



EUROPEAN COMMISSION
DG Competition

***Case M.7745 - FORTUM /
LIETUVOS ENERGIJA /
JV***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 23/11/2015

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EUROPEAN COMMISSION

Brussels, 23.11.2015
C(2015) 8344 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

To the notifying parties:

Dear Sir/Madam,

**Subject: Case M.7745 Fortum/Lietuvos Energija/ JV
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹ and Article 57 of the Agreement on the European Economic
Area²**

- (1) On 16 October 2015, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which UAB Fortum Heat Lietuva ('Fortum Heat' of Lithuania), controlled by Fortum Corporation ('Fortum' of Finland) and UAB Lietuvos Energija ('LE' of Lithuania) will acquire within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation joint control over UAB Kauno Kogeneracinė Jėgainė (the 'JV' of Lithuania) by way of purchase of shares in a newly created company constituting a joint venture (the 'Transaction')³. Fortum and LE are referred hereinafter as the "Notifying Parties", the Notifying Parties and the JV are referred hereinafter as the "Parties".

¹ OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p.3 ("the EEA Agreement").

³ Publication in the Official Journal of the European Union No C 351, 23.10.2015, p. 23.

1. THE PARTIES

- (2) **LE** is a Lithuanian State owned company primarily active in the Baltic region. LE's core business covers (i) power and heat generation and supply, (ii) electricity trade and distribution, (iii) gas trade and distribution.
- (3) **Fortum** is a Finnish-based energy group, primarily active in the Nordic countries and other areas of the Baltic, whose core business is the generation and the sale of electricity and heat, as well as energy-related services. The parent company of the Fortum group is a public company owned by the Finnish State.
- (4) The **JV** is a newly created undertaking, which will be jointly controlled by Fortum and LE.
- (5) Pending the implementation of the JV project, LE has incorporated and holds 100% of the shares in "*UAB Kauno kogeneracine jegaine*". The JV will be created through Fortum acquiring a participating interest ranging between 44 % and 49 % of this latter company share capital. The JV will develop, construct and operate a waste-to-energy combined heat power plant ('CHP plant') in Kaunas, Lithuania.

2. THE CONCENTRATION

- (6) The Transaction consists of a purchase of shares in a newly created JV. Currently, LE owns the entire issued share capital of the JV. Pursuant to the co-operation agreement signed on 20 May 2015, Fortum will purchase a participating interest in the JV ranging between 44 % - 49 % of the issued share capital. In addition, a third party [...] may also acquire a minority stake in the JV (up to 5 %).

Joint-control

- (7) The Transaction leads to an acquisition of joint control over the JV by LE and Fortum within the meaning of Article 3(1)(b) of the Merger Regulation for the following reasons.
- (8) First, LE will have a participating interest in the JV equal to 51% of the issued share capital, while Fortum will have a participating interest in the JV ranging from 44% to 49% of the issued share capital. Finally, [...] may have a participating interest in the JV up to 5% of the issued share capital.
- (9) Second, under a shareholders' agreement to be entered into between LE and Fortum, the key strategic decisions relating to the JV's management will require the consent of both LE and Fortum. Particularly, decisions on investments, approval of budget, business plan and essential transactions will need to be adopted with the consent of both LE and Fortum.
- (10) Third, [...]’s consent will not be required for the adoption of any decision and it will also not have the right to interfere in the management of the JV. The minority share in the JV will not grant [...] any specific rights, save for typical rights of a minority shareholder.
- (11) In light of all the above, the Commission takes the view that Fortum and LE will both have the possibility of exercising decisive influence over the JV. This is because both Fortum and LE have veto rights over strategic decisions of the JV whereas [...] will not have any influence over the commercial behaviour of the JV.

- (12) Therefore the Commission concludes that the JV will be jointly controlled by Fortum and LE.

Full-functionality

- (13) The JV qualifies as a full function joint venture within the meaning of Article 3(4) of the Merger Regulation, as it will perform on a lasting basis all the functions of an autonomous economic entity.
- (14) The JV will be active as an independent operator on the relevant markets of electricity generation and district heat supply, with access to sufficient resources, including financing (the Notifying Parties are contributing at closing an equity contribution in cash amounting to € [...] million and the JV will have access to financing from financial investors and banks as well as the EU Cohesion Fund⁴), as well as to tangible and intangible assets (a waste-to-energy CHP plant in Kaunas). The JV will also have its own CEO, managers and employees dedicated to its activities, which are not limited in time.

3. EU DIMENSION

- (15) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million⁵ (Fortum EUR 4 376 million, LE EUR 973 million). Each of them has an EU-wide turnover in excess of EUR 250 million (Fortum EUR [...] million, LE EUR [...] million), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension within the meaning of Article 2(1) of the Merger Regulation.

4. MARKET DEFINITION

- (16) The Notifying Parties' activities overlap horizontally on the plausible market for the generation and wholesale supply of electricity in Lithuania. Also the JV – once fully operational – will be active on this market as well.
- (17) The Transaction will also give rise to two vertical relations as LE is active on the markets for the retail sale of electricity in Lithuania, which is downstream to the plausible market for the generation and wholesale of electricity as well on the market for the retail sale of gas in Lithuania, which is upstream to the plausible market for the generation and supply of heat through district heating network in Kaunas on which the JV will be active.

4.1. Product and geographic market definition

4.1.1. Generation and supply of heat through district heating network

- (18) In previous decisions the Commission regarded the provision of district heating (i.e., the distribution of steam and/or hot water from a heat production plant to buildings) as

⁴ The JV will have access to financing possibly via the EU Cohesion fund. The Notifying Parties informed the Commission that an amount of up to € 69 million from the EU Cohesion Fund is allocated for the Kaunas CHP project in the Operational Programme of the EU Cohesion Fund for 2014-2020 for Lithuania, but still needs to be formally approved by the Commission through a State Aid Notification.

⁵ Turnover calculated in accordance with Article 5 of the Merger Regulation.

a separate relevant product market. The geographic scope of the market was regarded as being limited to the specific district heating network to which the plant is linked. However, the final product and geographic market definitions were left open.⁶

- (19) The Notifying Parties agree with the above market definition.
- (20) As the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition, the exact scope of the product and geographic market can be left open.

4.1.2. *Generation and wholesale supply of electricity*

- (21) In previous decisions, the Commission has defined a separate market for the generation and upstream wholesale supply of electricity, which encompasses electricity generated in power stations, traded on the wholesale market (through bilateral agreements, power exchanges and other regulated market places) as well as electricity physically imported via interconnectors. However, the final product market definition was left open.⁷
- (22) As to the geographic scope of this market, the Commission has considered the market for the generation and upstream wholesale supply of electricity as national in scope.⁸ Given the existence of fully liberalised markets and common prices throughout the different Nordic price areas during the largest part of the year, the market was considered wider than national but in the end the exact geographic market definition was left open.⁹
- (23) The Notifying Parties agree with the above product market definition, however submit that it is not appropriate to consider the geographic scope of the market to be as national, covering only Lithuania. According to the Notifying Parties, the geographic scope of this market should be wider encompassing the area covered by the Nord Pool Spot power exchange (i.e. Finland, Norway, Sweden, Denmark, Estonia, Lithuania and Latvia). In the Notifying Parties' view this is because the electricity market covered by the Nord Pool power exchange is fully interconnected and therefore it would be artificial to limit its geographic scope to a single country.
- (24) In any event, the Notifying Parties submit that even if the geographic scope of the market was to be regarded as national, the Transaction would not raise serious doubts as to its compatibility with the internal market.
- (25) As the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition, the exact scope of the product and geographic market can be left open.

4.1.3. *Retail sales of electricity*

- (26) The Commission has in past cases distinguished a separate market for the retail supply of electricity and, more particularly, has defined separate markets for the retail supply

⁶ Case COMP/M.5793 – Dalkia CZ/ NWR Energy.

⁷ Case COMP/M.6984 - EPH/ Stredoslovenska Energetika.

⁸ Case COMP/M.6984 - EPH/ Stredoslovenska Energetika.

⁹ Case COMP M.3268, Sydkraft/Graninge and Case COMP M.3867, Vattenfall/elsam and E2 Assets.

of electricity to (i) large industrial and commercial customers¹⁰ and (ii) household and smaller industrial and commercial customers.¹¹ The Commission has defined these retail markets to be national in scope. However, the final product and geographic market definitions were left open.¹²

- (27) The Notifying Parties do not contest the above market definition.
- (28) As the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition, the exact scope of the product and geographic market can be left open.

4.1.4. *Retail sales of gas*

- (29) In past cases, the Commission has distinguished the overall market for the retail sales of gas according to the different groups of end users. Particularly, in past decisions the Commission has identified the following product markets: (i) gas-powered electricity plants, (iii) large industrial customers, (iv) small industrial customers, (v) household customers. However, the final product market definition was left open.¹³
- (30) As to the geographic market definition, the Commission held the view of considering retail gas supply as national in scope, whilst also considering a subnational regional delineation, depending on the specific Member State. However, the final geographic market definition was left open.¹⁴
- (31) The Notifying Parties do not contest the above market definition.
- (32) As the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition, the exact scope of the product and geographic market can be left open.

4.2. **Competitive assessment**

Horizontal overlap – generation and wholesale of electricity

- (33) The Notifying Parties are currently active on the plausible market for the generation and wholesale supply of electricity in Lithuania (and on the Nord Pool Spot power exchange). The JV once operational in 2019 will also be active on this market.
- (34) If the geographic scope of the market were to be considered as encompassing the area covered by the Nord Pool power exchange, the combined market share of the Notifying Parties would be [10-20] % with an increment by LE of less than [0-5] %. Once the JV will become operational, it is expected to have a minimal share equal to [0-5]% on this market.

¹⁰ Case COMP/M.5512 Electrabel / E.on, of 16 October 2009; case COMP/M.5496 Vattenfall / Nuon Energy, of 22 June 2009; case COMP/M.6225 Molaris / Commerz Real / RWE / Amprion, of 23 August 2011.

¹¹ Case COMP/M.6225 Molaris / Commerz Real / RWE / Amprion, of 23 August 2011; case COMP/M.5467 RWE / Essent, of 23 June 2009.

¹² Case COMP/M.5512 Electrabel / E.on, of 16 October 2009; case COMP/M.5224 EDF / British Energy, of 22 December 2008; case COMP/M.4180 Gaz de France / Suez, of 14 November 2006; case COMP/M.3696 E.ON / MOL, of 12 December 2005.

¹³ COMP/M.6910 Gazprom/Wintershall/Target Companies, COMP/M.4180 Gaz de France/Suez, COMP/M.3440 EDP/ENI/GDP and COMP/M.5740 Gazprom/A2A/JV.

¹⁴ COMP/M.6910 Gazprom/Wintershall/Target Companies.

- (35) If the geographic scope of the market were to be considered as encompassing the Lithuanian territory only, the market share of LE would be [40-50] % both by value and by volume and the market share of Fortum would be [0-5] % both by value and by volume. Once in operation, the expected market share of the JV would be [0-5] % both by value and by volume.
- (36) Notwithstanding the large combined market share of the Parties, the Commission takes the view that Transaction will not raise competition concerns for the following reasons.
- (37) First, the Transaction will not generate a significant change in the structure of the Lithuanian market. In fact, the addition in terms of market shares brought about by Fortum is limited to [0-5]% and the JV, in 2019, will bring about a further small increment of [0-5]%.
- (38) Second, the Parties will continue to face strong competition from a number of players. Particularly, the Parties will face competition from AB INTER RAO Lietuva, currently holding an estimated market share of [50-60]%, which is larger than the combined market share of the Parties, as well as of other smaller players such as UAB Elektrum Lietuva with a share of [0-5]%, which is larger than Fortum's share.
- (39) Finally, all the volumes of electricity generated by Fortum in Lithuania are sold by Fortum to [...] on to Nord Pool Spot.
- (40) Based on the above and all available evidence, the Commission concludes that the Transaction will not raise serious doubts as to its compatibility with the internal market as regards the market for the generation and wholesale of electricity.

Vertical overlap

Generation and wholesale of electricity and retail sale of electricity

- (41) The Transaction gives rise to a vertical relation between the upstream market for the generation and wholesale supply of electricity in Lithuania, where the Parties are active, and the downstream market for the retail sale of electricity in Lithuania, where LE will remain active.
- (42) The Commission takes the view that the Transaction will not raise competition concerns as it will not affect the ability of LE to engage in a foreclosure behaviour.
- (43) First, the Transaction does not have a significant impact on the upstream market where LE already has a market share of [40-50] %. The increment brought about by the JV and Fortum will be limited to an aggregated share of [0-5]% and will not significantly affect the market structure.
- (44) Second, on the upstream market the Notifying Parties will face competition from a stronger competitor - AB INTER RAO Lietuva.
- (45) Third, the market position of LE on the downstream market for retail supply of electricity in Lithuania remains unchanged with market shares of [40-50]¹⁵ on the market for the retail sale of electricity to large industrial and commercial customers

¹⁵ 2014 share, both by volume and by value.

and of [40-50]%¹⁶ on the market for the retail sale of electricity to households and small industrial and commercial customers. On these markets LE will face competition from a significant number of players, such as UAB Elektrum Lietuva ([10-20]% and [10-20]% respectively), UAB INTER RAO Lietuva ([10-20]% on both markets), UAB Entry ([5-10]% on both markets) and UAB Enfit ([5-10]% on both markets).

- (46) In light of the above, the Commission considers that the Parties will not have the ability to engage in input foreclosure behaviour as a result of the Transaction.
- (47) Based on the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market with regard to the vertical relationship between the upstream market for generation and wholesale supply of electricity and the downstream market for retail sale of electricity in Lithuania.

Retail supply of gas and provision of heat through district heating network

- (48) LE is active on the market for retail gas supply to heating generators and other gas fired electricity plants in Lithuania, which is upstream to the market for the provision of heat through a district heating network in Kaunas. The JV will be active in the market for district heat supply and will require gas to start-up the CHP plant.
- (49) There are several players active on the Kaunas district heating network: Kauno Termofikacijos elektrine (KTE), UAB Geco Kaunas, UAB Pramonės Energija, UAB Aldec General, UAB Oneks Invest, UAB Lorizon Energy.
- (50) There is, however, only one heat supplier that currently uses gas for heat generation in Kaunas. Other competitors operating on the district heating market confirmed during the market investigation that they do not need gas for their operation.
- (51) LE has a [90-100] % share on the markets for retail sale of gas to heating generators and other gas fired electricity plants in Lithuania. Other competitors on this market are UAB "Dujotekana", UAB "Grata Group", UAB "Haupas", AB agrofirma "Josvainiai".
- (52) The Notifying Parties submit that the Parties have no ability to engage in input foreclosure behaviour with regard to gas supply to competitors on the district heating market in Kaunas. According to the Notifying Parties the JV's competitors could start buying gas from LE's competitors as well as from the natural gas Exchange Get Baltic. The market investigation confirmed that the competitors have the ability to procure gas from other suppliers than LE. The Commission therefore, considers that the Notifying Parties have likely no ability to engage in foreclosure vis-à-vis their competitors on the district heating market.
- (53) Furthermore, the Commission considers that a potential foreclosure strategy would likely not have any impact on competition on the district heating market in Kaunas. First, there are still five suppliers that operate their district heat plants without any gas and will therefore be able to supply heat to the district heat customers in Kaunas. Second, the competitor on the district heating market producing heat from gas has

¹⁶ 2014 share, both by volume and by value.

started preparation works for reconstruction of its gas powered plant into a biofuels plant which would mean that gas will likely be replaced by biofuels.¹⁷

- (54) Based on the above, the Transaction does not raise serious doubts as to its compatibility with the internal market with regard to the vertical relationship between the market for retail supply of gas to heating generators and other gas fired power plants in Lithuania and the market for district heating in Kaunas.

5. CONCLUSION

- (55) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

*For the Commission
(Signed)
Margrethe VESTAGER
Member of the Commission*

¹⁷ KTE website, <http://www.kte.lt/lt/projektai/projektas-1.html>.