Court of First Instance of the European Communities Reverses Commission's Approval of the German Coal-Compromise Merger

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A. Introduction

[1] On 31 January 2001, the Court of First Instance of the European Communities entered its appealable judgement in the complaint brought by the British coal producer RJB Mining plc. RJB brought the case before the Court of First Instance in order to challenge the Commission's approval of the German government's plan to rescue that country's coal mining industry. RJB especially took exception with elements of the rescue plan that constituted, in the opinion of RJB but not the Commission, State aid prohibited by the European Coal and Steel Community Treaty (ECSC).

B. Background

[2] With a deal that came to be called the *Kohlekompromiß* (Coal-Compromise), the German Federal Government orchestrated an agreement between Germany's major coal producers, the governments of the Federal States Saarland and North Rhein-Westphalia, and the German mining and power station worker's union. The Coal-Compromise sought to restructure and thereby save the German coal mining industry with obvious far-reaching economic and political implications. The final version of the compromise involved the merger of Germany's three surviving hard coal producers (employing an estimated 36,000 people), including among them the state-owned *Saarbergwerke* (Saarland Mine Works). The plan also provided for state aid to the newly merged entity (totaling DM 2.5 billion with possible additional aid totaling DM 200 million per year). Finally, the plan provided for the new entity's release from loan and debt obligations, guaranteed by the German Federal Government (totaling about DM 4 billion). The plan would be a supplement to existing state aid schemes that guarantee prices for German coal producers. Central to the dispute over the legality of the Coal-Compromise was the portion of the plan that provided for the privatization of the state-owned Saarland Mine Works through the sale of its assets to the newly merged conglomerate (Ruhrkohle AG) for DM 1. It was expected that the Coal-Compromise would permit 10 of the 17 concerned coal pits to remain viable in the long term and that the German coal industry would return to financial health by 2005.

[3] After reviewing submissions on the matter from interested parties the Commission of the European Communities authorized the merger in a decision issued on 29 July 1998. In the review that led to that decision, the Commission did not consider whether the Coal-Compromise involved State aid prohibited by Article 4 of the ECSC. The Commission's review focused instead on the permissibility of the merger under the concentration provisions of Article 66 of the ECSC treaty. Satisfied that the newly formed German coal entity could not attain a special position with respect to the sales of imported coal in Germany because the new entity had divested or structurally isolated its coal import interests, the Commission approved the merger on these limited terms.

[4] The Commission, the newly formed German coal mining entity (RAG) and the German Federal Government defended in the action.

C. Procedure and Law

European Coal and Steel Community

[5] The treaty forming the European Coal and Steel Community was the first of many that led to the emergence of the European Union under which it now functions, sharing the EU's institutions and law with European Atomic Energy Community (EURATOM 1957) and the European Economic Community (EC 1957). The 1951 Coal and Steel treaty followed the proposal of the French Foreign Minister Robert Schuman, binding the *Montan* (coal and steel industries) of France, Germany, Italy, Great Britain, Belgium and Luxembourg in an agreement that sought to open the market, in part by limiting state aid and checking consolidation.

[6] The provisions of the European Coal and Steel Community Treaty most relevant to the Coal-Compromise case are Articles 4 and 66, which read as follows:

Article 4

The following are recognized as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: . . . (c) subsidies or aid granted by States,

or special charges imposed by States, in any form whatsoever; . . .

Article 66

(1) Any transaction shall require the prior authorization of the High Authority, . . . if it has in itself the direct or indirect effect of bringing about within the territories referred to in the first paragraph of Article 79, as a result of action by any person or undertaking or group of persons or undertakings, a concentration between undertakings at least one of which is covered by Article 80, . . .

(2) The High Authority shall grant the authorization 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 the 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.

Court of First Instance of the European Communities

[7] The Treaty forming the European Coal and Steel Community established a court for the interpretation of the treaty. (Art. 7, ECSC Treaty). The Court of Justice for the European Communities, sitting in Luxembourg, now serves all three communities (ECSC, EURATOM and EC) but the scope of the Court's jurisdiction varies among the three treaty regimes. Under the ECSC, the Court of Justice has jurisdiction over 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 [ECSC] Treaty or of any rule of law relating to its application, or misuse of powers . . . Undertakings or associations referred to in Article 48 may, under the same conditions, institute proceedings against decisions or recommendations concerning them which are individual in character or against general decision or recommendations which they consider to involve a misuse of powers affecting them." (Art. 33, ECSC Treaty). The Court's jurisdiction pursuant to the EC treaty regime is much broader. (Arts. 220-245, Consolidated EC Treaty).

[]8 The Court of First Instance was created by order of the Council of Ministers of the European Union in 1988 and, in relevant part, is obliged to hear "actions brought by natural or legal persons pursuant to the second Paragraph of Article 33, Article 35, the first and second Paragraphs of Article 40 and Article 42 of the ECSC treaty; . . ." (Article 3(b), Council Order, 24 October 1988). The ECSC Treaty now accomodates the Council's order, providing for the Court of First Instance, which is charged with the initial review of actions brought by undertakings. (Art. 32(d), ECSC Treaty). The decisions of the Court of First Instance are appealable to the Court of Justice.

D. Court's Decision

[9] The Court of First Instance ordered the anullment of the Commission's approval of the "Coal-Compromise" merger.

Admissibility

[10] The Court found the application admissible. The Court dismissed the respondents' claim that the Court lacked jurisdiction because the applicant did not qualify as an "affected" undertaking as required by Article 33 of the ECSC. The Court found the Commission's (mis)handling of the Article 4 State aid question concerned the applicant because, by its decision not to review the State aid question, the Commission permitted benefits "to be granted to one or more undertakings which are in competition with it." The Court also dismissed, with respect to the respondents' jurisdictional objection, the argument that the applicant would, in fact, be benefited by the Coal-Compromise. The respondents had argued that the German coal entity's surrender of its import interests created an export opportunity for the applicant that otherwise did not exist. The Court concluded that boons to the applicant's export business aside, the Coal-Compromise would create the world's second largest producer of hard coal, a fact that would "inevitably affect the applicant's position on that market." Finally, the Court dismissed RAG's claim that the applicant was not concerned in the matter because it is not a true competitor (due to its own financial and market difficulties). The Court accepted the applicant's claim that its costs and productivity forecast suggested that it would, in fact, soon be a competitor of the new German coal entity.

Substantive Ruling

[11] Central to the case was the Commission's proposed two-stage review of the Coal-Compromise. As the disputed Commission ruling makes clear, it analyzed the agreement only on the basis of the concentration provisions of Article

66 of the ECSC, without prejudice to any potential analysis of the Article 4 State aid provisions of the ECSC. Reviewed in this manner, the merger would proceed following the Commission's approval while any Article 4 objections would be considered independently and at another time with the possibility that the newly merged entity would be required to return the financial benefits of improper State aid, but without any implications for the propriety and validity of the merger itself. The question before the Court was: (1) whether such a two stage review of the Coal-Compromise, permitting the merger to go ahead with the help of State aid that may have been improper, is acceptable; or (2) whether, as the applicant argued, consideration of Article 66 actually involves a unified and contemporaneous analysis of Article 4 and other "rules of competition instituted under [the ECSC] Treaty." (Art. 66, ECSC Treaty).

[12] The Court rejected the Commission's proposed two-stage review process. The applicant had argued that 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." The Court agreed, concluding that "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." In reaching this conclusion the Court emphasized that Article 66(2) of the ECSC Treaty requires an assessment of the "proposed transaction," which 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."

[13] The Court found that the Commission, contrary to its representation in the July 1998 order and its defense of the proposed two-stage review process in the proceedings before the Court, had actually considered the role of State aid when approving the Coal-Compromise. The Court noted that the Commission made reference to the relevance of the State aid in points 7, 13, 14 and 16 of the July 1998 order. The Court found, however, that the Commission failed appropriately consider all of the manifestations of State aid inherent in the Coal-Compromise, particularly the DM 1 sale of the Saarland Mining Works. Without expressly ruling, the Court suggested that State aid in the nature of the DM 1 sale of the Saarland Mining Works would constitute a violation of the Article 4 prohibition of State aid, allowing the new German coal entity to prejudicially strengthen its commercial power.

For more information:
Decision of the Court of First Instance of the European Communities (English) on-line:
http://europa.eu.int