

***Case No COMP/M.2744 -
RWE GAS / LATTICE
INTERNATIONAL / JV***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 07/08/2002

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 07/08/2002

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sir/Madam,

Subject: Case No COMP/M.2744 - RWE Gas / Lattice International/ JV
Notification of 09.07.2002 pursuant to Article 4 of Council Regulation
No 4064/89¹

1. On 09 July 2002, the Commission received a notification of a proposed concentration by which the undertakings RWE Gas AG, Germany ("RWE Gas") and Lattice Group Holdings Ltd., UK ("Lattice International") intend to acquire joint control by way of purchase of shares in the newly created company called Viavera GmbH ("the joint venture"), constituting a joint venture.
2. After examining the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No. 4064/89² and that it does not raise serious doubts as to its compatibility with the common market and with the EEA agreement.

I. THE PARTIES

3. RWE Gas is a subsidiary of the multi-utility RWE Group ("RWE"). RWE Gas is active in the trade and marketing of natural gas. It supplies in Germany parts of North Rhine-Westphalia, Lower Saxony, Rhineland-Palatinate, Hesse and Saxony-Anhalt. RWE Gas operates pipeline networks in these areas supplying local distribution companies

¹ OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

² OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

and end consumers (households and industrial). In 2002 RWE acquired control over the UK company Innogy Holdings plc active in the supply of gas in the United Kingdom.

4. Lattice International is a wholly owned subsidiary of Lattice Group plc, UK (Lattice) and is active in the provision of services in the gas supply chain. The Lattice Group's principal business is carried out by Transco plc, which is the owner, operator and developer of the majority of Britain's gas transportation system.

II. THE OPERATION

5. RWE Gas and Lattice International will acquire joint control of the newly created joint venture company viavera. Lattice international will hold [a minority] and RWE Gas [a majority interest in] its shares. The joint venture will be controlled jointly by the two parent companies. Each party shall appoint one of the two managing directors. All actions to be taken on behalf of the joint venture need the consent of both Managing Directors. The supervisory board of the joint venture shall consist of five members, three appointed by RWE Gas and two by Lattice International. The issues decided by the supervisory board include, inter alia, changes in the joint ventures's business plan (including budget), approval of the annual accounts etc. Resolutions of the supervisory board require four supporting votes to be passed. The agreement of both parties is therefore required for strategic decisions.
6. The joint venture will operate in the market for gas related logistic services, in particular transport management for gas traders and contract handling for network operators, tasks resulting from the system access obligations in the recently liberalised gas markets.
7. The joint venture will have sufficient financial and other resources in order to operate on a lasting basis as a full function joint venture. For the set-up phase the parent companies have agreed on contributing to the joint venture a considerable amount of assets and some employees. The parent companies will contribute a total amount of [...] EUR to the joint venture's capital reserve and in addition will provide loans amounting [...] EUR. Services, such as general IT and administrative services shall be supplied on an arm's length by RWE Gas for a transitional period for no longer than [...] years.
8. RWE Gas will transfer to the joint venture [...]. This software helps to manage administrative and technical queries in relation with the transport of natural gas.
9. In the start up phase RWE will allow the joint venture to make use of [...]. This software contains [...] which allows the calculation and visualisation of the best routing of natural gas through the pipelines.
10. A 24h operational support that the joint venture will source [...] from its parent companies.
11. RWE Gas and Lattice International expect the joint venture to sell the majority of its services to third parties, but RWE Gas and other RWE subsidiaries will be among the first customers of the joint venture. RWE Gas and Lattice International expect the joint venture to sell the majority of its services, i.e. [...] to third parties by [...]. The parties

expect the joint venture to have an initial turnover in 2002 of [...] million which is anticipated to increase to [...] million by the end of 2006.

12. It can be concluded from the above that the joint venture will perform on a lasting basis all the functions of an autonomous economic entity and thus constitute a full function joint venture within the meaning of Article 3(2) of the Council Regulation (EEC) No. 4064/89.

III. CONCENTRATION

13. On the 28 June 2002, RWE Gas and Lattice International signed an agreement, creating a joint venture performing on a lasting basis all the functions of an autonomous economic entity, constituting a concentration within the meaning of Article 3(1)(b) of the Council Regulation.

IV. COMMUNITY DIMENSION

14. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion³ (RWE Group €62,878 million and Lattice Group €6,347 million). Each of the undertakings concerned have a Community-wide turnover in excess of EUR 250 million [...], but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

V. PRODUCT MARKET AND GEOGRAPHIC DEFINITIONS

Product market definitions

15. According to the parties, the relevant product market can be defined as natural gas related logistic services. The joint venture will perform two kinds of services within this overall definition. Firstly, it will assist gas traders in managing the transport of gas through networks owned by third parties (“transport services”). The aim is to provide customers with the most cost efficient transport of natural gas. The services comprise of identification of optimal transport routes, procurement of transport capacities, forecasting of demand for the energy trader’s customers and a 24 hours transport handling service.
16. Secondly, it will provide services to network owners and operators relating to the management and handling of commercial obligations resulting from third party access (“network services”). The customers will be owners or operators of regional gas networks obliged to give third party access as a result of the liberalisation of the gas market. The services provided will comprise of development of the conditions for network access including sample contracts and support in negotiating such contracts.
17. The joint venture’s core business will focus on offering transport and network services to third parties. The parties submit that the services provided by the joint venture have not in the past been necessary on the European gas market. The services have until

³ 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.

now partly or wholly been provided by undertakings in the gas sector, usually as an operation ancillary to their core businesses.

18. It could be argued whether the provision of natural gas related logistics comprising of transport services and network services belong to the same product market. On the one hand the two services are derived from the obligation to grant access to third parties to gas networks. On the other hand, it is possible to access the market without offering both services. However, in this case it is not necessary to exactly define the relevant product market, as under either of the envisaged product market definitions no competition concerns would arise.

Geographic market definition

19. The parties argue that the market for natural gas related logistics is at least national in scope. With regard to transport services, the parties believe that the related services can be provided on a Community wide basis. The joint venture will provide its transport services in all Member States and Switzerland.
20. In relation to network services, the parties argue, that the market might be more narrow in geographic scope. Network services will only be provided to and demanded by owners and operators of regional gas networks. The activities of the joint venture will be limited to offering network services in Germany and The Netherlands at the beginning.
21. In the United Kingdom the gas network is run and owned by Transco, an affiliate of Lattice. The conditions for network access and transport of gas are published, non-negotiable and identical for everybody in the UK. There will therefore be no market for the joint ventures services in the UK, except for customers requesting for transport services in or out of the UK market.
22. However, for the purpose of this decision the precise geographic market definition can be left open, as under none of the described market definitions the operation will give rise to competition concerns.

VI. COMPETITIVE ASSESSMENT

23. The impact of the joint venture will in general be pro competitive. The joint venture will, by offering its services, facilitate market entry for third parties. The joint venture will furthermore provide its services across borders and thereby promoting the liberalisation of the European gas markets.
24. As the joint venture is going to be active on an emerging market the available market information on market shares and actual competitors is limited. However, it should be kept in mind, that gas companies and network owners already have to handle the logistics of gas transportation for their own needs.
25. The parties expect several new players to enter the market for gas logistic services. In addition, since the barriers for market entry are low, it is likely that companies which are currently active in the supply, transport and trading of natural gas and groups of regional gas providers will also provide services in these markets. Software providers and consultancy firms may also provide services in this market.

26. RWE Gas will contribute some IT assets such as the specialised software for the gas related services. In the initial start up period the joint venture will operate on one IT system owned by RWE Gas. However, to the extent that data provided by the joint venture is processed on applications owned by RWE Gas, the parties will install safeguard procedures so as to guarantee the privacy of this data. Furthermore, the joint venture will be physically separated from its parents with its own accommodation. In addition the joint venture will be financially separated from the parents with independent accounts and banking arrangements. Finally, the joint venture will have confidentiality agreements with actual and potential customers and suppliers, which prohibit any disclosure of business information by either party to third parties including the parent companies.
27. The market investigation has revealed that several gas companies are offering or are planning to offer similar services as the joint venture to third parties. These companies are active in the gas industry and have the necessary know-how and technical facilities to handle gas- and network services. The market investigation also showed that existing players on the natural gas market who have developed such services for their own needs now offer these services to third parties. As mentioned the market is still emerging and the factual experience still have to be gained by the market participants. Competitors explained that the complexity of offering a comparable gas logistic service depends very much on the complexity of the demand. In other words: the greater the number of operators that are involved in the organising of the routing of the natural gas, the more complicated and costly the service will be.

Germany

28. RWE is either directly or indirectly active in the entire supply chain for natural gas in Germany. Its activities concern long-distance and short-distance wholesale transmission of gas and distribution to end consumers. The RWE Group has a market share of approximately [0-10]% on the market for long-distance wholesale transmission of natural gas through its participation in Thyssengas jointly controlled with Deutsche Shell. The competitors are Ruhrgas AG (approximately 60% long-distance wholesale transmission of natural gas in Germany), BEB Erdgas und Erdoel GmbH, Verbundnetz Gas Aktiengesellschaft and Wingas GmbH. On the market for short-distance wholesale transmission of gas RWE Gas estimates its market share to be [5-15]%. The largest competitor is E.ON/Ruhrgas with an estimated 62% market share and there is a number of small competitors. Finally, on the market for local distribution of gas in Germany the market share of RWE is approximately [0-10]%.
29. The market for natural gas related logistic services is related to the business of transport, distribution and marketing of natural gas. As described above, RWE is active on the German market for the gas supply. However, the market position of RWE on the German market will not enable the joint venture to act independently of its competitors. This is based on limited the position of RWE on the market for long-distance and short-distance wholesale transmission of natural gas. RWE will not be able to use its market position on these markets to exclude competitors from offering similar services as the joint venture. On the contrary, the joint venture will have to negotiate contracts with competing gas companies concerning third party access to gas networks. Furthermore, a large amount of the German long-distance and short-distance wholesale transmission network is owned by independent third parties. These competitors will also be interested in attracting transport business in order to maximise

the capacity utilisation of their networks, thereby putting a competitive restraint on the behaviour of RWE and the joint venture.

The Netherlands

30. In the Netherlands, the long-distance network is almost exclusively owned and operated by Gasunie (Transport and Services). RWE is to a small extent active on the local distribution market through its subsidiary Obragas and N.V. Nutsbedrijf Haarlemmermeer (“NBH”). Obragas is a regional distribution company active in the eastern part of the Dutch province Nothern Brabant. In the gas supply to end-users Obragas had an estimated market share of [< 5]% on the Dutch market. NBH is also a regional distribution company with a market share of [< 3]% on the Dutch market. RWE Gas has entered into a binding agreement for the acquisition of a majority interest in the Dutch company Intergas N.V. The transaction requires the approval of the Dutch Ministry of Economic Affairs, which is still outstanding. Intergas N.V. is active on the market for supply of gas to end-consumers in Nothern-Brabant. Intergas N.V. has market shares of around [< 5]% of the Dutch market. Finally, RWE Gas Netherlands N.V. is active in the supply of gas to eligible customers on a Dutch wide basis, with a market share of less than 5%.
31. For the reasons mentioned above concerning the German gas market, the position of RWE on the Dutch market will not enable the joint venture act independently of its competitors. As mentioned RWE does not control the long-distance network and is only to a limited extent active as a gas supplier on the Dutch market.

United Kingdom

32. In relation to serving customers with gas transport services originating from or terminating on UK market, the joint venture will not be in a privileged position compared to its actual or potential competitors. As mentioned, the conditions for network access and transport of gas in the United Kingdom are published, non-negotiable and identical for all market participants. On the one hand this will exclude the possibility of Transco, as an operator of the UK gas network, to favour the joint venture in offering its logistic services on the UK market. On the other hand it will eliminate the possibility of Transco favouring RWE’s British subsidiary Innogy Holding Ltd on the UK market.
33. Since the transaction will not create any competition concerns on any of the national markets mentioned, it can be concluded, that no competition concerns would arise for transport services and/or network services on a EEA wide basis, as mentioned above in paragraph 22.

Co-ordination between the parents (Article 2(4))

34. The joint venture will not allow the RWE and Lattice to co-ordinate their competitive behaviour based on the establishment of the joint venture. Although Lattice operates the British gas network having a market share of almost 100%, Lattice does not hold any interest in companies purchasing or trading gas. Whereas RWE’s activities on the UK gas market through its subsidiary Innogy Holdings Ltd. are limited to the trade/wholesale of natural gas and supply/distribution to end consumers. Since RWE and Lattice are not active in the same product market, horizontal overlaps will not occur. It can therefore be excluded that the joint venture would create an incentive to co-ordinate the behaviour of its parent companies.

35. Based on the above mentioned it can be concluded, that the proposed concentration will not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or a substantial part of this area.

VII. CONCLUSION

36. 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) No 4064/89.

For the Commission

(Signed)
Christopher PATTEN
Member of the Commission