



COMMISSION OF THE EUROPEAN COMMUNITIES

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sir/Madam,

**Subject: Case No COMP/M. 5365 IPO / ENBW / PRAHA / PT
Notification of 1 September pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 01.09.2009, the Commission received a notification of a concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the "EC Merger Regulation") by which International Power Opatovice, a.s. ("IPO", Czech Republic), controlled by International Power plc ("IPR", United Kingdom), EnBW Energie Baden-Württemberg AG ("EnBW", Germany), jointly controlled by Electricité de France ("EdF", France) and Zweckverband Oberschwäbische Elektrizitätswerke ("OEW", Germany), and hlavní město Praha ("City of Prague", Czech Republic) acquired within the meaning of Article 3(1)(b) of the Council Regulation joint control of the undertaking Pražská teplárenská, a.s. ("PT", Czech Republic) by contract.

I. THE PARTIES

2. **IPO** is currently owned by International Power Plc, a British energy group. IPO operates a lignite-powered plant [...] in Opatovice, which sells both electricity and heat to customers in Eastern Bohemia. On 21 July 2009, the concentration concerning the sale of IPO, controlled by International Power Plc, to J&T was notified before the

¹ OJ L 24, 29.1.2004 p. 1.

Czech Competition Authority. The transaction is, however, subject to regulatory approvals and has not yet been implemented.

3. **EnBW** is a vertically integrated German energy company. EnBW mainly operates in electricity and gas markets, as well as energy and environmental services. Together with the City of Prague, EnBW operates a joint venture (Prazka energetika a.s., "PRE") active in the supply of electricity in the Czech Republic. EnBW is jointly controlled by EdF and OEW². In the Czech Republic, EdF is active also through Dalkia International. Dalkia International provides heat to end-customers in several Czech municipalities.
4. **City of Prague** is the municipality of Prague, Czech Republic. It is active in the generation and wholesale supply of electricity, retail supply of electricity, distribution of electricity through its joint venture with EnBW and [...] (PRE), provision of ancillary services, provision of heat, supply of gas and maintenance and repair of technology equipment in the energy sector. In addition, the City of Prague is active in the distribution of gas in the Czech Republic via a joint venture (Prazka Plynarenska a.s., "PP") with E.ON.
5. **PT** is primarily involved in the provision of district heat in the region of Prague and Neratovice. It is also active in generation and wholesale supply of electricity and the provision of ancillary services through Energotrans a.s.; and in the maintenance and repair of technology equipment in the energy sector, through Termonta.
6. IPO, EnBW, City of Prague and PT together are referred to as "the parties".

II. THE OPERATION AND THE CONCENTRATION

7. The operation consisted in the acquisition of joint control of IPO, EnBW and City of Prague over PT. This concentration was implemented in 2000. The parties notified the concentration only on 1 September 2009.
8. Pursuant to Article 26(2) of the EC Merger Regulation, Regulation (EEC) No 4064/89 (the Merger Regulation 4064/89) continues to apply to concentrations where control was acquired before the entry into force of the EC Merger Regulation. The Commission's jurisdiction is therefore based on the rules applicable under the EC Merger Regulation 4064/89.
9. At the time of the concentration IPO (formerly named EOP), a predecessor of EnBW and the City of Prague were the main shareholders in PT with shareholdings of [...] % (EOP), [...] % (GESO/EnBW) and [...] % (City of Prague). In February 2000, the predecessor of EnBW, GESO Beteiligungs- und Beratungs AG ("GESO"), and the City of Prague concluded a Framework Agreement in which GESO and the City of Prague agreed to vote their shares together with respect to PT via the newly created holding company PTH. PTH combines the shares of formerly GESO, now EnBW, and the City of Prague in PT. PTH is jointly controlled by its two shareholders. In addition, in April 2000 the majority needed for decisions in the PT General Meeting was increased to a

² M. 1853 – EdF/EnBW, decision of 7.2. 2001.

two thirds majority thereby ensuring the IPO, GESO and the City of Prague would vote together on matters relating to PT.

10. As well, at the Board of Directors' level, the majority needed for decisions was changed from simple majority to, at least, 4 out of 5 of its members. These decisions included, inter alia, the appointment of senior management, the approval of the annual budget, the approval of business plan and the approval of major investments. Moreover, at least one nominee of IPO and one nominee of City of Prague or GESO had to attend to the meeting of the Board of Directors and vote in favour of a proposal in order to make a decision. As a result of these changes the predecessor of IPO/EOP, GESO/EnBW and the City of Prague obtained the ability to block all strategic decisions concerning PT and therefore obtained joint control over PT.
11. The operation is the acquisition of joint control of IPO, EnBW and City of Prague, the two latter via their holding company PTH, over PT. Thus, the transaction constitutes a concentration in the meaning of Article 3(1)b), Article 3(4) of the Merger Regulation 4064/89.

III. COMMUNITY DIMENSION

12. The undertakings concerned (EOP: EUR 4,554 million, GESO/EnBW: EUR 3,998 million, City of Prague: EUR 590 million, PT: EUR 161 million) in 1999 had a combined aggregate world-wide turnover of more than EUR 5 billion³. EOP and GESO/EnBW had a Community-wide turnover in excess of EUR 250 million (EOP: EUR [...] million, GESO [...] million) but they did not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore had a Community dimension pursuant to Article 1(2) of the Merger Regulation 4064/89.

IV. COMPETITIVE ASSESSMENT

13. PT is mainly active in the provisioning of district heat in the Czech Republic, predominantly in the Prague and Neratovice. PT is also active in the generation and wholesale supply of electricity in the Czech Republic, as well as maintenance and ancillary services.

I. Horizontal overlaps

14. The parties' activities overlap in the field of district heat though there is no overlap concerning the geographic areas in which the parties are active.⁴

Provision of district heat

Relevant product and geographic market

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

⁴ There are no other markets where the combined market share of the parties exceeds 15%

15. The parties' consider the market for district heat as separate product market. Concerning the geographic scope of the market the parties consider that it is confined to the local network.
16. In past decisions, the Commission considered district heat as separate product market.⁵ Concerning the geographic market, the Commission has defined the market for provisioning of district heat as local and limited to the relevant network⁶. The Commission has no indications that a deviation from this market definition would be required in the present case.

Assessment

17. PT is operating a district heat network in Prague and in Neratovice. IPO is operating a district heat network in Hradec, Králové, Pardubice, Chrudim, Rybitvė, Lázne, Bohdalec, Opatovice and Ceperka. EnBW, through [...] Dalkia, is active in Frýdek-Místek, Havířov, Karviná, Kolín, Krnov, Mariánské Lázně, Nový Jičín, Ostrava, Olomouc, Přerov, and Ústí nad Labem. In all mentioned areas/networks each party has a market share of 100%.
18. In view of the fact that the activities of the parties in the distribution of district heat do not overlap as the relevant networks are separate and not connected, the transaction does not raise competition concerns on the basis of a horizontal overlap in district heat.

II. Vertical relationships

(1) Provisioning of district heat

19. The parties have a 100% market share in their respective district heat distribution networks. Due to this, all those markets which are up- or downstream related to the provisioning of district heat and in which one of the parties is active give rise to a vertically affected market.
20. The market for the distribution of district heat has been described in paragraphs 11 and 12 above. In those markets where one of the parties is active, they have a market share of 100%. The City of Prague is active in the supply of gas through its joint venture, PP, with E.ON. The supply of gas is an upstream market to district heat as gas is used for the production of heat. In addition, PT is active in the provisioning of maintenance and repair of technology equipment in the energy sector which is a downstream market to the provisioning of district heat.

(a) Supply of gas

21. Concerning the definition of the product and geographic market the parties refer to the Commission's decisional practice in former cases⁷ and in particular distinguish between different customer sizes. These markets would cover the Czech Republic.
22. The parties submit that in the overall upstream gas supply market PP's market share is [10-20] %. In none of the potential sub-markets⁸ for different customer sizes the market

⁵ See e.g. case M.3268 – Sydkraft/Graninge and Case COMP/M.4238 - E.ON/Pražská Plynárenská

⁶ M. 1803 – Electrabel/Epon. And M.1402 Gaz de France/BEWAG/GASAG.

⁷ M.4238 - E.ON/Pražska plynárenská.

shares would exceed [20-30] %. The parties submit that PT is only a small customer for gas representing about [0-5]% of the total gas demand in the Czech Republic⁹. Furthermore, there are strong players active in this market, such as RWE, who has a market share of [80-90] %, and E.ON.

23. In view of the fact that the parties' consumption of gas is relatively small, the parties' do not seem capable of foreclosing access to an important customer base. Customer foreclosure therefore is unlikely. Likewise, input foreclosure of gas for other users is unlikely in view of the limited amounts of gas required by the parties and in view of the fact that PP's market share is low. The Commission therefore considers that the transaction does not give rise to competition concerns in this field.

(b) Maintenance and repair of technology equipment in the energy sector ("M&R")

24. The parties submit that Maintenance and repair of technology equipment in the energy sector ("M&R") should be considered as separate market. The geographic scope of this market would be the Czech Republic.
25. The Commission has not yet defined M&R as separate market. However, in relation to utility networks, markets for the maintenance, construction and operation of networks were considered as separate markets¹⁰ so that M&R may well represent a separate market in the energy field as well. In any event, it can be left open whether M&R represents a separate market in the present case as the transaction will not lead to any concerns in this area.
26. The parties submit that PT, through its subsidiary Termonta Praha, and Dalkia (joint venture of EdF and Veolia) are active in the Czech M&R market attaining an estimated market share of ca. [5-10]% ([5-10] % Termonta and [0-5] % Dalkia). As well, if a wider market encompassing the maintenance and repair of technology equipment would be considered, the parties' market shares would be, in any event, much lower.
27. The Commission considers that due to the low market shares both customer and input foreclosure seem unlikely. The Commission therefore considers that the transaction will not lead to competition concerns in the relation between the provisioning of district heat and M&R.

(2) Distribution of electricity

28. The *distribution* of electricity in Prague and Roztoky u Prahy - in which EnBW and the City of Prague are active through their joint venture PRE - is a vertically affected market in relation to the upstream activity of generation and wholesale supply of electricity, the M&R, ancillary services as well as in relation to the downstream electricity retail.

⁸ Gas supply sub-markets: (i) supply to large customers (annual consumption more than 4200 MWh), (ii) supply to medium-sized commercial customers (annual consumption between 630 and 4200 MWh), (iii) supply to small customers (up to 630 MWh/year), and (iv) supply of gas to households.

⁹ The main gas purchasers in the Czech Republic are glasswork, metallurgy, cement, sugar and heating plants. There is some information outstanding about the parties' gas purchases in the Czech Republic and their market shares in the demand of gas supply.

¹⁰ COMP/JV.36 TXZ Europe/EdF-London Investments.

29. By referring to earlier Commission decisions the parties submit that distribution of electricity is a separate product market which is distinct from other electricity markets¹¹. The geographic scope of the market for electricity distribution would be local and confined to the relevant distribution network.
30. According to its past practice¹², the Commission distinguishes the following product markets in the electricity sector (i) generation and wholesale supply, (ii) transmission, (iii) distribution (iv) ancillary services and (v) retail supply of eligible customers¹³. For the distribution of electricity the Commission considered that the relevant geographic area is the relevant distribution network¹⁴. The Commission does not see any reasons for deviating from this earlier practice in the present case.
31. The parties submit that EnBW and the City of Prague are active in the *distribution* of electricity in Prague and Roztoky u Prahy through their joint venture PRE and holding a market share of 100%.
32. Concerning the generation and wholesale supply of electricity and for ancillary services the parties consider, by referring to the cited Commission practice that the markets are national in scope. Also the market for M&R that has been described above is considered as national. ¹⁵ Regarding the markets for retail of electricity to large industrial customers and to small industrial, commercial and domestic customers, the Commission has generally defined this market as national in scope¹⁶. However, in recent cases¹⁷ regarding the German market for retail supply of electricity to small customers, the Commission has considered that there were strong indications pointing towards a market that is narrower than national in scope. In any event the precise market definitions can be left open in the present case as the transaction will not lead to any concerns under any alternative market definition.
33. For generation and wholesale supply of electricity in the Czech Republic, the parties submit that PT, IPO and EnBW are active attaining a market share of ca. [5-10] %, whereas the main competitor, CEZ, holds a market share beyond [60-70] %. Concerning ancillary services, the parties submit that PT, IPO and EnBW are active with a combined market share of [10-20] % (EnBW, through Dalkia, has [5-10] %, IPO [0-5] % and PT [0-5] % market share). CEZ is also active in this market and has a market share ca [60-70] %. In the M&R market the share of PT and Dalkia (EdF/EnBW) would be ca. [5-10] %.
34. Finally, in electricity retail, EnBW and PRE (joint venture of EnBW and the City of Prague) would attain a combined market share of ca. [10-20] %. If a local market encompassing the city of Prague would be defined, PRE would have significant market shares both in the retail supply for large industrial customers ([90-100] %) and in the

¹¹ E.g. cases M.3696 - E.ON/MOL, M. 4110 – E.ON/ENDESA or Case COMP/M.4238 - *E.ON/Pražská Plynárenská*

¹² E.g. cases M.3696 - E.ON/MOL, M. 4110 – E.ON/ENDESA or Case COMP/M.4238 - *E.ON/Pražská Plynárenská*

¹³ As of 1 January 2006, all end users of electricity including households became eligible customers in the Czech Republic. This market could be further subdivided into retail supply to large industrial customers and retail supply to small industrial, commercial and domestic customers.

¹⁴ M.3268 Sydkraft/Granninge, M.3440 EDP/ENI/GDP.

¹⁵ COMP/JV.36 TXZ Europe/EdF-London Investments.

¹⁶ COMP/JV.36 TXZ Europe/EdF-London Investments.

¹⁷ COMP/M.5496 – VATTENFALL/ NUON ENERGY; Case No COMP/M.5467 – RWE/ Essent.

retail supply to small customers' market ([80-90] %). Nevertheless, this vertical link is pre-existent to the transaction and PT is not active in any of these markets. Given the low market shares in the aforementioned markets, both customer and input foreclosure are excluded in this case.

35. The parties consider that, as a result of the requirement of the Electricity Directive 2003/54/EC, electricity producers have free access to the distribution network, the price for distribution is regulated and end users have a free choice of the electricity supplier no matter who owns or operates the distribution network to which they are connected. Therefore, it would be unlikely that the transaction would lead to any competition concerns in the market for distribution of electricity in the city of Prague and Roztoky u Prahy.
36. The Commission considers that customer foreclosure is unlikely in the present case, as the activities of the parties in the field of electricity distribution is limited to only one region within the Czech Republic. In addition, input foreclosure can be excluded due to the regulatory framework in which the distribution network is operated.
37. In light of the above, the transaction does not raise serious doubts as to its compatibility with the common market in any of the mentioned markets in the Czech Republic.

V. CONCLUSION

38. 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)
Vladimir ŠPIDLA
Member of the Commission