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***Case No COMP/ M.4712 – IPM/
ERG NUOVE CENTRALI/ ISAB
ENERGY SERVICES***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERCER PROCEDURE**

Article 7(3)

Date: 26/06/2007



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26-VI-2007

SG-Greffe(2007) D/203771

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 7(3) DECISION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 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 Where possible the information omitted has been replaced by ranges of figures or a general description.

To the Notifying parties:

Dear Sirs,

Subject: Case No COMP/M.4712 – IPM/ ERG NUOVE CENTRALI/ ISAB ENERGY SERVICES
Notification of 22/06/2007 a concentration pursuant to Article 4 of Council Regulation No. 139/2004

1. I refer to the letter of [...] of 22 June 2007, requesting, on behalf of the notifying parties, ERG Power & Gas S.p.A. and IPM Eagle LLP, a derogation from the obligation imposed by Article 7(1) of Council Regulation No. 139/2004 ("the Merger Regulation")¹ to suspend the implementation of that concentration until it has been declared compatible with the common market pursuant to a decision under Article 6(1)(b) or Article 8(2) or on the basis of a presumption according to Article 10(6). The proposed concentration was notified to the Commission on 22 June 2007.
2. The Commission may, upon request, pursuant to Article 7(3) of the Merger Regulation, grant derogation from the above-mentioned obligation. In taking its decision, the Commission takes into account, *inter alia*, the effects of the suspension on one or more of the undertakings concerned by the concentration or on a third party, and the threat to competition posed by the concentration.

¹ OJ L 24, 29.01.2004, p. 1.

I. THE FACTS

The Parties

3. ERG Power & Gas S.p.A. is a 100% controlled subsidiary of ERG S.p.A., the holding company of the ERG Group.
4. The ERG Group is active in the energy and oil sector, and in particular in the businesses of crude oil processing, distribution of oil products and power generation. ERG S.p.A., the group holding company, has been listed on the Milan Stock Exchange since 1997.
5. ERG Power & Gas S.p.A. is active in the development of power plants and in the marketing and sale of electricity and steam. The electricity generation is carried out in the plants of its subsidiary ERG Nuove Centrali S.p.A.. The electricity produced by ERG Nuove Centrali S.p.A. is partly used for internal group consumption, and partly provided, by virtue of a tolling agreement², to ERG Power & Gas S.p.A. and subsequently sold to the market through the *Gestore del Mercato Elettrico* (the Italian transmission system operator), or to large industrial users. The latter, in turn, sells the electricity to industrial users and traders.
6. IPM Eagle LLP is a limited liability partnership incorporated under the laws of England and Wales, jointly owned and controlled by International Power (Impala) Limited (UK), on the one hand, and Mitsui Power Ventures Limited (UK), on the other hand and, ultimately, by the holding companies of the two groups, International Power plc (UK) and Mitsui & Co., Ltd (Japan).
7. The core business of IPM Eagle LLP is electricity generation through a range of power plant technologies, namely thermal, hydro and pumped storage. IPM Eagle LLP is active in Italy in the generation and sale of power only through the joint venture ISAB Energy S.r.l... and ISAB Energy Services S.r.l. IPM Eagle LLP is active in the generation of electricity mainly in the UK (through hydroelectric and thermal plants) and, to a lesser extent, in Spain.
8. IPM Eagle LLP owns, indirectly, 100% of the share capital of IPM IES B.V., a company incorporated under the laws of the Netherlands. IPM IES BV currently holds 49% of the quota share capital of ISAB Energy Services S.r.l., and jointly controls the company with ERG Power & Gas S.p.A., by virtue of a shareholders agreement conferring upon it a veto power on the strategic business decisions of ISAB Energy Services S.r.l.

² The tolling agreement is an intra-group agreement according to which ERG Power & Gas S.p.A. provides fuels to ERG Nuove Centrali S.p.A. and the latter, in turn, produces electricity by using such fuels and makes the electricity available to ERG Power & Gas S.p.A. ERG Power & Gas S.p.A. sells such electricity output to large industrial users or to group companies.

The proposed transaction

9. The proposed concentration involves the acquisition of joint control by IPM Eagle LLP (indirectly, through IPM IES B.V.) and ERG Power & Gas S.p.A., over certain assets, contracts and employees (the Business Line) currently owned and wholly controlled by Erg Nuove Centrali S.p.A. (NUCE) and dedicated to the supply of operational and maintenance services to industrial plants. ERG Nuove Centrali is in turn wholly owned by ERG Power & Gas, S.p.A.
10. One of the acquirers ERG Power & Gas S.p.A. already wholly owns and controls the target business through its 100% ownership of NUCE. The current owner of the target - ERG Power & Gas, S.p.A. is thus losing sole control over the Business Line but acquiring joint control.
11. Through the concentration, the Business Line will be transferred from Erg Nuove Centrali S.p.A. to ISAB Energy Services S.r.l. ERG Power & Gas S.p.A. holds 51% and IPM IES B.V holds 49% of ISAB Energy Services S.r.l..
12. ISAB Energy Services S.r.l. is not a full function joint venture because it does not provide its services at “arm’s length” to the market, but only operates vis-à-vis its parent companies or their affiliates, in the supply of services related to the setting up, building, management, operation and maintenance of industrial plants.
13. The combined world-wide turnover of the undertakings concerned exceeds EUR 5 billion (IPM EUR 1 859, ERG EUR 9 303). Each of IPM and ERG has a Community-wide turnover of more than EUR 250 million (IPM EUR 961, ERG EUR 6 397). Nor do the parties achieve more than two-thirds of their Community-wide turnover in the same Member State. The proposed transaction therefore has a Community dimension.

The reasons for the request

14. The parties have informed the Commission that the transfer of insurance cover for the employees of the Business Line has been made effective as from 1 July. This means that the employees will remain effectively without insurance cover until the transaction can be implemented under the Merger Regulation. As the transaction was notified on 22 June the earliest date for adopting a decision would be 19 July approximately. The parties therefore request authorisation to implement the transaction so as to render effective the transfer of the Business Line before the beginning of July.

II. ASSESSMENT OF THE REQUEST

15. In considering whether to grant a derogation of suspension pursuant to Article 7(3) of the Merger Regulation the Commission is required to take into account the likely effects of the suspension on one or more of the undertakings concerned by the concentration or on a third party and of the threat to competition posed by the concentration.

Purported effects of a failure to grant the suspension

16. If a derogation from the suspension obligation imposed under Article 7(1) ECMR were not granted the employees of the Business Line would effectively be without insurance cover in relation to accidents from 1 July 2007. This is because the documentation for the transfer of the workers' insurance cover has already been filed with the Istituto Nazionale Assicurazioni Infortuni sul Lavoro (INAIL) so as to render the transfer effective for social insurance purposes as of 1 July 2007. Given the complexity of the procedure and the involvement of the Trade Unions, the parties underline that it will not be possible for them to reverse the effects of this transfer in due time.
17. The parties have further explained that in Italy July is the month when employees receive back from their employer certain tax refunds on income tax (IRPEF), that have been paid in excess of the amount due. The employees have already been requested to inform the tax offices that Isab Energy Services (IES) and not Erg Nuove Centrali (NUCE) pay such balance. Consequently, the workers have been instructed to request a new tax model (Mod 730) so as to indicate that IES (and not NUCE) will be the new employer, in charge of refunding the withholding tax on employment income to the workers. Given the approaching tax payment dates, the reversal of this process would be very difficult and complicated for the workers and will create confusion and turmoil with the concrete risk of receiving late the favourable tax balance.

Threat to Competition

18. The transaction does not modify the competitive scenario in any way as it does not involve any addition to the parties' market shares. IPM Eagle is active in electricity generation in Italy only through the joint venture. The Business Line is valued at some Euro 8 160 000. The proposed concentration is therefore not expected to have any effect on competition and is a candidate for treatment via the simplified procedure.

Assessment

19. The parties would suffer a serious disadvantage if a derogation were not granted. The absence of such derogation would effectively mean that the employees of the Business Line would be without accident insurance from 1 July until the transaction is cleared.
20. On the other hand, prior completion of the transaction would not pose any threat to competition. In view of the absence of any threat of harm to competition and the interest of the employees in being covered by insurance as well as the tax implications mentioned above, derogation can therefore be granted in the present case.

III. CONCLUSION

21. Based on the above considerations and in accordance with Article 7(3) of the Merger Regulation, the IPM Eagle LLP and ERG Power & Gas are hereby granted a derogation from the obligations imposed by Article 7(1) of the Regulation until the acquisition has been declared compatible with the common market by means of a decision pursuant to Article 6(1) (b) or 8(2) or a presumption pursuant to Article 10(6). The present decision is addressed to IPM Eagle LLP and ERG Power & Gas.

For the Commission
(signed)
Neelie KROES
Member of the Commission