THE UNITED KINGDOM

- (41) The UK authorities emphasise the lack of transparency in the financing of the Charbonnages de France group's activities. The relations, more especially between EPIC CdF, HBL, HBCM, CdF Energie, Filianor and Sidéc, allow cross-subsidising of the group's various activities, either through direct financing or the provision of free services.
- (42) According to the United Kingdom, the factors set out in the Commission's letter of formal notice of 9 February 1999 tend to confirm that part of the aid intended in principle to support coal production is being misused for purposes not in conformity with Decision No 3632/93/ECSC and the Commission's decisions authorising the aid.

### V. ASSESSMENT

#### V.1. Assessment of the nature of the State aid in the measures in question

- (43) In its letter of formal notice of 9 February 1999, the Commission asked France to submit 'a report on the functioning of the commercial and financial mechanisms' implemented by Charbonnages de France. The report should include in particular the following elements:



- (a) the origin of the advances from the members of CdF Energie;
- (b) the origin of the funds that enabled EPIC CdF to pay CdF Energie compensation for the guaranteed concession price since 1994.
- (44) The French authorities have indicated that the advances from members do not come from the State aid or subsidies, which were 'specifically allocated', but from the profits of the subsidiaries of the Charbonnages de France group. The French authorities' reply is the same as regards EPIC CdF's cover of the guaranteed concession price: 'Operations relating to these contracts are recorded by EPIC CdF as "exceptional profits" and were funded from the profits of EPIC's subsidiaries'.
- (45) The Commission finds that France has not put forward anything to back up its claim that, firstly, the aid authorised by the Commission to support coal production has been 'specifically allocated' for that purpose and, secondly, that the funds which financed the disputed measures came from the profits of Charbonnages de France's subsidiaries. With regard to the aid authorised by the Commission for the coal sector, France merely gives a breakdown based on the aid categories in Decision No 3632/93/ECSC. This breakdown, which is used by France in its annual notifications of State aid to the coal industry and in the Commission's authorising decisions, does not, however, provide any information as to the actual use made of the aid by the beneficiary.
- (46) In accordance with Article 4 of Decision No 3632/93/ECSC, the French authorities state that the aid to the coal industry was granted, partly, 'to cover the difference between the production cost and the selling price of tonnages of mined coal'. The guaranteed concession price mechanism is a contributory factor in determining how big this difference is since, if discounts and refunds are given, it helps to reduce the selling price of the coal mined by Charbonnages de France. However, there is nothing which would show that part of the difference is covered by the State aid granted by France, while another part, equivalent to the reduction in the price of coal achieved by applying the guaranteed concession price mechanism, is covered by the profits of certain subsidiaries in the Charbonnages de France group. On the contrary, it is quite consistent to consider that all of the losses related to mining in France, including losses related to the reduction in the selling price of coal due to the application of the guaranteed concession price mechanism, were covered by State aid.
- (47) It should be recalled that the permanent advances from the members of CdF Energie are paid by the members of the grouping in proportion to each member's shareholding. In other words, the two coalfields, HBL and HBCM, alone contribute 71,14 % of the amount of these advances. It is not understood how these two entities which mine coal in France, an activity which gives rise to several billion francs in losses each year, could have financed the advances made to CdF Energie unless they were financed from State aid granted specifically to support coal production.
- (48) France puts forward the argument that Charbonnages de France is an industrial group whose consolidated accounts include other activities, in addition to mining, which produce profits or dividends. It is claimed that the guaranteed concession price was funded from the profits on these activities, which contribute to the consolidated results of the Charbonnages de France group of more than FRF 500 million a year.
- (49) The Commission considers that, if consolidation is relied upon to present the results of a group of companies as if they were just one single entity, the results of the profitable activities should firstly be set off against the results for the group's loss-making activities. Consequently, if France's argument is followed, any analysis of the State aid needed to cover the mining losses should take account of the consolidated result obtained after setting the consolidated group's total income off against its total outgoings. France's position is inconsistent in this respect. According to France, consolidation of the accounts, and hence the setting-off of some subsidiaries' losses against others' profits, should apply, as far as coal production losses are concerned, only to losses resulting from compensation for the guaranteed concession price supported by EPIC CdF.

- (50) Moreover, as stated in the Commission's letter of formal notice, the Charbonnages de France group's accounts clearly show that EPIC CdF would not have been able to pay the compensation for the guaranteed concession price and to finance commercial investments through advances if it had not received State aid from France. Both EPIC CdF's accounts and the consolidated accounts of the Charbonnages de France group show losses of several billion francs a year. The accounts for the 1995 financial year clearly show that the books can only be formally balanced thanks to public financial support. In 1995, the Charbonnages de France group achieved a consolidated turnover of FRF 8 270 billion. The consolidated overall net result of the group as a whole was a loss of FRF 4 167 billion, more than half of the turnover. According to Charbonnages de France, the gradual reduction in State aid 'meant that the group, which had stabilised its financial debt over the last two years, was unable to continue with that progress. In 1995, the debt burden increased markedly, exceeding 29 billion francs and leading to additional financial costs which impacted upon the result'. The Commission therefore considers that Charbonnages de France's further activities and the survival of the group are dependent on the payment of State aid by France to the coal industry. The mechanisms referred to above must therefore have been funded from the aid.
- (51) Against this background, the Commission believes that the amounts totalling FRF 78 494 201 which were paid by EPIC CdF to CdF Energie as compensation for guaranteed concession prices and paid on by CdF Energie to Sidec came from the State aid paid by France each year to support losses due to coalmining.
- (52) The Commission also considers that the amounts of commercial investments financed through advances given by EPIC CdF to CdF Energie, namely FRF 33 139 626 FRF, come from the State aid paid by France each year to cover losses related to coalmining. Given that these are permanent advances to CdF Energie, the amount of FRF 33 139 626 must be regarded, in full, as coming from the aid paid each year by France.
- (53) Lastly, the Commission considers that the permanent advances paid to CdF Energie by EPIC CdF, on the one hand, and by the two coalfields HBL and HBCM, on the other, also come from the State aid paid by France to cover losses related to coalmining. The members of CdF Energie contribute to the grouping's operation in proportion to their shareholding. The advances paid by EPIC CdF, HBL and HBCM correspond to 93,8 % of the total advances paid by the members of CdF Energie, a total of FRF 19 179 031. Given that these are permanent advances to CdF Energie, the amount of FRF 19 179 031 must be regarded, in full, as coming from the aid paid each year by France.

## V.2. Assessment of the compatibility of the State aid

### V.2(a) Aid to the French coal industry

- (54) In accordance with Article 8 of Decision No 3632/93/ECSC, on 9 December 1994 France sent the Commission an activity-reduction plan in line with the options agreed under the National Coal Pact signed between the undertaking Charbonnages de France and the trade unions. The activity-reduction plan provides for the gradual stoppage of mining by 2005. The severity of the social and regional problems meant that the French authorities were unable to keep to the date of 2002 laid down by Decision No 3632/93/ECSC as the deadline for the closure plan. Spreading the closures over a period of ten years should make it possible to reduce the particularly acute social and regional problems in regions which have been affected by the decline in mining for a number of years. In Decision 95/465/ECSC, the Commission took the view that the plan complied with the conditions and criteria laid down in Decision No 3632/93/ECSC.

- (55) In accordance with Article 9 of Decision No 3632/93/ECSC, France notified the Commission of the amount of aid which it intended to grant to the coal industry each year. For 1994 to 1997, the Commission authorised <sup>(15)</sup> the granting of aid for the reduction of activity pursuant to Article 4 of Decision No 3632/93/ECSC and of aid to cover exceptional costs pursuant to Article 5 of the Decision. In addition, for 1994 to 1996, the Commission authorised the granting of aid for research and development pursuant to Article 6 of Decision No 3632/93/ECSC. In its assessment, the Commission evaluated the conformity of the measures with the activity-reduction plan notified to the Commission on 9 December 1994.
- (56) It is therefore necessary to examine whether the aid allocated in the context of the application of the guaranteed concession price mechanism, commercial investments and permanent advances to CdF Energie comply with the conditions and criteria laid down in Decision No 3632/93/ECSC, and more particularly the terms of Decisions 95/465/ECSC, 95/519/ECSC, 96/458/ECSC and 2001/85/ECSC. If this is not the case, the Commission will have to conclude that the aid, or part of the aid, was allocated by Charbonnages de France for purposes contrary to the applicable provisions.
- (57) It would seem that the aid allocated under the disputed mechanisms in dispute does not fully comply with the conditions laid down for the grant of aid to cover exceptional costs. It does not correspond to any of the categories of costs referred to in the Annex to Decision No 3632/93/ECSC, or more especially to the costs expressly referred to in the Commission's decisions authorising the grant of aid each year by France to the coal industry. The aid provided for in Article 5 of Decision No 3632/93/ECSC is strictly limited to cover costs which are not related to current production (inherited liabilities). It is also obvious that the aid granted under these mechanisms does not comply with the aims and criteria laid down in Article 6 of the Decision for the grant of aid for research and development.
- (58) It is therefore necessary to examine whether the aid allocated by Charbonnages de France in the context of the application of the guaranteed concession price, commercial investments and permanent advances may be considered to be compatible with Article 4 of Decision No 3632/93/ECSC and to have been allocated by Charbonnages de France pursuant to that provision.

V.2(b) *Coal prices on the world market*

- (59) In accordance with Article 4(1) of Decision No 3632/93/ECSC, which refers to the provisions of Article 3(1) of that Decision, aid for the reduction of activity is intended to cover the difference between production costs and the selling price of coal freely agreed between the contracting parties in the light of the conditions prevailing on the world market. Article 3(1) of the above Decision therefore determines the maximum amount of permissible aid. As indicated in recital 23, the substantial discounts granted to Sidec meant that CdF Energie sold coal at a price below those prevailing on the international markets. These discounts were therefore financed by aid, some of which exceeded the permissible ceiling laid down in Article 3(1) of Decision No 3632/93/ECSC.
- (60) The Commission notes in this respect that France has not put forward any argument to contradict the facts which led the Commission to consider, in its letter of formal notice, that from 1994 to 1997 CdF Energie supplied Sidec with Community and imported coal at a price below that on the international market. On the contrary, in their letter of 8 April 1999 the French authorities appear to acknowledge the assumption reached by the Commission in its letter of formal notice. Referring to 'the effects of a mechanism which was no longer timely', France stated in particular that 'when energy prices started to pick up again in 1988, the management of Charbonnages de France asked CdF Energie to try to renegotiate contracts so that they would put the group at less of a disadvantage. At CdF Energie's request, Sidec proposed that its customers should reconsider the clauses in the contracts. A large number of customers refused, but some agreed to start discussions'.
- (61) The Commission draws attention in this regard to its letter of formal notice, which states: 'On the basis of the information at its disposal, the Commission considers that for the budget years 1994, 1995 and 1996, the grouping effectively supplied (Community and imported coal) on the Community market at a price below the world market price and could do so thanks to the aid

<sup>(15)</sup> See recital 6.

granted by CdF under the conditions set out above. If the French authorities do not refute the complainants' allegations in a manner which enables the Commission to conclude that the complaint is without foundation, the Commission will conclude that there has been a misuse of State aid originally authorised by the Commission to cover the production costs of Community coal (Article 4: Aid for the reduction of activity). It is also clear from the letter of formal notice that the arguments which led the Commission to consider that the prices charged to Sidec were below the prices of coal on the international markets were set out and analysed in a very detailed manner in that letter. It has to be said that France has not provided any information about prices charged, in 1994 and during the following years, for coal supplied by CdF Energie to Sidec. On the contrary, as already indicated in recital 60, France tacitly acknowledges in its letter of 8 April 1999 that CdF Energie effectively sold coal to Sidec at prices below those prevailing on the international market. Rather, France tries to justify this practice, stating in particular that it was not likely to have distorted competition in a manner which would harm the complainants.

- (62) The Commission would point out that its departments were themselves unable, as they did for 1993, to calculate the average annual price of coal sold by CdF Energie to Sidec for 1994 and the following years. No special auditors' report has been submitted to the registry of the commercial court in Paris for those years concerning Sidec's activities. This being so, in view of the situation on the coal and energy market, in France and worldwide, it has to be considered that the Commission's conclusions concerning the prices charged by CdF Energie during 1993 also apply to the years from 1994 to 1997 (see recitals 35 to 37). It should be noted in this respect that the various commercial and financial practices in 1994 and during the following years, as set out in the financial documents and business reports of the Charbonnages de France group, were the same as those during previous years. It must therefore be concluded that, in 1994 and during the years which followed, CdF Energie sold coal to Sidec at a price below the international rates for industrial coal of the same type sold on the competitive market.
- (63) Furthermore, it must be considered that not only the aid used by CdF Energie to cover the discounts related to the guaranteed concession price, but also the aid allocated for commercial investments and for permanent advances to CdF Energie meant that the Charbonnages de France group charged delivered prices for coal below those for coal of a similar quality from third countries. All these mechanisms implemented together and financed by means of State aid enabled CdF Energie to charge prices lower than the reference prices for coal on the international markets. However, Article 3(1), third indent, of Decision No 3632/93/ECSC lays down that the amount of operating aid may not cause delivered prices for Community coal to be lower than those for coal of a similar quality from third countries. It must therefore be considered that the aid allocated for all the disputed mechanisms was paid in breach of that provision.

V.2(c) *Aid to imported coal*

- (64) Most of the coal supplied to Sidec is imported by CdF Energie from third countries. Following the signing of the National Coal Pact in 1994, which provides for the gradual stoppage of mining by 2005, national production has continued to fall. CdF Energie has therefore only been able to supply coal to Sidec by increasingly adding imported coal to national coal. According to the letter from France of 8 April 1999, the volumes of Community and imported coal sold by CdF Energie to Sidec are as follows:

(1 000 tonnes)

	1994	1995	1996	1997
National coal	216,0	226,5	228,5	144,1
Imported coal	506,3	514,7	491,9	428,5
Total	722,3	741,2	720,4	572,6

- (65) The compensation paid by EPIC CdF under the guaranteed concession price was therefore paid to CdF Energie for sales to Sidéc of both national coal and imported coal. Similarly, the aid allocated for commercial investments and the aid allocated for permanent advances to CdF Energie enabled both of the undertaking's two activities to be equally supported, namely its activity as a commission agent for the marketing of fuel produced within the Charbonnages de France group and its activity as a coal dealer relating chiefly to the sale of imported coal.
- (66) The fact that, according to the annexes to CdF Energie's profit and loss account, the activity as a dealer did not produce a profit, while that as a commission agent produced a substantial loss (see recitals 30 and 31) does not in any way indicate that the aid was allocated solely to the latter loss-making activity, and thus to national coal. It is clear from the annexes to the profit and loss statement that the activity as a dealer does not include the share of operating costs which would be incurred by any other operator, and that as a result the outturn for that activity is increased in a way which does not reflect reality. In addition, it should be noted that the compensation for the guaranteed concession price appears specifically, in the annexes to the profit and loss statement, under a heading relating to activity as a dealer.
- (67) There is no doubt that the aid which may be granted by the Member States in accordance with Decision No 3632/93/ECSC is intended solely for Community coal. In this respect, the second recital of that Decision should be noted which states that 'added to the competition from crude oil and natural gas, there has been growing pressure from coal imported from outside the Community'. These terms exclude any idea of subsidising coal produced in a third country. It would also be contrary to the *ratio legis* of Decision No 3632/93/ECSC not to object to aid from government funds subsidising imported coal, which is already more competitive than Community coal.
- (68) It is also clear from the activity-reduction plan notified to the Commission by France in 1994 and the State aid notified to the Commission each year since that date that the aid granted by France to the coal industry is for national production. The aid allocated by the Charbonnages de France group for activity as a dealer was therefore not allocated in conformity with the provisions of Decision No 3632/93/ECSC, whatever the price of the imported coal charged to Sidéc.
- (69) Furthermore, aid granted under Article 4 of Decision No 3632/93/ECSC must, pursuant to the second indent of Article 2(1) of the Decision, help to solve the social and regional problems created by total or partial reductions in the activity of production units. However, the aid allocated as compensation for the guaranteed concession price and the aid allocated to commercial investments and permanent advances is, on the contrary, related to the development of CdF Energie's commercial activities. Given that mining in France has been gradually reducing since 1994, the aid in question has more particularly helped to develop CdF Energie's business as a dealer in imported coal. The Commission therefore finds that some of the aid paid by France to Charbonnages de France has not been allocated in accordance with the objectives for which the aid was authorised by the Commission.

#### V.2(d) *Distortions of competition*

- (70) In accordance with the fourth recital in paragraph I of Decision No 3632/93/ECSC, aid to the coal industry must not disturb the functioning of the common market. The fourth and fifth recitals of paragraph III of the Decision also specify that the Community must ensure the establishment, maintenance and observance of normal competitive conditions. In this context, the Community must ensure that aid does not discriminate between coal producers, purchasers or users in the Community.
- (71) The finding therefore is that the guaranteed concession price mechanism itself, the application of which is found to have been financed by means of State aid, was likely to distort competition contrary to the common market. The mechanism was likely to, and in fact did, encourage CdF Energie to charge prices for coal which were lower than those generally charged on the international markets. Detailed analysis of some of the data for 1993, which in particular led the Commission to send a letter of formal notice to France, shows very clearly the quantitative advantage which this mechanism gave the Charbonnages de France group as compared with competition (see recital 35).

As the complainants were unable to offer to supply coal to the same customers on terms as favourable as those of the Charbonnages de France group, they were therefore denied a substantial share of the relevant market, as described in recitals 14 to 16.

- (72) CdF Energie's profit and loss accounts also show that that entity would have sustained substantial losses if the compensation for the guaranteed concession price had not been paid by EPIC CdF. The amounts paid as compensation for the guaranteed concession price therefore enabled CdF Energie to remain viable and even to build up reserves which have not been paid back to its founder members. CdF Energie therefore had its own funds enabling it to finance part of its activities without the need to seek outside funding.

(in FRF)

	1994	1995	1996	1997
Compensation from EPIC CdF for the guaranteed concession price	22 466 500	35 016 000	11 000 000	10 011 701
CdF Energie's operating result	19 166 016	7 630 970	9 131 843	12 272 171
CdF Energie's result for the financial year	15 282 831	4 571 376	8 066 887	12 627 687

- (73) The guaranteed concession price mechanism, together with the advances for commercial investments and the permanent advances for members, therefore enabled CdF Energie to expand its activities related to the distribution of imported coal in France, enabling the undertaking to acquire a share of 61 % of the relevant market in 1997. As far as the commercial investments in particular are concerned, it seems that these were allowed for coal consumers whose needs were not such that they justified the conclusion of contracts related to a guaranteed concession price.
- (74) Furthermore, the contracts between Sidec and its customers provide for a sole right to supply coal for a period of 10 or 12 years, and even 15 years if the contract is extended. This customer loyalty policy, which enabled Charbonnages de France to gain a large share of the relevant market, would certainly not have worked if Sidec's customers had not been guaranteed that the price of the thermal unit from coal would never be more than the price of the thermal unit from fuel oil throughout the duration of the contract. These advantages may of course make customers sign up for such a period in times when they would not normally sign up for more than one year.
- (75) France cannot effectively rely on the argument that these contracts were not intended to enable CdF Energie to acquire the market in the sale of coal, but to combat the domination of oil. The Commission is required merely to establish the effects of these practices on competition between dealers in imported coal, the Charbonnages de France group's intentions being irrelevant in this respect. Furthermore, it is obvious that, by offering Sidec's customers advantageous conditions in order to compete with oil, the Charbonnages de France group was *ipso facto* putting pressure on CdF Energie's competitors which also supply coal to the relevant market.
- (76) The French authorities are trying to minimise the dominant position acquired by CdF Energie by relying on the argument that the market in industrial heating systems is too small and should be extended to include the steam coal market and even other sources of energy (see recital 40). It is argued that the Commission's analysis should cover more than France since coal is used throughout the world. The Commission cannot accept this argument. Some French customers, notably SNET and Electricité de France, are captive markets which are not *de facto* open to competition and therefore cannot be included in the relevant market. Furthermore, France does not in any way state to what extent this definition of the relevant market would be likely to affect the assessment of any distortions of competition caused by Charbonnages de France to the complainants.

## VI. CONCLUSION

- (77) In the light of the foregoing, the Commission believes that the compensation for the guaranteed concession price paid by EPIC CdF to CdF Energie, the advances paid by EPIC CdF for commercial investments and the permanent advances from the CdF Energie members were financed through the State aid granted by France to Charbonnages de France for coal production. The amount of financial support for 1994 amounts to FRF 74 785 157, including FRF 22 466 500 FRF as compensation for the guaranteed concession price, FRF 33 139 626 for advances for commercial investments and FRF 19 179 031 for permanent advances. The amounts of financial support paid by way of compensation for the guaranteed concession price for 1995, 1996 and 1997 amount to FRF 35 016 000, FRF 11 000 000 and FRF 10 011 701, respectively. The total amount of aid concerned therefore amounts to FRF 130 812 858.
- (78) This aid must be regarded as incompatible with the provisions of Decision No 3632/93/ECSC as it does not comply with the criteria and conditions provided for in that Decision to be compatible with the functioning of the common market. More especially, the aid was not granted in strict compliance, firstly, with the Commission decision approving the activity-reduction plan submitted by the French authorities in the framework of the National Coal Pact and, secondly, the decisions authorising the aid which France pays to the coal industry each year. It must therefore be concluded that this aid was misused in terms of the purpose for which it was able to be, and was, authorised pursuant to Decision No 3632/93/ECSC.
- (79) Consequently, the amounts of aid for 1994, 1995 and 1996, for which years the Commission authorised all the aid notified by France totalling FRF 120 801 157 (EUR 18 416 018), must be repaid by the Charbonnages de France group to the French Government. In accordance with Article 9(5) of Decision No 3632/93/ECSC, the sums to be repaid by Charbonnages de France must be considered an unfair advantage in the form of an unjustified cash advance and, as such, are liable to charges at the market rate payable by the recipient. The interest is calculated from the date on which the State aid granted each year by France, which includes the amounts to be reimbursed by Charbonnages de France, was paid to the recipient undertaking.
- (80) The aid for 1997 was authorised by the Commission, except as regards a provisional amount of FRF 35 million (EUR 5 335 716) on which the Commission had to take a decision after examining the complaints which are the subject of this Decision. In the light of the above, the Commission is able to authorise aid amounting to FRF 24 988 299 (EUR 3 809 442), the balance of FRF 10 011 701 (EUR 1 526 274) covering the compensation for the guaranteed concession price for that year having to be regarded as incompatible with the provisions of Decision No 3632/93/ECSC. If the latter amount was paid to Charbonnages de France before the Commission decision authorising it was taken, it must be considered an unfair advantage in the form of an unjustified cash advance and, as such, must be repaid by the beneficiary at the market rate. Any interest will be calculated from the date on which the aid, which includes the compensation paid to cover the guarantee concession price, was paid to the recipient undertaking.
- (81) With regard to the years 1998 to 2001, the Commission authorised the aid notified by France for the coal industry, except as regards a provisional amount of FRF 45 million (EUR 6 860 206) for each of the years from 1998 to 2000 in accordance with Decisions 2001/85/ECSC<sup>(16)</sup> and 2001/58/ECSC<sup>(17)</sup>, and of FRF 10 million (EUR 1 524 490) for 2001 in accordance with Decision 2001/678/ECSC<sup>(18)</sup>. In accordance with those decisions, the Commission has to take a decision on these amounts in the light of the outcome of the examination of the complaint which is the subject of this Decision. On the basis of the above, it must be considered that part of these amounts of aid was intended to be allocated, or was allocated before a Commission decision was taken, as compensation for the guarantee concession price paid by EPIC CdF to CdF Energie and by CdF Energie to Sidec for those years. The letter of 8 April 1999 from the French authorities shows that 13 contracts providing for a guaranteed concession price were still in force on that date. France is therefore asked to notify to the Commission the amounts of compensation for the guaranteed concession price paid by EPIC CdF to CdF Energie and by CdF Energie to Sidec for those years. On the basis of that information, the Commission will be able to take a final decision on the amounts of aid notified by France for the years 1998 to 2001 which have not been authorised.

<sup>(16)</sup> OJ L 29, 31.1.2001, p. 45.

<sup>(17)</sup> OJ L 21, 23.1.2001, p. 12.

<sup>(18)</sup> OJ L 239, 7.9.2001, p. 35.

- (82) The Commission requests France to take the measures necessary to comply with this Decision. In this respect, the letter of 8 April 1999 from the French authorities shows that the latest date of expiry of the contracts which include a guaranteed concession price clause is 2006. The various mechanisms identified in this Decision, in particular the guaranteed concession price mechanism under which compensation was paid by EPIC CdF to CdF Energie and by CdF Energie to Sidec, has distorted competition (see recitals 70 to 76). France is therefore requested to take the measures necessary to abolish these mechanisms, which are financed through State aid granted to Charbonnages de France for coal production,

HAS ADOPTED THIS DECISION:

*Article 1*

The State aid granted by France to the coal industry which has been allocated or is to be allocated as compensation for the guaranteed concession price and advances for investment paid by the industrial and commercial public undertaking Charbonnages de France (l'EPIC CdF) to the economic interest grouping CdF Energie (CdF Energie), and as permanent advances from the members of CdF Energie, totalling EUR 19 942 292, is incompatible with the common market.

*Article 2*

1. France shall take all necessary measures to recover the aid for the years 1994, 1995 and 1996 referred to in Article 1 above, totalling EUR 18 416 018, from the Charbonnages de France group.
2. Recovery shall be immediate and in accordance with the procedures laid down in French law, provided that these permit the immediate and effective implementation of this Decision. The amounts to be repaid must include interest from the date the aid was made available to the beneficiary to its actual recovery.

*Article 3*

1. France is authorised to grant to the French coal industry, for 1997, aid for the reduction of activity, in addition to that authorised by Decision 2001/85/ECSC, totalling EUR 3 809 442. The balance of the amount of aid on which the Commission had to take a decision in accordance with Article 1(a) of that Decision, namely EUR 1 526 274, therefore cannot be used.
2. If France has already paid the sum of EUR 1 526 274 referred to in paragraph 1 above to the Charbonnages de France group before a Commission decision has been taken, it shall be recovered as specified in Article 2(2).

*Article 4*

The grant of aid declared to be incompatible by virtue of this Decision shall stop upon notification of the Decision to France.

*Article 5*

1. The French Government shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply.
2. With regard to the aid to the coal industry for 1998, 1999, 2000 and 2001, France shall notify to the Commission, within 15 working days of notification of this Decision, the amounts of compensation for the guaranteed concession price paid by EPIC CdF to CdF Energie for those years.



*Article 6*

This Decision is addressed to the French Republic.

Done at Brussels, 9 April 2002.

*For the Commission*  
Loyola DE PALACIO  
*Vice-President*

---