

***Case No COMP/M.4841 -
ENEL / EMS***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 20/12/2007

***In electronic form on the EUR-Lex website under document
number 32007M4841***



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20/12/2007
SG-Greffe (2007) D/208151

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Madam,

**Subject: Case No COMP/M.4841 – Enel/EMS
Notification of 16.11.2007 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 16/11/07 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the "Merger Regulation"), by which the undertaking Enel Sp.A. ("Enel", Italy) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of Societatea Comerciala Filiala de Distribuție și Furnizare a Energiei Electrice "Electrica Muntenia Sud" - S.A. ("EMS", Romania) by acquisition 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 does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

I. THE PARTIES

3. Enel is the Italian former electricity incumbent. It is active in the generation, distribution and supply of electricity, mainly in Italy and it also operates in Spain, Bulgaria, Romania, Slovakia, Russia, France, North and South America. Enel is also active in the fields of purchase and sale of natural gas for domestic electricity generation and gas operations in Italy where it is the second largest operator in the gas distribution and supply business.

¹ OJ L 24, 29.1.2004 p. 1.

4. EMS is a Romanian company active in the distribution and retail supply of electricity in South of Romania. This company is currently controlled by Electrica, a company owned by the Romanian State. EMS is being sold in the framework of the privatisation process carried out by the Romanian government concerning those companies active in the electricity sector.

II. THE CONCENTRATION

5. Upon completion of the transaction, ENEL will acquire 67,5% of the shares in EMS via purchase of 50% of EMS shares from Electrica and contextual subscription of additional newly issued EMS shares representing 17,5%, via a share capital increase. The remaining shares will be kept by Electrica. However such participation will not confer on Electrica any relevant veto right. Therefore it can be concluded that Enel will acquire sole control of EMS. Consequently, the proposed transaction constitutes a concentration under the terms of the Merger Regulation.

III. COMMUNITY DIMENSION

6. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion². Each of them has a Community-wide turnover in excess of EUR 250 million, but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

IV. RELEVANT MARKETS

7. Enel and EMS mainly focus on electricity sector. While Enel has also some activities in the gas sector, there are no markets affected by the notified concentration in the latter sector. The analysis of the notified concentration will therefore be carried out with regard to the relevant electricity markets.
8. In previous decisions³, the Commission has considered the following markets in the electricity sector: wholesale supply of electricity, ancillary services, transmission, distribution, and retail supply (with possible further subdivisions)⁴. Given the activities of the parties, in the present decision the Commission will consider distribution of electricity and retail electricity in Romania⁵.

2 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).

3 See cases COMP/M.3440 EDP/ENI/GDP; COMP/M.3729 EDF/AEM/Edison.

4 See case COMP/M.4180 Gaz de France/Suez.

5 The Commission has generally defined in its previous decision the electricity wholesale market as national in scope. However, in the light of Council Directives 2003/54/EC and 2003/55/EC, the Commission has found that there may be emerging markets wider than national. For the present case it is not necessary to define the geographic dimension of the Romanian electricity wholesale market given that the parties are not active in the wholesale market in Romania. Enel is active on the generation segment only in Bulgaria but to date has never exported any electricity into Romania. Moreover Enel is bound by a long term contract with the Bulgarian State to sell the electricity

A. LEGAL FRAMEWORK OF THE ELECTRICITY SECTOR

A.1. European legal framework

9. The internal market in electricity is regulated by Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC⁶. The Directive lays down common rules concerning electricity generation, transmission and distribution, and sets out arrangements for the organisation and operation of the electricity sector, market access, applicable criteria and procedures for calls for tender and authorisations, and the use of the grids. It fixes a deadline for the total opening of the electricity markets of 1 July 2004 for the non-household sector and 1 July 2007 for the household sector. It provides that transmission and distribution network operators who are part of a vertically integrated undertaking must be independent, at least in terms of their legal form, organisation and decision making. This legal separation has to be effective by 2004 at the latest for transmission and by 2007 at the latest for distribution. The independence of network operators is intended to ensure non-discriminatory access to essential electricity infrastructure. In addition, each Member State must designate one or more independent regulatory authorities in the electricity sector.

A.2. National legal framework

A.2.1. Distribution electricity

10. In Romania the distribution grids are State-owned, being assigned to operators by means of a Concession Agreement between the relevant distribution company and the Ministry of Economy and Finance and an electricity distribution license issued by ANRE (National Regulatory Authority in the Energy Field). The license makes reference to a well-defined “Service Territory” limited to the area covered by the distribution grid, where the licensee is bound to provide its distribution services to all customers on a non discriminatory basis and subject to ANRE regulations.

A.2.2. Retail electricity

11. In Romania, the liberalization process started in 2000⁷, with the minimum threshold for customers' eligibility at 100 GWh/year representing about 10% of consumption. The minimum threshold was progressively reduced and at the end of 2004⁸ it was set at 1 GWh/year, which represented 55% of consumption Progressively⁹ the entire retail supply

produced into this State to the Bulgarian government until 2024. Consequently the electricity wholesale/generation market will not be further analysed in this decision.

6 OJ L 176, 15.7.2003, p. 37.

7 Government Decision No. 122/2000.

8 Government Decision no. 1823/2004.

9 See Government Decision no. 644/2005.

market was liberalised. As of July 2007 the electricity retail market in Romania is fully liberalized and all customers have the option of choosing their supplier.¹⁰

B. RELEVANT MARKETS

B.1. Distribution electricity

12. Regarding the operation and management of the low voltage grid (distribution), the Commission has found¹¹ that this activity constitutes a natural monopoly and that no competition takes place at this level. If parties owned distribution networks in different regions of the country, it was found that the parties' activities do not overlap as each grid constitutes a separate market as, for customers distribution through one grid is not substitutable with distribution through another grid. Therefore the geographic scope of the distribution markets should be defined regionally within the limits of the area covered by the grid.
13. On this basis there is no overlap in the parties' activities, and, therefore, no horizontally affected market. EMS, in fact, operates distribution grids in the area of Bucharest and two other regions in Romania (Ilfov county and Giurgiu county). The companies controlled by Enel are not active in electricity distribution in these areas.
14. The distribution market will not therefore be discussed any further in the present decision.

B.2. Retail electricity

B.2.1. Relevant product markets

15. Electricity retail supply involves the sale of electricity to final customers. The parties have claimed that, in line with previous Commission decision¹², no distinction should be made between customers who chose to switch their suppliers and those who chose not to exercise their right to do so: both categories are able to choose freely whether to remain with their supplier or to switch to another supplier, according to the price and the conditions offered.
16. In light of the fact that (i) the liberalisation in Romania has been completed for all customers and, therefore, the customers choose freely to be in the regulated or in the non-regulated system according to the price and the conditions in each system and (ii) the results of the market investigation show that switching does not entail any costs for the customers, the Commission takes the view that all eligible customers should be considered, irrespective of whether they are in the regulated or in the non-regulated regime, as belonging to the same market.
17. In light of the Commission's practice in previous decisions¹³, the notifying party submits that a distinction should be made between large (industrial and commercial) customers and

¹⁰ See Law no. 13/2007 of 23 January 2007 (the Energy Law).

¹¹ See case COMP/M.3440 EDP/ENI/GDP.

¹² See case COMP/M.3440 EDP/ENI/GDP.

¹³ See case COMP/M.4180 Gaz de France/Suez.

small customers, because of the different profiles and needs on the demand-side and of the different services and technologies offered on the supply-side.

18. According to previous Commission decisions¹⁴, the small customers' segment should be further subdivided in two sub-segments for small commercial customers and for residential customers, in light of the distinct profiles, consumption patterns, and contractual conditions and obligations that characterize the two types of customers.
19. The market investigation has largely confirmed the market definition proposed by the notifying party as well as the Commission's previous findings as regards the sub-segmentation of the small customers market into small commercial customers and residential customers. However, for the purposes of the present decision, the ultimate definition of the relevant product market can be left open since the proposed transaction does not raise serious doubts as to its compatibility with the common market or the EEA agreement, irrespective of the definition retained.

B.2.2. Relevant geographic markets

20. The notifying party submits that the electricity retail market after liberalization is national in scope. In fact, according to the notifying party, customers can freely negotiate, through bilateral contracts, within the national territory, while licensed suppliers are allowed to sell electricity to customers located all over the country.
21. The notifying party's definition of the geographic market is in line with previous Commission decisions¹⁵, and was largely confirmed by the market investigation. Accordingly, the Commission considers that the retail electricity market for the purposes of this decision is national in scope.

V. COMPETITIVE ASSESSMENT

A. RETAIL ELECTRICITY SUPPLY

22. The parties' activities overlap in the national markets for electricity retail supply, where Enel is active through its two subsidiaries: Enel Electrica Banat and Enel Electrica Dobrogea. The parties are not vertically integrated: neither one is active in the generation of electricity.
23. Post merger, in the wider market for the overall retail supply of electricity, the new entity would have a combined market share [in a range between 15-25%] (Enel, [5-15]% and EMS [5-15]%). Other competitors such as Electrica ([15-25]%), Hidroelectrica ([5-15]%), Energy Holding ([5-15]%) or E.ON Moldova ([5-10]%) are also present in the market.
24. The parties' combined market share is [in a range between 5-15]% (EMS [0-5]%, Enel [5-10]%) in the sub segment for large industrial customers and [30-40]% (EMS [15-25]%, Enel [15-25]%) in the sub segment for smaller customers.

¹⁴ See case COMP/M.4180 Gaz de France/Suez.

¹⁵ See case COMP/M.3440 EDP/ENI/GDP.

25. A further break-down among types of small customers does not significantly affect the parties combined position, as their combined share would be [30-40]% (EMS [15-25]%, Enel [15-25]%) among small commercial users and [30-40]% (EMS [15-25]% and Enel [15-25]%) among residential customers.
26. The limited position of the parties in the market for the overall retail supply of electricity as well as in the segment for electricity supply to large industrial customers renders unlikely that competition concerns arise in this market as a result of the present transaction.
27. The notifying party submits that their market position in the small customers segments might significantly change due to the complete liberalisation of the Romanian retail supply electricity markets, the possibility for all consumers to switch supplier and the absence of switching costs.¹⁶
28. The respondents to the market investigation have confirmed that there are no switching costs preventing the companies who wish to switch suppliers from doing so.
29. The presence on each of the above mentioned levels of other large players such as Electrica (with a market share [between 30-40]% in each of these sub-segments), EON Moldova and CEZ Oltenia (each with a market share of about [10-15]% in all these sub-segments) will ensure customers alternative sources of supply and will exercise competitive constraint on the merged entity.
30. On this basis, the Commission takes the view that the proposed merger will not give rise to competition concerns, regardless at what precise level of the retail supply market is assessed.

B. STATE AID

31. It is settled case-law that the Commission has to examine all competition issues arising from a proposed merger, including the effects that any potential financial support measure granted in favour of any of the involved parties may have on the relevant markets.¹⁷
32. The issue of possible state aid in this case refers to three different types of measures: access to public funds, exception from debts and paid consideration.
33. During 2002-2004, EMS had been granted, public funds accounting for about EUR 1.2 million.¹⁸ Furthermore, Electrica exempted EMS for the payment of penalties towards electricity generators (Transelectrica as well as Electrica itself) accounting for about EUR.

¹⁶ The Regulations currently in force do not provide for a switching charge to be paid by the customer, and moreover the customers are not under any obligation to pay an earlier termination penalty and have the right to switch to another supplier with a simple 30 days notice to their current supplier.

¹⁷ Judgement of the CFI of 31 January 2001, RJB Mining/Commission, T-156/1998, ECR p. II-137, point 114, and the decision of the European Commission from 26 March 2007 in case no. COMP/M.4517 – Iberdrola/Scottish Power.

¹⁸ Via Government Ordinance no. 29/1994 on the establishment and utilisation of the Special Fund for the development of the entire energy system development (“GO 29/1994”).

34. The notifying party states in the Form CO that any support measures which EMS may have enjoyed in the past will be communicated by a separate letter to the Commission for a possible assessment under state aids rules.
35. As regards the paid consideration, Enel won the privatization bid, having offered the Romanian State (via Electrica SA) a consideration of EUR 820 millions. However, the actual consideration paid by Enel to the Romanian state is of EUR 395 millions, while the remaining EUR 420 millions represented a capital subscription that increase Enel's participation in EMS to 67.5% and at the same time provide new liquidity to EMS.

The impact of the above support measures on the existing market position of EMS

36. The notifying party submits that the public funds have been granted via a legislative measure applicable to all undertakings active on the energy market aiming at the modernization and development of the energy system as a whole. Therefore it did not confer any particular advantage on any company or group of companies in the same sector. Thus, it cannot be held that such measures had the effect of strengthening the financial or commercial position of EMS in relation to its competitors in any of the relevant markets.
37. As regards the exemption from debts granted to EMS, the notifying party submits that this was intended to provide more clarity to the potential investors on the financial background of EMS, thus enabling such investors to offer a price which reflected the real value of the target company. The notifying party further submits that, in any event, the measure had no impact on the existing financial and commercial position of EMS in the relevant markets in light of the small impact of the value of the exemption (3 million) on the final price offered by ENEL (394 million).
38. As regards the paid consideration, the notifying party submits that the public bid in view of privatization was organised in a non-discriminatory way and the same terms and conditions (including the structure of the deal as a combination of sale of existing shares (around 50%) and a share capital increase to 67.5 %) were applied to all participants.
39. As regards the present transaction, the Commission took into account the financial and competitive position of the other market players to assess whether the potential state aid measures could have a material impact on the financial conditions of the combined entity and therefore an influence on the competitive assessment in the present case. However, the parties' main competitors are companies such as E.ON, CEZ, EGL GAS & POWER and Energy Holding. EON has a comparable or even more important turnovers and equity than Enel and the others are financially sound companies. Therefore any alleged financial strength conferred upon EMS (and Enel) by the above mentioned measures would not confer such an advantage in comparison to its competitors as to alter the assessment of this case.
40. The present decision under the Merger Regulation is without prejudice to the outcome of the procedure under the state aid rules.

VI. CONCLUSION

41. 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 (EC) No 139/2004.

For the Commission

(signed)
Neelie KROES
Member of the Commission