COMMISSION DECISION

of 9 July 1987

on the setting-up of a venture jointly owned by Redland plc, AAH Holdings plc and British Coal Corporation

(Only the English text is authentic)

(87/412/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 66 and 80 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 application filed on 16 December 1986 by the British Coal Corporation on behalf of all three parties, seeking authorization for merging some of their solid and liquid fuel interests into a new company jointly owned by Redland plc as to 55 %, AAH Holdings plc as to 25 %, and British Coal Corporation as to 20 %, which will be called British Fuels Limited.

Having obtained the comments of the United Kingdom Government,

Whereas :

I

1. AAH Holdings plc (AAH), Lincoln, is a holding company for a group principally engaged in fuel distribution, builders' supplies, distribution of pharmaceutical products, road haulage, general engineering and environmental and agricultural services. All activities are vested in independent, both wholly- and partly-owned subsidiaries. Among these is the British Fuel Company (BFC), which is owned in partnership with the British Coal Corporation (the former National Coal Board) and is engaged in fuel distribution. Apart from its holding in BFC, AAH has no further interests in the fuel distribution business. On account of its holdings in BFC and some subsidiaries under the BFC umbrella engaged in the distribution of solid fuels, AAH is an enterprise subject to the ECSC Treaty pursuant to Article 80 of the ECSC Treaty.

2. The British Coal Corporation (British Coal) is the leading producer and supplier of solid fuels in the United Kingdom, both directly and through distributors. In 1985/86 United Kingdom coal consumption of 121,4 million tonnes compares with British Coal's total sales of 111,8 million tonnes. British Coal is therefore an enterprise within the meaning of Article 80 of the Treaty. Among other subsidiaries and holdings, British Coal has a minority stake in the BFC.

3. The British Fuel Company (BFC) is a partnership owned jointly by AAH as to 50,25 % and British Coal as to 49,75 %, carrying on for a number of years solid and liquid fuel distribution ('fuel businesses'), road haulage, builders' supplies ('non-fuel businesses') and related businesses. The tonnage of solid fuel handled by the partnership, which operates through a number of subsidiaries, amounted to about 3,1 million tonnes *per annum* on average over the last three years.

4. The Redland plc group is a holding company principally engaged in the production and supply of materials and services to the construction industry in the United Kingdom and overseas, and solid and liquid fuel distribution in the United Kingdom. Its fuel distribution and related businesses are carried on through various subsidiaries known as the 'Cawoods companies', which are held by Cawoods Holdings Ltd ; among these are : Cawoods Coal Ltd, Cawoods Hargreaves Ltd (a 50 % joint venture with Hargreaves Group plc, now controlled by the Coalite Group), Cawoods of Northern Ireland Ltd, and some Eire associates. On average over the last three years, the tonnage of solid fuel handled by the Cawoods companies of Redland plc amounted to about 3,2 million tonnes per annum. On account of the activities carried on through the Cawoods Companies, Redland plc is an enterprise subject to the ECSC Treaty pursuant to Article 80.

5. The new company, British Fuel Limited (BFL), will be principally concerned with continuing and developing the existing solid and liquid fuels distribution businesses presently conducted separately by the Cawoods companies and BFC. The joint venture will emerge from the amalgamation of BFC (with British Coal's and AAH's current fuel distribution interests combined) with the Cawoods companies. First it is necessary, however, to restructure legally the respective businesses in such a way as to ensure that, in principle, all assets to be amalgamated concern exclusively fuel businesses. These restructuring measures within groups are not at issue in this case. What is at issue are the effects on competition of the new

(1) *Official Journal of the European Coal and Steel Community*, No 9, 11. 5. 1954, p. 345/54.

company, in which, after completion, the shares will be held 55 % by Redland plc, 25 % by AAH and 20 % by British Coal. Under the merger only British Coal will continue to be engaged in fuel distribution outside BFL.

II

6. The setting-up of the joint venture brings about a concentration in the form of control by a group. The agreements on the shareholdings in BFL and the management of the company mean that the three shareholders will be able to exercise joint control over the company within the meaning of Decision No 24-54. The joint company will therefore from a concentration with Redland plc, AAH plc and British Coal Corporation and the firms they control within the meaning of Article 66 (1) of the Treaty, without the three parent companies themselves forming a concentration.

Concentrations of this nature may be authorized if the Commission is satisfied that they will not lead to certain restrictions of competition.

7. The present share of BFC in the United Kingdom coal market amounts to roughly 85 %. It includes, with AAH having no other interests in fuel distribution, by virtue of British Coal's holding in the partnership, British Coal's own distribution business. It reflects the outstanding position of British Coal. Indeed, British Coal is the main producer in the United Kingdom and its supplies to the market should basically be considered as distribution of coal and its derivatives such as coke and briquettes. The reason for this is that, in principle, British Coal sells not only through all interested distributors who satisfy the normal standards of credit-worthiness and agree to make payment by the dates specified in its Conditions of Sale, but also to a large extent directly to consumers, itself acting as wholesaler.

8. The proposed transaction entails a change in the structure of the coal-connected distributive trade in that the market share held hitherto by BFC as defined in the previous paragraph will be increased by that of the Cawoods companies, i.e. around 3,2 million tonnes annually. This means that the share of the new company will amount to about 87 % of the United Kingdom coal market.

9. However, that share cannot really be considered as being on the whole available for competition among wholesalers. There are some very large consumers whose purchases account for the bulk of the solid fuel tonnage consumed in the United Kingdom and who, for good reasons, buy exclusively from British Coal direct. Such consumers are the two United Kingdom Generating Boards, the Central Electricity Generating Board and the South of Scotland Electricity Board, and steelworks in so far as they use coking coal in their own coke ovens or blast furnace coke produced by a British Coal subsidiary. Although few in number, the tonnage supplied to them accounts for about 91 million tonnes of British Coal's 1985/1986 sales. The reasons why they deal exclusively with the producer are partly technically, partly economically based. First, they require little local servicing. Moreover, they are able to switch easily from British Coal's products to either cheaper alternative sources of energy or cheaper coal offered by producers in third countries. The Generating Boards had to demonstrate this during the 1984/85 coal-industry dispute when their power stations, which are in fact interconnected, raised their fuel oil burn by 38,2 million tonnes of coal equivalent while reducing the coal burn by 39,5 million tonnes compared with the previous year. This technical flexibility combined with the low-priced alternative primary energies available to them such as fuel oil, nuclear power, liquid gases and imported coal puts these buyers in an extremely strong bargaining position. In order to get British Coal to align its prices for supplies to them as far as possible on the lower prices of alternative fuels, they prefer to agree contract terms directly with British Coal. This being so, it appears that the wholesale trade would not be able to secure a sufficient profit margin if it tried to interfere. Under these conditions, the vast bulk of the tonnages so supplied, i.e. that moved by rail or in the coastal sea trade to power stations and steelworks, is sold without any intervention of a distributor, whereas for relatively small tonnages transported by road and canal, the role of the trade is essentially to provide a haulage service, providing, and in some cases owning, the lorries and barges. Although in such cases it sometimes suits both British Coal and the consumer, for reasons of security, for the property to pass from British Coal to the haulier when it is loaded and then from the haulier to the consumer when it is unloaded, it is unrealistic to consider that the power station and steelworks market is one in which wholesalers can compete with British Coal. On the contrary, all solid fuel handled by British Coal on behalf of the Generating Boards and the steel industry must be regarded as a quantity not available for intermediate distributors, and consequently falls outside the scope of the further assessment of BFL's market share.

10. Consequently, as the power station and steel works markets absorb some 99,7 million tonnes, only about 21,7 million tonnes are in fact supplied under conditions under which wholesalers can compete for distribution. That quantity goes mainly to consumers in the general industry and domestic sectors. Also, 1,8 million tonnes of miners' coal have to be eliminated, the distribution of that coal being exclusively in the hands of British Coal and related companies.

11. So after completion, at the level of wholesalers servicing the United Kingdom market, the joint venture will have, due to the link with British Coal, a 52 % share as against 48 % for all other competitors.

III

12. The merger agreement and related agreements, looked at from the point of view of British Coal's shareholding of 20 % in the joint venture, provide that British Coal will neither seek nor be able to impose on BFL any conditions concerning supplies which afford undue preference or advantage to British Coal products.

Furthermore, as regards the prices to be charged to BFL for British Coal products Decision No 30-53 [1], as last amended by Decision No 1834/81/ECSC [2], provides that a seller and the undertakings controlled by it are obliged to supply the same or similar products basically on the same terms to all customers who compete with each other. This principle fully applies to British Coal's sales both to BFL and to any other distributor.

13. There are several precedents where the Commission has adopted the view that, when assessing an enterprise's position in the market, account has to be taken not only of the products of that enterprise's own sector but also of the substitutes that can reasonably be chosen by its customers. Experience has indeed shown that, for general industry and household purposes, solid fuel, fuel oil, gas and electricity compete equally with each other. There is reason to conclude, therefore, that in spite of its market share of 52 % as against 41 % for the former BFC, BFL or its shareholders will not have the power to determine prices, to control or restrict distribution or to hinder effective competition in a substantial part of the market for those products.

14. This is because BFL will have to face fierce competition from generally low-priced alternative energies which has resulted in reduced solid fuel consumption on all markets. This development, which dates back to the middle and late 1950s has been further aggravated by the collapse in oil prices since the early months of last year. Solid-fuel distributors have therefore been constantly compelled to reduce costs and profit margins to the bare minimum in order to retain existing customers, so that the increased market share in no way enables BFL or its shareholders to determine prices.

15. Furthermore, after completion of the merger operation, BFL will not act under more favourable trading conditions in the market than its competitors. Although 52 % is a large market share, it should be noted that about 60 other distributors operate in the market, some of which hold shares in the range of 3 to 6 %. The change caused by the setting-up of the joint venture is not so great as to alter substantially the conditions of supply for consumers.

16. In addition, it must be borne in mind that the coal consumption of the United Kingdom general industry and domestic markets represents only a small part of the overall fuel consumption there: only about 15 % of all fuels consumed are still of solid-fuel origin, compared with 67 % in 1960. It follows that, taking account of all forms of energy for markets, the takeover of the Cawoods companies' market share by the former BFC in fact neither restricts users' freedom of choice of both supplies and suppliers nor hinders effective competition.

17. The fact that British Coal, in its capacity as producer, is involved in the joint venture makes it necessary to establish whether, through the new company, it will have the power to evade the rules of competition laid down in the Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to markets.

18. Between 1948, the year in which the British coal industry was nationalized, and the time of United Kingdom accession to the Communities, other fuels had already heavily eroded solid fuels' position on the two markets which are in fact the main fields of the trade's activity. Coal consumption there fell by about 77 million tonnes, i.e. by 70 %. Since then, British Coal as the major supplier suffered a further 26 % drop in production and a reduction in manpower of more than 40 %. As a consequence of all this, the volume of business which could usefully be handled by the independent distributive trade shrank to relatively minor proportions, and to keep itself alive it had to diversify into other fields of business such as oil distribution and, more recently, builders' supplies, agricultural products and a wide range of other interests. It appears that, while British Coal's natural interest is to produce and sell as much coal and derived fuels as possible, for the independent distributive trade the marketing of solid fuels has to a large extent become a sideline. If, as a result, and eventually through increased involvement in the distributive trade, British Coal nevertheless tries to supply its products to the final consumer in a stable and regular way, there are no grounds for concluding that this is being done with a view to establish for itself an artificially privileged position involving a substantial advantage in access to markets. The planned transaction must rather be considered a legitimate way for British Coal to stabilize its eroded position on the energy market.

19. The Commission must ensure that the effects of the joint venture on competition remain limited to the extent outlined in the above assessment.

[1] *Official Journal of the European Coal and Steel Community*, No 6, 4. 5. 1953, p. 109/53.
[2] OJ No L 184, 4. 7. 1981, p. 7.

Given its position as the main producer of solid fuels in the United Kingdom, there is reason to believe that British Coal will use its holding in BFL to promote the sale of its own products. To avoid undue consequences for competition, therefore, the supplying of BFL by British Coal should be subject to certain conditions :

The parties and BFL should not be allowed to enter into any agreement with British Coal concerning supplies to BFL having the effect of placing fuels supplied by other producers in the Community at a competitive disadvantage. The scope for any contractual obligation on BFL for purchasing from British Coal should therefore be defined in terms of quantity. For agreements lasting in excess of one year a maximum of 65 % of BFL's requirements seems appropriate. Nor should BFL be allowed to be supplied by British Coal on preferential terms compared with those applied by British Coal to the joint venture's competitors, nor to be given preferential treatment for products in scarce supply. In order to take account of the foregoing considerations, appropriate conditions must be attached to any authorization.

20. Subject to the conditions set out in point 19, the planned joint venture therefore satisfies the conditions for authorization under Article 66 (2) of the ECSC Treaty and can be authorized,

HAS ADOPTED THIS DECISION :

Article 1

The Joint venture British Fuels Limited, London, between Redland plc, AAH Holdings plc and British Coal Corporation is hereby authorized.

Article 2

The authorization referred to in Article 1 shall be subject to the following conditions :

1. The parties to the joint venture and BFL shall not enter into any agreement in excess of one year concerning the supplying of BFL with solid fuels produced by British Coal or any of its subsidiaries covering more than 65 % of BFL's reasonable requirements within any such contract period.

2. British Coal and its subsidiaries shall not grant preferential terms for supplies to BFL. The provisions implementing Article 60 of the ECSC Treaty apply irrespective of British Coal's shareholding in BFL or the size thereof. British Coal and its subsidiaries shall not be allowed to operate any price discount scheme tending to place BFL's competitors at an undue disadvantage, or to give preferential treatment to BFL for products in scarce supply.

3. BFL shall, not later than 15 February each year, inform the Commission of the following :

   (a) the aggregate quantity of solid fuels purchased during the preceding calendar year ;

   (b) the quantities purchased during the preceding calendar year from British Coal and its subsidiaries, broken into products and qualities and showing prices charged by these suppliers.

Article 3

This Decision is addressed to Redland plc, Reigate (Surrey), AAH Holdings plc Lincoln, and British Coal Corporation, London.

Done at Brussels, 9 July 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission