

***Case No COMP/JV.28 -  
SYDKRAFT / HEW /  
HANSA ENERGY  
TRADING***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 30/11/1999

*Also available in the CELEX database  
Document No 399J0028*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30 November 1999

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

**Subject: Case No COMP/JV.28 - Sydkraft/HEW/Hansa Energy Trading**

Notification of 27<sup>th</sup> October 1999 pursuant to Article 4 of Council Regulation (EEC) No 4064/89.

1. On 27 October 1999, the Commission received the notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 ("Merger Regulation") by which Sydkraft AB ("Sydkraft") and the company Hamburgische Electricitäts-Werke AG ("HEW") acquire joint control of a newly established new joint venture company Hansa Energy Trading GmbH (the "JV") which is to engage in the trade and sale of energy.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

**I. THE PARTIES AND THE OPERATION**

3. Sydkraft is an energy supplier primarily active in the generation, distribution and supply of electricity, the transmission and sale of natural gas, and the production and supply of district heating. Sydkraft sells its products mainly in Sweden but also in other Nordic countries, certain Baltic countries and Germany. Sydkraft is a privately owned company and the parent company of the Sydkraft Group.
4. HEW is a German energy company mainly involved in the production and supply of electricity (this representing approx. 80% of its turnover). It is also active in the gas, district heating, waste management and telecommunications sectors. HEW's activities are essentially restricted to Germany, but it started trading electricity on NordPool, the Nordic Power exchange in 1998 and is listed as a participant on the Amsterdam Power Exchange ("APX") since earlier this year. HEW is part of the Hamburger Gesellschaft für Beteiligungswesen mbH ("HGV") group, a holding company of the Hamburg municipality. HGV has a 50,2% stake in HEW and is entitled to 54,09% of the voting rights, thus controlling HEW.

5. Sydkraft and HEW propose to set up the JV as a limited liability company under German law. The JV is to engage in the trade and sale of energy in Europe. Its initial focus will be spot trading of electricity and financial trading of electricity derivatives on the APX, as well as the sale of physical electricity in the Netherlands, Belgium and Luxembourg.

## **II. COMMUNITY DIMENSION**

6. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5,000 million<sup>1</sup> (Sydkraft: EUR 1.714 million in 1998; HGV: EUR 3.485 million in 1998). Each of the parties has a Community-wide turnover in excess of EUR 250 million (Sydkraft: EUR > 250 million in 1998; HGV EUR > 250 million in 1998). None of the undertakings concerned achieves more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. Hence, the operation has a Community dimension.

## **III. CONCENTRATION**

### *Joint Control*

7. Each parent will hold 50% of the JV's share capital of €5 million and will hold half of the voting rights. No shareholders' meeting can obtain a quorum without the presence of at least one representative of each shareholder (art. 5.3. of the Shareholders Agreement). Strategic decisions, such as the adoption of the budget, appointment of senior management, major investments and significant changes to the structure of the joint venture are to be taken by an Advisory Committee ("AC"). Each party is entitled to appoint two representatives to the AC. Each party will have veto rights over strategic decisions since these decisions must be adopted within the AC by a majority of at least 75% of the votes cast (art 6.4.(b) of the Shareholders Agreement).
8. Accordingly, neither parent company will be in a position to determine the strategic decisions of the JV without the agreement of the other. The parent companies will thus have joint control of the JV.

### *Full-function*

9. The JV, established for an indefinite duration, is a trading and sales company for energy, mainly electricity. Its initial focus will be spot trading of electricity and financial trading of electricity derivatives on the APX, as well as the sale of physical electricity in the Netherlands, Belgium and Luxembourg. Accordingly, the JV's activities will consist in buying and selling electricity, in marketing electricity to end-customers and in trading both physical electricity as well as financial derivatives based on electricity on the APX, as well as covering the risks linked to those operations.
10. The JV is established with a share capital of €5 million. Any further financing will be obtained by the JV on a stand-alone basis. This capital base may be seen to be small.

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<sup>1</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

However, the JV's capital base of €5 million will at the very least suffice for it to develop a trading business as envisaged for the JV. In this respect it should be noted, that the APX having only taken up operations on 1st May 1999, is still a developing exchange. Arguably, as the JV's business develops, its capital base will suffice to cover risks arising out of a turnover which represents a multiple of its share capital. Thus its capital base will suffice to cover reasonably foreseeable net outstanding positions.

11. The parent companies will provide the JV with a management (a managing director) dedicated to its day-to-day operations. The managing director, appointed for up to five years, will have competence to decide on ordinary business matter of the JV, such as the raising or granting of loans or the pledging or mortgaging of the JV's assets in the course of the JV's ordinary operations (art. 7.1 Shareholder's Agreement). It is intended that the JV will initially have a staff of four, potentially later rising to about 10 as the JV's business develops. As trading as such is not an activity which requires a lot of manpower, the JV's initial staff of four plus a managing director would seem to be sufficient for it to operate.
12. As the JV is meant to be a trading company, it will not be restricted to buying energy from its parent companies. It may however purchase energy from its parents, but then only on an arm's length basis. Whilst the parents commit themselves to providing the JV with necessary services for setting up its' business, these services will only be provided on arm's length basis.
13. Finally, the parent's businesses will remain completely separate, as the JV is concerned with new business.
14. Accordingly, the JV will perform the functions normally carried out by trading and sales companies for energy. It will thus be able to fulfil on a lasting basis the functions of an autonomous economic entity and thus constitutes a concentration within the meaning of article 3 of the Merger Regulation.

#### **IV. COMPETITIVE ASSESSMENT**

##### ***1. Product market***

15. The parties submit that the JV will operate on two different product markets, namely;
  - (1) physical trading, involving deliveries of electricity to distributors and industrial customers and related spot trading in electricity; and
  - (2) financial trading in electricity derivatives.
16. The parties submit that physical and financial trading are two distinct forms of trade being carried out in a dissimilar way, in pursuit of different objectives, requiring different assets and resources, and involving different types of risk. The parties further submit that the Commission has previously defined trading in (financial) derivatives as a distinct product market<sup>2</sup>.
17. According to the parties, physical trading will be either conducted through bilateral agreements for the delivery of a certain amount of electricity for a fixed price and a fixed amount of time with suppliers or purchasers, or on the spot market.

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<sup>2</sup> Kreditbank/Cera Bank, Case IV/M. 1122 at para.8

18. Financial trading on the other hand would, according to the parties, involve trading derivatives based on electricity such as futures, swaps, options or swaptions, which is based on financial settlement only and does not involve actual physical delivery.
19. The parties do not address the issue whether this differentiation into physical and financial trading also applies to other forms of energy such as gas. It is likely, that a similar differentiation could be argued for other commodities too. However, since the JV will at least for a foreseeable future only be active in electricity trading, this question can be left open in the present case.
20. In its decision in EdF/Louis Dreyfus<sup>3</sup>, the Commission has accepted that electricity trading does constitute a product market, which is separate from other electricity-related activities such as producing, or transport. It did not, however further subdivide trading into physical and financial trading. However, whether or not this division is warranted can be left open in this case, as the JV will not create or strengthen a dominant position whether or not the market for electricity trading is further subdivided.

## **2. Geographic market**

### *a) Physical trade of electricity*

21. The parties submit that for physical trade, the markets are still national. This is supported by the fact that at present, each of the three Benelux countries which constitute the target of the JV's activities, have been liberalised to different degrees, and in effect, only the Netherlands market which is partially liberalised to the extent that about 33% of consumers are able to choose their electricity supplier freely, constitutes a realistic target for the JV at present. The other two markets (Belgium, Luxembourg) must also be considered as being national, given the state of the implementation of the Electricity Directive<sup>4</sup>. The Electricity Directive has not yet been implemented fully in Belgium, which was granted an additional deadline of 1 year until 19.02.2000 for doing so. Thus, there are not yet any eligible customers, and the JV will thus not be able to enter this market at present. This situation will change once the Belgian market is liberalised at which point a market opening of approx. 35% is expected. Luxembourg has not yet implemented the Electricity Directive either and it is uncertain at present when it will do so. Even if the geographic market defined should be seen to be wider than national now or in the foreseeable future, the setting up of the JV does not create or strengthen a dominant position.

### *b) Financial trading*

22. Currently, financial trading in electricity can only be done at the Eltermin, the Nord Pool's futures market. Financial trading is expected to be introduced to the APX shortly.

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<sup>3</sup> Case IV/M.1557

<sup>4</sup> Council Directive 96/92 of 19<sup>th</sup> December 1996

23. Based on the situation at Eltermin, the market for trading in electricity derivatives is likely to be wider than national, as no physical settlement is required. Indeed it is not a requirement for Eltermin participants to be present in either of the Nordic countries. As financial trading of electricity derivatives varies little from financial trading in derivatives based in any other commodities, an analogy may be drawn to the financial markets. Here the Commission its decision Fortis/Generale de Banque<sup>5</sup>, has found indications that the financial markets, and thus the market for trading in financial derivatives is international.
24. But the questions as to the geographical market can be left open, as the setting up of the JV does not create or strengthen a dominant position under either market definition.

### 3. Assessment

#### Physical trading of electricity

25. In the Netherlands, there are about 650 eligible customers, accounting for about 33% of total consumption. This will increase to 66% in 2002 and 100% in 2007. This market is being targeted by several major energy companies such as Electrabel, RWE, PreussenElektra, EdF, Vattenfall, Statkraft and Enron, all of which have already signed contracts with eligible customers and are trading on the APX spot market. Accordingly, the JV represents a further market player. Neither of the parties is present on the market for physical supplies in the Benelux. In view of the numerous other market players, and the fact that the market is an emerging market, the setting up of the JV does not create or strengthen a dominant position, nor would it do so in case the markets should be seen to be wider than national.

#### *Assessment under Article 2(4)*

26. Pursuant to article 2(4) of the merger Regulation, "*to the extent that the creation of a joint venture has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination shall be appraised in accordance with the criteria of article 81(1) and (3) of the EC Treaty*". In order to establish a restriction of competition in the sense of article 81(1), it is necessary that the co-ordination of the parent companies' competitive behaviour is likely and appreciable and that it results from the creation of the joint venture.
27. HEW is registered as a participant with the APX spot market, but has not yet commenced trading, and Sydkraft does not exclude becoming a participant in the future. Thus the parents are not yet, but might become active on the same market as the JV, this leading to a potential for co-ordination between them. However, even if the parents were both to become active on this market, the APX as is the case with all exchange markets, is a very price sensitive market and there are only low barriers to entry. Thus, should the parents try to obtain higher prices by co-ordinating their behaviours, they would risk losing any market share they might have very quickly. In any event, the parties' low market shares as new entrants, as well as the JV's likely low market share as new entrant, would make it unlikely that any co-ordination appreciably restricts competition.

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<sup>5</sup> Case IV/M. 1172

**Financial trading of electricity:**

28. Once the APX futures market is initiated – probably by the end of the year – it is expected that participants will not only include the present 20 listed APX spot market participants, but also commodity traders and financial institutions. This assessment is supported by the fact that institutions such as Morgan Stanley and Louis Dreyfus are active at Eltermin. Accordingly, here too, the JV will be a new market entrant. In view of the numerous other market players, and the fact that the market is an emerging market, the setting up of the JV will not create or strengthen a dominant position.

*Assessment under Article 2(4)*

29. HEW will trade at the APX futures market once established, and Sydkraft may also become a participant. However, the same assessment as for the trade of physical electricity is valid for the financial trade too, and accordingly, there is no likelihood that the parents would co-ordinate their behaviour in a way that might appreciably restrict competition.

**V. CONCLUSION**

30. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) N° 4064/89 and under article 57 of the EEA Agreement.

For the Commission,