JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
31 January 2001 *

In Case T-156/98,

RJB Mining plc, having its registered office at Harworth (United Kingdom), represented by M. Brealey, Barrister, and J. Lawrence, Solicitor, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by K. Leivo and R. Lyal, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

RAG Aktiengesellschaft, established in Essen (Germany), represented by M. Hansen and S. Völcker, lawyers, with an address for service in Luxembourg

* Language of the case: English.

and by

Federal Republic of Germany, represented by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

interveners,

APPLICATION for annulment of the Commission decision of 29 July 1998 authorising the acquisition by RAG Aktiengesellschaft of control of Saarbergwerke AG and Preussag Anthrazit GmbH (Case No IV/ECSC.1252—RAG/Saarbergwerke AG/Preussag Anthrazit),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: B. Vesterdorf, President, M. Vilaras and N.J. Forwood, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 28 June 2000,

gives the following

Judgment

Legal background

1 Article 66(1) of the Treaty establishing the European Coal and Steel Community provides for the prior authorisation by the Commission of concentrations between undertakings. Article 66(2) states as follows:

'The Commission shall grant the authorisation referred to in the preceding paragraph if it finds that the proposed transaction will not give to the persons or undertakings concerned the power, in respect of product or products within its jurisdiction:

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

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

...'

2 Article 33 of the ECSC Treaty provides *inter alia* as follows:

'The Court of Justice shall have jurisdiction in actions brought by a Member State or by the Council to have decisions or recommendations of the Commission declared void on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The Court of Justice may not, however, examine the evaluation of the situation resulting from economic facts or circumstances in the light of which the Commission took its decisions or made its recommendations, save where the Commission is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.

Undertakings ... may, under the same conditions, institute proceedings against decisions or recommendations concerning them which are individual in character ...'

3 The ECSC Treaty prohibits, in principle, State aid granted to coal-mining undertakings. Article 4 thereof provides, therefore, that in particular subsidies or aids granted by States in any form whatsoever are incompatible with the common market for coal and steel and are accordingly to be prohibited within the Community, as provided in the Treaty.

4 The first paragraph of Article 95 of the ECSC Treaty states:

'In all cases not provided for in this Treaty where it becomes apparent that a decision ... of the Commission is necessary to attain, within the common market in coal and steel and in accordance with Article 5, one of the objectives of the Community set out in Articles 2, 3 and 4, the decision may be taken ... with the unanimous assent of the Council and after the Consultative Committee has been consulted.'

5 Pursuant to that provision the High Authority and then the Commission have, since 1965, adopted legislation allowing the grant of aid to the coal sector. The last measure in that series of legislative measures was Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ 1993 L 329, p. 12, hereinafter 'the 1993 Code' or 'the Code').

Facts

6 The applicant is a privately-owned coal mining company established in the United Kingdom of Great Britain and Northern Ireland, which took over the principal mining operations of British Coal. As the appearance of substitute energy sources and the increase in imports of coal from outside the Community have, since 1990, caused a large reduction in demand for coal in the United Kingdom, the applicant's 'traditional' market, the applicant has attempted, unsuccessfully, to find another geographical market for some of its surplus production.

7 By letter of 13 November 1997, Ruhrkohle AG, now RAG Aktiengesellschaft (hereinafter 'RAG'), notified the Commission of its intention to acquire the entire share capital of Saarbergwerke AG (hereinafter 'SBW'), owned by the Federal

German Government and by the Saarland, and of Preussag Anthrazit GmbH, owned by Preussag AG. The notification was supplemented by letters of 27 November 1997, 15 December 1997 and 23 January 1998. The transaction was to lead to the merger of the three remaining German coal-mining companies (hereinafter 'the merger') and constitute a concentration between undertakings within the meaning of Article 66(1) of the ECSC Treaty.

8 The price to be paid by RAG for the acquisition of SBW was fixed at one German mark (DEM).

9 The merger forms part of an agreement (hereinafter 'the Kohlekompromiß') concluded on 13 March 1997 between those three companies, the Federal German Government, the Land of North-Rhine Westphalia, the Saarland and the German mining and power station workers' union. The Kohlekompromiß, which includes the merger and the promise of the grant of State aid, is intended to provide a socially acceptable framework for the adjustment of the German coal industry to a competitive environment by 2005. The parties to the Kohlekompromiß estimated that around 10 of the 17 pits still open when the agreement was concluded would remain viable in the long term.

10 The Kohlekompromiß provides for the grant of State aid for the closure of pits, totalling DEM 2.5 billion, granted by the Federal Republic of Germany. Additional to that aid is possible aid for mining activities of DEM 200 million per annum, granted by the Federal German Government and by the Land of North-Rhine Westphalia. The payment of those additional public credits is dependent on completion of the merger.

11 Furthermore, under the Kohlekompromiß, the Federal Republic of Germany agreed to release RAG from its obligations relating to loans guaranteed for a nominal value of around DEM 4 billion.

12 The Kohlekompromiß also falls within the scope of existing aid by which, in essence, the difference between the cost of production of German coal and the price of coal on the world market is paid to coal producers by the Federal German Government, subject to an annual ceiling which is to be progressively decreased. Without that aid, the German coal producers would in all likelihood be unable to sell their coal at all, since their production costs are more than three times the current price of coal on the world market.

13 The ceiling at which the sale of German coal to the power stations and the steel industry is effectively guaranteed, as determined by the amount of annual aid granted by the Federal German Government, amounted in 1997 to around 51.5 million tonnes, out of a total demand for coal in Germany of some 75.1 million tonnes. The remaining domestic demand for coal is satisfied by imports (some 22.4 million tonnes in 1997) and to a very limited extent (some 1.5 million tonnes in 1997) by German producers. Owing to their high production costs, German producers cannot play a significant role outside the State-aided segment of the market, except in so far as they also act as importers.

14 On 9 March 1998, pursuant to Article 67 of the ECSC Treaty, the Federal German Government notified the Commission of the existence of State measures which were liable to have repercussions on competition, namely the privatisation of SBW through its sale to RAG for a token amount of DEM 1.

15 By letter of 16 March 1998, the applicant submitted to the Commission its observations on the planned merger. On 1 May 1998, the applicant supplemented its observations in a new letter addressed to the Commission in which it set out its additional concerns with regard to the merger.

16 By letter of 5 May 1998, the applicant lodged with the Commission a formal complaint relating to the various items of State aid. It was directed in particular at the aid granted to the German coal industry in 1997 (hereinafter 'the 1997 aid') and in 1998 (hereinafter 'the 1998 aid') and the elements of State aid which seemed to it to be part of the planned merger. The complaint was registered by the Commission under No 98/4448.

17 By letter of 7 May 1998, the Commission acknowledged receipt of the applicant's letters of 16 March and 1 May 1998 and requested the applicant to assist it in defining the geographical market and the relevant product by replying to a questionnaire. The applicant complied with that request.

18 By decision of 10 June 1998, the Commission approved the 1997 aid.

19 In the context of the planned merger, the Commission, by letter of 16 June 1998, requested the applicant to give its views on the commitments offered by RAG.

20 The applicant considered that additional information was necessary before it could express a view and, by letter of 19 June 1998, it requested such information from the Commission. The Commission did not comply with that request.

21 By letter of 30 June 1998, the applicant nevertheless replied to the question posed by the Commission on 16 June 1998, stating that the commitments offered by RAG did not answer its concerns relating to the merger.

22 By application lodged at the Registry of the Court of First Instance on 20 July 1998, the applicant brought an action contesting the Commission's decision of 10 June 1998 by which it approved the 1997 aid (Case T-110/98).

23 In response to reservations expressed by the Commission during the administrative procedure, RAG, the party which had notified the merger, undertook to sell the import business of SBW, to transfer its own import activities to a separate company (Ruhrkohle Handel GmbH) with separate accounts from those concerning its sales of German coal (carried out by Ruhrkohle Verkauf GmbH) and to reduce its shareholding in another importer, Brennstoff-Import GmbH.

24 By decision of 29 July 1998, the Commission authorised the merger (Case No IV/ECSC.1252 — RAG/Saarbergwerke AG/Preussag Anthrazit, hereinafter 'the contested decision').

25 In the contested decision (points 21 and 26) the relevant product market is stated to be that for hard coal and hard coal products and is limited geographically to Germany.

26 Points 6 and 7 of the contested decision state as follows:

'The notified plan is part of an agreement, commonly called the "Kohlekompromiß" ("coal compromise"), concluded on 13 March 1997 between the German State, the *Länder* of North-Rhine Westphalia and Saarland, the Industriegewerkschaft Bergbau und Energie (German mining and energy industry union) and the three undertakings [that are the subject of the merger]. The agreement provides that the hard-coal mining divisions of the three

undertakings concerned, RAG, [SBW] and Preussag Anthrazit, will be merged into a single company, Deutsche Steinkohle AG, under the control of RAG. According to the information supplied by the parties and the German Government, that merger plan and the public aid consented to within that framework are intended to render socially acceptable the politically-desired restructuring process within the German coal mining industry and guarantee that the coal mining industry will remain viable and efficient in the long term, beyond the year 2005. According to the agreement, of the 17 collieries currently in operation, 10 or 11 pits with an annual production of around 30 million tonnes and around 36 000 jobs are to be retained in the long term.

Within the framework of the Kohlekompromiß, in parallel with the planned takeover by RAG of the shares held by the Federal Republic and the Saarland in [SBW], the Federal Republic of Germany has agreed to provide public financing aid of a total amount of DEM 2.5 billion for the future closure of mines (appropriations for commitments). That aid will, from 1998, be combined in an overall credit line with the funds provided by the Federal Government and the Land North-Rhine Westphalia for promoting sales of domestic power station coal and coking coal (sales subsidies). The public aid to the German hard coal sector, which totalled DEM 10.5 billion in 1997, will then be reduced in stages to a total of DEM 5.5 billion by the year 2005. In addition to the financial contributions of the German State and the Land North-Rhine Westphalia, an annual sum of DEM 200 million will, with effect from 2001, be made available out of revenue from the "white" (non-coal) activities of RAG. If the results of those activities do not permit this, the State and the Land of North-Rhine Westphalia will each pay one half of the missing amount. The payment of additional federal aid is subject to the condition that the shares of the German Federal State and the Saarland in [SBW] are acquired by RAG.'

27 Furthermore, in point 32 the contested decision states as follows:

'... the analysis should be confined to the sale of imported coal in all sales sectors and to the sale of domestic coal to industrial customers other than power generators and steel producers...'.

28 Lastly, the contested decision states in paragraph 54, under the heading 'State aid', that:

'This decision concerns only the application of Article 66 of the ECSC Treaty and does not prejudge any decision of the Commission relating to the application of other provisions of the EC Treaty or of the ECSC Treaty and of corresponding secondary law, in particular the application of provisions relating to control of State aid.'

29 By letter of 19 August 1998, the Commission sent to the applicant a copy of the contested decision in German. In its letter, it stated that the contested decision related only to hard coal, since questions relating to infrastructure and transport facilities were excluded from the scope of application of the ECSC Treaty.

30 By decision of 2 December 1998, the Commission approved the 1998 aid.

31 By letter of 23 December 1998, the applicant requested the Commission, in accordance with Article 35 of the ECSC Treaty, to take a decision finding that the State aid linked to the merger was unlawful.

32 The applicant states that on 11 January 1999 it received a copy of the notification by the Federal German Government previously sent to the Commission under Article 67 of the ECSC Treaty concerning State measures liable to have repercussions on competition, namely the privatisation of SBW.

33 By application lodged at the Registry of the Court of First Instance on 18 January 1999, the applicant brought an action for annulment of the Commission's decision of 2 December 1998 approving the 1998 aid (Case T-12/99).

34 By application lodged at the Registry of the Court of First Instance on 3 March 1999, the applicant brought an action for a declaration that the Commission unlawfully failed to adopt a decision on the applicant's complaint concerning examination of alleged non-notified State aid which the German authorities had granted in the context of the acquisition of control of SBW and Preussag Anthrazit GmbH by RAG (Case T-64/99).

35 In May 1999, RAG announced the purchase of Cyprus Amax Coal Corp., by virtue of which it became the second largest producer in the world in terms of tonnes of hard coal.

36 By letter reproduced in the *Official Journal of the European Communities* of 8 April 2000 (OJ C 101, p. 3), the Commission informed the German Government of its decision to initiate the procedure provided for in Article 88 of the ECSC Treaty in regard to the concentration between RAG and SBW since it might involve State aid. Under the heading 'The price of DEM 1', the Commission states:

'(36) 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 the Code].'

Procedure and forms of order sought

37 The application in this action was lodged at the Registry of the Court on 29 September 1998.

38 By document lodged at the Registry of the Court on 21 December 1998, RAG sought leave to intervene in support of the Commission.

39 By document lodged at the Registry on 22 February 1999, the Federal Republic of Germany sought leave to intervene in support of the Commission.

40 By order of 1 March 1999, the President of the First Chamber of the Court of First Instance granted RAG leave to intervene.

41 By order of 9 March 1999, he granted the Federal Republic of Germany leave to intervene.

42 On 19 July 1999, the applicant lodged a request that the case be given priority over other cases pursuant to Article 55(2) of the Rules of Procedure of the Court of First Instance. That request was not granted.

43 On hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure without any preparatory inquiry.

44 At the hearing on 28 June 2000, the parties presented oral argument and answered questions put by the Court.

45 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

46 The defendant contends that the Court of First Instance should:

— declare the application inadmissible;

— in the alternative, dismiss the application as unfounded;

— order the applicant to pay the costs.

47 RAG, intervening, contends that the Court should:

— dismiss the application as inadmissible;

— in the alternative, dismiss the application as unfounded;

— order the applicant to pay the costs, including those of RAG.

48 The Federal Republic of Germany, intervening, contends that the Court should:

— dismiss the application as inadmissible or unfounded.

49 At the hearing the applicant confirmed that it was withdrawing its claims for an order, in so far as they related to the aid granted to the German coal industry in 1997.

Admissibility

Arguments of the parties

50 The Commission submits, in a plea containing two parts, that the action is inadmissible.

51 First, it states that the applicant's application, save in so far as it relates to the question of vertical integration resulting from the presence of coal production and coal consumption activities within the merged entity, is inadmissible on the ground that its real target is not the contested decision but rather the State aid connected with the merger. Concentrations and State aid are different issues governed by different provisions and give rise to different decisions. Moreover, the case-law cited by the applicant ('the *Matra* case-law') in support of its

application, namely the judgments in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, in Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595 and in Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, does not imply that, in procedures in respect of concentrations, the Commission is required to make a finding on the compatibility or the lawfulness of any State aid.

52 Second, the applicant is not concerned by the contested decision since it is not able to compete with the German producers for the sale of coal outside the State aid scheme.

53 RAG, which supports the Commission's arguments, asserts that the applicant has no 'legitimate, present, vested and sufficiently clear' interest (see in particular the judgment in Case 167/86 *Rousseau* v *Court of Auditors* [1988] ECR 2705, paragraph 7) in challenging the contested decision and submits, moreover, that the outcome of the present dispute could affect the applicant's interests only if a number of other highly improbable events were to occur. Furthermore, since the operative part of the contested decision has the effect of improving opportunities for future access to the market for non-German hard coal producers such as the applicant, the applicant has no legal interest in proceeding with the action (see, to that effect, the order of the Court of Justice in Case 134/87 *Vlachou* v *Court of Auditors* [1987] ECR 3633, paragraphs 9 and 10).

54 In support of the argument that the applicant is not concerned by the contested decision, RAG observes that the applicant has never sold a tonne of coal in Germany, and is never likely to do so in the future. Even if the applicant were one day to be in a position to sell coal in Germany, that would not distinguish it from other coal mining companies in the world.

55 The German Government shares the Commission's reservations as to the admissibility of the action.

56 According to the applicant, the correct approach, as regards its interest in instituting proceedings, is to examine what would be the situation if the merger had ultimately not been authorised. It is convinced that if the rules of the ECSC Treaty were enforced, it would, now and in the foreseeable future, have a realistic prospect of being able to compete effectively on the German hard-coal market and/or significantly increase its sales on the United Kingdom market.

57 As regards its *locus standi*, the applicant considers that it is concerned by the contested decision and points out that the decision refers to the restructuring of the German coal industry and its move towards a competitive environment. It is convinced that if the State aid regime for which it argues were applied, the demand for large quantities of coal would lead to an adjustment of the world market price. In that situation, the Community would benefit from maintaining at least one viable source of coal, namely the applicant itself, which produces by far the cheapest coal in the Community.

58 Lastly, the applicant considers that the Commission, by inviting it to comment on the merger, itself clearly accepted that it was a competitor of RAG. In the contested decision (point 39), the Commission addresses the concerns of RAG's 'competitors'.

Findings of the Court

59 The second paragraph of Article 33 of the ECSC Treaty, which is worded differently from the second paragraph of Article 173 of the EC Treaty (now, after

amendment, the second paragraph of Article 230 EC), authorises undertakings to institute proceedings for the annulment of decisions or recommendations concerning them which are individual in character. As the Court of Justice has acknowledged, in particular in its judgments in Joined Cases 24/58 and 34/58 *Chambre Syndicale de la Sidérurgie de l'Est de la France* v *High Authority* [1960] ECR 281, Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraphs 14 and 15, and in Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761, paragraph 8, an undertaking is concerned by a Commission decision that allows benefits to be granted to one or more undertakings which are in competition with it.

60 As regards the first part of the plea, put forward by both the Commission and RAG, it must be observed that the Commission accepts that, in raising the question of the vertical integration of coal activities brought about by the merger, the applicant is directly challenging the decision which the Commission took on the merger, that is to say, the contested decision.

61 Moreover, although the applicant does challenge the fact that the legality of the State aid in question was not examined by the Commission before it authorised the merger, the fact remains that it raises that objection in respect of the Commission's examination carried out under Article 66(2) of the ECSC Treaty. The applicant observes that the Commission could not authorise the merger without taking a position on the question whether the acquisition price of DEM 1 constituted State aid and, if so, that it should have evaluated how that aid would affect the power of the merged entity to control or restrict competition, thus enabling that entity to evade the competition rules.

62 The applicant's action cannot therefore be interpreted as seeking to achieve, in the absence of a Commission decision relating to the aid, the same result as might be achieved by an application for annulment of such a decision, had it been adopted.

63 It follows that the first argument of the Commission and of RAG must be rejected.

64 As to RAG's argument that the applicant is seeking annulment of a decision, the operative part of which tends to improve chances of future access to the German market for non-German coal producers, and that the applicant therefore has no interest in bringing proceedings, the proper approach is to examine whether the applicant's interests have been affected by the merger.

65 The applicant submits that the probability of its being in a position to compete on the German market would be significantly increased if the contested decision were annulled.

66 It must be observed, first of all, that the commercial strength of the entities, taken individually, is well below that of the merged entity, namely RAG. Conversely, RAG's strength on the international market, which results from the fact that it has become the second largest producer in the world in terms of tonnes of hard coal, inevitably affects the applicant's position on that market.

67 Next, according to point 7 of the contested decision, the payment of additional State loans of up to at least DEM 2.5 billion is subject to the condition that RAG take over the respective shareholdings in SBW of the Federal German State and of the Land Saarland. It follows that RAG benefits from the aid inherent in the Kohlekompromiß which improves its competitiveness *vis-à-vis* the applicant.

68 Lastly, the future of the German hard-coal industry is largely dependent on the planned merger, to such an extent that, should that merger not take place, a

minute part of the German market could stay closed to world-wide competition. In that regard, although it is not certain that in such circumstances the applicant could penetrate the German market, it is nevertheless indisputable that its chances of gaining access to that market would be increased. Moreover, if the existence of the German coal industry were threatened, the German power stations and steel producers would probably not obtain their supplies exclusively from coal producers outside the Community, but, for reasons of security of supply, would obtain part of their supplies from the applicant, it being the most competitive and cheapest Community undertaking.

69 Consequently, it cannot be disputed that the applicant has an interest in bringing proceedings and it is not necessary to rule on whether the commitments given by RAG to divest itself of its import arm in fact improve the applicant's situation.

70 In the second part of their plea, the Commission and RAG dispute that the applicant can be regarded as a real or potential competitor of the companies participating in the merger and is therefore concerned by the contested decision.

71 It is common ground that the applicant has sold coal on the German market only by way of a test sample for VBW Energie AG. Furthermore, the difference between the applicant's average production costs and the prices on the world market were considerable when the present action was brought, being at least 50%.

72 However, point 6 of the contested decision refers to the restructuring of the German coal mining industry and its development towards a competitive

environment in which approximately 10 of RAG's pits will remain viable in the long term and in which that industry will be viable and efficient from 2005 onwards. The Commission therefore accepts that RAG may become a competitor of the applicant, from 2005 at the latest.

73 Next, in point 39 of the contested decision, the Commission refers to the concerns of 'competitors' of RAG, in particular as to the transparency of the use of State aid by RAG. In its observations of 1 May 1998, the applicant specifically referred to that problem. It must therefore be found that the Commission, which had itself invited the applicant's observations, regarded it as a competitor of RAG.

74 Furthermore, the applicant submits that reductions in its operating cost of between 15 and 20% over a period of four years are wholly achievable and that, if its surplus production capacity were fully utilised, its average production costs would fall spectacularly by around 10%.

75 Furthermore, it foresees an increase in the price of coal on the world market. It follows that the applicant regards itself as a competitor of RAG, which is why, in addition to the present action, it has brought five other actions which all relate to the financial situation of RAG.

76 Moreover, according to the case-law of the Court of Justice, when the Court examines the admissibility of an action it attaches weight to the part played by natural or legal persons in the administrative procedure (see to that effect Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, paragraph 15; Case

169/84 *Cofaz* v *Commission* [1986] ECR 391, paragraph 24; and Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 54, 'the judgment in Kali & Salz').

77 In its judgment in Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 64, the Court of First Instance interpreted the judgment in *Cofaz* v *Commission*, cited above, holding that the Court of Justice merely held in that case that an undertaking is concerned within the meaning of Article 173 of the EC Treaty if it can establish that it was at the origin of the complaint which gave rise to the investigation procedure, that its observations were heard and that the course of the procedure was largely determined by those observations, and on the further condition that its position on the market is substantially affected by the aid measure which is the subject of the contested decision. However, that does not preclude the possibility that an undertaking may be in a position to demonstrate by other means, by reference to specific circumstances distinguishing it individually as in the case of the addressee, that it is individually concerned.

78 Furthermore, in its judgment in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13, the Court of Justice held that it was both in the interest of a satisfactory administration of justice and of the proper application of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC) that natural or legal persons who are entitled, by virtue of Article 3(2)(b) of Council Regulation No 17 of 6 February 1962: First regulation implementing Article 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), to request the Commission to find that there has been an infringement of Article 85 and 86, should be able to institute proceedings to protect their legitimate interests if their requests are not complied with either wholly or in part.

79 Owing to the specific features of the ECSC regime, the conditions for the admissibility of an action for annulment brought by an undertaking under the ECSC Treaty are less strict than those for a similar action under the EC Treaty. However, the case-law on the EC Treaty mentioned above contains findings

which may also be relevant to an assessment of the admissibility of an action for annulment brought under the ECSC Treaty.

80 It must be observed in that the regard that the applicant played a part in the administrative procedure before the Commission, given that it not only submitted observations on the planned merger, but also, more particularly, its observations were taken into account and it answered questions on two occasions during that procedure.

81 The applicant has therefore demonstrated the existence of a set of factors which makes it possible for the Court to conclude that the contested decision may affect its competitive situation, in particular *vis-à-vis* RAG. It follows that the applicant is concerned by the contested decision.

82 It follows from all of the foregoing considerations that the action must be declared admissible.

Substance

83 The applicant submits two pleas in law in support of its application for annulment of the contested decision. It alleges, first, that the Commission infringed the ECSC Treaty and/or rules of law relating to its application and, second, that it infringed essential procedural requirements, in particular by providing an inadequate statement of reasons, and also the principle of good administration.

Infringement of the ECSC Treaty and/or rules of law relating to its application

84 The applicant has divided this plea into four parts. It submits, first, that the *Matra* case-law has clearly not been applied; second and third, that there has been a manifest failure to apply the first indent and the second indent of Article 66(2) of the ECSC Treaty; and, fourth, that the Commission did not assess the impact of the vertical integration of the coal activities inherent in the merged entity.

85 The Court will consider together the two parts of the plea which allege manifest failure to apply the first and second indents of Article 66(2) of the ECSC Treaty.

86 First of all, the applicant and RAG do not agree on the scope of the Court's review under Article 33 of the ECSC Treaty. RAG contends that the application does not take account of the fact that the Court's review of Commission decisions conducted pursuant to that provision is limited.

87 It suffices to observe in that regard that, as regards the evaluation of the situation resulting from economic facts or circumstances underlying the contested decision, it is settled case-law that the Court, in conducting its review, must confine itself to ascertaining whether the Commission misused its powers or manifestly failed to observe the provisions of the ECSC Treaty or any rule of law relating to its application. In that context, the term 'manifest' in Article 33 presupposes that the failure to observe legal provisions is so serious that it appears to arise from an obvious error in the evaluation, having regard to the provisions of the ECSC Treaty, of the situation in respect of which the decision was taken (see Case 6/54 *Netherlands* v *High Authority* [1954-1956] ECR 103, at p. 115, and Joined Cases 15/59 and 29/59 *Knutange* v *High Authority* [1960] ECR 1, at p. 10, and the

order of the President of the Court of Justice in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraphs 61 and 62). Even if the application does not take account of the fact that review of Commission decisions by the Court of First Instance under Article 33 of the ECSC Treaty is limited, the Court, when conducting that review, will do so within the limits of the case-law cited above.

Alleged failure to apply Article 66(2) of the ECSC Treaty

— Arguments of the parties

88 The applicant submits, in essence, that the Commission committed a manifest error when analysing the merger under Article 66(2) of the ECSC Treaty. An analysis carried out without reference to the question of State aid relating, directly or indirectly, to the merger cannot put the Commission in a position whereby it can properly determine whether the merged entity will have the power 'to evade the rules of competition instituted under [the] Treaty'. The word 'rules' clearly refers to the body of rules contained in or arising from the ECSC Treaty (including secondary legislation, such as decisions). Those rules include Article 4(c) of the ECSC Treaty and the rules abolishing and prohibiting subsidies and aids granted by States.

89 The applicant observes that three separate items of aid affected the merger in question and should have influenced the Commission's analysis. First, the Commission presumed that the 1998 aid was lawful and did not therefore have to be repaid by the undertakings that were parties to the merger. The grant of that aid was in fact illegal: at the date when the present action was brought, no aid whatsoever to the German coal industry had been authorised for 1998. As the Commission has no competence to approve aid already paid, it has no option but to refuse to approve that aid for 1998.

90 Second, as regards the aid inherent in the merger, the applicant submits that the Commission, when approving the merger, did not assess whether the consideration of DEM 1 to be paid for the entire share capital in SBW constituted State aid. It observes that the Commission itself found that the notifications by the Federal Republic of Germany suggests that the privatisation of SBW entailed aid, which had not been notified, of DEM 1 billion to RAG. The applicant observes that in 1997 SBW made a profit of DEM 4.3 million and that it owns a number of valuable assets, including three mines (Ensdorf, Göttelborn/Reden and Warndt/Luisenthal), substantial shares in the Fuerstenhausen and Zentralkokerei Saar coking plants, and a number of power stations.

91 Third, as to the aid conditional upon the merger, the applicant states that point 6 of the contested decision refers to the planned merger and the State aid promised in connection with that merger. The notification of the merger under Article 67 of the ECSC Treaty confirms the details relating to the cancellation of debts and to other aid granted to RAG of approximately DEM 7 to 8 billion.

92 The Commission's inexplicable attempt to separate the financial aspects of the transaction and the financial situation of the entities concerned entirely from the assessment of the merged entity's power to determine prices, to control or restrict production or distribution or to hinder effective competition, is an evident error vitiating the contested decision.

93 The Commission wrongly assumed that there was no potential competition on the market for the supply of domestic coal to domestic power stations and did not therefore analyse the effect of the merger on that market, even though that situation was the result of the grant of the illegal aid. The same is true of the analysis of the merger's impact on sales of imported coal. There too, the Commission carried out the analysis on the basis of the assumption that imported

coal is not liable to compete with the supply of domestic coal to the power stations and steel manufacturers on the German market. That approach led the Commission to limit the effects of the merger to the sale of imported coal in all sectors and the sale of domestic coal to other industrial consumers apart from power generators and steel manufacturers.

94 Furthermore, the way in which the Commission carries out its analysis is also contrary to its assertion, in point 54 of the contested decision, that the decision concerns only the application of Article 66 of the ECSC Treaty and in no way prejudges a decision relating to the aid in question. The Commission's approach is based on a misunderstanding of the nature of the examination required by Article 66 of the ECSC Treaty and assumptions which led it to accept that the German State could, first, grant State aid in order to eliminate competition from importers and, second, then create a market structure through a merger that ensures the elimination of competition forever. That approach by the Commission in itself constitutes a manifest error.

95 The Commission submits that it took account of the financial support provided by the State aid when it determined the market power of the companies that were parties to the merger. The contested decision in no way prejudices the outcome of any subsequent procedure regarding the various elements alleged by the applicant to constitute unlawful aid.

96 The Commission explained at the hearing that when it analysed the merger, it studied, in accordance with Article 66(2) of the ECSC Treaty, the vertical effects of that merger, as a grouping of coal producers and power stations, and its consequences. The finding that the merger does not lead to an unacceptable concentration of commercial strength does not mean that the Commission cannot

require incompatible aid to be repaid. It adds that it is currently examining, as a separate matter, in an analysis carried out under the State aid rules, not under the rules relating to concentrations, the issues relating to the aid and in particular the question of the price for, or as the case may be, gift of SBW.

97 In answer to the applicant's arguments, the Commission states that in the contested decision it took the view that there was no competition between German coal producers in regard to coal subsidised by the State. That is true irrespective of the size of the sector subsidised by the State and of the lawful or unlawful nature of the aid. The repayment of the aid granted would not open up the subsidised coal market to competition, but would eliminate production of German coal.

98 So far as concerns the market for imported coal, in regard to which the applicant argues that it could be the subject of increased competition, the Commission observes that in the contested decision it analyses the position of the merging companies on the market for imported coal and approves the merger on condition that the addition of market shares resulting from the acquisition of SBW's import activities is counterbalanced by the disposal of other market shares. In other words, the market position of the merged entity would be no better than that of RAG prior to the merger. That is true whatever the size of the market and whether or not a certain portion of supplies to power stations is foreclosed by State aid.

99 According to the Commission, the applicant's arguments highlight the fundamental flaw in its case. If the applicant were right in its view that the aid in question is illegal and must be repaid, then the merger presents even less of a threat to competition than the Commission concluded, because, according to the applicant, the merger concerns only unviable activities.

100 Furthermore, the Commission observes that the question whether the merger would have taken place in its current form if aid in the form of an insufficiently high purchase price had not been granted is irrelevant to the analysis of the merger.

101 At the hearing, the Commission clarified its interpretation of Article 66(2) of the ECSC Treaty, in which causality is an important aspect. For the Commission to be able to refuse to authorise a merger, it is the concentration between two previously independent undertakings which must result in the merged entity's evading the competition rules and thus acting independently of the other players on the market. That interpretation is also apparent from point 39 of the contested decision.

102 The German Government observes that, so far as concerns sales of domestic coal to the power-generating industry and the steel industry, and having regard to the fact that, owing to the State aid granted to the undertakings in question, there was no competition, a refusal to approve the merger would have been conceivable only if the merger specifically removed any possibility of a reappearance of competition, which the applicant does not allege to be the case.

103 As regards the market sectors for the sale of German coal to other industrial customers and the sales of imported coal, the undertakings that were parties to the merger entered into commitments which rule out any increase in market shares of the import business and deprive them of the possibility of using their position on the market for the sale of German coal in order to influence their import business. On the basis of those commitments, the Commission rightly assumed that the existing market position of the undertakings concerned was not strengthened by the merger. The German Government observes that if, however,

there has been no strengthening of their market position, the necessary causal link between the merger and the market position of the undertakings in question is missing.

104 The German Government also submits that the concept of 'rules of competition' in Article 66(2), second indent, of the ECSC Treaty does not refer to all the abstract rules in the ECSC Treaty. The second indent of Article 66(2) merely refers to the competition rules in that provision, to the effect, in particular, that an artificially privileged position involving a substantial advantage in access to supplies or markets may not be established.

105 RAG observes that the merger does not modify the competitive situation in regard to domestically produced coal, since under the current State aid scheme in the Federal Republic of Germany there is no realistic prospect of any competition between RAG, SBW and Preussag Anthrazit.

106 As regards imported coal, RAG observes that the Commission obtained from it not only a commitment to sell Saarberg Coal International & Co. and the entire coal importing business of SBW, but also commitments substantially improving, in comparison with the situation before the merger, access by foreign suppliers through independent importers. In particular, the Commission required RAG to separate the sale of imported coal from the sale of domestic coal by splitting those activities into two separate businesses (Ruhrhohle Handel GmbH and Ruhrkohle Verkauf GmbH) and to reduce its shareholding in another importer, Brennstoff-Import GmbH.

— Findings of the Court

107 As regards the alleged infringement of Article 66(2) of the ECSC Treaty, the applicant submits that the economic analysis of the merger was linked to the grant of State aid in two important respects: first, the State aid dictated the geographical market as defined in the contested decision, since it was regarded as a 'market access barrier'; second, it dictated the analysis of the consequences of the merger, since the aid to the coal industry 'practically removed competition' between the companies that were parties to the merger. Those considerations, it alleges, led the Commission to limit the effects of the merger to those on 'the sale of imported coal in all sectors and the sale of domestic coal to other industrial consumers apart from energy producers and steel producers'.

108 As to the first submission, it is apparent from the contested decision (point 23) that the Commission took the view that there was no competition between German coal producers and other producers, since the average production costs of the German producers are much higher than prices on the world market (more than DEM 180 per tonne in 1997). Consequently, there is no serious possibility of the German producers' producing and trying to sell unsubsidised German coal.

109 The Commission correctly observes in that regard that any repayment of the aid granted 'would not open up competition' with regard to subsidised German coal. That repayment would eliminate German coal production. The increase in competition to which the applicant refers would take place on the market for imported coal, which was the subject of a separate analysis by the Commission. As the Commission observes, the issue can be considered in another way: either there is a specific market in Germany for coal subsidised by the State, in which case the merger has no effect on competition, or that specific market does not

exist, in which case there is a world market on which the German producers merely play an insignificant role.

110 As regards the applicant's second submission, the Commission considers, in point 31 of the contested decision, that prior to the merger there had not been any competition between German coal producers as regards State-subsidised coal either. Moreover, in point 52 of the contested decision, it foresees, as far as the sale of imported coal is concerned and in view of the commitment which it had obtained from RAG, that the merged entity's market position will be no better than that of RAG prior to the merger.

111 In view of the foregoing, the applicant, in arguing that the State aid dictated the geographic market because it was regarded as a 'market access barrier', has not shown that the Commission incorrectly analysed the situation. Nor has the applicant shown that the State aid mentioned in the decision dictated the analysis of the consequences of the merger. It follows that both submissions by the applicant must be rejected.

112 As regards the alleged failure to take adequate account of the State aid, in particular in so far as concerns the financial consequences of the merger, it is settled case-law of the Court of Justice that the Commission must, as a matter of principle, avoid inconsistencies that might arise in the implementation of the various provisions of Community law (see *Matra* v *Commission*, cited above paragraph 41, and Case C-164/98 P *DIR International Film and Others* v *Commission* [2000] ECR I-447, paragraphs 21 and 30). That obligation on the Commission to maintain consistency between the provisions of the Treaty relating to State aid and other provisions of the Treaty is all the more necessary when the other provisions also have undistorted competition in the common market as their aim (*Matra* v *Commission*, cited above, paragraph 42, and *SIDE* v *Commission* cited above, paragraph 72).

113 It follows in particular that, when adopting a decision on the compatibility of aid with the common market, the Commission must be aware of the risk of individual traders undermining competition in the common market (*Matra* v *Commission*, cited above, paragraph 43).

114 It also follows that in adopting a decision on the compatibility of a concentration between undertakings with the common market the Commission cannot ignore the consequences which the grant of State aid to those undertakings has on the maintenance of effective competition in the relevant market.

115 The latter obligation does not, however, mean that the Commission, when adopting a decision on the compatibility with the common market of a merger between undertakings at the end of a specific procedure, must necessarily await the outcome of the parallel, but independent, procedure in which the compatibility with the common market of a State aid is examined.

116 In the present case, the Commission, in reply to the applicant's argument concerning the alleged failure to take adequate account of aspects of State aid, has submitted that it took account of the financial support provided by the 1998 State aid when it determined the commercial strength of the companies that were party to the merger. According to the Commission, the contested decision in no way prejudges the outcome of any subsequent procedure concerning the various elements which the applicant claims constitute illegal aid.

117 It is also apparent from the contested decision (points 7, 13, 14 and 16) that the Commission was aware of the figures relating to the financial support provided

by the State aid. Those figures concern the aid relating to 1997 and 1998 and at least part of the aid that was made dependent on the completion of the merger. Moreover, it should be noted that the figures referred to in points 13, 14 and 16 of the contested decision appear in the section headed 'Assessment, from the point of view of competition, under Article 66(2)'.

118 Those points show that in its assessment under Article 66(2) of the ECSC Treaty, the Commission recognised that it was appropriate to examine that issue in the present case and took account of the financial support provided by the State aid mentioned in paragraphs 10 and 12 above when it determined the commercial strength of the companies that were parties to the merger.

119 The question which arises therefore, is whether the Commission, when determining the financial strength of the merged entity, took into account all the elements which could constitute State aid and, in particular, the element inherent in the completion of the merger, namely the price which RAG paid in order to acquire SBW.

120 As regards the possible State aid inherent in the completion of the merger, it should be observed that in its letter to the German Government published in the Official Journal of 8 April 2000 (see paragraph 36 above) the Commission took the view that the sale of SBW at the price of DEM 1 could be regarded as unnotified State aid to the coal industry and that the value of that aid could be estimated at DEM 1 billion.

121 However, at the hearing, the Commission stated that it was currently carrying out a separate examination under the rules on State aid, not those relating to concentrations, of the question of aid, namely the price for or gift of SBW as the

case may be, in order to establish whether the total assets transferred correspond to the price paid or whether there has been an implicit transfer of State resources to the recipient of a gift.

122 In the present case, the Commission did not therefore examine the price in that way before it authorised the merger. Consequently, it cannot have assessed in the contested decision whether and, if so, to what extent the purchase price of DEM 1 strengthened the financial and thus the commercial strength of RAG.

123 Furthermore, if the price of DEM 1 constitutes State aid whose real value is around DEM 1 billion, RAG could have benefited from it to strengthen its commercial power and used it for purposes which it determined, including the support of its import business.

124 It should be pointed out that Article 66(2) of the ECSC Treaty provides that the Commission must assess the 'proposed transaction'. That implies that the Commission is required to assess the transaction as a whole, not merely one part of the transaction as it did in the present case when it considered the physical transfer of the undertakings without taking into consideration the other elements of the transaction, namely the price really paid.

125 In the present case, although the Commission was not required to assess the legality of the supposed aid, namely the aid inherent in the merger, in a formal preliminary decision (see paragraphs 109 and 110 above), it could not, in its analysis of the competitive situation under Article 66(2) of the ECSC Treaty, refrain from assessing whether, and if so to what extent, the financial and thus the commercial strength of the merged entity was strengthened by the financial support provided by that supposed aid.

126 In those circumstances, the contested decision must be annulled and it is not necessary to examine the other parts of this plea or the other plea on which the applicant relies.

Costs

127 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must, in accordance with the form of order sought by the applicant, be ordered to bear it own costs and to pay those incurred by the applicant, other than costs occasioned by the interventions of RAG and the Federal Republic of Germany.

128 Since the applicant has not sought an order that RAG and the Federal Republic of Germany pay the costs associated with their interventions in this case, RAG and the Federal Republic of Germany are to bear only their own costs, in accordance with Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber),

hereby:

1. **Annuls the Commission decision of 29 July 1998 authorising the acquisition of control by RAG Aktiengesellschaft of Saarbergwerke AG and Preussag**

Anthrazit GmbH (Case No IV/ECSC.1252 — RAG/Saarbergwerke AG/ Preussag Anthrazit);

2. Orders the Commission to bear its own costs and to pay the costs incurred by the applicant other than costs occasioned to the applicant by the interventions of RAG Aktiengesellschaft and the Federal Republic of Germany;

3. Orders RAG Aktiengesellschaft and the Federal Republic of Germany to bear their own costs.

Vesterdorf Vilaras Forwood

Delivered in open court in Luxembourg on 31 January 2001.

H. Jung

Registrar

B. Vesterdorf

President