COMMISSION

COMMISSION DECISION

of 16 January 1991

relating to a proceeding under Article 85 of the EEC Treaty

(IV/32.732 — IJsselcentrale and others)

(Only the Dutch text is authentic)

(91/50/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 thereof,

Having regard to the application made to the Commission on 26 May 1988 under Article 3 of Regulation No 17 by NV IGMO, of Meppel, Centraal Overijsselse Nutsbedrijven NV, of Almelo, NV Regionaal Energiebedrijf Salland, of Deventer, and the Municipality of Hoogeveen, requesting it to find that NV Samenwerkende Elektriciteitsproduktiebedrijven (SEP) and the electricity generation companies in the Netherlands have infringed Article 85,

Having given SEP and the electricity generators the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19 (1) of Regulation No 17 in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Articles 19 (1) and (2) of Regulation No 17 [2],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

1. The complaint

(1) On 26 May 1988 an application was made under Article 3 of Regulation No 17 by NV IGMO (Intercommunaal Gasbedrijf Meppel en Omstreken) of Meppel; the Hoogeveen municipal distribution undertaking (the two of these have since been merged into Rendo NV); NV Regionaal Energiebedrijf Salland, of Deventer, and Centraal Overijsselse Nutsbedrijven NV of Almelo.

The complaint is against IJsselcentrale; it was made in the course of civil proceedings concerning the imposition by IJsselcentrale of an import and export ban coupled with an exclusive purchasing obligation, and the imposition of an extra cost equalization charge.

The complaint relates to three matters :

1. The import ban explicitly laid down both in the 1971 General SEP Agreement (Article 2) and in the 1986 Cooperation Agreement (Article 21).

2. The exclusive purchasing obligation deriving from the agreements between the complainants and IJsselcentrale, and particularly from Article 2 (2) of the General Terms and Conditions applying. According to the complainants this obligation to purchase, which in effect also prevents imports, is in its turn a consequence of the relevant provisions of the Cooperation Agreement.

3. IJsselcentrale's power to determine prices unilaterally, and the equalization charge which in fact was unilaterally imposed on the complainants by IJjsselcentrale under a decision of its Board *(Raad van Commissarissen)* taken on 26 October 1984.

This equalization charge was imposed by IJsselcentrale in order to eliminate differences between the costs of distribution to small and large consumers by, on the one hand, IJsselcentrale, and on the other hand municipal or regional distributors and

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.

is based on the fact that IJsselcentrale primarily supplies country regions and that the municipal or regional distributors primarily supply city regions.

For the time being the operation of the extra cost equalization charge is outside the scope of this proceeding; but according to the complainants the import ban makes the imposition of the extra charge possible.

The complainants are local distributors which in their turn are supplied by a regional distributor namely IJsselcentrale.

2. The electricity undertakings

(2) There are at present four electricity generating companies in the Netherlands: NV Elektriciteitsbedrijf Zuid-Holland ('EZH'), of Voorburg; NV Energieproduktiebedrijf UNA, of Utrecht; NV Elektriciteits-Produktiemaatschappij Zuid-Nederland ('EPZ'), of Eindhoven; and NV Elektriciteits-Produktiemaatschappij Oost- en Noord-Nederland ('EPON'), Zwolle; there are at the moment 38 distribution undertakings.

The generators are companies whose share capital is owned by local authorities, both provinces and municipalities, either directly, as in the case of EZH and UNA, or indirectly, through the large distributors which cover the relevant area, in the case of EPZ and EPON.

The shares in the distribution undertakings are likewise held directly or indirectly by the provinces and municipalities, where the distributor is not actually a department of public administration.

(3) On 3 June 1949 these companies, or in some cases their predecessors, set up NV Samenwerkende Elektriciteitsproduktiebedrijven ('SEP').

SEP is a public limited company intended to serve as a vehicle for cooperation between the electricity generators. Initially its object was to administer mutual assistance in the event of breakdowns, by making the best possible use of national and international interconnections.

At present there are a total of four high voltage interconnections between the Netherlands and Germany and three between the Netherlands and Belgium. Except for the Musselkanaal-Lathen interconnection, which is the property of the Elektriciteitsbedrijf voor Groningen en Drenthe ('EGD'), all of these are the property of SEP. SEP also have the use of the one interconnection which is not its own property.

SEP's statutes provide that its shareholders must be public-law bodies, or private-law bodies with legal personality, which in the Netherlands either operate a public electricity generation undertaking or administer a cooperative arrangement between a group of operators of public electricity generation undertakings.

SEP's objects are laid down in its statutes as follows:

— to draw up a joint Electricity Plan;

— to operate (principally in the capacity of an owner) the 380/220 kV grid;

— to conclude agreements with foreign electricity undertakings concerning imports and exports and the use of international interconnections;

— to arrange the joint purchase of fuels for the purpose of generation;

— to pool energy and generation costs;

— to make the best possible use of domestic electricity generation.

These tasks were given a general basis in legislation with the entry into force of the Electricity Law 1989 (1).

3. The agreements

(4) The Cooperation Agreement which was concluded on 22 May 1986 between the predecessors of the present four generators on the one hand and SEP on the other replaced the General SEP Agreement of 1 February 1971, and was concluded for a duration of 25 years. Article 2 (1) of the Cooperation Agreement lays down among other things that parties to the Agreement are to be shareholders in the Company (i.e. SEP). Parties are also to hold a valid authorization from the Minister with responsibility for electricity supply to build or to operate, or both, one or more generation plants with a view to the public supply of electricity.

(5) Article 21 of the Cooperation Agreement deals more specifically with imports and exports, as follows:

'1. Electric capacity may be provided and electric power supplied to or by electricity undertakings established outside the Netherlands only through the Company.

2. In supply agreements with undertakings which distribute electric power the parties shall stipulate that those undertakings shall not obtain or supply electric power, with or without any associate electric capacity, from or to electricity

(1) Full title: Law of 16 November 1989 laying down rules on the generation, import, transmission and sale of electricity (Electricity Law 1989); published *Staatsblad* 535, 7 December 1989.

undertakings established outside the Netherlands.

3. Paragraphs 1 and 2 of this Article shall not apply to supply operations, up to a ceiling to be determined by implementing rules laid down in accordance with Article 32 of this Agreement, carried out solely for reasons connected with the local distribution of electric power.'

(The implementing rules referred to in paragraph 3, which are intended to cover the supply of power to firms located near the border, exempt from this prohibition supply operations with a capacity of not more than 5 000 kW and a tension of 15 kV.)

Moreover, Article 10 (4) of the OVS States:

'Participants are obliged — and are responsible for the proper implementation of this obligation — to stipulate in supply agreements with distributors of electric power that all electricity of a nominal capacity, generated by their installations, will be delivered to the company through the intermediary of the Participant in whose territory the relevant installation is located. This capacity equals or exceeds the threshold referred to in Article 12 (3).'

The old General SEP Agreement of 1 February 1971, which was replaced by the Cooperation Agreement, also included provisions similar to those to be found in the Cooperation Agreement covering such matters as the electricity plan, interconnections, supply and settlement, and implicitly imports and exports.

(6) The general terms and conditions for the supply of power to municipalities with their own distributors in the territory of IJsselcentrale's concession, which have been in force since 1 April 1965, include an Article 2 (2) under which the municipality undertakes 'to obtain electric power for supply in its territory exclusively from IJsselcentrale, and to use that power only for its own consumption or for supply to third parties for consumption in the territory of the Municipality.' This clause imposes an exclusive purchasing obligation on the municipality, and a ban on supplying third parties outside its territory. In Article 13 (1) Ijsselcentrale undertakes not to supply electric power to third parties in the territory of the municipality without the municipality's consent, with a few stated exceptions.

The complainants in this proceeding, in their capacity as distributors and purchasers from IJsselcentrale, which supplies only as a main distributor, also impose an exclusive purchasing obligation. Thus the Municipality of Deventer, for example, in its Large Consumer's Contract for the supply of electricity, includes the following clause in Article 1: 'The consumer undertakes to obtain the electric power needed for his business in Deventer from the Municipality.'

Under the model General Terms and Conditions for the supply of electricity to large consumers (1984), drawn up and published by the Vereniging van Exploitanten van Elektriciteitsbedrijven in Nederland (Association of Operators of Electricity Undertakings in the Netherlands — 'VEEN'), the distributors apply a provision in Article 19 (2) which reads as follows:

'The consumer may not without the written consent of the distrubutor:

(a) obtain electric power from third parties;

(b) operate or procure the operation of autogenerating plant alongside the public grid;

(c) use the power supplied otherwise than on his own premises.'

Thus consumers too are bound by an exclusive purchasing obligation and a ban on supplying power to third parties.

(7) Before the entry into force of the Electricity Law 1989, electricity undertakings frequently operated under concessions granted by the authorities. Production and distribution were then frequently in the same hands. This was the case with IJsselcentrale, which was granted a concession by the Royal Order of 13 June 1918, No 54. Such concessions, including IJsselcentrale's, were for the construction and operation of plant and of works for the production, transmission, transformation, distribution and supply of electricity, with the exception of electricity for telegraph and telephone purposes; at least in IJsselcentrale's case they did not confer any exclusive rights in the territory of the concession. The concession containes a supply obligation. If this obligation is not properly performed, the concession may be revoked.

(8) On 5 June 1975, during the currency of the General SEP Agreement of 1 February 1971, an agreement was concluded between the State of the Netherlands, SEP, and the eleven electricity generators of the time, which, like SEP itself, were all parties to the General SEP Agreement. This new agreement is commonly known as 'the Compact (*Covenant*) of 1975.' The main objective of the Compact was to require SEP to submit the Electricity Plan it drew up for approval by the Minister for Economic Affairs. This Compact entered into force on 3 July 1975 and was to apply for the duration of the Cooperation Agreement.

4. The legislation

(9) Until very recently the legislation governing the electricity market in the Netherlands was very restricted in scope. Only a part of the Electricity Law of 22 October 1938 (published *Staatsblad* 1938, 523) had actually entered into force. The concessions granted by the authorities to electricity undertakings were not based on that legislation. The Law, which applied until 8 December 1989, did not prevent parties other than electricity undertakings from importing electricity themselves. Under the Law of 10 December 1936, however *(Staatsblad* 524), authorization was required for any such imports. In principle such authorization could be obtained by anyone.

Under the old legislation there was an agreement between the distributors and the national authorities which made the prices charged to final consumers (maximum prices) subject to approval by the Minister for Economic Affairs. The prices charged to large consumers were the subject of negotiations between organizations representing large consumers and electricity undertakings.

Two developments can be observed on the Dutch market: on the one hand there is a movement towards concentration on the generation side with the result that only four generators remain; and on the other hand there is a movement towards a more formal type of regulation of the market by means of legislation. On 8 December 1989 the new Electricity Law 1989 entered into force with the exception of certain provisions for which there is a transitional period. It represents an important step to a more open electricity market in the Netherlands.

Broadly speaking, the scheme laid down in the Cooperation Agreement has been given a basis in legislation. In some respects, however, the Law allows greater freedom than the Cooperation Agreement.

The main features of the new Law are as follows:

— As regards the national electricity supply, Article 2 provides that licensees (i.e. the electricity generators which operate electric power stations and produce for the public electricity supply) and the Designated Company [1] are jointly to ensure the reliable and efficient operation of the national public electricity supply at costs which are as low as possible and in a socially responsible fashion, subject to the provisions of the Law and any rules made under it.

— The designated company is every two years to draw up an Electricity Plan covering developments in the supply of electricity in the Netherlands (Article 15 (1)).

— Any person who operates one or more electric power stations for the public electricity supply may supply any electricity available when the generating capacity of that plant exceeds a stated threshold using those power stations or otherwise, only to the designated company, and may supply the electricity supplied to him by that company only to distributors (Article 11 (1)).

— Notwithstanding any provision to the contrary, the owner of a distribution undertaking is entitled to have electricity supplied and electric capacity provided to him by the licensee (Article 12 (1)). Generators thus have an obligation to supply to distributors. Article 12 (3) provides that notwithstanding any provision to the contrary any person is entitled to have electricity supplied and electric capacity provided to him by any person who operates the public supply of electricity to consumers in the territory in which he requests such supply of electricity or provision of capacity.

Thus distributors also have an obligation to supply to final consumers.

— SEP, as the 'Designated Company', is to have the sole right to import electric power with a view to public supply (Article 34) with the exception of electricity with a voltage below 500 volts. Distributors are therefore prohibited from importing electricity with a view to public supply. Certain final consumers however may import electric power for their own consumption (this follows from Article 34) [2].

— Large private consumers are no longer to be bound by an exclusive purchasing obligation to their local or regional distributor (Article 13 (2) [2].

— Distributors and large-scale consumers who find their own generator or distributor too dear may transfer to another supplier within the

[1] I.e. the SEP. Designation was made by Ministerial Order of 20 March 1990 *(Staatscourant* 58, 22. 3. 1990).

[2] As one of a number of stimuli to competition introduced by the Law, according to a summary of the Law drawn up by the Ministry of Economic Affairs.

Netherlands (who will normally be operating outside their territory); this is known as 'cross-shopping' *(horizontaal winkelen)*(1).

— Consumers may themselves generate current and may feed any surpluses of autogenerated current to distributors (Article 41).

— Anyone who with a view to public supply operates lines for the transmission of electric power, with the associated transformers, substations and other accessory plant is upon written application obliged to make an offer concerning the transmission for the applicant of electricity for public supply, of electricity for large private consumers, or of imported electricity (Article 47 (1))(2).

— Any owner of a distribution undertaking is obliged to accept an offer for the supply of electricity made by:

(a) a natural or legal person who generates that electricity in the territory in which electricity is supplied to consumers by that distribution undertaking or by a distribution undertaking to which that distribution undertaking supplies electricity;

(b) a distribution undertaking to which the relevant distribution undertaking supplies electricity.

This obligation does not apply where the electricity:

(a) is generated by a power station;

(b) is generated by a natural or legal person to which imported electricity is also available for use in the relevant establishment (Article 41).

— The designated company may not, without the approval of the Minister, conclude any agreement under which electric capacity outside the Netherlands is to be provided to that company. The Minister may withhold approval from an agreement only where this is necessary in the interests of proper electricity supply (Article 35).

— The Law broadens the scope for local electricity generation by distributors: they may always operate their own autogenerating plant up to a maximum capacity of 25 MW, and approval for the construction or operation of autogenerating plant with a higher capacity may be withheld only if certain requirements are not met (Article 40).

— As the Law does not regulate exports, it is to be assumed that anyone, private consumers as well as distributors, is free to export. The Law does not, however, impose any obligation to transmit electricity for export similar to the obligation to transmit imported electricity.

The Electricity Law 1989 entered into force on 8 December 1989. It itself provides, in Article 61, that certain of its Articles are to enter into force only on 1 July 1990, of which Articles 11 and 34 concern us here; and in Articles 58 and 59 that Articles 2 to 11 of the Electricity Law 1938 *(Staatsblad* 1938, 523) are repealed and that the Law of 10 December 1936 *(Staatsblad* 524) is repealed (Articles 58 and 59).

5. Consumption, importation and exportation of electricity and autogenerated electricity in the Netherlands

(10) The electricity consumed in the Netherlands may be generated by the electricity undertakings responsible for public supply, or imported or generated by the users themselves.

(1) As one of a number of stimuli to competition introduced by the Law, according to a summary of the Law drawn up by the Ministry of Economic Affairs.

(2) On the obligation to transmit, the explanatory memorandum has the following to say:

'Where an application for transmission is made, the line operator must, if necessary, show that he is unable to satisfy the application for lack of transmission capacity. SEP, as the operator of the interconnections with foreign countries, may here refer to multiannual contracts it has already concluded regarding imports for purposes of public supply'.

Reference: Lower House, 1987/88 session; 19591 (hereinafter referred to as *'Kamerstukken* No 19591'), No 3, p. 56.

The memorandum in response to the Final Report reads:

'This obligation applies in the case of cross-shopping by both distributors and especially large consumers. It also applies in the case of purchase of current abroad by final consumers, and, in particular, by especially large consumers. The obligation applies to imports only in so far as it can reasonably be said that capacity is sufficient. The owner or owners of the grid may not avoid their obligation to transmit by asking an unreasonably high price. The Bill therefore provides that transmission must be provided against payment of the costs reasonably attributable to such transmission itself, in proportion to consumption. To avoid any misunderstanding it should be pointed out that in practice, of course, this will almost always be fictitious transmission'.

Kamerstukken No 19591, No 9, p. 8.

	1984	1985	1986	1987	1988
Consumption in the Netherlands, GWH	54 970	56 370	57 320	60 400	62 410
Net generation in SEP framework, TWh	53	52,8	56,4	56,8	56,6
Autogeneration	7 486	8 190	8 555	9 967	10 800
(% of generation)	(12 %)	(13 %)	(12,7 %)	(14,6 %)	(15,6 %)
Fed to public grid	888	1 072	1 320	1 680	1 940
(% of Netherlands consumption	(1,6 %)	(2 %)	(2,3 %)	(2,8 %)	(3,1 %)
(% of autogeneration)	(11,9 %)	(13 %)	(15,5 %)	(16,8 %)	(18 %)
Imports	not available	5 240	2 370	3 645	5 840
(% consumption)		(9,5 %)	(4,2 %)	(6,4 %)	(9 %)
Including ESD's imports (see recital 14)	not available	294	222	46	0

Sources: — Information supplied by SEP to the Commission
— *Elektriciteit in Nederland 1988*, publication commissioned by SEP and VEEN.
— Information supplied by VEEN.

NB: the figures in the brochure *Elektriciteit in Nederland* differ somewhat from those in SEP annual reports. The effect on the percentage figures is only slight.

The turnover in money terms represented by consumption in the Netherlands in 1988 was approximately Fl 8 300 million on the basis of final consumer prices (1).

Like imports, the figures for autogenerated energy are considerable ; they have been growing in recent years, and in 1988 accounted for about 15,6 % of total power generated (2).

Autogenerators also feed a substantial quantity back into the public grid ; in 1988 this accounted for about 3 % of consumption in the Netherlands, and 18 % of autogenerated electrical energy.

As regards the external trade balance, in the years 1984 to 1988 the Netherlands was a net importer. Until 1985 import/export trade took place via four international interconnections ; at present there are seven such interconnections. Further details are given in the table.

(11) The organization of international connecting networks between the Netherlands and other countries is regulated through the Union for the Coordination of the Production and Transport of Electric Power (UCPTE), in which along with the Netherlands, Belgium, France, Germany, Austria and Switzerland are also represented. For more than 30 years trade has been managed by this private-law cooperative association of the national electricity organizations, which themselves conclude commercial agreements for the exchange of electric power, based on three forms of cooperation :

— exchange hour-to-hour, on the basis of costs,
— contracts for net transfers, mainly short term,
— more long-term agreements, for example where a power station in a neighbouring country is jointly owned.

About 8 % of total consumption in these countries is exchanged via these interconnections (3).

This arrangement is thus based on voluntary cooperation between the national monopolies and has no binding character.

6. Imports of electric power into the Netherlands in the future

(12) The Dutch electric power grid is connected with grids in other Member States by lines which are the property of SEP or which are controlled and administered by SEP. Depending on the year considered, imports and exports leave the Netherlands a net importer of power by between 4 % and 9 % of Dutch consumption.

SEP regularly draws up an electricity plan, which also covers foreseeable imports and exports of electric power and an estimate of the autogeneration by the industry. The Cooperation Agreement lays down specific rules here.

(13) In the 1989-98 electricity plan SEP discusses the imports to be expected in future. On page 8 the plan has this to say :

(1) Source : *Elektriciteit in Nederland 1988.*
(2) Source : *Elektriciteit in Nederland 1988.*
(3) Source : UCPTE brochure *Elektrisch Europa*, 1987.

'Agreement has been reached with foreign electricity undertakings for import contracts guaranteeing a capacity of 1 050 MW. There would be 300 MW provided in the period running from 1996 to 2006, and 750 MW in the period from 1997 to 2008. ... Together with the guaranteed imports already agreed with VEW, this will make full use of the scope for importation.'

And on page 39 of the same plan we read the following :

'Electricity imports

A useful way to meet part of the new capacity requirement has been found in the conclusion of import contracts for a determined period with a guaranteed capacity available. A guaranteed supply has already been agreed with VEW for the period from 1990 to 2000, though for separate reasons. This is for a capacity of 800 MW in the period after 1993.

After completion of the circular 380 kV grid, which is already underway, and after the Meeden-Diele interconnection with the North German electricity grid has been connected to the 380 kV grid, as decided in this plan, it will, in principle, be possible to meet a capacity requirement of about 2 000 MW by means of imports covered by a capacity guarantee. The interconnections with foreign grids would also continue to be used for mutual assistance and exchanges on a spot market-basis.'

7. Purchases of foreign electricity by Elektro-Schmelzwerk Delfzijl BV

(14) Elektro-Schmelzwerk Delfzijl BV ('ESD'), based in Delfzijl, is a subsidiary of the Wacker-Chemie group, which has its head office in Munich. Between 1982 and 1987 ESD purchased power in Germany via the Musselkanaal-Lathen international interconnection. The power was imported at ESD's request, but SEP in fact acted as importer. In the middle of 1987 this operation ran into difficulties, which according to SEP were of a technical nature. ESD expressed the wish to import power itself, and no longer through SEP. When it became clear that under the Law of 1936 this was not possible without authorization, ESD sought authorization from the Minister of Economic Affairs, and obtained it on 23 January 1987. In a letter to the Lower House of Parliament dated 23 January 1987 the Minister told the House that SEP did not wish to continue importing for ESD during 1987, although this would have been technically possible (for example using the Meeden-Diele interconnection). In the same letter the Minister said that ESD was dependent for further imports on the willingness of SEP, but that SEP had 'major reservations' on the point.

(15) A letter from SEP to the Ministry of Economic Affairs dated 17 February 1987 makes it clear that SEP was very unhappy at the granting of the authorization, and that SEP itself had agreed only to temporary import 'for' ESD. SEP took it that these imports would be 'specifically earmarked' for a particular purchaser.

It was still being assumed, therefore, that power would be imported for, and not by, the purchaser. In the same letter SEP observed that it would be possible to introduce 'special rates' for large private consumers, so that imports would no longer be an alternative ([1]).

(16) In a letter of 5 March 1987 the Ministry stated that imports by individual purchasers had been repeatedly discussed but that SEP had each time expressly rejected the possibility, and it again urged SEP to import for ESD. The letter also mentioned the practice of 'specific earmarking' and stated that the use of this terminology struck at the heart of SEP's policy, noting that only SEP imports and that SEP as a monopolist decides whether or not an individual consumer is allotted a share of the imported electricity. In its reply of 17 March 1987 SEP said among other things that application of Article 27 of the Cooperation Agreement (separate rates for a large private consumer) would make 'imports by third parties' unnecessary, once the category of large private consumers became interested, as SEP anticipated.

By letter of 13 October 1987 SEP made an offer to ESD under which SEP would import for use by ESD power generated by the German electricity undertaking PREAG via the Meeden-Diele line. SEP would import and supply to EPON, and the power imported would be for the use of ESD only. SEP would charge transmission and other costs.

([1]) On the question of rates for large consumers, SEP's annual report for 1987 says the following, on page 9 :

'Every purchaser in this category is free to choose between a contract on the basis of the LBT (*Landelijk Basis Tarief*, i.e. the national basic tariff), importation, autogeneration, or the new tariff for large consumers ; where the new tariff is chosen it must cover the total electricity requirement, and the choice may not be changed during the currency of the contract.'

SEP also said that after 1 January 1988 it would be able to apply special rates for large consumers, and consequently advised ESD to agree any imports only up to that date.

By letter of 14 October 1987 ESD told SEP that in view of the pressure of time it would accept this offer, for the period up to 1 April 1988, with an option until 1 January 1989. Thus ESD did not make use of its authorization to import directly, but continued to buy through SEP.

This is also clear from a letter from ESD to SEP dated 30 December 1987, in which ESD agreed to purchase from the distributor EGD (Electriciteitsbedrijf voor Groningen en Drenthe) for the first quarter of 1988. The letter said that ESD continued to be interested in importing, and as a directly interested party would be glad to attend the negotiations on imports if these resumed.

The above described practice of SEP is in line with its view of its 'planning' function as set out in its letter of 22 September 1988 to the Commission and is connected with its supply obligation towards its final consumers. The import monopoly according to SEP is the logical consequence and imports and exports must therefore be integrated into the capacity planning function which is necessary because of its supply obligation.

8. 'Import gains'

(17) At least from 1984 onward SEP's annual accounts show that SEP had built up a financial reserve out of what were termed 'import gains' *(importvoordelen)*. This reserve is clearly accounted for by the difference between the costs of the power imported by SEP and the cost of power generated within the Netherlands.

This means that the lower price paid by SEP for imported power was not passed on to consumers, or at any rate not directly passed on in full. Furthermore, it means that private consumers can obtain benefits from imports.

On page 37 of the Annual Report for 1985 it was stated that this arrangement was intended as far as possible to avoid sudden changes in rates in future. In 1985 about Fl 73 million was added to the reserve out of import gains.

In 1985 the reserve amounted to about Fl 277 million, and the Annual Report stated that a sum of Fl 193 million would be put to a use to be determined by the Minister for Economic Affairs.

In the year covered by the report imports came mainly from France (EdF) and West Germany (RWE) and to a lesser extent from Belgium and Switzerland.

The Annual Report for 1986 stated that out of the tariff equalization reserve, which then amounted to ± Fl 341 million, a sum of about Fl 235 million would in the future be allocated for a purpose to be determined by the Minister for Economic Affairs. The gains from electricity imports were falling rapidly, the report said, and would ultimately disappear, because prices in the Netherlands and abroad had arrived at the same level.

(18) The Annual Reports for 1987 and 1988 no longer make express reference to import gains as the source of the tariff equalization reserve. In 1988 the reserve amounted to about Fl 381 million, of which about Fl 350 million was once again to be allocated by the Minister for Economic Affairs.

On page 30 of the Annual Report for 1988 we find the following:

> 'The increase in consumption is covered almost entirely by an increase in imports. Imports of power totalled 5 840 GWh, which amounts to about 9 % of national consumption. Never before has the import balance reached such a high level.'

(19) The Commission has no knowledge of cases in which exports of electricity by others than SEP has been obstructed by the latter. On the contrary there is a case of effective export by the distributor Provinciale Limburgse Elektriciteits-Maatschappij, which since recently supplies VEGLA (Vereinigte Glaswerke GmbH) at Aachen, West Germany. According to SEP there are no objections against this because VEGLA is supplied via their own powerline located on Dutch territory. From this it may be concluded that SEP does not consider supplies to be exports as long as the 'plug' of the consumer is located on Dutch territory.

9. The Cooperation Agreement in conjunction with the entry into force of the Electricity Law 1989

(20) Although the Electricity Law 1989 entered into force on 8 December 1989, the provisions dealing with imports in Article 34 entered into force on 1 July 1990.

By letter of 15 December 1989 SEP informed the Commisson that in the meantime Article 21 of the Cooperation Agreement would continue to apply. According to SEP that Article would not be adjusted to take account of the new Law even after 1 July 1990. As far as is known to the Commission this Article has not yet been adapted. The same is true for the General Terms and Conditions for the supply of electricity to large-scale consumers of 'VEEN'. This Decision consequently relates both to the period before the Electricity Law 1989 entered into force and to the period thereafter.

The immediate subject matter of this Decision is Article 21 of the Cooperation Agreement in so far as it relates to imports by private consumers, or is applied by SEP to such imports, and combined with SEP's control of the interconnections has the effect of restricting imports and exports by those consumers, and exports by distributors.

II. LEGAL ASSESSMENT

A. Article 85 (1) of the Treaty

1. *Agreements between undertakings*

(21) The Cooperation Agreement is an agreement between undertakings within the meaning of Article 85 (1). It must be considered in the light of the fact that the four electricity generation companies are shareholders in SEP, a joint subsidiary which acts as a vehicle for cooperation between them.

The Agreement is a matter of private law only. Despite the influence which the Dutch authorities exercise over planning and generation of electricity for public supply, there is no evidence that the Agreement was concluded under pressure from the authorities. Nor does the Compact between the State and the electricity generators which has already been referred to form any bar to the generators' own responsibility. The General SEP Agreement, the predecessor of the Cooperation Agreement, in any event predates the Compact.

(22) SEP has argued that the participating electricity generators together form an economic unit, because they are components in 'one indivisible public electricity supply system.' The real function of Article 21 of the Cooperation Agreement, according to SEP, is to secure an allocation of tasks between the generators, with certain tasks being centralized and allocated to SEP. SEP here invokes the Court of Justice's Judgment in *Hydrotherm v. Compact* (Case 170/83) [1]. SEP contends that there can therefore be no question of competition between the parties, so that Article 85 does not apply.

(23) This reasoning cannot be accepted. It is true that Article 85 is not concerned with agreements between undertakings belonging to the same group of companies, and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements are concerned merely with the internal allocation of tasks as between the undertakings (Court of Justice, Case 30/87 *Bodson* [2]; but that is not the situation here.

(24) To begin with, the four participants do not belong to a single group of companies. They are separate legal persons, and are not controlled by a single person, natural or legal. Each generating company determines its own conduct independently. It is hard to see how else there could be differences between the prices different generators charge for power making it worthwhile for a consumer to buy in another distribution zone (the so-called 'cross-shopping'). This observation certainly applies after the introduction of the Electricity Law 1989, which expressly permits cross-shopping.

The fact that the generators all form part of one indivisible system of public supply changes nothing here. The distributors likewise form part of the same system, but there is no reason to suppose that they form an economic unit with the generators on that ground alone.

Finally, it cannot be said that SEP itself forms an economic unit with one or more of the generating companies. SEP is a joint venture controlled by its parent companies together.

2. *Restriction of competition*

(25) Article 21 of the Cooperation Agreement, the subject of this Decision, prohibits the importation and exportation of electricity by undertakings other than SEP; it does so:

— horizontally, by prohibiting generators from exporting or importing (paragraph 1);

[1] [1984] ECR 2999.
[2] [1988] ECR 2479.

— vertically, by requiring generators to impose the same ban on distributors in their supply agreements (paragraph 2).

These prohibitions restrict competition.

(26) The parties to the Agreement also undertake, in Article 10 (4) of the Agreement, to include a clause in their supply agreements requiring all power autogenerated by distributors (with a minimum capacity per establishment of 5 MW or more) to be supplied to SEP via the party in whose supply territory the relevant plant is located. Distributors are therefore prevented from exporting locally generated power, or supplying it direct to purchasers. This means that local generation is not an alternative to the imports prohibited by Article 21.

Article 10 (4) of the Cooperation Agreement thus reinforces the restrictive effect of Article 21.

(27) In the course of the administrative proceedings SEP emphasized that Article 21 does not prevent anyone who is not a distributor from importing or exporting. After investigation, however, the Commission has reached the conclusion that within the structure of electricity supply in the Netherlands the way in which SEP applies Article 21 in practice enables it to exercise total control of imports and exports.

(28) In this connection it must be pointed out first of all that in their general terms and conditions distributors impose an exclusive purchasing obligation on their customers (usually local energy undertakings), and that those customers do the same to their own customers (large consumers); imports are thus made impossible. The distributors who impose this exclusive purchasing obligation are themselves bound by an exclusive purchasing obligation towards the generators grouped in SEP. Thus the purchasing obligation which the generators impose works its way down the distribution chain, with the result that large consumers who purchase from the public grid cannot also import. This is also clear from the inclusion of the same purchasing obligations in the 1984 General Terms and Conditions for the Supply of Electricity to Large Consumers, which were drawn up by VEEN and are generally applied by the distributors. The succession of exclusive purchasing obligations forms a coherent system in conjunction with Article 21 of the Cooperation Agreement as it is applied by SEP and the generators, so that these provisions of the General Terms and Conditions together with Article 21 form a whole, operating both among generators and ultimately between them and their industrial consumers.

(29) Secondly, SEP operates and/or owns the international interconnections through which all imports and exports must be channelled, whether for public or private supply. Lines privately owned by consumers are not a real alternative.

SEP itself imports substantial quantities of electricity, from other Member States and elsewhere (see recitals 10 *et seq.*). In principle it is technically possible to make power lines available to private importers at reasonable prices, provided SEP has sufficient capacity available, as is now provided in the Electricity Law 1989. But SEP has not been prepared to do this. The ESD case (see recitals 14 to 16 above) is an illustration : it was not ESD but SEP which ultimately imported from Germany. From the correspondence between SEP and the Ministry of Economic Affairs already referred to it is clear that SEP was opposed to direct imports by ESD, and indeed regarded importation for ESD by SEP itself as a temporary measure. From ESD's letter to SEP dated 30 December 1987 it is clear that SEP was keeping ESD from having contact with the German supplier. In any event it is plain that SEP wished to reserve importation, even as a temporary arrangement, to itself, and wishes to continue doing so in future too. As a last resort SEP was prepared to apply a special tariff which was so attractive that ESD decided not to import, and agreed to be supplied by EGD.

SEP has thus been applying Article 21 of the Cooperation Agreement in such a way that it in practice prevents private industrial consumers from themselves importing electricity. SEP is claiming what in fact amounts to an import monopoly. It may be mentioned, too, that SEP's complete refusal to make power lines available to others can be considered an agreement or concerted practice between the generators participating in SEP, which could constitute a separate infringement of Article 85.

(30) In the third place, SEP itself has argued that power imported for the importers' own use cannot be considered separately from power intended for public supply. In its planning function SEP must take account of imports. In practice, in any case, a final consumer who proposes to import himself will have to announce his intention in good time beforehand to the supplier with whom he has a supply contract. SEP will be informed, because its cooperation is indispensable for transmission over the international interconnections and the high-tension grid. Consumers cannot feed surpluses of imported power back into the public grid.

(31) The Commission concludes that Article 21 of the Cooperation Agreement enables SEP to control the import and export of power in the interest of its shareholders. The consumers' theoretical entitlement to import themselves is thereby rendered inoperative in practice, and they are consequently deprived of access to other sources of supply.

3. *Effect on trade between Member States*

(32) The import and export ban in Article 21 is liable appreciably to affect trade between Member States. This is the more so as the Cooperation Agreement is to apply for a period of 25 years, and covers the entire territory of the Netherlands. In addition, as has already been pointed out, imports by industrial consumers are rendered difficult in a way which conflicts with the achievement of a single market in energy.

B. The operation of the Cooperation Agreement under the Electricity Law 1989

(33) According to SEP Article 21 of the Cooperation Agreement continues to apply even after the entry into force of the Electricity Law 1989, and particularly Article 34 of this Law. SEP evidently considers that the new Law changes nothing in Article 21 of the Cooperation Agreement. The Commission would make the following observations in this respect.

1. *Imports*

(34) Article 34 of the Electricity Law 1989 prohibits anyone other than SEP from importing power with a view to public supply. On the other hand, imports for purposes other than public supply are no longer subject to prior authorization. Imports by final consumers, and essentially industrial consumers, are therefore unrestricted, provided they are intended for the importer's own consumption: imported power cannot be supplied to third parties (Article 37 (1) of the new Law), nor can it be fed into the public supply (Article 41 (2) (b)).

Under Article 47 (1) (c) SEP now has an obligation to transmit any power imported SEP must allow the importer access to its connections on reasonable terms, provided there is sufficient capacity available.

Under the new rules, therefore, an industrial consumer is indeed entitled to import, but for the technical facilities needed he remains dependent on SEP, which with its control of the high-tension grid is still in a position to place difficulties in the way of imports. This may occur particularly where the connections are fully loaded as a result of power imports by SEP itself.

(35) Contrary to SEP's claims, therefore, Article 21 has not simply been incorporated into the Law. If that had been done Article 21 would now no longer serve any purpose. The fact that SEP wishes to continue to apply Article 21 is an indication that the Article continues to have significance alongside the Law. All this confirms the Commission's view that Article 21 is being applied in a way which goes beyond the terms of the Law.

2. *Exports*

(36) The Electricity Law 1989 makes no rules regarding the export of power, except for the obligation of generators to supply electricity only to SEP (Article 11). In response to a questionnaire the Dutch Government informed the Commission that the export of power from the Netherlands is completely unrestricted. According to the Dutch Government not only SEP but also distributors and private consumers are free to export. This applies whether the power involved is taken from the public grid or autogenerated.

(37) Like importers, however, exporters continue to be dependent on SEP for transmission. The new Law does not impose an obligation to transmit power for export. A potential exporter must therefore reach agreement with SEP and with the owners of foreign grids. SEP thus retains a key role. The way in which it plays that role depends on the way in which it applies Article 21 of the Cooperation Agreement.

3. *Conclusion*

(38) It must be concluded that the application of Article 21 of the Cooperation Agreement continues to infringe Article 85 of the Treaty under the rules introduced by the new Law.

C. Article 90 (2) of the Treaty: non-public supply

(39) Article 90 (2) of the Treaty states that undertakings entrusted with the operations of services of general economic interest are to be subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks asigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

SEP invokes the exception laid down in Article 90 (2). It argues that the electricity industry possesses special features: on the one hand, it is under an obligation to guarantee supply, and on the other, as a necessary consequence of that obligation, it must be able to exercise control of generation, imports and exports.

1. *The undertakings are entrusted with the operation of services of general economic interest*

(40) SEP's main task is to ensure the reliable and efficient operation of the national public electricity supply at costs which are as low as possible and in a socially responsible fashion (Article 2 of the Electricity Law 1989). This definition of SEP's tasks is complemented by the generators' obligation to supply to distributors (Article 12 (1) of the Law). The arrangement is clearly based on the terms of the concessions formerly granted by the Minister for Economic Affairs. The generators' obligation to supply was a central feature there too (*cf.* Ijsselcentrale's concession, recital 7).

In these circumstances it can be accepted that both SEP and the participating generators are engaged in 'the operation of services of general economic interest'.

(41) The operation of these services now has a basis in legislation, which it did not have before the entry into force of the new Law. But even before the new Law these tasks had been assigned to the generators by an act of public law, namely the grant of concessions by the Minister for Economic Affairs. It must be concluded that both before and after the entry into force of the Electricity Law 1989 SEP and the generators were 'entrusted' with the operation of these services.

(42) The first test of Article 90 (2) is therefore satisfied.

2. *The application of the competition rules does not obstruct the performance of the tasks assigned*

(43) In the Commission's view the application of the competition rules does not obstruct SEP in the proper performance of the tasks assigned to it, because the performance of those tasks does not require absolute control of imports and exports, including imports and exports by private consumers and particularly industrial consumers, which as we have seen is the consequence of Article 21 of the Cooperation Agreement.

(44) As far as imports are concerned this can be seen from the following considerations.

(a) In 1988 15,6 % of total power generated in the Netherlands was accounted for by what are known as autogenerators (see recital 10 above). These autogenerators feed their surpluses into the public grid. Autogeneration evidently does not interfere with the performance of SEP's tasks. There is no reason to suppose that importation should be any different.

SEP has argued in this respect that importation is a one-off operation, whereas autogeneration has a structured and therefore more long-term character. But the distinction SEP is suggesting does not, in fact, exist. Imports too have to be planned. Part of SEP's function is to adapt its own generation activities to the scale of imports and local generation. Imports too have to be notified to SEP in advance (see recital 30). Imports too are allowed for in the Electricity Plan. Thus there is no difference here between importation and autogeneration.

Furthermore, in the case of autogeneration as in the case of importation the distributors are released from their obligation to supply; a consumer who announces his intention of meeting his power requirements wholly or partly by means of importation or autogeneration cannot in an emergency simply fall back on the public supply. He may conclude a back-up contract with the distributor, under

which a stated capacity is 'set aside' for him against payment. There is no obligation to conclude such a contract under the new Law.

(b) The Dutch authorities do not believe that absolute control of imports by SEP is necessary to the performance of the tasks assigned to it. It would be difficult to explain otherwise why the new Law expressly leaves imports for the importer's own consumption unrestricted. In the course of the Parliamentary debate on the new Law the Minister for Economic Affairs referred to the similiarities between autogeneration and importation which have just been discussed *(Kammerstukken,* Verslag van een schriftelijk overleg, No 15, pp. 8, 17 and 18). In both cases the 'absolute obligation to supply' does not apply. There is consequently no need for 'absolute control of generation and importation' either.

Thus the absolute control of imports given to SEP by Article 21 of the Cooperation Agreement is not considered by the Dutch authorities themselves to be indispensable to the performance of these tasks of general interest.

(c) Lastly, SEP's rights of ownership over the international interconnections do not justify total control over imports. Even before SEP's obligation to transmit was laid down in legislation (Article 47 (1) (c) of the new Law), the power lines could be made available on reasonable terms to other parties for the transmission of power they were importing themselves. The other requirements that SEP might lay down for transmission operations could be that nothing must be done to endanger the reliability of the grid ; that the transaction must be an economically justifiable one with some measure of regularity (no spot transactions) ; that the operations must have a measure of continuity over a reasonable period ; and that the prices must be reasonable and non-discriminatory. As a general rule these requirements will be met only by private consumers with significant power requirements, such as large consumers or groups of several industrial consumers. Thus there was and is no reason for absolute control as a consequence of SEP's operation of the power lines.

(45) With regard to exports of power by private industrial consumers there are in principle the same reasons for holding that control by SEP cannot be justified for the purposes of Article 90 (2) of the Treaty.

(a) As SEP has itself argued, when power is obtained from the public grid the Dutch electricity undertakings do not 'look behind the meter' : they supply current to a customer, and are not concerned with what the customer does with it, whether he consumes it himself, exports it, or supplies it in his turn to someone else. There is no reason why autogenerated current should not be exported in the same way. It does not after all affect the public supply, indeed that is why the new Law leaves it unrestricted.

(b) Here again the new Dutch legislation leaves industrial consumers, including autogenerators, free to export.

(c) Rights of ownership over the interconnections cannot justify absolute control of exports either.

(46) It must be concluded that the second test of Article 90 (2) is not satisfied.

3. *The development of trade*

(47) In view of the foregoing there is no need to consider the last sentence of Article 90 (2). It is clear, however, that obstruction of imports and exports such as that deriving from Article 21 of the Cooperation Agreement does affect trade to an extent contrary to the interests of the Community. In the light of the Community's efforts to achieve a single internal market in energy such obstruction of imports and exports, which moreover is intended to continue for a period of 25 years, cannot be accepted.

(48) Thus this provision of Article 90 (2) is in any event not satisfied either.

D. Article 90 (2) of the Treaty : public supply

(49) To the extent that Article 21 is applied to imports with a view to public supply, and to exports by generators and distributors, the following observations are in order.

1. *Imports*

(50) The ban on imports by generators and distributors otherwise than through SEP in the context of public supply, is now laid down in Article 34 of the Electricity Law 1989. The present proceeding is a proceeding under Regulation No 17, and the Commission will not pass judgment here on the question whether such restriction of imports is justified for the purposes of Article 90 (2) of the Treaty. To do so would be to anticipate the ques-

tion whether the new Law is itself compatible with the Treaty, and that is outside the scope of this proceeding.

2. *Exports*

(51) An export ban imposed on generators in the field of public supply can be deduced from the supply obligation imposed by Article 11 of the Electricity Law 1989 which obliges the generators to supply their electricity only to SEP and to supply exclusively to distributors the electricity supplied to them by SEP. Again, no judgment will be made on this export ban under the present proceedings.

The ban on exports, including those made outside the field of public supply, by distributors imposed by Article 21 of the Cooperation Agreement, conflicts with the scheme of the new Law in which these exports are left unrestricted. It appears doubtful to the Commission whether the parties to the Cooperation Agreement are entitled to impose an export ban that runs counter to the Law in this way, but to judge by what is said in SEP's letter to the Commission of 15 December 1989 SEP evidently considers that the possibility does exist.

Accepting therefore that the ban on exports by distributors laid down in Article 21 continues to apply, the Commission takes the view that it cannot be justified by Article 90 (2). There is no apparent reason why exports by these distributors should endanger the public supply. As long as distributors are in a position to meet their supply obligations domestically, there is no reason to prevent them from exploiting any surpluses by exporting them.

(52) It must be concluded that the ban on exports which continues to be imposed by Article 21 of the Cooperation Agreement on distributors even after the entry into force of Article 34 of the Electricity Law 1989 cannot be justified by reference to Article 90 (2).

E. **Article 85 (3) of the Treaty**

(53) The Cooperation Agreement was not notified to the Commission in accordance with Article 4 of Regulation No 17. Neither were earlier agreements between the participants in SEP ever so notified. Even if the Cooperation Agreement were to be notified, it would not qualify for exemption under Article 85 (3). It follows from the foregoing that the absolute effect which SEP has given to the import and export ban in Article 21 is not indispensible to the attainment of the objectives of the Cooperation Agreement. The third test of Article 85 (3) is thus in any event not satisfied.

F. **Conclusion**

(54) The Commission concludes that Article 21 of the Cooperation Agreement between SEP and the Dutch electricity generators, as applied in conjunction with the control and influence in fact exercised over international supplies of power, constitutes an infringement of Article 85 (1) of the Treaty in so far as it has as its object or effect:

(a) the restriction of imports by private industrial consumers, and

(b) the restriction of exports by distributors and industrial consumers, including autogenerators,

and that it does not satisfy the conditions for application of Article 90 (2) of the Treaty.

G. **Article 3 of Regulation No 17**

(55) Article 3 of Regulation No 17 allows the Commission to adopt a decision finding that an infringement has been committed in the past, in order to clarify the legal position, and to require the undertakings concerned to bring such infringement to an end, to the extent that it still continues.

SEP has stated that it will continue to apply Article 21 of the Cooperation Agreement, so that it cannot be said that SEP and the electricity generators participating in it have put an end to the infringement. They must therefore be required to do so. One way in which the infringement could be ended would be for SEP to inform the parties to the Cooperation Agreement, and purchasers, that the Agreement is to be interpreted and applied as meaning that exports of quantities of electric power not intended for public supply, and direct imports by private industrial consumers, are unrestricted, and will not, without good reason, be obstructed by virtue of the ownership or operation of the power grid by SEP and the parties to the Agreement; and that the Agreement will be applied accordingly.

The Commission will allow the parties three months from the date of notification of this Decision to make proposals for the ending of the infringement.

HAS ADOPTED THIS DECISION :

Article 1

Article 21 of the Cooperation Agreement concluded on 22 May 1986 by the predecessors of the present four electricity generating companies on the one hand and by NV Samenwerkende Elektriciteitsproduktiebedrijven on the other, as applied in conjunction with the control and influence in fact exercised over the international supply of electricity, constitutes an infringement of Article 85 (1) of the Treaty in so far as it has as its object or effect the restriction of imports by private industrial consumers and of exports of production outside the field of public supply, by distributors and private industrial consumers, including autogenerators.

Article 2

The companies referred to in Article 3 shall take all necessary steps to bring the infringement referred to in Article 1 to an end. Within three months of reception of this Decision they shall submit to the Commission proposals for the ending of the infringement.

Article 3

This Decision is addressed to :

— NV Samenwerkende Elektriciteitsproduktiebedrijven,
Utrechtseweg 310,
6812 AR NL-Arnhem ;

— NV Electriciteitsbedrijf Zuid-Holland,
Von Geusaustraat 193,
2274 RJ NL-Voorburg ;

— NV Energieproduktiebedrijf UNA,
Keulsekade 189,
3534 AC NL-Utrecht ;

— NV Elektriciteits-Produktiemaatschappij Zuid-Nederland EPZ,
Begijnenhof 1,
5611 EK NL-Eindhoven ;

— NV Elektriciteits-Produktiemaatschappij Oost- en Noord-Nederland,
Dr Stolteweg 92,
8025 AZ NL-Zwolle.

Done at Brussels, 16 January 1991.

For the Commission
Leon BRITTAN
Vice-President