

***Case No COMP/M.3173 -
E.ON / FORTUM
BURGHAUSEN /
SMALAND /
EDENDERRY***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 13/06/2003

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13/06/2003

SG (2003) D/230137

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Subject: Case No COMP/M.3173 - E.ON/Fortum Burghausen/Smaland/Edenderry Notification of 06.05. 2003 pursuant to Article 4 of Council Regulation No 4064/89 Publication in the Official Journal of the European Communities No. C114, 14/05/2003, page 4

1. On 06.05.2003, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ by which the undertaking E.ON AG («E.ON», Germany) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertakings Fortum Kraftwerk (KW) Burghausen GmbH (Germany), Fortum Distribution Smaland AB (Sweden) and Edenderry Power Ltd (Ireland), controlled by Fortum Corporation (Finland), by way of purchase of shares.
2. After examining the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation 4064/89 and that it does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

I. THE PARTIES

3. E.ON AG, which is a result of the merger between VEBA and VIAG AG² has its main activities in the generation and supply of electricity, gas, water, chemical products and

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).

² Case Comp/ M.1673-VEBA-VIAG

oil as well as the provision of telecommunication services and asset management. Its core activities in the electricity sector are located in Germany, but E.ON has also important activities in Sweden (since its acquisition of Sydkraft AB³) and in the UK (through its acquisition of Powergen⁴ and TXU⁵).

4. The Fortum Corporation («Fortum») resulted from the concentration of Neste and IVO⁶. The Fortum companies are active on various markets for energy generation and supply, primarily in Finland. The group has furthermore activities in the chemical sector. The subsidiaries subject to the proposed transaction are Fortum KW Burghausen, a producer of electricity in Germany, Fortum Distribution Smaland, a Swedish distribution company in the Carlstadt area and Edenderry Power, a power generator in Ireland, all three hereinafter referred to as the «Fortum shareholdings».

II. THE OPERATION

5. On 31 January 2003, E.ON and Fortum Corporation entered into an agreement to achieve an amicable settlement of a dispute arising from the now-concluded acquisition of Ruhrgas AG by E.ON. In the said agreement it has been further agreed to enter into a swap transaction with E.ON being required to sell certain shareholdings in a number of Norwegian companies and loans to Fortum and Fortum being obliged to sell 100% of the shares in the Fortum shareholdings to E.ON. Although the acquisition of all three Fortum companies will not necessarily happen at the same time, the transactions constitute one single operation in the sense of Article 5 par. 2 ECMR, given that they will take place within a few months from each other and that they all find their origin in one and the same settlement agreement.

III. CONCENTRATION

6. 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

7. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 2500 million⁷ (E.ON 37.059 million and the Fortum shareholdings 137 million) and the aggregate Community-wide turnover of each undertaking concerned is more than EUR 100 million (E.ON 25.761 million and the Fortum shareholdings 137 million). In three Member States the combined aggregate turnover of both E.ON and the Fortum shareholdings is more than EUR 100 million; in these Member States the aggregate turnover of each undertaking concerned is more than EUR 25 million. E.ON

³ Case Comp/M. 2349-E.ON/Sydkraft

⁴ Case Comp/M.2443-E.ON/Powergen

⁵ Case Comp/M.3007-E.ON/TXU EuropeGroup

⁶ Case Comp/M.931 – Neste/IVO

⁷ 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.

and the Fortum shareholdings do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

V. RELEVANT MARKETS

8. The parties define four different product markets: production/wholesale of electricity, transmission of electricity, distribution of electricity and supply of electricity. This definition corresponds to the approach of the Commission in previous cases.⁸ In its decision in VEBA/VIAG the Commission also came to the conclusion that market conditions for the supply of small customers such as household, commercial and agricultural customers from low voltage networks are different from those for the supply of industrial special contract customers from medium voltage and higher network levels, and that these are therefore to be classified as different product markets⁹.
9. In contrast to the view held by the Commission in previous cases, the parties view above markets as being EU-wide in scope, referring to internal market legislation (“acceleration directive”, which is expected to be adopted in the course of 2003 and which will replace the internal market directive 96/92/EC) and the increase in cross-border trade through power exchanges such as Nord Pool or EEX. However, it is also true that a number of regulatory barriers to entry still exist in a number of large Member States and imports of electricity remain of a modest dimension.
10. In the present case, however, it is not necessary to define the relevant product and geographic markets because in all alternative market definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of that area.

VI. COMPETITIVE ASSESSMENT

11. The notified concentration will create horizontal overlaps only in the German market for the generation of electricity. In Ireland, E.ON is not active and in Sweden the company acquired is a pure network operator. The concentration will not create any appreciable impact on a EU-wide market.
12. In Germany, E.ON, according to the information supplied by the parties, has a share in power generation sector (TWh) of [20-30]%, while KW Burghausen only adds [0-5]%. E.ON faces competition from a number of other players, including RWE with [20-30]%, Vattenfall with [10-25]% and EnBW with [10-25]%. A similar picture can be drawn by looking at the installed generation capacity (MW). The parties’ combined share amounts to [20-30]%, the increment through the acquisition being minimal, given that KW Burghausen’s operational capacity is only [...] MW. Market leader RWE has [30-40]%, Vattenfall [10-20]% and EnBW [10-25]%. In conclusion, the limited increment arising from the concentration will not impair on the competitive structure of the market.
13. The parties submit that E.ON’s market share in the supply of electricity in 2001 excluding electricity sales to distributors amounted to [10-20]% on the overall market and that E.ON’s respective market shares for industrial customers and residential customers remain below [15-25]%. In order to clarify structures on the electricity market

⁸ See for example Case Comp/M.1346- EDF/London Electricity

⁹ See case Comp/M.1673 - VEBA/VIAG

as a whole, the parties also submit data on all power supply to final consumers. These data give power supply in 2002 as 511.2 TWh. The parties attributed this supply to the interconnection companies operating in Germany on the basis of the origin of the power supplied, *without* considering which firm at which market level, e.g. regional supply company or municipal electricity undertaking, maintained *direct* contractual relations with customers. These data provided by the parties and based on VDEW statistics do not therefore represent market shares in the strict sense, but clarify the importance of individual energy supply companies at all market levels taken together and portray the structures of the German electricity sector.¹⁰ On that basis the position of E.ON and its main competitors can be summarised as follows:

Power supply on the German market as a whole in 2002¹¹

(Interconnected) companies	Power supply (TWh)	%
E.ON	[...]	[20-30]
RWE	[...]	[20-30]
EnBW	[...]	[10-20]
Vattenfall Europe	[...]	[10-25]
Other (regional supply companies, municipal electricity undertakings)	[...]	[20-30]
Total for Germany	511.2	100%

14. In any event, given the modest activities of KW Burghausen, the transaction will not substantially influence the position of E.ON in the supply of electricity to German customers. Besides, E.ON is already at present KW Burghausen's only customer of electricity supplies.
15. In Sweden, E.ON through its affiliate Sydkraft is active as a vertically integrated company in the generation, distribution and supply of electricity. Fortum Distribution Smaland is the owner and operator of a regional network (<30 kV) and of local networks (high voltage: 14 kV, low voltage: 0,4 kV). The amounts of electricity distributed over Smaland's network are very minor ([0-5]%). The largest network is owned by Vattenfall, accounting for more than 60% of all electricity sales distributed over regional grids (Sydkraft's network accounts for [10-25]%). Since Fortum Smaland is the mere owner/operator of a distribution network and does neither produce nor supply electricity to third parties, the transaction does not lead to any overlap between the parties' activities.
16. In Ireland, power generation remains predominantly owned by or sold to the Electricity Supply Board (ESB), a state-owned vertically integrated company, which has been the sole

¹⁰ See the Commission's decision in Case Comp/ M.1673-VEBA-VIAG (par. 53).

¹¹ VDEW, 20th February 2003

producer, distributor and supplier of electricity. ESB is obliged to offer third parties access to its transmission and distribution networks on terms approved by the Commission for Electricity Regulation (CER). With an installed capacity of only [...] MW, the market share of Edenderry Power on the Irish market is [0-5]%. The market leader is ESB with [60-80]%. Since E.ON is not active in the Irish electricity market the transaction does not produce any overlap between the parties' activities.

17. In conclusion, the transaction is not likely to create or strengthen a dominant position as a result of which competition would be significantly impeded in the common market or a substantial part of it.

VII. CONCLUSION

18. 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