

***Case No COMP/M.5707 -
TENNET/E.ON***

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

Article 6(1)(b) NON-OPPOSITION
Date: 04/02/2010

***In electronic form on the EUR-Lex website under
document number 32010M5707***



EUROPEAN COMMISSION

Brussels, 4.2.2010

SG-Greffe(2010) D/1369
C(2010)850

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.5707 - TENNET/ E.ON
Notification of 23/12/2009 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 23/12/2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertaking TenneT Holding B.V. ("TenneT", The Netherlands) controlled by the State of The Netherlands, acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Transpower Stromübertragungs GmbH ("TPS", Germany) controlled by E.ON, by way of purchase of shares ("the proposed transaction").

I. THE PARTIES AND THE OPERATION

2. TenneT operates the national Dutch extra-high and high voltage electricity transmission system. TenneT is the only Transmission System Operator ("TSO") in the Netherlands. In addition, TenneT supplies services in support of free-market operation and a sustainable energy supply system. TenneT is not active in the production, generation or supply of electricity as, in fact, it is not allowed to be active in those fields pursuant to the Dutch Electricity Act 1998.
3. The target TPS, a 100% subsidiary of E.ON, is one of the four TSOs in Germany covering an area of approximately 140,000 km² with extra-high voltage lines (380/220 kV) of approximately 10,700 km in length and transformer stations connected thereto.

¹ OJ L 24, 29.1.2004 p. 1.

4. The proposed transaction results from E.ON's commitment vis-à-vis the Commission, inter alia, to separate and subsequently divest its transmission system business, this commitment became binding upon E.ON by the decision of 26 November 2008 based on Article 9 of Council Regulation (EC) No 1/2003.² E.ON has agreed to sell and transfer all of its shares in TPS to TenneT and TenneT has agreed to acquire TPS, subject to the terms of the Sale and Purchase Agreement dated 18 November 2009. The proposed transaction constitutes a concentration within the meaning of Article 3 of the EC Merger Regulation

IV. COMMUNITY DIMENSION

5. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion³ (TenneT – EUR 460 million, TPS – EUR 6385 million). Each of them has a Community-wide turnover in excess of EUR 250 million (TenneT – EUR 460 million, TPS – EUR 6385 million), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

V. COMPETITIVE ASSESSMENT

Relevant product and geographic markets

6. In previous decisions, it has been decided that the operation and management of high-voltage transmission grids constitutes a natural monopoly and no competition takes place at this level⁴. Each high-voltage transmission grid constitutes a separate product market. Transmission through one grid is not substitutable with transmission through another grid.
7. The geographical market for electricity transmission has been defined as being regional, within the limits of the area covered by the respective high-voltage transmission grid. The geographic scope of the transmission grid operated by TenneT can thus be defined as covering the Netherlands as a whole, since TenneT is the only Dutch TSO. For the transmission grid operated by TPS, the geographic scope can be defined as limited to that part of Germany to which the TPS network extends, i.e. the German states of Schleswig Holstein, Bremen, Lower Saxony, Hesse (partly), North Rhine-Westphalia (partly) and Bavaria (except for the South-West).
8. In previous decisions, the Commission has considered the existence of a market relating only to transmission of electricity involving a "cross-border flow" within the meaning of Article 2(1) of Regulation (EC) No. 1228/2003.⁵ A cross-border flow refers to electricity that is transmitted from one Member State to another by means of interconnection. While it is in principle possible for market participants to substitute certain interconnectors when booking interconnector capacity by using others, in particular when they are located on

² Cases COMP/B-1/39.388 – German Electricity Wholesale Market and 39.389 – German Electricity Balancing Market.

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

⁴ COMP/M.4922 – EMCC, para. 12 and COMP/M.5154 – CASC JV, para. 19.

⁵ COMP/M.5154 – CASC JV, para. 21 and COMP/M.5467 – RWE / Essent, para. 182.

the same border, this will usually lead to an increase in the number of interconnectors that are necessary to complete the booking path. Therefore the geographic scope of such an activity will often be limited to the respective interconnector line. In the present case substitution between the interconnectors situated on the border between Germany and the Netherlands cannot be excluded. For the purpose of this decision, however, the geographic market definition for "cross border flow" can be left open as the transaction would not give rise to competition problems under any alternative market definition.

9. In previous decisions, the Commission has also distinguished a market for balancing power.⁸ Balancing power is used to cover the deviations between contracted and actual supply and demand of each player. Balancing services are similar to intra-day trading opportunities at the wholesale market, at which the companies in actual under- or over-supply can trade their surpluses or purchase their extra needs. It has been determined in previous decisions that the market for balancing power is national in scope⁶.

Competitive assessment

10. In accordance with the above market definition for the electricity transmission, no overlap arises in case of a concentration between different TSOs, such as TenneT and TPS.
11. As regards the market relating to cross-border transmission of electricity through interconnectors, only one interconnector, Diele, links the parties' respective grids. TenneT is also a co-owner of the other inter-connectors linking Germany and the Netherlands. As a result of the proposed transaction, the Diele Interconnector will become wholly owned by TenneT. However, as TenneT is a wholly unbundled TSO, it would have no incentive to allocate capacity in a way that discriminates in favour of any other market player, even if it co-owns other interconnectors linking the two Member States. In this respect the proposed transaction might be viewed as pro-competitive, because previously the interconnector was co-owned by a vertically integrated company, E.ON. The situation for the other interconnectors will remain unchanged. As regards the interconnector usage tariffs and congestion management rents, these are subject to the stringent price control by respective regulators, as is the case for national grids, therefore TenneT will have no ability to unilaterally raise usage prices or exploit congestion rents.
12. As regards the balancing markets, no overlap arises as the respective networks are located in different Member States. However, even if in the future the market would be defined as larger than national due to the creation of the internal electricity market, the transaction would not create competition problems. TenneT is not vertically integrated and will have to buy all its requirements for balancing power from third parties. It will have no incentive to purchase power from any particular supplier and in fact will seek the most economic source. Indeed, the operation may create opportunities for other suppliers to replace E.ON.

⁸ COMP/M.3440 – ENI / EDP / GDP, para. 51-55 and COMP/M.5467 – RWE / Essent, para 21.

⁶ COMP/M.4180 – GDF / Suez, para. 737.

VI. CONCLUSION

13. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
(signed)
Neelie KROES
Member of the Commission