



EUROPEAN COMMISSION

DG Competition

Case M.8758 - BAYWA / CLEAN ENERGY TRADING

Only the English text is available and authentic.

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

Article 7(3)

Date: 7.12.2017



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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 7.12.2017
C(2017) 8560 final

PUBLIC VERSION

To the notifying party

**Subject: Case M.8758 - BAYWA / CLEAN ENERGY TRADING
Commission decision pursuant to Article 7 (3) of Council Regulation
No. 139/2004¹ and Article 57 of the Agreement on the European
Economic Area²
Request for derogation from the suspension obligation**

Dear Sir or Madam,

- (1) We refer to your application for a derogation from the suspension obligation provided for in Article 7(1) of Council Regulation (EC) No 139/2004 ("the Merger Regulation") with regard to the proposed acquisition by BayWa r.e. renewable energy GmbH ("BayWa r.e.", Germany) of C.E.T. Clean Energy Trading GmbH ("C.E.T.", Germany) (the "Transaction") submitted pursuant to Article 7(3) of the Merger Regulation on 6 December 2017.
- (2) BayrWa r.e. and C.E.T. are collectively referred to as the "Parties".

1. THE PARTIES AND THE OPERATION

- (3) BayWa r.e. is a wholly-owned subsidiary of BayWa AG ("BayWa"). It acts as a holding company for several companies in the fields of solar energy, wind energy, bioenergy and geothermal energy. More specifically, BayWa r.e. plans and

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").

develops biogas, wind and solar energy plants and sells photovoltaic modules. Generally, BayWa r.e. sells these plants after construction and does not operate them. On rare occasions it operates those energy plants until they are sold. In addition, through its subsidiaries, BayWa r.e. sells biomethane and is further active in the direct marketing of electricity from facilities which fall under the renewable energy law (Erneuerbare-Energien-Gesetz-EEG) and which produce "EEG electricity", to a limited extent from its own plants and project companies as well as for third-party power generation plants. In addition, it supplies end customers with natural gas and electricity via its subsidiaries.

- (4) BayWa, the parent company of BayWa r.e., has worldwide operations in trading, logistics and supplementary services in the field of Agriculture, Energy and Building Materials, as well as in the Innovation & Digitalisation development segment. In the field of energy, in addition to the activities of BayWa r.e., it operates as a contractor a combined heat and power (CHP) plant with conventional natural gas through one of its subsidiaries.
- (5) The target C.E.T. is a company recently founded in view of the insolvency proceedings of the CLENS group consisting of Innowatio GmbH and its subsidiaries ("CLENS"). CLENS operates as a direct marketer of electricity from renewable energy and CHP plants, as a supplier of electricity from renewable and conventional sources for industrial and commercial customers, and as a marketer of flexibility (in particular control energy) from decentralized power generation plants.
- (6) On 15 November 2017, CLENS filed for bankruptcy for all companies belonging to the group with the exception of Clean Energy Sourcing GmbH, Vienna. At present, CLENS is under control of the preliminary insolvency administrator.
- (7) As part of the insolvency proceedings that are scheduled to open on 8 December 2017, it is proposed that, on that day, the insolvency administrator transfers CLENS' business unit "Direct Marketing of Electricity from Renewable Energy Plants and the Supply of Electricity to End Customers" (the "Business Unit") to C.E.T.
- (8) The business unit to be transferred essentially comprises the electricity purchase contracts concluded by CLENS with power generators (approximately [...] contracts, the "Purchase Contracts") and the electricity supply contracts concluded by CLENS with industrial and commercial end customers and to a lesser extent with other electricity suppliers (the "Supply Contracts"), as well as the customer database regarding the Supply Contracts.
- (9) Following the intended transfer of those assets by the insolvency administrator to C.E.T. on 8 December 2017, BayWa r.e. proposes to sign on the same day a share purchase and transfer agreement for the acquisition of C.E.T.
- (10) Moreover, BayWa r.e. proposes to put in place on 8 December 2017 bank guarantees securing the payments due to the electricity generators under the Purchase Contracts. The Purchase Contracts were initially secured by bank guarantees put in place by CLENS. Given its insolvency, CLENS was no longer in a position to fulfil its payment obligations under the Purchase Contracts, and the electricity generators made use of the initial bank guarantees. As a consequence, the electricity generators are contractually entitled to the

replacement of the drawn bank guarantees by new ones ("*Nachgesicherungsanspruch*") or to immediately terminate the Purchase Contracts if the electricity supply remains unsecured. The proposed bank guarantees by BayWa r.e. would be conditional upon the signing of the share purchase and transfer agreement.

(11) [...]:

— [...].

— [...].³

— [...].

— [...].

2. CONCENTRATION WITH EU DIMENSION

(12) The Transaction consists of the acquisition by the undertaking BayWa r.e. of shares in a newly created company (C.E.T.) to which a number of assets will be transferred that are currently operated as a business unit and have a market presence. Those assets therefore constitute an undertaking and the Transaction gives rise to a concentration pursuant to Article 3(1)(b) of the Merger Regulation.

(13) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (BayWa: EUR [...], C.E.T.: EUR [...]). Each of them has an EU-wide turnover in excess of EUR 250 000 million (BayWa: EUR [...], C.E.T.: EUR [...]), and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The proposed Transaction therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

3. THE APPLICATION FOR A DEROGATION FROM THE SUSPENSION OBLIGATION

(14) BayWa r.e. submits that without the immediate issuance of new bank guarantees it is highly likely that a substantial amount of electricity producers will terminate their Purchase Contracts with CLENS or C.E.T, respectively. Several electricity producers have already announced their intention to terminate their Purchase Contracts during the next days if no new guarantees would replace drawn guarantees, and others would be likely to follow. The immediate termination of the Purchase Contracts by a majority of the electricity producers would dramatically lower the value of the Business Unit, and thus of C.E.T., and may put at risk the entire Transaction. If a substantial part of the Purchase Contracts were to be terminated, there may not be sufficient assets left to maintain the business activity of C.E.T..

³ It is planned to transfer the entire German direct marketing portfolio from CLENS to C.E.T.. C.E.T. will enter into the rights and obligations of the respective direct marketing company in the contracts [and will continue the former business of CLENS with the temporary help of insolvent companies of the Innowatio Group.].

- (15) In order to be able to implement the measures described above, BayWa r.e. requests a derogation from the suspension obligation in relation to the Transaction according to Article 7(3) of the Merger Regulation.

4. THE CONDITIONS FOR A DEROGATION PURSUANT TO ARTICLE 7(3) OF THE MERGER REGULATION

- (16) Pursuant to Article 7(1) of the Merger Regulation, a concentration falling under that regulation shall not be implemented either before its notification or until it has been declared compatible with the internal market. Pursuant to Article 7(3) of the Merger Regulation, the Commission may, on reasoned request, grant derogation from the suspension obligation imposed in Article 7(1) of the Merger Regulation if certain conditions are met.
- (17) The Transaction constitutes a concentration within the meaning of Article 3 of the Merger Regulation and has an EU dimension according to Article 1 thereof. Hence the operation is subject to the suspension obligation laid down in Article 7(1) of the Merger Regulation.
- (18) Article 7(3) of the Merger Regulation provides that, in deciding on the request, the Commission must take into account, *inter alia*, the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition.
- (19) A derogation from the obligation to suspend concentrations is granted only exceptionally, normally in circumstances where the suspension provided for in the Merger Regulation would cause serious damage to the undertakings concerned by a concentration, or to a third party.

A. The effects of the suspension on the undertakings concerned and third parties

- (20) BayWa r.e. submits that without the immediate issuance of new bank guarantees it is highly likely that a substantial amount of electricity producers would terminate their Purchase Contracts. According to BayWa r.e., this would lead to a significant loss of value of C.E.T., which could put the entire Transaction at risk, if no critical mass of Purchase Contracts can be transferred. BayWa r.e. submits that this would have severe consequences for the employees of the Business Unit , for the electricity generators that are party to the Purchase Contracts (who would quickly need to find new business partners), as well as for the customers of the Business Unit. It would also affect the creditors of the insolvent CLENS Group, who will not be compensated with the earning from the purchase price during the insolvency proceedings.
- (21) The Commission considers that those risks appear material.
- (22) Against this background and based on the information available, the Commission considers that the suspension obligation imposed by Article 7(1) of the Merger Regulation could lead to serious harm to the undertakings concerned and third parties in the present case. Furthermore, on the basis of the information submitted

by BayWa r.e., a derogation from the stand-still obligation would not have adverse effects on any third party.

B. No threat to competition posed by the concentration

- (23) Both Parties to the Transaction are active in energy sector. On the basis of the information submitted by BayWa r.e., it appears that the horizontal overlaps are quite limited and that the vertical relationships do not raise, *prima facie*, any issue of foreclosure.

Generation and wholesale supply of electricity

- (24) In identifying the relevant markets, BayWa r.e. refers to the Commission's precedents, where the Commission defined the product market for the generation and wholesale supply of electricity as comprising domestic generation of electricity at power stations within a certain geographic market as well as the electricity that is physically imported into this geographic market via interconnectors to be sold on to retailers.⁴ The Commission made in previous decisions no distinction between the different sources of electric energy within the wholesale electricity market.⁵
- (25) From a geographical perspective, the Commission has consistently defined the relevant geographic market as normally national and sometimes smaller such as Great Britain as in relation to the UK.⁶ BayWa submits that the relevant geographic market in the present case would at least be German wide if not broader.

Retail supply of electricity

- (26) In previous cases, the Commission defined the market for retail supply of electricity as a separate market encompassing the sale of electricity to final customers.⁷ Further distinctions have been made between: (i) large half-hourly metered industrial customers often connected to the high voltage grid and (ii) small commercial and domestic customers that are non-half-hourly metered and are connected to the low-voltage grid. The differentiation between the two groups is due to different needs and profiles on the demand side and different services and technologies offered on the supply side.
- (27) The German National Competition Authority ("BKartA") has made a distinction between (i) load measured (leistungsgemessene) customers and (ii) non-load measured or standard load profile (nicht-leistungsgemessene or Standardlastprofil)

⁴ See Case M.7850 - EDF / CGN / NNB GROUP OF COMPANIES, paragraph 54, Case COMP/M.7137 - EDF/Dalkia en France, paragraph 34; Case COMP/M.6984 - EPH/Stredoslovenska Energetika, paragraph 15; Case COMP/M.5445 - Mytilineos/Motor Oil/Corinthos Power, paragraph 12; Case COMP/M.5224 - EDF/British Energy, paragraph 11; Case COMP/M.4180 - Gaz de France/Suez, paragraph 674; Case COMP/M.3883 - GDF/Centrica/SPE, paragraph 9.

⁵ See Case M.7850 - EDF / CGN / NNB GROUP OF COMPANIES, paragraph 54, Gas fired, coal fired, nuclear, hydroelectric power stations, wind farms or others.

⁶ See Case M.7850 - EDF / CGN / NNB GROUP OF COMPANIES, paragraph 55, Great Britain comprises England, Wales and Scotland but excludes Northern Ireland. See Case COMP/M.5224 - EDF/British Energy, paragraph 20.

⁷ Case M.5467 - RWE / ESSENT, paragraph 280.

customers based on similar considerations to those of the Commission in its precedents.⁸

- (28) In the present case, C.E.T. would essentially be active in the retail supply of electricity to large industrial customers,⁹ whereas BayWa supplies electricity to households and small businesses under the standard load profile, as well as to load measured customers.
- (29) Previously, the Commission has considered the geographic market for the supply of electricity to large customers in Germany as national in scope.¹⁰

Horizontal overlaps

- (30) The Parties' activities overlap at the level of generation and wholesale supply of electricity, as well as at the level of retail supply of electricity in Germany.
- (31) However, the Parties' combined market shares are very low, below [5-10]% at the level of generation and wholesale supply of electricity, below [0-5]% at the overall retail level and below [5-10]% as regards the retail supply of electricity to large industrial customers.
- (32) Moreover, BayWa r.e. submits that the German electricity market and its segments combine a variety of strong market players. In addition to major energy companies, municipal utilities, industrial companies, foreign energy suppliers and innumerable operators of EEG plants generate electricity.
- (33) It therefore appears that, on the basis of the information provided by BayWa r.e., the Transaction would not raise *prima facie* any competition concern as regards horizontal overlaps, in particular in view of the low combined market share of the Parties.

Vertical links

- (34) While a vertical link exists between the generation and wholesale supply of electricity and the retail supply of electricity, potential foreclosure concerns are unlikely in the present case given the low combined market share of the merged entity at both levels.

Conclusion

- (35) Therefore, on the basis of the information provided by the Parties, it appears *prima facie* that the Transaction is not likely to pose a threat to competition within the EEA.

⁸ BKartA, B8-62/06, RWE Energy / SaarFerngas, decision of 12 March 2007, page 32 et seq. See also BKARTA's merger decisions B 8-93/07, RWE / Stadtwerke Krefeld-Neuss of 23 October 2007 and B 8-123/07, E.ON / Wasser und Energieversorgungs mbH Salzgitter of 19 December 2007. In particular, the BKARTA argues that load measured customers have greater price elasticity, a structured demand profile due to their need of differentiated products and as a consequence different buying power and behaviour as opposed to non-load measured customers, which instead require simple products and uniform tariffs.

⁹ Pursuant to BayWa r.e., around [0-5]% of the volume of electricity supplied by CLENS to end customers in 2016 was delivered via standard low profile delivery points.

¹⁰ Case M.5467 - RWE / ESSENT, paragraph 284.

D. Balance of interests

- (36) Based on the above, it appears that, whilst the suspension obligation could seriously affect the value of C.E.T. and thereby put the entire Transaction at risk, no threat to competition caused by the Transaction can currently be identified, and a derogation from the suspension obligation of Article 7(1) of the Merger Regulation does not appear to have adverse effects on either of the Parties or on any third party. Therefore the Commission finds that a derogation pursuant to Article 7(3) of the Merger Regulation can be granted to the extent specified below.

5. CONDITIONS

- (37) According to Article 7(3), fourth sentence, of the Merger Regulation, a derogation from the suspension obligation laid down by Article 7(1) of the Merger Regulation may be made subject to conditions and obligations in order to ensure effective competition.
- (38) On 7 December 2017 BayWa r.e. committed to submit a complete Form CO (or Short Form CO as the case may be) no later than one month after the adoption of a Commission decision granting a derogation.
- (39) Based on the preceding considerations, the Commission has decided to grant a derogation from the suspension obligation with regard to the Transaction subject to the following condition:
- BayWa r.e. shall: submit a complete notification no later than one month after the adoption of the present decision.

6. CONCLUSION

- (40) The Commission considers that the request submitted by BayWa r.e. for a derogation from the suspension obligation laid down in Article 7(1) of the Merger Regulation meets the requirements set out in Article 7(3) of the Merger Regulation.
- (41) Based on the above considerations and in accordance with Article 7(3) of the Merger Regulation and Article 57 of the EEA Agreement, BayWa r.e. is granted a derogation from the obligations imposed by Article 7(1) of the Merger Regulation in respect of the Transaction subject to the condition referred to in paragraph (39).

For the Commission

(Signed)

Margrethe VESTAGER
Member of the Commission