STATE AID

Germany

(2000/C 101/03)

(Text with EEA relevance)

(Article 88 of the Treaty establishing the European Coal and Steel Community)

Commission notice pursuant to Article 88 of the ECSC Treaty and Commission Decision No 3632/93/ECSC of 28 December 1993, addressed to the other Member States and other interested parties, concerning aid falling under the Community rules for State aid to the coal industry.

By the following letter, the Commission has informed the German Government of its decision to initiate the procedure provided for in Article 88 of the Treaty:

The possibility that State aid may have been involved in the merger of RAG AG and Saarbergwerke AG.

1. THE FACTS

The companies

1. At the end of 1997, hard coal production in Germany was carried out by three undertakings.

(a) RAG Aktiengesellschaft (RAG AG), a private sector company whose activities include indigenous and international hard coal mining, mine engineering, the marketing and trading of hard coal, the production of coke, power generation, district heating, chemicals and plastics, environmental protection technologies and services, and real estate. In 1997, 37.1% of RAG AG was owned by the holding company VEBA AG, 30.2% was owned by the largely publicly-owned electricity company VEW AG (via its subsidiary Beteiligungs-Gesellschaft für Energieunternehmen mbH), 12.7% owned by the steel producer Thyssen-Stahl AG, 10% owned by the holding company Montan-Verwaltungsgesellschaft mbH (majority owned by the steel company Krupp Hoesch Stahl AG) and 10% owned by the holding company Verwaltungsgesellschaft-Ruhrkohle Beteiligung mbH (majority owned by the steel company ARBED SA) (1).

RAG AG operated 13 underground hard coal mines at the end of 1997, all of which were situated in the Ruhr coal basin in the Land of North-Rhine Westphalia. Total production that year amounted to 38.7 million tce (2).

(b) Saarbergwerke AG, a public sector company whose activities included hard coal mining, the marketing and trading of hard coal, the production of coke, power generation, district heating, environmental protection, trading and services (including transport and oil distribution) and rubber manufacturing. Saarbergwerke AG was jointly owned by the Federal Republic of Germany (74%) and the Land of Saarland (26%), and in 1997 it operated three underground hard coal mines with a total annual production of 6.6 million tce.

(c) Preussag Anthrazit AG, a private sector company active in the production and marketing of coal products. It was wholly owned by the Hanover-based Preussag AG Group and operated one anthracite mine at Ilbenbüren with an annual production in 1997 of 1.7 million tce.

The coal compromise

2. On 13 March 1997, the Federal Government, the governments of the hard coal producing Länder of North-Rhine Westphalia and the Saar, the mining industry and the trade union federations reached an agreement on the future of hard coal subsidies for the period to 2005. This agreement, known as the "coal compromise" (Kohlekompromiß), was notified to the Commission by letter of 26 March 1998 as an amendment to the previous modernisation, rationalisation and restructuring plan notified on 29 April 1994 (3). The Commission analysed the amended plan for the period up to the expiry of Decision No 3632/93/ECSC (4) in July 2002 and found, by Decision 1999/270/ECSC (5) that it was compatible with the objectives and criteria of Decision No 3632/93/ECSC.

3. The agreement provided for a continuing reduction in annual production from 47 million tce in 1997 to 37 million tce in 2002 and a reduction in the number of operating mines from 17 to 12. It also allocated a total State aid package of DEM 68.16 billion for the period 1997 to 2005 inclusive, with a declining annual ceiling from DEM 8.91 billion for 1997 to 7.4 billion for 2002 and DEM 5.5 billion for 2005.

References:

(2) Tce: tonnes of coal equivalent.
4. The “coal compromise” specified that a total sum of DEM 2.5 million was made dependent upon RAG AG taking over Saarbergwerke AG. This breaks down to an annual amount of DEM 200 million between 1998 and 2005, paid by the Federal Government on behalf of Saarland, provided that its regional government transferred its 26 % share in Saarbergwerke AG to RAG AG. In addition, for 1998, 1999 and 2000, an additional annual amount of DEM 300 million would be paid from the Federal budget provided that RAG AG acquired the Federal Government's 74 % share in Saarbergwerke AG.

5. The subsidies to be paid by the Federal Republic of Germany under the “coal compromise” were enacted by the German Parliament in the “Law on the New Framework of Coal Subsidies” of 17 December 1997 (6).

The merger

6. By letter of 13 November 1997 RAG AG 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 GmbH.

7. By letter of 9 March 1998 the Federal Republic of Germany notified the Commission under Article 67 of the ECSC Treaty of the planned privatisation of Saarbergwerke AG by sale to RAG AG for a consideration of DEM 1. This letter indicated that the privatisation was an integral part of the “coal compromise” and part of an ongoing privatisation policy since 1983 to sell state holdings. Saarbergwerke AG was the last important mining activity to be privatised.

8. On 3 April 1998, the Federal Republic of Germany, the regional government of Saarland and RAG AG agreed to merge Saarbergwerke AG with RAG AG, privatising Saarbergwerke AG in the process. The companies' hard coal mining activities were to be merged to form a single company, Deutsche Steinkohle AG, controlled by RAG AG, to be joined on 1 January 1999 by Preussag Anthrazit GmbH. According to the information provided by the parties and by the Federal Republic of Germany, the aim was to permit supra-regional rationalisation and to ensure that the adjustment process took place under socially acceptable conditions, with the objective of ensuring a lastingly viable, efficient mining industry beyond 2005.

9. By decision of 29 July 1998, the Commission authorised, under Article 66 of the ECSC Treaty, the acquisition of Saarbergwerke AG and Preussag Anthrazit GmbH by RAG AG following a commitment by the companies involved to divest part of their hard coal import business and to structurally separate the remainder. In taking this decision, the Commission specifically indicated, in point 53, that the decision only concerned 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”.

Complaints

10. An action (7) was brought before the Court of First Instance of the European Communities on 25 January 1999 by the German company VASA Energy GmbH. This asked that the Court should declare that, by failing to examine the complaint made pursuant to Articles 92 and 93 of the EC Treaty which argued that the inclusion of Saarbergwerke AG's so-called “White sector” (all activities other than those related to indigenous coal) in the merger arrangements amounted to a State aid of some DEM 1 billion to the RAG AG group, and to adopt a decision on the basis of that examination within two months after receiving from the applicant, by letter of 15 September 1998, a formal request to that effect made in accordance with Article 232 (former Article 175) of the EC Treaty, the Commission has infringed Article 232 (former Article 175) of the EC Treaty.

11. An action (8) was brought before the Court of First Instance of the European Communities on 3 March 1999 by the United Kingdom coal producer RJB Mining asking that the Court should:

— annul the implied decision by which the Commission has refused to examine whether Germany has complied with Article 4(c) of the ECSC Treaty and the Code in respect of State aid inherent in, and conditional on, the merger,

— annul the implied decision by which the Commission has refused to examine the applicant's complaint dated 16 March 1998 that the aid inherent in, and conditional on, the merger is incompatible with Article 4(c) of the ECSC Treaty and the Code,

— annul the implied decision by which the Commission has refused to record the failure of Germany to comply with Article 4(c) of the ECSC Treaty and the Code, in respect of State aid inherent in, and conditional on, the merger.

State aid authorisations and notifications

12. By Decision 1999/270/ECSC (9) of 2 December 1998, the Commission authorised Germany to grant aid to the coal industry for 1998 amounting a total of EUR 4,787.7 million, of which EUR 2,667.3 million was under Article 3, EUR 1,606.9 million under Article 4 and EUR 513.5 million to cover inherited liabilities under Article 5.


13. By Decision 1999/299/ECSC (10) of 22 December 1998, the Commission authorised Germany to grant aid to the coal industry for 1999 amounting to a total of EUR 4 606.3 million, of which EUR 2 612.4 million was under Article 3, EUR 1 613.4 million under Article 4 and EUR 380.4 million to cover inherited liabilities under Article 5.

14. By letter of 28 September 1999, Germany notified the Commission, in accordance with Article 9(1) of Decision No 3632/93/ECSC of the aid it intends to grant to the coal industry in 2000.

II. THE VALUE OF SAARBERGWERKE AG

15. Saarbergwerke AG's coal activity, at the end of 1997, was concentrated on three underground hard coal mines and the Fürstenhausen coking plant. Ensdorf mine, traditionally the most productive in Germany, produced 2.5 million tce in 1997 and employed 2 231 people. The Warndt/Luisenthal mine produced 2.2 million tce in 1997 and employed 3 504 people. Finally, the Göttelborn/Reden mine produced 1.9 million tce and employed 2 899 people. It should be noted that the Fürstenhausen coking plant at Völklingen in the Saarland, which produced had an output of 520 000 tonnes of coke in 1997, was closed in June 1997 following on from the merger of Saarbergwerke AG with RAG AG.

16. Saarbergwerke AG's extensive non-coal activities, the so-called “White sector”, were split into four main groups: energy, environment, trade and services, and rubber. In detail:

Energy:
Saarbergwerke AG operated, in 1997, some 2 239 MW of electricity generating capacity:
- 33 % ownership of the Bexbach 772 MW hard coal-fired power station (commissioned 1982),
- 100 % ownership of the Weiher II 300 MW hard coal-fired power station (commissioned 1963/64),
- 100 % ownership of the Weiher III 707 MW hard coal-fired power station (commissioned 1982),
- 70 % ownership of the Völklingen 230 MW hard coal-fired power station (commissioned 1989),
- 100 % ownership of the Fenne III 230 MW hard coal-fired power station (commissioned 1989).

In addition, Saarbergwerke AG owned the district heating company Saarberg-Fernwärme GmbH, which had four operating subsidiaries involved in district heating and energy consultancy: Saarberg-Fernwärme Fürstenwalde GmbH (owned 100 %); Fernwärme-Verbund Saar GmbH (owned 74 %), Ilmenauer Wärmeversorgung GmbH (owned 49 %) and ESB Energierspar-und Betriebenge- sellschaft mbH (owned 25 %). Owning 345 MW of thermal capacity, it was advertised as operating one of the largest long-distance heat networks in Germany as well as supplying heat to the Saarlouis Ford plant.

Saarbergwerke AG also had a 25 % stake in Saar Ferngas AG, Saarland's main natural gas supply company.

Environment:
Saarbergwerke AG was the sole shareholder of Saarberg-Oekotechnik GmbH, a company specialising in the planning, financing, construction, project management and operation of waste disposal treatment installations, and which was one of the largest private operators of thermal treatment plants for residual waste in Germany. Apart from waste-to-energy plants, the company was also active in landfill, the decontamination of soil and closed areas, the disposal of industrial waste and energy engineering services.

Saarbergwerke AG was also the sole shareholder of SHU Saarberg Umwelttechnik GmbH, a company specialising in power station emissions control technology and of Saarwasser GmbH, the biggest provider of drinking water in Saarland with customers in some 18 towns and municipalities.

Trade and services:
Saarbergwerke AG was the sole shareholder of the trading holding company Saarberg Handel GmbH. This holding company owned Saarberg Coal International GmbH, an international coal trading company which distributed domestic and imported hard coal products in Germany, France, Belgium and Luxembourg and which had total sales in 1997 of 2.6 million tonnes. It also had a 50 % holding in Montana Energie-Handel GmbH & Co., which in 1997 marketed approximately 100 000 tonnes of imported coal in the Munich area as well as around 1 million tonnes of petroleum products. The remainder of Saarberg Handel GmbH’s holdings were concentrated in the mineral oil business, with 50 % holdings in ELF Mineralöl Berlin GmbH, TOTAL Mineralölvertrieb GmbH and FINA Luxembourg S.A. and the sole ownership of the Berlin-based Saarberg Tanklagergesellschaft oil storage company. It also a 50 % holding in Saarberg Bio-Energie Handelsgesellschaft mbH.

Among the service companies owned by Saarbergwerke AG was SaarTech GmbH specialising in mining, industrial and coke-making technologies; SaarProjekt GmbH specialising in the development of industrial and residential sites, landscaping, forestry, the purchase and sale of real estate and estate agent services; Industrie-Ring Sach- und Versicherungsmittelsgesellschaft mbH, an independent insurance broker; and TÜB Gesellschaft für technische Überwachung und Beratung mbH specialising in inspection and approval services for industry and for public authorities. It also had a 50 % holding in the information technology service company SaarTech GmbH.

Rubber:

Saarbergwerke AG was the sole shareholder of Saar-Gummiwerk GmbH, a company specialising in the production of industrial rubber products for the automobile and automobile part industry, the construction industry, railway track superstructure and for the shoe industry. It employed some 1,700 people and owned 100% of SaarGummi Iberica SL in Spain and 50% of Gold Seal SaarGummi India Ltd. It was advertised as one of the top European companies in the field of synthetic rubber processing for the construction and automotive industries.

17. By letter of 11 March 1998, the German authorities provided some information about the intended privatisation of Saarbergwerke AG. By letter of 23 March 1998, the Commission requested additional information on the sale. This information request was answered by letters of 15 and 20 April 1998. By letter of 25 June 1998, the German authorities presented the Commission with the executive summary of a report on a restructuring concept for Saarbergwerke AG (11). This report had been completed in January 1996 by the management consultant Roland Berger and Partner GmbH at the request of the Federal Republic of Germany, the majority shareholder of Saarbergwerke AG.

18. By letter of 10 July 1998, the German authorities presented the Commission with an evaluation (12) of sector wide solutions for the German hard coal industry that had been completed in March 1996, as well as a short report (13) dated 9 July 1998 purporting to be an updated valuation of Saarbergwerke AG. Both of these reports had been prepared by the management consultant Roland Berger and Partner GmbH at the request of the Federal Republic of Germany, the majority shareholder of Saarbergwerke AG. The March 1996 report (14) indicated that synergies achieved by merging the coal activities of Saarbergwerke AG with RAG AG could be worth roughly DEM 25 million to DEM 40 million per year in the medium to long term.

19. The information presented to the Commission by the German authorities did not specify a value for the so-called “White sector” (all activities other than those related to indigenous coal) of Saarbergwerke AG. However, Vasa Energy GmbH, in its action (15) before the Court of First Instance of the European Communities of 25 January 1999, included further pages from the report on a restructuring concept for Saarbergwerke AG by Roland Berger and Partner GmbH of January 1996 that had been presented to the German authorities, but which the latter had not passed on to the Commission. The second indent of page 63 of the full January 1996 report estimated the value of the so-called “White sector” at around DEM 1 billion (16).

20. The short update report of 9 July 1998 indicated that the mining activities had a negative, non-quantifiable, corporate value given that there would be no opportunity to make a profit, but that there would be a risk of losses over the whole period of the subsidy system up to 2005. In addition, the report highlighted that there would be political, non-quantifiable risks from 2002, due to the expiry of the ECSC Treaty, and from 2005 as no political indication had yet been given on the extent and duration of subsidies on a national level after this date.

III. APPLICABLE LAW

21. Article 86 of the ECSC Treaty requires Member States to ensure fulfilment of the obligations resulting from decisions and recommendations of the institutions of the Community and to facilitate the performance of the Community’s tasks. It also stipulates that Member States undertake to refrain from any measures incompatible with the common market referred to in Articles 1 and 4.

22. At issue might be the non-notification by the Federal Republic of Germany of aid to the Community coal sector.

Legal framework for State aid to the coal industry

23. Article 4(6) of the ECSC Treaty lays down the principle that subsidies or aids granted by Member States are incompatible with the common market for coal and steel. However, the Commission has recognised that structural changes on the international and Community energy markets since the early 1960s has forced the coal industry in the Community to make major modernisation, rationalisation and restructuring efforts. In combination with the more recent competitive pressures from natural gas, nuclear and coal imported from outside the Community, many coal undertakings in the Community are in financial difficulties and require significant amounts of State aid.


(15) Case T-29/99 (see footnote 7).

24. Since 1965 the Commission has established a series of framework decisions temporarily providing for State aid to be granted to the coal industry subject to prior notification to, and authorisation from, the Commission. These framework decisions have clearly laid down the objectives and principles under which State aid may be considered by the Commission.

25. Decision No 3632/93/ECSC contains the Community rules for State aid from Member States to the coal industry for the period from 1 January 1994 to the expiry of the ECSC Treaty on 23 July 2002. This decision, invoked under the first paragraph of Article 95 of the ECSC Treaty, provides the temporary framework for exempting specific State aid, under strict criteria, from the provisions of Article 4(c) of the ECSC Treaty.

26. Article 1 paragraph 1 of Decision No 3632/93/ECSC provides that all aid to the coal industry granted by Member States or through State resources in any form whatsoever may be considered Community aid and hence compatible with the proper functioning of the common market only if it complies with Articles 2 to 9 of the Decision. Article 1(2), (3) and (4) define what is to be considered to be State aid, including:

— any direct or indirect measure or support by public authorities linked to production, marketing and external trade which, even if it is not a burden on public budgets, gives an economic advantage to coal undertakings by reducing the costs which they normally have to bear (Article 1(2));

— aid elements contained in financing measures taken by Member States in respect of coal undertakings which are not regarded as risk capital provided to a company under standard market-economy practice (Article 1(4)).

27. Article 2 paragraph 1 of Decision No 3632/93/ECSC establishes the conditions under which aid may be considered by the Commission. It must help to achieve at least one of the following objectives:

— to make, in the light of coal prices on the international market, further progress towards economic viability with the aim of achieving a deflation of aids;

— to solve the social and regional problems created by the total or partial reductions in the activity of production units;

— to help the coal industry adjust to environmental protection standards.

28. Article 2(2) of Decision No 3632/93/ECSC establishes the principle that, by the end of 1996 at the latest, all State aid must be entered in the public budget, or channelled through strictly equivalent mechanisms, in order to increase transparency.

29. Article 3 of Decision No 3632/93/ECSC provides for operating aid to cover, at most, the difference between production costs and the selling price freely agreed between the contracting parties in the light of the prevailing conditions on the world market. The undertakings receiving aid must be included in a modernisation, rationalisation and restructuring plan for the period 1994 to 2002 submitted by the Member State concerned.

30. Article 4 of Decision No 3632/93/ECSC provides that the granting of such aid to undertakings which are unable to attain the minimum conditions of viability laid down in Article 3 paragraph 2 of the Decision may be considered if it is linked to a closure plan for the undertakings or production units concerned. The closure deadline may, on exceptional social and regional grounds, occur after July 2002 provided that there has been a significant reduction in capacity by that date.

31. In its judgment in case T-110/98 (17), the Court of First Instance clearly confirmed that aid may only be authorised under Article 3 of Decision No 3632/93/ECSC pursuant to the first objective of Article 2(1) of the Decision, and that any aid for helping to achieve solve social and regional problems or adjusting to environmental protection standards could not be authorised under Article 3 of the Decision. The same judgment also addressed the issue of improving economic viability by reducing production costs, the prerequisite for aid to be considered under Article 3 of the Decision. The Court concluded that “by expressly providing that that reduction must improve the 'viability' and not only the economic 'situation' of the undertakings concerned, the legislature expressed the idea that a reduction in production costs which is insignificant, or indeed purely symbolic, is not sufficient to justify authorisation of operating aid to those undertakings. It is not possible seriously to imagine an improvement in the competitiveness of the Community coal sector if the reduction in production costs is insignificant in economic and financial terms” (18).

(17) Paragraph 109 of the judgment of the Court of First Instance in case T-110/98 on 9 September 1999.

(18) Paragraph 106 of the judgment of the Court of First Instance in case T-110/98 on 9 September 1999.
Article 8 of Decision No 3632/93/ECSC provides the procedural rules for the submission of the restructuring plans for those Member States which intend to grant operating aid to the coal sector, for the examination of these plans and their acceptance by the Commission. Article 9 of Decision No 3632/93/ECSC provides the procedural rules for the annual submission of aid notifications. Article 9(1) requires the Member State concerned to send the notification by 30 September each year (or three months before the measures enter into force) at the latest, for all the financial support that they intend to grant to the coal industry in the following year. By the 30 September each year at the latest, Member States are also required to notify to the Commission the amount of aid actually paid in the preceding year.

IV. ANALYSIS OF THE POSSIBLE STATE AID ASPECTS OF THE MERGER

In privatising Saarbergwerke AG, the Federal Republic of Germany opted for private negotiations with nominated private sector German companies. An open tender procedure might have had the advantage of permitting the market to place a commercial value on Saarbergwerke AG either as a whole or in respect of its separate components.

In its letter of 9 March 1998 notifying the Commission of the planned privatisation of Saarbergwerke AG, the Federal Republic of Germany indicated that a number of specific conditions made the process of finding a buyer problematic:

— the buyer must acquire a group whose share capital has shrunk through carrying forward of losses to around 65% of its nominal value;

— the buyer must assume liability with all his assets for the coal area;

— future profit risks, in particular in the light of the reduction in subsidy as well as the uncertainty in coal policy due to the expiry of the ECSC Treaty in 2002 and the coal policy agreements in 2005, must be assumed by the buyer;

— even in the opinion of neutral experts, the necessary development towards a stable profit situation in the various sectors of the investment area requires urgent capital input by the new owner.

The letter also indicated the factors determining the price of DEM 1:

— The Saarbergwerke group continues to be involved in the highly subsidised area of coal mining. The current subsidy arrangements last until 2005, while the ECSC subsidy regime is only valid to 2002. The great uncertainty from 2002 onwards that results from this alone entails considerable risk for any buyer, which has a decisive negative effect on the capitalised income value of Saarbergwerke AG.

— The national subsidy scheme does not allow profit but rather provides an ever-greater burden of risk for the company. The company has incurred considerable losses in previous years from coal activities.

— The non-coal activities of the Saarbergwerke AG must achieve above-average returns in order to provide an attractive overall consolidated result, which is a requirement for a positive company valuation.

The letter notes that RAG AG can accept the sale price of DEM 1 because the agreement was concluded against the background of the decisions of the Federal Government on coal subsidy and national rationalisation which only has value for RAG AG, the main operator on the market. It also notes a number of conditions that the Government has imposed upon RAG AG, including the obligation to mobilise all its assets if there is a danger of insolvency in the mining area and a ban on the distribution of profits to shareholders during the whole subsidy period.

The German authorities also highlighted the obligation of RAG AG to cover losses from the mining operations until the year 2000 and to transfer, in the years 2001 to 2005, DEM 200 million annually from the “White sector” to the coal activities. If the “White sector” does not generate enough funds to provide the DEM 200 million annually, the public authorities will provide the difference. For this guarantee RAG AG will pay a premium. Payments under the guarantee will have to be compensated by RAG AG with later profits from the “White sector”. However it should be noted this obligation, agreed in the “coal compromise” of March 1997, was a general measure concerning the coal and non-coal operations of RAG AG as it was constituted at that time and not linked to, or dependent upon, the merger and therefore cannot justify the price paid for Saarbergwerke AG.

The price of DEM 1

The Commission considers that the letter notifying the privatisation could indicate that the Federal Republic of Germany takes the view that the token price of DEM 1 paid by RAG AG for Saarbergwerke AG was due to perceived financial risks associated with:

— future political decisions with respect to the restructuring of the German coal industry,
— the uncertain continuing availability of financial support from the Government, both after 2002 and after 2005,

— and the risk of fluctuations of world market prices, which serves as the benchmark for calculating the subsidy amounts per tonne of coal. Any drop in international prices, in the absence of productivity improvements in Germany, increases the amount of subsidy required per tonne.

Since the value of the “White sector” is given in the evaluation of Roland Berger and Partner GmbH at around DEM 1 billion, the negative value of the coal activities, due to the aforementioned financial risks, could also be estimated at DEM 1 billion, given the overall sale price of DEM 1. Should this be the view of the Federal Republic of Germany, the Commission would consider that this could constitute a non-notified aid to the Community coal industry, as defined in Article 1(2) and (4) of Decision No 3632/93/ECSC.

### Operating aid

37. The Commission is of the view that such non-notified aid may not match the objectives and criteria specified in Decision 3632/93/ECSC for operating aid. As provided for under Article 3(1) of Decision No 3632/93/ECSC, all necessary operating aid has already been approved by the Commission for 1997, 1998 and 1999 (19). For the period 1999 to 2005 (which extends beyond the date of expiry of the ECSC Treaty), Germany has already indicated in the “coal compromise” that it intends to grant substantial financial support to cover the difference between the production costs and the selling price freely agreed between the contracting parties in the light of the conditions prevailing on the world market.

38. The “coal compromise” and the subsequent “Law on the New Framework of Coal Subsidies” of 17 December 1997 do not specify fixed quantities of coal to be delivered to the power and steel sectors, but to confirm that the State aid foreseen is an “appropriate contribution” to cover the difference between production costs and market prices. Since quantities are not guaranteed, uneconomic production can be curtailed by RAG if the total aid package of DEM 68,15 billion allocated for the period 1997 to 2005 proves insufficient. This was recognised by the Federal Republic of Germany in their complementary notification of 22 October 1997 on aid for 1997, when they indicated that the mines could only compensate for any insufficiency of State aid by reducing production (20).

39. The press release (21) issued by the Federal Republic of Germany at the time of the “coal compromise” indicated that this compromise will “help to preserve a viable and economically acceptable mining industry” (22). The aim, stated in the information provided to the Commission by the companies and by Germany in the context of the merger notification, is that, as a result of the planned merger and the State aid that has been promised, the politically desirable process of adjustment in the German hard coal industry will take place under socially acceptable conditions and a lastingly viable, efficient mining industry will be ensured beyond 2005. Of the seventeen pits then in operation, ten or eleven, producing some 30 million tonnes of coal a year and employing 36 000 people, should have a long-term future. This approach would then appear to be consistent with the notification by Germany of operating aid for these mines under Article 3 of Decision No 3632/93/ECSC.

40. This viability of the indigenous coal industry after 2005 would, however, appear to be in contradiction to the unquantified risks which appear to be indicated in the most recent notification from the Federal Republic of Germany concerning the privatisation of Saarbergwerke AG. This notification indicated that these risks were of such a magnitude as to justify the sale price of DEM 1 of assets evaluated by Roland Berger and Partner GmbH in January 1996 at some DEM 1 billion (which excludes the synergies that have been estimated at between DEM 25 billion and DEM 40 million per annum).

### Criteria for non-operating aid

41. The Commission is also of the view that, if it is the case that such non-notified aid to the coal industry would have been given, it may not match the objectives and criteria provided for in the remaining articles of Decision No 3632/93/ECSC for the following reasons:

— Aid to cover potential future risks cannot be considered as aid to cover exceptional costs, as provided for under Article 5 of Decision No 3632/93/ECSC. Exceptional costs are defined as those arising from or having arisen from the modernisation, rationalisation or restructuring of the coal industry which are not related to current production (inherited liabilities).

(19) Respectively:
Commission Decision 1999/270/ECSC of 2 December 1998 (see footnote 9);
(20) Notification from the Federal Republic of Germany of 22 October 1997; section II Angabe der Nettoerträge der Unternehmen ohne Beihilfe, second paragraph, fourth indent.
(22) Paragraph 4 of the press release
— Decision No 3632/93/ECSC also provides that aid may be authorised for research and development (Article 6) and for environmental protection (Article 7). These are clearly not appropriate for the possibly non-notified aid in question.

42. Since Decision No 3632/93/ECSC lays down the objectives and criteria under which the complete ban on State aid provided for in Article 4(c) of the ECSC Treaty can be derogated, State aid which falls outside the provisions of this Decision is automatically prohibited. In this situation, a derogation can only be possible by recourse to Article 95 of the ECSC Treaty, which is also the legal basis for Decision No 3632/93/ECSC. This would necessitate the aid being subject to a Commission decision with the unanimous assent of the Council.

V. CONCLUSIONS

43. The examination of the notifications from the Federal Republic of Germany and the analysis subsequently carried out by the Commission gives it reason to believe that non-notified aid, which could total up to DEM 1 billion for the benefit of RAG AG could possibly have been involved in the privatisation of Saarbergwerke AG.

44. In order to respect the right of defence, the Commission hereby calls upon the Federal Republic of Germany to provide, in the month following receipt of the present letter:

— a detailed and quantified economic evaluation of the risks involved for RAG AG in acquiring Saarbergwerke AG,

— a detailed commercial and financial evaluation of each of the subsidiary companies in the Saarbergwerke AG group at the time of the merger together with the expected future cash flows,

— a detailed commercial and financial evaluation of the synergies available to Deutsche Steinkohle AG in acquiring the coal producing activities of Saarbergwerke AG,

— an explanation as to why the price of DEM 1, paid by RAG AG for Saarbergwerke AG, was not notified as State aid to the coal sector as defined under Article 1 paragraphs 2 and 4 of Decision No 3632/93/ECSC if the Federal Republic of Germany considered this to be risk insurance for RAG AG.

The Commission wishes to stress that no new elements may be presented subsequently.

45. 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 coal sector, and given that such aid does not match the objectives and criteria of Decision No 3632/93/ECSC, the Commission will examine the aid in the context of Article 4(c) ECSC and in the light of the three decisions already taken under the provisions of Decision No 3632/93/ECSC for the years 1997, 1998 and 1999, and the notification received for the year 2000.

46. 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.' The Commission hereby invites the other Member States and interested parties to send their comments on this matter within one month of the date of publication of this notice to the following address:

European Commission,
Directorate-General Energy and Transport,
Directorate C,
Rue de la Loi/Wetstraat 200,
B-1049 Brussels.
Fax (32-2) 296 43 37

The comments will be communicated to the Federal Republic of Germany.