In the published version of this decision, some information has been omitted concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 16/08/1999

PUBLIC VERSION

COMMISSION OF THE EUROPEAN COMMUNITIES

Commission Decision

of 16 August 1999

authorising Shell Coal (South America) Ltd, Carbones del Zulia and RIG Deelneming Maatschappij B.V. to acquire control over a joint sales company

(Case IV/ECSC.1306 – Shell/Carbones del Zulia/Ruhrkohle)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 66(2) thereof,

Having regard to Decision No 24/54 of 6 May 1954 laying down in implementation of Article 66(1) of the Treaty a Regulation on what constitutes control of an undertaking,[1]

Having regard to the notification submitted by the parties by letter dated 1 June 1999,

Whereas:

1. By letter dated 1 June 1999, Shell Coal (South America) Ltd, Carbones del Zulia and RIG Deelneming Maatschappij B.V. notified the Commission under Article 66(1) of the ECSC Treaty that they intended to increase the scope of their existing production joint venture, Carbones del Guasare S.A. (Venezuela), by setting up a sales organisation to sell its production in Europe and elsewhere.

I. THE PARTIES

2. **Shell Coal (South America) Ltd ("SCL")** is a company within the Royal Dutch/Shell group ("Shell"). Shell is active world-wide in the exploration, production and sale of oil and natural gas and in the production and sale of chemicals and coal. In 1999 Shell's world-wide turnover came to 83.572 billion

[1] OJ of the High Authority No 9, 11.5.1954, p. 345.

EUR, of which 28.797 billion EUR was achieved in the EU. In 1998 Shell sold on its own account [15-20] million tonnes of hard coal world-wide.

3. **Carbones del Zulia ("Carbozulia")** is a wholly owned subsidiary of the Venezuelan state-owned oil company Petroleos de Venezuela SA ("PDV"). PDV's world-wide turnover in 1998 amounted to 22.768 billion EUR, of which 2.489 billion EUR was achieved in the EU. In 1998 PDV sold around [<5] million tonnes of hard coal world-wide, of which about [<5] million tonnes was sold in the EU.

4. **RIG Deelneming Maatschappij B.V. ("RIG")** is a company within the Ruhrkohle group ("RAG"). The latter is engaged in the production and sale of coal mainly in Germany, in the production and sale of chemicals and in the generation of electricity. In 1998 RAG's world-wide turnover was 13.960 billion EUR, of which 12.721 billion EUR were realised in the EU. In 1999 RAG estimates it will make world-wide sales of hard coal of around [60-70] million tonnes, the large majority of which will be sold in the Community.

5. **Carbones del Guasare S.A. ("Carbones")** is a Venezuelan company engaged in the production of coal, which was established in 1988. Since 1995, the share holdings in Carbones have been as follows Carbozulia (47.64%), SCL (25.32%) and RIG (25.32%). In 1998 the JV produced [<10] million tonnes of hard coal, of which about 45% was sold in the EU.

6. Shell and RAG have entered into an agreement whereby they agree on a common position in relation to decisions concerning Carbones. The management of Carbones is in the hands of the Board of Directors to which Carbozulia on the one hand and Shell and RAG on the other each have the right to appoint two directors making four in total. The Board of Directors decides by simple majority on strategic matters including the business plan and annual budget. Therefore Carbones is jointly controlled by Carbozulia, Shell and RAG. The JV encompasses the Paso Diablo and Socuy mine complex ("Mine"). Remaining recoverable reserves at the Mine are estimated at around 360 Mio tonnes (Paso Diablo : 150 Mio tonnes; Socuy : 210 Mio tonnes).

II. THE OPERATION

7. The notified proposed operation concerns the establishment of a sales company, controlled by Carbones - and therefore by the notifying parties - which will market Mine coal under the terms to be set out in an Agreement for the Marketing of Coal

8. After the establishment of the sales company Carbones will cease to be merely a production joint venture but will become a full function joint venture with sales and marketing operations in the Community. At present, each of the three partners is responsible for the sale and marketing of a share of the Mine's output related to its shareholding in Carbones. This arrangement has hindered the efficient utilisation of the Mine's infrastructure and has limited sales to about [<10] million tonnes a year. The parties believe that as a result of the better co-ordination of sales, output could be increased to [<10] million tonnes over the next two years without significant expenditure. The sales company will have only a small number of employees and will be based in London.

9. In the past the production joint venture did not fall under the ECSC Treaty as it had no production or distribution of products covered by Annex 1 of the ECSC Treaty within the Community. Following the establishment of a sales organisation Carbones will be regularly involved in the distribution of the hard coal and the proposed operation therefore requires the prior authorisation of the Commission.

10. As a result of their involvement in the distribution of hard coal within the Community and in case of RAG its production of hard coal within the Community, SCL, Carbozulia and RAG are undertakings within the meaning of Article 80 of the ECSC Treaty, read in conjunction with Annex I of the Treaty.

11. The establishment of the sales company will result in a concentration within the meaning of Article 66(1) of the ECSC Treaty.

12. The proposed operation requires prior authorisation because the total annual Community production (some 43 million tonnes) and distribution (approximately 18 million tonnes) of the undertakings exceed the thresholds set out in Article 1(1)(a) and Article 4 of High Authority Decision No 25-67 of 22 June 1967 laying down in implementation of Article 66(3) of the Treaty a regulation concerning exemption from prior authorisation,[2] as amended by Commission Decision No 3654/91/ECSC of 13 December 1991.[3]

IV. ASSESSMENT UNDER ARTICLE 66(2)

13. The proposed merger may be authorised under Article 66(2) of the ECSC Treaty if it does not give the undertakings concerned the power:

    - to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for these products; or

    - to evade the rules of competition instituted under the Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

A Relevant product market

14. The Carbones produces hard coal, which is exported to the EU and elsewhere. In the RAG/Saarbergwerke/Preussag Anthrazit case (IV/ECSC.1252) the Commission concluded that the relevant product market was hard coal and left open the question of whether this could be further subdivided into three smaller markets for :

    – coal for electricity generation,

    – coal for the steel industry, and

    – coal for other industrial users

[2] OJ No 154, 14.7.1967, p. 11.

[3] OJ L 348, 17.12.1991, p. 12.

15. This market definition and its sub-division into three smaller segments was largely confirmed by the market investigation, though some respondents suggested that there were only two segments (a) coal for thermal use (for the electricity industry and other industrial users) and (b) coking coal (for the steel industry).

16. It is not necessary to decide whether the market can be further sub-divided in this case as even on the narrowest definition the operation does not raise competition problems.

B. Relevant geographic markets

17. Further in the RAG/Saarbergwerke/Preussag Anthrazit case the Commission concluded that the conditions on the German coal market were, as a result of the operation of the German coal subsidy regime, different to those elsewhere in the Community. This subsidy regime enables German mines to sell coal to the electricity generating and steel industries at world prices. The Commission also considered that the subsidised coal supplied to the electricity generating and steel industries from German mines could be excluded from the competitive analysis, because this coal had certain practical advantages for German consumers, including proximity to the source and lower stock requirement and was not more expensive. In addition, there are strong social and political pressures to use German coal in Germany. The competition effects in the RAG/Saarbergwerke/Preussag Anthrazit case were therefore analysed in relation the German market for unsubsidised coal.

18. If this geographic market definition is adopted it will also be necessary to examine the effect of the operation outside Germany. None of the parties produce coal anywhere in the EU outside Germany, therefore if the proposed operation has no effects on the market/s for imported coal, it will have no effect on any wider market including coal produced in the EU. It is not necessary to decide whether the relevant geographic market would be the EU excluding Germany or the individual national markets as the proposed operation will not give rise to competition problems whichever definition is used.

19. The parties are of the opinion that the relevant geographic market in this case is the EU, since imported coal (including coal from the Mine) competes with all other imported coal, as it does not benefit from subsidies.

20. In this case it is not necessary to determine the relevant geographic markets as even on the narrowest definitions the operation will not give rise to competition problems.

C. Impact of the concentration

(a) The sale of imported hard coal in the EU

21. In 1998 a total of 147 million tonnes of imported hard coal were sold in the EU. Of these total sales about 78 million tonnes (53%) were accounted for by sales to the electricity industry. The steel industry bought some 50 million tonnes (35%) and the other industrial users 18 million tonnes (12%).

22. In that year [<5] million tonnes of Mine coal ([<5%]) were imported by the notifying parties. This coal will in the future be marketed by Carbones.

23. The table below shows the parties' shares of total EU imports of hard. (NB: totals may not agree as a result of rounding errors.)

EU Hard Coal Imports 1998 (%)

Supplier	Mine Coal	Other Coal	Total
Shell	[<5]	[<5]	[<5]
Carbozulia	[<5]	[<5]	[<5]
RAG	[<5]	[<10]	[<10]
Total Parties	**[<5]**	**[10-20]**	**[10-20]**

24. On a market for imported hard coal the parties combined market share for both Mine and non-Mine coal is [10-20%]. This is insufficient to give rise to any competition problems.

(b) The sale of imported hard coal in the EU excluding Germany

25. Imports of hard coal into the EU excluding Germany totalled 126 million tonnes in 1998. Of this amount Mine coal imported by the parties accounted for about [<5%] and tonnes and imports of other coal made by the parties about [<5%]. The tables below give details in terms of tonnes and percentages.

EU Hard Coal Imports, excluding Germany 1998 (%)

Supplier	Mine Coal	Other Coal	Total
Shell	[<5]	[<5]	[<5]
Carbozulia	[<5]	[<5]	[<5]
RAG	[<5]	[<5]	[<5]
Total Parties	**[<5]**	**[<5]**	**[<10]**

26. More detailed analysis also shows that the parties' combined shares on the three smaller possible markets, coal for electricity generation, coal for steel industry and coal for other industrial users would not exceed [10-20%]. Similarly the market shares in individual member States are all below 20%. The parties' total combined market shares would not be sufficient to give them any power to evade the ECSC competition rules.

(c) Sale of unsubsidised coal in Germany

27. Total sales of unsubsidised coal, that is imported coal and coal sold to industries other than the electricity generating and steel industries, in Germany in 1998 were 24.6 million tonnes

German Sales of Unsubsidised coal 1998 (%)

Supplier	Mine Coal	Other Coal	Total
Shell	[<5]	[<5]	[<5]
Carbozulia	[<5]	[<5]	[<5]
RAG	[<5]	[40-50]	[40-50]
Total Parties	**[<5]**	**[40-50]**	**[40-50]**

28. On the German market for unsubsidised coal RAG had a strong position with a share of sales of about [40%-50%] in 1998. Of this total approximately [<5%] was mine coal, [40%-50%] other imports and [<10%] of German produced coal sold to other industrial users.

29. In 1998 Carbozulia made no sales in Germany (though it had in previous years) and Shell's sales of Mine coal represented about [<5%] of the unsubsidised sales and its sales of other coal about [<5%]. Over the last three years the average tonnage of Mine coal sold by Shell and Carbozulia was approximately […] tonnes and on average the tonnage of non-Mine coal sold by Shell represented about [<5%]. Carbozulia has no other source of coal apart from its interest in the Mine and therefore has only ever sold Mine coal.

30. The effects of the proposed operation must be made in relation to the direct and indirect effects of the addition of Shell's and Carbozulia's sales on the position of RAG.

31. The direct effect of the operation will be to give RAG joint control over the sales of Mine coal in Germany. The additional tonnage in question is negligible, less than […] tonnes or [<5%] in 1998, and will not make any significant difference to RAG's market position. Over the last three years the sales of Mine coal made in Germany by Shell and Carbozulia have averaged approximately […] tonnes a year, not substantially different from their combined sales in 1998.

32. Then there is the question as to whether the establishment of the joint venture would enable the parties to collaborate and that this collaboration would enable them to restrict distribution, control prices or otherwise evade the ECSC competition rules. There are a number of reasons why this is unlikely. First, even if there were to be collaboration between the parties in relation to their sales to the unsubsidised German market, this would only add just over [<5%] to the share already controlled by RAG and would not add substantially to RAG's market power. Secondly, Carbozulia will be active on the market only through the joint venture because it has no other source of coal. Its only interest therefore is in maximising the sales of the joint venture. It would not be in Carbozulia's interest therefore to allow the joint venture to be used as means of collaboration between RAG and Shell. Thirdly, customers can easily select another importer or indeed import coal on their own account.

33. As Carbozulia and Shell are not active on the markets for the supply of hard coal to other industries it is only necessary to examine the effect of the proposed operation on the German market for the sale unsubsidised coal for the electricity and steel

industries. In 1998 the additional market share for the supply of unsubsidised coal to the electricity industry which could accrue directly to RAG as a result of its joint control over Carbones would be [<5%]. This increases to [<5%] if the non-Mine sales of Shell are included. There are no sales of Mine coal to the steel industry. Shell's sales to this sector accounted to about [<5%]. In neither case will these small increases in market share significantly increase the market power of RAG. Furthermore electricity utilities and steel companies are large sophisticated organisations capable of finding alternative importers or importing on their own account.

(d) Conclusion

34. It may therefore be concluded that whichever market definitions are chosen the proposed operation would not give the undertakings concerned the power:

- to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for these products; or
- to evade the rules of competition instituted under the Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

V. STATE AID

35. This decision concerns only the application of Article 66 of the ECSC Treaty and in no way prejudges a Commission decision concerning the application of other provisions of the EC Treaty or of the ECSC Treaty and corresponding secondary law, in particular the application of provisions on the monitoring of state aid.

VII. CONCLUSION

36. In the light of the above considerations, the Commission has reached the conclusion that the proposed merger does not give the undertakings concerned the power to hinder effective competition or to evade the rules of competition instituted under the ECSC Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

37. Since the requirements of Article 66(2) of the ECSC Treaty are thus met, the proposed merger may be authorised,

HAS ADOPTED THIS DECISION:

Article 1

The acquisition by Shell Coal (South America) Ltd Carbones del Zulia and RIG Deelneming Maatschappij B.V. of joint control over a joint sales company is hereby authorised under Article 66(2) of the ECSC Treaty.

Article 2

This Decision is addressed to:

SHELL COAL (South America) Ltd

CARBONES DEL ZULIA S.A.

RIG DEELNEMING MAATSCHAPPIJ BV

Done at Brussels, 16.08.1999

For the Commission