II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 December 1974

on the acquisition by the Federal Republic of Germany of a majority shareholding in Gelsenberg AG, Essen

(Only the German text is authentic)

(75/156/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 66 and 80 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 ;

Having regard to the communication from the Government of the Federal Republic of Germany of 13 March 1974 concerning its intention to acquire a majority shareholding in Gelsenberg AG, Essen ;

Whereas :

1. Through a number of State-controlled undertakings the Federal Republic of Germany engages in the production and distribution of coal. It owns :

— a controlling 40 % holding in Vereinigte Elektrizitäts- und Bergwerks-Aktiengesellschaft (VEBA), Bonn and Berlin ; the remainder of VEBA's shares is dispersed over a large number of holdings. VEBA holds 99·1 % of the share capital of Hugo Stinnes AG, Mülheim, an undertaking engaged in the wholesale coal trade, which itself holds controlling interests in this field. VEBA also has a 14·1 % share in the capital of the coalproducing undertaking Ruhrkohle AG ;

— about 83 % of the share capital of Vereinigte Industrie-Unternehmungen Aktiengesellschaft (VIAG), Berlin.

Together with VIAG, VEBA controls Braunschweigische Kohlenbergwerke (BKB), Helmstedt. BKB stopped production of brown coal briquettes on 1 April 1974, but it controls other smaller distribution undertakings within the meaning of Article 80 of the Treaty.

BKB, together with VEBA, also controls BKB/Stinnes-Stromeyer GmbH, which is also a coal wholesaler.

The Federal Republic of Germany also owns :

— 76 % of the shares of Saarbergwerke AG, Saarbrücken, which is a coal-producing undertaking within the meaning of Article 80 of the Treaty. Saarbergwerke has a majority holding in several coal distribution undertakings within the meaning of Article 80 ;

— 100 % of the share capital of Salzgitter AG, which has a 10·8 % holding in Ruhrkohle AG.

2. Gelsenberg AG is a group with activities in the fields of hydrocarbons, chemicals, nuclear processing/electricity generation, inland waterways, transport and distribution ; 48·3 % of its shares are held by Rheinisch-Westfälische Elektrizitätswerk-Aktiengesellschaft (RWE), Essen. The remainder of the shares is dispersed over a number of holdings. Its wholly-owned subsidiary Raab Karcher GmbH is a coal distri-

bution undertaking within the meaning of Article 80 of the Treaty. Raab Karcher GmbH has links with Bayerische Brennstoffhandel GmbH KG and Hansen Neuerburg Export-Import GmbH OHG : these last two undertakings are controlled jointly by Raab Karcher and other firms. Gelsenberg AG also has a 13·55 % holding in Ruhrkohle AG.

3. The Federal Government proposes to acquire 51·3 % of the share capital of Gelsenberg AG. The combination of Gelsenberg AG and VEBA is designed to produce a viable large-scale group whose activities would centre on oil and electricity production. Since a merger of the two undertakings means the combination of their coal production and distribution businesses too, this constitutes a concentration within the meaning of Article 66 (1).

The Federal Government controls, directly or indirectly, other undertakings within the meaning of Article 80. With regard however to these holdings of the Federal Government it should be noted that the undertakings controlled by the Government are not subject to any central planning or decision-making authority but are operated as economically independent undertakings. Although therefore VEBA, Vereinigte Industrie-Unternehmungen AG, Saarbergwerke AG and Salzgitter AG are effectively linked to each other, nevertheless the connection does not bring about any restrictive effect on competition. Consequently, assessment of the concentration can be confined to the integration of Gelsenberg AG into VEBA.

4. VEBA and Gelsenberg AG, like all shareholders of Ruhrkohle AG, were formerly mining companies and transferred their mining holdings to Ruhrkohle AG in 1969. Like the many other shareholders, they do not have a large enough shareholding to control Ruhrkohle AG. Acquisition of holdings in Gelsenberg AG will, however, give the Federal Government a further 13·55 % of the shares of Ruhrkohle AG. The undertakings controlled by the Federal Government will then hold approximately 39 % of the capital of Ruhrkohle and will undoubtedly have a considerable influence on its business policy. However, there are no indications that the Government of the Federal Republic of Germany could use its strengthened position to modify the supply conditions of Ruhrkohle AG so as to favour the merchants controlled by it. In addition the terms of business of Ruhrkohle AG as authorized by the Commission (1) ensure equal treatment for all wholesalers in terms of direct purchasing from Ruhrkohle AG.

The change in the pattern of ownership of Ruhrkohle AG will thus not give the VEBA/Gelsenberg AG Group any advantage as regards access to production.

(1) OJ No L 120, 7. 5. 1973, p. 14.

5. To judge by 1973 figures, annual sales of solid fuels on the relevant market (the Federal Republic of Germany) can be expected to be as follows :

Sales by VEBA, including wholesale deliveries by Braunschweigische Kohlenbergwerke, Helmstedt, controlled jointly with VIAG	approx. ..... metric tons
Sales by Gelsenberg AG	approx. ..... metric tons
	approx. ..... metric tons

The total sales of approximately . . . . . metric tons per annum by the two undertakings to be merged represent some 33 % of total sales by coal wholesalers on the relevant market. This share of the wholesale market will be the largest in the Federal Republic. However there are seven other coal wholesalers in the Federal Republic with market shares of between 5 and 10 %. And there are about 150 smaller undertakings. Consequently, and because these wholesalers are widely scattered throughout the Federal Republic of Germany consumers still have a wide choice in covering their requirements for solid fuels despite the concentration amounting to 33 % of the market.

VEBA/Gelsenberg AG are not in a position to fix prices for solid fuels. Of the approximately . . . . . metric tons of solid fuels sold in 1973, about . . . . . metric tons were produced in the Community. Since the trade margin allowed for this coal by the main supplier fields is only about 4 % of the list price, the two undertakings cannot sell at much below list price. On the other hand, VEBA/Gelsenberg AG can only raise prices as far as the competition from fuel oil allows, because for many years the price of fuel oil has been well below that of Community coal. This applies also, though to a lesser extent, to the approximately . . . . . metric tons of coal imported in 1973. VEBA/Gelsenberg AG account for approximately . . . . . % of the market in coal imports from non-Community countries — a market position of much the same strength as their position in the wholesale coal business as a whole. However, prices for imported coal from the duty-free import quota have invariably been above the price for fuel oil. The only exception is coal from state-trading countries, some of which has been imported at the same price as fuel oil.

This price situation has changed substantially the wholesale fuel trade in two ways : most consumers have converted their installations to use fuel-oil or modified them to use either solid or liquid fuels. As a result the coal wholesalers in Germany sold about 49 000 000 metric tons of fuel oil in 1973 in addition to solid fuels. This means that currently only about 30

to 32 % of sales by coal wholesalers (ton for ton) is accounted for by solid fuels : by far the greater part of their business is in fuel oil. The oil companies, however, also sold about 33 000 000 metric tons direct rather than through coal wholesalers. As a result there is less opportunity today for a wholesaler to exploit a strong market position. The possibility of substituting fuel oil for solid fuel and the appearance of new competitors in the market ensure a sufficently competitive situation. This competition among wholesalers is primarily in terms of the variety of their supplies, their reputation for delivery on time, quality, delivery arrangements and their treatment of complaints.

In determining whether the merger of the two undertakings might afford them other exceptional competitive advantage, consideration should be given to the fact that they have their own inland waterway vessels. VEBA and Gelsenberg AG have a carrying capacity of their own which enabled them in 1971 to transport about . . . . . % and . . . . . % respectively of total shipments by German firms within the Federal Republic of Germany and to and from foreign ports. However, less than 20 % of the solid fuels sold in the Federal Republic of Germany is shipped by water, and VEBA and Gelsenberg AG each carried less than . . . . . % of their solid fuels sales in their own vessels. Another pointer indicating that the two undertakings will not gain a privileged position through the use of their own vessels is the fact that on inland waterways the supply of cargo space exceeds demand and VEBA/ Gelsenberg AG have no direct influence on transport charges since waterway freight charges, where not fixed at set rates (as in German domestic traffic), are determined freely on the freight market. Given this market structure and this relationship between supply and demand, the two undertakings have virtually no scope for granting special terms to buyers to make use of their transport facilities.

6. Consequently, the merger will not enable the undertakings involved to determine prices or to control or restrict distribution in a substantial part of the solid fuel market or to evade the rules of competition instituted under the Treaty. Also, it will not give them an artificially privileged position affording a substantial advantage in access to supplies or markets,

HAS ADOPTED THIS DECISION :

Article 1

The Federal Republic of Germany is authorized to acquire a majority of the shares of Gelsenberg AG, Essen.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 16 December 1974.

For the Commission

The President

François-Xavier ORTOLI