

***Case No COMP/M.5979 - KGHM/ TAURON  
WYTWARZANIE/ JV***

Only the English text is available and authentic.

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

---

Article 6(1)(b) NON-OPPOSITION  
Date: 23/07/2012

***In electronic form on the EUR-Lex website under  
document number 32012M5979***



EUROPEAN COMMISSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 23/07/2012

C(2012) C(2012) 5318

PUBLIC VERSION

MERGER PROCEDURE

**To the notifying parties:**

Dear Sir/Madam,

**Subject: Case No COMP/M.5979 – KGHM/ TAURON WYTWARZANIE/ JV  
Commission decision pursuant to Article 6(1)(b) of Council Regulation  
No 139/2004<sup>1</sup>**

1. On 18.06.2012, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which KGHM Polska Miedź S.A. ('KGHM', Poland) and TAURON Wytwarzanie S.A. ('Tauron Wytwarzanie', Poland) belonging to TAURON Polska Energia S.A. group ('TAURON', Poland) acquire within the meaning of Article 3(4) of the Merger Regulation joint control of Elektrownia Blachownia Nowa Sp. z o.o. ('JV', Poland) by way of purchase of shares in a newly created company constituting a joint venture<sup>2</sup>. (KGHM and Tauron Wytwarzanie are designated hereinafter as the "notifying parties" or "parties to the proposed transaction".)

**(1) THE PARTIES**

2. KGHM controls a group of companies called KGHM Polska Miedź S.A. ("KGHM Group"), which is (mainly) a Polish copper producer. The KGHM Group is active in the copper mining and production, as well as in production of precious and non-ferrous metals

---

<sup>1</sup> OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

<sup>2</sup> Publication in the Official Journal of the European Union No C 189, 29/06/2012, p.18

business. The KGHM Group is listed on the Warsaw Stock Exchange and includes 85 companies.

3. TAURON is a Polish energy group listed on the Warsaw Stock Exchange, which comprises 41 subsidiaries and holds various stakes in 40 other companies. The group is mainly active in generation, wholesale and distribution of electricity in Poland, but also in other countries in Central and Eastern Europe. The company is also active in the coal mining business and production and sale of heat.

## **(2) THE OPERATION**

4. The envisaged transaction will create a JV for the purposes of construction and operation of a new 850 MW gas power plant, which is to be built at TAURON's Blachownia power plant site.

*- Joint control*

5. TAURON and KGHM will both hold a 50% stake in the JV, which is to be active in generation and wholesale of electricity. The JV will be jointly controlled by KGHM and TAURON, as the two companies will hold equal stakes in the JV, will be entitled to an equal number of general shareholders meeting votes, an equal number of representatives in the company's Board and Supervisory Board, and both KGHM and TAURON will have a veto right in adopting strategic decisions.

*- Full functionality*

6. The new JV will be a full-functional joint venture, as it will perform on a lasting basis all the functions of an autonomous economic entity. The JV will have its own management and sufficient resources to operate independently on the market. The JV is created for an indefinite duration and will be the party to the electricity sales agreements.
7. The JV will sell its output on the wholesale market, and instruct – on market terms – TAURON or Tauron Wytwarzanie to act as an intermediary for the purposes of the sale of its output on the electricity wholesale market. As a result TAURON will perform the intermediary services based on an Agency agreement and will not have an exclusive right to act as the JV's agent – the JV will have the right to appoint a different company to act as an intermediary, as well as the ability to directly enter into electricity sales agreements.
8. KGHM will not be entitled to any preferential treatment as far as the purchase of power generated by the JV is concerned. In fact the parties explained that KGHM's participation in the proposed transaction is financial. KGHM will not be purchasing power generated by the JV since the electricity generated by the JV is to be sold on the market. Furthermore, neither KGHM, nor TAURON will have the priority right to purchase any of the JV's electricity output.
9. In the light of the above, the proposed transaction constitutes a concentration within the meaning of Art. 3(4) of the Merger Regulation.

### (3) EU DIMENSION

10. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>3</sup> (KGHM: EUR 5 483 million in 2011, TAURON: EUR 5 037 million in 2011). Each of them has a EU-wide turnover in excess of EUR 250 million (KGHM: EUR 4 412 million in 2011, TAURON: EUR [...] million in 2011), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

### (4) COMPETITIVE ASSESSMENT

#### Relevant Product and Geographic Markets

11. In previous decisions relating to the electricity sector<sup>4</sup>, the Commission identified, *inter alia*, the following as separate product markets:
- generation and wholesale supply of electricity;
  - retail supply to eligible customers which can be further segmented into (a) large industrial and commercial customers; (b) small industrial and commercial customers; and (c) domestic customers.
  - balancing market and ancillary services; and
  - financial trading of electricity.
12. In the *PGE/Energa* case the Polish Competition Authority has defined electricity markets in Poland similarly to the Commission.<sup>5</sup>
13. Activities of the parties overlap horizontally on the following energy markets: (i) the generation and wholesale supply of electricity in Poland; (ii) retail supply of electricity in Poland; (iii) CO<sub>2</sub> allowances/emission rights trading in the EEA and (iv) balancing and ancillary services in Poland. However, only the two first overlaps give rise to affected markets.
14. Further, KGHM Group is an important player in the market of production of copper blisters, copper anodes and copper cathodes which could be considered downstream to the market for retail and supply of electricity where TAURON and the JV will be active.

---

3 Turnover calculated in accordance with Article 5 of the Merger Regulation.

4 COMP/M.2947, Verbund/EnergieAllianz; COMP/M.3268, Sydkraft/Grange; COMP/M.3440, ENI/EDP/GDP; COMP/M.3696, E.ON/MOL; COMP/M.3868, DONG/Elsam/Energi E2; COMP/M.4110, E.ON/Endesa; COMP/M.4180, Gaz de France/Suez; COMP/M.4517, Iberdrola/Scottish Power; COMP/M.4685, ENEL/Acciona/Endesa; COMP/M.4841, ENEL/EMS; COMP/M.5496, Vattenfall/Nuon Energy; COMP/M.5467, RWE/Essent; COMP/M.5512, Electrabel/E.ON; COMP/M.5549, EDF/Segebel; COMP/M.5711, RWE/ENSYS.

5 Decision DKK-1/2011 of the Polish Office of Competition and Consumer Protection (“UOKiK”), *PGE/Energa*, 13 January 2011, p. 26, 37.

(i) *Generation and wholesale supply of electricity*

15. In its previous decisions, the Commission identified a single product market for electricity generation and wholesale supply.<sup>6</sup> This market comprises electricity generated in power stations, traded on the wholesale market (through bilateral agreements, regulated market places or power exchanges) as well as electricity physically imported *via* interconnectors. The Polish Competition Authority took a similar approach in the *PGE/Energa* case<sup>7</sup> and examined the state of competition with regards to installed capacities, generation and wholesale transactions.
16. The parties agreed with such definition of the relevant product market and provided their market shares accordingly.
17. In a case concerning the Dutch electricity wholesale market,<sup>8</sup> the Commission discussed a possible distinction between *off-peak*, *peak* (and even *super-peak*) transactions, in line with national decisional practice. This segmentation was envisaged by the Commission because “*domestic electricity producers are disciplined to a sufficient degree, amongst others by imports from Germany, because during those hours [off-peak] there is more capacity available on the interconnector*”. However, the Commission left the precise market definition open.
18. According to the parties such distinction should not be relevant for the present case. This is because Poland is not connected to a sufficient level to the neighbouring countries' network. As a result, no significant import takes place from neighbouring countries and the electricity capacity available during peak and off-peak hours is similar.
19. The market investigation also did not indicate that the distinction between *peak* and *off-peak* hours would be relevant for the Polish market. This approach is in line with the previous decisions of Polish Competition Authority, which did not distinguish between *peak* and *off-peak* hours.<sup>9</sup>
20. Therefore, for the purpose of this decision the relevant product market is considered to be generation and wholesale supply of electricity without distinction between *peak* and *off-peak* hours.
21. With regards to the geographic market, the parties consider that electricity generation and wholesale supply is national in scope. The parties explained that all customers in Poland can purchase electricity from a number of suppliers active within this Member State. At the same time, in view of the parties, Polish electricity network is not sufficiently connected to the networks of neighboring countries so as to enable the assessment of the geographic market on wider than national level.

---

6 COMP/M.3440, ENI/EDP/GDP; COMP/M.5224, EDF/British Energy, paragraphs 10-11; COMP/M.5549, EDF/Segebel, paragraphs 15-16.

7 UOKiK Decision DKK-1/2011, PGE/Energa.

8 COMP/M.5467, RWE/ESSENT, paragraphs 25, 30, 31.

9 UOKiK Decision DKK-1/2011, PGE/Energa.

22. Similar approach has been adopted by previous decisions of Polish competition authority.<sup>10</sup>
23. These statements are in line with the findings of the Commission in its past decisional practice.<sup>11</sup> Also the market investigation confirmed the national market delineation.
24. As a result, the relevant geographic market for generation and wholesale supply of electricity shall be considered national in scope for the purpose of assessment of this transaction.

*(ii) Retail and supply of electricity*

25. Retail supply of electricity entails the sale of electricity to final customers. The Commission has previously identified separate product markets for large and small customers. In ENI/EDP/GDP<sup>12</sup>, the Commission distinguished between i) large industrial customers which are connected to high and medium voltage and ii) smaller industrial, commercial and domestic customers which are connected to the low voltage grid. In another case, the Commission distinguished<sup>13</sup> between i) domestic customers, ii) smaller industrial and commercial customers (SMEs) which do not use "half hourly rates" and iii) large industrial and commercial ("I&C") customers which do use half hourly rates.
26. In its decisional practice, the Polish Competition Authority has concluded that there is no need to further segment the electricity retail market into supply of industrial, institutional and household (Group G) users<sup>14</sup>.
27. The parties submit that the relevant product market is the market for retail supply of electricity to end users. The parties do not consider further segmentation of the retail supply of electricity market to be necessary, as the definition of the market would not affect the assessment of the transaction in any case.
28. The market investigation suggested that indeed the segmentation of electricity retail market into supply of industrial, institutional (outside Group G) on one hand and household (Group G) users on the other hand could be relevant for the Polish market. This is mainly because the prices of electricity delivered to customers forming these two possible segments differ.<sup>15</sup>
29. As a result, for the purpose of this decision, the Commission considers the relevant product market consists of retail supply of electricity, which could be further segmented into (i)

---

10 UOKiK Decision DKK-1/2011, PGE/Energa.

11 Commission Decision of 11 September 2008 establishing that Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors is not applicable to the production and wholesale of electricity in Poland, [2008] OJ L 251/35, paragraph 9; COMP/M.4517, Iberdrola/ Scottish Power; COMP/M.2890, EDF/ Seaboard.

12 Case M.3440 - ENI/EDP/GDP

13 Case M/5224 -EDF/BE

14 UOKiK decision DKK-1/2011.

15 The respondents explained that the prices for electricity sold to customers from Group G are subject to tariffication whereas the prices of electricity supplied to other customers formed on a liberalized market.

retail supply to customers from Group G and (ii) retail supply to customers outside Group G.

30. In any event, the exact product market definition with respect to the segmentation of the market for retail supply of electricity can be left open, since the transaction does not raise serious doubts irrespective of the product market definition adopted.
31. As regards the geographic market, the parties follow the decisional practice of the Commission<sup>16</sup> and Polish Competition Authority<sup>17</sup> and submit that the market for retail supply of electricity is national in scope.
32. The market investigation confirmed this view. Consequently, the relevant geographic market for the purpose of the assessment of present transaction is considered to be national in scope.

*(iii) CO2 allowances/emission rights trading*

33. The Commission defined a separate market for the trading of CO2 allowances/emission rights as the market that includes EU emission allowances (“EUAs”) issued for trade under the EU Emission Trading Scheme (“EU ETS”), and potentially including Certified Emission Reductions (“CERs”) issued under the global mechanisms set up by the Kyoto Protocol. However, the Commission left open the question of whether CERs should be included with EUAs in the relevant product market.<sup>18</sup> Polish Competition Authority adopted a similar approach<sup>19</sup> and the parties agree with this definition.
34. With regards to the geographic scope of the market, the Commission considered that the market for the trading of CO2 allowances/emission rights is EU wide.<sup>20</sup> Polish Competition Authority defined the market in a similar way and the parties agree with this approach.
35. In any event the question of the precise market definition can be left open in the present case, as no serious doubts arise irrespective of product and geographic market definition.

*(iv) Balancing and ancillary services market*

36. On the balancing and ancillary services market, the TSO purchases electricity, either through the balancing exchange market or through bilateral contracts.
37. According to the Commission’s practice, the balancing and ancillary services market may constitute a separate relevant market<sup>21</sup>, with the possibility of various sub-segmentations

---

16 COMP/M.2947 Verbund/EnergieAllianz; COMP/M.1673 VEBA/VIAG; COMP/M.5467 RWE/ Essent; COMP/M.3268 SYDKRAFT/GRANINGE; COMP/M.1732 Sydkraft/Hew/Hansa Energy Trading.

17 UOKiK decisions DKK-1/2011, DOK-163/2006, DOK-19/07.

18 COMP/M.3868, DONG/Elsam/Energi E2, paragraph 277; COMP/M.5224, EDF / British Energy, paragraphs 137 and 139; COMP/M.5793, Dalkia CZ / NRW Energy, paragraph 18.

19 UOKiK decision DKK-1/2011.

20 COMP/M.5793, Dalkia CZ / NRW Energy, paragraph 19.

21 COMP/M.4180, Gaz de France/ Suez, paragraph 683.

depending on the specificities of the national legal frameworks<sup>22</sup>. The parties agree with the definition of the product market.

38. In line with the Commission's past decisional practice<sup>23</sup>, the parties submit that the market for electricity balancing and ancillary services is national in scope.

39. In any event the question of the precise market definition can be left open in the present case, as no serious doubts arise irrespective of product and geographic market definition.

*(v) Copper blisters and copper anodes*

40. KGHM Group is active in production of copper blister and copper anodes.

41. Copper blister and copper anode are produced<sup>24</sup> in the process of converting copper concentrate to copper cathode through an electrolytic refining process.

42. The parties put forward that copper blister and copper anode belong to the same product market since customers generally may choose between purchasing either of these products. This approach is in line with Commission's precedent.<sup>25</sup>

43. Furthermore, the parties submit, in line with the Commission's precedent,<sup>26</sup> that the corresponding geographic market is world-wide.

44. In any event the question of the precise market definition can be left open in the present case, as no competition concerns arise irrespective of product and geographic market definition.

*(vi) Copper cathodes*

45. KGHM is also active in production of copper cathodes.

46. According to Commission's precedents production and sale of copper cathodes constitute a relevant product market which could be further subdivided into LME-grade and off-grade. The question of subdivision into LME-grade and off-grade cathodes was however ultimately left open.<sup>27</sup>

47. With respect to the geographical market definition, the Commission concluded that the geographic scope of the copper cathodes market is world-wide.

---

22 COMP/M.5827, Elia / IFM / 50Hertz, paragraphs 13-17.

23 COMP/M. 3440, EDP/ENI/GDP, paragraph 187.

24 Copper concentrate is typically converted to copper cathode through an electrolytic refining process, involving the three following stages: (i) production of copper matte (ii) production of copper blister, (iii) production of copper anode.

25 COMP/M.4505, Freeport – McMoran Coppers&Gold/Phelps Dodge Corporations, paragraphs 11 – 17.

26 Ibid.

27 COMP/M.6316 Arubis/Luvata Rolled Products, paragraphs 16-18.



48. The parties agree with the above findings of the European Commission. However in any event, the question of the precise market definition can be left open in the present case, as no serious doubts arise irrespective of product and geographic market definition.

### **Competitive Assessment**

49. The transaction will lead to horizontally affected markets on (i) the Polish market for generation and wholesale of electricity and (ii) the Polish market for retail supply of electricity.
50. The transaction will also lead to vertically affected markets between production and sale of copper blisters, copper anodes and copper cathodes; which could be considered downstream to the market for retail and supply of electricity where TAURON and the JV will be active.

#### *(i) Horizontally affected markets*

##### Polish market for generation and wholesale of electricity

51. TAURON is an important generator of electricity in Poland, whereas KGHM Group sells *de minimis* amount of electricity to the market as its aside activity. The JV's activity will also consist of generating electricity.
52. In 2011, TAURON had a total installed generation capacity in Poland of 5 371 MW, representing 17% of the total installed capacity in Poland. Group KGHM has an installed generation capacity of 0.1068 GW and is currently in the process of adding two new units of 42 MW each. The JV's installed capacity would be 850 MW (less than 3% of total generation capacity).
53. In 2011, TAURON generated 23 983 GWh of electricity, representing 14.7% of all electricity generated in Poland. KGHM produced 382 GWh of electricity (0.2%), of which it used [...] GWh ([90-100]%) for own needs.<sup>28</sup> Upon planned completion in 2017, the JV is expected to produce 5 054 GWh (3.45%) of all electricity generated in Poland.
54. Upon completion of the transaction, the parties will continue to face strong competition on the Polish market for electricity generation and wholesale supply. Thus, in 2011, competitor PGE had an installed capacity of [...] MW ([30-40]%) and produced [...] GWh of electricity in Poland ([30-40]%), EdF – [...] MW ([5-10]%) and [...] GWh ([5-10]%), ENEA – [...] MW ([5-10]%) and [...] ([5-10]%), ZE PAK – [...] MW ([5-10]%) and [...] ([5-10]%), GDF Suez – [...] MW ([5-10]%) and [...] MW ([5-10]%), ENERGA – [...] ([0-5]%) and [...] ([0-5]%), respectively.
55. Respondents to the market investigation did not consider that the transaction would negatively affect the market for generation and wholesale supply of electricity. In contrast, a number of respondents pointed to the fact that there is under-capacity on Polish electricity market and that the construction of new power plants is expected to benefit the electricity market.

---

28 The parties explain that KGHM Group sells electricity due to technical and not business reasons. In fact, KGHM Group sells only electricity to third parties active in the area of its plants, which are connected to KGHM Group's network and provide services for KGHM Group.

56. Based on the above, the proposed transaction does not give rise to serious doubts as to its compatibility with internal market on the market for electricity generation and wholesale supply in Poland.

Polish market for retail supply of electricity

57. TAURON is active on the national market for retail supply of electricity via its subsidiaries TAURON Sprzedaż Sp. z o.o.; Vattenfall Sales Poland Sp. z o.o. and TAURON Polska Energia S.A.

58. KGHM has a minimal presence on the market for retail supply of electricity in Poland, since its activities in the sale of electricity, are limited to sales to companies active on the territory of KGHM Group's plants. KGHM Group does not supply electricity to household (Group G) customers.

59. In 2011, the total volume of the Polish market for retail supply of electricity was 119 595 GWh, including 30 957 GWh sold to Group G consumers (i.e. households) and 88 638 GWh sold to other users. TAURON's share on the total retail supply of electricity market in Poland was 36%, its share of supply to households (Group G) was [30-40]%, and supply to other users – [30-40]%. KGHM's share in the total market in Poland is [0-5]%. The JV will not be active on the retail market for the supply of electricity in Poland.

60. The parties' main competitors on the market for retail supply of electricity are PGE ([20-30]%), Energa ([10-20]%) and Enea ([10-20]%). The same companies are the parties' main competitors on the possible market for retail supply of electricity to customers outside Group G: PGE ([20-30]%), Energa ([10-20]%) and Enea ([10-20]%).

61. Similarly to the market assessment with regards to generation and wholesale of electricity, the respondents to the market investigation did not consider that the transaction could negatively affect the market for retail supply of electricity.

62. Based on the above, it is concluded that the proposed transaction does not give rise to serious doubts as to its compatibility with internal market on the market for retail electricity supply in Poland.

*(ii) Vertically affected markets*

Retail supply of electricity as input to copper blisters, copper anodes and copper cathodes.

63. KGHM Group is a world-wide player in production of copper blisters and copper anodes. According to KGHM's best estimates, its market share on the worldwide market for production of copper blisters would be around [0-5]%, with main competitors such as Codelco ([5-10%]) and Aurubis ([5-10%]) and Jiangxi Copper ([0-5]-[5-10%]).<sup>29</sup>

---

<sup>29</sup> On the EEA – wide market for copper blister production, KGHM would achieve market share of [20-30]%. Its main competitors in the EEA are Arubis, New Bolinden and Freeport – McMoRan Copper & Gold.

64. KGHM Group is also a world-wide player in production of copper cathodes, with world-wide market share of [0-5]%. Its main competitors are Codelco ([5-10]%), Aurubis ([5-10]%) and Freeport McMoRan ([5-10]%).<sup>30</sup>
65. TAURON is active in the retail supply of electricity in Poland. On the market for Polish end users which are not households TAURON's market share would amount to [30-40]%.<sup>31</sup>
66. However, post-transaction the parties do not seem likely to have ability or incentive to foreclose competitors. First, TAURON is active in electricity supply in Poland only; whereas the main competitors of KGHM are companies active globally. Second, the electricity demand of KGHM is limited (around [...] GWh) compared to the TAURON's output of electricity (23 983 GWh) in Poland.
67. In addition, the parties argue that the rationale for KGHM Group to invest in the JV is the diversification of company's investment portfolio and risk differentiation. Also, none of the respondents of the market investigation raised concerns with regards to possible foreclosure due to transaction
68. Based on the above, it is concluded that the proposed transaction does not give rise to serious doubts as to its compatibility with internal market.

## **(5) CONCLUSION**

69. For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

*For the Commission  
(Signed)  
Joaquín ALMUNIA  
Vice-President*

---

<sup>30</sup> On the EEA – wide market KGHM would have share of 21.5% and its main competitors are Aurubis ([40-50]%), New Boliden ([10-20]%) and Freeport-McMoRan ([5-10]%).

<sup>31</sup> TAURON's market share in retail supply of electricity in Poland to Group G (households) customers is [30-40]%. However for the assessment of this transaction this market share is not relevant since KGHM does not constitute part of Group G customers.