EN

Case No COMP/M.2822-ENBW/ENI/GVS

Only the English text is available and authentic.

REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 8 (2)
Date: 17/12/2002

Commission Decision

of 17/12/2002

declaring a concentration to be compatible with the common market

and the EEA Agreement

(Case No COMP/M.2822–EnBW / ENI / GVS)

(Only the English text is authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings[1], as last amended by Regulation (EC) No 1310/97[2], and in particular Article 8(2) and 22 (3) thereof,

Having regard to the Commission's decision of 16 September 2002 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations[3],

Having regard to the final report of the hearing officer in this case[4]

1 OJ L 395, 30.12.1989, p. 1; corrected version in OJ L 257, 21.9.1990, p. 13.

2 OJ L 180, 9.7.1997, p. 1.

3 OJ C ...,...200. , p....

4 …

WHEREAS:

1. On 14 August 2002, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EEC) No 4064/89 ("the Merger Regulation") by which the undertakings Energie Baden-Württemberg AG ("EnBW"), Germany, and ENI S.p.A. ("ENI"), Italy, acquire joint control of the German undertaking Gasversorgung Süddeutschland GmbH ("GVS") 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 Merger Regulation and raises serious doubts as to its compatibility with the common market. Therefore, on 16 September 2002, the Commission decided to initiate proceedings in accordance with Article 6(1)(c) of the Merger Regulation and Article 57 of the EEA Agreement.

3. The Advisory Committee discussed the draft of this Decision on 6 December 2002.

I. THE PARTIES AND THE OPERATION

4. EnBW is active in the fields of electricity as well as gas generation, transmission, distribution, supply and trading and district heating supply. Other business activities comprise telecommunications and waste recycling. Prior to the liberalisation of the German electricity market, EnBW's business activities were focused on Southwest Germany (mainly the state of Baden-Württemberg). After the liberalisation, however, EnBW extended some of its electricity activities nation-wide (for example, "Yello" electricity to mainly household customers). As far as gas is concerned, EnBW distributes, through subsidiaries, gas at local level to final customers as well as secondary distributors.

5. EnBW is jointly controlled by Electricité de France ("EDF") and Zweckverband Oberschwäbische Elektrizitätswerke ("OEW")[5]. EDF is a wholly state-owned company, which is active in all fields of supply and transport of electricity in France. EDF is the operator of the national grid, but is not active in the sectors of gas generation or supply. EDF indirectly holds 34.5 % of the shares of EnBW. OEW is an association of nine public districts in Southwest Germany. Its main purpose is to hold shares in companies active in the energy sectors. Through its wholly owned subsidiary OEW Beteiligungsgesellschaft mbH, OEW holds 34.5% of the shares in EnBW.

6. ENI is active in the exploration and production of oil and natural gas world-wide. ENI is a gas producer in Italy, the North Sea, Egypt, Nigeria, Kazakhstan and Libya. Furthermore, ENI purchases gas volumes from Sonatrach, Gasunie, Gazprom/Gazexport, Nigeria LNG and some Norwegian gas producers. ENI is also active in the supply, transmission, storage, distribution and trade of natural gas. ENI holds shares in companies with transportation capacities which are active in the operation of the trans-national pipelines for transmission of natural gas in Germany, Austria, Switzerland, Tunisia, and sea pipelines in the Mediterranean from Tunisia to Italy, in the Black Sea from Russia to Turkey and in the North Sea from the United Kingdom to Belgium.

5 Commission Decision 2002/164/EC in Case. COMP/M.1853 – EDF/EnBW (OJ L59, 28.2.2002, p. 1).

7. ENI is currently controlled by the Italian Ministry of Finance through a controlling 30.33% participation in ENI's share capital. The remaining shares of ENI are floated on the stock exchange.

8. GVS' business activities are regional gas distribution and transportation using and operating a gas transport system (network of pipelines) in Baden-Württemberg. GVS mainly supplies gas to local distribution companies. In addition to this, GVS supplies two industrial plants, Rodia Rhone-Poulenc AG, Freiburg, and Badische Stahlwerke AG, Kehl. The latter activity constitutes approximately 1 % of GVS' turnover.

9. Presently, 26.25% of the shares in GVS are held by MVV RHE AG ("MVV"), 25% by the State of Baden-Württemberg, 15.35% by individual local authorities and 33.4% by Neckarwerke Stuttgart AG ("NWS"), which is controlled by EnBW. MVV, State of Baden-Württemberg, NWS and some of the individual local authorities, which taken together represent 95.62% of the shares in GVS, have decided to sell their shares. Two local authorities will remain shareholders of GVS together accounting for 4.38% of the shares in GVS. EnBW and ENI (the latter through its wholly owned subsidiary Società Nazionale Metanodotti ("SNAM")) intend to acquire 95.62% of the shares in GVS. After completion of the transaction, the notifying parties intend to use GVS as their main gas distribution channel within and beyond the borders of the State of Baden-Württemberg.

II. CONCENTRATION

10. As a result of the notified operation EnBW and ENI will jointly control GVS. Via NewCo, a jointly controlled 50/50 joint venture, EnBW and ENI (through its wholly owned subsidiary SNAM) intend to acquire all the shares in GVS and, thereby, gain control of GVS. Since NewCo will be a mere holding company for the Parties' shares in GVS, the transaction will indirectly lead to joint control of GVS by the Parties. All major strategic decisions of NewCo and GVS will require the consent of EnBW and SNAM. Both parent companies will have equal rights as to the appointment of the joint venture's managing bodies. Therefore, EnBW and SNAM will jointly control GVS through NewCo.

11. The proposed operation, therefore, constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

12. EDF (including EnBW), ENI and GVS have a combined aggregate worldwide turnover of more than EUR 5 000 million (EUR 40 700 million for EDF in 2001, EUR 48 900 million for ENI in 2001 and EUR 1 734 million for GVS in 2001). The aggregate Community-wide turnover of EDF, ENI and GVS exceeds EUR 250 million (EUR 36 600 million for EDF in 2001, EUR 36 200 million for ENI in 2001 and 1 704 million for GVS in 2001). EDF (including EnBW) generated more than two-thirds of its community-wide turnover in France, GVS in Germany, and ENI in Italy. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

IV. THE RELEVANT MARKETS

A. Relevant product market

13. In Germany, as a result of historical developments, there are two levels of gas wholesale companies: wholesale companies which purchase gas from Community and non-Community gas producers and transport this gas over long distances through high-pressure pipelines, and regional supply companies, which use short-distance medium and low pressure transmission pipelines . In Exxon/Mobile[6] as well as in Veba/Viag[7] the Commission concluded for Germany that long-distance and short-distance wholesale companies operate on a different wholesale market.

Regional wholesale of gas is the relevant product market

14. GVS' business activities are regional gas distribution and transportation using and operating a gas transport system (network of pipelines) in Baden-Württemberg. GVS mainly supplies gas to local distribution companies. Therefore, regional wholesale of gas is the relevant product market in which GVS operates.

15. As set out further below in recital 20, the investigation carried out by the Commission revealed that large commercial customers and municipality-owned utilities ("Stadtwerke") tend to conclude supply contracts with gas wholesalers active in their respective region. This means that the regional wholesale (in former decisions[8] referred to as short-distance wholesale transmission)[9]of gas still has to be seen as a distinct product market. The assessment below will focus on the market thus defined.

B. Relevant geographic market

16. In Exxon/Mobile[10] as well as in Veba/Viag[11], the Commission has left open whether the gas wholesale markets in Germany were still regional, that is to say, still limited to the former demarcation regions, or already national in scope.

1. The notifying parties submit that the gas wholesale market is national in scope

17. The notifying parties take the view, that the wholesale transmission markets are national, because distribution has traditionally been organised largely on a national basis through national or regional operators. This is supported by the possibility of third party access fixed on a national basis, which enables other regional gas suppliers to supply gas

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6 Commission Decision of 29.09.1999, Case No. IV/M.1383 – Exxon/Mobil, paragraphs 48 ff , 111

7 Commission Decision 2001/519/EC in Case COMP/M.1673 – Veba/Viag, OJ L188, 10.7.2001, p.1., paragraph 186

8 Commission Decision of 29.09.1999, Case No. IV/M.1383 – Exxon/Mobil, paragraphs 48 ff , 111; Commission Decision 2001/519/EC in Case COMP/M.1673 – Veba/Viag, OJ L188, 10.7.2001, p.1., paragraph 186

9 For reasons of terminological clarity, this expression is not used in the present decision, given that the activity at stake is a sales and not a transport activity.

10 paragraph 152

11 paragraph 186

customers even in regions where the respective supplier does not physically have a network.

18. With respect to the Commission's assessment in Exxon/Mobile and Veba/Viag the notifying parties take the view that the regional scope established in those decisions was due to the regulatory framework in place at that time, based on "Verbändevereinbarung Erdgas I" ("VVI")[12], which did not sufficiently enable newcomers in gas wholesale supply to compete effectively against the respective incumbents in the different regions. Meanwhile, however, on 3 May 2002, "Verbändevereinbarung Erdgas II" ("VVII") was signed by the relevant industrial organisations. It entered into force on 1 October 2002 and is valid until 30 September 2003.

19. The parties point out that the VVII will apply a uniform pricing system for regional and trans-regional wheeling. The price will be calculated according to the number and characteristics of transmission tracks used. Therefore, the parties are of the view that gas markets must be considered as national in scope as a result of the pro-competitive effects of the VVII.

2. The investigation showed that the market for regional wholesale of gas is still regional in scope and is likely to remain so in the future.

2.1 At present, most customers are still supplied by gas wholesalers active within the previous demarcations, the "Bundesländer".

20. The investigation carried out by the Commission did not confirm the parties' submission that gas markets must be considered national. It revealed that large industrial customers and municipality-owned utilities ("Stadtwerke") concluded to a large extent supply contracts with gas wholesalers active in their respective region, that is, at the level of the "Bundesland", for example the State of Baden-Württemberg, Bavaria, Hesse, Rhineland Palatinate and North Rhine Westphalia. This corresponds to the previous demarcations for gas markets, which were subsequently banned due to the liberalisation process in the gas sector.

21. In addition, very few customers consider the use of spot markets to be a viable alternative supply source. In their view, substantial volumes are unsuitable for purchases at spot markets due to the typical short-term delivery contracts and small volumes available. Moreover, many Stadtwerke appear to be inexperienced in managing renewal of spot purchase and delivery on a continuous basis in order to have a permanently secured supply of gas. Spot market deliveries are therefore not currently a common means to bring in gas from outside the region.

[12] VVI was signed on 4 July 2000.

2.2 Further to Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas[13] , Germany started liberalising the gas sector through agreements : Verbändevereinbarung Erdgas I (VVI) then amended by Verbändevereinbarung Erdgas II (VVII).

22. VVI and VVII are agreements by four German business associations[14] concluded with the view to put into practice the principles of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998[15]. It is true that the current supply situation is still based on the framework defined by VVI since VVII only came into force on 1 October 2002. However, the framework foreseen by VVII is not significantly different from that defined by VVI. In particular, VVII does not modify the concept of distance related tariffs which has already been established by VVI. The essential differences between VVI and VVII lie mainly in the following two points: a new model of network access ("Punkt-Zahlen-Modell") as well its application to the regional wholesale level.

23. As regards network access, VVI established a price model based on postage stamp tariffs[16] for access to regional networks. The prices of the postage stamps were defined by each network operator concerned on specified areas.

24. VVII introduced a new model for regional network access and transportation network access. This model is called "Punktzahlen-Modell" whereby the price of transmission is computed based on the distance of pipelines and the diameters or pressure of the pipelines. This model is also used for long distance transmission. On the basis of VVII a uniform calculation model is foreseen for both long-distance and regional wholesale. . The tariff model for the local supply networks (Stadtwerke) is still the same as VVI : local-distribution postage stamps ("Endverteilerbriefmarke").

25. The operators had to make public by 1 October 2002 whether they would apply the "Punktzahlen-Modell" or the local-distribution postage stamp for their networks. If they chose the "Punktzahlen-Modell", they had to publish their specific prices in relation to the distance and diameters/pressure for the pipelines by 30 June 2002. Then they also had to publish the "Punktzahlen" themselves by 1 October 2002. These "Punktzahlen" have to be calculated on the basis of the specific prices, thus making it possible to compute the total price to be paid based on distance, diameter, etc.

2.3 Key issues considered as necessary to make the gas market fully open to newcomers have not yet been addressed by VVI and VVII.

26. On the basis of VVII, it appears that the total price can still not be computed transparently by potential competitors because the operator of the physical network to be used is the only one to know and/or decide the path the gas will follow in its network and hence the parameters (distance, diameters of different sections) on which the price

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[13] OJ L204, 21.7.1998, p.1

[14] Bundesverband der Deutschen Industrie e.V; Verband der Industriellen Energie- und Kraftwirtschaft e.V; Bundesverband der deutschen Gas- und Wasserwirtschaft e.V.; Verband kommunaler Unternehmen e.V.

[15] Those principles include in particular free choice of supplier, network access and unbundling.

[16] Postage stamp tariffs are tariffs unrelated to distance or the characteristics of a single transaction.

will be based. Suppliers interested in trough-transmission have no means to control that the distance of transportation related to the path they paid is the one effectively followed.

27. This cost model remains distance related and requires specific third-party-access-agreements (TPA-agreements) with each network operator involved in a specific transaction. This means in most cases that the greater the distance you want your gas to travel, the more networks you have to go through, the more access agreements you have to negotiate with related network operators and the greater the additional costs and burdens that will be incurred. As a consequence, TPA continues to be costly and complicated and prevents alternative suppliers from transporting gas on long distance if not in their own network.

28. It is worth noting that the German federal ministry of economics and technical development ordered an independent study[17] which made a competitive assessment of the framework provided by VVI for network access and came to the following conclusions:

> *"The current rules defined for network access and tariff by the business associations are not yet appropriate for developing a liquid gas market and mass transactions, essential issues are not yet addressed (...)*
>
> *- case-by-case negotiations versus binding standard conditions*
> *- network access and tariffs*
>
> *(...)*
>
> *Network access and tariffs are related to transactions, which means that each tariff is defined directly or indirectly on the basis of the specific underlying commercial transaction. This system impedes competition through high transaction cost and the risk of discrimination of third parties for network access. In fact, tariffs should be independent of the specific transaction involved (stamp tariff)."*

29. These arguments are still valid since VVII did not address these issues. In fact, VVII is only an intermediate step within the liberalisation process of gas markets and many of the critical issues such as binding standard conditions have been left open and have to be addressed within a further agreement, to be issued by 30 September 2003. In this respect, VVII contains a list of improvements to be tackled in a new VVIII by the concerned business associations. They have to:

> *"develop an improved concept which achieves the following goals:*
>
> *More competition and transparency than so far, more straightforward services and use, opportunities for gas trading floors, non-discriminatory conditions, suitability for mass market and tariff independent of specific transaction characteristics (non-distance based tariff/stamp), suitability for forming energy balancing group, causality principle in cost allocation.*

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[17] EWI, BET: *"Analyse und Wettberwerbliche Beurteilung der Verbändevereinbarung Gas zum Netzzugang"*, Gutachten im Auftrag des Bundesministeriums für Wirtschaft und Technologie. Endbericht 09.11.2000. Paragraph : *"8. Zusammenfassung"*.

The improved concept shall be put into force in time for the beginning of the economic gas year 2003/2004.

The business associations concerned have agreed upon that a continuous sharing of experience in this field may help develop and lead to a more simple, transparent and competitive network access."[18]

2.4 As the Commission cannot assume with the required degree of certainty that the characteristics of the gas markets will change in the short-term, it must rely on the current characteristics of the concerned markets which are regional in scope.

30. As regards the future VVIII, VVII specifies that VVIII should be ready for gas year 2003/2004. However there are no indications at present as to how the business associations concerned will address the issues outlined in recital 24. Therefore, for the purpose of the present assessment the Commission cannot take into account the impact of the future VVIII on the development of the gas markets in Germany.

31. In the light of the above, it can be concluded that the relevant gas wholesale market is currently regional in scope and that the conditions for competitors outside Baden-Württemberg to enter this area will improve only gradually over the coming years. GVS' business activities are regional gas distribution and transportation using and operating a gas transport system (network of pipelines) in Baden-Württemberg. Therefore, the geographic market to be considered in the present case is the State of Baden-Württemberg.

2.5 Baden-Württemberg constitutes a substantial part of the common market.

32. The quantities of gas supplied in the State of Baden-Württemberg roughly correspond to those supplied, for example, in Austria or in Denmark. Therefore, Baden-Württemberg constitutes a substantial part of the common market.

V. COMPATIBILITY WITH THE COMMON MARKET

A. DOMINANT POSITION OF GVS

1. GVS has high market shares in the regional wholesale gas market and is the main gas supplier in Baden-Württemberg.

33. GVS owns and operates a transport system of approximately 1 881 km in Baden-Württemberg, including two compressor stations and two smaller storage facilities. The main gas flow direction is North to South with Lampertheim, Amerdingen, Zoltingen, Michelbach and Willstätt being the most important entry points into the GVS pipeline system. These entry points are served through the international transport systems MEGAL (owned by Ruhrgas and Gaz de France), TENP (owned by Ruhrgas and ENI/SNAM) and MIDAL (owned by Wingas). GVS is supplied with gas by Wingas

[18] VVII, paragraph 6.2.4: " Bis zum 30.9.2003 werden die Unterzeichnerverbände ein verbessertes Konzept entwickeln, welches die folgenden Ziele erreicht: mehr Wettbewerb und Transparenz als bisher, einfachere Bedienung und Nutzung , Börsenfähigkeit, Diskriminierungsfreiheit, Eignung für Massengeschäft/Transaktionsunabhängigkeit, Bilanzkreisfähigkeit, Kostenzuordnung nach Verursacherprinzip. Das verbesserte Konzept wird rechtzeitig vor Beginn des Gaswirtschaftsjahres 2003/2004 in Kraft gesetzt. Die Unterzeichnerverbände sind sich darin einig, dass ein stetiger Erfahrungs- und Meinungsaustausch zu diesem Thema den einfachen, transparenten und wettbewerbsfähigen netzzugang begleiten und fördern soll."

accounting for [less than 20%]* of GVS' supplies. The remainder is supplied by Ruhrgas.

34. The regional wholesale gas market in Baden-Württemberg comprises a consumption of [70-90]* billion kWh in 2001. On this market level only GVS, Ruhrgas, and Wingas are active. GVS had a market share of [more than 75%]* on the market for regional wholesale, the remaining [less than 25%]* were supplied by Ruhrgas and Wingas.

35. GVS has concluded long-term wholesale supply contracts with its customers, as can be seen in table 1 below. [40%-50%]* of the supply contracts end between now and 2008, the remainder run until 2015.

Table 1: GVS' supply contracts in Baden-Württemberg

Name of the Stadtwerk	**Contractual expiration date**	**Annual supply volume (2001, GWh)**
[Total supply 60.000-80.000 GWh]*		

36. The current supply contracts between GVS and its customers are based on a standard contract model named LV III. This model (version of 1 March 2000) foresees a contractual duration until 30 September 2015. Supply contracts based on LV III model contain no possibility for an early termination and only limited flexibility in terms of adaptation of volume and price.

2. Conclusion

37. On the basis of GVS' market share of [more than 75%]*, it can be assumed that GVS enjoys a dominant position.

B. Future potential for changes in the gas supply market

1. Although GVS will remain dominant in the near future there are indications that GVS may face a certain degree of competition in the coming years.

38. There are indications that some of the factors which currently hamper any significant competition in the regional wholesale market may be changed to such an extent in the foreseeable future that at least a limited degree of competition would be conceivable. This is in particular true of the completion of the Wingas long distance gas pipeline Südal and the expected decision of the German Federal High Court on the long-term exclusive gas supply agreements.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an esterisk.

2. Completion of the Wingas long-distance gas pipeline, Südal.

39. As one of the wholesale gas importers, Wingas owns and operates a system of pipelines which allows it to transport gas long distance. Its existing pipelines have also enabled Wingas to directly supply Stadtwerke and industrial customers located in areas along the path of its pipelines. In this case, Wingas does not need to go through the network of a competitor such as GVS but builds dedicated connections from its main transportation pipeline to its customers.

40. At present, a section of Wingas' pipeline system covers a small area in the north-west of Baden-Württemberg. Wingas currently supplies three Stadtwerke located in that area: Stadtwerke Weinheim, Stadtwerke Heidelberg and Stadtwerke Schwäbisch Hall which recently switched from GVS to Wingas.

41. However, Wingas is currently building a new pipeline, called Südal, which is likely to be completed by the end of 2004. This pipeline would enable Wingas to transport gas from Russia and supply cities and industrial customers in areas such as München and Augsburg in Bavaria as well as Stuttgart in Baden-Württemberg. Given the density of industrial and municipality customers in the areas across which the pipeline will run, Wingas may appear as a viable competitor to GVS in a substantial part of Baden-Württemberg from 2005 onwards.

3. Judgements on the long-term exclusive gas supply agreements.

42. The long-term exclusive supply clauses contained in in the long-term gas supply contracts have been subject to court proceedings in the German Court of Appeal of Düsseldorf[19] and and in the German Court of Appeal of Stuttgart[20]. Both courts came to the conclusion that the relevant exclusive long-term contractual clauses infringed German as well as Community competition law (§§1,19,20 of the German Law against restriction of competition[21] and Articles 81 and 82 of the EC Treaty) and therefore were deemed invalid.

43. As regards the consequences of the invalidity of the relevant exclusive long-term contractual clauses, the German Court of Appeal of Düsseldorf rejected the possibility to resort to the safeguard clause contained in the contract, in order to adapt the contractual gas volume or the duration of the contract. The German Court of Appeal of Stuttgart did not follow the German Court of Appeal of Düsseldorf in this respect, since it did not rule out the possibility that the safeguard-clause form the basis of an appropriate and necessary adaptation. Therefore, it rejected the claim that the entire contract should be invalidated. As a consequence, customers would free to source at least a certain percentage of their current supplies from a different supplier.

44. The judgement of the German Court of Appeal of Stuttgart has been appealed and the German Federal High Court has accepted the appeal for legal review An oral hearing is foreseen to take place in April 2003.

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[19] OLG Düsseldorf, Judgement of 07/11/2001, Aktenzeichnen : U(Kart)31/00, "Thyssengas ./. Stadtwerke Aachen AG";

[20] OLG Stuttgart, Judgement of 21/03/2002, Aktenzeichnen : 2 u 136/01, "Gasversorgung Süddeutschland GmbH ./. Stadtwerke Schwäbisch Hall GmbH"

[21] Gesetz gegen Wettbewerbsbeschränkungen (GWB)

45. Depending on the approach to be taken by the German Federal High Court, it is possible that customers would be in a position to source at least a certain percentage of their supplies from a different supplier. This in turn would make it more attractive for new competitors, such as Wingas, but also gas dealers and wholesale suppliers in neighbouring areas, to become active in Baden-Württemberg. It is true that in the current state of the market incentives for new competitors to become active in Baden-Württemberg are poorly developed. This is mainly the result of a combination of two different factors. Firstly, transmission, though being legally and technically feasible, is still difficult because of the current conditions for transmission as outlined in recitals 22 to 29. Secondly, and more importantly, customers are bound to their current supplier on the basis of long-term contracts.

46. In a situation, however, where at least a certain percentage of the demand will be open to competition competitors have a chance to step in and gain customers. This is evident for a company such as Wingas which builds dedicated connections from its main transportation pipeline in order to supply customers and, therefore, does not need to go through GVS' network. However, even competitors such as gas dealers and wholesale suppliers in neighbouring areas which have to go through GVS' network could profit from this development, at least to a certain extent, particularly if conditions for transmission improve in the longer term.

3. Conclusion

47. In the light of the above, it is concluded that there are indications that GVS may face a certain degree of competition in the medium term. This will be in particular the case due to the completion of the Südal pipeline by the end of 2004 and the opening up of the long-term supply contracts on the basis of the expected judgement by the Federal High Court which, in turn, will enable customers to source at least a certain percentage of their supplies from a different supplier[22].

C. STRENGTHENING OF GVS' DOMINANT POSITION

48. The proposed concentration will strengthen GVS's dominant position in Baden-Württemberg through down-stream vertical integration foreclosing a substantial part of GVS' current customers.

1. EnBW controls a substantial part of the downstream market of gas distribution

49. In Baden Württemberg, EnBW is active on the market for local gas distribution, which is the down-stream market in relation to the regional wholesale of gas, through participation in Stadtwerke. The volumes sold by GVS to undertakings which are controlled by EnBW, that is, the volumes sold to Stadtwerke in which EnBW holds a majority shareholding, correspond to [more than 20%]* of the regional wholesale market as shown in Table 2 below. If all shareholdings of EnBW are considered, the volumes sold by GVS to those Stadtwerke correspond to [more than 30%]* of the regional wholesale market.

22 This is without prejudice to the consequences of possible changes in the framework of the implementation of Community legislation.

Table 2: EnBW's participation in Stadtwerke in Baden-Württemberg

EnBW's participation in Stadtwerke in Baden-Württemberg (indirectly and directly), with gas supply	Share in capital in %	Gas supply in 2001 (GWh)
100% consolidated participation:		
EVS-Gasversorgung Nord GmbH, Stuttgart	100,00	[…]*
EnBW Gas GmbH, Karlsruhe	100,00	[…]*
EnBW Ostwürttemberg DonauRies AG, Ellwangen	99,48	[…]*
Neckarwerke Stuttgart AG, Stuttgart	86,27	[…]*
Badenwerk Gas GmbH, Karlsruhe	72,00	[…]*
EVS-Gasversorgung Süd GmbH, Stuttgart	51,00	[…]*
Equity consolidated participation:		
[…]*		
Non- consolidated participation:		
[…]*		

[Total Supply: more than 30.000 GWh]*

50. However, EnBW's downstream market position is even stronger since its subsidiaries also supply gas on the basis of long-term contracts to independent Stadtwerke, that is to say, Stadtwerke where EnBW has no participation. The Table 3 shows the Stadtwerke which are supplied with gas by EnBW's subsidiaries Neckarwerke Stuttgart AG (NWS), EnBW Gas GmbH (EnBW Gas), EVS-Gasversorgung Nord Energie GmbH (EGVN), EVS-Gasversorgung Süd GmbH (EGVS) and EnBW Ostwürttemberg DonauRies AG (ODR) as regional distributors.

Table 3: Customers supplied by EnBW's subsidiaries

Name of the Stadtwerk	**Supplier**	**Contractual expiration date**	**Annual supply volume (2001, GWh)**
[Total Supply less than 7.000 GWh]*			

***customers where EnBW is a shareholder**

2. Without the present operation EnBW would have a strong incentive to profit from developments in the coming years, such as the completion of the Wingas long-distance gas pipeline, Südal.

51. As outlined in recitals 39 to 41, Wingas is currently building the new Südal pipeline, which is likely to be completed by the end of 2004. The new pipeline will run across an area of Baden-Württemberg where the density of industrial and municipality customers

is very high, namely the Stuttgart area. The investigation carried out by the Commission has revealed that dedicated connections from main transportation pipelines are a viable supply alternative up to a distance of 20 to 25 kilometres on both sides of the pipeline. Accordingly, a corridor of 40 to 50 kilometres around the new Südal pipeline would be the potential supply area for gas supply via dedicated pipelines.

52. In this respect, it should be noted that the EnBW's subsidiaries NWS, EGVN and EGVS as well as the following Stadtwerke in which ENBW has shareholdings are located in this area: Energieversorgung Gaildorf OHG, Stadtwerke Esslingen am Neckar GmbH, Gasversorgung Dornstadt GmbH, Energieversorgung Rottenburg am Neckar GmbH, Gasversorgung Pforzheim Land GmbH, Stadtwerke Sindelfingen GmbH, Stadtwerke Schwäbisch Gmünd GmbH, FairEnergie GmbH, Reutlingen, Stadtwerke Nürtingen GmbH, Stadtwerke Fellbach GmbH.

53. EnBW's subsidiary NWS is one of the bigger customers of GVS accounting for [20%-30%]* of its current supplies. NWS' supply contract will end in 2008. Without the proposed transaction, EnBW would have a strong incentive to explore competitive alternatives for NWS future gas supplies, namely supply through Südal via dedicated pipeline available in the market from 2005 onward.

3. As a shareholder of GVS EnBW would be more interested in GVS economic performance and, therefore, rather use its influence to secure GVS current supplies.

54. It is true that even before the proposed operation, EnBW has a certain interest in GVS economic performance since EnBW's subsidiary NWS is one of the ten shareholders in GVS, with a stake of 33.40%. As a result of the proposed operation, however, EnBW would jointly control GVS which, in turn, would double its interest in GVS economic performance. As EnBW would have a stronger interest in GVS' economic success as a shareholder of GVS, EnBW's subsidiaries would negotiate with GVS as EnBW's preferred supplier once an existing supply contract came to an end. In this respect, it can be concluded that GVS would be able to secure supply contracts if its offer was at least equally acceptable as those of its competitors. Other shareholders in these subsidiaries would have no reason to oppose EnBW's preferred supplier where the company had no direct or indirect disadvantages resulting from a supply by GVS. In addition, EnBW could use its decisive influence as a shareholder in GVS to adapt GVS' offers in a way that least affected GVS' and EnBW's profitability.

55. Moreover, EnBW has a high number of minority shareholdings in Stadtwerke as shown in the Table 3 above. Even for those companies where EnBW has a non-controlling participation the concentration could have a comparable result in terms of securing future supply for GVS, as outlined in recital 54, at least to a certain extent.

56. It is true that, in those companies, EnBW does not have the same influence to direct the future gas sourcing as in its subsidiaries. In this respect, even in Stadtwerke where EnBW has only a minority participation, EnBW holds seats on the companies' boards, either on the board of directors or in the supervisory board. Thus, EnBW has representatives on [15-25]* Stadtwerke's boards amounting, in total, to [50-70]* representatives. This presence at least enables EnBW to obtain information on competing supply offers made by gas suppliers other than GVS. Consequently, GVS would be in a better position to match the conditions of competing offers. Therefore, even for the companies in which it holds minority shareholdings, EnBW's presence secures GVS preferred access those clients, allowing it to secure supply contracts if the other shareholders of the client do not perceive any economic disadvantages compared to supply by a competitor of GVS.

57. As a result of the proposed operation, GVS would thus be in a position to secure sales to EnBW' subsidiaries of [20%-30%]* of its current customer base which corresponds to [20%-30%]* of the gas volumes it presently sells in the relevant market. If all shareholdings of EnBW are considered, those percentages are arguably higher. Conversely, the relevant part of consumption would be withdrawn from the market (in the case of EnBW's subsidiaries), to the detriment of other suppliers, or at least would risk being subject to some degree of foreclosure.

4. Conclusion

58. As outlined under recitals 38 to 47 competition will be economically and legally feasible to a limited extent in the coming years. This limited competition will be eliminated to a significant extent through the vertical downstream integration resulting from the proposed operation. It cannot be assumed that EnBW's subsidiaries and the companies in which it holds shares will make use of the competitive opportunities arising through the completion of the new Wingas pipeline and the anticipated opening up of supply contracts for at least a certain percentage of supplies. This, in turn, will lead to a significant strengthening of GVS dominant position in the near future.

59. Therefore, it is concluded that, in the current state of the regional wholesale gas market, the proposed concentration would strengthen GVS' dominant position in Baden-Württemberg due to EnBW's activities on the down-stream market.

VI. UNDERTAKINGS

60. The Decision to initiate proceedings adopted by the Commission pursuant to Article 6 (1) c of the Merger Regulation already raised the competition concerns outlined in this Decision. In response, the notifying parties proposed commitments aiming to remedy these concerns at an early stage of the in-depth investigation.

1. UNDERTAKINGS OFFERED BY THE NOTIFYING PARTIES

61. In order to address the issue on the foreclosure effect of the proposed operation, the notifying parties undertake to grant a special right whereby each local distribution company, customer of GVS in Baden-Württemberg, irrespective of whether EnBW holds a participation in it or not, can early terminate its supply contract that it concluded with GVS. The special right of early termination can be exercised at two different points in time. Long-term contracts ending in 2008 can be terminated either in October[23] 2004 or October 2006; those ending in 2015 can be terminated either in October 2005 or October 2007. Customers will have to notify their early termination 6 months in advance.

62. These special termination provisions also extend to contracts concluded between local distribution companies and Neckarwerke Stuttgart AG or EnBW Gas GmbH[24], in both of which EnBW is a controlling shareholder.

[23] October is typically the month of the year determining the beginning of the one year period for gas supply agreements.

[24] These supply contracts end all in 2008, i.e. the relevant customers can exercise their right to early termination either in October 2004 or in October 2006.

63. Moreover, the undertakings proposed contain provisions on reporting as well as the obligation on the notifying parties to inform all local distribution companies concerned of these special termination rights

2. ASSESSMENT OF THE UNDERTAKINGS

64. The undertakings proposed of the notifying parties addresses the foreclosure effect by providing the possibility to bring substantially volumes of gas demand on to the market much earlier than currently possible under the long-term supply agreements. Even under the assumption that all local distribution companies in which EnBW holds participation would remain with GVS as their supplier of gas, a potential volume of at least about 60% of GVS' present sales could come gradually on the market in Baden-Württemberg over the next years.

65. Moreover, by expanding the early termination rights to the customers of NWS and EnBW Gas outlined in Table 3 and in recital 50 those customers will have the possibility of early termination of their supply contracts with NWS and EnBW Gas. If one disregards customers which are either EnBW subsidiaries or where EnBW has a participation an additional 5% of gas volume could come gradually on the market in Baden-Württemberg over the next years.

66. The current supply contracts can be terminated for the first time in 2004, for those contracts ending in 2008, and in 2005, for those ending in 2015. In this respect, it can be expected that conditions in the regional wholesale gas market may have changed by that time because of the completion of the Südal pipeline and efficient TPA rules allowing for some degree of competition to take place.

67. In the current situation customers accounting for [40%-50%]* of GVS' sales of gas are contractually bound until 2008 and customers accounting for [50%-60%]* of the sales are even bound until 2015. As a result of the early termination rights in the undertakings proposed by the parties at least about 60% of the gas volumes sold by GVS will be opened up to competition in the near future.

68. The undertakings proposed by the parties will improve the conditions for competition in the regional wholesale market in the coming years to an extent that clearly outweighs the competitive disadvantages of the proposed operation. As a result of the proposed operation, companies accounting for a considerable part (see recital 57) of the regional wholesale market would be prevented from making use of the upcoming competitive opportunities. Through the commitment proposed by the parties, however, at least about 60% of GVS total supply (60% direct customer and 5% indirect customer supplied by NWS and EnBW Gas) will legally be able to change supplier for 100% of the respective supplies. This extensive market opening taking place in the coming years future will mean that GVS's market position becomes subject to competition and that the market may benefit from the legal liberalisation, as it is gradually expected to evolve.

69. Without these commitments, Stadtwerke, which represent [50%-60%]* of GVS' entire supplies, are currently bound contractually to GVS until 2015. Under those circumstances it can be expected that GVS would keep retain its dominant position in Baden-Württemberg for the next 13 years. This would be the case even if certain volumes of long-term exclusive contracts were released, within the coming years, due to the application of national and/or Community competition law. On the basis of the commitments, however, competitors, such as Wingas in particular, will have the chance

to win customers to a significant extent in the coming years. They will have the chance to gradually expand their position in Baden-Württemberg, and to proceed on a considerably better basis in the relevant market once all the contracts currently in force have expired.

70. Against this background and for these reasons the commitments will clearly outbalance the effects of the proposed concentration. They appear to be at least as effective as the divestiture of “Stadtwerke” by the new entity, a solution which would also involve, to a considerable extent, activities which are unrelated to the competition problems identified above (in particular electricity, water and district heating) and are, probably, inseparable[25] .

71. An outline of the proposed undertakings was presented to a wide range of third parties, including competitors and all local distribution companies in Baden-Württemberg and companies located in neighbouring regions, for example, Bavaria and Hesse, from which potential competition could be expected. Most third-party-commentators considered these proposals to be an appropriate means to free gas volume from long-term supply agreements and, in consequence, to resolve the competition concerns raised by the proposed concentration.

72. The undertakings proposed by the parties and accepted by the Commission in this case in no way prejudice the legal assessment of the long-term exclusive supply clauses or the supply contracts as a whole, under German or Community law.

VII. CONDITIONS AND OBLIGATIONS

73. Pursuant to the first sentence of the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

74. The achievement of each measure that gives rise to a structural change in the market is a condition, whereas the implementing steps which are necessary to achieve that result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission’s decision declaring the concentration compatible with the common market no longer stands; where the undertakings concerned commit a breach of an obligation, the Commission may revoke its clearance decision, acting pursuant to Article 8(5)(b) of the Merger Regulation, and the Parties may also be subject to fines and periodic penalty payments in accordance with Articles 14(2)(a) and 15(2)(a) of the Merger Regulation[26].

75. In view of the foregoing, this Decision must be conditional upon the granting of the special right of early termination of supply contracts as set out in sections I and II of the undertakings. This will result in a structural change in the market. Sections III, IV and V of the undertakings, which refer to procedures shall be obligations upon the parties aimed at implementing the structural change in the market. .

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[25] NWS for example accounts for at least 20% of GVS’ total gas sales. NWS, in turn, however, achieves only 23.7% of its respective turnover with gas. The remainder 76.3% were achieved with its other activities, thereof electricity being the most important which account for 59%.

[26] cf. the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98(2001/C 68/03).

VIII. CONCLUSION

76. It can be concluded from the foregoing that the undertakings proposed by the notifying parties will remove the competition concerns and thus, if implemented, render the proposed operation compatible with the common market. The operation should therefore be declared compatible with the common market pursuant to Article 8(2) of the Merger Regulation and with the EEA Agreement pursuant to Article 57 thereof.

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Energie Baden-Württemberg AG and ENI S.p.A. would acquire joint control of the undertaking Gasversorgung Süddeutschland GmbH within the meaning of Article 3(1)(b) of Regulation (EEC) No 4064/89 is declared compatible with the common market and with the EEA Agreement.

Article 2

Article 1 is subject to full compliance with the conditions set out in sections I and II of the Annex.

Article 3

Article 1 is subject to full compliance with the obligations set out in sections III to V of the Annex .

Article 4

This decision is addressed to:

The notifying parties

Brussels,

For the Commission

ANNEX 1: UNDERTAKINGS

Pursuant to Articles 8 (2) and 10 (2) of Council Regulation 4064/89 as amended (MCR), and in order to enable the Commission to adopt a decision pursuant to Article 8 (2) MCR declaring the acquisition of joint control of GVS compatible with the Common Market and the EEA Agreement, EnBW and Eni (the Parties) subscribe to the Commitments set out below.

These Commitments shall take effect upon the date of adoption of the Commission decision declaring the concentration compatible with the Common Market and the EEA Agreement.

I. The Parties, in their capacity as shareholders having joint control of GVS once the above-mentioned concentration will have been authorized, hereby undertake to require GVS to implement the following obligations:

1. All GVS customers, except industrial customers, distributing gas to final customers in Baden-Württemberg which have entered with GVS into a supply contract ending 30 September 2008 at the latest shall be granted a special right of termination.

This right may be exercised only once and shall become effective, at the customers' choice, either 1 October 2004 or 1 October 2006.

Customers wishing to exercise the right must give GVS six months notice by registered mail, reaching GVS no later than 30 March 2004 or 30 March 2006, respectively.

2. All GVS customers, except industrial customers, distributing gas to final customers in Baden-Württemberg which have entered with GVS into a supply contract ending 30 September 2015 shall be granted a special right of termination.

The right may be exercised only once and shall become effective, at the customers' choice, either 1 October 2005 or 1 October 2007.

Customers wishing to exercise the right must give GVS six months notice by registered mail, reaching GVS no later than 30 March 2005 or 30 March 2007, respectively.

II. EnBW as a controlling shareholder of Neckarwerke Stuttgart AG (NWS) and EnBW Gas GmbH (EnBW Gas) hereby furthermore undertakes to require the latter companies to grant the special right of termination defined with respect to GVS in I above to customers, except industrial customers, distributing gas to final customers in Baden-Württemberg with whom they have entered into a supply contract ending 30 September 2008 at the latest.

III. The Parties undertake to cause GVS to submit to the Commission, by 1 May 2004 for the first time and by 1 December of years 2004 to 2008 thereafter, a written report informing the Commission about the customers having exercised the special right to terminate their supply agreements referred to above. EnBW undertakes the same obligations with regard to NWS and EnBW Gas.

IV. The Parties undertake to cause GVS to inform the customers concerned within two months from the adoption of the decision of the special right of termination and to publish information regarding the special right of termination on the internet. EnBW undertakes the same obligations with regard to NWS and EnBW Gas.

V. The Commission may, where appropriate, in response to a request from the Parties showing good reasons, waive or modify one or more of the conditions or obligations laid down in these Commitments.

Brussels,

EUROPEAN COMMISSION

The Hearing Officer

FINAL REPORT OF THE HEARING OFFICER
IN CASE COMP/ M.2822 – ENBW / ENI / GVS

(pursuant to Article 15 of Commission Decision (2001/462/EC, ECSC) of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings – OJ L162, 19.06.2001, p.21)

The parties did accept the competition concerns from the outset. No reply to the 6.1.c decision was submitted by the parties. They proposed acceptable remedies at an early stage of phase II, which were slightly modified following the market test in order to reflect specific competition concerns raised by third parties in the market test. Therefore, no statement of objections was sent, no access to file took place as well as no hearing.
Neither the parties nor any third party did question the way the market test was handled. The case , therefore, does not give rise to any observations on the right to be heard:
Brussels, 9 December 2002

Serge DURANDE

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