EN

Case No COMP/M.3007 - E.ON / TXU EUROPE GROUP

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REGULATION (EEC) No 4064/89
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 18/12/2002

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18/12/2002

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.3007 - E.ON/TXU-Europe Group plc
Notification of 15.11.2002 pursuant to Article 4 of Council Regulation No 4064/89[1]

1. On 15.11.2002, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 (hereafter "Merger Regulation") by which the undertaking Powergen UK plc ("Powergen", UK), controlled by the German E.ON group acquires within the meaning of Article 3(1)(b) of the Council Regulation control of parts of the UK based company TXU Europe Group plc ("TXU-E", UK), belonging to the American TXU Corp group, by way of purchase of assets.

2. On the 18 October 2002 the Commission, based on a reasoned request from Powergen, adopted a decision pursuant to Article 7(4) of the Merger Regulation granting Powergen a derogation from the obligation imposed by Article 7(1) to suspend the implementation of a concentration until it has been declared compatible with the common market pursuant to Article 6(1)(b) or Article 8(2) or on the basis of a presumption according to Article 10(6) of the Merger Regulation. This decision enabled Powergen to make an unconditional offer for the United Kingdom assets of

1 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).

TXU Europe. Powergen's offer was successful and it completed the acquisition of TXU-E on the 21 of October 2002.

3. After examining the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and that it does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

I. THE PARTIES

4. E.ON is a vertically integrated company whose core business is the production and supply of electricity and gas, being primarily present in Germany, Sweden and a significant number of countries in central and Eastern Europe. Through the recent acquisition of Powergen plc[2], E.ON is present in the UK, where it is active in the generation, distribution and supply of electricity and the supply of gas. E.ON has also interests in other sectors, i.e. chemicals, water, telecommunications and real estate.

5. TXU-E owns electricity generation assets in the UK and supplies over 5 million electricity and gas customers in the UK. It also owns assets elsewhere in Europe but these are not the subject of the proposed transaction. TXU-E is a subsidiary of the Texas based energy company TXU Corp, a company listed on the New York stock exchange.

II. THE OPERATION

6. The concentration consists of the acquisition on 21 October 2002 by E.ON through its subsidiary Powergen and subsidiaries of Powergen of sole control over the UK electricity and gas supply business and the UK generation assets of TXU-E.

III. CONCENTRATION

7. In the light of the above, it can be concluded that the operation constitutes a concentration within the meaning of Article 3 (1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

8. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion[3] (E.ON EUR 46,421 million and TXU-E EUR 4,975 million). Each of them have a Community-wide turnover in excess of EUR 250 million (E.ON EUR […] million and TXU-E EUR […] 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.

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2 Case COMP/M. 2443 – E.ON/Powergen.

3 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.

V. RELEVANT MARKETS

9. The notified concentration will create horizontal overlaps on the market for the generation of electricity, supply of electricity and on the market for combined heat and power ("CHP"). Furthermore the transaction will create an overlap on the market for the supply of gas and it will bring together two vertically integrated supply companies.

Electricity

A. Relevant product markets

10. In line with previous Commission's decisions[4], four separate product markets for the electricity sector in the UK can be identified: *generation/wholesale*, *transmission*, *distribution* and *supply* of electricity. The operation will have an impact only on the generation and supply markets (where both parties are active), only Powergen is present in the distribution of electricity and neither party is active in the transmission of electricity. Accordingly, the analysis of the relevant markets will be restricted to the overlapping segments mentioned and the vertical integration in the industry.

Generation/wholesale of electricity

11. E.ON considers that the market for generation of electricity (comprising both the energy produced in power stations and that imported through interconnectors) constitutes a relevant product market. This is in line with previous Commission's decisions[5]. However, the precise market definition can be left open, since no serious competition concerns have been identified.

Supply of electricity

12. Electricity supply involves the sale of electricity to the final consumer and includes billing services. On the basis of previous Commission's decisions[6], the parties refer to the traditional distinction between the supply of electricity to, (i) customers with a maximum demand below 100 kW and (ii) customers with a demand of 100 kW and above. This distinction was based on the previous regulatory regime, where only customers with a demand above 100 kW were allowed to freely choose their supplier.

13. Furthermore, in case COMP/M. – 2890 EdF/Seeboard, the Commission indicated that the market could be subdivided into three categories: (i) domestic customers with domestic demand; (ii) enterprises (SMEs) which do not use "half hourly" tariffs; and (iii) large/commercial enterprises that have "half hourly" tariffs. Only the last category is able to freely negotiate their contracts, while SMEs can economically only be served on standard terms and domestic customers cannot negotiate the terms at all.

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4 Cases No IV/M. 1346 – EDF/London Electricity; No. IV/M. 1606 – EDF/South Western Electricity; No. COMP/JV.36 – TXU Europe/EDF London Investments; COMP/M. 2209 – EDF Group/Cottam Power Station; COMP/M. 2890 – EDF/Seeboard.

5 See Commission's decision Case No COMP/M. 2890 – EDF/Seeboard – decision of 25/07/2002.

6 See footnote 4.

14. The market investigation did not give a clear view of how the market for the supply of electricity should be defined. However, the question whether the product market should be divided into customers with a demand below or above 100 kW or whether the three fold product market definition described above should be used, can be left open, since in either case, competition would not be significantly impeded or give rise to competition concerns.

CHP

15. Powergen operates and develops large scale combined heat and power schemes. CHP is an energy efficient technology, which recovers heat from the power generation process. The heat is then used for industrial processes such as steam generation, product drying, fermentation, sterilising and heating. CHP plants are generally provided to the order of the host client and embedded into its site, where they are designed to contribute to or meet its requirements both of energy and of heat, generally through steam. CHP can be seen as an alternative to buy electricity from a supply company. In general the customers are on the same or on a nearby site as the CHP plant. The utilisation of CHP heat requires the customer's facilities to be situated near the power generator in order to make it economical viable to use the heat for industrial purposes. Powergen supplies customers with HP steam mains over distances of approximately 5 km.

16. Smaller scale CHP plants supply heat in the form of hot water or steam. This can be supplied up to possibly several kilometres depending on the nature of the customer. Applications may include residential accommodation or hospitals. This type of CHP application might be extended to a district heating network. In such a case, the CHP scheme would include not only a central generation facility but will also have dedicated pipework distribution systems supplying several customers over an extended area. Based on the limited scope of the parties' activities and the limited overlap, it can be left open whether CHP constitutes a separate product market.

Gas

Supply of gas

17. The Commission has in previous decisions recognised that the supply of gas constitutes a separate product market[7]. E.ON has identified four separate sub-markets for the supply of gas. These consist of (i) the supply of gas to domestic customers, (ii) the supply of gas to small industrial customers (2,500 therms per annum to 25,000 therms per annum), (iii) the supply of large industrial customers (above 25,000 therms per annum) and (iv) the supply of interruptible gas. According to E.ON, the first three reflect the opening of gas markets to competition, where the above 25,000 therms was first and domestic customers was last opened.

18. One third party has proposed that the market for the supply of gas constitutes one single product market and one product. Other third parties regard the division in customer groups as mentioned above to reflect the differences in competition between the groups. There exist price differentials between each of the customers groups identified due to differences in consumption and transport cost between each of the groups. On

[7] COMP/M.2890 – EdF/Seeboard.

the supply side, each customer category has potentially different requirements and in order to expand supply to a different category, it would be necessary to develop appropriate skills and competencies. For the purpose of this decision, however, the precise product market definition can be left open, since in all possible product market definitions, the concentration will not create any significant competition concerns.

B. Relevant geographic markets

Electricity

Generation/wholesale of electricity

19. As to the geographic scope concerned the E.ON refers, on the one hand, to those decisions where the Commission found that generation market to be England and Wales[8]. On the other hand, E.ON notes that the Commission indicated subsequently in the EDF/Seeboard case[9], that the geographic dimension of the market concerned could be wider, given the presence of the Scottish and French interconnectors. However, according to E.ON, that it is arguable that the market for generation is confined to England and Wales due to capacity constraints on exchange of electricity with Scotland, Northern Ireland and France, and the fact that the New Electricity Trading Arrangement ("NETA"), which was introduced on the 27 March 2001, only applies to England and Wales.

20. However, for the purpose of this decision the precise geographic market definition can be left open, since under any possible alternative market definition (i.e. even on the most narrow market definition based on a regional delineation comprising of England and Wales), effective competition would not be significantly impeded.

Supply of electricity

21. E.ON contends that the relevant geographic market is Great Britain (England, Wales and Scotland) on the basis that there are no significant differences in the regulatory regimes applying to England/Wales as compared to Scotland and little 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.

22. Until 1999small customers have been restricted to buying their electricity from the public electricity supply company ("PES") responsible for the supply in their geographic area. Thus, the geographic market was limited to one of the twelve former PES-areas covering the UK[10]. The Commission has recently suggested that the geographic scope may be wider than regional (possibly national, given the number of

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8 See footnote 4.

9 Case No COMP/M. 2890 - EDF/Seeboard.

10 The market was defined regional in case no. COMP/M.1346 – EDF/London Electricity. Commission's decision of 27/01/1999.

players competing in all areas)[11]. E.ON argues, that in the light of the liberalisation process of the market concerned and the existing levels of supplier switching, a distinction based on customers' size is not longer meaningful. In any case, should this segmentation remain applicable, E.ON considers the market for small customers to be Great Britain-wide.

23. Powergen supplies small/domestic customers in the former East Midland area through its subsidiary […] (which Powergen acquired in 1998) and TXU-E is supplying small/domestic customers in the former Eastern and Norweb areas where they previously enjoyed a monopolistic position. However, it can be left open whether the former PES-areas constitute separate geographic markets or whether the geographic market should be defined wider, since even on a regional basis, the transaction will not cause any competition concerns.

24. The Commission has in previous decisions[12] stated, that the geographic scope of the market for the supply of electricity to large customers (i.e. customers with a demand exceeding 100 kW), were England and Wales, although recognising subsequently (in the EdF/Seeboard case) that the geographic dimension might be Great Britain.

25. For the purpose of this decision, the precise geographic market definition for large customers can be left open, since in either of the proposed geographic markets, no competition concerns will arise.

CHP

26. According to the parties the heat component of CHP is distributed on a local basis to for heating or industrial purposes. The transport of steam is not economically viable over long distances due to the thermal loss. This basically limits the area in which the supply of steam to the local area surrounding the power plant. For the purpose of this decision, and since the CHP activities of the parties do not represent any significant competitions concerns, the precise geographic market definition can be left open.

Gas

Supply of gas

27. E.ON submits that the scope of the geographic market is Great Britain. The vast majority of the population of Great Britain is served by the natural gas pipeline network operated by Transco. The market investigation has confirmed this view. There are no significant differences in the regulatory regime applying to England and Wales compared to Scotland and no differences in the number of supply companies competing in Scotland. Following the introduction of the Standard Licence Conditions issued under the Utilities Act 2000 in October 2001 these standard conditions now apply across England, Wales and Scotland. As a result of this the geographic scope of the market for domestic and industrial customers is considered to encompass Great Britain.

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11 Case No COMP/M. 2890 - EDF/Seeboard

12 See Case No. IV/M.1346 – EDF/London Electricity.

VI. COMPETITIVE ASSESSMENT

A. Horizontal issues

Electricity

Generation of electricity

28. The generation of electricity can be measured in terms of i). operational capacity (expressed in MW), ii). operational and mothballed capacity (expressed in MW) and iii). volume of electricity generated (expressed in GWh). According to figures provided by the E.ON, the parties' combined share of operational capacity in England and Wales would account for some [10-20%] (Powergen [10-15%]; TXU-E [< 5%] in November 2002. In comparison British Energy Generation has an operational capacity of [10-15%], Innogy [10-15%], EdF [10-15%], AES [5-10%] and a number of smaller competitors have market shares between 3-6%. The parties' share of operational and mothballed capacity is [10-20%] (Powergen [< than 15%], TXU-E [< 5%]). Innogy has the second largest operational and mothballed capacity of [10-15%], British Energy Generation [10-15%], EdF [10-15%], AES [5-10%] and approximately 18 smaller generators have operational and mothballed capacity ranging from 1-6%.

29. On the basis of volume electricity generated for England and Wales, Powergen and TXU-E would have, for the financial year 2000/2001, a combined market share of [10-15%] ([10-15%] and [< 5%], respectively).

30. In England and Wales, the market leader on volume of electricity generated would be British Energy Generation with an [15-20%] market share. The parties would be the second largest player on the market with a [10-15%] market share closely followed by Innogy and EdF both with [10-15%]. The parties would also face competition from a number of smaller competitors with a volume of electricity generation between 1-9%. It should be noted, that the Great Britain generation market is suffering from some 22% over-capacity over maximum demand and that prices in the market have declined to below the cost of production for some generators.

31. The result of the market investigation has in general shown that the limited increment arising from the concentration will not materially change the supply and demand for electricity. Most generators expect the electricity market remain highly competitive. Some generators expect the liquidity on the wholesale market to diminish, based on the strengthening of the position of the vertically integrated generators/supply companies, whose in-house generation closely matches its supply business.

32. E.ON has acquired TXU-E's retail business without TXU-E's existing long-term purchasing contracts for the supply of electricity. Prior to the merger Powergen had a small net excess of generation output, which in a 12 month period until September 2002 resulted in a net differential of 7 TWh, confirming Powergen's net long position. In comparison TXU-E has in the same period only generated 17 TWh and consumed 51 TWh which results in a net short position of 34 TWh. Based on this, the parties' combined position would be a net short position of 27 TWh. This net short position does not constitute a significant part of the wholesale electricity trade. In comparison the total purchase of electricity accounted for 138 TWh, of which 34 TWh were purchased by TXU-E. E.ON states, that the purchase of TXU-E generation and retail business has not materially changed the physical balance between the generating

capacity and the customers in Great Britain. Thus, in trading terms, the generators who used to supply TXU-E will now be contracting to provide energy to Powergen and those suppliers who used to purchase from Powergen.

33. Furthermore Ofgem, the UK energy regulatory authority, indicates in its consultation paper[13] on the present transaction that competition in the electricity generation sector is well developed and the degree of concentration, which before the operation is relatively low, will not be significantly affected post-merger.

34. In conclusion, the transaction is not likely to create or strengthen a dominant position as a result of which competition would be significantly impeded on the possible most narrowly defined market for generation of electricity in England and Wales.

35. One third party has submitted that the transaction will lead to a collective dominant position on the relevant market for the purchase of wholesale electricity in England and Wales, may lead to a dominant position on the market for the supply to certain categories of industrial and commercial customers and will strengthen de dominant position for domestic supplies in the parties' former PES areas. The argued collective dominant position would according to the third party be held by E.ON/Powergen, RWE/Innogy and EdF/London Electricity as a result of the vertical integration and the high supply market share in the former PES-areas, where these companies are active. According to the third party, these vertically integrated companies are responsible for approximately 60% of wholesale electricity supplied in England and Wales.

36. The Commission's investigation has not supported this claim. On the contrary the market investigation has shown a highly competitive electricity market in the UK. It arguable whether joint market shares of around 60% would give rise to a collective dominant position. Particularly given the existence of several vertically integrated competitors such as British Gas, Scottish and Southern Energy and Scottish Power, which are in a position to contest any possible anti-competitive behaviour in the market. Based on this it seems highly unlikely, that the argued collective dominant oligopoly would be able to withstand challenge from other competitors and its customers, which are freely able to shift suppliers. In addition, it should be noted that the market shares of the former incumbent suppliers in the former "PES"-areas, have been significantly declining on the last 3 years, see below. In light of these observations, it can be concluded, that the present transaction will not lead to the creation or strengthening of a collective dominant position on the market concerned. Concerning the issue on the dominant position in the former PES-area and the dominant position in relation to the supply of electricity to certain categories of industrial and commercial customers, these concerns are not shared by the Commission on the basis of its investigation (see below).

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[13] Ofgem:'Powergen plc's completed acquisition of the UK assets of TXU Europe Limited – A consultation paper', November 2002.

Supply of electricity

Domestic customers

37. In August 2002 the parties had a combined share in the market for supply of electricity to domestic customers in Great Britain of [20-25%] (Powergen [5-10%]; TXU-E [10-15%]). The parties would face competition from several large players: British Gas is the second largest competitor with a [20-25%] market share, followed by npower [15-20%], EdF [15 - 20%] and Scottish & Southern Energy [10-15%]. On an England and Wales basis, the combined market share would represent some [20-25%] (Powergen [5-10%], TXU-E [10-15%]).

38. Until the complete liberalisation of the UK electricity market in September 1999 the Regional Electricity Companies (REC), such as Powergen's subsidiary […] and TXU-E's subsidiaries Eastern Electricity and Norweb, enjoyed monopolies for supply to domestic customers in their respective areas. The parties' respective market shares in these old monopoly areas have been falling since liberalisation. For example, […]'s share in its area had fallen from 100% to 61% between September 1999 and June 2002. At the regional level, which has been examined in previous Commission's decisions, the parties' market share in the East Midlands area was [60-70%] in April 2002 (TXU-E [5-10%], Powerger 61%). In the former Eastern and North West areas, TXU-E had market shares of 65% and 59%, while Powergen's market shares were [< 5%] and [< 5%] as in April 2002 respectively.

39. As a consequence of the liberalisation competitors have been able to increase their market shares in the old REC areas and thereby putting a competitive restraint on the pricing of the former incumbent supplier. British Gas has a [20-25%] market share in East Midlands area and npower approximately [5-10%].

40. Since the liberalisation price caps have been abolished, domestic customers can switch suppliers straightforwardly and the suppliers can supply customers all over the country. Perhaps the most impressive example of the changes that have taken place in the domestic electricity market since 1999 is the fact that, on a national basis, British Gas is now the largest electricity supplier to domestic customers in Great Britain.

41. Ofgem, the UK regulator, is of the opinion that competition is effective in the segment for domestic customers, with all of them benefiting lower prices and the possibility of switching suppliers easily. Despite a reduced switching rate during the last year, the levels of switching are still significant and the erosion of former monopolists' market shares continues.

42. Based on all of the above considerations it can be concluded, that the transaction will not create or strengthen a dominant position as a result of which effective competition will be significantly impeded on the market for the supply of electricity to domestic customers.

Industrial customers

43. The parties' combined market share of the supply of electricity to all industrial customers (non-domestic sector) in Great Britain will be [25-35%] (Powergen [10-15%]; TXU-E [15-20%]), and [25-35%] (Powergen [10-15%] and TXU-E [15-25%] on an England and Wales-basis).

44. The parties combined market share in Great Britain would be [15-20%] (Powergen 10-15%] and TXU-E [5-10%]) for customers below 100 kW and [30-40%] (Powergen [10-15%] and TXU-E [20-25%]) for customers above 100 kW. Excluding Scotland the combined market shares for England and Wales would account for respectively [20-25%] (Powergen [10-15%] and TXU-E [10-15%]) for customers below 100 kW and [30-40%] (Powergen [10-15%] and TXU-E [20-30%) for customers above 100 kW.

45. On the basis of a possible distinction between enterprises using "half-hourly" tariffs and those that do not, Powergen and TXU-E would have together [30-40%] of the market for "half hourly" metered customers in Great Britain (Powergen [10-15%]; TXU-E [20-25%]) and [30-40%] on an England and Wales-basis ([10-15%] and [20-25%] respectively). The market shares for non "half hourly" metered customers are not available but will be very similar to those for customers below 100 kW ([20-25%] Great Britain, [20-25%] England and Wales) as mentioned above. This is because all customers having an annual demand in excess of 100 kW are legally required to install half hourly metering this is optional for those with demand between 70 kW and 100 kW.

46. The parties face strong competitors on the markets for customers below and above 100 kW, on whichever geographic market chosen. The competitors are npower ([20-25%]), British Gas ([20-25%]), EdF ([10-15%]) and Scottish & Southern Energy ([10-15%]) on the national market for customers below 100 kW. On the national market for customers above 100 kW the competitors are npower ([20-25%]), British Energy ([10-15%]), Scottish and Southern ([5-10%]), EdF ([5-10%]) and Scottish Power ([5-10%]) and some minor competitors. The parties are not able to provide the market shares of the competitors on an England and Wales basis.

47. E.ON argues that competition in the sector for the supply to industrial customers is well developed with powerful purchasers who drive a hard bargain with competing suppliers for their business. Contracts are of comparatively short duration (normally 1 year) so that switching is possible. Market shares are volatile and could change quickly when contracts are renegotiated. The parties have provided a historical review of their market shares. This shows, that on the market for the supply of customers above 100 kW, TXU-E's market share was in May 2000 9%, in May 2001 20% and in May 2002 [20-25%]. In the same periods npowers market share was respectively 13%, 24% and [20-25%]. In comparison Powergen's market share has remained stable at [10-15%] over the period mentioned.

48. The market investigation substantially confirmed the parties' assertions as to the use of bidding/tendering procurement systems, the relatively ease to switch suppliers, price transparency at both wholesale and retail level (as a result of the new trade arrangements) and the competitive (declining) trend followed by prices over the last three years. Most customers consider the proposed transaction will not have a significant impact on their business or the general competitive structure of the electricity supply.

49. The market investigation has confirmed, that most contracts for the supply of electricity is made on an annually basis but 2 years contracts are not uncommon. Contracts are normally concluded on the basis of bids from approximately 6 bidders. The main criterion for choosing supplier is price. Sometimes other factors such as payment terms and added value services, such as management reporting information, are considered. None of the replies to the market investigation has indicated that there are any barriers,

that would make it difficult to change supplier of electricity. In general, the industrial customers expect the impact of the proposed transaction and on their ability to procure electricity to be low.

50. It can be concluded, that the proposed transaction will not create or strengthen a dominant position as a result of which effective competition would be significantly impeded on the market for the supply of electricity to industrial customers

<u>CHP</u>

51. E.ON will take over one of TXU-E's combined CHP plants. The plant has a capacity of 31 MW of a total market of [3,000 -3,500 Mwe]. Powergen has about [15-25%] of the CHP market and the acquisition of the TXU-E capacity will add less than 1% to Powergen's existing capacity. The erection of a CHP plant is normally based on bidding basis, where contracts are awarded amongst suppliers/operators of the CHP production units in a tender contest. Previous achievements in the market do not necessarily imply success in future tenders. Based on the limited scope of the parties' activities and the limited overlap no significant competition concerns have been identified.

<u>Gas</u>

Domestic customers

52. The parties will hold a combined market share of [10-15%] of the domestic customers in Great Britain. However, the former monopoly British Gas will dominate the market for the supply of gas to domestic customers with a market share of [60-70%] based on figures from August 2002. The other competitors will be npower ([5-10%]), Scottish and Southern Energy [5-10%], Edf ([5-10%]) and Scottish Power with ([0-5%]). Based on the above, it can be concluded that the transaction is not likely to create any significant competition concerns.

Small industrial customers

53. As mentioned above a separate market for the supply of gas to small industrial customers could be identified, with a demand between 2,500 therms per annum to 25,000 therms per annum. On this market the parties' market share would be [20-25%] (Powergen [5-10%], TXU-E [15-20%]). On this market the parties would have a similar market share as British Gas with [20-25%]. In addition the parties would also face competition from Shell Gas Direct [15-20%], npower [15-20%], TotalFinaElf [5-10%] and a number of smaller competitors.

54. The market investigation revealed that there appears to be no significant barriers to switching suppliers in the small industrial market. Both the competitors and the customers generally confirmed this. The average duration of a gas contract does however in some circumstance tends to be longer than for electricity, but several contracts are for a period of 1-2 years. Based on the above it can be concluded that the transaction is not likely to create any significant competition concerns.

Large industrial customers

55. On the product market for the supply of large industrial customers with a demand above 25,000 therms, the parties would be the largest player with a [20-25%] combined

market share (Powergen [5-10%] and TXU-E [10-15%]). It would face competition from British Gas ([10-15%]), Mobil Gas Marketing ([10-15%]), TotalFinaElf ([10-15%]), Shell Gas Direct (10-15%]) and a number of smaller competitors.

56. The market for large industrial customers is characterised by large sophisticated buyers, which enjoys a wide choice of energy suppliers. As for the large customers of electricity, tenders and procurement is widely used, normally involving 5 to 7 bidders. As for electricity, the market investigation indicated that the main criterion is price. Some customers also request account management services including accurate billing and consumption data. In general switching supplier is regarded as being easy for the large customers. Neither the competitors nor the customers expect any real impact from the transaction. Post-merger there will be around 20 active suppliers within the sector dealing with sophisticated customers. In conclusion, the transaction is not likely to create any significant competition concerns in the market for the supply of gas to large industrial customers.

Supply of interruptible gas

57. TXU-E and Powergen also supply interruptible gas (gas delivered to final customers under contracts), which allows the supplier to interrupt supply in certain circumstances in exchange for lower tariffs. As to the supply of interruptible gas on a Great Britain basis the parties' combined market share would account for [5-10%] (Powergen [< 5%]; TXU-E [5-10%]).

58. As to the supply of interruptible gas, the merged entity would not be a leading and well below the market leader, BP Gas [15-20%], which is followed by competitors such as GdF [10-15%], Mobil Gas Marketing [10-15%], Shell Gas Direct [10-15%], Statoil [10-15%], TotalFinaElf [10-15%] and British Gas [10-15%]. Based on this, no competition concerns can be identified.

B. <u>Vertical issues</u>

59. Powergen and TXU-E are both vertically integrated companies. However, this does not lead to significant competition concerns since this situation already existed prior to the merger. Furthermore there are strong competitors in those vertical markets and several companies, which are competing with the parties on the same horizontal markets, are also vertically integrated. Moreover, vertical integration seems to be inherent in the industry structure except for the niche players. In its consultation paper[14] Ofgem express the view that, given effective competition at the various levels of the energy supply chain, vertical integration itself should not pose a threat to competition. In relation the generation of electricity, the transaction is not likely to have significant impact on the trade of electricity, as mentioned above. On the gas markets, the transaction will not change the degree of vertical integration on the market, since only Powergen operates non-significant gas shipping business.

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14 Ofgem:'Powergen plc's completed acquisition of the UK assets of TXU Europe Limited – A consultation paper', November 2002.

VII. CONCLUSION

60. 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.

For the Commission

(signed)
Mario MONTI
Member of the Commission