

***Case No COMP/M.4922 -  
EMCC***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 22/08/2008

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22-08-2008

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1) (b) DECISION

**To the notifying parties:**

Dear Sir/Madam,

**Subject: Case No. COMP/M.4922 - EMCC  
Notification of 16.07.2008 pursuant to Article 4 of the Council Regulation  
No 139/2004 of 20 January 2004 on the control of concentrations between  
undertakings<sup>1</sup>**

1. On 16/07/2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertakings Energinet.dk ("ENDK", Denmark), E.ON Netz GmbH ("ENE", Germany), Vattenfall Europe Transmission GmbH ("VE-T", Germany/Sweden), Nord Pool Spot AS ("NPS" Norway) and European Energy Exchange AG ("EEX", Germany) acquire within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of a newly created joint venture – European Market Coupling Company ("EMCC") by way of purchase of shares.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("Merger Regulation") and will not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

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<sup>1</sup> OJ L 24, 29.1.2004 p. 1.

## **(1) THE PARTIES**

3. ENE, ENDK and VE-T are electricity transmission system operators ("TSOs")<sup>2</sup>; EEX and NPS are power exchanges<sup>3</sup>. ENE is an indirect 100%-subsidiary of E.ON AG, a vertically integrated electricity and natural gas supplier. VE-T is a 100%-subsidiary of Vattenfall AB, a Swedish state-owned vertically integrated energy undertaking. The three other parents i.e. ENDK, EEX and NPS are not controlled by a vertically integrated electricity or natural gas company. ENDK is a Danish state-owned TSO. EEX is the German energy exchange, located in Leipzig, and operates an exchange for the following products and derivatives: power, natural gas, European emissions allowances and coal. NPS is the Nordic energy exchange operating and owning the day-ahead auction trading system Elspot and the intra-day trading system Elbas. In addition to its headquarters in Oslo, NPS has offices in Denmark, Finland and Sweden.

## **(2) THE CONCENTRATION**

4. The European Market Coupling Company ("EMCC"), will provide the congestion management services for cross border electricity transmission systems by market coupling<sup>4</sup> and a platform for a secondary trading of transmission rights. The strategic and economic rationale for the parties to create EMCC is to implement and comply with the requirements of Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity ("Regulation 1228/2003")<sup>5</sup>
5. JVs would be full-functional as it is intended to take on the foreseen market coupling and secondary capacity auctioning activities on a long-lasting basis and to do so autonomously. The clients of the JVs would be both the shareholders and so called commercial capacity holders (independent interconnectors) on the one hand and any traders willing to sell or buy the transmission rights on the secondary market on the other

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<sup>2</sup> "transmission system operator" means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long term ability of the system to meet reasonable demands for the transmission of electricity;

<sup>3</sup> "power exchange" is a form of a commodity exchange where various energy products and their derivatives are traded.

<sup>4</sup> Market coupling is a method for integrating electricity markets in different areas. With market coupling the daily cross-border transmission capacity between the various areas is not explicitly auctioned among the market parties, but is implicitly made available via energy transactions on the power exchanges on either side of the border (hence the term implicit auction). It means that the buyers and sellers on a power exchange benefit automatically from cross-border exchanges without the need to explicitly acquire the corresponding transmission capacity.

<sup>5</sup> OJ L 176 , 15/07/2003 p 1

hand<sup>6</sup>. The JV would be financed by a cost based service-fee which would be split equally between the capacity holders in relation to the capacities brought by them to the JV. The JV would therefore apply an equal charging methodology to the parents and to independent capacity holders.

6. According to the EMCC Business Plan, three other interconnectors<sup>7</sup> are foreseen as future customers, namely the Baltic Cable Company (which is jointly controlled by some of EMCC's parent companies), NorGer link and NorNed line. On this assumption, and also assuming that secondary trading is developed as foreseen, more than [40-60]% of the JV's revenue would be derived from sales to third parties.
7. Moreover with the eventual creation of other electricity coupling companies and auction offices in other regions, as provided for in article 3.2 of the Guidelines on the management and allocation of available transfer capacity of interconnections between national systems<sup>8</sup> ("Allocation Guidelines"), it is expected that, in the future, auction offices will start competing with each other in the provision of electricity coupling and allocation services vis-à-vis interconnector/transmission system operators.
8. Therefore the JV will be full functional and the operation constitutes a concentration within the meaning of Article 3.1(b) of the ECMR.

### **(3) COMMUNITY DIMENSION**

9. The transaction has a Community dimension pursuant to Article 1(2) of the Merger Regulation. The undertakings concerned had a combined aggregate worldwide turnover of more than EUR 5 billion in 2007. They did not achieve more than two thirds of its aggregate Community-wide turnover in one Member State.

### **(4) RELEVANT PRODUCT AND GEOGRAPHIC MARKETS**

10. The operation deals with the provision of the congestion management services for cross border electricity transmission systems by market coupling. The European Commission has not yet identified or defined, in its publicly available decisions, relevant markets with regard to the creation and operation of undertakings active in electricity market coupling.

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<sup>6</sup> Part of the interconnection capacity would be allocated in the form of explicit auctions for a long-term (yearly) or mid-term (monthly) as opposed to day-ahead implicit capacity allocation. Long-term capacity right is a standardised product that allows the holder to use the given amount of capacity during the whole duration of the right (e.g. 100MW during the whole year). The experience shows that the capacity holders hardly ever use their right for the whole period. Under the rules in place they are obliged to sell the capacities that they are unable to utilise and the only platform where such a sale could occur is the JV.

<sup>7</sup> "interconnector" means a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States,

<sup>8</sup> 2006/770/EC: Commission Decision of 9 November 2006 amending the Annex to Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity; OJ L 312 , 11/11/2006, p 59

## Electricity Markets

11. In its past practice, the Commission has notably considered the following product markets as relevant markets in the electricity sector<sup>9</sup>: (i) Generation and wholesale supply of electricity; (ii) Electricity transmission (i.e. the operation and management of the high-voltage grid); (iii) Distribution of electricity (i. e. the operation and management of the lower-voltage grids); and (iv) Retail supply of electricity to end-customers, indicating that there could be a distinction between large industrial and commercial customers on the one hand and smaller industrial and commercial customers and domestic customers on the other hand<sup>10</sup>. The wholesale supply and the retail supply have been defined as national in scope, whilst the distribution market has been defined as limited to the respective grid (following the same logic as the transmission market described below)<sup>11</sup>. For the purposes of the present case, it is however not necessary to conclude on the precise scope of the relevant product or geographic markets in the electricity sector as under any alternative market definition, the proposed transaction does not give rise to any competition concerns.
12. The Commission has held that the operation and management of transmission systems constitutes a natural monopoly and that no competition takes place at this level<sup>12</sup>. In its past practice, if the parties to a transaction operated transmission systems in different regions or countries, the Commission has concluded that these parties' activities do not overlap as each grid constitutes a separate market. Transmission through one grid is not substitutable with transmission through another grid. Therefore, the geographic scope of the transmission markets was defined by the Commission as being regional within the limits of the area covered by the respective grid<sup>13</sup>.
13. In the case of the EMCC, each of the parties operates its own transmission system in a region defined by the reach of the grid (i.e. the respective transmission system). This region is in essence either identical with their country of origin (in case of ENDK) or limited to a part of Germany (in case of VE-T and ENE).
14. The existence of a separate market relating only to the transmission of electricity involving a "cross-border flow" within the meaning of Article 2 (1) of Regulation 1228/2003 cannot be excluded. The geographic scope of such activity would in principle be limited to the respective interconnector line. While it is in principle possible for market participants to substitute certain interconnectors when booking interconnector capacity by using others, this will normally lead to an increase in the number of interconnectors that are necessary to complete the booking path. To the Commission's knowledge, to date, there is no single interconnector which could constitute a direct

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<sup>9</sup> Cases No. COMP/M.4672 – E.ON/Endesa Europa/Viesgo; COMP/M.3440 – ENI/EDP/GDP; COMP/M.4180 – Gas de France/Suez; COMP/M.3696 – E.ON/MOL.

<sup>10</sup> *Idem*

<sup>11</sup> *Idem*

<sup>12</sup> e.g. Case No. COMP/M.3696 – E.ON/MOL, para. 212.

<sup>13</sup> *Idem*

substitute for another. Although it cannot be excluded that this may in the future be the case, even on the basis of this very narrow market definition, this transaction would not result in any horizontal overlap between the parties' activities.

15. The Commission has not, to date, identified or defined any relevant markets regarding the creation and operation of companies active in the provision of services in the congestion management services for cross border electricity transmission systems by market coupling. Given that such companies have either not been yet created or they are in an initial set-up phase, such a market currently does not exist. However, with the eventual creation of other market coupling companies in other regions as foreseen by the Allocation Guidelines, there could, in the future, be a separate market for electricity coupling services vis-à-vis interconnector/transmission system operators.

### **Markets for Power Exchanges**

16. The Commission has not yet dealt with relevant product markets in the power exchange sector. In relation to stock exchanges, the German Federal Cartel Office has indicated that it would consider the provision of stock exchange trading infrastructure, further subdivided by product categories, as distinct product markets. These stock exchange markets were found to be national in scope.<sup>14</sup>

## **(5) COMPETITIVE ASSESSMENT**

17. In their capacity as electricity transmission system operators, the parties will retain their scope of responsibility in the operation and management of their respective transmission systems. They will thus retain their existing activities in transmission services on the transmission markets. The cooperation in the JV is by its very nature directly related to their core functions as TSOs in line with Regulation 1228/2003 and the Allocation Guidelines. Whereas the operation of the transmission systems by TSOs confers to them a monopolistic position in the respective transmission system, such a monopolistic position is not affected by a common platform and procedure for the market coupling between adjacent transmission systems and therefore no horizontal competition concerns arise with respect to transmission system operation.
18. Both EEX and NPS are active in the provision of exchange services in relation to electricity. EEX and NPS are responsible for price formation and for the orderly and fair operation of markets and determine capacity products, calculation rules for those products and provide effective settlement and clearing services. However, the transaction will leave these functions unaffected. Notably the price formation at the two power exchanges, also post implementation of EMCC, will be carried out individually. Therefore no horizontal competition concerns arise with respect to energy trading on power exchanges.
19. Two of the parties to this concentration belong to vertically integrated energy companies which have overlapping activities in the markets for electricity generation and wholesale supply of electricity and in a number of downstream markets. These parties are VE-T

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<sup>14</sup> Federal Cartel Office, Report 2005/2006, Bundestag Printed Paper No. 16/5710, p. 159.

and ENE. There is therefore a potential for enhancing the risk of co-operative effects between the parents companies ("spill over" effects) arising from the setting up of EMCC, that fall to be examined under Article 2(4) of the ECMR. However the potential risk of co-operative effects on any of the upstream, downstream or neighbouring markets is attenuated by the following factors:

20. First, the information flow from the parties to the JV, and vice versa, will be limited to what is strictly necessary for the TSOs and EMCC, respectively, to fulfil their obligations. Notably, the EMCC will not make additional information available to the TSOs that would lead to a risk of anti-competitive coordination, if compared to the pre-merger access to such information. The scope of information that will be shared with the TSOs will be solely driven by what is required to operate the system or prepare the appropriate national reporting and/or studies. Moreover, each TSO will only receive the information that is relevant to perform its function, meaning that a TSO will only receive detailed information for its border(s) and will not receive information with respect to the other borders.<sup>15</sup> The strict rules on the confidentiality of information are further reinforced by Article 12 of the Directive 2003/54/EC, which stipulates "the transmission system operator shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business. Information disclosed regarding its own activities, which may be commercially advantageous, shall be made available in a non-discriminatory manner."
21. Second, congestion income will be collected by EMCC on behalf of the TSOs and will be then re-distributed between the TSOs in line with the provisions of the Allocation Guidelines<sup>16</sup>. The obligations under European and national regulations regarding the use of the congestion income will also remain unaffected by the implementation of the market coupling mechanism in the region and, accordingly, the obligations currently in place regarding investments in infrastructure remain unchanged and will not be affected by the parties' cooperation in the context of the JV<sup>17</sup>.
22. Third, the joint venture will not facilitate the coordination among the parties as regards the allocation of capacities at each interconnector involved in the interest of their vertically integrated companies. Market coupling will ensure that the available capacity at the involved interconnectors is optimally used. However, by way of the implicit auction mechanism capacity is not allocated to particular market participants but made available to the trading markets at the power exchanges concerned. Thereby, it is the coupled markets as a whole that benefit from market coupling. Consequently, market coupling guarantees that cross border transmission rights be allocated (implicitly) in a non-discriminatory manner.
23. The limited size of the JV as compared to the other activities of the various groups in the energy markets tends to further reduce the likelihood that the setting up of this JV will result in coordination on such other markets. The JV will not result in the creation of

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<sup>15</sup> Form CO, page 61

<sup>16</sup> 2006/770/EC: Commission Decision of 9 November 2006, para. 6

<sup>17</sup> Form CO, page 63-64

significant structural links between the parent companies. As the JV's turnover can be expected to be moderate it is also unlikely that it will create a platform for any credible retaliation mechanisms<sup>18</sup>.

24. Finally, coordination between TSOs with adjacent transmission systems as regards the usage of interconnector capacity and the exchange of the relevant technical information for the congestion management on these interconnectors is in line with the provisions of Regulation No 1228/2003. In view of promoting the efficient allocation of scarce transmission capacity, the Allocation Guidelines, require a common co-ordinated congestion management within regions, i.e. they extend the scope of the common congestion management efforts of TSOs from a bilateral to a tri- or multilateral level and the EMCC is set-up to implement such a co-ordinated approach.
25. The notified transaction does not therefore raise any competition concerns, given that no horizontal overlaps exist between the transmission systems of the participating electricity transmission system operators, and the creation of the JV will not lead to any anti-competitive spill-over effects.

## **VI. CONCLUSION**

26. 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 (EC) No 139/2004.

For the Commission,  
(signed)  
Androulla VASSILIOU  
Member of the Commission

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<sup>18</sup> Case No. COMP/M 4141 Linde/BOC, para. 146