



EUROPEAN COMMISSION

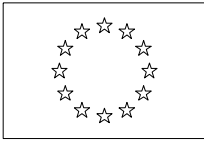
DG Competition

Case No COMP/M.1853 – EDF/ENBW

Only the English text is authentic.

**REGULATION (EEC) No 4064/89
MERCER PROCEDURE**

Modification of Article 8(2) with conditions & obligations
Date: 14/09/2006



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14/09/2006

C(2006) 3995 final

PUBLIC VERSION

COMMISSION DECISION

**relating to the modification of the commitments in the case
No COMP/M.1853 – EDF/ENBW**

Only the English text is authentic

COMMISSION DECISION

relating to the modification of the commitments in the case No COMP/M.1853 – EDF/ENBW

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

- 1) Having regard to the Treaty establishing the European Community,
- 2) Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,
- 3) Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings¹, as last amended by Regulation (EC) No 1310/97², and in particular Article 8(2) thereof,
- 4) Having regard to Council Regulation (EEC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings³ (hereinafter, “the Merger Regulation”), and in particular Article 8(2) and Article 26 (2) thereof,
- 5) Having regard to the Commission Decision of 7 February 2001 to declare, subject to compliance with conditions and obligations, the concentration compatible with the common market,

Whereas:

1. By letter dated 9 August 2006 the Commission received from Electricité de France (“EdF”) a request to change some provisions of the commitments that were attached to the Commission’s decision in the above-mentioned case. On 6 September 2006 Zweckverband Oberschwäbische Elektrizitätswerke (“OEW”) joined this request.

I. EDF’ PROPOSAL

2. EdF proposed to modify three provisions in the commitments.
 - a) **Abandon the PPA product and replace it by an equivalent base-load VPP product**

¹ OJ L 395, 30.12.1989, p. 1; corrected version in OJ L 257, 21.9.1990, p. 13.

² OJ L 180, 9.7.1997, p. 1.

³ OJ L 24, 29.1.2004, p. 1.

3. The commitment foresaw to offer power from co-generators⁴ equivalent to 1000 MW of generation capacity (“the PPA product”). Due to its specific product characteristics, auction participants were not particularly interested in that product despite some improvements made over time. Furthermore, since 2003 a real risk of sales below costs arose year by year which was remedied by granting EdF the right to set a reserve price.
4. While EdF has to fulfil its obligations, the company proposed to abandon the PPA product and to replace it by the equivalent amount of the 400 MW base-load VPP product⁵, a category that is successfully sought by the market because of its more flexible characteristics.
5. After analysis, involving the trustee who is in charge of monitoring the implementation of the commitments, the Commission has come to the conclusion that by reducing product complexity it would further improve for participants the attractiveness to choose among convenient energy products.

b) Abandon the “portfolio of choice” rule

6. The so-called “portfolio of choice” rule initially intended to allow bidders to optimise the product portfolio they purchase under the VPP auctions, i.e. bidders who bid for a mix of base-load and peak-load VPP have the option to withdraw their bids on one of these categories to rebalance the purchased products if they are not awarded the portfolio of their choice. That rule appeared necessary to establish in the commitments since no liquid wholesale market existed in France.
7. Over time, however, the French power exchange has (also as a result of the VPP) developed to offer a certain degree of liquidity, also in products similar to those offered under the VPP auctions. According to EdF, competitors can source energy products complementing their portfolio purchased from the VPP auctions from alternative sources. Hence, the initial objective of that rule therefore appears to have lost its intended purpose.
8. EdF furthermore observed that bidders occasionally misused that rule “to game” with the VPP products. An analysis of the bidders’ behaviour, carried out by the trustee, showed that bidders bid less and less for both product categories. However, during several VPP auctions, the trustee identified bidders using this rule for unintended purpose. They arbitrated between VPP products and that of other electricity wholesale markets during the auction process whereby they applied this rule to dispose of unsold capacity at the end of the auction. The consequential withdrawal from initially made bids left significant amounts of capacity unsold which could only be offered to the market at the next auction or through additional advance sales auctions. Significant undersell can have a negative impact on the market. Competitors acquire less capacity hence they compete less intensively with EdF. If significant amounts of unsold generation capacity are offered at the

⁴ EdF was obliged to purchase electricity from French co-generators.

⁵ The equivalent amount of base-load VPP would be 400 MW of generation available throughout the year, whereas the PPA product of 1000 MW is only available during winter months. The trustee confirmed the correctness of EdF’s calculation.

next VPP auction in addition to the normal volumes, downward pressure on prices is highly likely to occur because the larger volumes of generation capacity are less easily absorbed by the market. EdF may be in a situation to sell this generation capacity even below cost. Even there is the possibility of a reserve price to prevent the sale below cost, this scenario would nevertheless entail the risk that large volumes of generation capacity remain unsold.

9. It can be concluded from the above that the abandoning of the portfolio of choice rule would further reduce product complexity while at the same time improve the availability of VPP products by decreasing the likelihood of undersell of generation capacity.

c) Introduction of a base-load VPP product with duration of four years

10. According to EdF, the French market wishes to purchase base-load VPP products with duration longer than three years. Market participants reason that longer term products would be more favourable to competition in the French market. Alongside, the French regulator found evidence in the market favouring longer term products.
11. To address this market expectation, EdF proposes to introduce a base-load VPP product with duration of four years, which will be added to the existing product choice. Consequently, EdF has to calculate accurately the indifference price curve for the four year product. At present, however, no quotation of prices for such a product exists on the French wholesale market hence the trustee would have difficulties verifying EdF's calculations. To address this issue, the four year baseload product was simulated during a test auction and its indifference price curve was calculated by EdF. It revealed that sufficiently reliable information was available from a variety of sources like brokers specialised in electricity contracts and from other organised electricity markets.
12. While the implementation issues involved with EdF's proposal can be solved eventually, the introduction of a longer-term product could raise two principal issues, namely liquidity and price distortion, since the total amount of generation capacity offered remains constant and demand may shift from existing products to the new product.
13. However, the potential risk appears relatively low given the fact that there has been a strong demand in the past for the products with shorter durations, i.e. in particular the six months and twelve months product. Furthermore, the calculation of the indifference curve includes all products and hence prices are interlinked to some extent. Moreover, it can be expected with sufficient likelihood that over time pricing information will develop for the four year baseload product as it did for the three year baseload product in the past.
14. It can be concluded that the introduction of the four year baseload VPP product will satisfy market demand by offering a choice for auction participants to source their energy needs from a wider offer in terms of product duration.
15. In order to verify its impact on the French market, the new product will be introduced initially for a period of one year. After that, the results will be evaluated and on that basis the Commission will decide as to whether to continue with this product offer.

II. CONCLUSION

16. In the light of the foregoing, it can be concluded that all proposals from EdF are justified and they are likely to improve the functioning of the VPP auctions.

HAS ADOPTED THIS DECISION:

Article 1

The modified commitment text is approved, as attached in Annex 1 to this decision; by that, the commitment as such obliges EdF to continue to fully comply with all its provisions

Article 2

This decision is addressed to

Electricité de France

Zweckverband Oberschwäbische Elektrizitätswerke

Done at Brussels, 14/09/2006

For the Commission
(Signed)

Neelie KROES
Member of the Commission

Annex 1

9.8.2006

(Consolidated version)

COMP/M.1853 – EDF/ENBW

UNDERTAKINGS

On 31 August 2000, pursuant to Article 4 of the Merger Control Regulation, Electricité de France (EDF), France, and Zweckverband Oberschwäbische Elektrizitätswerke (OEW), Germany, (the “Parties”), notified a proposed concentration whereby EDF alongside OEW acquires joint control, within the meaning of Article 3 (1) b of the Regulation, of Energie Baden-Württemberg AG (EnBW), Germany.

The Parties are prepared to submit commitments pursuant to Article 8 (2) of the Regulation in order to take account of concerns raised by the Commission.

These commitments shall take effect on receipt by the Parties of the European Commission’s decision approving the operation and be subject to the proposed acquisition being consummated.

A. Undertakings offered by EDF

1. Relations with CNR

To the extent specified hereunder, EDF is committed to contribute to CNR becoming an active competitive force in the electricity sector in France. To that effect, CNR will, as from 1 April 2001, be put in a position so as to ensure on its own both the operation of its power plants and the commercialisation of the power so generated.

EDF and CNR concluded on 15 January 2001 two joint declarations concerning respectively the operation of CNR power plants and the commercialisation of the energy produced by CNR (see confidential Annex). EDF undertakes to conclude with CNR by 31 March 2001 at the latest binding agreements, which will implement these declarations.

EDF undertakes to take in good faith all measures and to conclude with CNR all agreements necessary to enable CNR to become a fully independent electricity producer exercising on its own the entirety of its responsibilities, as laid down in the joint declarations referred to.

Should these agreements not have been concluded by the envisaged date, EDF undertakes to apply the principles contained in the two declarations. EDF will in this case address a reasoned request to the Commission to extend the deadline for the conclusion of the agreements, such extension not to be unreasonably withheld.

a) Operation of the CNR generation facilities

EDF undertakes to enter into a contract with CNR pursuant to which EDF will supply, through its personnel, and for a time period of 5 (five) years (renewable by agreement of these parties), services necessary for the operation of the hydro-electric power plants on the Rhône under the overall responsibility of CNR.

EDF's services shall be limited to the technical operation and maintenance of these plants.

These services shall not comprise functions related to the optimisation (dispatching) or the commercialisation of the production. Functions of this kind shall belong to CNR and be implemented by CNR's own personnel.

b) Transitory assistance to optimisation of the CNR generation

Nevertheless, EDF undertakes to provide CNR, during a transitory period ending by beginning of 2002, the assistance necessary to enable the latter to ensure on its own the optimisation of its production plants, as specified in the above-mentioned joint declaration concerning the operation of the CNR power plants.

c) Commercialisation of the electricity generated by CNR

EDF undertakes not to make any claim to the electricity generated by CNR or part thereof as from 31 March 2001, i.e. the end date of the procedure provided in Article 50 of the French Electricity Law for reviewing the contractual relations between EDF and CNR.

Accordingly, CNR will be in a position to act freely and independently, on its own or with partners, on the eligible market, the wholesale market, with the RTE and with other French and European producers.

Furthermore, in order to allow CNR progressively to develop the marketing of its entire production, EDF has offered CNR a purchase guarantee on the terms and conditions set out hereunder.

EDF undertakes to purchase, between 1 April 2001 and 1 April 2006, upon request of CNR, part of its production as necessary to allow CNR progressive entry on the market. The quantities to be so purchased as well as the purchase price will be the subject of a contract to be concluded between EDF and CNR prior to 31 March 2001 in accordance with the joint declarations of 15 January 2001.

d) Withdrawal of EDF from CNR board, abstention from voting and caretaking of shares

Given that EDF will no longer be involved in CNR's commercial policy and market conduct, it undertakes to renounce the exercise of its voting rights in CNR and to withdraw its representative from the CNR board of directors by 31 March 2001. A trustee will act as a caretaker of EDF's shares in CNR.

e) Article 50 Electricity Law

The commitments referred to under this point 2 are offered subject to the consent of the authorities in charge of the reviewing procedure laid down in Article 50 of the French Electricity Law.

The issue of EDF's claim for compensation, including the possibility of appealing to the French Conseil d'Etat with respect to this issue, shall in no way restrict CNR's industrial and commercial independence.

f) Tasks of trustee

EDF shall appoint a trustee in accordance with the provisions set out under C. below. The trustee shall, in line with the general provisions referred to, monitor and advise the Commission on the implementation of this commitment and act as a caretaker of the EDF shares in CNR.

2. Supply of losses for the French electricity transport network (RTE)

EDF undertakes not to claim any special or exclusive right with regard to the supply of energy required to compensate losses occurring on the transport network operated by the French RTE and to adhere to the RTE's logic of organising public tenders to that effect.

3. Generation capacities in France

a) *Access to generation capacity in France*

EDF undertakes to make available to competitors, on the terms and conditions set out below, access to generation capacities located in France in the form of a maximum of 5400 (five thousand four hundred) MW of virtual power plants.

The contracts to be concluded will not include restrictions as to the use of the electricity so purchased.

b) *Virtual power plants*

EDF shall offer competitors access to electricity under the form of drawing rights on virtual power plants (VPP). A VPP contract is an option to buy electricity from EDF.

The key features of a VPP are outlined below.

Capacity price: An independent generator buys x MW of generation capacity from EDF for EUR y MW/year. Over the duration of the contract, the buyer has the right to call upon EDF at any time in order to request delivery of up to x MW. The required load curve has

to be notified one day ahead at 12:00 hr. Independent generators will bid capacity prices.

Energy price: The buyer pays EDF EUR z /MWh consumed (energy price). In the case of baseload virtual plants, the energy price reflects nuclear variable costs of a power plant operated by EDF in France. The energy price of peakload virtual power plants reflects the variable costs of a physical peakload unit operated by EDF in France.

For the time being, on this basis, the energy price is 8 (eight) Euro/MWh in the case of a baseload plant and 26 (twenty six) Euro/MWh in the case of a peakload plant.

Energy prices are fixed by EDF after having given the trustee the occasion to verify their level.

Delivery point: The electricity is delivered to the high voltage grid in France.

Length of contract: The VPP contracts will have the duration of three months, six months, one year, two years and three years.

In the case of the baseload VPP and consistent with the development of the market since the beginning of the auction process, a four year contract shall be offered, for an initial trial period of one (1) year (i.e. for the four auctions taking place between September 2006 and June 2007 including). If EDF wishes to continue with the four year baseload VPP contract thereafter, EDF shall make a reasoned request, setting out the results of the trial period, within four weeks after the end of the last auction of the trial period. Upon request by the Commission, the Trustee shall provide a written report, reviewing the results of the trial period, to the Commission. If the Commission thereafter approves the continuous use of the four year baseload VPP contract, EDF may offer the four year contract on the same enduring basis as the other VPP contracts. If the Commission does not approve the offer of the four year baseload VPP contract within five weeks of EDF's request, EDF will offer only VPP baseload contracts with durations of three months, six months, one year, two years and three years after the trial period.

Types of VPP: EDF will offer 4400 (four thousand four hundred) MW of baseload and 1 000 (one thousand) MW of peakload capacity. “

VPP Auction: Both baseload and peakload plants will be offered simultaneously, but separately. VPP contracts will be awarded through an open, non-discriminatory public auction. The auction will be open to energy utilities and energy traders.

The bid: Entrants will bid for an integer number of MW of capacity. The smallest bid is 1 (one) MW. Successful bidders will be obliged to pay to EDF their bid price.

Bid volume cap: The maximum volume of each bid is limited to a fraction of the total capacity auctioned to ensure that at least three bidders are selected.

Evaluation of bids: Bids will be grouped according to plant type disregarding the length of the contract. Within each group, bids will be sorted in descending order according to their spread in relation to a reference value set by EDF in order to facilitate the bidding process. The reference value will reflect EDF's estimates of the French wholesale power market. The reference value is not a reserved price and spreads may be negative. Reference values will be communicated to and examined by the trustee before the invitations to bid are announced.

Capacity will be awarded to bidders according to their rank until the auctioned capacity volume is reached.

Method of payment: All bidders will be required to make a cash bid, which will provide the basis for their evaluation. Successful bidders will be allowed to propose energy swaps instead of cash payments.

Implementation: EDF will promote auctions every 3 (three) months offering baseload and peakload plants. The first auction involving the sale of 1 000 (one thousand) MW will be conducted in 4 (four) rounds of 250 (two hundred fifty) MW. The principles of the first virtual power plant auction will be announced in May 2001. The first round

will take place in the beginning of September 2001. The other rounds will follow at ten-day intervals.

The remainder will be offered at a pace compatible with demand and proper functioning of the market, under the supervision of the trustee.

Reserved price: The imposition of a floor price for the bids may be necessary and therefore justified given that EDF lacks experience with auctions of VPPs and has to avoid sale below costs.

If the trustee testifies that the prices of the auctions are abnormally low in relation to market prices or that the auctions result in bids significantly below EDF's costs, the Commission, upon reasoned request by EDF or the trustee, will decide whether, and for what period, the fixing of a reserved price is appropriate. In agreement with the trustee, further auctions may be suspended until the Commission has taken a decision.

A request aiming at the fixing of a floor price should not be made prior to the completion of the first round of 4 times 250 MW auction.

c) Duration

EDF undertakes to grant access to generation capacities on the terms and conditions set out above for a time period of 5 (five) years from the date of the Commission decision approving the operation.

This period is based on the expectation that within the forthcoming 5 (five) years the electricity market in France will have developed so as to allow sufficient alternative supply sources for replacing the quantities provided by EDF in auctions, i.e. around 40 TWh. After 5 (five) years the Commission will decide on the basis of a reasoned request of EDF whether or not these conditions are met and will respectively terminate or extend this commitment.

Nevertheless, EDF and/or the trustee may at any time, but not before three years have elapsed since the Commission decision, submit a reasoned request to terminate this commitment.

4. Tasks of trustee

EDF shall appoint a trustee in accordance with the general provisions set out under C. below. The trustee shall, in line with the general

provisions referred to, monitor and advise the Commission on the implementation of this commitment.

The trustee shall in particular supervise the auctions in order to ensure a transparent and non-discriminatory auction process.

The trustee is bound to respect the confidentiality of all information provided to him or otherwise obtained by him in the course of the exercise of his mandate. He will in particular have to refrain from disclosing any information related directly or indirectly to EDF's costs. This obligation remains valid even after the expiry of his mandate for as long as the information continues to be commercially sensitive.

B. Undertakings offered by EDF, OEW and EnBW

1. The EnBW shareholding in WATT AG

EnBW AG holds 24.5 per cent of the voting stock in WATT AG, an electricity company in Switzerland, the other shareholders being Nordostschweizerische Kraftwerke AG with 34.5 per cent, E.ON AG (previously Bayernwerk AG) with 24.5 per cent and Crédit Suisse S.A.

2. Divestiture of shares in WATT AG

The Parties undertake that EnBW AG divests, and EnBW agrees to divest, its shareholding in WATT AG within a maximum period of (...) months from the date of the Commission's decision to declare the envisaged operation compatible with the Common Market pursuant to Article 8 (2) of the Merger Control Regulation.

The purchaser - or purchasers - shall be unconnected to and independent of the Parties and EnBW, and be subject to prior approval by the Commission.

The Parties shall be deemed to have complied with the commitment upon conclusion of a binding contract for the sale of the shares within the relevant time period or such other time period as may then be agreed by the Commission.

3. Tasks of the trustee

The trustee shall, in line with the general provisions referred to, monitor and advise the Commission on the implementation of this commitment. In particular, the trustee shall:

- Monitor and advise the Commission as to the development of the procedure for selecting a purchaser and as to the conduct of the negotiations.
- Monitor and advise the Commission as to whether prospective purchaser(s) with whom he intends to negotiate are likely to satisfy the Commission's requirements as to suitability.
- Monitor the maintenance of the viability and marketability of the shareholding and ensure that it is managed in the ordinary course of business, pursuant to good business practice.

In the event that a binding contract for the sale of the shares will not have been concluded within the time period specified above, the Parties shall procure that a trustee be appointed in accordance with the general provisions set out below under C. and granted the irrevocable mandate to carry out the divestiture within a further time period of (...) months.

The trustee shall sell the shares at the best possible terms and conditions in accordance with good business practice. He is not bound by any minimum price.

4. Interim Period

Following the decision of the Commission and pending the sale of the shares, the Parties and EnBW undertake to preserve the full economic and competitive value of the shareholding until the date of disposal in accordance with good commercial practice, and to manage the shareholding in the best interests of that business. In particular, the Parties and EnBW undertake not to carry out any act upon their own authority, which may reasonably be expected to have significant adverse impact on the economic value, the management, or the competitiveness of the shareholding or business concerned until the date of disposal.

5. Extension of time period

At the Parties' reasoned request, the Commission may extend the deadline for the divestiture of the shares. Such request shall specify the circumstances that justify an extension, such as unforeseen events, outside the sphere of interest of the Parties and EnBW AG, which are preventing or delaying the divestiture.

C. General Provisions - Trustee

1. Appointment of a trustee

Within 30 days after the decision, the Parties⁶ will propose to the Commission trustees suitable to monitor the commitments referred to under A.1 (Relation with CNR), A.3 (Generation capacities in France) and B. (The EnBW shareholding in WATT AG). The trustees must be independent of the Parties. The appointment of the proposed trustees is subject to approval of the Commission.

If a proposed trustee is rejected, the Parties will propose the name of a new trustee within 15 days of being informed of the rejection.

If the new trustee is rejected by the Commission, the Commission shall nominate a suitable trustee whom the Parties will appoint or cause to be appointed.

2. Trustee's mandate

Within 30 days of the date on which the Commission has approved a trustee, the Parties shall enter into a mandate agreement with the trustee, the terms of which shall have previously been agreed with the Commission, which confers on the trustee all the rights and powers necessary to permit the trustee to monitor the Parties' compliance with the terms of this undertaking in a manner consistent with the purpose of this undertaking.

Throughout the duration of the trustee's appointment the trustee shall provide written reports to the Commission on the progress of the discharge of his duties under the mandate, identifying any respects in which he has been unable to discharge such duties. The reports shall be provided at two monthly intervals, commencing 2 months after the date of the appointment of the trustee, or at such other times or time periods as the Commission may specify and notify in writing to the Parties. The Parties shall receive a non-confidential copy of such reports.

The trustee's duties and functions as set out above shall not be extended or varied in any way by the Parties, save with the express consent of the Commission. Any instruction or request to the trustee

⁶ For the purpose of this Section, EnBW is deemed to be a party.

from the Parties, which conflicts with the terms of the mandate and duties and functions as set out above, will be considered null and void.

The Parties shall provide the trustee with all such assistance and information, including copies of all relevant documents, as the trustee may reasonably require in carrying out his mandate. The Parties shall make available to the trustee office space as necessary to fulfil his tasks. The Parties shall hold regular meetings with the trustee, according to a timetable agreed between them, in order to provide the trustee, either orally or in document form, with all information necessary for the completion of his task. At the request of the trustee, the Parties shall provide the trustee with access to the Parties' sites.

The trustee is bound to respect the confidentiality of all information provided to him or otherwise obtained by him in the course of the exercise of his mandate. This obligation remains valid even after the expiry of his mandate for as long as the information continues to be commercially sensitive.

The mandate and this undertaking shall be deemed to be terminated if the Parties announce that the operation has been irrevocably abandoned.

Notwithstanding the trustee's overall responsibility to discharge his functions and his position as an independent unrelated third party, the trustee shall have, to the extent possible given the nature of his tasks, due regard to the commercial interests of the Parties, in particular respect the confidentiality of commercially sensitive information, and undertake in the mandate to do so.

[Signed]

EDF

OEW