

***Case No COMP/M.5512 -
ELECTRABEL/ E.ON***

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

Article 6(1)(b) NON-OPPOSITION
Date: 16/10/2009

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16.10.2009

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Dear Sir/Madam,

**Subject: Case No COMP/M.5512 - ELECTRABEL/ E.ON
Notification of 11 September 2009 pursuant to Article 4 of Council
Regulation No 139/2004¹**

1. On 11 September 2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which Electrabel S.A./N.V. ('Electrabel', Belgium) belonging to GDF Suez Group ('GDF Suez', France) acquires from E.ON AG ('E.ON', Germany) within the meaning of Article 3(1)(b) of the Council Regulation sole control of certain power plants (the 'Acquired Assets'), as well as drawing rights (the 'Acquired Drawing Rights') to electricity capacities in Germany (the 'Proposed Transaction').

I. THE PARTIES

2. **Electrabel** is part of GDF Suez, an international industrial and services group, which is active in electricity, natural gas, energy services, water and waste management.
3. **The Acquired Assets** and the electricity generation capacity underlying the Acquired Drawing Rights are owned by E.ON, an international vertically integrated energy company active on both electricity and natural gas markets.

II. THE CONCENTRATION

¹ OJ L 24, 29.1.2004 p. 1.

4. The proposed Concentration concerns the acquisition by Electrabel of sole control over the following Acquired Assets in Germany from E.ON: hard coal power plants Farge (capacity of 350MW) and Zolling (449MW); gas power plant Zolling (50MW), hydro power plants Kainzmuhlsperre (28MW), Reisach Hochspeicher (99MW), Tanzmuhle (3.3MW) and Trausnitz (1.8MW); and biomass plant Zolling (10MW). Post-transaction, the said Acquired Assets will be owned by GDF SUEZ Deutschland AG, Electrabel's fully owned subsidiary in Germany.
5. In addition, Electrabel will acquire from E.ON drawing rights to parts of the total electricity capacity of the following nuclear power plants in Germany: (i) Krummel – [...] for a period up to [...]; (ii) Gundremmingen – [...] for a period up to [...]; and (iii) Unterweser – [...] for a period up to [...]. The Acquired Drawing Rights will be directly owned by Electrabel.
6. The Proposed Transaction arises from the commitment by E.ON to divest power generation assets and electricity drawing rights under the Article 9 decision issued by the Commission on 26 November 2008². E.ON and Electrabel intend to swap electricity generation assets and drawing rights in Germany, Belgium and the Netherlands, respectively.
7. The Proposed Transaction comprises the acquisition of sole control over the Acquired Assets and of the transfer of electricity drawing rights.
8. The acquisition of sole control over the Acquired Assets constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.
9. The Acquired Assets constitute a business to which a market turnover can be attributed and thus have a market presence within the meaning of point 24 of the Jurisdictional Notice³.
10. The transfer of the Acquired Drawing Rights is linked to the realisation of the asset transfer agreement⁴. However there is no need to conclude whether the Acquired Drawing Rights constitute a transfer of business within the meaning of the Merger Regulation⁵, since the Proposed Transaction would have a Community dimension on the basis of the transfer of the Acquired Assets alone.
11. The Proposed Transaction thus constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

² Cases COMP/B-1/39.388 and 389.

³ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentration between undertakings (2008/C 95/091) OJ C 95 of 16 April 2008, p. 1 – 48 According to Electrabel, a turnover of EUR [...] can be attributed to the Acquired Assets.

⁴ Under paragraph 38-39 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) no 139/2004 on the control concentrations between undertakings.

⁵ Paragraph 24 *ibid*.

III. COMMUNITY DIMENSION

12. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion⁶. 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. COMPETITIVE ASSESSMENT

13. In Germany, Electrabel is mainly active in the retail supply of electricity to small commercial and domestic (household) customers in the areas of Gera, Saarbrücken and Wuppertal, as well as in the generation and wholesale supply of electricity. The latter market is an affected market in relation to the downstream market for retail supply of electricity to small commercial and household customers.

Relevant product and geographic market

14. According to its past practice⁷, 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 electricity for end-users. Further distinctions have been made in the retail supply market between (i) large/industrial customers often connected to the high voltage grid and (ii) small commercial and domestic (household) customers that are non-half-hourly metered and are connected to the low-voltage grid.⁸
15. Concerning the generation and wholesale supply of electricity in Germany, by referring to the cited Commission practice, this market is found to be national in scope.
16. For retail supply of electricity, the Commission has generally defined these markets, including those for small customers, as national in scope, provided that these markets are fully liberalised⁹ and if the conditions of competition are found to be uniform throughout the relevant territory. The notifying party, in line with the Commission's practice, considers that the retail supply electricity markets are national in Germany, where the liberalisation of the electricity market started already in 1998 enabling customers to freely choose their suppliers.
17. However, in recent decisions¹⁰ with respect to the market for the supply of electricity to small customers in Germany, the Commission has considered that there are specific factors in Germany pointing towards a market that is narrower than national in scope,

⁶ Turnover calculated in accordance with Article 5(1) of the Merger Regulation.

⁷ See cases COMP/M.5224 – EDF / British Energy, COMP/M.3440 – EDP / ENI / GDP, COMP/M.4180 – Gaz de France / Suez, COMP/M.3868 – Dong / Elsam / Energi E2, COMP/M.3696 – E.ON / MOL.

⁸ See cases COMP/M.3440 – EDP / ENI / GDP, COMP/M.5224 – EDF / British Energy, COMP/M.4180 – Gaz de France / Suez - COMP/M.5496 – VATTENFALL/ NUON ENERGY or COMP/M.5467 – RWE/ Essent.

⁹ See cases COMP/M.5224 – EDF / British Energy, COMP/M.4180 – Gaz de France / Suez and COMP/M.3696 – E.ON / MOL.

¹⁰ COMP/M.5496 – VATTENFALL/ NUON ENERGY; Case No COMP/M.5467 – RWE/ Essent.

such as (i) the continuing dominance of the *Stadtwerke*¹¹ in their municipal area; (ii) overall low and regionally different customer switching rates across Germany; (iii) local marketing strategies focusing on the territorial incumbent; and (iv) different local pricing policy according to the targeted DSO¹² area.

18. In the light of the foregoing, although recognising that competition in Germany is progressively expanding and that this could likely lead to a broadening of the geographic scope of the market for the retail supply of electricity to small customers in the future, there are still strong indications pointing to local electricity retail markets for small customers approximately corresponding to each DSO area in Germany. Thus, the areas of activity of the *Stadtwerke* of Gera, Saarbrücken and Wuppertal could be considered as separate geographic markets in this case.
19. For the purposes of this decision it can be left open however whether the market for the retail supply of electricity to small customers in Germany should be defined as local in scope given that the transaction does not raise serious doubts as to its compatibility with the common market under any alternative market definition.

Assessment

20. On the market for the retail supply of electricity to small commercial and household customers in Germany, Electrabel's market share is well below [0-5] %. Even in the most extreme scenario where Electrabel would allocate the entire additional capacity resulting from the Proposed Transaction to the retail market for the supply of electricity to small customers, the market share post-transaction would remain below [0-5] %.
21. If a narrower geographic market definition of the retail supply of electricity market were to be taken into account, Electrabel would have a market share exceeding 15% in the following regions: Gera ([80-90] %), Saarbrücken ([90-100] %) and Wuppertal ([90-100] %)¹³.
22. Electrabel is also active in the market for the generation and wholesale of electricity in Germany, which is national in scope. The capacities of the acquired power plants and drawing rights amount to 1,691 MW, which accounts for less than [0-5] % of the generation of electricity in Germany and leads to a combined market share of [0-5] % nation-wide for Electrabel post transaction.
23. Despite the low market share in the market for the generation and wholesale of electricity in Germany, the latter is still an affected market in relation with the downstream markets for the retail supply of electricity to small customers in Gera, Saarbrücken and Wuppertal.

¹¹ The German retail electricity market is characterized by the existence of municipal utilities, *Stadtwerke*, which control the physical network and still exert significant influence on the electricity retail supply to small customers in their network area. There are currently over 800 such municipal utilities active in the electricity, gas or both sectors, including in the areas of, Gera, Saarbrücken and Wuppertal.

¹² Distribution System Operators.

¹³ GDF, along with the municipalities, jointly controls the distribution grid in these [...] areas: Gera, [...] and Wuppertal.

24. Even if a narrower geographic market definition of the retail supply of electricity market were to be taken into account, the Commission takes the view that customer foreclosure is unlikely in this case, given that the wholesale market (which is upstream to the retail market) is undisputedly national in scope. Even in the most extreme case scenario according to which the Acquired Assets and Acquired Drawing Rights would supply 100% of Electrabel's needs in Gera, Saarbrücken and Wuppertal, Electrabel would be unlikely to be able to foreclose access to an important customer base.
25. Input foreclosure of electricity for other users is excluded in view of the limited amounts of electricity generated by the notifying party in Germany ([0-5] % of the total market), as well as the presence of strong competitors in that market ([20-30] % RWE, [20-30] % E.ON, [10-20] % Vattenfall, [10-20] % EnBW, inter alia. The additional capacity acquired as part of the Proposed Transaction is unlikely to affect the ability of the customer base in the three regions to choose an alternative supplier.
26. 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 Germany.

V. CONCLUSION

27. 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