

***Case No IV/M.402 -
POWERGEN / NRG
ENERGY /
MORRISON
KNUDSEN / MIBRAG***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION

Date: 27.06.1994

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.6.1994

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

**Subject: Case IV/M.402 - PowerGen/NRG Energy/Morrison Knudsen/Mibrag
Your notification of 24.5.1994 pursuant to Article 4 of Council Regulation
No. 4064/89.**

1. The proposed operation concerns the sale by the Treuhand of MIBRAG, a brown coal producer in the former East Germany to a consortium of PowerGen, NRG Energy and Morrison Knudsen. The operation was notified to the Commission on 24 May 1994 pursuant to Article 4 of Council Regulation (EEC) No 4064/89.

The parties have also made a separate notification under Article 65 and 66 of the ECSC Treaty. PowerGen and NRG Energy are also participating in the Schkopau power project with VEBA Kraftwerke Ruhr AG (VKR) which will be the subject of a notification under Regulation 17.

2. After examination of the notification the Commission has concluded that the proposed operation falls within the scope of Council Regulation No. 4064/89 and does not raise serious doubts as to its compatibility with the common market.

THE PARTIES AND THE OPERATION

3. PowerGen plc is a UK company engaged in the generation and sale of electricity. NRG Energy Inc is a subsidiary of Northern States Power Company and is a US corporation in non-utility energy related businesses. Morrison Knudsen Corporation is a US corporation active in the environmental, industrial, power and transportation sectors.
4. PowerGen, NRG Energy and Morrison Knudsen (collectively "the purchasers") intend to acquire 99% of the shares of Mitteldeutsche Braunkohlengesellschaft mbH (MIBRAG mbH) through a Netherlands holding company MIBRAG BV. MIBRAG mbH consists of brown coal mines and processing plants, power plants and other activities which were part of the original MIBRAG. The remaining parts of the original MIBRAG have been split off into two other separate companies which the purchasers will not acquire. Certain interface arrangements will be necessary between MIBRAG mbH and the two other companies.

CONCENTRATION

Joint control

5. The purchasers will act as one when exercising their shareholders rights in MIBRAG mbH through MIBRAG BV. Each of the purchasers will indirectly hold one-third of the shares of MIBRAG BV. At the level of MIBRAG BV a number of decisions require the unanimous consent of the purchasers including the approval of the business plan and the budget. [...] ⁽¹⁾ The purchasers, therefore, will exercise joint control of MIBRAG BV, and through it, MIBRAG mbH.

Full function JV not leading to the co-ordination of competitive behaviour

6. MIBRAG mbH is a full function enterprise owning all the assets, intellectual property rights and concessions necessary to carry out its business. It does not depend for its business on facilities that are economically integrated with the parent companies businesses.
7. The purchasers are not active in MIBRAG mbH's neighbouring, upstream or downstream markets in Germany. Even though MIBRAG mbH and its shareholders are active in some of the same product markets there can be no co-ordination of competitive behaviour because they operate on different geographic markets. For example, there is no possibility of PowerGen selling electricity generated in the UK to eastern German customers or for MIBRAG mbH to sell its electricity to customers in the UK. Therefore, MIBRAG will be a full function entity which will not lead to the co-ordination of competitive behaviour.
8. Thus the notified operation constitutes a concentration within the meaning of Article 3 of the Merger Regulation.

⁽¹⁾ [Deleted as a business secret]

COMMUNITY DIMENSION

9. The operation has a Community dimension. The worldwide turnover of all undertakings concerned amounts, in their respective last financial year, to more than 5,000 million ECU. The Community wide turnover of PowerGen and MIBRAG exceeds 250 million ECU. The undertakings concerned do not achieve more than two thirds of their aggregate Community wide turnover within one and the same Member State.

COMPATIBILITY WITH THE COMMON MARKET

Product market

10. The main product of MIBRAG mbH is brown coal. Brown coal is primarily used for electricity generation. Its low calorific value and the need for higher capital outlay required for environmentally friendly use let it compete only where there are no significant transport costs. The production of brown coal is only economically viable if there is a specially equipped brown coal power plant near to the brown coal mine. The power generation equipment necessary to burn brown coal is not widely available in other EU member states. Conversion from brown coal burning to hard coal burning power stations is expensive and would make no commercial sense.
11. MIBRAG also produces brown coal briquettes (which are an ECSC product) and pulverised brown coal. It also has minor activities in the electricity, district heating, waste disposal, water treatment and decontamination, consulting and engineering and insurance brokerage sectors.

Geographical market

12. The geographical scope of all MIBRAG's activities is almost entirely limited to eastern Germany. The high proportion of transport costs to total costs of brown coal and the concentration of brown coal burning power stations in eastern Germany mean that its customers are limited to that area. MIBRAG's electricity generating activities are based in eastern Germany and its electricity is prevented from being sold more widely because the interconnectors with western Germany are not yet fully operational. MIBRAG's other activities are either all or nearly all based in eastern Germany. However, given the current impossibility for MIBRAG to sell its electricity in western Germany, it is not necessary precisely to define the relevant geographical market.

Competitive assessment

13. The purchasers are not present on the brown coal or brown coal product markets on which MIBRAG operates. In addition, none of the parents are engaged in the production of fuels in the same geographical area as MIBRAG. For the technical and economic reasons outlined above, brown coal is not a perfect substitute for hard coal, which PowerGen uses in its electricity generating operations in the UK. LAUBAG, a large eastern German brown coal producer, currently provides competition for MIBRAG and may be acquired by Rheinische Braunkohlewerke AG, the only western German brown coal producer, which would strengthen LAUBAG as a competitor for MIBRAG.

14. The technical difficulties associated with the interconnectors between eastern and western Germany make it impossible for MIBRAG's electricity generation activities in eastern Germany to compete with those of PowerGen in the UK. MIBRAG's other activities do not overlap at all with any of the purchasers on the same geographical market even for consulting services. If MIBRAG and Morrison Knudsen did operate on the same (worldwide) market for consulting services, their market shares would be completely insignificant.

State aid issues

15. The Commission considers the offer to acquire part of MIBRAG, based on the tender of the purchasers as the best offer. Accordingly, this sale does not appear to contain any aid elements. However, two clauses in a coal supply agreement between the operator of the power plant Schkopau, Veba Kraftwerke Ruhr AG (VKR) and MIBRAG, concluded in 1992 relating to the supplier's liability for certain damage (paragraph 9) and to the price of brown coal - tied to that of imported hard coal - payable under this agreement (paragraph 5), could contain state aid elements. The Treuhandanstalt remains ultimately responsible for these liabilities after the sale. According to Article 93(1) EC Treaty, the Commission is required, in cooperation with Member States, to keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

CONCLUSION

16. Based on the above findings, it appears that the proposed concentration does not raise serious doubts as to its compatibility with the common market.

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For the above reasons, the Commission has decided not to oppose the notified concentration and to declare it compatible with the common market. This decision is adopted in application of Article 6(1)b of Council Regulation 4064/89.

For the Commission