



EUROPEAN COMMISSION
DG Competition

Case M.9795 - SÜWAG / EWM / ÜWM JV

Only the English text is available and authentic.

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

Article 4(4)
Date: 17/08/2020



EUROPEAN COMMISSION

Brussels, 17.08.2020
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PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

To the notifying parties

To the Bundeskartellamt

Subject: Case M.9795 – SÜWAG / EWM / ÜWM JV
Commission decision following a reasoned submission pursuant to Article 4(4) of Regulation No 139/2004¹ for referral of the case to Germany and Article 57 of the Agreement on the European Economic Area².

Date of filing: 24.07.2020

Legal deadline for response of Member States: 14.08.2020

Legal deadline for the Commission decision under Article 4(4): 28.08.2020

Dear Sir or Madam,

1. INTRODUCTION

- (1) On 24 July 2020, the Commission received by means of a Reasoned Submission a referral request pursuant to Article 4(4) of the Merger Regulation with respect to the transaction cited above. The parties request the operation to be examined in its entirety by the competent authorities of Germany.

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').

- (2) According to Article 4(4) of the Merger Regulation, before a formal notification has been made to the Commission, the Parties to the proposed transaction may request that their transaction be referred in whole or in part from the Commission to the Member State where the concentration may significantly affect competition and which present all the characteristics of a distinct market.
- (3) A copy of this Reasoned Submission was transmitted to all Member States on 24 July 2020.
- (4) By letter of 14 August 2020, the Bundeskartellamt as the competent authority of Germany informed the Commission that Germany agrees with the proposed referral.

2. THE PARTIES

- (5) Süwag Energie AG, Frankfurt am Main (“Süwag”) is a regional energy company which is controlled by Innogy SE and indirectly by E.ON SE (“E.ON”). E.ON, including Süwag, is active in electricity generation and wholesale supply, operation of gas and electricity distribution networks, distribution of electricity and gas, water supply, district heating and e-mobility. Syna GmbH (“Syna“), a wholly-owned subsidiary of Süwag, is the distribution system operator for electricity and gas networks for which Süwag holds the concessions.
- (6) Elektrizitätswerk Mittelbaden AG & Co. KG, Lahr (“EWM”) is a regional energy company active in electricity generation and wholesale supply, electricity distribution networks, electricity distribution and e-mobility. EWM currently operates its electricity distribution networks via ÜWM.
- (7) Überlandwerke Mittelbaden GmbH & Co. KG, Lahr (“ÜWM”) will operate electricity distribution networks and may participate in concession award procedures for electricity distribution networks in the German region Mittelbaden.

3. THE OPERATION AND CONCENTRATION

- (8) The transaction in question involves the creation of a joint venture for the operation of electricity distribution networks and participation in future concession tenders for electricity distribution networks. The JV, ÜWM, will be jointly controlled by E.ON, via Süwag, and EWM, following the purchase of shares. Süwag and Syna will contribute their electricity distribution networks in the area of Rheinmünster to EWM’s subsidiary ÜWM which is already operating EWM’s electricity distribution networks in Mittelbaden. E.ON, via Süwag, will acquire a 37.8% stake in ÜWM and jointly control ÜWM together with EWM.

4. EU DIMENSION

- (9) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million and two of the undertakings have a turnover of more than EUR 250 million [...]. The Parties do not each achieve more than two-thirds of their aggregate EU-turnover in any one Member State. The notified operation therefore has an EU dimension within Article 1(2) of the Merger Regulation.

5. ASSESSMENT

- (10) On the basis of a preliminary assessment of the information provided by the Parties in the Reasoned Submission, the proposed Transaction is an appropriate candidate for pre-filing referral from the Commission to the Bundeskartellamt in accordance with Article 4(4) of the Merger Regulation.
- (11) In the Reasoned Submission, the Parties claim that the Transaction gives rise to the following vertically affected markets:
- (a) the generation and wholesale supply of electricity (upstream) and the operation of electricity distribution networks (downstream);
 - (b) the operation of electricity distribution networks (upstream) and the retail supply of electricity to consumers (downstream);
- (12) Since the operation of electricity distribution networks is considered a natural monopoly³ and any operator of a distribution network thus has a market share of 100%, these vertical links result in affected markets.
- (13) The Transaction may also create affected markets for the concession of the operation of electricity distribution networks in some communes in South-West Germany.
- (14) The markets involved have been defined as national and/or local:
- the (national) market(s) for generation and wholesale of electricity where the Parties' combined market share is around [5-10]%;
 - the (local) markets for the electricity distribution networks operated by the Parties where the Parties' market shares is [90-100]% in each of the local markets where they are present, and possibly the related concessions market where operators bid to manage the concession for the electricity distribution network;⁴
 - the markets for the retail supply of electricity to final consumers (national or local markets) where the Parties' combined market shares in the respective segments of the market are [90-100]% for household and small commercial customers in the basic supply service, [10-20]% for special contract customers and smaller commercial customers (on a national level⁵) and [10-20]% for large industrial customers.⁶

5.1. Relevant product markets

5.1.1. *The market for generation and wholesale supply of electricity*

- (15) In previous decisions, the Commission considered that the market for generation and wholesale supply of electricity encompasses the production of electricity at power stations, electricity imported into the relevant geographic area through

³ M.8870 – E.ON/Innogy.

⁴ Form RS, para. 26.

⁵ As this market has local elements, the Commission's preliminary investigation also covered the activities of the Parties at local level and found that the Parties overlap in 35 local markets with combined market shares between 40% and 100%.

⁶ Form RS, tables 5 and 6. See the product market definition in paragraphs 22-24.

interconnectors and electricity traded on the wholesale market (bought and sold through bilateral agreements, regulated market places or power exchanges including day-ahead, intra-day and spot market platforms).⁷ In certain cases, the Commission has also left open whether peak and off-peak hours (and potentially super-peak hours) needed a further distinction.⁸ The Commission has not distinguished between different sources of energy.⁹

- (16) The Parties agree that the generation and wholesale supply market should include both electricity from conventional as well as from renewable sources and consider the generation and wholesale supply of electricity to constitute the relevant product market.¹⁰
- (17) For the purposes of the present decision, there is no need to deviate from previous Commission decisions as described in paragraph (15) as the assessment of whether the proposed concentration meets the criteria for an Article 4(4) referral would not change under any of the previously considered product market definitions.

5.1.2. The market for distribution of electricity

- (18) In previous decisions, the Commission has considered a product market for the operation of distribution networks, separate from the market for transmission networks. The Commission further distinguished between distribution networks for gas and electricity.¹¹
- (19) The Parties agree and take the view that distribution networks for electricity constitute a separate product market.¹²
- (20) Although the Commission has not previously defined a separate market for concession tenders for electricity distribution networks, the Commission's preliminary investigation showed that this Transaction might have an impact on such a market. The impact of the Transaction on such a market may therefore need to be further analysed.
- (21) For the purposes of the present decision, there is no need to deviate from previous Commission decisions and therefore the markets can be considered to be distribution networks for electricity.

5.1.3. The market for retail supply of electricity

- (22) In previous decisions, the Commission considered a product market for electricity retail supply, further distinguishing between (i) large industrial customers and (ii) household and commercial customers.¹³ Furthermore, among household and small commercial customers, the Commission distinguished between special contract

⁷ COMP/M.8687 – Prisko / OKD Nastupnicka, para 55.; COMP/M.8056 – EPH / PPF Investments / Vattenfall Generation / Vattenfall Mining, para. 13; COMP/M.6984 – EPH / Stredoslovenska Energetika, para. 15; COMP/M.8871 – RWE / E.ON Assets, para. 13 et seq.

⁸ COMP/M.5467 – RWE / Essent, para. 25; COMP/M.6225 – Molaris / Commerz Real / RWE / Amprion, para. 20.

⁹ See e.g. COMP/M.8871 – RWE / E.ON Assets, para.13; COMP/M.5467 – RWE / Essent, para. 24.

¹⁰ Form RS, paragraph 40.

¹¹ See e.g. COMP/M.5467 – RWE / ESSENT, para. 179.

¹² Form RS, paragraph 43.

¹³ COMP/M.7778 - Vattenfall/ENGIE/GASAG; para. 30; COMP/M.8758 – BayWa/Clean Energy Trading, para. 26; COMP/M.5467 – RWE/Essent, para. 280.

customers and basic supply customers, as well as between heating electricity and regular electricity supply.¹⁴ This is in line with the Bundeskartellamt's market definition, which also distinguishes between metered RLM customers (industrial customers) and non-metered customers (household and small commercial customers) and, in relation to the latter, between basic supply, special contract and heating electricity customers.¹⁵

- (23) The product market definition is not disputed by the Parties.
- (24) For the purposes of the present decision, there is no need to deviate from previous Commission decisions as described in paragraph (22), as the assessment of whether the proposed concentration meets the criteria for an Article 4(4) referral would not change under any of the previously considered product market definitions.

5.2. Relevant geographic market

5.2.1. The market for generation and wholesale supply of electricity

- (25) In previous decisions, the Commission considered the geographic market for the generation and wholesale supply of electricity as national in scope, but has also recognised in some instances that where interconnection capacity between Member States is sufficiently large, the geographic scope of the market may be broader. This could be the case where Member States belong to the same bidding area, as is the case for Germany and Luxembourg. These Member States might therefore belong to the same geographic market.¹⁶
- (26) The Parties submit that the generation and wholesale supply market is only technically vertically affected due to the distribution network activities of the Parties in Germany and any potential effects would in any case be limited to Germany. As such, it can be left open whether the generation and wholesale supply market is national in scope or whether Luxembourg and Germany are part of the same geographic market as a result of interconnection capacity.
- (27) The Commission concurs that for the purposes of the present decision, the definition of the geographic market can be left open, as it would not affect the assessment of whether the proposed concentration meets the criteria for an Article 4(4) referral. The concentration does not raise any competition concerns under a broader geographic market definition, as production in and exports from Luxembourg are limited¹⁷ and no customer foreclosure concerns arise as a result of the Parties' monopolies for several local electricity distribution networks.

5.2.2. The market for distribution of electricity

- (28) In previous decisions, the Commission considered the relevant geographic market for the operation of electricity distribution networks to be limited to the geographic

¹⁴ COMP/M.7778 - Vattenfall/ENGIE/GASAG.

¹⁵ BKartA, B4-80/17 – EnBW/MVV, Rn. 176; BKartA, 8-94/11 – RWE/Stadtwerke Unna, para. 22 and 32.

¹⁶ COMP/M.8871- RWE / E.ON Assets, para. 18.

¹⁷ Luxembourg imports the vast majority of the electricity it requires.

See e.g. https://ec.europa.eu/energy/sites/ener/files/documents/ec_courtesy_translation_lu_necp.pdf

area of the network in question, with each grid constituting a relevant geographic market.¹⁸

- (29) The Parties agree with the Commission's geographic market definition for electricity distribution networks.¹⁹
- (30) For the purposes of the present decision, there is no need to deviate from previous Commission decisions and therefore the markets can be considered to be regional in scope, coinciding with the area covered by each respective electricity distribution network.

5.2.3. *The market for retail supply of electricity*

- (31) In previous decisions, the Commission generally considered national markets for electricity retail supply. In Germany, however, the Commission also considered the possibility of narrower, i.e. regional or local geographic markets. For retail supply to household and small commercial customers, the Commission considered local markets (restricted to the relevant distribution network area and constituting natural monopolies), however ultimately left the market definition open. For special contract customers (households and small commercial customers), the Commission considered a national market with local competitive elements. For large industrial customers, the Commission considered a national market as well.²⁰
- (32) The geographic market definition is not disputed by the Parties.
- (33) For the purposes of the present decision, there is no need to deviate from previous Commission decisions as described in paragraph (31)(22), as the assessment of whether the proposed concentration meets the criteria for an Article 4(4) referral would not change under any of the previously considered geographic market definitions.

5.3. **Assessment of the referral request**

5.3.1. *Legal requirements*

- (34) According to the Commission Notice on case referral, in order for a referral to be made by the Commission to one or more Member States pursuant to Article 4(4), the following two legal requirements must be fulfilled:
 - a) there must be indications that the concentration may significantly affect competition in a market or markets,²¹ and
 - b) the market(s) in question must be within a Member State and present all the characteristics of a distinct market.²²
- (35) On the basis of the information submitted in the Reasoned Submission, the Transaction gives rise to vertically affected markets in the markets for generation

¹⁸ See e.g. COMP/M.8871- RWE / E.ON Assets, para. 21. COMP/M.5827 – Elia/IFM/50Hertz, para. 23.

¹⁹ Form RS, paragraph 46.

²⁰ See e.g. COMP/M.8871- RWE / E.ON Assets, para. 23; COMP/M.7778 – Vattenfall/ENGIE/GASAG, para. 33-37; COMP/M.5827 – ELIA/ IFM/50HERTZ, para 24.

²¹ Further developed in point 17 of the Commission Notice on Case Referrals.

²² Further developed in point 18 of the Commission Notice on Case Referrals.

and wholesale supply of electricity (upstream) and the distribution networks for electricity (downstream) on the one hand and the distribution networks for electricity (upstream) and retail supply of electricity (downstream) on the other hand.

- (36) As established in footnote 21 of the Commission Notice on case referral in respect of concentrations (the “**Referral Notice**”), the existence of affected markets within the meaning of the Form RS would generally be considered sufficient to meet the requirements of Article 4(4). As outlined in paragraph (12), the market shares of the Parties for the respective distribution networks for electricity which they operate is [90-100]%. As the Parties are also active in the generation and wholesale supply and retail supply of electricity which are upstream and downstream markets to the market distribution networks, these markets are therefore vertically affected, under any product and geographic market definition previously considered by the Commission. This alone would be a sufficient indication that the concentration may significantly affect competition in these markets in Germany.
- (37) In addition, in previous decisions, the Commission also reviewed the impact of concentrations on competition for concession tenders for electricity distribution networks.²³ Süwag (or other affiliated companies of E.ON) and EWM/ÜWM both previously competed in concession tenders. Notably, EWM competed against E.ON/Süwag in [...] concession tenders in 2013-2019.²⁴ The Commission’s preliminary assessment found that the Parties might be each other’s closest competitors in tenders for concessions for electricity distribution networks in the part of Germany where the JV would operate, in which case the proposed transaction may significantly affect competition in this region.
- (38) Therefore, the first legal requirement set forth in Article 4(4) of the Merger Regulation is met.
- (39) With regard to the second requirement, all markets involved in the affected vertical links are national (Germany), or narrower than national. As stated in paragraph (26) and (27), according to the Parties, only the generation and wholesale market for electricity has been defined as broader than national in a recent case. However, even if Luxembourg was included in the geographic market, together with Germany, the proposed transaction may significantly affect competition only in Germany. In fact, the Commission’s preliminary investigation showed that the proposed transaction may significantly affect competition in the specific region in South-West Germany where the JV will be active.
- (40) As outlined in paragraphs (28)-(30), the markets for the distribution of electricity are narrower than national (local). As outlined in paragraphs (31)-(33) the markets for retail supply of electricity are national or narrower, depending on the sub-segment of the market, but in no case broader than national.
- (41) The markets involved in the affected vertical links present, therefore, all the characteristics of distinct markets. Therefore, the second legal requirement set forth by Article 4(4) of the Merger Regulation is also met.
- (42) In view of the foregoing, the preliminary assessment suggests that the proposed transaction may significantly affect competition within Germany (and more

²³ See e.g. COMP/M.8870 – E.ON/Innogy, COMP/M.7778 – Vattenfall / ENGIE / Gasag.

²⁴ Form RS, para.57.

specifically, the region where the JV will be active) and that the effects of the Transaction would be restricted to Germany.

- (43) Furthermore, the market in question presents all the characteristics of a distinct market.

5.3.2. *Additional factors*

- (44) In addition to the verification of the legal requirements, point 19 of the Notice provides that it should also be considered whether referral of the case is appropriate, and in particular “whether the competition authority or authorities to which they are contemplating requesting the referral of the case is the most appropriate authority for dealing with the case”.
- (45) Point 23 of the Notice states that “consideration should also, to the extent possible, be given to whether the NCA(s) to which referral of the case is contemplated may possess specific expertise concerning local markets, or be examining, or about to examine, another transaction in the sector concerned”.
- (46) In this case, the Parties submit that the transaction affects markets which are subject to complex national regulations.²⁵ The Bundeskartellamt has experience in assessing concession tenders as it has dealt with several concentrations in electricity distribution networks and has published guidelines about electricity and gas concession tenders.²⁶ The Commission agrees with this assessment.
- (47) According to point 20 of the Referral Notice, “concentrations with a Community dimension which are likely to affect competition in markets that have a national or narrower than national scope, and the effects of which are likely to be confined to, or have their main economic impact in, a single Member State are the most appropriate candidate cases for referral to that Member State”. As set out in paragraphs (34)-(43), this applies to the present case. The impact of the case would occur only in a region in Germany and referral is made to Germany only, so “the benefit of a ‘one-stop-shop’” is preserved.
- (48) Point 21 of the Referral Notice refers to concentrations that potentially engender “substantial cross-border effects” and stipulates that a “considerable margin of discretion should be retained in deciding whether or not to refer such cases”. The preliminary assessment suggests that the concentration in Germany will not have significant repercussions in geographic markets in other Member States, as discussed in paragraph (39)-(41). Likewise, the concentration does not pose a risk of fragmentation of the common market.
- (49) As the principal impact of the concentration concerns Germany, point 22 of the Referral Notice about concentrations affecting national markets in more than one Member State, does not apply. As the case should be referred to Germany only, the benefit of a one-stop-shop is preserved.
- (50) The Commission considers, on the basis of the information submitted in the Reasoned Submission, that the principal impact on competition of the concentration is liable to take place in the German market and that the requested referral would be consistent with points 17-23 of the Referral Notice.

²⁵ Form RS, para.14.

²⁶ Bundeskartellamt, Guidelines for electricity and gas concession tenders, 21 May 2015.

5.3.3. *Conclusion on referral*

- (51) The proposed Transaction is a concentration within the meaning of Article 3 of the Merger Regulation and it has an EU dimension. On the basis of the information provided by the Parties in the Reasoned Submission, the case meets the legal requirements set out in Article 4(4) of the Merger Regulation in that the concentration may significantly affect competition in markets within a Member State which presents all the characteristics of a distinct market.
- (52) Moreover, as outlined in paragraph (50), the Bundeskartellamt can be considered to possess specific expertise concerning the markets in question.

6. CONCLUSION

- (53) For the above reasons, and given that Germany has expressed its agreement, the Commission has decided to refer the transaction in its entirety to be examined by Germany. This decision is adopted in application of Article 4(4) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Olivier GUERSENT
Director-General