COMMISSION

COMMISSION DECISION

of 28 February 1996

authorizing the acquisition by Ruhrkohle Handel GmbH of control of Raab Karcher Kohle GmbH

(Case No IV/ECSC.1147-Ruhrkohle Handel/Raab Karcher Kohle)

(Only the German text is authentic)

(Text with EEA relevance)

(96/471/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 66 thereof,

Having regard to Decision No 24/54 of 6 May 1954 laying down in implementation of Article 66 (1) of the Treaty, a Regulation on what constitutes control of an undertaking [1],

Having regard to the proposal, notified on 15 November 1994, for the acquisition by Ruhrkohle Handel GmbH of the entire share capital of Raab Karcher Kohle GmbH,

Having consulted the Government of the Federal Republic of Germany,

Whereas:

I. THE PARTIES

(1) Ruhrkohle GmbH, Düsseldorf ('RH') is a wholly-owned subsidiary of Ruhrkohle Beteiligungs-GmbH, which in turn is a wholly-owned subsidiary of Ruhrkohle AG. Ruhrkohle Beteiligungs-GmbH is the holding company for those of Ruhrkohle AG's interests which do not involve the production of coal or coke.

(2) RH is active in the fields of trade in solid fuels (hard coal, hard coal briquettes, coal coke and brown coal), trade in mineral oil, vehicle servicing and building technology. The coal business includes domestic and international trading with customers in industry and the wholesale trade and with private householders. Coal processing (for special grades of coal) is also carried on. In 1994 RH achieved a total turnover of DM 3,82 billion, of which some two thirds was in Germany and one third in the rest of Western Europe. The trade in coal business turned over DM 2,67 billion. RH employs 1 960 people, including approximately 400 in coal-related activities.

(3) Ruhrkohle AG, Essen, ('RAG') is primarily active in the mining of hard coal and the production of coke, and distributes both products either direct or through RH and other traders. Accounting for over 80 % of domestic hard coal production, RAG is by far the largest German mining company. RAG also has interests in the fields of electricity generation, chemicals and plastics, waste treatment, mining technology and real estate. In 1994 RAG's turnover came to DM 22,5 billion, of which DM 22,4 billion was achieved in Germany. Of this total, DM 13,1 billion was earned from mining and DM 12,4 billion from the activities of the other group companies. Of RAG's total workforce of 111 000, 87 000 are still employed in mining (1969: 183 000). RAG's shares are held by five shareholders (partly through joint ventures with co-proprietors): VEBA (approximately 39,2 %), VEW (30,2 %), Thyssen (12,7 %), Krupp-Hoesch (8 %) and Arbed SA (6,5 %); own holding: 3,5 %.

[1] OJ of the High Authority No 9, 11. 5. 1954, p. 345.

(4) Raab Karcher Kohle GmbH, Essen, ('RKK') ties together the coal trading activities of Raab Karcher AG, a member of the VEBA group. In 1994 the company employed just over 700 people (1993: 1 209) and achieved a turnover of DM 1,29 billion (1993: DM 1,59 billion). Of this total, DM 1,18 billion was earned in Germany and DM 113 million in other Member States.

(5) RH (like RAG) and RKK market hard coal, an ECSC product, and are therefore undertakings within the meaning of Article 80 of the ECSC Treaty.

II. THE PROPOSED TRANSACTION

(6) RH proposes to acquire all the shares in RKK from Raab Karcher AG. This will result in a 'concentration' within the meaning of Article 66 of the ECSC Treaty.

III. THE CONCENTRATION

(7) By acquiring all the capital and voting rights in RKK, RAG (through RH) will gain direct control of RKK. This constitutes an acquisition of control within the meaning of High Authority Decision No 24/54 and hence a concentration within the meaning of Article 66 (1) of the ECSC Treaty.

(8) This finding is not invalidated by the fact that RKK, as the undertaking being taken over, has hitherto belonged indirectly to VEBA AG and that VEBA is the largest shareholder in RAG (VEBA has a 39,2 % stake in RAG and about 40 % of the voting rights at the general meeting). In the light of RAG's articles of association and the rules of procedure of its executive board and supervisory board, it cannot be said that VEBA exercises sole control over RAG and that the proposed acquisition of RKK is accordingly an internal company matter which does not have to be notified. Instead, RAG's general meeting, executive board and supervisory board each take decisions by a simply majority in all cases (paragraphs 6 (2), 11 (3) and 21 (3) of the articles of association; paragraph 13 (7) of the rules of procedure of the executive board). This also applies to matters of fundamental importance such as questions to do with the corporate strategy of the whole undertaking, the safeguarding of shareholders' rights in subsidiaries, etc. (paragraph 3 (7) read in conjunction with paragarph 2 (1) of the rules of procedure of the executive board). Under the terms of the agreements reached pursuant to the memorandum of association, there are no veto rights for certain shareholders, and according to the shareholders there is no agreement on the pooling of voting rights. Changing coalitions and, in particular, majority decisions going against VEBA are therefore theoretically possible.

(9) The parties take the view that RAG is controlled by none of the shareholders, whether alone or jointly with others. This may be borne out by the possibility of changing coalitions. There is, however, evidence to suggest that RAG is controlled jointly by the five shareholders. Because of RAG's prominent position under German coal policy, the shareholders have strong common interests. In particular under the 'Jahrhundertvertrag' (Century contract), which was applicable until the end of 1995, and the 'Hüttenvertrag') (Steelworks Agreement) (see paragraphs 26 and 27 below), RAG is essentially under an obligation to implement German coal policy in respect of hard coal in close cooperation with the competent national authorities. Indeed, decisions within RAG's general meeting and supervisory board have so far always been taken unanimously.

(10) Although the existence between minority shareholders of strong common interests may result in their not acting against each other in exercising their voting rights in relation to the joint venture, this rarely justifies the conclusion that there is joint control (see *inter alia* paragraph 32 of the Commission notice on the notion of a concentration under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Official Journal No C 385 of 31 December 1994, page 5). In earlier Decisions the Commission left open the question of the joint control of RAG by its shareholders. It found that VEBA exercises only a limited influence over RAG, and in the assessment under the competition rules it largely ignored the relationship between the two firms (see paragraph 2 of the Decision of 12 December 1990, Case No 782 Stinnes Intercarbon/Stromeyer). The 'Jahrhundertvertrag' expired at the end of 1995 and the new subsidy rules for German coalmining in force from 1996 may lead to divergences in the interests of the individual shareholders in RAG. The question of the joint control of RAG does not need to be decided here. Even assuming that there is joint control, with respect to RKK there would be a change in the control by VEBA. RKK would no longer be under VEBA's sole control, being placed under the joint control of RAG's shareholders (on the change from sole to joint control, see paragraphs 16 and 18 of

the Commission notice on the notion of a concentration under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. The acquisition of RKK is therefore at all events a concentration within the meaning of Article 66 (1) of the ECSC Treaty.

(11) For the purposes of assessing the concentration under the competition rules, the question of the joint control of RAG by its shareholders must, however, be taken into account in that, assuming that VEBA jointly exercised a decisive influence over RAG, even before the concentration took place there was no completely independent competitive relationship between RAG/RH and RKK. An assessment of this limited competitive relationship does not need to be carried out here, however, because, even if there were a completely independent competitive relationship between RAG/RH and RKK, the proposed concentration will not — as is shown below — lead to any impediment to effective competition.

IV. THE RELEVANT MARKET

1. The product markets

(12) RH and RKK sell hard coal and hard coal products (hard coal briquettes and coal coke) to industrial users (the electricity industry, steelmakers and other industrial enterprises), domestic consumers and small businesses. The domestic consumer and small business sector does not come under the ECSC Treaty (see Article 80 of the ECSC Treaty).

Demand side

(13) On the demand side in the case of hard coal and hard coal products (hereinafter called 'hard coal'), it can first of all be said in general terms that there is a market for the sale of hard coal to industrial users. Owing to the different end uses, different subsidy provisions for certain categories of user, and hence markedly different prices, the market should, however, be further subdivided into sales to the electricity industry (power station coal or steam coal), steelmakers (coking coal and blast furnace coke) and other industrial users. The last-named category covers primarily the sugar, cement and paper industries and purchases mainly steam coal to produce process heat. All these types of coal and coke are, pursuant to Article 81 read in conjunction with Annex I, subject to the rules of the ECSC Treaty. A corresponding division of the market according to category of user is also proposed by the parties.

The substitutability of fuels

(14) With regard to sales to the electricity industry (electricity-generating utilities and auto-generators) which account for 70 % of all sales (see paragraph 25) other fuels cannot in principle be substituted for hard coal. The supply structure being dictated by the existence of certain power stations and regulated to some extent by central government ('energy mix'), and the substantial investment needed to convert existing power stations and build new ones make it difficult, if not impossible, to switch from hard coal to oil, natural gas or nuclear power. The parties have submitted that a considerable number of power stations can also burn oil or gas and that there are direct imports of electricity. Electricity is imported from other Member States to supplement domestically produced power during peak-load periods, but so far the quantities involved have been insignificant. The Commission has ascertained in the course of its enquiries, moreover, that to some extent oil is used for start-up purposes and oil or gas for standby purposes in the event of instability in the coal combustion process due, for example, to impurities. With oil or gas, however, a coal-fired power station attains only a fraction of the combustive power that it does using hard coal, so in reality neither fuel can be substituted for the latter.

(15) The same holds true in principle for brown coal. Coal-fired power stations are not suited to burning both types of coal. Converting from one type of coal to the other is, as the parties themselves admit, uneconomic and, owing to the different combustion characteristics, scarcely feasible technically (boiler volume, by-product recovery).

(16) Since, unlike hard coal, brown coal is disproportionately costly to transport (water content of up to 40 %), competition with hard coal would in any event come into prospect only where the two types of coal are mined in adjacent areas (see paragraph 10 of the Commission Decision of 27 June 1994, IV/M.402 — PowerGen/NRG/Energy/Morrison Knudsen/Mibrag). Such competition is relevant, however, only in the context of building new power stations, and it therefore affects hard coal sales only indirectly. The Commission has ascertained in the course of its enquiries that apart from the construction of a new brown-coal-fired power station in Brandenburg no further power station capacity is to be built in Germany for the next 10 years. In the operation of existing power stations, price developments in relation to individual fuels matter only in so far as a power station operator has different types of station at his disposal and is able to vary their loading. During peak-load periods even these power station operators are no longer flexible in this respect.

(17) For these reasons the relevant product market in relation to the principal group of users, the electricity industry, must be restricted to hard coal, other fuels providing, at best, a certain marginal competition at the preliminary stage of capital expenditure on new and replacement combustion plant (see paragraph 7 of the Commission Decision of 12 December 1990 — Stinnes Intercarbon/Stromeyer).

(18) From the point of view of steelmakers, other fuels can likewise by substituted for hard coal only to a very limited extent. The question whether the relevant product market is to be limited to hard coal or, if necessary, further defined can, however, in the last analysis be left open here; even assuming that there was a market for the sale of hard coal to steel producers, the concentration will not result in any hindering of effective competition (see paragraph 55).

(19) In the case of sales of hard coal to other industrial users, there are, on the other hand, certain substitution relationships with oil and gas or other fuels. The parties have given examples of the dual use of furnaces in the cement industry; main fuels such as coal are burnt in a primary furnace, meeting some 70 % of energy requirements, and cheaper fuels or waste materials are burnt in a secondary furnace to meet the remaining third of requirements. Similar examples were given for the sugar industry. The Commission recognized the competitive pressure exerted by other fuels on hard coal in the field of 'other industrial users', in its British Fuels Limited Decision of 9 July 1987 (1987 Competition Report, point 94). However, even in the case of these industrial users there would appear to be no unlimited interchangeability between hard coal and other energy sources owing to the conversion costs entailed. The question whether the relevant product market is to be limited to hard coal or, if necessary, further defined can, however, in the last analysis be left open here: even assuming that there was a small market for the sale of hard coal to other industrial users, the concentration will not result in any hindering of effective competition (see paragraphs 56 *et seq.*)

2. The relevant geographic market

(20) The market for the sale of hard coal to the electricity industry in Germany is from a geographical point of view still a national one. The parties gave a definition to that effect in their notification. This is due first and foremost to the special system for subsidizing German hard coal, which has produced a supply structure in the energy sector and a competition structure in the sale of coal in Germany that are unlike those in the other Member States (see paragraphs 26 *et seq.*) Although German power station operators will in future be able to buy imported coal without restriction, there is little incentive for them, until they have exhausted the resources available under the government's aid package, to import hard coal rather than purchase it from RAG, or any other German producer. Any imports at a price below the average third-country price would depress the latter even further during the following quarter, and this would have the effect, from the standpoint of foreign suppliers, of an entry barrier. On the whole, there is relatively little interpenetration of Member States markets.

(21) The sale of hard coal to steelmakers is determined until the end of 1997 by the procurement obligations and subsidies provided for under the 'Hüttenvertrag' (see paragraph 27). From a geographical point of view, this market is therefore a national one.

(22) With regard to unsubsidized sales of hard coal to other industrial users, there may be said to be a geographic market extending beyond Germany inasmuch as most of the coal such users buy is imported. On the other hand, customer-supplier relationships play a more prominent role in what is very much a small-business-user structure; the supplier function has so far been performed essentially by German traders. The question of the definition of the geographic market can, however, in the last analysis be left open here: even if Germany is assumed to be the relevant market, the concentration will not hinder effective competition (see paragraphs 56 *et seq.*)

V. ASSESSMENT UNDER ARTICLE 66 (2)

(23) The concentration between RH and RKK can be authorized under the conditions laid down in Article 66 (2) if the proposed transaction does not give the undertakings concerned the power:

— to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for these products, or

— to evade the rules of competition, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

(24) The question whether the proposed concentration will hinder or eliminate competition in the German market for the sale of hard coal must be examined against the background of the subsidy rules for German hard coal intended for electricity generation (power station coal), which are set to change in 1996, and in the light of RAG's position in the sale of domestic and imported coal arising out of the concentration.

1. The sale of hard coal in Germany

(25) In 1994 a total of approximately 80 million tonnes hard coal and hard coal products were sold in Germany (1993: 76,7 million tonnes, in each case for hard coal, hard coal briquettes and coal coke together; *source:* Statistik der Kohlenwirtschaft e.V., Zahlen zur Kohlenwirtschaft vol 142, June 1995). Of the total amount, 17,6 million tonnes (plus 0,9 million tonnes of coking coal for processing into coke in Germany) consisted of imports. The German market is just ahead of the British market and well ahead of the other coal-consuming Member States (Spain, France, Italy and Benelux) the largest market in the EU. Of total sales the lion's share, or some 70 %, was accounted for by electricity producers. The steel industry bought 18,8 million tonnes and other industrial users 4,7 million tonnes. Domestic consumers and small businesses bought approximately 1,3 million tonnes.

(26) In the past the German market was characterized, in relation to the two main user groups, namely electricity producers and steelmakers, by the 'Jahrhundertvertrag' and the 'Hüttenvertrag'. 'Jahrhundertvertrag' is the name given to a set of agreements dating from 1980 between the 44 public electricity-generating utilities and industrial producers of electricity for in-house consumption (autogenerators), on the one hand, and the Gesamtverband des deutschen Steinkohlebergbaus (General Association of the German Coalmining Industry), on the other, on the sale of specific quantities of German hard coal up to 1995 for the purpose of generating electricity. Coal was purchased at a fixed list price equal to the cost of production, the difference between that price and the world market price for heavy fuel oil being refunded to the electricity producers through a levy, the 'Kohlepfennig', on final consumers. During negotiations between the German Government and the parties to the 'Jahrhundertvertrag' as part of the 1989 'Kohlerunde' (round of coal talks), the obligatory minimum amount to be purchased was set for the last five-year period (1991-95) at 40,9 million tonnes coal equivalent (tce) (or approximately 41,5 million tonnes of hard coal) a year, of which 34,4 million tce was for the electricity-generating utilities and 6,5 million tce for autogenerators. The Commission exempted the 'Jahrhundertvertrag', which expired on 31 December 1995, from the prohibition on restrictive practices, by Decision of 22 December 1992 pursuant to Article 85 (3) of the EC Treaty (Official Journal No L 50, of 2 March 1993, page 14). The 'Zollkontingentsgesetz' (Tariff Quota Act), which in the past has restricted the volume of coal imports, also expired at the end of 1995.

(27) The 'Hüttenvertrag' provides for certain procurement obligations for coking coal on the part of German steelmakers. It is applicable until the year 2000 and has been authorized by the Commission up to the end of 1997 (Decision of 30 March 1989, Official Journal No l 101, of 13 April 1989, page 35). The 1991 'Kohlerunde' talks ended in agreement on a set of follow-up arrangements applicable until 2005. As a result of the procurement obligations, customer-supplier relationships for coking coal and coke exist almost exclusively between coal producers and the steelmakers. The wholesale trade is scarcely involved in this business.

(28) From 1 January 1996 a new subsidy regime will apply to German power station coal. In future it will no longer be the sales volume that is fixed but in a slightly degressive form the aid volume. The law to safeguard the use of hard coal in power generation and to amend the Atomic Law and the Electricity Supply Law of 19 July 1994 ('Artikelgesetz'; the Article Law) provides for aid for the conversion of coal into electricity of DM 7,5 billion for 1996 and DM 7 billion a year for the period 1997 to 2000. A steeper reduction in 1999 and 2000 is, however, not ruled out. With an estimated difference in price between German and imported hard coal of DM 200 a tonne, a sales volume of 37,5 million tonnes in 1996 and 35 million tonnes in subsequent years is being aimed at. Within the

limits of this aid package, subsidies are paid direct to the mining companies. They are equal to the difference between the cost of producing German coal and the average third-country price for imported hard coal, free at German frontier. Details are governed by the Electricity-from-coal Directives of the Federal Ministry of Economic Affairs of 13 June 1995 (Bundesanzeiger (Federal Gazette) of 20 June 1995, page 6565).

(29) This aid to Community coal can be granted only after prior authorization from the Commission, in accordance with the provisions set out in Decision No 3632/93/ECSC. In line with that Decision, State aid must cause no distortion of competition and must not discriminate between coal producers, purchasers and consumers in the Community.

(30) The parties are of the opinion that, as a result of the new subsidy rules, the market for hard coal as such will be opened up to competition from imports as from 1996.

(31) With financial support from the aid budget, RAG and the other two German mining companies (Saarbergwerke and Preussag Ibbenbühren) must from 1996 sell their coal independently to power station operators. This represents in principle a step towards the opening-up of the market for power station coal, which in the past was almost completely regulated; from 1996 electricity producers will have more opportunities than before to purchase imported coal. However, according to the information in the Commission's possession, it is only to a limited extent that there can be said to be an opening-up of the market to competition. For the time being RAG has no room for manoeuvre when it comes to setting prices. In order to qualify for a subsidy, it is in principle, obliged to sell at the average third-country price. Under the Electricity-from-coal Directives and the award decisions, that price can be undercut in only a limited number of exceptional circumstances. If, for example, an electricity producer can prove that it has purchased 20 % of its annual requirements at an imported-coal price which is below the third-country price, it can insist on RAG's supplying German hard coal at the lower price. RAG is then entitled to a refund of the (accordingly greater) difference compared with its production costs, but it must at the same time bear in mind that its share of the aid budget of DM 7,5 billion (DM 7 billion from 1997) will be exhausted more quickly.

(32) On the other hand, RAG is in a position until the aid budget is exhausted always to sell at the average world market price. The sales opportunities of other coal importers are consequently limited from the outset. Every import of coal at a below-average price has a favourable impact, when the further average third-country price is calculated, on the price chargeable to electricity producers. RAG's actual sales prospects from 1996 compared with those of importers are difficult to evaluate because, in the past, sales have not reflected the electricity industry's actual requirements. The Commission's enquiries have revealed, however, that electricity producers at least in the short term will still turn predominantly to RAG and the other German mining companies for their power-station-coal requirements. They can now obtain German hard coal at the average world market price. Moreover, their power stations are designed to run on German hard coal and the increasingly important recovery of by-products of the combustion process is geared to the make-up of German hard coal. Individual electricity producers have mentioned overall logistical and qualitative advantages as a reason for not changing their previous purchasing behaviour. Security of supply and the preference of public electricity-generating utilities for domestic hard coal were cited as further grounds for adhering to the same procurement policy. Even if the annual sales volume of RAG and the other two German mining companies were to taper off from 1996, importers will not benefit direct from the falling demand for coal.

(33) In RAG's view, electricity producers will purchase the quantities not covered by long-term supply contracts through short-term spot transactions involving smaller quantities. This will benefit importers to some extent. The Commission established in the course of its enquiries that, by and large, both competitors and users expect the share of sales accounted for by imports to increase to some extent. In 1994 18,5 million tonnes of hard coal products (including 2,2 million tonnes of coke) were imported into Germany (1). On the basis of the expected increase, the volume of imports may be estimated at some 20 to 25 million tonnes in the year 2000. Only after 2000 following the further reduction in subsidies to the German coal industry is there likely to be a more marked increase in import penetration of the German market. Some studies conclude that a fairly sharp increase will occur: while the Verein Deutscher Kohleimporteure e.V. (Association of German Coal Importers), Hamburg, views scenarios of either 25 or 30 million tonnes as possible in 2000, the Statistik der Kohlenwirtschaft e.V., Essen, point to

(1) 1993: 15 million tonnes of hard coal products (including 1 million tonnes of coke). The Verein Deutscher Kohleimporteure (Association of German Coal Importers) estimates that, across the EU, imports will increase from the current level of 130 million tonnes to 190 million tonnes.

an import volume of more than 32 million tonnes that year. The parties refer to studies by Prognos AG and the International Energy Agency (IEA), which both forecast an increase to over 35 million tonnes in the year 2000.

(34) To sum up, the market for the sale of hard coal to industrial users in Germany will in the years ahead undergo considerable change irrespective of the proposed concentration between RH and RKK. Owing to the new subsidy rules applicable from 1996, customers in the electricity industry will reduce their purchases of domestic hard coal, which currently has a 70 % share of all coal sales, and in the medium term will exert increased demand for imported hard coal. This will have a particular impact on the structure of competition at the trading stage, as will be explained below (see paragraphs 42 *et seq.*) The assessment of the new entity in the light of competition law must take particular account of this impact despite the fact that it is not conditioned by the concentration.

2. The impact of the concentration on the relevant markets

(a) *Market shares*

(35) In 1994 RAG (including RH) sold a total of 55,9 million tonnes of hard coal, briquettes and coke. Of this amount, 40,8 million tonnes were sold to electricity producers, 14,7 million tonnes to steel-makers and 1,5 million tonnes to other industrial users, domestic consumers and small businesses.

(36) In 1994 RKK sold a total of 7,9 million tonnes (1993: 8,1 million tonnes), of which 5,6 million tonnes were sold in Germany. Of this latter amount, 3,5 million tonnes were mined in Germany and 2,1 million tonnes were imported.

(37) According to the figures submitted by the parties, in 1994 the volume of the market for power-station coal could be put at 57,6 million tonnes (1993: 58,5 million tonnes, in each case not counting sales to the steel industry and to the domestic consumer and small business user sector). Bearing in mind that 85 % of the coal sold by RH and RKK is supplied by RAG and is therefore included in RAG's sales figures, the following market shares are arrived at for the sale of hard coal to the electricity industry:

RAG	[...] million tonnes (1)	[65-70 %] (2)
RH	[...] million tonnes (1)	[<10 %] (2)
RKK	[...] million tonnes (1)	[<5 %] (2)
	[...] million tonnes (1)	[70-75 %] (2)
Saarbergwerke	[...] million tonnes (1)	[10-15 %] (2)

(38) Taking only sales of imported hard coal to the electricity industry (volume: 11,6 million tonnes), the following picture emerges:

RH	[...] million tonnes (1)	[15-20 %] (2)
RKK	[...] million tonnes (1)	[5-10 %] (2)
	[...] million tonnes (1)	[20-30 %] (2)
Stinnes	[...] million tonnes (1)	[40-45 %] (2)
RTE	[...] million tonnes (1)	[<5 %] (2)
Others	0,8 million tonnes	6,9 %
Direct imports	2,5 million tonnes	21,6 %

(39) In the case of sales of hard coal to other industrial users (excluding steelmakers) the market shares are as follows (taking as a basis a volume of 4,7 million tonnes in 1994):

RH	[...] million tonnes (1)	[15-20 %] (2)
RKK	[...] million tonnes (1)	[20-25 %] (2)
	[...] million tonnes (1)	[35-40 %] (2)
Stinnes	[...] million tonnes (1)	[25-30 %] (2)
Rheinbraun	[...] million tonnes (1)	[5-10 %] (2)
Others	1,1 million tonnes	23,4 %

(1) Deleted business secret.
(2) Business secret, replaced by a range of market shares.

(40) The total volume of sales of hard coal to steelmakers came to 18,8 million tonnes in 1994. As a result of steelmakers' purchasing obligations under the 'Hüttenvertrag', 14,4 million tonnes consisted of direct supplies from RAG at regulated prices. RH and RKK sold only small quantities of imported coal in this market; RH sold [...] million tonnes (1) and RKK [...] million tonnes (1). The combined share of the total market comes to [75-85 %] (2). Saarbergwerke has a market share of [10-15 %] (2) ([...] million tonnes (3) direct supplies). The combined share of RH and RKK in all imports of coke and coking coal comes to [25-30 %] (2).

(b) *The competitive position of RAG after the concentration*

(41) Taking as a basis the market conditions currently prevailing in the hard coal distribution business, RH/RKK would have a sales volume in excess of 20 million tonnes of hard coal (10,6 million tonnes of domestic hard coal and 9,7 million tonnes of third-country coal, including 4 to 5 million tonnes of coal imported into Germany). In view of the expected changes in market structure in the years ahead and the line previously taken by RKK in the German coal trade, the acquisition of RKK cannot, however all things considered be expected to give RAG the power to hinder effective competition in the sale of hard coal to industrial users (electricity industry, steelmakers and other industrial users), particularly given the likely reduction of its market share (Article 66, paragraph 2 of the ECSC Treaty).

(aa) Sales to the electricity industry (power station coal)

(42) In the past against the background of the payment of subsidies under the 'Jahrhundertvertrag' sales of domestic hard coal to electricity producers via traders took place on a fairly large scale. Under the subsidy rules applicable from 1996, the distinction between direct sales by the coalmining companies and sales through traders will become blurred. In future it will be in the interests of the German mining companies and RAG in particular to sell domestic hard coal direct at the predetermined average third-country price. The parties therefore proceed on the assumption, as do other market participants, that in future substantially less, if any, German power station coal will be sold by traders such as RH, RKK, etc. All traders will basically switch to trading in imported coal. With regard to domestic hard coal, trade will probably, as the parties have submitted, be maintained only with autogenerators. But since this involves an annual volume of only some 0,6 million tonnes, RH/RKK will derive no significant competitive advantage from being tied into the RAG group.

(43) If, therefore, it is to be assumed that in future there will no longer be any room for a trading stage in the sale of German hard coal to the electricity industry, the acquisition of RKK will result in RAG expanding much less than might at first appear to be the case. As indicated above, it will mean an effective increase in market share of [< 5 %] (2) in the field of power-station coal, the largest segment of the hard coal market. The fact that RAG itself has such a sizeable share of the power-station coal market is a direct result of the particular circumstances linked to the selling of subsidized German coal. The expected increase of competition in this market in the medium to long term will erode RAG's current market share. Since RAG has no real room for manoeuvre here when it comes to setting prices, this market share does not reflect real market power. In view of imported coal's increasing importance in future, the expansion through the acquisition of RKK will, on the basis of 1994's figures [5-10 %] (2), mean an increase of all imports into Germany. The import business is not, however, as will be seen below, characterized by lasting customer-supplier relationships and was not one of RKK'S particular strengths.

RKK's competitive potential

(44) In 1994 RKK achieved a turnover of DM 1,3 billion and employed 700 (1995: 500) people. It has an extensive distribution and storage network consisting of nine branches with 44 storage depots. Of these depots 37 are used exclusively, however, to supply domestic consumers and small business users (including 28 in the new Federal States). Only at four depots — Mannheim, Stuttgart, Karlsruhe and Dusiburg-Ruhrort — is the supplying of industrial users, in addition to domestic consumers and small business users, of any importance. Of the 500 people currently employed by RKK, as many as 400 work in the domestic consumer and small business user sector. According to the parties, the domestic consumer and small business user sector will in the years ahead contract still further to a significant degree, necessitating the closure of more depots. In recent years RKK has already had to close down many of the depots it acquired in the new Federal States after German unification. RH

(1) Deleted business secret — less than 0,5 million tonnes.
(2) Businees secret, replaced by a range of market shares.
(3) Deleted business secret.

will achieve not inconsiderable synergy effects in distribution and storage as a result of the concentration. These will occur above all in the domestic consumer and small business user sector and should result in a profitable volume of sales being achieved in a fast-shrinking market. The 'Bundeskartellamt', which is responsible for the assessment of the effects of the merger on the domestic consumers and small businesses, has not prohibited the concentration.

(45) Small industrial users are supplied, in contrast, on a direct-to-purchaser basis, for which, to the extent that it is actually necessary, only Duisburg-Ruhrort is of any importance as a handling depot. Large industrial users — that is, power stations — have their own railway sidings and inland waterway port facilities and are not dependent on their suppliers' infrastructure. RKK's network of sales and of storage depots does not therefore confer on RH any particular advantage when it comes to supplying industrial users.

Import trade

(46) In the import trade RKK has agents in South Africa, Colombia, the USA and Australia. In 1994 it imported 2,1 million tonnes of hard coal products into Germany (1993: 1,6 millon tonnes). Of this amount, over one third came from South Africa, the other major sources being Colombia, China, Poland and the Czech Republic. These coal-producing countries stand out in terms of the price and quality of their exports to Germany. Whereas, with a combined total of 65 % South Africa, Australia and the USA account for the bulk of coal trading worldwide, it is from South Africa, Poland and Colombia that most of Germany's coal imports come (these countries' share of imports being 61 %).

(47) RKK expects its import business to shrink further in 1995 to about 1,5 million tonnes. Although contracts are concluded on an exclusivity basis for specific grades of coal, as a rule they are made for only one year. Since the proposed merger with RH was announced, RKK has lost several supply contracts with foreign producers either in whole or in part. Thus, the Chinese coal producer Shanxi Sanjia Coal & Chemistry Ltd, referring to the merger, gave notice of termination of the supply relationship as from the end of 1995 (volume: just under [...] tonnes [1]). RKK's South African suppliers, Total and Duiker, have cut their supplies (of about [...] tonnes [1]) by almost 50 % on account of the supply relationship between RH and a rival South African producer, Amcoal. RKK expects that deliveries will be stopped altogether in 1996. According to the parties, this customer-loss effect caused by the concentration will also result in some foreign producers refusing to collaborate with an importer (RKK) who has links with a domestic coal producer, in this case RAG.

(48) Even if, with imports into Germany of some two million tonnes, RKK is — like Stinnes, RH and RTE — one of the larger importers, the focal point of its trading activities is — like that of RH — German coal. Whereas only [...] million tonnes [2] of Stinne's total sales in Germany [...] [1] consisted of German coal, RKK sold [...] million tonnes [3] of German coal. This is the result of a redistribution of tasks within VEBA in 1992. Stinnes was put in charge of international coal trading in its entirety and most of the import business, *inter alia* through the acquisition of RKK's shareholding in Polkohle. RKK was to concentrate mainly on German coal. Since then RKK has lacked a sufficient volume of international business inasmuch as it carries on no international coal trading, apart from importing coal into Germany. Stinnes, by contrast, is a much larger player in terms both of international trade and of imports into Germany.

(49) According to a number of market participants, trade in power station coal will, in future, increasingly be characterized by direct customer-supplier relationships between power stations and foreign producers. Traders will operate in this environment only as agents handling the logistics. RAG and RKK have a substantial indirect shareholding in what used to be the leading importer of Czech coal, Brennstoff-Importgesellschaft mbH, Bayreuth, but users in Germany now also buy direct from Czech mining companies. The same applies to Polish coal, of which [...] [1] in 1995 more than 60 % is no longer imported through the previous sole importer, Polkohle. The parties estimate that direct imports by power stations already amount in the curent year to 2,5 million tonnes. At the level of municipal electricity supply companies, the Wirtschaftliche Vereinigung deutscher Versorgungsbetriebe (Association of German Public Utilities), Frankfurt — which groups together more than 300 municipal undertakings — expects a considerable increase in direct imports from 1997 onwards and estimates that its own deliveries will come to 2 to 3 milion tonnes a year.

(1) Deleted business secret.

(2) Deleted business secret less than 1 million tonnes.
(3) Deleted business secret between 2,5 and 3,5 million tonnes.

(50) To sum up, through the acquisition of RKK, RAG/RH will improve its access to imported coal, but, because of the limited importance of RKK as an importer and the diminishing importance of pure trading businesses in the coal importing field, it will not have unlimited room for manoeuvre in the importation of coal. Nor can it be said that the access of competitors like Stinnes, RTE and others to sources of supply in other coal-producing countries will be more difficult as a result of the concentration.

Actual and potential competition

(51) After the concentration, Stinnes Intercoal will be almost the only competitor facing RH/RKK in the coal wholesale trade. As already indicated, the transfer of RKK's international coal business and shareholding in Polkohle to Stinnes brought about a reallocation, within the VEBA group of companies, of areas of activity between RKK and Stinnes. Although, unlike RKK, Stinnes sells mainly imported coal, there are only minor differences between the two firms' clientele owning to the fact that they both predominantly supply power stations. Against the background of this overlapping of the two firms' clientele, the stiffening of competition in the coal importation field, and the resulting differences between the two companies due to their disparate orientations, RH/RKK and Stinnes will in future compete with one another more fiercely. Although VEBA indirectly has a significant interest in the new entity RH/RKK, it has, by selling RKK to RAG, reduced rather than increased its influence over RKK. In view of RH/RKK's outstanding market position Stinnes is of particular importance being the only significant independent competitor to the new entity. This follows mainly from the considerable standing of Stinnes in the international coal trade and with the sale of improved hard coal in Germany. At present, Stinnes is the most important competitor of RH/RKK both with regard to its access to the markets for the procurement of cheaper imported coal and with regard to its access to the markets for the sale of hard coal in Germany.

(52) Besides Stinnes, traders such as RTE, Saarberg Handel and a number of smaller firms are active in Germany. However, owing to the comparatively small quantities they deal in, they are of only limited importance as rivals to RH/RKK and Stinnes.

(53) As a result of the increased importance of direct imports, potential competition on the German market will come direct from foreign producers. British and French coal producers stated, however, in answer to a Commission survey that, owing to the subsidizing of German coal, they could see no improved prospect of successful entry into the German market in the short term. Not until German coal subsides have been further reduced will the opportunities for importers improve substantially. In the medium term, between 1996 and 1998, the growth in imports will therefore still be restrained, probably not exceeding 15 to 20 %. If, as has been forecast (see paragrpah 33), a sharper rise were subsequently to occur, foreign producers and foreign traders (Glencore, PhiBro, SSM, Anker) might be expected judging by the findings of the Commission survey to enter the market.

(54) The prospects for imported coal and hence the competitive structure depend essentially, however, on the future procurement behaviour of the electricity producers. The eight largest electricity-generating utilities in Germany meet between 70 and 80 % of the country's electricity requirements. The electricity producers are currently concluding only basic contracts with RAG and the other German coal producers. This enables them to conclude short-term spot transactions involving domestic or foreign coal. Even if it is not to be expected that public electricity-generating utilities will jeopardize the smooth run-down of German coal production by drastically reducing their demand for German coal, they can nevertheless at any time buy imported coal either through traders or direct from foreign producers. The acquisition by RAG/RH of RKK is therefore not considered by the vast majority of those users to be anti-competitive.

(bb) Sales to the steel industry

(55) Whereas under the 'Hüttenvertrag' hard coal products used to be supplied exclusively by German coal producers direct to steelmakers, in 1994 sales of 1,9 million tonnes of imported coke and coking coal were achieved for the first time by traders (out of total sales to steelmakers of 18,8 million tonnes). RH's share of the imports came to [. . .] million tonnes (1) and RKK's to [. . .] million tonnes (1). As a result of the concentration, RAG/RH's share of total deliveries to the steel industry increases by only about 1 % to about [75-85 %] (2). The combined share of all imports comes to [25-30 %] (2). Following the termination of RKK's coke-supply agreement with Shanxi

(1) Deleted business secret — less than 0,5 million tonnes.
(2) Business secret, replaced by a range of market shares.

Sanjia, the market share looks set to shrink further. For this reason and owing to a certain customer-loss effect, the concentration will likewise not lead to a hindering of effective competitive in this market.

(cc) Sales to other industrial users

(56) Taking as a basis a small market for the sale of hard coal to other industrial users, the concentration would give RH/RKK a combined market share of [35-40 %] (1). The next strongest competitor is Stinnes with [25-30 %] (1). Foremost among other industrial users are small and medium-sized undertakings in the cement, limestone and paper industries, etc. and undertakings which need hard coal to produce process heat. Altogether they purchase comparatively small volumes. For example, RH sells no more than 150 000 tonnes a year ot the largest of its other-user customers. In 1994 the overall volume of this market segment came to no more than 4,7 million tonnes, down from 6 million tonnes in 1993. In the longer term Raab Karcher estimates that the market will decline to about 3 million tonnes in 2005. The market for the sale of coal to other industrial users is therefore a minor one compared with that for power station coal and the sale of coal to steelmakers.

(57) The parties expect there to be a considerable customer-loss effect in this market because small industrial users do not wish to be dependent on a single supplier. Since the proposed concentration was announced, a number of customers have already given notice that they intend to switch suppliers. As part of the RAG group, from 1996 RKK will no longer be an independent trader; the name 'Raab Karcher Kohle GmbH' will cease to be used.

(58) Unlike the electricity industry, other industrial users overwhelmingly purchase imported hard coal. Because they are geographically dispersed and buy comparatively small quantities, they are able to obtain coal only through traders who are active in Germany, and not direct from German or foreign producers. For this reason, the concentration will have a stronger impact here than in the case of other users. However, a sufficient number of alternative sources of supply are still available in the form of Stinnes (the largest German coal importer), RTE, Rheinbaun and several smaller traders.

(59) In the opinion of all market participants, sufficient quantities of imported coal are now available. The decisive competitive parameter is the price. Since, moreover, transport and transhipment facilities, especially for barges, are available to traders in Germany, RH/RKK will not have any particular competitive edge in this respect. It is to competitors' advantage, moreover, that importing is conducted chiefly on a direct-to-customer basis from the seaport. If transhipment has to be carried out in Duisburg, the new entity will be able to capitalize on the presence in Duisburg-Ruhrort of the warehousing and transhipping firm Navigare, in which RKK has a majority interest. Nevertheless, as a major port on the Rhine and Ruhr rivers, Duisburg is home to a number of other transhipping firms. In addition, the storage and transport facilities which RAG has at its disposal for the distribution of German coal are of only limited use for importing purposes.

(c) *The proposed acquisition of MG PC Petrolkoks GmbH*

(60) RAG proposes to acquire 100 % of the sharecapital of the German undertaking MG PC Petrolkoks GmbH, Frankfurt am Main ('MGPC'), through its subsidiary RH or, after the implementation of the concentration, RKK. MGPC, a subsidiary of the MG Carbon GmbH, is exclusively active in the sale of petrol coke and processed products of petrol coke. This is a by-product that results from the refining of crude oil. It is a non-coal product and therefore does not fall within the application of the ECSC-Treaty (see Annex I to the Treaty). Because the concentration also has no Community dimension according to the Merger Regulation it was notified to the Bundeskartellamt and was cleared on 24 November 1995.

(61) Petrol coke is used as fuel by powers plants and in the cement industry. Furthermore petrol coke is used with the production of coal coke and as an additive of coal coke in the steel industry. Petrol coke is produced by all manufacturers of crude oil and is marketed predominantly by five large trade companies (Aimcor, Koch-Carbon, Thyssen/Citco, SSM and Louisiana-Carbon). MGPC sold worldwide some two million tonnes of petrol coke (see *Coal Week International* of 1 August 1995), 0,38 million tonnes of it in the Community. In Germany (market volume: 2,4 million tonnes) MGPC sold [...] tonnes (2) petrol coke last year and reached a market share of about [5-10 %] (3). RH is not active in the sale of petrol coke. The proposed concentration does not lead to an addition of market shares and would have only negligible effects on the German market for the sale of petrol coke. The acquisition of MGPC by

(1) Business secret, replaced by a range of market shares.

(2) Business secret.

(3) Business secret, replaced by a range of market shares.

RH/RKK would neither affect the German markets for the sale of hard coal nor give any potential to the new entity RH/RKK for preventing other traders and/or users from gaining access to international sources of supply for cheaper imported hard coal.

(62) Both the Ruhrkohle group of companies and the RKK have stated that besides MGPC they have not acquired any undertakings or assets of undertakings from Metalgesellschaft or its subsidiary MG Carbon GmbH being active in the production and/or sale of coal or coke.

VI. SUMMARY

(63) Because of the changes which the market can be expected to undergo as from 1996 following the entry into force of the new subsidy regime reduction in market volume, disappearance of the trading stage in the case of German hard coal and which to conform with Community legislation must entail no distortion of competition between coal users in the Community, the proposed concentration is not likely to hinder effective competition in the largest segment, that consisting of the sale of hard coal to the electricity industry. The sizeable market share of RAG group has in the past mainly resulted from the direct supplies of price-regulated domestic hard coal to German electricity generators according to the 'Jahrhundertvertrag'. Since RAG/RH had no real scope for price setting here, its sizeable market share does not reflect real market power.

(64) After the purchasing commitments of the German electricity generators regarding domestic coal have expired in the medium to long term, the import of hard coal is expected to become very important. However, RAG/RH through the acquisition of RKK gains no potential for preventing other traders and/or users from gaining access to international sources of supply the more so since RAG's total market share is likely to decrease. This view is largerly based on the assessment of the competitive potential of Stinnes with the import of hard coal. At present Stinnes is the most important competitor of RH/RKK both with regard to its access to the markets for the procurement of cheaper imported coal and with regard to its access to the markets for the sale of hard coal in Germany. RKK's strengths used to lie more in trading in German coal and above all in the supplying of domestic consumers and small business users with such coal. Both areas will become less important in future, the latter even drastically so. In view of this, too, the proposed concentration is unlikely to hinder effective competition on the markets for the sale of coal to steelmakers and other industrial users.

Since the requirements of Article 66 (2) of the ECSC Treaty are thus met, the proposed concentration may be authorized,

HAS ADOPTED THIS DECISION:

Article 1

The exercise of control over Raab Karcher Kohle GmbH by Ruhrkohle Handel GmbH is hereby authorized.

Article 2

This Decision is addressed to Ruhrkohle Handel GmbH, Jägerhofstraße 29, D-40479 Düsseldorf and to Raab Karcher Kohle GmbH, Rudolf-von-Benningsen-Foederder-Platz 1, D-45131 Essen.

Done at Brussels, 28 February 1996.

For the Commission

Karel VAN MIERT

Member of the Commission