

***Case No COMP/M.5154 -
CASC JV***

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

Article 6(1)(b) NON-OPPOSITION
Date: 14/08/2008

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14/08/2008

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Dear Sir/Madam,

**Subject: Case No COMP/M.5154 – CASC JV
Notification of 09.07.2008 pursuant to Article 4 of the Council Regulation
No 139/2004 of 20 January 2004 on the control of concentrations between
undertakings¹**

1. On 09.07.2008, the Commission received the notification of a proposed concentration by which CEGEDEL Net S.A. (“CEGEDEL, Luxembourg), ELIA System Operator SA/NV (“ELIA”, Belgium), EnBW Transportnetze AG (“EnBW TNG”, Germany), E.ON Netz GmbH (“ENE”, Germany), RTE EDF Transport SA (“RTE”, France), RWE Transportnetz Strom GmbH (“RWE TSO”, Germany), and TenneT TSO BV (“TenneT TSO”, The Netherlands), intend to establish a joint venture, to be named Capacity Allocation Service Company for Central Western Europe (“CASC”)
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (“Merger Regulation”) and will not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

¹ OJL 24, 29.1.2004 p. 1.

(1) THE PARTIES

3. All the parties setting up the new entity in the form of a Joint Venture ("JV") are Transmission System Operators ("TSOs")². Those are either fully owned (CEGEDEL, EnBW, TNG, ENE, RTE, RWE TSO) or partially owned (ELIA) subsidiaries of vertically integrated energy companies. TenneT is an independent transmission system operator.
4. CEGEDEL Net belongs to the CEGEDEL group which is active in all the fields of supply and transport of electricity in Luxembourg. CEGEDEL Net operates the electricity transmission system owned by the CEGEDEL group, which is located in Luxembourg.
5. ELIA is the owner of, and system operator for, the electricity transmission system in Belgium. For historical reasons ELIA is also the co-owner of 220 KV and 150 KV network assets in the south-eastern part of Luxembourg which, therefore, is part of the Belgian transmission system. 24% of ELIA's shareholding belongs to Electrabel.
6. EnBW TNG belongs to the EnBW group, which is active in all fields of supply and transport of electricity mainly in the Southwest of Germany. EnBW TNG is the owner and operator of the transmission system in the German state of Baden-Württemberg.
7. ENE belongs to the E.ON group, which has its main activities in the electricity and gas sectors. ENE operates the electricity transmission system owned by the E.ON group; this system spans the German states of Schleswig Holstein, Bremen, Lower Saxony, Hesse (partly), North Rhine-Westphalia (partly) and Bavaria (except for the South-West).
8. RTE belongs to the EDF group, which is active in all fields of production and supply of electricity in France. RTE is the owner and operator of the national transmission system in France.
9. RWE TSO belongs to the RWE group, which is primarily active in the business areas of energy, water and industrial services. RWE TSO is the operator of the transmission system owned by the RWE group, which mainly extends to the German states of North Rhine-Westphalia, Rhineland-Palatinate, Saarland and the South-West of Bavaria.
10. TenneT TSO is the transmission system operator of the Dutch national high voltage grids.

² "transmission system operator" means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long term ability of the system to meet reasonable demands for the transmission of electricity;

(2) THE CONCENTRATION

11. CASC will be founded in order to provide cross-border capacity allocation services with respect to the interconnectors³ within the Central Western Europe region. CASC will act on behalf of the transmission system operators which will continue to technically operate and own the interconnectors concerned. Following the creation of CASC, long-term (i.e. yearly and monthly) auctions in the Central Western Region⁴ shall be harmonised and operated by CASC. Capacity allocation will be harmonised by way of explicit auctioning. The core functions of CASC will comprise the publication of auction specifications, processing of bids and allocation of transmission rights, publication of results as well as a number of front office and back office functions (registrations, financial functions such as invoicing to market participants and revenue distribution among the participating TSOs).
12. The strategic and economic rationale for the parties to create CASC is to implement and comply with the requirements of Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity ("Regulation 1228/2003")⁵. The benefit of the harmonisation of the long term auctions is that market participants requesting cross-border capacities in the CWE region can approach one single auction office instead of having to deal with a variety of auction offices and rules. As a result, market participants do not have to deal with a number of legal, functional and technical differences any more if they apply for cross-border capacity rights. This will lead to a reduction of the transaction costs incurred by the traders.
13. The JV will be full-functional as, it will perform capacity auctioning activities on a long-lasting and autonomous basis. The JV is founded for indefinite period of time. The clients of the JV will be the shareholders on the one hand and any traders willing to sell or buy the transmission rights on the secondary market on the other hand. Once in operation, it will finance itself through cost-based service fees to be paid by its customers. The business plan of the parties foresees that around [20-40]% of the JV's revenue will be derived from third parties, mainly from fees linked to the secondary capacity trading.
14. In the long run, CASC aims to provide other related services, such as intra-day capacity trading, which would further increase the share of the revenue obtained from third parties. Moreover with the eventual creation of other auction offices in other regions, as provided for in article 3.2 of the Guidelines on the management and allocation of

³ "interconnector" means a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States,

⁴ Central Western Region encompasses the transmission systems operated by the the parties to this transaction.

⁵ OJ L 176 , 15/07/2003 p 1

available transfer capacity of interconnections between national systems⁶ ("Allocation Guidelines"), it is expected that, in the future, auction offices will start competing with each other in the provision of allocation services vis-à-vis interconnector/transmission system operators.

15. Therefore the JV is considered to be full functional and the operation constitutes a concentration within the meaning of Article 3.1(b) of the ECMR.

(3) COMMUNITY DIMENSION

16. The transaction has a Community dimension pursuant to Article 1(2) of the Merger Regulation. The undertakings concerned had a combined aggregate worldwide turnover of more than EUR 5 billion in 2007. Neither of those achieved more than two thirds of its aggregate Community-wide turnover in one Member State.

(4) RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

17. The operation deals with the provision of services in relation to the allocation of transnational interconnector capacity. The European Commission has not yet identified or defined, in its publicly available decisions, relevant markets with regard to the creation and operation of undertakings active in the provision of services in relation to the allocation of transnational interconnector capacity.
18. In its past practice, the Commission has notably considered the following product markets as relevant markets in the electricity sector⁷: (i) Generation and wholesale supply of electricity; (ii) Electricity transmission (i.e. the operation and management of the high-voltage grid); (iii) Distribution of electricity (i. e. the operation and management of the lower-voltage grids); and (iv) Retail supply of electricity to end-customers, indicating that there could be a distinction between large industrial and commercial customers on the one hand and smaller industrial and commercial customers and domestic customers on the other hand⁸. The wholesale supply and the retail supply have been defined as national in scope, whilst the distribution market has been defined as limited to the respective grid (following the same logic as the transmission market described below)⁹. For the purposes of the present case, it is however not necessary to conclude on the precise scope of the relevant product or geographic markets in the electricity sector as under any alternative market definition, the proposed transaction does not give rise to any competition concerns.

⁶ 2006/770/EC: Commission Decision of 9 November 2006 amending the Annex to Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity; OJ L 312 , 11/11/2006, p 59

⁷ Cases No. COMP/M.4672 – E.ON/Endesa Europa/Viesgo; COMP/M.3440 – ENI/EDP/GDP; COMP/M.4180 – Gas de France/Suez; COMP/M.3696 – E.ON/MOL.

⁸ *Idem*

⁹ *Idem*

19. The Commission has held that the operation and management of transmission systems constitutes a natural monopoly and that no competition takes place at this level¹⁰. In its past practice, if the parties to a transaction owned transmission networks in different regions or countries, the Commission has concluded that these parties' activities do not overlap as each grid constitutes a separate market. Transmission through one grid is not substitutable with transmission through another grid. Therefore, the geographic scope of the transmission markets was defined by the Commission as being regional within the limits of the area covered by the respective grid¹¹.
20. In the case of the CASC, each of the parties operates its own transmission network in a region defined by the reach of the grid (i.e. the respective transmission system). This region is in essence either identical with their country of origin (in case of CEGEDEL Net, ELIA, RTE and TenneT TSO) or limited to a part of Germany (in case of EnBW TNG, RWE TSO and ENE).
21. The existence of a separate market relating only to the transmission of electricity involving a "cross-border flow" within the meaning of Article 2 (1) of Regulation 1228/2003 cannot be excluded. The geographic scope of such activity would in principle be limited to the respective interconnector line. While it is in principle possible for market participants to substitute certain interconnectors when booking interconnector capacity by using others, this will normally lead to an increase in the number of interconnectors that are necessary to complete the booking path. To the Commission's knowledge, to date, there is no single interconnector which could constitute a direct substitute for another. Although it cannot be excluded that this may in the future be the case, even on the basis of this very narrow market definition, this transaction would not result in any horizontal overlap between the parties' activities.
22. The Commission has not, to date, identified or defined any relevant markets regarding the creation and operation of companies active in the provision of services in relation to the allocation of transnational interconnector capacity ("auction offices"). Given that such offices have either not been yet created or they are in an initial set-up phase, such a market currently does not exist. However, with the eventual creation of other auction offices in other regions as foreseen by the Allocation Guidelines, there could, in the future, be a separate market for auction office services vis-à-vis interconnector/transmission system operators.

(5) COMPETITIVE ASSESSMENT

23. In their capacity as electricity transmission system operators, the parties will retain their scope of responsibility in the operation and management of their respective transmission systems. They will thus retain their existing activities in transmission services on the transmission markets. The cooperation in the JV is by its very nature directly related to their core functions as TSOs in line with Regulation 1228/2003 and the Allocation Guidelines. Whereas the operation of the transmission networks by TSOs confers to

¹⁰ e.g. Case No. COMP/M.3696 – E.ON/MOL, para. 212.

¹¹ *Idem*

them a monopolistic position in the respective transmission system, such a monopolistic position is not affected by a common platform and procedure for the allocation of cross-border transmission capacity between adjacent transmission networks. This platform serves as a market facilitator enhancing cross-border activities by suppliers and traders.

24. The vast majority of the parties to this concentration belong to vertically integrated energy companies which have overlapping activities in the markets for electricity generation and wholesale supply of electricity and in a number of downstream markets. These parties are CEGEDEL Net, EnBW TNG, ENE, RTE and RWE TSO. There is therefore a potential for enhancing the risk of co-operative effects between the parents companies ("spill over" effects) arising from the setting up of CASC, that fall to be examined under Article 2(4) of the ECMR. However the potential risk of co-operative effects on any of the upstream, downstream or neighbouring markets is attenuated by the following factors:
25. First, the information flow from the parties to the JV, and vice versa, will be limited to what is strictly necessary for the TSOs and CASC, respectively, to fulfil their obligations. Notably, the single auction office will not make additional information available to the TSOs that would lead to a risk of anti-competitive coordination, if compared to the pre-merger access to such information. The scope of information that will be shared with the TSOs will be solely driven by what is required to operate the system or prepare the appropriate national reporting and/or studies. Moreover, each TSO will only receive the information that is relevant to perform its function, meaning that a TSO will only receive detailed information for its border(s) and will not receive information with respect to the other borders.¹²
26. Second, congestion income will be collected by CASC on behalf of the TSOs. While the JV will become the owner of the congestion income, it will be re-distributed between the TSOs [...] in line with the provisions of the Allocation Guidelines¹³. The obligations under European and national regulations regarding the use of the congestion income will also remain unaffected by the implementation of a harmonised capacity allocation mechanism in the region and, accordingly, the obligations currently in place regarding investments in infrastructure remain unchanged and will not be affected by the parties' cooperation in the context of the JV.
27. Third, the calculations regarding the available capacities at each interconnector will remain within the sole responsibility of the TSOs. The role of the JV will be to allocate the available capacities, provided by the TSOs, to the market. In that regard, CASC will neither be involved in the decision-making process of the TSOs, nor able to influence the amount of capacity available.
28. The limited size of the JV as compared to the other activities of the various groups in the energy markets tends to further reduce the likelihood that the setting up of this JV will result in coordination on such other markets. The JV will not result in the creation of significant structural links between the parent companies. As the JV's turnover can be

¹² Form CO, page 66-67

¹³ 2006/770/EC: Commission Decision of 9 November 2006, para. 6

expected to be moderate it is also unlikely that it will create a platform for any credible retaliation mechanisms¹⁴.

29. Finally, the current legislation, notably Regulation 1228/2003, requires TSOs with adjacent transmission systems to put in place some form of coordination as regards the usage of interconnector capacity and the exchange of the relevant technical information for the congestion management on these interconnectors. In view of promoting the efficient allocation of scarce transmission capacity, the Allocation Guidelines, require a common co-ordinated congestion management within regions, i.e. they extend the scope of the common congestion management efforts of TSOs from a bilateral to a tri- or multilateral level and the CASC is set-up to implement such a co-ordinated approach.
30. The notified transaction does not therefore raise any competition concerns, given that no horizontal overlaps exist between the transmission networks of the participating electricity transmission system operators, and the creation of the JV will not lead to any anti-competitive spill-over effects.

VI. CONCLUSION

31. 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 by)
Olli REHN
Member of the Commission

¹⁴ Case No. COMP/M 4141 Linde/BOC, para. 146