

***Case No COMP/M.1842 -
VATTENFALL / HEW***

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

Article 6(1)(b) NON-OPPOSITION
Date: 20/03/2000

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20/03/2000

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No COMP/M.1842 – Vattenfall/HEW

Notification of 17 February 2000 pursuant to Article 4 of Council Regulation No 4064/89

1. On 17 February 2000, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ by which the Swedish Vattenfall AB (“Vattenfall”) and the Freie und Hansestadt Hamburg (“FHH”), a German *Bundesland*, acquire joint control of the German electricity generator Hamburgische Electricitäts-Werke AG (“HEW”).
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

I. THE PARTIES

3. Vattenfall is an energy group mainly active in the Nordic countries. Its business activities comprise the generation of electricity, operation of local and regional electricity networks and diverse services in the energy sector. In Germany, Vattenfall is active via its subsidiary

¹ OJ L395, 30.12.89 p. 1; corrigendum OJ L 257, 21.09.90, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 09.07.97, p. 1, corrigendum OJ L 40, 13.02.98, p. 17).

VASA Energy GmbH & Co. KG (“VasaEnergy”) in electricity trade, the production and distribution of district heat and services relating to energy solutions.

4. FHH is as a *Bundesland* a legal entity within the federal structure of Germany. It holds participations in various undertakings most of which relate to the provision of public services.
5. HEW is one of the eight German *Verbundunternehmen* (electricity generating and grid companies). FHH holds [...]% of the shares and [...]% of the votes in HEW. The other shareholders are the Swedish Sydkraft ([...]%) of the capital, [...]%) of the votes), the German PreussenElektra, a subsidiary of VEBA, ([...]%) of the capital, [...]%) of the votes) and various private and institutional investors ([...]%) of the capital, [...]%) of the votes). Apart from electricity generation and operation of an electric power grid, HEW is active – partly via subsidiaries – in the distribution of electricity and district heat to end customers (mainly within its traditional former concession area) as well as gas supply and waste management. Its core business area corresponds to the area of the FHH.

II. THE OPERATION

6. Currently, HEW is solely controlled by FHH. FHH will sell to Vattenfall (Deutschland) GmbH (“Vattenfall (Deutschland)”), a German subsidiary of Vattenfall, 25.1% of the shares and of the votes in HEW thereby retaining 25.1% of the shares and 31.0% of the votes. The voting rights relating to the shares of the parties will be transferred to Vattenfall HGV Holding GbR (“the partnership”), a partnership under the German Civil Code specifically set up for the purposes of holding and exercising the voting rights in question and the partners being Vattenfall (Deutschland) and Hamburgische Gesellschaft für Beteiligungsverwaltung mbH - HGV - (“HGV”), an undertaking controlled by FHH.

III. CONCENTRATION

Joint control

7. The voting rights related to the shares retained by FHH and acquired by Vattenfall in HEW will be executed by the partnership, [...]. The director acts according to the orders agreed upon in the partners’ meeting and [...].
8. Therefore, Vattenfall and FHH will jointly control HEW.

Full-function joint venture

9. HEW is already active as a full-function undertaking on the respective markets. The transaction will not lead to changes in this regard. The shareholders’ agreement and the partnership agreement have been entered into for an indefinite period. Thus, the joint venture will perform on a lasting basis all the functions of an autonomous economic entity.
10. Therefore, the creation of the joint venture HEW constitutes a concentration within the meaning of Article 3 (1) (b).

IV. COMMUNITY DIMENSION

11. The undertakings Vattenfall and FHH have a combined aggregate worldwide turnover in excess of EUR 5,000 million² (Vattenfall: EUR 3,135 million; FHH: EUR [...] million). Each of them has a Community-wide turnover in excess of EUR 250 million (Vattenfall: EUR [...] million; FHH: EUR [...] million). 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. COMPETITIVE ASSESSMENT

A. Relevant product markets

12. On the one hand, the proposed operation concerns the markets for supply and distribution of district heat, supply of natural gas, waste management services and diverse other services of a municipal company. However, they do not have to be assessed any further since there will be no or only immaterial overlaps respectively on these markets.
13. On the other hand, the concentration has effects concerning the electrical energy sector. Both parties are active in the supply of electrical energy to customers. For the purpose of this case, however, a further distinction into various types of customers, *inter alia*, household consumers, small and medium businesses, industrial customers and other large customers, is not necessary, as Vattenfall's contribution to electricity supply is very small in amount in comparison with other competitors.

B. Relevant geographic markets

14. The parties state that the market for supply of electrical energy is at least national in scope, if not European, and refer to the decrease of transport costs and the abolition of legal barriers and to its ongoing liberalisation. In previous decisions³, the Commission noticed that there were indications that in Germany the relevant market could be national in scope. However, the market definition was left open. The precise geographic market definition can be left open also in this case as even assessed on a narrower basis the operation concerned does not lead to competition concerns.

² 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.

³ E.g. Case No COMP/M.1720 – Fortum/Elektrizitätswerk Wesertal.

C. Assessment

15. In Germany, HEW supplied in 1998 to its customers [10-30] TWh whereas Vattenfall delivered approximately [1-10] TWh. In comparison to that is the total amount of electricity sold in Germany of approximately 480 TWh. As Vattenfall's supply is effected throughout Germany, whereas HEW acts primarily in its former concession area, the market increment would also be minimal on a narrower market. Consequently, the operation would not lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the common market and the EEA or a substantial part thereof.

VI. ANCILLARY RESTRAINTS

16. In so far as Vattenfall in the agreements entered into between Vattenfall and FHH undertakes to [...], this clause reflects [...] and is to be considered an integral part of the operation.

VII. CONCLUSION

17. 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 and Article 57 of the EEA Agreement.

For the Commission,