

***Case No COMP/M.5591 -  
CEZB/ JAVYS/ JESS JV***

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 04/11/2009

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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.5591 – CEZ/ JAVYS/ JESS JV  
Notification of 29/09/2009 pursuant to Article 4 of Council Regulation  
No 139/2004<sup>1</sup>**

1. On 29.09.2009, the Commission received a notification of a proposed concentration pursuant to Article 4 and following a referral pursuant to Article 4(5) of Council Regulation (EC) No 139/2004 by which the undertakings ČEZ BOHUNICE a.s. ("CEZB", Czech Republic), belonging to the group ČEZ a.s. ("CEZ", Czech Republic), and Jadrová a vyrad'ovacia spoločnosť, a.s. ("JAVYS", Slovak Republic) acquire within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Jadrová energetická spoločnosť Slovenska, a.s. ("JESS", Slovak Republic) by way of purchase of shares in a newly created company constituting a joint venture.

## **I. THE PARTIES**

2. CEZ is an integrated energy conglomerate headquartered in the Czech Republic. It is mainly active on the Central and South-Eastern European electricity markets. Its principal activities are the production and sale of electricity. CEZ is controlled by the Czech State, which holds 69% of the share capital.
3. JAVYS is a company wholly-owned by the Slovak Republic. It is active in the treatment and disposal of radioactive waste and spent nuclear fuel and decommissioning of nuclear facilities in the Slovak Republic, where it owns virtually 100% of the market.

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<sup>1</sup> OJ L 24, 29.1.2004 p. 1.

4. JESS shall be active in the market of generation and wholesale supply of electricity as an operator of the new nuclear power plant in Jaslovské Bohunice (Slovak Republic). The power plant is not foreseen to be operational before the year 2020.

## **II. THE CONCENTRATION**

5. The parties will have joint control over the JV, JESS. The joint venture shall be a joint stock company in which CEZ will have a 49% and JAVYS a 51% equity interest. While the split of the voting rights of the parties will strictly correspond to the mentioned equity interests, a consensual decision-making of both shareholders will be ensured by the requirement of consent of both shareholders while deciding in all decision making bodies of the joint venture.
6. Based on the information from the parties in their notification and subsequent communications, and in the absence of indications that would contradict the accuracy of this information, the Commission considers that the JV will be full functional. JESS will operate independently and have sufficient resources (i.e. land, financial resources, etc.) which are necessary to a lasting market presence in the generation and wholesale supply of electricity. Within the Shareholders Agreement the parties concluded that JESS would sell produced electricity on its own account and under its own name at market prices. Future customers of JESS shall be electricity traders, electricity distribution companies, electricity suppliers and large industrial customers.
7. Therefore, the operation constitutes a concentration within the meaning of Articles 3(1)(b) and 3(4) of the ECMR.

## **III. COMMUNITY DIMENSION**

8. The notified concentration does not meet the turnover thresholds of Articles 1(2) and 1(3) of the Merger Regulation.
9. On 23/07/2009, the Commission received from the parties a referral request pursuant to Article 4(5) of the Merger Regulation which has been transmitted to all Member States. Since no Member State has expressed its disagreement as regards the request to refer the case to the Commission, the concentration is deemed to have a Community dimension.

## **IV. MARKET DEFINITIONS AND ASSESSMENT**

### **Relevant product and geographic markets**

10. *The generation and wholesale supply of electricity*: In previous decisions the Commission has found that this market comprises an upstream market for the supply of electricity, constituted mainly by the generation and imports of electricity for further resale<sup>2</sup>.

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<sup>2</sup> Most recent case: COMP/M.5467 - *RWE/Essent*, para 231-232.

11. The Commission has found in most of the previous decisions that the market for the wholesale supply of electricity is national in scope<sup>3</sup>. In the DG Competition Report on the Energy Sector Inquiry<sup>4</sup> the electricity wholesale markets in Europe were considered to be national in scope (except Denmark and Italy). Some respondents to the market test submitted that due to the fact that this year a market coupling was put in place between Slovakia and the Czech Republic, the market could become wider than national. However market coupling in itself does not mean that markets should be considered wider than national. Indeed, such widening is not supported by current market results as: i) the liquidity of the CZ and SK energy exchanges is still low and trading volumes are not larger than interconnector capacity allocated through market coupling<sup>5</sup>; ii) the volumes of energy that are subject to market coupling are relatively low as compared to the whole consumption in the Slovak Republic<sup>6</sup>; iii) the price differences between the two countries continue to exist<sup>7</sup>. The parties to the transaction also submit that the market is national. The national character of the Slovakian market has been confirmed by the Slovak NCA and the Energy Regulator. Therefore for the purpose of this case the relevant geographic market will be considered as Slovakia.
12. *Treatment and disposal of radioactive waste ("RAW") and spent nuclear fuel ("SNF")*: Treatment of radioactive waste means collection, assortment, storage, processing, treating, manipulation and disposal of radioactive wastes from nuclear devices, as well as treatment and storage of institutional radioactive wastes. There are no precedents as regards the product market for the treatment of radioactive waste and spent nuclear fuel. Although such a treatment involves various industrially different services, in the case of Slovakia a further subdivision of this market is not necessary as presently JAVYS is a quasi sole provider of all of these services and they are interrelated.
13. There are no precedents as regards the geographic market for the treatment of radioactive waste and spent nuclear fuel. As JAVYS so far has been the quasi sole provider of the treatment services the parties submitted that the market is national in scope which is the narrowest market definition. Therefore for the purposes of this decision the geographic market for the treatment of radioactive waste and spent nuclear fuel will be considered as Slovakia.

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<sup>3</sup> Most recent case concerned the wholesale supply of electricity in Germany and the Netherlands: Case No COMP/M.5467 - *RWE/Essent*, para 235-236 In the case concerning Slovakia from the year 2005: COMP/M.3665 – *ENEL/ SLOVENSKE ELEKTRARNE*, the market definition has been left open, although the transaction has been mainly analysed on the national level.

<sup>4</sup> DG Competition Report on the Energy Sector Inquiry (January 10, 2007), SEC (2006) 1724 at paragraph 402.

<sup>5</sup> The parties estimate that since the launch of the market coupling at the Czech Day-Ahead -Market it is traded, on the average, 0.6 GWh/h, of which about 0.14GWh/h are shifted to the Slovak Day-Ahead-Market within the framework of the market coupling mechanism. In this period, TSO offered for use within the framework of the market coupling about 0.7 GWh/h in the direction from CZ to SK

<sup>6</sup> The parties estimate that within the framework of the market coupling – measured on a yearly basis - about 1200 GWh would be shifted from CZ to SK as compared to the national consumption of SK of about 29830 GWh in 2008 .

<sup>7</sup> The parties submit that by way of example at the forward products – e.g. annual band 2010 – the spread between 0.2 - 0.5 EUR/MWh can be observed

14. *Decommissioning of nuclear facilities*: One of the parents, JAVYS, is active in the decommissioning of nuclear facilities, which could be theoretically vertically related to the activities of the nuclear power plant. However, in Slovakia there is no market for this kind of services as this activity is subject to a stringent governmental control and planning. Decommissioning activities are considered to have strategic importance for the Slovak Republic, are performed according to the Strategy of the Final Period of Nuclear Power Industry approved by the Government of the Slovak Republic and exclusively carried out on the basis of the license issued by the Nuclear Regulatory Authority of the Slovak Republic. This activity is highly regulated and its financing comes from the public funds<sup>8</sup>.

### **Competition assessment**

15. The transaction does not give rise to a horizontal overlap between the parent companies in the market for the wholesale supply of electricity as JAVYS has no activities in this market<sup>9</sup>. The transaction gives rise to a limited horizontal overlap between one of the parent companies and the joint-venture: CEZ's market share on the Slovak market is currently small - around 6%, it has no generation capacity in Slovakia and all the electricity it sells is imported. Currently the Slovak market is dominated by Enel/Slovenské Elektrárne ("SE") that holds a share of more than 50% (according to the estimates of some of the respondents to market investigation - 78%). In light of the above, the transaction is unlikely to significantly impede effective competition as: i) it brings new capacity to the market that is currently short in supply<sup>10</sup>; ii) one of the parents, CEZ, is a relatively small player in Slovakia; the other parent, JAVYS, is unlikely to be a viable entrant on its own as its core competence is the treatment of the nuclear waste<sup>11</sup>; iii) there are no horizontal overlaps between the parents, so the transaction is not capable of facilitating the coordination of market behaviour of the parent companies.
16. Although there is strong evidence that currently the Slovak wholesale market is national, some of the respondents to the market investigation pointed out that in the future the market could become wider than national, including the Czech Republic or even the whole CENTREL area<sup>12</sup>. As discussed above it is unlikely that in the foreseeable future this market can become wider than national. If such a hypothetical wider market

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<sup>8</sup> In particular on the basis of contracts with the National Nuclear Fund of the Slovak Republic ("NNF") and the Bohunice International Decommissioning Support Fund ("BIDSF").

<sup>9</sup> JAVYS operated a power plant that was approaching the end of its commercial life and it exited the market in 2008 with the decommissioning of its last nuclear plant.

<sup>10</sup> The shutdown of the old nuclear power plants in 2006 and 2008 resulted in a 20% deficiency of electric power in Slovakia.

<sup>11</sup> As mentioned above, JAVYS was the operator of a power plant until recently but this activity was abandoned. Given that such operation was not part of its core competences as well as the size of the investment compared to its current financial means it is unlikely whether it could enter the market on its own.

<sup>12</sup> CENTREL is the regional group of four transmission system operator companies from four countries: the Czech Republic, Hungary, Poland and the Slovak Republic.

definition is considered, though, CEZ is likely to have a stronger market position as it is an incumbent wholesale supplier in the Czech Republic. This does not, however, change the competition assessment with regard to this transaction as the key factors making the impediment of effective competition unlikely in the Slovak market still apply in the wider market: i) the transaction brings new capacity to the wholesale supply market; ii) there are no horizontal overlaps between the parent companies; iii) one of the parent companies is unlikely to be a potential entrant on its own.

17. There is a potential vertical link between JAVYS' and JESS' activities as JESS is a potential customer for JAVYS's services of treatment and disposal of radioactive waste and spent nuclear fuel and at present JAVYS has a quasi monopoly position in the RAW and SNF treatment on the Slovakian market. Therefore, there is a hypothetical risk of anti-competitive foreclosure of JESS' competitors. JAVYS might hypothetically impose less favourable conditions on other nuclear plants using its treatment services and therefore raise the costs of JESS' competitors.
18. The analysis of the current regulatory and contractual framework for the treatment of nuclear waste in Slovakia leads to the conclusion that such foreclosure is unlikely. The agreements on the provision of services concluded between JAVYS and its customers specify in detail the method of calculating the nuclear services price, entitled costs and adequate profit. Moreover, there is a dispute resolution mechanism if JAVYS and its customers fail to reach an agreement regarding service prices. In such a case, prices are to be determined by an independent and professionally qualified person jointly appointed by the contractual parties<sup>13</sup>. This price-setting mechanism makes difficult any abusive or discriminatory change of contractual terms. The view that anti-competitive foreclosure is unlikely is also shared by the Slovak NCA which has been consulted on this issue.
19. Moreover, in the year 2012 an independent agency under the supervision of the Ministry of Economy of the Slovak Republic will be established for storing radioactive waste. Therefore the activity of storage will be carved out from JAVYS' activities. Storage of the radioactive waste can be considered as an essential facility. All the other services might be provided by specialized companies such as Alldeco/AMEC, Studsvik, Belgoproces, Nukem Technologies, Iberdola or VT Nuclear which are able to offer the full scope of nuclear services provided by JAVYS. These companies are in the possession of some key proprietary technologies and JAVYS subcontracts with them for the processing of some types of waste. In line with the current Slovak legislation, any undertaking or natural person may carry out the disposal and treatment of radioactive waste if they meet all legal conditions and obtain permission for these activities from the Nuclear Regulatory Authority of the Slovak Republic. AllDeco/AMEC recently has been awarded in a tender process one of the contracts for the processing of waste in Slovakia, which proves that a viable entry is possible.

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<sup>13</sup> Should they fail to agree who is to be appointed, either of the contractual parties is entitled to apply with the Slovak Chamber of Auditors to appoint an independent auditor, who will determine such prices according to the price-making principles as set forth in the agreements. Neither of the parties resorted to such option so far.

20. Therefore, the concentration is not likely to give rise to any horizontal or vertical anti-competitive effects. Consequently, it does not raise serious doubts as to its compatibility with the Common market or the EEA Agreement.

## **VI. CONCLUSION**

21. 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