

***Case No COMP/M.5604 -
DONG/ KOM-STROM***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 15/09/2009

***In electronic form on the EUR-Lex website under document
number 32009M5604***



Brussels, 15.09.2009
SG-Greffe(2009) D/5437
C(2009)7067

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.5604 – DONG/ KOM-STROM
Notification of 12/08/2009 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 12/08/2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertaking DONG Naturgas A/S controlled by DONG Energy A/S ("DONG", Denmark) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking KOM-STROM AG ("KOM-STROM", Germany) by way of purchase of shares ("Proposed Transaction").

I. THE PARTIES AND THE OPERATION

2. DONG is an integrated energy group majority-owned by the Kingdom of Denmark. The group is active in Denmark and other areas of Northern Europe in three major business segments: exploration and production of natural gas and oil, power generation and marketing of energy. In Germany, DONG is *inter alia* active as an electricity and natural gas wholesaler and as a retailer. Furthermore, DONG has a shareholding in and exercises joint control over Stadtwerke Lübeck GmbH ("SW Lübeck").

¹ OJ L 24, 29.1.2004 p. 1.

3. KOM-STROM is active as an energy supplier (wholesale and trading) in Germany. Through a subsidiary, it is active in financial products related to energy. Apart from energy supply, it also offers a wide range of consulting and other services in energy procurement and emission certificates. Currently, KOM-STROM is controlled by a Dutch energy company, Essent N.V. whose proposed acquisition by RWE was cleared by the Commission on 23 June 2009².
4. The Sales and Purchase Agreement between Essent N.V. and DONG for the 83.57% of the shares in KOM-STROM owned by RWE was signed on 10 August 2009. After the completion of the Proposed Transaction DONG will acquire sole control over KOM-STROM. The remaining 16.43% will be held by KOM-STROM's current minor shareholders, eleven local utility companies.

II. COMMUNITY DIMENSION

5. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion³ (DONG: EUR 8,15 billion; KOM-STROM: EUR 0,8 billion). Each of them has a Community-wide turnover in excess of EUR 250 million (DONG: EUR [...], KOM-STROM: EUR [...]) but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The Proposed Transaction therefore has a Community dimension.

III. PRELIMINARY ASSESSMENT

Relevant product and geographic markets

6. *The generation and wholesale supply of electricity:* In previous decisions the Commission has found that this market comprises an upstream supply of electricity, mainly generation and imports of electricity for further resale⁴.
7. The Commission has found in previous decisions that the electricity wholesale supply market in Germany is national in scope⁵.
8. *The retail supply of electricity:* This market comprises sales of electricity to final consumers. The Commission further considered the market for retail supply to (i) large/industrial (load-measured) customers and (ii) household/small commercial (non-load measured) customers⁶.
9. The Commission considered the market for supply of large industrial customers to be national⁷. The Commission analysed the market for the supply to small customers and households in Germany at the regional level, although left the definition open⁸. The

² Case No. COMP/M.5467 - *RWE/Essent*.

³ Turnover calculated in accordance with Article 5(1) of the Council Regulation (EC) No 139/2004 and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

⁴ Case No. COMP/M.5467 - *RWE/Essent*, para 231-232.

⁵ Case No COMP/M..5467 - *RWE/Essent*, para 235-236.

⁶ Case No COMP/M..5496 *Vattenfall/Nuon Energy*, para 14.

⁷ Case No. COMP/M.5496 *Vattenfall/Nuon Energy*, para 16.

⁸ *Idem*, para 40-42.

BKartA has found that the market for electricity retail supply to small customers is regional/local in scope and corresponds to the Distribution System Operator (DSO) area⁹.

10. *Wholesale supply of natural gas*: The Commission has distinguished between a market for sales to regional resale companies (long-distance wholesale supply) and to municipal utilities - "Stadtwerke" (short-distance wholesale supply)¹⁰. With regard to the German natural gas market the Commission has also considered a distinction between L-Gas and H-Gas at the wholesale supply level¹¹.
11. In previous decisions the Commission has found that the geographic market for the wholesale supply of natural gas in Germany is at least regional and corresponds to the geographic extension of the respective grid areas of the long-distance transmission companies for the long-distance wholesale supply market and the short-distance transmission companies (regional resellers) for the short-distance supply market¹².
12. *Retail supply of natural gas*: In previous decisions the Commission has distinguished different product markets for retail supply of gas to: (i) retail gas supply to electricity power plants, (ii) retail gas supply to large industrial customers, (iii) retail gas supply to small customers (households)¹³. With regard to the German natural gas market the Commission has also considered a distinction between L-Gas and H-Gas at the retail supply level¹⁴.
13. The Commission has noted that all the markets for retail supply of natural gas are not wider than national¹⁵ and in case of retail supply to small customers there are some indications that the relevant geographic market may be narrower¹⁶. The BKartA has taken the view that the market for retail supply to large industrial customers and small customers is regional in scope, corresponding to the geographic extension of the specific grid area of the incumbent supplier¹⁷.
14. For the purpose of the Proposed Transaction all the market definitions can be left open since under any reasonable alternative market definition it does not raise doubts as to the compatibility with the common market.

Competition assessment

15. DONG and KOM-STROM entered the German energy markets shortly after the liberalization of the German energy sector. They do not belong to one of the vertically integrated incumbent energy suppliers (i.e. E.ON, RWE, Vattenfall and EnBW) who still have significant market shares on the German energy markets. On the following markets where the activities of the parties overlap, their combined market shares are

⁹ BKartA, decision of 12 March 2007, Case No B8-62/06 – *RWE Energy/Saar Ferngas*, para 32 et sq.

¹⁰ Case No COMP/M.4890 – *Acelor/Ferngas*, para. 11; Case No COMP/M.5467 – *RWE/Essent*, para 329.

¹¹ Case No. COMP/M.5467 – *RWE/Essent*, para 329.

¹² Case No. COMP/M.5467 – *RWE/Essent*, para 330-333.

¹³ Case No COMP/M.5467 – *RWE/Essent*, para 367.

¹⁴ COMP/M.5467 – *RWE/Essent*, para 370 - 371.

¹⁵ Case No. COMP/M.4890 – *Arcelor/Ferngas*, para 13.

¹⁶ Case No. COMP/M.5467 – *RWE/Essent*, para 378-382.

¹⁷ BKartA, decision of 12 March 2007, Case No B 8 – 62/06 – *RWE/SaarFerngas*, Section A.1(b).

below 10%: i) electricity wholesale supply and trading in Germany, ii) short-distance wholesale supply of natural gas in Germany at both the regional and national levels; iii) electricity retail supply to large industrial customers in Germany and iv) retail supply of natural gas to large industrial customers in Germany. Therefore, the Proposed Transaction does not give rise to any horizontal competition concerns.

16. The Proposed Transaction results in a vertical relationship between the upstream markets for electricity wholesale supply, as KOM-STROM and DONG are wholesale suppliers, and the downstream market for electricity supply to small customers in the region of Lübeck where DONG is active through its jointly controlled subsidiary SW Lübeck. KOM-STROM is not active as a retail supplier of electricity or natural gas to small customers, therefore no horizontal overlap arises in this regional market. SW Lübeck has a market share of [60-70]% on the market for electricity supply to small customers in the region of Lübeck (the City of Lübeck has approximately 211.000 inhabitants).
17. SW Lübeck's electricity purchases from KOM-STROM are small, in 2008 the supplies by KOM-STROM were marginal ([0-5]% of its requirements), in 2009 to date KOM-STROM has supplied [...] TWh to SW Lübeck which accounted for a share of [0-5]% of the total purchases of electricity of Stadtwerke Lübeck ([...] TWh). Even if SW Lübeck procured all of its electricity from KOM-STROM no foreclosure effects would occur due to SW Lübeck's moderate size as a purchaser of electricity on the German upstream market for wholesale supply. In 2009, SW Lübeck is expected to purchase [...] TWh of electricity from its suppliers. This volume accounts to [0-5]% of the total sales of electricity to municipal utilities ([...] TWh) in Germany. As noted above, KOM-STROM is a small player in the upstream wholesale market with no generation and import capacity, with a market share below [0-5]%.
18. As regards natural gas, as noted above KOM-STROM is a recent and small player on the natural gas wholesale market and is currently not supplying SW Lübeck.
19. Therefore, the Proposed Transaction would not give rise to any vertical anti-competitive effects in the affected gas markets.

VI. CONCLUSION

20. 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