



Brussels, 07. 11. 2000

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION
ARTICLE 66 ECSC DECISION

COMMISSION OF THE EUROPEAN COMMUNITIES

Commission Decision

of 07. 11. 2000

**authorising RAG Aktiengesellschaft
to acquire control of North Goonyella Properties Pty Ltd**

(Case COMP/ECSC.1341 - RAG/North Goonyella)

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 dated 02 October 2000 and to subsequent information ,

Whereas:

1. On 02 October 2000, RAG Aktiengesellschaft (RAG), Essen, notified the Commission under Article 66(1) of the ECSC Treaty that it intended to acquire all the shares of North Goonyella Properties Pty Ltd (NGP).

I. THE PARTIES

2. RAG Aktiengesellschaft ("RAG") is active in the extraction and marketing of hard coal and the production of coke. It also holds shares in a number of international mining companies and has interests in power generation, chemicals and plastics,

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

waste treatment and environmental services, mining technology and real estate. In 1999 the RAG group's worldwide turnover was €13 620 million, of which €10 265 million 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
4. NGP is an Australian company that holds the mining lease exploited by the North Goonyella Joint Venture in Queensland. As set out below this company will also be exclusively responsible for the marketing and sale of coal produced by the North Goonyella Joint Venture.

II. THE TRANSACTION

5. The acquisition of NGP by RAG forms part of a series of operations concerning the North Goonyella mining operation (currently owned by Sumitomo Corporation) which consists essentially of:
 - The North Goonyella Joint Venture, an unincorporated joint venture which holds most of the assets necessary for the mining operations,
 - North Goonyella Coal Mines Ltd (NGCM), the operator of the mine, and
 - North Goonyella Properties Pty Ltd, the holder of the mining lease and the company responsible for marketing the coal
6. RAG, with 60%, and Thiess Investment Pty Ltd (Thiess), with 40%, will jointly acquire the assets of the North Goonyella Joint Venture. They will establish a new joint venture which they will jointly control. However, under the terms of the Joint Venture Agreement, Thiess will have no veto as to how the coal marketed.
7. Thiess is an Australian contracting and engineering company that will acquire sole control of NGCM, the mine operating company. RAG and Thiess will subcontract the operation of the mine to NGCM.
8. RAG will transfer a 40% interest in the mining lease to Thiess.
9. RAG and Thiess will conclude, simultaneously with the new joint venture agreement, a Coal Sales Agency Agreement that will give NGP the exclusive rights to agency for all coal produced at North Goonyella. This agreement can only be terminated if the joint venture is disbanded. RAG will thus be able to steer the marketing of the joint venture's coal on a day to day basis and will maintain strategic control over the marketing of coal by virtue of its majority voting rights in the joint venture.
10. RAG's acquisition of NGP falls to be considered under the ECSC Treaty because NGP will be exclusively responsible for the marketing, distribution and sale of all the coal produced by the North Goonyella coal mine, including coal distributed on a regular basis in the European Union.
11. The joint acquisition by RAG and Thiess of the assets North Goonyella Joint Venture does not fall under the ECSC Treaty as the joint venture is not engaged in the production or sale of coal within the territory of the European Union.

III. THE CONCENTRATION

12. As a result of its involvement in the production and distribution of hard coal and hard coal products within the European Union, RAG is an ECSC undertaking within the meaning of Article 80 of the ECSC Treaty.
13. By virtue of its regular distribution of hard coal in the European Union ([700 000-900 000] tonnes in 1997, [1 000 000 – 1 500 000] tonnes in 1998 and [700 000 – 900 000] tonnes in 1999), for the purposes of Article 66, NGP is also an ECSC undertaking within the meaning of Article 80 of the ECSC Treaty.
14. By acquiring all of the share capital of NGP, RAG will be able to exercise sole control over the company. The notified transaction therefore constitutes an acquisition, by RAG, of sole control over NGP within 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.
15. The proposed concentration requires prior authorisation inasmuch as the annual tonnage of coal distributed by the undertakings (RAG 9 million tonnes, NGP [700 000-900 000] tonnes in 1999) 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 from prior authorisation,² as amended by Commission Decision No 3654/91/ECSC of 13 December 1991.³

IV. ASSESSMENT UNDER ARTICLE 66(2)

16. The proposed merger shall 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 markets

17. 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 coking coal sold to the steel industry. It is not necessary to consider whether steam coal can be further subdivided as the proposed operation concerns only coking coal.

² OJ No 154, 14.7.1967, p. 11.

³ OJ L 348, 17.12.1991, p. 12.

18. As this case concerns the acquisition by RAG of a company engaged in the distribution of coking coal for the steel industry the primary focus must be on the effect of the operation on the supply of coking coal. However since RAG also manufactures coke for the steel industry (both from coal mined in Germany and from imported coal) it will be necessary to examine the impact of the operation on the market for coke. The relevant product markets are therefore coking coal and coke.
19. In Germany, a distinction may have to be drawn between domestic and imported coking coal. However the question may be left open, as in any case, the proposed operation will not give rise to competition concerns.

C. Relevant geographic markets

20. 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 of that case, 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.
21. The conditions of competition on the German hard coal market were therefore sufficiently different from those on markets outside Germany for Germany to be considered as a separate relevant geographic market. There is no reason to change the view expressed in the RAG/Saarbergwerke/Preussag Anthrazit decision that it is not necessary to examine the effects of this operation on the market for subsidised coal.
22. In this case it not necessary to consider whether, outside Germany, there are national markets for any type of coal as whatever market definition is chosen, the operation will not give rise to competition problems.

D. Impact of the concentration

1. Sale of Coking Coal outside Germany

23. 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 1999, for imported coking coal would be [10-20]% in Belgium, [0-10]% in Italy, [15-25]% in Spain and [5-15]% in the United Kingdom. These market shares are not high enough to give rise to competition problems particularly as coking coal is available from a large number of alternative sources.

2. Coking Coal and Coke in Germany

(a) Coking coal in Germany

24. Total coking coal imports into Germany in 1999 were 3.5 million tonnes of which RAG imported 1.8 million tonnes including all the coal imported from the North Goonyella mine and sold by NGP ([50 000 - 60 000]) tonnes. However a substantial part of the coking coal imported by RAG was used internally for the manufacture of

coke in its own coke ovens. RAG sales of imported coking coal to third parties totalled [700 000 – 900 000] tonnes or [25-35]% of sales to these customers. On the basis of the 1999 situation third parties would not be affected as NGP sold only to RAG.

25. However in the two previous years a total of [200 000 – 300 000] tonnes of North Goonyella coking coal was sold to third parties by NGP. This represents about [0-10]% of the imported coking coal sold to third parties. Over the same period RAG sold approximately [500 000 – 600 000] tonnes of imported coking coal to third parties ([5-15]%). The combined market share for the two years 1997 and 1998 was [10-20]%.
26. German imports of coking coal have increased from about [2.6] million tonnes in 1997 to [about 3.5] million tonnes in 1999. Of the 1999 total about 1.7 million tonnes were imported independently of RAG by the steel industry.
27. 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.
28. North Goonyella is only a minor supplier of coking coal to German customers, less than 2% of imported coking coal in 1999 and less than 1% of all coking coal. Potential purchasers of coking coal will easily be able to find alternative sources. In 1999 the sea borne trade in coking coal was approximately 160 million tonnes from a total production of 520 million tonnes. Furthermore recoverable reserves of coking coal are more than adequate, over 150 billion tonnes or approximately 300 years at current extraction rates.
29. Furthermore North Goonyella coal has no particular properties that make it indispensable and alternative supplies of good quality coking coal are available from many sources. North Goonyella'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. This appears to be confirmed by the fact that its highest European sales were achieved in 1998 at the height of the economic crises in the Far East.

(c) Coke supply in Germany

30. In relation to the supply of coke to German steel companies the operation will be neutral. In 1999 RAG itself purchased [30 000 – 60 000] tonnes of North Goonyella coking coal for delivery to its own 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 [4.0-4.5] million tonnes of coke from RAG, their total requirement for 1999 was [2-3] million tonnes. At the same time the steel companies have been increasing their purchases of coking coal and coke from independent sources.
31. RAG would only be able to use North Goonyella coking coal to replace either German coking coal or other imported coking coal in its own coke ovens. Access to the North Goonyella 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, [one German steel

mill] 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.

32. In the light of the above arguments the proposed transaction would not give rise to competition problems in Germany.

V. CONCLUSION

33. In the light of the above considerations, the Commission has reached the conclusion that the proposed merger would not give rise to competition problems and that in particular it would not give RAG 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.

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

VI. STATE AID

35. This decision concerns only the application of Article 66 of the ECSC Treaty and in no way prejudices 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.

HAS ADOPTED THIS DECISION:

Article 1

The acquisition by RAG Aktiengesellschaft of control of the North Goonyella Properties Pty Ltd is hereby authorised under Article 66(2) of the ECSC Treaty.

Article 2

This Decision is addressed to:

The notifying party

Done at Brussels,

For the Commission