

***Case No COMP/M.2801 -  
RWE / INNOGY***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 17/05/2002

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## COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 17-05-2002  
SG (2002) D/229831

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)b) DECISION

To the notifying party

Dear Sir,

**Subject: Case No COMP/M.2801 - RWE/Innogy**  
**Notification of 12 April 2002 pursuant to Article 4 of Council Regulation No 4064/89<sup>1</sup>**

1. On 12 April 2002, the Commission received a notification of a proposed concentration, whereby RWE Aktiengesellschaft ("RWE"), Germany, would acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the electricity business and other related businesses of the UK company Innogy Holdings plc ("Innogy") by way of a public bid announced on 22.3.2002.

### THE PARTIES

2. *RWE* is the ultimate parent company of the RWE group which is primarily active in the business areas of energy, water, environmental services, industrial services, crude oil and printing systems.
3. Formed in October 2000, *Innogy* is the demerged domestic arm of the former National Power plc, UK. In 2001 Innogy acquired the Yorkshire Electricity and Northern Electricity supply businesses and is now the largest electricity retailer in the UK, supplying over 4.7 million electricity customers and 1.9 million gas customers under the *npower* brand. Innogy is also one of the largest electricity generators in the UK with an operational capacity of 8,713 MW. In addition, Innogy is also active in cogeneration and renewable energy, the operations and engineering business (which provides technical and commercial solutions for power plant development and operations), electricity storage technology and trading.

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<sup>1</sup> 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).

## THE OPERATION

4. By the proposed acquisition of Innogy, RWE intends to extend its energy activities into a new geographic market, i.e. the United Kingdom, in which RWE is currently active only to a very limited extent. The notified transaction concerns the energy sector.
5. RWE announced on 22.3.2002 a public offer for the acquisition of the entire issued and to be issued share capital of Innogy. The offer has been made by a bidding vehicle i.e. GBV Fünfte Gesellschaft für Beteiligungsverwaltung mbH, a direct 100% subsidiary of RWE. One of the conditions for the offer to become unconditional is its acceptance in respect of no less than 90% of Innogy shares or, if this condition should be waived by RWE, acquisition by RWE of more than 50% of the voting rights exercisable at a general meeting of Innogy.
6. The notified operation therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

## COMMUNITY DIMENSION

7. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion<sup>2</sup>. Each one of these undertakings has 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.

## COMPETITIVE ASSESSMENT

### Product and geographic affected markets

#### *Electricity*

8. The definition of the relevant product market(s) in the electricity sector must take into account the existing degree of liberalisation thereof. As stated in previous decisions by the Commission<sup>3</sup> the electricity industry can be divided into at least four different physical stages: (i) generation (the production of electricity in power stations); (ii) transmission (the transport of electricity over high tension cables); (iii) distribution (the transport of electricity over the low tension local cables) and (iv) supply (the delivery of electricity to the customer).

#### The UK

##### *Product markets*

9. There has been a significant change in the structure of the electricity marketing system in England and Wales which came into operation on 27 March 2001 and which affects the way that generators

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<sup>2</sup> 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).

<sup>3</sup> Joint cases COMP M. 2675 EdF/TXU Europe/West Burton Power Station and COMP M. 2679 EdF/TXU Europe/24Seven

market the electricity they produce and the way that electricity suppliers to end consumers purchase their supplies. The New Electricity Trading Arrangements (“NETA”) endeavour to remove distortions in the old Pool system and to make the electricity marketing arrangements operate more competitively than the Pool by allowing participants (including generators, exporters, traders and suppliers) to contract bilaterally in advance for the sale and purchase of electricity. Under the Pool arrangements, generators bid prices to the National Grid Company for each half hourly period. The National Grid Company then selected the offers securing that the quantity requirements and the transmission constraints were satisfied at the lowest possible price, and accordingly set the price for electricity for the corresponding period. All purchasers from the Pool paid the same price and the generators were paid the price fixed by the Pool for all their output.

10. Under NETA<sup>4</sup>, the generators will continue to sell their electricity mainly to suppliers, but the price paid will be determined by the contracts arranged between sellers and buyers, rather than set centrally via the Pool. NETA includes forward and futures markets that allow contracts for electricity to be struck several years in advance; short-term power exchanges allowing participants to ‘fine-tune’ their contracts; and a balancing mechanism allowing to make up any shortfall in consumption or generation and a settlement process for charging participants whose contracted positions do not match their metered volumes of electricity. These trading arrangements and the associated balancing and settlement mechanism are limited to England and Wales, as were the previous arrangements for trading electricity in the Pool. With the introduction of the NETA system, the overall electricity market in the UK is similar to other commodity markets. Generators, exporters, traders and suppliers enter into independent contracts to sell electricity on a bilateral basis. All electricity generated domestically or imported through the Scottish and French interconnectors is transacted through the NETA system. This also applies when the generator and the supplier (or trader) belong to the same group.
11. Bearing in mind the above-described physical stages (see paragraph 8), and following the introduction of the NETA system, according to the parties, the operation will have an impact in the following markets in the UK:
12. *Electricity wholesale* which includes all the electricity generated in England and Wales and sold there by the generators as well as all the electricity physically imported in England and Wales through the Scottish and French interconnectors. Generators and exporters bilaterally sell electricity to operators supplying end users (suppliers) or to traders (who will in turn trade it to other traders or sell it to suppliers).
13. *Electricity trading*: the parties suggest that there is a separate product market for the trading of electricity. The market can be seen to form a subset of the overall interaction of generators and suppliers in the vertical chain. The parties include in the market trades (purchase and sale) of electricity but not purchases done by electricity suppliers or end users.
14. However, for the purposes of this decision it is not necessary to decide about the boundaries of these electricity markets as the operation does not give rise to the creation or strengthening of a dominant position under any possible market definition.

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<sup>4</sup> For a detailed description of the NETA see [http://www.ofgem.gov.uk/projects/neta\\_index.htm](http://www.ofgem.gov.uk/projects/neta_index.htm)

15. *Electricity supply to final consumers*: the parties agree that electricity supply should be considered as a distinct product market. In a number of cases the Commission has considered, but not finally decided, whether a distinction should be made between two separate markets in relation to the supply of electricity to final consumers namely the supply of electricity to small consumers on one hand and the supply of electricity to large customers on the other hand. Based on previous decision small customers are considered to be those with a demand not exceeding 100 kW whereas large customers are considered to be those with a demand exceeding 100 kW<sup>5</sup>. The small customers sector has, since May 1999, been fully open to competition. Around 115 000 customers are, according to the parties, currently switching supplier each week. By the end of 2001, around 33% of small customers were no longer with the former incumbents. Given these recent developments, the parties consider that the relevant product market in respect of electricity supply is a single market for all customers. However, for the purpose of this case, it is not necessary to decide whether there are one or two relevant product markets, as in either case, the operation does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of it.

#### *Geographic markets*

16. *Electricity wholesale and trading*: In previous cases<sup>6</sup>, the Commission left the exact definition of the geographic market for generation open though it was suggested that its geographic scope could be England and Wales. The parties are of the opinion that the market for generation and trading is confined to England and Wales due to the capacity constraints on exchange of electricity with Scotland, Northern Ireland and France and the fact that NETA only applies to England and Wales. The interconnectors opening up England and Wales to imported electricity are the Scottish interconnector and the French interconnector respectively. Their combined capacity currently accounts for 5,9% of peak demand in England and Wales. In addition, only 10% of the electricity output in England and Wales comes from outside these territories through the French and Scottish interconnectors. However, in the present case, the exact definition of the geographic market for generation and trading may also be left open given that the concentration will not lead to the creation or strengthening of a dominant position in the EEA or any substantial part of it in any possible geographic market definition.

17. As regards *electricity supply to end consumers* to both large and small customers, the parties argue that there are no significant differences in the regulatory regimes applying to England/Wales as compared to Scotland and no differences in the number of supply companies competing in Scotland and England/Wales. Further, following the introduction of new standard electricity supply licenses issued under the Utilities Act 2000 in September 2001, these now apply across England, Wales and Scotland. As a result, the parties believe that the geographic scope of the electricity supply market is considered to now encompass England, Wales and Scotland. However, for the purpose of the current case, the exact definition can be left open as the operation does not create or strengthen any dominant position, however the markets are considered.

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<sup>5</sup> Joint cases COMP M. 2675 EdF/TXU Europe/West Burton Power Station and COMP M. 2679 EdF/TXU Europe/24Seven.

<sup>6</sup> Case IV M. 1606 EdF/Cottam Power Station, IV M. 346 EdF/London Electricity, Joint cases COMP M. 2675 EdF/TXU Europe/West Burton Power Station and COMP M. 2679 EdF/TXU Europe/24Seven.

## Germany

### *Product markets*

18. *Electricity supply at interconnected level:* The Commission has identified in previous cases a market for the supply of electricity at interconnected level in Germany<sup>7</sup>, i.e. supplying regional distributors, traders and large industrial customers.
19. *Electricity trading:* the parties consider that the trading of electricity should be regarded as a separate product market. Electricity trading includes the "physical" trade of electricity as well as "non-physical" financial trading in electricity derivatives. The parties do not consider that a further segmentation of the market is justified, as physical and financial trades are intrinsically related. For example, they are used to hedge each other. Also, it is possible to sell option contracts to deliver physical electricity at some time in the future. If the option is exercised, the contract results in a physical delivery, but if it is not, it would remain a pure financial transaction. As indicated above, in respect of the UK, the trading market can be seen as a subset of the overall interaction between generators and suppliers. The parties indicate that direct sales between generators and suppliers should not be included in the notion of trading in order to separate the trading activity from the markets of generation and supply.
20. However, for the purpose of this case, it is not necessary to clearly delineate the boundaries of the market for electricity trading because irrespective of the definition adopted, the concentration will not lead to the creation or strengthening of a dominant position.

### *Geographic market*

21. *Electricity wholesale supply at interconnected level:* in line with previous Commission practice<sup>8</sup>, the parties suggest that this market is national in scope. For the purposes of the present transaction, given that the operation does not raise serious doubts irrespective of geographic market definition considered, the question on how to exactly define the relevant geographic market can be left open.
22. *Electricity trading:* According to the parties, the market for trading electricity in Germany is at least national in scope. The Commission has recently indicated<sup>9</sup> that the geographic scope may be wider than national. For the purposes of the present transaction, given that it does not raise serious doubts irrespective of geographic market definition considered, the question on how to exactly define the relevant geographic market for electricity trading in Germany can be left open.

## **Gas**

23. *Gas trading in Belgium:* The parties consider that the trading of natural gas in Belgium constitutes a relevant product market. This market almost exclusively consists of the "physical" wholesale of gas by gas producers or traders to other traders or suppliers, excluding sales to end consumers. The "non-physical" financial trading in natural gas derivatives is insignificant. The definition of the relevant

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<sup>7</sup> Case COMP M. 1673 Veba/Viag; case COMP M. 2701 Vattenfall/Bewag.

<sup>8</sup> See footnote 7

<sup>9</sup> Case COMP M. 2701 Vattenfall/Bewag

product and geographic markets can however be left open given that the transaction will no lead to the creation or reinforcement of a dominant position on the basis of any possible market definition.

## Assessment

### *Horizontally affected markets*

24. *Electricity supply to end consumers in England, Wales and possibly Scotland:* Innogy's share in terms of volume in England, Wales and Scotland amounts to approx. [20-30]% and RWE has only recently secured its first contract for the supply of electricity to an end user (a cement producer) in the UK. The volume to be supplied by RWE will lead to approx. a market share of [less than 1]%. There are 3 active electricity suppliers in the market in England, Wales and Scotland with market shares of more than 10%: TXU ([10-20]%), S&SE ([10-20]%) and Powergen ([10-20]%) and 4 with market shares in a range of 5-10%: Centrica ([...]), Scottish Power ([...]), EdF ([...]) and British Energy ([...]). If a separate market should be considered for industrial and commercial consumers Innogy has a [20-30]% market share and RWE's expected market share is [less than 1]%. Other competitors with significant market shares active in this segment of commercial and industrial clients are TXU ([20-30]%), British Energy ([10-20]%), Powergen ([10-20]%) and S&SE ([less than 10]%). If England and Wales had to be considered as a separate market from Scotland Innogy's market shares are [less than 30]% for the market in general and [less than 30]% for industrial and commercial consumers, RWE market shares being [less than 1]% for the market in general and [less than 1]% for industrial and commercial consumers. Given the limited horizontal overlaps and the existence of other important competitors the transaction will no create or strengthen a dominant position in the electricity supply market in the UK in any possible product and geographic market definition.
25. *Electricity trading in Germany:* RWE's activities in Germany as electricity trader accounts for a share of [10-20]%. Innogy's activities represent a share of [less than 5]%. The main competitors in the German electricity trading market are AEP, TXU, E.ON and Electrabel (the estimated market share for each of them is 15%). Given the limited horizontal overlap and the number and market shares of the competitors, the transaction will no lead to the creation or strengthening of a dominant position.
26. *Gas trading in Belgium:* Innogy's estimated market share for physical trading is [10-20]% and RWE's [less than 10]%. The main competitors in the Belgian gas physical trading market are TotalFinaElf (approx. 15%), EdF (at least 15%), Electrabel (approx. 15%), Accord (approx. 10 to 15%) and BP (approx. 10 to 15%). The parties do not operate as "non-physical" traders. Accordingly, the only trading activities of the parties in this country are related to physical trading through the Zeebrugge interconnector (all natural gas is imported in Belgium). Given the limited combined market share of the parties and the number of important competitors the transaction will not lead to the creation or strengthening of a dominant position in a market limited to gas trading market in Belgium. Moreover, the parties sell gas to end-consumers in Belgium only to a very limited extend. Indeed, RWE has a majority stake in the Dutch gas utility Intergas N.V. which supplies end consumers (small customers) in the small Belgian town Baarle Hertog (which town is part of Intergas traditional supply area though it belongs to Belgium). Given the negligible character of this activity, it does not change the assessment of the case, irrespective of the market definition chosen.

*Vertically affected markets*

27. *Electricity supply and generation in the UK:* Innogy/RWE has a market share of [20-30]% (depending on market definition see paragraph 24 above) in the UK for electricity supply. This market is downstream to the generation market where Innogy has market share of [less than 10]% in terms of energy delivered in England and Wales and RWE [less than 1]%. It has to be taken into account that the market shares in the upstream market is small and the market share in the downstream market below 30%. Moreover, since the horizontal overlap on both the upstream and the downstream markets is negligible, the situation post-transaction is comparable to the situation prior to the transaction. Consequently, there is no risk of creation or strengthening of a dominant position.
28. *Electricity supply at interconnected level and trading in Germany:* RWE has a share of [30-40]% in electricity supply at interconnected level in Germany. The proposed transaction will therefore have certain vertical effects as the parties are also active as electricity traders in Germany with a combined market share of [10-20]%, with Innogy accounting for [less than 5]%. However, this vertical effect is in any case insignificant in view of the very modest activities of Innogy in the German electricity trading market.

**CONCLUSION**

29. 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  
Franz FISCHLER  
Member of the Commission