Public Version

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COMMISSION OF THE EUROPEAN COMMUNITIES

Commission Decision

of 17. 11. 1999

authorising RAG Aktiengesellschaft to acquire control of the Burton Coal Joint Venture

(Case COMP/ECSC.1316 - RAG/Burton)

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 14 October 1999 and to subsequent information ,

Whereas:

1. By letter dated 14 October RAG Aktiengesellschaft, Essen, notified the Commission under Article 66(1) of the ECSC Treaty that it intended to acquire 95% of an unincorporated joint venture, Burton Coal Joint Venture.

I. THE PARTIES

2. RAG Aktiengesellschaft ("RAG") is active in the extraction and marketing of hard coal and in the processing of coking coal into blast furnace coke. It also holds shares in a number of international mining companies and has interests in power generation, chemicals and plastics, waste treatment and environmental services,

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

mining technology and real estate. In 1998 the RAG group's worldwide turnover was 13 960 million €, of which 12 721million € was achieved in Germany.

3. The shares in RAG are directly or indirectly held by four companies, VEBA AG (approximately 39.2%), VEW AG (30.2%), Thyssen Krupp Stahl AG (20.6%) and ARBED SA (6.5%); approximately 3.5% of the shares are held by RAG itself. The notifying parties take the view that RAG is controlled by none of the shareholders, whether alone or jointly, because shifting coalitions holding a majority of voting rights are always possible in matters relating to the strategic operation of RAG's business. The question of the joint control of RAG has been left open in previous Commission decisions (for example, paragraph 10 of Commission Decision 96/471/ECSC in Case IV/ECSC.1147 - Ruhrkohle Handel/Raab Karcher Kohle[2]) and need not be decided here either.

4. The Burton Coal Joint venture is an unincorporated joint venture which owns the Burton Coal Mine in Queensland, Australia. RAG will acquire 95% of the operation from its present owners, Portman Mining. The remaining 5% is held by Thiess Contractors Pty. Ltd. the mining contractor operating the Burton Coal mine. The surface mine began production in 1996 and by 1998 capacity has been expanded to approximately 4 million tonnes a year. In 1998 the joint ventures turnover was about 70 million € of which 23 million € were in the Community.

II. THE TRANSACTION

5. The operation is the sale by Portman Mining of its 95% share holding in the Burton Coal joint Venture to RAG. The operation is conditional *inter alia* on RAG obtaining all necessary regulatory approvals.

III. THE CONCENTRATION

6. As a result of its involvement in the extraction of and distribution of hard coal and hard coal products in the Community RAG is an ECSC undertaking within the meaning of Article 80 of the ECSC Treaty. Burton, by virtue of its regular distribution of hard coal in the Community (1997, 513 000 tonnes; 1998, 994 000tonnes) is also an ECSC undertaking within the meaning of Article 80 of the ECSC Treaty.

7. By acquiring the 95% of the share capital of Burton, RAG will be able to exercise sole control over those companies. The minority shareholder has no rights beyond those relating to its share holding. The notified transaction therefore constitutes an acquisition, by RAG, of sole control over Burton the meaning of Article 1 of High Authority Decision No 24-54 of 6 May 1954 and, accordingly, brings about a concentration within the meaning of Article 66(1) of the ECSC Treaty.

8. The proposed merger requires prior authorisation inasmuch as the annual tonnage of coal distributed by the undertakings exceeds the thresholds for exemption under 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

[2] OJ L 193, 3.8.1996, p. 42.

from prior authorisation,[3] as amended by Commission Decision No 3654/91/ECSC of 13 December 1991.[4]

IV. ASSESSMENT UNDER ARTICLE 66(2)

9. 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. German policy on coal: general background

10. In the past, the sale of hard coal to German power generators and steel makers was governed by specific agreements known as the Jahrhundertvertrag (for the electricity industry and the Hüttenvertrag (for the steel industry) which contained extensive rules on state aid, imports and procurement obligations. The Jahrhundertvertrag expired on 31 December 1995. The Hüttenvertrag should have continued until the end of 2000 however the Commission's authorisation under Article 65 ECSC for the agreement expired on 31 December 1997. By mutual agreement between RAG and the German steel makers the Hüttenvertrag has been replaced by a number of bi-lateral agreements, some of which have yet to be finalised.

11. In March 1997 the Kohlekompromiß (coal compromise), a political agreement between the German Federal Government, the coal producing Länder, the coal industry and the unions, again changed the conditions under which the hard coal industry operates in Germany. There is an overall ceiling for aid to mining. Operating aid will be granted only for the production of hard coal for use in power generation and steel making and may only be used compensate for the difference between production costs in German mines and the average price for imports into Germany. In addition there is an overall cap or limit on the amount of aid that can be paid so there is limit to the tonnage of coal that can be subsidised in any year. By 2005 domestic output is to be cut to approximately 30 million tonnes from approximately 47.9 million tonnes in 1996 figure. From a total of DEM 10.5 billion in 1997, state aid to the coal industry is set to fall to DEM 5.5 billion in 2005.

B. Relevant product markets

12. Burton is an Australian coal producer. The bulk of its output is coking coal, though it also produces and sells some steam coal. RAG is active in the production of both

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3 OJ No 154, 14.7.1967, p. 11.

4 OJ L 348, 17.12.1991, p. 12.

coking coal and steam coal. Burton also provides smaller tonnages to the electricity generating industry

13. For almost all users of steam and coking coal it is impossible to replace coal by other fuels in the short term. Power stations are adapted to a certain energy source and coke has a metallurgical function in the steel industry. Coal sales to industrial users can be divided into at least two separate categories, steam coal for sales to the electricity and other industries, and coal sold to the steel industry.

14. As this case concerns the acquisition by RAG of a company essentially engaged in the production of coking coal for the steel industry the primary focus must be on the effect of the operation on the supply of coking coal, though the effect on the supply of steam coal must also be examined. Since RAG manufactures coke (both from coal mined in Germany and from imported coal) it will therefore be necessary to examine impact of the operation on the market for coke.

15. It may also be necessary to consider whether imported coal should be considered as a separate relevant product market. This question is of importance only in relation to the German market as on all other geographic markets no competition problem will arise whichever definition is chosen.

16. The relevant product markets are therefore steam coal, coal for the steel industry and coke.

C. Relevant geographic markets

17. 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 case were therefore analysed in relation the German market for unsubsidised coal.

18. The conditions of competition on the German hard coal market are therefore sufficiently different from those on markets outside Germany for a separate relevant geographic market to be assumed. This applies both to the German market as a whole and to its three individual segments. There is no reason to change the view expressed in the RAG/Saarbergwerke/Preussag Anthrazit decision that the effects of the operation in Germany should be analysed separately for subsidised and unsubsidised coal. It is not necessary in this case to examine the impact on the markets for subsidised coal in Germany because the operation will have no effect on these markets. Furthermore as Burton sells only to the electricity generating industry in Germany it is only necessary to examine the effect of the operation in relation imported coal for electricity generation and for the steel industry as there will be no impact on the sales to other industries.

19. In this case it not necessary to consider whether, outside Germany, there are national markets for any type of coal as even on the narrowest definitions the operation will not give rise to competition problems.

D. Impact of the concentration

1. Sale of hard coal outside Germany

20. On the narrowest view, that is the national markets for imported coal, it is clear that the proposed operation will have no adverse effect on competition in any of the countries in which both parties supply coal. The combined market shares, in 1998, for all types of imported coal considered together would be 2.1% in Belgium, 3.9% in Italy, 2.5% in the Netherlands and 0.8% in the United Kingdom. The combined market share of the parties would not exceed 5% in any Community country for either coking coal or steam coal.

2. Coal and Coke in Germany

(a) Steam coal in Germany

21. The operation is unlikely to have any significant effect on the on the German market for imported steam coal, Burton had no sales to other industrial users in Germany. The operation will add only 0.5% to RAG's share of this market.

(b) Coking coal in Germany

22. In relation to coking coal the situation is more complex. Until the expiry of the Hüttenvertrag RAG had, at least in theory, a monopoly over the supply of coke and coking coal to the German steel producers. This situation no longer applies and German steel makers now purchase a growing part of their coking coal requirements from sources other than RAG.

23. In 1997 German steel companies imported approximately 1.0 million tonnes of coking coal. The remainder of their requirements, some 6 million tonnes, was supplied by RAG and was almost exclusively German coal. In 1999 they expect to import 2.7 million tonnes of their total requirements of about 6.4 million tonnes. There has therefore been a very rapid and significant increase in the tonnages of coking coal imported by the steel companies. This tendency seems likely to continue though probably not at the same rate as experienced in recent years and will consolidate the steel makers independence from RAG.

24. The steel companies' imports of coking coal into Germany in 1997 accounted for 41% of total consumption of these imports and in 1998 this had increased to 55%, the remainder being imported by RAG. Although the acquisition of Burton by RAG would theoretically have increased RAG's total coking coal imports by about 220 000 tonnes or 5%, the practical effect of the operation is likely to be very different. The steel companies have clearly shown that they wish to establish alternative sources to supply to RAG. They have, in recent years, considerably increased the proportion of their requirements sourced from other suppliers.

25. In 1998 Burton supplied about 220 000 tonnes of coking coal to German steel makers. The figure for 1999 may reach about 580 000 tonnes based steel companies estimates. However potential purchasers of coking coal can easily find alternative

sources of suitable coking coal. In 1998 as the world trade in coking coal is currently approximately 185 million tonnes.

26. Furthermore Burton coal has no particular properties that make it indispensable and alternative supplies of good quality coking coal are available from many sources. Burton's natural outlets for its coal appear to be on the Pacific rim due to its location and in particular to the costs of transport. That it has made substantial sales in sales in Europe seems largely due to the economic crises in the Far East which severely reduced sales opportunities there and also significantly lowered freight rates to Europe. With the recovery now under way Burton coal is likely to be less competitive. However consumers have indicated that they would seek alternative supplies of coking coal from overseas if Burton coal was no longer available.

27. The effect of RAG maintaining or increasing the amount of coking coal from Burton used in its own coking ovens would not affect the position of the steel makers as the additional Burton coal would only displace indigenous or imported coal from other sources in the RAG coke ovens and the steel makers would be able to replace this source of supply.

28. It should be noted that the German steel companies have considerable experience in the purchase transport and stocking of bulk materials. In addition to coal and coke they purchase iron ore, limestone and scrap often on the international markets and in particular they have shown themselves capable of making arrangements to increase their imports of coking coal. It is extremely unlikely that they would experience any practical difficulty in maintaining the level of their purchase of imported coal.

(c) Coke supply in Germany

29. In relation to the supply of coke to German steel companies the operation will be neutral. In 1998 RAG itself purchased 248 000 tonnes of Burton coking coal for delivery to its own blast furnace coke ovens. The tonnage of coke RAG can sell is limited by the requirements of the steel companies. This has been decreasing significantly. In 1997 the five German blast furnace based steel companies purchased just over 4 million tonnes of coke from RAG, on the basis of the first six months of 1999 the total requirement for this year will be 2.24 million tonnes. At the same time the steel companies have been increasing their purchases of coking coal and coke from independent sources.

30. RAG would only be able to use Burton coking coal to replace either German coking coal or other imported coking coal in its own coke ovens. Access to the Burton coal will not strengthen its position in the market place for coke where the steel companies have the possibility of producing their own coke or purchasing additional supplies from third parties. For example Stahlwerke Bremen imports several hundred thousand tonnes of coke a year from a wide variety of sources including in recent years Japan, Spain, Russia, Egypt, Poland and Holland.

(d) Conclusion in relation to Germany

31. The proposed transaction would not give RAG the power:

- to determine prices, to control or restrict production or distribution , or to hinder effective competition of coal in Germany for coke or imported coal; 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

32. 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 legislation, in particular the application of provisions concerning state aid.

VI. CONCLUSION

33. In the light of the above considerations, the Commission has reached the conclusion that the proposed merger would not give RAG 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.

34. 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 RAG Aktiengesellschaft of control of the Burton Coal Joint Venture is hereby authorised under Article 66(2) of the ECSC Treaty.

Article 2

This Decision is addressed to:

RAG Aktiengesellschaft
Rellinghauser Strasse 1-11
D - 45128 Essen

Done at Brussels,

For the Commission