

***Case No COMP/M.2413 -  
BHP / BILLITON (see  
ECSC.1356)***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 14/06/2001

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.06.2001

SG (2001) /D 289186

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PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Madam, Dear Sir,

**Subject: Case No COMP/M.2413 - BHP/Billiton**

Notification of 10.05.2001 pursuant to Article 4 of Council Regulation No 4064/89

1. On 10 May 2001, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 by which the undertaking Broken Hill Proprietary Company Ltd (BHP), Australia, enters into a full merger within the meaning of Article 3(1)(a) of the Council Regulation with Billiton Plc, United Kingdom, by way of creation of a single economic unit through a dual listing companies structure.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

**I. THE PARTIES**

3. Broken Hill Proprietary Company Ltd ("BHP") is an Australian-based mineral mining and metals producer active, *inter alia*, in the production of carbon steel, coking coal, copper, iron ore, diamonds, oil and gas.
4. Billiton plc ("Billiton") is a UK-based mineral mining and metals producer. It is involved in the production, *inter alia*, of aluminium, thermal coal, manganese, copper, chrome and nickel.

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1 OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

## **II. CONCENTRATION**

5. The proposed concentration concerns the combination of the businesses and assets of BHP and Billiton in a dual listed companies structure ("DLC"), with [...] % of the interests held by the shareholders of BHP and [...] % by those of Billiton. Essentially, this means that, while the two companies will combine into a single economic entity, each will remain a separate publicly quoted company<sup>2</sup> with its own assets and shareholders, thereby retaining its distinct corporate identity<sup>3</sup>. The companies will, however, have identical boards of directors and unified management structures (with headquarters in Melbourne), and the shareholders of the two companies will have an identity of economic interest through an equalisation of dividends and capital distributions. Moreover, a complex set of arrangements ensures that the shareholders of the two companies will have equivalent voting rights per share in a joint voting procedure, and that it will not be possible to gain control of one company without making simultaneous offers to both sets of shareholders. The arrangements also provide cross-guarantees which ensure that each company's debts are guaranteed by the other. Accordingly, the operation constitutes a merger between two previously independent undertakings within the meaning of Article 3 (1) (a) of the Merger Regulation<sup>4</sup>.

## **III. COMMUNITY DIMENSION**

6. BHP and Billiton have a combined aggregate world-wide turnover in excess of EUR 5,000 million<sup>5</sup> (BHP, EUR 12,423 million; and Billiton, EUR 7,852 million). Each of them has a Community-wide turnover in excess of EUR 250 million (BHP, [...] million; and Billiton, [...] million), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension, but does not constitute a co-operation case under the EEA Agreement, pursuant to Article 57 of that Agreement.

## **IV. COMPETITIVE ASSESSMENT**

7. The activities of the parties are largely complementary, the principal exception being that both have significant activities in the production and sale of copper concentrate. The parties' activities overlap horizontally to a limited extent in a number of other markets (thermal coal, lead, silver, gold, and zinc). There is moreover a number of marginal vertical links between the parties' operations: between Billiton's manganese activities and BHP's steel activities; between Billiton's rheological ferro-silicon activities and BHP's iron ore and diamonds activities; between Billiton's high purity pig iron activities and BHP's steel activities; and between the parties' zinc activities, on the one hand, and a number of the parties' other activities, on the other.

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2 BHP's shares will be listed on the Melbourne stock exchange and Billiton's in London.

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4 See Commission decision in Case IV/M.660 - RTZ/CRA, which involved a structure virtually identical to the one contemplated in the present case.

5 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

## **A. Minor overlaps and vertical relationships**

### **1. Lead, zinc, silver and gold**

8. The Commission has in previous decisions identified distinct product markets for lead, zinc, silver and gold<sup>6</sup>. These markets are distinct, due in particular to the metals' different physical characteristics, their different usage and different price levels. The parties produce these metals in the form of concentrate and sell them to third parties for further processing.
9. The Commission has in previous decisions considered the relevant geographic markets for lead, silver and gold as being world-wide in scope, due to the fact that these metals are actively traded on a global basis as commodities. The geographic scope of the market for zinc was previously considered by the Commission as being world-wide as well<sup>7</sup>; however, in a recent decision, the Commission found that the geographic scope of the market for zinc was EEA-wide because imports into the region are low and transport costs are not negligible.<sup>8</sup> Nevertheless, since the parties do not supply zinc into Europe, the precise geographic scope of the zinc market can be left open.
10. The parties' activities overlap horizontally to a limited extent in the markets for the sale of lead, silver, gold and zinc concentrates to third parties. The transaction will, however, have no significant effect on these markets due to the low combined world-wide market shares of the parties, which amount to [5-15%], [5-15%], less than [0-10%] and [0-10%] respectively.
11. Given that the parties' combined share of the zinc concentrate market is [0-10%], the proposed operation will not give rise to competition problems in relation to any of the vertical relationships between the parties' zinc production and any of their zinc consuming activities.

### **2. Steel**

12. BHP is active in the production of flat carbon steel products in Australia, New Zealand and the USA. Billiton has an indirect interest in the production of stainless steel in South Africa (through a joint venture, Columbus) and in the distribution of carbon and stainless steels in the USA and Canada. Neither party has steel production operations in the European Union. Columbus owns a steel distributor active in the United Kingdom.
13. BHP is not active in the production or distribution of steel products in the territories covered by the ECSC Treaty but it is engaged in such activities in third countries. Therefore, those aspects of the present concentration do not fall within the scope of application of Article 66(1) of the ECSC Treaty<sup>9</sup>.
14. In earlier decisions, the Commission found that stainless steel could be distinguished from other types of steel<sup>10</sup> by its physical and chemical characteristics, particularly by its resistance

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<sup>6</sup> Commission decision of 29. 8. 1994 in case IV/M.470 – Gencor/Shell, OJ 1994 C 271, p. 3

<sup>7</sup> Commission decision in case IV/M.470 – Gencor/Shell (see footnote 1) and Commission decision of 6. 11. 1995 in case IV/M.660 – CRA/RTZ, OJ 1996 C 022, p. 0010

<sup>8</sup> Commission decision of 21. 3. 2001 in the case COMP/M.2348 – Outokumpu/Norzink, not published yet

<sup>9</sup> Case COMP/ECSC.1341 RAG/North Goonyella; Case IV/M.660 RTZ/CRA

<sup>10</sup> Case N° ECSC.1342 – Outokumpu/Avesta Sheffield

to corrosion and high temperatures. This makes it uniquely suitable for certain applications in process engineering, automobile engineering, hygiene products and cutlery among others. Further, the Commission has in the past distinguished between the production and direct sale of steel, on the one hand, and its distribution, on the other. The Commission has in the past identified separate markets for the production and direct sale of different steel products produced and sold directly by BHP: hot rolled coil, cold rolled coil, galvanised strip, tinplate and organically coated strip. There are no elements in the present case which would lead to a change in these views.

15. The Commission has in previous decisions found that the geographic scope of the markets for the production and direct sale of the various steel products were at least as wide as the EEA. In relation to the distribution of steel products via stockholders, the geographic scope of the market was national. There are no elements in the present case which would lead to a change in these views.
16. The present operation will not, therefore give rise to horizontal overlaps for steel products, as only BHP produces carbon steels, while Billiton's production is of stainless steel. Only Billiton is involved in the distribution of steel.
17. There is a possible vertical effect between BHP's production of flat steel products and Billiton's steel distribution. However, as the Billiton operation has an insignificant share of the UK market for steel distribution, and as BHP's share of the EEA direct supply of flat steel products does not exceed [0-10%] for any steel product market on which BHP is active, the proposed operation will not give rise to any competition problems as a result of this vertical effect.

### **3. Coal**

18. Both parties produce hard coal, but do not produce or distribute these products in the territories covered by the ECSC Treaty. Therefore, the concentration does not fall within Article 66.1 of the ECSC Treaty. Billiton produces only thermal coal, while BHP produces both coking coal and thermal coal. Coking coal can be distinguished by its particular chemical and physical characteristics, which make it suitable for transformation into blast furnace coke for use in the steel industry. In the recent past<sup>11</sup> the Commission has examined the markets for imported coking coal and imported thermal coal in five geographic areas, Germany, France, Spain, the United Kingdom and the rest of Europe. In relation to coking coal there is no overlap between the parties' activities, so the operation will not change the present situation. For thermal coal, the parties' market shares do not exceed [25-35]% on any of the markets postulated above. Furthermore, the contribution of BHP to these market shares is comparatively modest, less than [0-10%] in all cases. The operation will not therefore give rise to competition problems in relation to coal.
19. Coking coal is used in the manufacture of carbon steel. However only BHP is involved in the production of coking coal and in the production of carbon steel. The operation will not therefore change the nature of the vertical relationship.

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<sup>11</sup> Case N° ECSC.1252- RAG/Saarbergwerke/Preussag Anthrazit, Case N° ECSC.1306 Shell/ Coal/CDZ/RIG

#### **4. Iron Ore**

20. Iron ore is used essentially in the production of carbon steel. Stainless steel, which is only produced by Billiton, is almost exclusively produced from scrap in electric arc furnaces. Only BHP produces iron ore and only BHP produces carbon steel. The proposed operation will not therefore change the vertical relationship in respect of iron ore and carbon steel. BHP does not produce iron ore or steel within the territories covered by the ECSC Treaty, so the concentration does not fall within Article 66 of the ECSC Treaty.

#### **5. Manganese and manganese alloys**

21. Only Billiton mines manganese ore and produces manganese and various manganese alloys, (high-carbon ferro-manganese, medium/low carbon ferro-manganese and silico-manganese). These operations are based in South Africa and Australia. As Billiton does not produce high carbon ferro-manganese and BHP does not produce steel within the territories covered by the ECSC Treaty, the concentration does not fall within Article 66.1 ECSC.
22. The Commission has, in previous decisions, not yet examined the markets for manganese and manganese alloys. The manganese in these products has particular metallurgical functions for which there are no substitutes. There is limited substitution between manganese metal and its various alloys, and between the various manganese alloys themselves. The narrowest possible relevant product market definitions would appear to be, therefore, manganese ore, manganese, high-carbon ferro-manganese, medium/low carbon ferro-manganese and silico-manganese.
23. These products are produced in a limited number of areas and sold to steel producers and other consumers on a world-wide basis. It is not, however, necessary to determine the geographic scope of the market in this case, because no competition problems would arise whatever the relevant geographic market.
24. BHP as a steel maker is a consumer of manganese ore and alloys, and the proposed operation will therefore give rise to a vertical effect. In 2000 BHP purchased all its requirements of manganese ore and alloys from Billiton in Australia. The proposed operation will not, therefore, change the pattern of supply. Furthermore, as each category of manganese products that BHP purchases represents less than [5-15%] of the current Billiton sales of that product, there would be no incentive for Billiton to reduce sales to third parties. In addition, BHP's share of the EEA market for the various steel products it produces is [0-10%] or less. Accordingly, no competition problems will arise from the combination of BHP's steel making activities with Billiton's manganese and manganese alloy business.

#### **6. Ferro-Silicon**

25. Billiton through its joint venture Samancor produces ferro-silicon for use in dense media separation (rheological ferro-silicon). Rheological ferro-silicon has a very small particle size and is unsuitable for the metallurgical applications which account for over 98% of ferro-silicon consumption. Rheological ferro-silicon is one of a number of minerals that can be used in dense media separation. It is not necessary to decide whether rheological ferro-silicon is a separate relevant product market or part of a larger market, e.g. for minerals for use in dense media separation as, even on the narrowest market definition, no competition problems arise.

26. Rheological ferro-silicon is manufactured by only five companies (including Billiton) at a limited number of sites and sold to mining companies throughout the world. The relevant geographic market would therefore appear to be world-wide.
27. Billiton's share of the global merchant market for rheological ferro-silicon, the narrowest possible product market definition, is estimated at approximately [50-60%]. BHP does not produce rheological ferro-silicon or indeed metallurgical ferro-silicon.
28. BHP uses rheological ferro-silicon in its iron ore operations in Australia and in its Canadian diamond mining operations. However, BHP already sources over 90% of its requirements of rheological ferro-silicon from Samancor. The proposed operation will not have any anti-competitive vertical effects as, even if the new group sourced all its requirements for rheological ferro-silicon from Samancor, this would only increase Samancor's market share by less than [0-10%]. Nor would Samancor have any incentive to reduce supplies to other customers, as these customers would still constitute about 90% of its business.

## **7. High purity pig iron**

29. Billiton jointly controls Richards Bay Minerals in South Africa, which produces high purity pig iron as a co-product in its titanium production. High purity pig iron is mainly used in the foundry industry to produce high quality castings mainly for the automobile industry. However, it can be used as a source of iron units in steel production, in which case it would replace the use of ferrous scrap or molten iron (produced from iron ore). High quality pig iron, if considered to be a relevant product market, would be the narrowest possible product market definition.
30. It is not necessary to define the relevant geographic market as, whatever definition is used, there would be no competition problems arising from the vertical effect of the combination of the parties' operations.
31. BHP produces steel in Australia and is therefore theoretically a potential consumer of high purity pig iron as a source of iron units. In practice, BHP is extremely unlikely to use high purity pig iron. Firstly BHP, as a major iron ore producer in Australia would have no incentive to use high purity pig iron. Secondly, the transport costs from South Africa to Australia would render high purity pig non-competitive with indigenous iron ore or scrap. Finally, and most importantly, the preferred and most profitable outlet for high quality pig iron is the foundry industry, so that there would be no incentive for the combined group to use high purity pig iron in steel production. Only very limited quantities of the material are likely to be available for use in the steel industry. The entire global production of high purity pig iron represents less than 1% of the iron units consumed by the steel industry. As Billiton does not produce high purity pig iron, and as BHP does not produce steel within the territories covered by the ECSC Treaty, the concentration does not fall within Article 66.1 ECSC Treaty.

## **B. Copper concentrate**

### **1. Relevant product markets**

32. Both parties have significant activities in the production and the sale of copper concentrate, and relatively minor activities in the production and sale of refined copper.

33. Copper mines produce two types of ore: copper oxide and copper sulphide. Copper produced from copper oxide is transformed into the finished product at the mine by a process known as leaching. Copper sulphide, on the other hand, is first transformed into an intermediate product known as copper concentrate, which is then in turn transformed into the finished product by a smelting and refining process. The operator of a copper mine may choose either to carry out this smelting/refining process himself (captive use), usually close to the mine, or he may sell the copper concentrate to an independent smelter/refiner<sup>12</sup>.
34. The finished product is generally referred to as "copper cathode" (99.99% pure copper), and is traded as such on the London Metal Exchange (LME) and New York Commodity Exchange. Copper cathode produced from copper sulphide and copper oxide are virtually indistinguishable, and are entirely substitutable from a demand side perspective.
35. Most copper mine operators are "integrated" producers: that is to say that they concentrate and smelt/refine the copper sulphide themselves, and then sell the finished product on for transformation into rod, wire or other applications. A minority of producers, however, sells the copper concentrate to independent smelter/refiners, who in turn resell the finished product (the "custom market"). Some of the integrated producers' concentrate is also sold on the custom market.
36. Most of the world's independent smelter/refiners are located in places where there is significant demand for copper, but where copper mining has become either impossible (exhausted ore reserves) or uneconomic: Japan, China, South Korea and Europe. These smelter/refiners usually purchase copper concentrate according to a pricing mechanism which shields the smelter/refiners against the volatility of the world copper price (LME price): the concentrate supplier is paid the LME copper price obtaining 2-3 months following delivery (the time required to smelt/refine the concentrate), minus the costs of smelting/refining: the latter are known in the industry as treatment and refining charges, or "TC/RC's". A small proportion of copper concentrate (5%-10%) is supplied according to a pricing mechanism known as "shared pricing", which exposes the smelter/refiner to some copper price risk.
37. TC/RC's vary as a function of the balance between the supply of copper concentrate and available custom smelting/refining capacity: a surplus of copper concentrate and a smelting/refining bottleneck will generally cause TC/RC's to rise and vice versa. Historical information provided by the parties indicates that changes in the level of TC/RC's closely follow copper price movements.
38. Contracts between concentrate suppliers and third party smelters/refiners tend to be long-term (generally ranging from 2 to 12 years), but some commercial terms, including the level of TC/RC's, are negotiated annually<sup>13</sup>. These long-term contracts generally fall into two broad categories: so-called "finance-related" contracts<sup>14</sup> (representing about 25-35% of the market) and so-called "non-finance-related" contracts (about 55-65% of the market). Under the former contract type, an arbitration mechanism ensures that annually-variable contract terms are reached, even where the concentrate supplier and the smelter/refiner cannot reach agreement

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12 Copper concentrate is sufficiently high value for it to be viable to transport it overseas for smelting/refining.

13 As Japanese smelters have tended to negotiate for the purchase of concentrate as a consortium, the terms concluded in Japan are typically used as a worldwide benchmark.

14 Finance related contracts provide the guaranteed revenue flow which enable banks to finance mining projects.



by negotiation; under the latter contract type, failure by the concentrate supplier and the smelter/refiner to reach agreement on the annually-variable contract terms will result in a one year "holiday" from the contract, during which period the smelter/refiner can turn elsewhere for its concentrate requirements.

39. Smelters/refiners can also obtain copper concentrate on the "spot" (short-term) market; some 10%-20% of the world custom copper concentrate market is accounted for by such sales. The spot market would be the usual source of supplies for smelters/refiners during a "holiday" from a long-term contract. Price levels on the spot market tend to be volatile.
40. These factors appear to indicate that there is a distinct market for the sale of copper concentrate to third party smelters/refiners. This custom market includes both sales made pursuant to long-term contracts and sales made on the spot market. However, the custom market is disciplined by the LME copper price: the demand for copper concentrate, and therefore for smelting/refining capacity, is ultimately dependent on the demand for refined copper. The Commission's market investigation has confirmed this view (see below).
41. It is also clear that there is a distinct market for the sale of refined copper (or "copper cathode"). As mentioned above, copper cathode produced from sulphide and oxide ore are entirely substitutable from a demand-side perspective.

## **2. Relevant geographic markets**

42. The notifying parties state that the relevant product markets (for the supply of copper concentrate and refined copper to third parties) are world-wide in geographic scope, and the Commission's investigation has confirmed this assertion. Copper concentrate is one of the highest value bulk cargoes shipped on the world's oceans, and the cost of transporting copper concentrate from mines located in Chile, Indonesia and Australia (where most copper mines are located) to Japan, China, South Korea and Europe (where most independent smelters/refiners are located) does not vary to any significant extent. Moreover, the parties have provided information which demonstrates that ocean freight charges represent a relatively small proportion of concentrate value, and that the TC/RC's charged by smelters/refiners in Asia and Europe are at closely comparable levels. European smelter/refiners import concentrate from, inter alia, Chile, Argentina, Indonesia and Australia. It is also clear that the market for refined copper (or "copper cathode"), a high value, globally traded commodity, is world-wide in geographic scope.

## **3. Assessment**

43. The parties' combined 1999 share<sup>15</sup> of the world-wide production of copper ore amounted to some [5-15%]<sup>16</sup> (BHP [5-15%] + Billiton [0-10%]). The parties' world-wide share of sales of copper cathode (the finished product) to third parties in 1999 amounted to less than [0-10%]<sup>17</sup> (BHP [0-10%] + Billiton [0-10%]).

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<sup>15</sup> All of the market shares, and forecast market shares, discussed in this section are based on data provided by an independent market analyst, Brook Hunt, as well as on the merging companies' own current, historical and forecast production and sales figures.

<sup>16</sup> BHP's and Billiton's combined share of the world's copper ore reserves is less than [0-10%].

<sup>17</sup> More or less all of these sales are accounted for by copper cathode resulting from the leaching of copper oxide.

44. BHP and Billiton both supply their total production of copper concentrate to the custom smelter/refiner market. Indeed, they are the only major copper ore producers who are not mainly integrated producers of copper cathode from sulphide ore. Together, the parties accounted for [20-30%] (BHP [15-25%] + Billiton [0-10%]) of total world supply to the custom market in 2000<sup>18</sup>. However, taking into account mining activities which are coming on stream as well as expansion of existing mines, the parties' share of the custom market is expected to amount to [30-40]% in 2003<sup>19</sup> and [30-40]% in 2005<sup>20</sup>. At the same time, the parties forecast that, in the light of a number of "probable"<sup>21</sup> future projects, the merging companies' market share will amount to [30-40]% in 2003 and [25-35]% in 2005.
45. The parties' closest competitors in the world-wide custom concentrate market had market shares in 2000 of 12.5% (Freeport), 10% (Anglo American), 4.9% (Phelps Dodge), 4.7% (MIM Holdings), 4.6% (Codelco) and 3.4% (Rio Tinto).
46. The parties' combined market shares are not indicative of dominance on the world-wide custom market. Nor are their forecast combined market shares for 2003 and 2005 indicative of such dominance; these forecast shares show significant increases for two reasons: firstly, the fact that a mine currently controlled by Billiton<sup>22</sup> is commencing production in 2001 and is expected to be producing at capacity by 2002; and secondly, the fact that BHP's largest mine<sup>23</sup> is undergoing a major expansion. It should, however, also be noted that BHP has expressed the intention to "withdraw", as soon as possible and probably by mid-2002, from its second largest mine<sup>24</sup>; this withdrawal would reduce the combined entity's market share by [0-10%] in 2003, to [25-35%], and by [0-10%] in 2005, to [25-35%].
47. Furthermore, the Commission's market investigation has confirmed that the parties' position in the custom concentrate market is unlikely to give them either the ability or the incentive to increase the price of concentrate to supra-competitive levels, or to reduce their output of concentrate in response to prevailing TC/RC levels. For one thing, there are a number of alternative custom copper concentrate suppliers, the largest of which are copper ore producers of a similar size to the new entity, to whom smelter/refiners may turn for supplies. In any event, output restrictions would be unattractive, as they would entail serious diseconomies associated with operating copper mines at below-capacity levels; mines supplying concentrate to custom smelter/refiners tend to operate at maximum capacity. The parties' competitors (other concentrate suppliers) and customers (third party smelter/refiners) contacted during the course of the Commission's market investigation all confirmed that the parties would be very unlikely to restrict output in this way.

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18 The total market amounted to 4769 Kt in 2000. This includes both internationally-traded and domestically-traded concentrate sold to third parties, but excludes domestic custom concentrate sales in China, Russia, Armenia and Kazakhstan; for a variety of reasons, the bulk of this concentrate is non-tradable.

19 The total market is estimated to amount to 5193 Kt in 2003.

20 The total market is estimated to amount to 5123 Kt in 2005.

21 These projects, identified by Brook Hunt, are probable in the sense that they do not yet have committed finance but are likely to be developed.

22 Antamina, Peru

23 Escondida, Chile

24 OK Tedi, Papua New Guinea; [...].

48. In view of the market position of the parties to the concentration, it appears that the notified operation will have little or no impact on competition in the EEA. Consequently, the proposed concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of that area.

**V. CONCLUSION**

49. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89 and Article 57 of the EEA Agreement.

For the Commission

*(signed)*  
Mario MONTI  
Member of the Commission