

## COMMISSION DECISION

of 30 March 1989

authorizing the agreements on supplies of solid fuels to six steelworks by  
Ruhrkohle AG

(Only the German text is authentic)

(89/248/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 65 thereof,

Having regard to the application submitted by Ruhrkohle on 4 November 1988 in its own name and in the name of the steelworks concerned,

Whereas :

## I. THE FACTS

## A. Steelworks agreement 1969

- (1) With effect from 1 January 1969, Ruhrkohle AG (RAG) concluded with the steelworks Salzgitter Hüttenwerk AG, Hoesch AG, Fried. Krupp Hüttenwerke AG, Ilseder Hütte, August Thyssen-Hütte AG, Mannesmann AG, Rheinische Stahlwerke and Klöckner-Werke AG supply agreements in which the steelworks undertook to obtain their solid fuel requirements for their plants in the common market from RAG. In the agreements, RAG undertook to supply such requirements (steelworks agreements).
- (2) The steelworks agreements were part of the measures which were taken in 1969 by 23 German mining companies in agreement with the Government of the Federal Republic of Germany and which led to the establishment of RAG. The relevant undertakings (parent companies) gave up their mining assets and transferred them to RAG, in return for which they acquired shares in RAG in proportion to the value of the physical fixed assets transferred to it. In the case of the mining companies which, at the time when RAG was established, also operated steelworks, the giving-up of their mining assets meant that they lost their own coal supply used in their steel production. So as to ensure the continuation of these traditional links in the manner and to the extent that they would have developed without the transfer of mining assets to RAG, identical steelworks agreements were concluded between RAG and the relevant parent companies.

- (3) The main provisions of the agreements are as follows: RAG charges such customers a contract price determined in accordance with a uniform procedure. The contract price takes account of the fact that imports of cheap coking coal into the Federal Republic from outside the Community are restricted by law. Consequently, so as to avoid competitive disadvantages for the parties to the steelworks agreements *vis-à-vis* the steel industry in other Community countries, the contract price is set in such a way that it results in cost prices for the parties to the steelworks agreements that are equivalent to the cost prices they would have had to pay if they too imported coal from outside the Community. The same applies in the case of blast-furnace coke taking account of processing costs in the coke-ovens. Both sides start from the assumption in these arrangements that the difference between RAG's production costs and the competitive price is covered by State aid. RAG has reserved the right to operate the steelworks agreements appropriately if the system for covering the difference between production costs and the competitive price through aid no longer applies or is no longer sufficient to cover the total amount. Coking coal supplies would be reduced or cease whereas coke supplies would continue with coke made from third-country coal.

RAG is required to grant the parties to the agreements most-favoured-customer treatment.

The steelworks must not have coking carried out against payment by other undertakings or hire any coking capacity. They must clear the creation or extension of their own coking capacity with RAG and reach agreement with RAG on any financial consequences resulting from this.

- (4) The steelworks agreements were concluded for a period of 20 years and could be terminated only on 31 December 1988, subject to five years' notice being given. They were to be extended by a year at a time if notice to terminate was not given five years before their expiry.
- (5) When RAG was set up, the steelworks agreements formed an integral part of the merger plan which was authorized by the Commission on 27 November 1969 under Article 66 (2) of the Treaty.

- (6) During the period covered by the agreement, from 1969 to 1988, patterns of ownership in the relevant steelworks have undergone some changes. The steelworks at present bound by the steelworks agreement are the following undertakings:

Krupp Stahl AG, Bochum,  
Mannesmann AG, Düsseldorf,  
Thyssen Stahl AG, Duisburg,  
Stahlwerke Peine-Salzgitter AG, Salzgitter,  
Hoesch Stahl AG, Dortmund,  
Klöckner Stahl GmbH, Duisburg.

- (7) Depending on the fluctuations in the cyclical situation, the steelworks agreement governs some 16 to 18 million tonnes (coal equivalent) of demand for coking coal and coke of the steel industry in the Federal Republic of Germany.

#### B. Follow-up agreement to the steelworks agreement

- (8) The application submitted by the parties concerned is aimed at repealing the agreed rules governing termination of the steelworks agreement and adopting an amended form to 31 December 2000.
- (9) In the new steelworks agreement (follow-up agreement to the steelworks agreement), the steelworks' exclusive procurement obligation (100 % of their requirements) is dropped. The steelworks additional right to purchase, to a limited extent, from other sources is set out in Annex 1 to the follow-up agreement and in an interpretation declared by RAG to be binding in this respect. Under this, the parties to the agreement are free to obtain special fuels and solid fuels other than coal or coal products (e.g. petroleum coke and pulverized lignite) from other sources. The steelworks are merely required in this respect to afford RAG the opportunity of making a counter-offer, which they do not have to accept, even if it is technically and economically equivalent to the other offer.
- (10) RAG is also in one other respect no longer the sole supplier of the steelworks which are parties to the agreement, since it has concluded an agreement with the mining company Auguste Victoria, under which Auguste Victoria may throughout the entire period covered by the follow-up agreement supply to RAG limited amounts within the framework of the follow-up agreement and subject to its conditions, for supply to the steelworks.
- (11) The follow-up agreement to the steelworks agreement is for a period of 12 years and will be renewed by tacit agreement by one year each year if notice is not given to terminate it four years before it is due to expire.
- (12) In the follow-up agreement to the steelworks agreements it is foreseen that a subsequent change

in the situation, such as that which could result from a decision of the Commission of the European Communities or other decisions, could render the execution of the contract impossible. It is also foreseen that the system whereby the differences between the cost of production and competitive prices is covered by State aids could be modified. The contract, *inter alia*, thus takes into account the fact that Commission Decision No 2064/86/ECSC of 30 June 1986 establishing Community rules for State aid to the coal industry<sup>(1)</sup> will expire on 31 December 1993 and that no forecasts regarding a possible follow-up decision can be made.

## II. LEGAL ASSESSMENT

### Article 65 (1)

- (13) Article 65 (1) prohibits certain types of anticompetitive agreements and practices. The agreements concluded by RAG and the relevant steelworks meet the criteria laid down in Article 65 (1) for prohibition for the following reasons:

RAG and the parties to the agreements are undertakings within the meaning of Article 80 of the Treaty.

Normal competition is restricted by the fact that the fact that the steelworks which are parties to the agreements must acquire solely from RAG all solid fuels except special fuels and except solid fuels other than coal or coal products.

RAG prevents the steelworks from producing blast-furnace coke through the provision prohibiting them from having coking carried out against payment by other companies or hiring coking capacity. RAG also influences the steelworks' decisions regarding their investment in the expansion and creation of their own coking capacity, by requiring them to agree with it on periods of notice and the offsetting of any financial consequences arising for it.

In addition, the steelworks which are parties to the agreements have agreed with RAG on a price formation process which, in conjunction with most-favoured-customer treatment results in mutually coordinated prices. The right to most-favoured-customer treatment allowed them by RAG also influences RAG's price formation process in relation to other steelworks in the Community.

- (14) The agreements concluded by RAG and the steelworks which are associated with the application are therefore prohibited under Article 65 (1).

<sup>(1)</sup> OJ No L 177, 1. 7. 1986, p. 1.

**Article 65 (2)**

- (15) However, the Commission may, under Article 65 (2), authorize specialization agreements, joint buying or joint selling agreements, and strictly analogous agreements in respect of particular products, provided the conditions set out are fulfilled.
- (16) The agreement concluded by the parties in accordance with the principles of the follow-up agreement to the steelworks agreement is strictly analogous to an agreement within the meaning of the said paragraph, and in particular with a view to rationalization and joint buying.
- (17) RAG supplies the steelworks which are parties to the agreement with coking coal or with blast-furnace coke, or with both products, depending on the extent to which such steelworks have coking capacities of their own. Within the framework of the contractually agreed amounts, though subject to the order situation in the steel industry and bearing in mind substitution possibilities indicated in point 9, the follow-up agreement to the steelworks agreement allows RAG to ensure long-term planning of its production of coking coal and blast-furnace coke. Because of the high capital costs in mining and the unsatisfactory profit situation that has existed for decades because of competition from non-Community coal and other forms of energy, but also because of strongly declining demand in the various sectors of consumption, the mining companies must endeavour to adjust their capacities to sales as far as possible. They must however, in the Federal Republic of Germany, simultaneously take care to ensure that their capacity for supplying coking coal is sufficient to cover in full the requirements of the steelworks, since the German steelworks do not in principle have any alternatives in procuring the fuels they require. This is due firstly to the fact that the import of coking coal from non-Community countries into the Federal Republic except for use in a coastal coking plant (some 2 % of consumption in the Federal Republic of Germany) is restricted and secondly to the fact that suitable Community coal (coking coal) is not available to the steelworks that are parties to the agreement at a competitive price, either because of the other Community producer countries' own requirement for such coal or because of the high subsidy requirement. Long-term agreements on as large a proportion as possible of the total requirements of the steelworks that are parties to the agreement therefore help to secure their supplies and at the same time to minimize RAG's production costs. The agreement therefore makes for a substantial improvement in the production of coking coal and blast-furnace coke.
- (18) The follow-up agreement to the steelworks agreement is not more restrictive than is necessary for achieving the abovementioned improvement in production and supplies. The newly introduced relaxation of the steelworks' obligation to procure their requirements from RAG allows, to a limited extent, other suppliers to have access if they can make competitive offers.
- (19) Nor does the agreement enable the parties concerned to determine prices for the products in question. The contract price is determined by factors which lie outside the sphere of influence of RAG and the parties to the agreement, namely the prices of coal imported from non-Community countries and the extent of the aid intended to cover the difference between RAG's costs and revenue.
- (20) The restriction of blast-furnace coke production by the agreement is not such as to involve a substantial part of blast-furnace coke production in the common market. When RAG was set up, the steel-producing parent companies that operated their own coking plants retained them, while the other mining companies transferred theirs together with their coal mining to RAG. This procedure is covered by the Commission Decision of 27 November 1969. Coking capacities at that time were appropriate to the circumstances when RAG was established and to the taking-over of its supply obligation for blast-furnace coke under the steelworks agreement. It is normal that such plants should be maintained and renewed over periods of more than 20 years. Furthermore, the trend in the steelworks' requirements of blast-furnace coke during the period covered by the steelworks agreement has tended to be downwards. Consequently, only minor importance is to be attached to the possible restriction in the production of their own coke which is imposed on the steelworks through the follow-up agreement to the steelworks agreement.
- (21) The question of whether the parties concerned, in particular RAG, are shielding themselves against effective competition from other undertakings within the common market through the agreement must be answered in the negative in view of the factors set out in point 17 regarding the producers of coking coal and of blast-furnace coke produced from Community coal. However, this question must also be put with regard to the suppliers of coal which the steelworks in certain circumstances use in addition to coking coal (sinter coal) and of blast-furnace coke produced from non-Community coal.

(22) Blast furnace works need sinter fuels, either low volatile coal (not coking coal) or coke (coke breeze), in order to transform fine ore before it is placed in the blast furnace into sinter of appropriate size. The steelworks decide for or against one or other type of fuel in the light of their technical requirements. The parties to the steelworks agreements accordingly reject the use of coal for sinter purposes. In their experience, the volatile components of coal may form tars which condense in the electrostatic filters situated after the sintering plants and could lead to fires there. They therefore use only coke breeze. This is produced in their own coking plants in so far as they produce blast-furnace coke themselves, i.e. in the case of four of the six steelworks. The coke breeze tonnages which the other two undertakings must according to the agreement obtain from RAG are of an insignificant level.

Community coking plants that wished to supply blast-furnace coke produced from non-Community coal to the undertakings bound by the follow-up agreement to the steelworks agreement would have to fulfil two conditions. They would have to have capacity available and purchase the non-Community coal at prices that are lower than those which RAG in accordance with the agreement takes as the reference for alignment. These conditions can, under the circumstances known to the Commission, be fulfilled consistently only in the case of marginal amounts or for spot supplies. For reasons of the homogeneity of the blast-furnace coke required and with a view to ensuring security of supplies, the steelworks that are parties to the agreements are interested in neither alternative.

The agreement does not therefore give the undertakings concerned the power to shield themselves against effective competition from other undertakings within the common market.

- (23) The Commission considers it necessary to restrict the authorization for the notified agreement to the period until 31 December 1997, which is a sufficiently long time to allow the planning described in point 17.
- (24) Subject to this restriction in time, the agreement meets the conditions for authorization under Article 65 (2) and can therefore be authorized.
- (25) As pointed out in points 3 and 12, the agreement itself shows that its operation is largely dependent

on the granting of State aid. The authorization and in particular duration of this agreement in no way prejudices any future Commission decision concerning State aids. In addition, any change in circumstances may make appropriate a review of the authorization under the fourth subparagraph of Article 65 (2) of the Treaty.

- (26) This Decision is without prejudice to the Commission's evaluation of investment programmes pursuant to Article 54 of the Treaty establishing the European Coal and Steel Community,

HAS ADOPTED THIS DECISION :

*Article 1*

The agreement concluded by Ruhkohle AG and the steelworks Krupp Stahl AG, Mannesmann AG, Thyssen Stahl AG, Stahlwerke Peine-Salzgitter AG, Hoesch Stahl AG and Klöckner Stahl GmbH on the supply and procurement of solid fuels is hereby authorized.

*Article 2*

This Decision is addressed to the following undertakings :

Ruhrkohle AG, Essen ; Krupp Stahl AG, Bochum, Mannesmann AG, Düsseldorf, Thyssen Stahl AG, Duisburg, Stahlwerke Peine-Salzgitter AG, Salzgitter, Hoesch Stahl AG, Dortmund and Klöckner Stahl GmbH, Duisburg.

*Article 3*

This Decision shall take effect on the day of its notification to the undertakings concerned. It shall have effect until 31 December 1997.

Done at Brussels, 30 March 1989.

*For the Commission*

Sir Leon BRITTAN

*Vice-President*