II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 7 May 2002

authorising RAG Aktiengesellschaft to acquire control of Saarbergwerke AG and Preussag Anthrazit GmbH

(Case COMP/ECSC.1350 — RAG/Saarbergwerke/Preussag Anthrazit II)

(notified under document number C(2002) 1436)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/36/ECSC)

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 the notification submitted by the parties by letter dated 13 November 1997,

Whereas:

(1) By letter dated 13 November 1997, RAG Aktiengesellschaft, Essen, ('RAG') notified the Commission under Article 66(1) of the ECSC Treaty that it intended to acquire the entire share capital of Saarbergwerke AG, Saarbrücken, ('SBW') and Preussag Anthrazit GmbH, Ibbenbüren, ('Preussag'). The purpose of the transaction was to bring about a merger between the last three remaining German hard coal mining companies. The purchase price for SBW was DEM 2, of which DEM 1 was to be paid to Germany and DEM 1 to the Saarland in their capacity as previous owners.

(2) By decision of 29 July 1998 (Case COMP/ECSC.1252 — RAG/Saarbergwerke/Preussag Anthrazit) ('decision of 29 July 1998'), the Commission authorised under Article 66 of the ECSC Treaty RAG's takeover of SBW and Preussag after RAG gave a commitment to sell SBW's coal import business, Saarberg Coal International GmbH ('SCI'), and to separate the sale of coal mined in Germany from the sale of imported coal.

(3) In the meantime, the merger had been completed. In fulfilment of the commitments, SCI had been sold to an independent French buyer.

(4) On 31 January 2001, in RJB *Mining* v *Commission* [1], the Court of First Instance annulled the Commission decision of 29 July 1998 in its entirety. The Court found that the Commission had not assessed whether the total assets of SBW transferred to RAG corresponded to the price paid of DEM 2 or whether State resources had been implicitly transferred to RAG. In the present case, although the Commission was not required to assess the legality of the supposed aid, namely the aid inherent in the merger, in a formal preliminary decision, it could not — according to the Court's judgment — in its analysis of the competitive situation under Article 66(2) of the ECSC Treaty, refrain from assessing whether, and if so to what extent, the financial and thus the commercial strength of the merged entity was strengthened by the financial support provided by that supposed aid in the form of the low purchase price [2].

(5) On 8 November 2001, the parties submitted all relevant information for a renewed assessment of the notified merger.

[1] Case T-156/98 [2001] ECR II-337.
[2] Germany and RAG have lodged an appeal against this judgment before the Court of Justice.

I. THE PARTIES

(6) Prior to the merger, RAG was active primarily in the extraction and marketing of coal and in the processing of coking coal into blast furnace coke. It also held shares in a number of international mining companies and had interests in the fields of power generation, chemicals and plastics, waste treatment and environmental services, mining technology and real estate.

(7) At the time of the merger in 1998, the shares in RAG were held by four shareholders (partly through joint ventures with co-proprietors): VEBA AG, VEW AG, Thyssen-Krupp-Stahl AG and ARBED SA. RAG's current shareholders are E.ON AG, the successor to VEBA (37,1 %), RWE AG in succession to VEW (30,2 %), Thyssen-Krupp-Stahl (12,7 %), Montan-Verwaltungsgesellschaft mbH, a joint venture between E.ON and Thyssen-Krupp-Stahl (10 %), and Verwaltungsgesellschaft RAG Beteiligung mbH, a joint venture between ARBED SA and RAG itself (10 %).

(8) SBW carried on business primarily in the following fields: coal extraction in Germany, coke production, power generation, distance heating, environmental protection, trading and services (in particular the marketing and trading of coal and the transport and distribution of oil) and rubber. It was owned 74 % by Germany and 26 % by the Saarland.

(9) Preussag was likewise active in the extraction and marketing of coal products; its other activities related to heat generation and water supply. The company operated a mine at Ibbenbüren. It was wholly owned by the Preussag AG group.

II. THE TRANSACTION

(10) The notified transaction is part of an agreement, commonly known as the 'coal compromise' (Kohlekompromiss), reached on 13 March 1997 between the Federal Republic of Germany, the *Land* of North-Rhine Westphalia, the Saarland, the German mining and power station workers' union *(deutsche Industriegewerkschaft Bergbau und Energie)* and the abovementioned three companies ('the coal compromise'). Under the agreement, the mining businesses of the three companies RAG, SBW and Preussag were to be merged to form a single company, Deutsche Steinkohle AG, controlled by RAG. According to the information provided by the parties and by Germany, the aim was that, as a result of the merger and the State aid that had been promised, the politically desirable process of adjustment in the German coal industry would take place under socially acceptable conditions and a lastingly viable, efficient mining industry would be ensured beyond 2005. Under the coal compromise, of the 17 pits still in operation in 1997, 10 or 11, producing some 30 million tonnes of coal a year and employing around 36 000 people, were to be retained in the long term.

(11) Under the coal compromise, Germany, in parallel with the purchase by RAG of the shares in SBW held by the Federal Government and the Saarland, earmarked a total of DEM 2,5 billion of aid for future pit closures. As of 1998, this aid was lumped together with the funds from Germany and the *Land* of North-Rhine Westphalia for promoting the sale of domestic power station coal and coking coal, subject to an overall ceiling. State aid for the German coalmining industry, which in 1997 totalled DEM 10,5 billion, was then to be gradually reduced to a total of DEM 5,5 billion by 2005. In addition to the contributions from Germany and the *Land* of North-Rhine Westphalia, since 2001 DEM […] (*) is being provided each year out of the earnings from RAG's non-coal activities. […]*. Disbursement of the additional federal resources will be conditional on RAG actually acquiring the shareholdings of Germany and the Saarland in SBW.

III. CONCENTRATION, COMPETENCE OF THE COMMISSION

(12) In its decision of 29 July 1998 the Commission established that, by acquiring the entire share capital of SBW and Preussag, RAG would be able to exercise sole control over those undertakings. In the meantime, the merger plan had been executed in accordance with the notification. It can therefore be said that the notified transaction constitutes an acquisition of control within the meaning of Article 1 of High Authority 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], and accordingly brings about a concentration within the meaning of Article 66(1) of the ECSC Treaty.

(13) The Commission also established in its decision of 29 July 1998 that, as a result of their involvement in the extraction of and trade in hard coal and hard coal products, RAG, SBW and Preussag are to be considered undertakings within the meaning of Article 80 of the ECSC Treaty, read in conjunction with Annex I thereto. To the extent that the parties also sell coal to domestic consumers and small craft industries, pursuant to Article 80 the transaction does not fall under the ECSC Treaty. As regards the effects in the domestic consumer and small craft industry sector and the non-mining activities of the parties to the merger, the transaction was notified to the German Federal Cartel Office and exempted in early 1998.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

[1] OJ 9, 11.5.1954, p. 345/54.

(14) The Commission established further that the proposed merger requires prior authorisation inasmuch as the annual output of the undertakings involved (approximately 48 million tonnes of hard coal) exceeds the maximum amount referred to in Article 1(1)(a) 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 [1], as last amended by Commission Decision No 3654/91/ECSC [2]. This aspect of the Commission decision was not contested. The question of the Commission's competence therefore does not need to be examined anew. The criterion to be adopted in this respect is the time of the original notification [3].

IV. **ASSESSMENT UNDER ARTICLE 66(2)**

(15) After the Court of First Instance annulled the Commission decision of 29 July 1998 on 31 January 2001, a renewed competition assessment was needed in the light of the Court's judgment. For this renewed assessment, unlike in the case of the question whether the notified merger falls within the scope of merger control under the ECSC Treaty, the criterion to be adopted is not the time of the original notification. Instead, the decisive factor is the position at the time of the decision [4]. The Commission must therefore assess whether the merger, in the shape of the notification as supplemented in the meantime on the basis of the current market position of the parties and in the light of any increase in RAG's financial strength, gives the parties the power within the meaning of Article 66(2) of the ECSC Treaty

(a) to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market affected by the merger, or

(b) to evade the rules of competition instituted under the Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

A. *GERMAN POLICY ON COAL: GENERAL BACKGROUND*

(16) In the past, the sale of coal to German power generators and steelmakers was governed by specific agreements known as the Century Contract *(Jahrhundertvertrag)* and the Steelworks Agreement *(Hüttenvertrag)*, which contained extensive rules on State aid, imports and procurement obligations. The Century Contract and the Law on tariff quotas for solid fuels *(Zollkontingentgesetz)* expired on 31 December 1995. The Steelworks Agreement was terminated in 1999.

(17) The conditions under which the coal industry operates in Germany are now based essentially on the coal compromise. Under the coal compromise, there is to be an overall ceiling for aid to mining. Aid will be granted only towards using coal in power generation and steel making. Germany has given assurances that the aid will be limited to the amount absolutely necessary and is intended only for output supplied to the power industry and the Community's coal and steel industry. Under the coal compromise, aid for coal supplied to the power industry can compensate for the difference between production costs in German mines and the average price for imports into Germany. The average price for imported coal is determined each year, and the actual selling price is calculated on the basis of that import price, which includes transport costs. In the case of sales to the steel industry, the aid compensates for the difference between the average price for imported coal in the Community and actual production costs. In both cases the absolute amount of aid is limited.

(18) Under the coal compromise, domestic output was originally to be cut from approximately 47,9 million tonnes in 1996 to approximately 30 million tonnes in 2005. From a total of DEM 10,5 billion in 1997, State aid to the coal industry was set to fall to a total of DEM 5,5 billion in 2005. In 2000 the coal compromise was revised. Output is now to be reduced from as early as 2002 to less than 29 million tonnes. In 2000 output came to approximately [30 to 40]* million tonnes. For 2000 operating aid of DEM 3,8 billion (2001: DEM 3,8 billion), aid for the reduction of activity of DEM 3,1 billion (2001: DEM 1,9 billion), aid to maintain an underground labour force of DEM 71 million (2001: DEM 67 million) and aid to cover exceptional costs of DEM 2,1 billion (2001: DEM 2,7 billion) is provided for [5]. The structure of the aid has changed substantially compared with 1999. The share of total aid accounted for by sales subsidies, which in 1999 still came to 91 %, fell in 2001 to 66 %. By contrast, the share of aid accounted for by aid to cover exceptional costs unconnected with day-to-day mining operations increased. The reduction in aid is set to continue until 2005 at least.

[1] OJ 154, 14.7.1967, p. 11.
[2] OJ L 348, 17.12.1991, p. 12.
[3] See Case No IV/M.308 Kali+Salz/MDK/Treuhand, OJ C 275, 3.9.1998, paragraph. 9.
[4] See Case No IV/M.308 Kali+Salz/MDK/Treuhand, loc. cit., paragraph 10.
[5] See Commission decision of 21.12.2000 on German aid to the coal industry for 2000 and 2001, OJ L 127, 9.5.2001, p. 55.

(19) The German steel industry was subject to extensive procurement obligations in respect of domestic coking coal under the Steelworks Agreement, which was first concluded when RAG was established in 1969. The agreement was authorised by the Commission under Article 65 of the ECSC Treaty until the end of 1997 by means of Decision 89/248/ECSC of 30 March 1989 authorising the agreements on supplies of solid fuels to six steelworks by Ruhrkohle AG [1]. It was amended for 1998, the exclusive procurement obligations in particular being either discontinued or scaled down. The Commission closed the proceeding under Article 65 of the ECSC Treaty in respect of the 1998 Steelworks Agreement by administrative letter [2]. The agreement was terminated in 1999 and replaced by bilateral agreements between RAG and the individual steel producers. These agreements, which are not to run beyond 2005, no longer contain any exclusivity clauses, procurement obligations dependent on total requirements or most-favoured-nation clauses.

B. *RELEVANT PRODUCT MARKETS*

(20) In its decision of 29 July 1998, the Commission established that basically the merger concerned the sale of coal and coal products. It based this finding on the following arguments:

(21) Coal is sold to industrial customers (power generators, steel manufacturers and other industrial customers) and to private households and small businesses. The household and small-business sector is not covered by the ECSC Treaty and was therefore not affected by the decision.

(22) Most of the coal used by industry (including steel manufacturers and power generators) is supplied direct to the final consumer by the mining companies or the importer. The wholesale trade is of no significance in these market segments and its role requires no further discussion in this Decision.

(23) For large users it is impossible to replace coal by other fuels in the short term. Power stations are adapted to a particular energy source, and it is not possible to substitute other sources of energy, such as natural gas, for coal in the short term. In the steel industry, coke serves a special metallurgical purpose, which cannot be satisfied by using other raw materials.

(24) It is of course possible to divide sales of coal to industrial customers into three separate categories: power generators, steelmaking and other industry (sugar mills, cement works, papermaking). However, since all three types of sales are affected by the same factors, it is not necessary to consider each one separately in order to assess the present case.

(25) Since the decision of 29 July 1998 no changes have occurred that would require a different assessment. The sale of coal and coal products is therefore regarded as the relevant product market in this decision as well.

C. *RELEVANT GEOGRAPHIC MARKET*

(26) In its decision of 29 July 1998, the Commission assumed that Germany was the relevant geographic market for the sale of coal and coal products. The decisive factor was that because domestic coal was heavily subsidised (see section A, recital 16 et seq.) the entire output was sold in Germany, thereby meeting a considerable proportion of the total German demand for coal products. In addition, for the German customer, German coal has certain advantages over imported coal: the geographical proximity of the mines and hence the fact that users need to carry smaller stocks, homogeneous product characteristics, and the fact that the users' installations are geared to using domestic coal. There is also strong political and social pressure in Germany to buy German coal. This created the expectation that German coal was always preferred by the customer as long as its price, as a result of the aid, was on a par with the average price of coal imported into Germany.

(27) Accordingly, subsidised coal accounted in 1977 for [65 to 75 %]* of the total sales of coal products in Germany, of which [90 to 100 %]* went to power generation and steelmaking. Given the sales conditions described, which meant that in Germany there were only very limited opportunities for competing importers, the Commission concluded in its decision of 29 July 1998 that Germany was a separate relevant geographic market.

(28) The aid scheme also means that German coal is not exported from Germany. The direct consequence of the aid for domestic coal is that German coal producers can only align sales to German power generators and German steel makers on the average price of coal imported into Germany. But since the absolute amount of aid is limited, so is the possibility of selling German coal at the world market price. Given that the difference between the German subsidised price and the world market price (approximately DEM [120 to 250]* per tonne) is still considerable, there is no incentive to sell more German coal, i.e. over and above the subsidised quantities, abroad.

[1] OJ L 101, 13.4.1989, p. 35.
[2] Proceeding COMP/E-3/36.779 RAG Hüttenvertrag, letter of 8.11.2000.

(29) From the updated information supplied by the parties for 1998 to 2001 it is clear, however, that subsidised coal in Germany accounted for a diminishing proportion of the total German market. In 1997 imports accounted for about [25 to 35 %]* of the total market, but by 2000, according to the parties, this share had risen to some [40 to 50 %]*. This proportion can be expected to increase, since the existing subsidy rules provide for a further significant decline in current production and sales until at least 2005.

(30) It can be seen from the above that the market for coal and coal products in Germany still has specific features which distinguish it as far as competition is concerned from other geographical regions. On the other hand there are indications that the German coal market is becoming more international. Ultimately, however, the precise definition of the relevant market for the purposes of this decision can be left unsettled, since, even if it is assumed that the market continues to be restricted to Germany, the merger does not give rise to any reservations.

D. *ASSESSMENT OF THE EFFECT ON COMPETITION*

(31) In its decision of 29 July 1998 the Commission based its reservations (which were allayed by the commitments given by the parties) in particular on the risk that, as a result of the merger, the parties' advantageous position at that time regarding the sale of subsidised German coal might be transferred to the open market. In view of the current market situation, and various structural changes that have taken place since the Commission's decision of 29 July 1998, there is now, in the Commission's view, no reason for such reservations (see section 1 below, recital 32 et seq.). Further, even a possible influx of financial resources in the context of the low selling price for SBW would not be sufficient to justify any reservations on competition grounds (see section 2 below, recital 47 et seq.).

1. POSITION OF THE PARTIES AS REGARDS THE SALE OF COAL IN GERMANY

(a) ***The position of RAG with regard to the merger***

(1) **Domestic (German) coal**

(32) By acquiring control of SBW and Preussag, RAG became the only German coal producer. It must be remembered however that, for the reasons mentioned (recital 16 et seq.), sales of German coal follow the (declining) level of aid, since the amount of German coal that can be sold depends on the aid available. Accordingly, the parties' sales of domestic coal have fallen considerably, from 67,6 million tonnes in 1994 to 32,7 million tonnes in 2001. This trend will continue, since it follows the predicted decline in aid. The merger between RAG and SBW does not alter this: because of the higher production costs it is impossible for German coal to compete with imports without aid, so that the merger has no effect on the production and sale of German coal.

(2) **Total market/imported coal**

(33) In Germany, as in the Community, coal consumption fell steadily in recent years, and it can be assumed that this trend will continue (the Verein Deutscher Steinkohleimporteure forecasts, for instance, that demand in Germany will be 60 million tonnes in 2010). This is due particularly to the preference for other – more environmentally friendly and cheaper – sources of energy and the decline of German steel production. In a market where the volume is falling, the parties' share of the total market, consisting of domestic and imported coal, has shrunk since 1994 (see Table 1). RAG, SBW and Preussag together sold 70,8 million tonnes of coal in 1994, but only 43,6 million tonnes in 2001.

Table 1

Sales of coal in Germany

[…]*

(34) As regards market share, the parties still have a strong position on the total market, but their shares have clearly declined. When looking at market share, it has to be remembered that SBW's import business is not affected (any longer) by the merger, since it was disposed of by RAG in 1999. The trend of the parties' position in recent years does not include SBW's import business, therefore, the aim being specifically to highlight what has happened to those parts of the business currently involved in the merger. In 1994 the parties had [80 to 90 %]* of the total market (approximately [80 to 90 %]*, excluding SBW's imports), but only [80 to 90 %]* (approximately [70 to 80 %]*, excluding SBW's imports) in 1997, and [60 to 70 %]* in 2001. This indicates that RAG has not succeeded in completely offsetting its losses in German coal by increasing its share of imported coal.

Table 2

Parties' share of the total market

[…]*

Source: The parties.

(35) Taking imported coal separately, the parties succeeded in increasing their absolute sales of imported coal from […]* million tonnes ([…]* million tonnes excluding SBW's imports) in 1994 to […]* million tonnes in 2001. However, this increase in absolute quantities reflects the competitive position of the parties only to a limited extent, since it was associated with the rise in imported coal's share of the total market. The parties' share of the imported coal market did indeed go up from 1994 ([10 to 20 %]*, or [10 to 20 %]* excluding SBW's imports) to 1997 ([30 to 40 %]*, or [30 to 40 %]*, i.e. in the period preceding the merger. After the merger, however, as Table 3 shows, it remained stable with slight fluctuations between 1997 ([30 to 40 %]*, or [30 to 40 %]* and 2001 ([25 to 35 %]*, and latterly shows a downward trend. RAG, therefore, was unable to defend its slight increases in market share in 1999 and 2000. It should also be pointed out that RAG meets only a small portion of its imports into Germany from its own sources of production and must buy most of its imports from other producers. Thus it has no perceptible advantage as regards access to sources of supply compared with its competitors in the import field.

Table 3

Parties' share of the imported coal segment

[…]*

Source: The parties.

(36) It will be seen therefore that the parties have not succeeded after the merger in offsetting the decline in their sales of domestic coal by increasing their import business. Furthermore, the merger did not to lead to a perceptible, sustained expansion of the parties' position in the import coal sector; rather, their current market share is again below the level which they had before the merger. Given this trend, it is not expected that there will be a clear strengthening of the merged company within the period under consideration.

(b) ***Position of competitors and other competitive conditions***

(37) Current market conditions, which are distinguished by certain structural changes that have occurred on the German coal market since the decision of 29 July 1998, indicate that RAG's competitive position will not be strengthened.

(38) One important structural change has been the increasing share of imports in the total market. In 2001 imports accounted for about 50 %, compared with about 44 % in the previous year. Imports in the power station and coking coal sector in 2001 exceeded domestic production for the first time: 35 million tonnes approximately as against 33 million tonnes. The volume of imports has increased by [10 to 20 %]* a year on average, albeit with significant fluctuations (+[0 to 10 %]* in 1995; + [15 to 25 %]* in 1997 and + [0 to 10 %]* in 1999). Coal imports are forecast to increase further, since the steadily falling total volume of aid entails a corresponding fall in sales of German coal. These sales are clearly falling faster than the gentle decline in total demand in Germany. The safe sales position that RAG had on the domestic coal market compared with its competitors is therefore increasingly less significant for the total market. This automatically reduces any possibility that RAG might have of transferring its position as regards domestic coal to the imported coal sector.

(39) In addition, it should again be pointed out that RAG, by meeting the commitment to sell in the decision of 29 July 1998, has separated itself from the import business of SBW (SCI). There is thus no overlapping of the parties in the field of imports — an area which is important for competition. The merger has not resulted in the combination of the parties' import activities, and there has been no addition of market shares. SCI operates in today's market as an independent competitor with stable market shares.

(40) The third factor is that, in recent years, there has been a clear structural strengthening of competitors in the imported coal sector, which is exposing RAG to stiffer competition and has already led to the decline of the parties' shares of the import market. Imports are the result of direct sales by foreign coal producers and sales through German coal importers. RAG's largest competitors for imported coal are either international producers or firms which are associated with coal customers in Germany. The RWE energy group, one of the largest customers for power station coal, is RAG's largest competitor in the import field, with a share of some [25 to 35 %]* in 2001 (RAG: [25 to 35 %]*. RWE has strengthened and expanded its position, in particular through the takeover in recent years of SSM Coal (Netherlands) and Rheinbraun Brennstoff GmbH. Other competitors include Glencore, BHP-Billiton and Rio Tinto, which are among the largest coal producers in the world; to date they have a combined market share of [5 to 15 %]*. SCI — SBW's coal importing business, which was sold to a French dealer — has shares of about [0 to 10 %]*. The parties estimate that independent dealers have a share of about [5 to 15 %]* of the coal import market in Germany.

(41) Since the decision of 29 July 1998 there has also been a structural strengthening of international coal producers, which has led to new market entries in Germany. Thus, the Australian producer, BHP, and the South African firm Billiton have merged to become the world's largest coal producer. BHP-Billiton entered the German market in 1999 and today has a [0 to 10 %]* share of the imported coal sector. In 2000, Rio Tinto (UK), likewise one of the largest coal producers in the world, penetrated the German imported coal market and in 2000 and 2001 sold some […]* tonnes of coal in Germany, which amounts to a [0 to 10 %]* share of German coal imports.

(42) The German coal market has hardly any barriers to entry. The transport and storage infrastructure is freely accessible and available. RAG does have some activities in the logistics field, but it is not very important in this sector and there are many other suppliers. Furthermore, own transport or storage capacity is not essential to operation on the market. The dealer requires only skilled labour, a telephone and a PC in order to enter the market. Coal is a not very differentiated 'commodity' product. Its quality is laid down in ISO standards and there is no possibility for differentiation between product qualities or brands. The main relevant factor of competition, therefore, is price.

(43) Trends and market conditions indicate therefore that in the imported coal sector RAG is confronted by a growing number of strong, international competitors who are exerting considerable pressure on its market position. The level of market entries in recent years suggests that, as coal imports into Germany increase, new competitors will enter the German market.

(44) There have been substantial changes on the demand side as well. Firstly, various steel industry mergers resulted in international groups with bundled purchaser power, such as Thyssen-Krupp-Stahl in 1998, or the amalgamation of Usinor, Arbed and Aceralia to form Arcelor in November 2001. Secondly, as a result of increasing liberalisation in recent years, competition in the power generation market has increased considerably. In this new competitive environment, it is essential for power station operators to procure cheaper coal and make use of even the smallest price differentials. Greater competitive pressure among customers thus reinforces the potential of RAG's low-cost competitors. The greater price sensitivity of large customers also means that the current terms on which RAG's customers obtain their long-term supplies of domestic coal no longer provide it with leverage over the imported coal sector, since in that sector price is increasingly becoming the decisive factor of competition.

(45) Lastly, it should be pointed out that the long-term anticompetitive procurement obligations of the power and steel industries, which were contained in the Century Contract and the Steelworks Agreement have since been revoked. RAG's contracts with its customers no longer contain any procurement obligations that are consequent on the total requirement, or on exclusive dealing or most-favoured-nation clauses. Today's contracts with the steel and power industries usually expire in one year or less and contain normal market-supply conditions as regards price and quantity.

(c) ***Conclusion: No danger of competition being distorted under current market conditions***

(46) In short, therefore, given current market conditions and subject to the examination of the effects of a possible financial strengthening of RAG (see section 2, recital 47 et seq.), it cannot be assumed that RAG within the meaning of the first indent of Article 66(2) of the ECSC Treaty might determine prices, control or restrict production or distribution, or hinder effective competition in a substantial part of the markets affected by the merger. Under these conditions, which have changed since 1998, there is likewise no risk that RAG within the meaning of the second indent of Article 66(2) might evade the rules of competition instituted under the ECSC Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets. This applies both to an independent German coal market and to a market that is more extensively defined in geographical terms. If an international coal market is assumed, the parties' market shares would clearly be smaller, since their activities are focused on Germany and other competitors would have to be taken into consideration. On such a wider market, even less competitive importance would ultimately attach to RAG's special position in relation to German coal.

2. POSSIBLE INCREASE IN RAG'S FINANCIAL STRENGTH

(47) In *RJB Mining* v *Commission* the Court of First Instance pointed out that the Commission had not examined during the merger proceedings whether the total assets transferred from SBW corresponded to the price paid of DEM 2 or whether there had been an implicit transfer of State resources to RAG. Consequently, the Commission could not have assessed in its merger decision of 29 July 1998 whether and, if so, to what extent the purchase price of DEM 2 strengthened the financial and thus the commercial strength of RAG. Accordingly, the following questions must be examined below:

(a) whether the financial and commercial strength of RAG was increased by the merger, and

(b) whether any financial strengthening of RAG raises competition policy problems under Article 66(2) of the ECSC Treaty.

(48) For the sake of completeness, however, it should be noted at the outset that the financial support which RAG receives from Germany to bring the price of German coal into line with the price of imported coal and for the closure of production sites is not such as to strengthen the commercial strength of RAG in a manner that is significant from a competition point of view. Both the production cost subsidies and the subsidies for the closure of production sites merely cover at most the costs actually borne by RAG.

(a) ***Increase in the financial and commercial strength of RAG***

(49) The Court of First Instance did not in its judgment provide any criteria for determining how any discrepancy between the purchase price and the actual value of SBW and any resulting increase in RAG's financial strength should be established. One possible and appropriate approach in the present case (among a number of conceivable approaches) is, for the purposes of determining whether there was any financial strengthening of RAG, to investigate the effects the merger actually had on RAG's consolidated balance sheet. This allows retrospective insight to be gained into the financial effects of the merger [1], and makes it possible, particularly in conjunction with the risks for SBW's coal sector, to determine at least a maximum value (under a worst-case scenario) for any financial inflow, which is sufficient for analysis in the present case.

(50) Accordingly, the Commission asked the auditing company BDO to carry out a study of the effects of the merger on RAG's consolidated balance sheet. The study shows that, as a result of the takeover of SBW, RAG achieved an accounting gain from the merger of DEM [0 to 500]* million. This value corresponds to the accounting net value of SBW's equity capital at the time of the takeover (DEM [0 to 500]* million) minus the purchase price (DEM 2) and minus the transaction taxes directly associated with the takeover (DEM […]* million).

(51) The gain from the merger contrasts in RAG's consolidated balance sheet on 31 December 1998 with depreciations of SBW's assets amounting to DEM […]* million. By far the largest depreciations related to power stations (DEM […]* million) and the stock of solid fuels (DEM […]* million). In the case of the power stations, the main item was the advance depreciation of SBW's energy procurement costs, which were above the market price. As far as the partial depreciation of the value of the stock of solid fuels is concerned, the stock, which had hitherto been valued at list prices, was brought down in value to the level of the world market price.

(52) The study thus comes to the conclusion that the (negative) impact of the merger on RAG's equity capital as actually shown in RAG's consolidated balance sheet as at 31 December 1998 amounted to minus DEM [0 to 500]* million.

(53) As regards future earnings developments, the study points to the possibility that the depreciations affecting the power stations could at least in part be offset at a later date by future earnings from power station holdings. The same applies to the depreciations of solid fuel stocks, where the possibility exists of subsidised purchase of the stocks which had been devalued to the world market price. Finally, the study points to a theoretical possibility of at least partial utilisation of SBW's corporation and trade tax loss carryovers by RAG, though reference is also made to the uncertainty of the partial non-recognition of the deductibility of the loss carryovers by the German tax authorities.

(54) According to the study, however, it is not to be expected that the abovementioned factors that might possibly have a positive impact on earnings will result in the merger having a significant, positive overall impact on RAG's financial strength.

(55) On the basis of the study, it is assumed that the accounting gain of DEM [0 to 500]* million shown in the merged balance sheet, corresponding to the net value of SBW's equity capital at the time of the merger excluding depreciations, can, applying a hypothetical worst-case scenario, be regarded as the maximum value of the increase in RAG's financial strength that is relevant from a competition point of view.

(56) It is not necessary to assess the depreciations carried out by RAG in assessing the present case, since, even assuming the full value *without* depreciation, no competition problems pursuant to Article 66(2) of the ECSC Treaty arise. On the basis of the study, it can be assumed that there is no need for any *upward* revaluation in SBW's assets.

[1] In contrast to estimates of the 'value as a going concern' according to the conventional procedure for evaluating an undertaking (e.g. earning capacity value method, discounted cash flow method), which, particularly for an objective sector such as coal production, involves substantial subjective assessments of risks and future developments, and consequently is subject to considerable uncertainties. It should be mentioned in this context, however, that the studies available to the Commission, which were drawn up in accordance with the conventional procedures for assessing the value of undertakings, come up with substantially smaller assessments of value (see recital 60).

(57) As regards the availability of the financial strength, it can be assumed that the net value of the equity capital would be available directly following the merger in the form of liquid resources. This would then correspond to the premise that SBW's realisation value is equivalent to its book value. It would of course be more realistic to assume only gradual, annual availability of the increased financial strength resulting from the increased earning power, or only indirect availability through a possible increase in RAG's credit standing. However, there is no need to analyse this aspect, since, even assuming full, direct liquid availability of the book values, no competition problems pursuant to Article 66(2) of the ECSC Treaty arise.

(58) It should be emphasised once again at this point that the method described in paragraphs 49 et seq. represents a hypothetical approach to determining a maximum value. An assessment of the risks of SBW's business activity was deliberately not carried out, since it would necessarily involve assessing assumptions to be made on the probability of the risks materialising. This too is not necessary, since, even assuming the hypothetical maximum value, no competition problems arise. It should, however, be noted in this context that a revaluation of the possible increase in financial strength on the basis of risk assessment may lead to a substantially smaller value. On the other hand, any higher value than the maximum value determined under the worst-case scenario can be ruled out by the Commission.

(59) The assumption of a maximum estimated increase in financial strength of DEM [0 to 500]* million is, moreover, in line with other studies on SBW's corporate value commissioned by RAG and Germany. The studies which RAG commissioned […]* in 2000 both ruled out a positive corporate value for SBW.

(60) An initial report drawn up by the management consultancy Roland Berger in January 1996 at the request of the German Government is ultimately uninformative as regards the questions being looked at here. Germany commissioned the report two years prior to the merger in order to examine SBW's recovery strategy. Its purpose was not to assess corporate value or a price at which the company might be sold. The report identifies a positive 'restructuring value' of SBW's holdings *outside* the coal industry. In a letter sent to the Commission in April 2000, however, Roland Berger explained that such value could on no account be regarded as the probable sales value of such holdings. Implementation of these restructuring measures — which were geared to SBW continuing on a stand-alone basis — never took place and, according to Roland Berger, could have been achieved only on the basis of substantial investment.

(61) A second report drawn up by […]* in March 1996, which had also been commissioned by Germany, was aimed at assessing possible cross-company solutions for the German coal industry and does not have anything to say on assessing the value of the company as a whole. The third […]* report, dating from July 1998, updated the value estimates for SBW and indicates that, while there is a positive value for the portfolio of holdings outside the coal industry, this is offset by a much higher negative value for the coal-related sector.

(b) ***Competitive impact of a possible increase in financial strength***

(62) Assuming a maximum increase in financial strength amounting to DEM [0 to 500]* million, this would not be sufficient to increase RAG's commercial strength to such an extent as to enable it to engage in anti-competitive conduct within the meaning of Article 66(2) of the ECSC Treaty.

(63) In the first place, the maximum increase in financial strength resulting from the merger is equivalent to less than [5 to 15 %]* of RAG's total equity capital according to the balance sheet as at 31 December 1999.

(64) Furthermore, RAG's total financial strength including the possible increase is no greater than the financial strength of RAG's main competitors in the German imported-coal sector. The relevant balance sheet figures of its main competitors, RWE Trading, Glencore International, BHP Billiton plc and Rio Tinto plc, are broadly similar to or greater than the figures for RAG.

(65) An increase in RAG's financial strength would have no impact on the competitive situation as regards German coal production. The possibility can be ruled out that an increase in RAG's financial strength would be used to subsidise additional home-produced coal. The subsidising of the domestic production of coal is closely linked to production ceilings. Any exceeding of these ceilings would inevitably result in a decrease in subsidies per tonne of domestic coal, so that in practical terms there would be no economic advantage for RAG. It must also be borne in mind that the production costs of domestic coal are much greater than the price of imported coal, so that substantial funds would be necessary per tonne of coal in order to make such coal saleable in Germany or internationally. The assumed maximum financial inflow could be used only once to bring a volume of some […]* million tonnes of German coal (whose production costs amount to some DEM […]* per tonne more than the imported coal price) down to a saleable price level. This is equivalent to only [0 to 10 %]* of the total market volume.

(66) Furthermore, the assumed maximum increase in financial strength would not result in any negative competitive impact on the import business in Germany. Coal is a product with low value added, and the decisive factor for customers is to have a low price for the required quality. All RAG could attempt to do on the basis of its increased financial strength in order to impede competition on the German imported-coal market would be to:

— stop actual or potential competition by buying up efficient coalmines outside Germany, or

— eliminate actual or potential competitors by offering imported coal at below the competitive price level.

(67) The possibility that RAG could significantly stop competition by purchasing coalmines outside Germany can be ruled out. The maximum increase in RAG's financial strength that can be assumed could result only in acquisitions of limited size which would only marginally increase RAG's worldwide market position. RAG currently produces [100 to 150]* million tonnes a year in its German and foreign coalmines compared with an annual worldwide production total of 3 400 million tonnes. The removal of a sufficient number of actual or potential competitors in the German coal market is consequently not realistic.

(68) Nor can it be assumed that there would be a significant and lasting restriction of competition as a result of the elimination of actual competitors if RAG were, on the basis of its increased financial strength, to offer imported coal at below the competitive price level.

(69) Such behaviour would not have any long-term impact mainly because of the financial strength of RAG's competitors, the low entry barriers for German coal imports and the increased financial requirements resulting from the increased amounts of imported coal.

(70) As mentioned in recital 64, the joint financial strength of RAG and SBW is comparable to, but at all events not significantly greater than, the financial strength of RAG's main competitors. It can therefore be assumed that RAG's competitors are in a position to counter low-price strategies on the part of RAG effectively and on a sufficiently long-term basis.

(71) German coal production has fallen by almost 40 % since 1995 (from 53 million tonnes in 1995 to 32,7 million tonnes in 2001). Overall German coal consumption has declined during the same period (see Table 1 in recital 33). The resulting increase in the share of imported coal in the overall German coal market not only makes it more attractive for coal importers to enter the German coal market. It also means that RAG would have to expend substantial and increasing resources in order to supply the increasing demand with subsidised imported coal.

(72) As explained, market entry barriers for the German coal market are low. Investment strength is of little importance for the imported-coal business, since the main factor determining commercial success is a skilled and experienced workforce. Even assuming that RAG could, by setting prices below cost, squeeze competitors out of the market in the short term, such competitors could easily return to the market as soon as RAG increased its prices again. Consequently, losses incurred during the period when competitors are squeezed out of the market through below-cost prices could not be subsequently recovered by means of higher prices. The possibility must therefore be ruled out that RAG would pursue such a strategy. There would at least be no lasting weakening of competition, since, even if squeezing-out proved successful in the short term, the low market entry barriers would make it possible for competitors to re-enter the German coal market as soon as RAG increased its prices to a level above the competitive price and to undo RAG's initial market share gains by charging lower prices.

(73) It was also noted that developments in recent years have resulted in greater price sensitivity on the part of RAG's main customers, severely restricting RAG's scope for price increases above the level of international competitive prices (following a hypothetical squeezing-out of competitors from the German market). Competition between RAG's main customers, the coal-fired power station operators (responsible for some [75 to 85 %]* of total German coal consumption) has grown much stronger in recent years with the ongoing liberalisation and internationalisation of the electricity sector. Consequently, the possibility can be ruled out that German electricity producers would accept coal at higher prices than those charged to their foreign competitors by international coal producers. Similarly, German steel producers will hardly accept prices above the competitive level since they too are faced with increasingly intensive competition.

(74) Lastly, it must be borne in mind that downward subsidisation of coal imports into Germany by RAG in order to squeeze out competitors would have negative repercussions on the sale of German-produced coal at RAG's expense. The total amount of subsidies is set for each year. Subsidies are granted only in order to offset the difference between RAG's production costs and the average price of coal imported into Germany. Consequently, any significant 'artificial' reduction of the price of imported coal would also increase the necessary amount of subsidy per tonne of German coal and would therefore, in view of the ceiling on the volume of subsidies, reduce the amount of domestic coal that could be sold. Any market share gains by RAG in imported coal would thus be eroded by sales losses in domestic coal.

(c) ***Summary on the increase in financial strength***

(75) It must therefore be concluded that, even on the basis of a hypothetical maximum value, determined on the basis of several worst-case assumptions, the increase in financial strength resulting from the merger would not be such as to strengthen RAG commercially to such an extent that it would be able to engage in anti-competitive behaviour within the meaning of Article 66(2) of the ECSC Treaty. It must be borne in mind here that an assessment of the possible increase in financial strength that includes full assessment of the risks involved in SWB's business activities may result in a substantially lower value.

V. **CONCLUSION**

(76) It is clear from the above considerations that the proposed merger notified does not give the undertakings concerned the power within the meaning of Article 66(2) ECSC to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market, or to evade the rules of competition instituted under the ECSC Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

(77) Since the conditions laid down in Article 66(2) of the ECSC Treaty are fulfilled, the notified merger can be authorised.

(78) This Decision concerns only the application of Article 66 of the ECSC Treaty and is without prejudice to any Commission decision concerning the application of other provisions of the EC Treaty or of the ECSC Treaty and the relevant secondary law, in particular the application of the provisions on the control of State aid,

HAS ADOPTED THIS DECISION:

Article 1

The acquisition by RAG Aktiengesellschaft of exclusive control of Saarbergwerke AG and Preussag Anthrazit GmbH is hereby authorised under Article 66(2) of the ECSC Treaty.

Article 2

This Decision is addressed to:

RAG Aktiengesellschaft
Rellinghauser Straße 1-11
D-45128 Essen.

Done at Brussels, 7 May 2002.

For the Commission
Mario MONTI
Member of the Commission