II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 7 May 2002

on aid allegedly granted by Germany to RAG AG in connection with the privatisation of Saarbergwerke AG

(notified under document number C(2002) 1810)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/631/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 4(c) thereof,

Having regard to Commission Decision 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry [1],

Having given notice to the parties concerned to submit their comments in accordance with Article 88 of the ECSC Treaty [2] and having regard to those comments,

Whereas:

I. PROCEDURE

(1) By letter of 13 November 1997, RAG AG (hereinafter referred to as 'RAG') notified the Commission under Article 66(1) of the ECSC Treaty that it intended to acquire the entire share capital of Saarbergwerke AG and Preussag Anthrazit AG.

(2) By letter of 9 March 1998, Germany notified the Commission under Article 67 of the ECSC Treaty of the planned privatisation of Saarbergwerke AG through its sale to RAG for a token price. This letter indicated that the privatisation was an integral part of an agreement concluded on 13 March 1997 between the German Federal Government, the Governments of North Rhine Westphalia and Saarland, the coalmining industry and the trade unions of the coalmining and electricity sectors (hereinafter referred to as the 'coal compromise').

(3) Saarbergwerke AG (hereinafter referred to as 'Saarbergwerke') was a public sector company whose main activities included coal extraction in Germany, production of coke, power generation, district heating, environmental protection, trade and services (in particular trading in coal, oil transport and oil distribution) and rubber manufacturing. Coal extraction has traditionally been referred to as the company's 'black' area of activity and the other activities constitute the 'white' area of activity. Saarbergwerke was jointly owned by the Federal Republic of Germany (74 %) and Saarland (26 %). It operated three coalmines, with a total production in 1997 of 7,3 million tce [3].

(4) The coal compromise, in which new guidelines were laid down for coal policy for the period to 2005, provided for a steady reduction in annual production from 47 million tce in 1997 to 42 million tce in 2000 and 30 million tce in 2005 and a reduction in the number of production units from 17 to 12. These 1997 data should be corrected downwards. Coal production in 2000, for which Germany transmitted estimates when it notified the Commission of State aid, will total about 35 million tce and in 2005 production is unlikely to exceed 26 million tce.

[1] OJ L 329, 30.12.1993, p. 12.
[2] OJ C 101, 8.4.2000, p. 3.
[3] tce: tonnes of coal equivalent.

(5) In the coal compromise, the total State aid package for the period 1997 to 2005 was fixed at DEM 68 billion, with a declining scale for the level of aid: starting with DEM 10,5 billion in 1997, the aid ceiling for 2005 was put at DEM 5,5 billion. The grant of a total sum of DEM 2,5 billion was made subject to RAG taking over Saarbergwerke.

(6) On 3 April 1998, the Federal Government, the Government of Saarland and the RAG concluded an agreement under which RAG took over Saarbergwerke's entire share capital by acquiring the shares held by the Federal Government and the Saarland Government. The selling price was fixed at DEM 2, namely DEM 1 for the Federal Government's shares and DEM 1 for those held by Saarland. It was further agreed to merge the companies' coalmining activities within a single company, Deutsche Steinkohle AG, which is wholly controlled by RAG.

(7) By decision of 29 July 1998, the Commission authorised, under Article 66 of the ECSC Treaty, the acquisition of Saarbergwerke and Preussag Anthrazit by RAG, following a commitment by RAG to divest the coal import business of Saarbergwerke and to separate the sale of coal produced in Germany from the sale of imported coal [4]. The Commission specifically indicated that the aforementioned decision only concerns the 'application of Article 66 of the ECSC Treaty and in no way prejudices any decision the Commission may take in application of other articles of the EC or ECSC Treaties and in particular any decision relating to State aids'.

(8) The merger of RAG and Saarbergwerke took effect on 1 October 1998. For accounting reasons, however, provision was made for retrospective effect from 1 January 1998.

(9) On 29 September 1998, the United Kingdom RJB Mining company (now known as 'UK coal') applied to the Court of First Instance of the European Communities, asking it to annul the Commission's decision of 29 July 1998 authorising the merger of RAG, Saarbergwerke and Preussag Anthrazit on the grounds that in its analysis of the merger the Commission had not verified whether the selling price included State aid. RJB Mining took the view that it can be concluded from the information which Germany transmitted to the Commission that State aid of the order of DEM 1 billion to RAG was inherent in the sale of Saarbergwerke.

(10) By judgment of 31 January 2001 in Case T-156/98, *RJB Mining* v *Commission*, the Court of First Instance annulled the Commission's decision of 29 July 1998 [5]. According to Court, the Commission had failed to verify the selling price and in particular to examine the extent to which the financial support that may be connected with a purely symbolic selling price might have strengthened RAG's financial power and thereby also its economic power. On 12 and 19 April 2001, Germany and RAG appealed against the judgment [6].

(11) The Commission asked a firm of […] (*) consultants for a study examining what effects the merger might have on RAG's financial power. In its study, […] focused in particular on the way in which Saarbergwerke's accounts had been consolidated with those of RAG.

II. **DESCRIPTION**

II.1. **Selling price**

(12) In its letter of 9 March 1998 notifying the Commission of the planned privatisation of Saarbergwerke, Germany argued that the risks connected with the takeover of the Saarbergwerke's mining sector justified selling the company for a token price. According to Germany, the Government had made a commitment in the coal compromise only to subsidise coal production up to 2005. The expiry of the ECSC Treaty and of the provisions on State aid to coalmining under Decision 3632/93/ECSC of 23 July 2002 allegedly created considerable uncertainty for the future of coalmining. Germany argued that the selling price therefore largely ensued from the imponderabilities of future national and Community decisions on the future of German coalmining.

(13) Germany also stressed the significant risks connected with fluctuations in the price of coal on the world market, in particular as these prices served as the reference for calculating subsidies per tonne of coal. Any reduction in coal prices on international markets that was not offset by a rise in productivity would lead to an increase in subsidy per tonne of coal. However, as a ceiling had been imposed on the level of aid that Germany could grant each year, a drop in world coal prices would inevitably oblige the company to reduce its production as it would otherwise be unable to continue to cover its operating losses from State aid. Apart from the fact that it would be difficult to adapt production in the short term, a decline in coal production would also lead to an increase in production costs.

[4] Case IV/ECSC.1252 — RAG/Saarbergwerke/Preussag Anthrazit.

[5] [2001] ECR II-337.

[6] Cases C-157/01 P and C-169/01 P.

(*) Confidential information.

(14) Germany also pointed to various obligations that had been imposed on RAG when it took over Saarbergwerke. For instance, RAG had to cover losses in the coal sector up to 2000 and between 2001 and 2005 transfer DEM 200 million each year from the 'white' to the 'black' sector. This obligation, laid down in the coal compromise, was already applicable prior to the compromise in respect of RAG's existing coal and non-coal activities, and consequently it was not connected with the merger, nor was it dependent on it. For instance, German coal companies were until 1997 obliged to use 75 % of their profits from the 'white' sector to cover losses from mining activities. Moreover, RAG was subject to additional obligations — in particular to retain activities in Saarbergwerke's 'white' sector and include its own environmental activities in Saarbergwerke, which according to Germany's arguments constrained the company's economic freedom to act.

(15) In view of all these facts, it would have been difficult to find a buyer for Saarbergwerke. In this connection, Germany stresses, in particular in its letter of 15 April 1998, that attempts had been made since 1991 to find a buyer for the company.

II.2. **Letter of 4 February 2000 inviting comments**

(16) The information which Germany sent to the Commission by letter of 30 June 1998 in connection with the merger includes parts of a report on the consolidation plan for Saarbergwerke. The report had been compiled in January 1996 by Roland Berger & Partners at the German Government's request in its capacity of main shareholder (majority partner) in Saarbergwerke.

(17) By letter of 10 July 1998, Germany transmitted to the Commission parts of an evaluation of March 1996 by Roland Berger & Partners containing comprehensive solutions for the German coal industry and a brief report of 9 July 1998 on updating valuations for Saarbergwerke. This report had been compiled for the German Government by […], following a Commission request for further information to enable it to investigate the merger.

(18) The information which Germany transmitted to the Commission did not include any figures on the value of the 'white' sector. However, VASA Energy GmbH & Co. KG, when it instituted proceedings before the Court of First Instance of the European Communities [7], submitted pages from the January 1996 report by Roland Berger & Partners which Germany had not submitted to the Commission. In this part of the report, Roland Berger & Partners valued the 'white' sector at about DEM 1 billion.

(19) In the report of 9 July 1998 updating valuations for Saarbergwerke, […] described the value of mining sector as unquantifiably negative on account of the uncompetitiveness of mining activities. The report also referred to unquantifiable political risks from 2002 in connection with the expiry of the ECSC Treaty and from 2005 because of the absence of political obligations for Germany with regard to the level and duration of subsidies after that date.

(20) In the light of all the information at its disposal, the Commission believed that various elements led to the conclusion that the privatisation of Saarbergwerke involved non-notified State aid of DEM 1 billion. Under Article 88 of the ECSC Treaty, the Commission invited Germany by letter of 4 February 2000 to submit comprehensive information, in particular a detailed economic, business and financial valuation of Saarbergwerke and an assessment of the risks involved in acquiring the company. The Commission's letter was published in the *Official Journal of the European Communities*. At the same time, the Commission also invited interested parties to submit their views [8].

(21) In its letter, the Commission pointed out that if it considered that the sale of Saarbergwerke included non-notified aid to the coal sector, it would examine the aid in the context of Article 4(c) ECSC and in the light of Decisions 98/687/ECSC [9], 1999/270/ECSC [10] and 1999/299/ECSC [11] taken in accordance with Decision 3632/93/ECSC, and of the notification received for the year 2000. The Commission further announced that: 'Should the Commission find, following receipt and examination of the reply from the Federal Republic of Germany, that the sale of Saarbergwerke AG included non-notified aid to the non-coal activities, then this will be examined in conformity with the State aid rules laid down in the Treaty establishing the European Community.'

III. **GERMANY'S COMMENTS**

(22) In response to the Commission's letter, Germany transmitted the information requested and stated its position on the token price paid by RAG for acquiring Saarbergwerke. With its letter, dated 8 May 2000, Germany enclosed various documents: an expert report by […] of 2 May 2000 including a valuation of Saarbergwerke on the basis of discounted cash flows and several scenarios for the sale and winding-up of Saarbergwerke's activities (the winding-up scenario concerns in particular Saarbergwerke's coal activities which reportedly involved very high risks and might have to be discontinued); an expert opinion from […] of 29 February 2000 which

[7] Case T-29/99, *Vasa Energy* v *Commission* (ruling not published).

[8] See footnote 2.
[9] OJ L 324, 2.12.1998, p. 30.
[10] OJ L 109, 27.4.1999, p. 14.
[11] OJ L 117, 5.5.1999, p. 44.

included a valuation of Saarbergwerke in accordance with the gross rental method; an expert opinion of 29 April 2000 on the procedure adopted to determine the company value of Saarbergwerke; and a letter from Roland Berger & Partners dated 14 April 2000 once again sketching the background and views expressed in their statement of January 1996, in particular the irrelevance of the sum of DEM 1 billion mentioned there.

(23) According to Germany, the privatisation of Saarbergwerke through its sale to RAG for the sum of DEM 2 did not include an aid component. Rather, from the viewpoint of the public authorities the sale of this company 'as is', i.e. without any prior financial consolidation, — a company burdened with substantial business risks — constitutes an optimum economic result. The proprietors of Saarbergwerke, i.e. the German Federal Government and the Government of Saarland, are said to have behaved like sellers acting in accordance with free-market conditions and seeking to optimise revenue from the sale.

(24) The expert reports which […] compiled for Germany confirm that at the time of privatisation Saarbergwerke had a negative value overall. On account of the fact that the mining sector was structurally in deficit, […] calculated a negative value of DEM […] million for the company as a whole. Winding up the mining sector was not a plausible alternative as the liquidation costs, which […] estimated to represent a negative overall value of DEM […] billion, would have greatly exceeded the expected revenue from a sell-off of the 'white' sector. Nor would a break-up of Saarbergwerke through the sale of the various company components on balance have led to a positive value as the coal sector as such would have been unsellable and hiving off the energy sector would in particular have led 'to the destruction of the economic values' of this sector. Germany's argumentation is based on the close economic linkage between the various components of the company, in particular that between the power generation sector and the coal sector.

(25) Germany's position is that by selling Saarbergwerke to RAG in one package at the price of DEM 2 it had chosen the economically most sensible formula.

IV. **OPINIONS OF THIRD PARTIES**

(26) After the Commission's letter to Germany inviting it to submit comments had been published in the *Official Journal of the European Communities*, the Commission received two opinions from third parties. The Permanent Representation of the United Kingdom to the European Union sent a letter dated 5 May 2000 in which the United Kingdom gave its support on all points of the analysis which the Commission had set forth in its published letter.

(27) RJB Mining (now UK Coal) also submitted an opinion, in a letter of 5 May 2000. According to RJB Mining, the conditions for the RAG/Saarbergwerke merger are not transparent, in particular with regard to fixing the selling price. Breaking up the company and selling off the individual company components separately, moreover, would have made it possible through a tendering procedure to attain a higher price than the token sum paid by RAG.

V. **EVALUATION**

(28) In order to ascertain whether the RAG/Saarbergwerke merger involved State aid, the Commission first of all examined how a private company acting in accordance with free-market conditions would have behaved. On the basis of this criterion, it can be assessed whether the German Federal Government and the Saarland Government when selling Saarbergwerke for the sum of DEM 2 waived part of the revenue they could have obtained if Saarbergwerke had been sold in its entirety. Next, the Commission examined whether, as indicated in recitals 55 to 59, the sale of the 'white' and 'black' sectors, irrespective of the valuation of the company as a whole, was tantamount to aid flowing from the former (whose value was positive) to the latter (whose value was negative).

V.1. **Value of the 'black' sector**

(29) Germany, mainly basing its argument on […]'s report, arrives at a negative continuation value of DEM […] million for this sector and a negative liquidation value of DEM […] billion. Germany takes the view that the sale of the entire company to RAG for DEM 2 was thus an economically highly sensible measure. […] have calculated a negative value of DEM […] million for all the activities of Saarbergwerke taken together, in which the coal sector accounts for this negative result (– DEM […] million for the 'black' sector and + DEM […] million for the 'white' sector).

(30) In 1997 Saarbergwerke's mining activities comprised three sites for coal extraction (Ensdoft, Warndt/Luisenthal and Göttelborn/Reden) and a coking plant (Fürstenhausen) in Völklingen which, however, ceased operating in June 1997 when Saarbergwerke and RAG merged. In 1997 the output of the Ensdorf, Warndt/Luisenthal and Göttelborn/Reden mines was 2,8 million tce, 2,4 million tce and 2,1 million tce respectively. In this sector worked 12 697 of a total of 18 000 employees of Saarbergwerke.

(31) In Decision 1999/270/ECSC on German aid to the coal industry under the coal compromise, the Commission declared that the restructuring of the Saarbergwerke production units would lead to a further reduction in production and in particular to the closure of the Göttelborn/Reden mine in 2000 on account of the considerable geological difficulties at this mine, making it impossible to continue mining there.

(32) According to information supplied by Germany in its statements on State aid to coalmining, production costs at the Warndt/Luisenthal mine were DEM […]/tce in 1998 compared with an average selling price of coal of DEM […]/tce in the same year as estimated by Germany (i.e. production costs amounted to […] times the selling price of coal). The Ensdorf mine was considered to have the lowest deficit in Germany, with production costs of DEM […]/tce in 1998 which was still more than […] times the selling price of coal.

(33) At the time Saarbergwerke was privatised, the Ensdorf and Warndt/Luisenthal mines were receiving operating aid authorised by the Commission in particular through Decision 98/687/ECSC. On the basis of information supplied by Germany, the Commission assumed that both mines were able to further improve its economic viability by reducing production costs and thereby meet the criteria laid down in Article 3 of Decision 3632/93/ECSC.

(34) According to the judgment of 9 September 1999 of the Court of First Instance of the European Communities in Case T-110/98 *RJB Mining* v *Commission* ([12]), the provisions of Article 3 of Decision 3632/93/ECSC do not require that the undertaking in receipt of aid achieve viability by the end of a fixed period. They require only that economic viability 'improve'. According to the Court, the reason for that 'open-ended formulation is the economic reality on which the scheme of State aid to the Community's coal industry is based, namely the structural uncompetitiveness faced by that industry because most of its undertakings remain uncompetitive in relation to imports from third countries … It follows that improvement in the economic viability of a given undertaking necessarily means no more than a reduction in the level of its non-profitability and its non-competitiveness.'

(35) Even if these mines improved their economic viability and came closer to meeting the criteria for the grant of operating aid within the meaning of Article 3 of Decision 3632/93/ECSC, the fact would remain that their prospects for attaining the viability threshold would still be slight. Decision 1999/270/ECSC provides that '… it can be concluded that a substantial reduction in aid can largely be achieved by means of measures to reduce mining activity.' The text goes on to point out that 'Even if the average production costs in the German coal industry have fallen slightly, taking account of Article 3(3) of Decision 3632/93/ECSC, the production costs, expressed at 1992 constant prices, are still too high as they should be DEM […] per tce in 2002 as compared with DEM […] per tce in 1992.'

([12]) [1999] ECR II-2585.

(36) Given the geological difficulties inherent in coal deposits in Germany and the production costs connected with extraction, it is clear that the coal produced by these units cannot compete with coal imported from third countries and will not be competitive in the future. Despite drastic restructuring, modernisation and rationalisation in the coal industry intended to enhance competitiveness, German coal production is and remains uncompetitive compared with imports from third countries, even if there is a discernible rise in productivity, progressive closure of the least profitable units and drastic cuts in employment in the sector.

(37) This analysis is confirmed by the way the coal sector developed in the years following the RAG/Saarbergwerke merger. While the coal compromise envisaged coal production of 37 million tce in 2002, the output-reducing measures connected with the chronic uncompetitiveness of the sector will probably mean that output in Germany in 2002 will be less than 29 million tce. The figure of 35 million tce estimated for 2000 is less than that envisaged for 2002 in the coal compromise.

(38) When on 22 November 2000 Germany notified aid to the coal industry for 2002, it stated that further measures for reducing mining activity would be required, involving additional closures. In Commission Decision 2001/361/ECSC ([13]), the Commission took note that this reduction in capacity marked the continuation of the extensive measures for restructuring, rationalisation, modernisation and reduction of mining activity that had been taken since the coal compromise of 1997.

(39) The study which […] carried out for the Commission confirms that there was a high risk involved for RAG in taking over Saarbergwerke's coal sector. This risk concerns in particular the steady diminution of aid, the amounts of which are laid down in the coal compromise, the uncertainties about the period after 2005, as the coal compromise expires at the end of 2005, the fact that State aid to the coal industry has to be authorised by the Commission, the uncertainty about the level of coal prices on the world market, and the difficulty of adjusting production so as to optimise the use of State aid. The […] study reaches the conclusion that these risks, although difficult to quantify, will most probably have a negative impact for RAG as it assumed considerable risks in buying Saarbergwerke without a clear quid pro quo. At the time of the merger, the expiry of the ECSC Treaty and of the rules on State aid to the coal industry laid down in Decision 3632/93/ECSC on 23 July 2002 were to be considered additional risks for RAG.

([13]) OJ L 127, 9.5.2001, p. 55.

(40) In this connection, the Commission refers to the fact that the valuation of the coal sector by […] is based on the assumption that after 2005, that is, after the expiry of the coal compromise, no more coal will be produced in Germany. Consequently, there is considerable doubt with regard to the future of the sector in Germany after 2005.

(41) Notwithstanding all the difficulties to accurately determine the value of the coal sector, it is concluded from the above observations that this sector has a negative value, in spite of the subsidies which Germany has paid from year to year to cover operating losses. The absence of any prospect for competitiveness at the time of the merger has been confirmed since. Accordingly, it can safely be assumed that […]'s estimation that there is a negative continuation value of DEM […] million is realistic.

V.2. **Value of the 'white' sector**

(42) According to […], the electricity generation sector has a negative value of DEM […] million. This value has been determined on the basis of two hypotheses: on the one hand, the sector is closely linked with the Saarland coal industry and, on the other hand, coal production will be abandoned after 2005. Because of this close link between the mining sector and electricity generation, the value of the electricity sector is strongly dependent on the availability of coal produced in Saarland. At the time when Saarbergwerke was sold, Germany gave a commitment only to cover operating losses in the coal industry up to 2005. As there is no guarantee of aid being granted after that and as the German coal industry suffers from chronic uncompetitiveness, […] believe that it cannot be excluded that after 2005 the coal industry will simply disappear. Disappearance of the German coal industry would oblige power stations to use imported coal, which according to data supplied by Germany would entail significant additional costs, in particular for transporting coal from transshipment ports.

(43) The hypothetical disappearance of the coal industry after 2005 would therefore completely neutralise the value of electricity generation. If coal continues to be produced in Germany after 2005, however, […] estimate the value of electricity generation positively at DEM […] million.

(44) […] have valued the activities in the 'white' sector other than electricity generation as follows: (a) district heating: DEM […] million; (b) environment: DEM […] million; (c) trade and services: DEM […] million; (d) rubber: DEM […] million.

(45) […] have analysed performance in the 'white' sector on the one hand and the proceeds from the sale of particular segments of this sector after the merger, on the other. It found that the profitability of these activities between 1992 and 1996 was very low […]. Accordingly, there is no evidence that activities in the 'white' sector of Saarbergwerke would have given RAG an added value. Apparently, the sale of particular areas of activity after the merger incurred losses totalling DEM […] million.

(46) In light of these observations, the overall value of the 'white' sector can be evaluated as mildly positive. The […] analysis shows that the value estimated by […] is realistic. This value is assessed to lie between DEM […] million and DEM […] million in light of the hypothesis concerning the future of the coal industry after 2005 and its impact on the value of the power generation sector.

V.3. **Sale of the company**

(47) The arguments adduced by Germany in its letter of 8 May 2000 are based on the hypothesis that the only option was to sell Saarbergwerke in its entirety and that this package had a negative value. The positive value of particular components of the company's 'white' sector could not have offset the substantially negative value of the 'black' sector, whether the sector were continued or wound up. Given the chronic deficit of Saarbergwerke's coal sector, Germany's best option was to sell the company 'as is' for the sum of DEM 2.

(48) Germany points out that a break-up of Saarbergwerke by selling the various components of the company separately would not have led to a positive value.

(49) An additional factor is that the various areas of activity within the Saarbergwerke group were not structurally separated. This means that if one or more loss-making sectors — in particular the coal sector — with a negative residual value had been wound up, it would have had to be offset by the positive value accruing from the sale of other parts of the company. The wind-up of the coal-mining sector, whose negative value […] have estimated to amount to DEM […] billion, would thus have largely absorbed the proceeds from the sale of profitable company sectors.

(50) An analysis of RAG's accounts confirms that the take-over of Saarbergwerke has not led to a positive value. At the end of the operation, rather, there was a negative result of DEM […] million. This negative sum results in particular from accounting adjustments made after the merger. In accordance with general accounting principles, many of these adjustments should have been made by Saarbergwerke prior to the merger. Other adjustments were justified by the fact that Saarbergwerke applied different accounting principles from RAG. According to […], some of these adjustments were set too high, though only by DEM […] million. […] concludes that no positive value could have accrued for RAG from the sale of Saarbergwerke in 1998.

V.4. **The alleged DEM 1 billion value**

(51) According to Roland Berger & Partners' report of March 1996, the value of the 'white' sector could be estimated at about DEM 1 billion. However, this report was not compiled as a valuation in view of the privatisation of Saarbergwerke. Germany, in its letter of 8 May 2000, indicates that this amount is based on the hypothesis that the requisite restructuring measures are actually taken, which was not the case when the company was privatised. The DEM 1 billion value was therefore not based on a valuation of the company 'as is' but anticipated the restructuring measures which Roland Berger & Partners considered necessary. Accordingly, the value specified was a 'restructuring value'.

(52) The value of the 'white' sector estimated by Roland Berger & Partners in their report of March 1996 has in fact not been confirmed by any other report, neither by […] or […] nor by the […] study carried out for the Commission.

(53) The letter of 4 February 2000 in which the Commission asked Germany to submit comprehensive information and according to which the privatisation of Saarbergwerke might have involved DEM 1 billion in State aid was first and foremost based on the fact that all of the measures provided for in the coal compromise, in particular the merging of the coalmining sectors of Saarbergwerke and Preussag Anthrazit within RAG, were intended to ensure supra-regional rationalisation on the one hand and to cover the adaptation process by an industrial agreement on the other hand with a view to enhancing the efficiency of the coal industry ensuring its survival beyond 2005.

(54) Unfortunately, the restructuring of coalmining after the privatisation of Saarbergwerke in 1998 did not lead to a discernible improvement of the economic viability of this sector. The restructuring efforts, which have led to far more extensive mine closures and production cuts than envisaged in the coal compromise, have failed to improve the sector's competitiveness. Under these circumstances, the long-term survival of Saarland's coal industry is highly questionable.

V.5. **Examination of the sale in the light of Commission practice vis-à-vis cluster sales**

(55) As expounded in recitals 20 and 21, the Commission was of the opinion that the sale for the sum of DEM 2 might be tantamount to State aid as it included assets with a potentially highly positive value. Even if the low price, viewed in the light of all the business sectors sold, was justified, the Commission normally assumes in cases in which authorities demand that separate business components be sold together that the sale is not effected without specific conditions and, accordingly, may include State aid. In particular where a business sector with a negative value and another one with a positive value are to be sold off together, it might be assumed that the sale involves State aid for the former, and the same applies to a separate sale of the business sector at a negative price.

(56) An example of this strategy is the Commission's letter to Germany of 8 December 1992 (SG(92)D/17613), in which the Commission notes that 'in cases where such companies have not historically grown together, the Commission cannot take the view that an artificial merger of companies meets its requirement that the offers must not be subject to conditions.' This argument was adduced in particular in the sale of the Lintra group (aid N 49/95) ([14]). This view can be justified in particular by referring to the likely behaviour of an investor who acts in accordance with free-market conditions and is otherwise in the same situation, who would dissolve a company with negative value rather than waive the proceeds from the sale of a company with positive value.

(57) The Commission has verified whether these arguments apply to Saarbergwerke's case. It has found (see recital 49) that an investor acting in accordance with free-market conditions who was in the same position as the owners of Saarbergwerke would have had no way of preventing the positive value of the 'white' sector from being drained by the negative value of the 'black' sector as Saarbergwerke's coal sector was not constituted as a separate legal person. The company's structure shows that the coal sector formed part of the Saarbergwerke AG holding company.

(58) Nevertheless, the Commission is of the opinion that this is not a wholly convincing analysis. Given the lack of profitability and the substantial potential debts of the 'black' sector, whose survival fully depends on State aid, it seems questionable whether an investor acting in accordance with free-market conditions would have allowed assets with a strongly positive value to go unprotected. Such an investor can therefore not be simply referred to as a yardstick for comparison.

(59) On the other hand, Germany has also indicated that there are historical and commercial links between Saarbergwerke's various business components, in particular between the coal and electricity generation sectors, even though in electricity generation German coal has been steadily replaced by imported coal (from 1992 to 1998, German coal dropped from 72 million tce to 47 million tce and this trend still continues, with less than 35 million tce in 2000). In the 1998 merger there was at least a certain link between Saarbergwerke's areas of activity, and if German coal had in the short term been replaced by imported coal this link could have led to

([14]) OJ C 168, 12.10.1996, p. 10.

difficulties. In view of all these facts, the Commission has reached the conclusion that the arguments on cluster sales have no relevance for the Saarbergwerke case. However, it wishes to point out that for such sales in clear-cut cases (in particular if there are no commercial or historical links between business sectors and if they belong to separate companies), the Commission will continue to use these arguments in the manner set down in recitals 55 and 56.

VI. **CONCLUSION**

(60) The privatisation of Saarbergwerke through its sale to RAG at the price of DEM 2 included no aid component. Account being taken of the considerable business risks involved, the sale of the company 'as is', i.e. without any prior financial consolidation measures, was an operation in which the public authorities behaved like a seller acting in accordance with free-market conditions and seeking to optimise proceeds from the sale.

(61) Saarbergwerke's lack of positive value is connected with the coal sector which suffers from a chronic deficit and has a very uncertain future. The lack of positive value is confirmed by three reports, one of which was compiled by an audit company at the Commission's request.

(62) According to the report compiled by […], the continuation value of Saarbergwerke must be estimated at a negative value of DEM […] million, i.e. a negative value of DEM […] million for the 'black' sector and a positive value of DEM […] million for the 'white' sector,

HAS DECIDED AS FOLLOWS:

Article 1

The privatisation of the Saarbergwerke AG company through its sale to the RAG AG company at the price of DEM 2 involves no State aid.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 7 May 2002.

For the Commission

Loyola DE PALACIO

Vice-President