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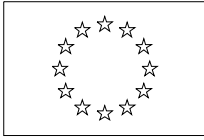
***Case No COMP/M.5711 -
RWE/ ENSYS***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 15/12/2009

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EUROPEAN COMMISSION

Brussels, 15/12/2009

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the Notifying Parties:

Dear Sir/Madam,

**Subject: Case No COMP/M.5711 – RWE/ Ensys
Notification of 18 November 2009 pursuant to Article 4 of Council
Regulation No 139/2004¹**

1. On 18 November 2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the "EC Merger Regulation") by which the undertakings Süwag Energie AG ("Süwag", Germany), controlled by RWE Aktiengesellschaft ("RWE", Germany), Capiton AG ("Capiton", Germany) and Gothaer Versicherungsbank VVaG ("Gothaer", Germany) acquire within the meaning of Article 3(1)(b) of the EC Merger Regulation joint control of the undertaking Ensys AG ("Ensys", Germany) by way of purchase of shares (the "proposed transaction").

I. THE PARTIES

2. RWE is the ultimate parent company of the RWE Group which is primarily active in electricity and natural gas. RWE's activities in the energy sector cover products and services related to electricity and gas at essentially every level of the supply chain, ranging from exploration/generation to the supply of end-consumers. In Germany, RWE has a considerable number of shareholdings in local utilities (*Stadtwerke*) and markets various nation-wide and niche products such as the products of "eprimo" and its product "Pro Klima". RWE has European-wide operations.
3. Süwag is a subsidiary of RWE and is active in the retail supply of electricity and gas to large industrial customers, small and medium-sized businesses and private households.

¹ OJ L 24, 29.1.2004 p. 1.

4. Capiton is a private equity investor primarily investing in medium-sized companies in Germany, Austria and Switzerland while Gothaer is an insurance company mainly active in the areas of life, health and pension insurances.
5. Ensys is a small electricity supplier active in the trading of electricity and retail supply of electricity mainly to industrial customers. The company's activities are almost entirely focused on Germany, only some of the trading activities are related to other European countries. Ensys does not hold participation in local utilities (*Stadtwerke*) and does not have any generation assets and electricity production activity. Currently, Ensys is jointly controlled by Selva Vesta (51%) and KE Power (49%), the latter being a mere investment vehicle controlled jointly by Capiton and Gothaer while Selva Vesta is a mere holding company controlled by Mr Steiof, who does not control any other undertaking.
6. For the purposes of the present decision, RWE/Süwag and Ensys will be designated together as the "Parties" and Süwag, Capiton and Gothaer as the "Notifying Parties".

II. THE OPERATION

7. Süwag intends to acquire a minority shareholding in Ensys, which shall result in a situation of joint control over Ensys by Süwag, Selva Vesta, Capiton and Gothaer. Following the proposed transaction, Süwag will hold 24.9 % of the shares in Ensys, while the shareholdings of Selva Vesta on the one hand and Capiton's and Gothaer's (through KE Power) on the other hand will be diluted on a pro-rata basis.
8. The Notifying Parties will have joint control over Ensys given that strategic business decisions will require affirmative vote of all shareholders represented at the supervisory board.
9. Süwag intends to invest for no more than three years. Under the term sheet provided as an annex to the notification, any loans that will be provided by Süwag are due for repayment by 31 December 2012. Süwag will have the right to have Ensys sold in a regular M & A sales process by 1 January 2013. In order to safeguard its investments in Ensys, Süwag decided to become a shareholder in Ensys, also on a temporary basis.
10. Therefore, the proposed transaction constitutes a concentration within the meaning of Article 3 (1) (b) of the EC Merger Regulation.

III. COMMUNITY DIMENSION

11. The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 billion² and the aggregate Community wide turnover of each of at least two undertakings concerned exceeds EUR 250 million³. The undertakings concerned do not achieve two-thirds of their respective Community-wide turnover within one and the same

² Turnover calculated in accordance with Article 5(1) of the EC Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). RWE's consolidated worldwide turnover in 2008 was EUR 48,950 million; Selva Vesta's worldwide turnover in 2008 was approximately [...]; Capiton AG had in 2008 a worldwide turnover in excess of EUR 250 million; Gothaer achieved a consolidated worldwide turnover of approx. EUR 4,039 million; Ensys had in 2008 a worldwide turnover of EUR 339.23 million.

³ RWE's Community-wide turnover in 2008 was approximately [...]; Selva Vesta's EU-wide turnover in 2008 was approximately [...]; Capiton AG had in 2008 a EU-wide turnover in excess of EUR 250 million; Gothaer achieved a consolidated EU-wide turnover of approx. [...]; Ensys had in 2008 a EU-wide turnover of [...].

Member State. The proposed transaction therefore has a Community dimension pursuant to Article 1(2) of the EC Merger Regulation.

IV. COMPETITIVE ASSESSMENT

12. Both RWE/Süwag and Ensys are active in the electricity markets in Germany and, to a limited extent, in Austria, Belgium and Norway.
13. In previous cases concerning the electricity markets, the Commission has generally distinguished separate markets for (i) generation and wholesale supply, (ii) trading in electricity (possibly as a separate product market⁴ or part of the wholesale market⁵ and – if treated separately from wholesale – possibly further delineated into physical and financial electricity trading⁶), (iii) retail supply to large industrial customers and (iv) retail supply to small customers.
14. The proposed transaction gives rise to a horizontal overlap between RWE/Süwag's and Ensys' activities in the retail supply and trading of electricity. These markets will be analysed below.

A. GENERATION AND WHOLESALE SUPPLY OF ELECTRICITY IN GERMANY

1. Product market definition

15. In line with the Commission's decision making practice⁷, the Notifying Parties submit that the market for generation and wholesale supply of electricity comprises an upstream supply of electricity, mainly generation, and imports of electricity for further resale.
16. The market investigation has not contradicted this conclusion.
17. For these reasons, the Commission concludes for the purposes of the present decision that the market for the generation and wholesale of electricity in Germany comprises generation and imports of electricity for further resale.

2. Geographic market definition

18. The Commission has found in its most recent decisions that the electricity wholesale supply market with regard to Germany is national in scope⁸. In addition, in the DG Competition Report on the Energy Sector Inquiry⁹ all European electricity wholesale markets were considered to be national in scope (except Denmark and Italy).
19. The Notifying Parties do not contest the national character of this market.
20. The market investigation has not put in question such a geographic delineation.

⁴ See case No IV/JV.28 - *Sydkraft/HEW/Hansa Energy Trading*, para 20.

⁵ See case COMP/M.5467 – *RWE/Essent*, para 294; case COMP/M.4180 – *Gaz de France/Suez*, para. 674; case No. COMP/M.3696 – *E.ON/MOL*, para 224, COMP/M.5549 – *EDF/Segebel*.

⁶ See case No. COMP/M. 3268 – *Sydkraft/Graininge*, para 63-66.

⁷ COMP/M.5467 - *RWE/Essent*, para 231-232.

⁸ COMP/M.5467 - *RWE/Essent*, para 235-236.

⁹ DG Competition Report on the Energy Sector Inquiry (January 10, 2007), SEC (2006) 1724, para 402.

21. Consequently, for the purpose of this decision, the Commission will consider the market of generation and wholesale of electricity as national in scope.

3. *Competitive assessment*

a) **Horizontal overlaps**

22. Ensys has no generation assets and no electricity production activities in Germany, consequently there is no horizontal overlap between the Parties' activities.

b) **Vertical relationships**

23. RWE's wholesale activity in electricity is in a vertical relationship with Ensys's activity in retail supply.

24. In generation/wholesale supply, based on the installed capacity, RWE has a [20-30] % market share, but this amounts to [30-40] % when considering the actual production. In the retail supply to large customers, Ensys's market share is [0-5] %. In the retail supply to small customers, Ensys's (nation-wide) market share is close to [0-5] % (approximately [...] GWh, amounting to [0-5] %). In electricity trading, Ensys's market share in 2008 was [0-5] %.

25. The Notifying Parties submit that, given that the Commission cleared the RWE/Essent concentration¹⁰ where a similar vertical relationship existed between RWE and Essent and where Essent had almost three times the market share of Ensys in the retail supply of electricity to large customers (precisely [0-5] %¹¹) and a several times larger market share in the retail supply to small customers (namely [0-5] %¹²), the same reasoning should apply *a fortiori* in the case at hand.

26. In this respect, it should be noted that indeed Ensys has no participations in Stadtwerke, which distinguishes the proposed transaction from the RWE/Essent¹³ case. Moreover, the overwhelming majority of the respondents to the market investigation (the Parties' customers and competitors) did not consider that the proposed transaction would change their electricity sourcing possibilities and did not raise any concerns that would result from the vertical relationship between RWE/Süwag and Ensys.

27. In view of Ensys' insignificant market shares on the downstream markets, its absence from the upstream generation market and the results of the market investigation, the Commission concludes that the proposed transaction will not result in foreclosure of the Parties' competitors from supplies or markets and therefore does not raise vertical concerns.

¹⁰ COMP/M.5467 – RWE/Essent of 23 June 2009.

¹¹ COMP/M.5467 – RWE/Essent, para 294.

¹² COMP/M.5467 – RWE/Essent, para 295.

¹³ COMP/M.5467 – RWE/Essent, para 278.

B. ELECTRICITY TRADING IN GERMANY

1. *Product market definition*

28. In previous decisions, the Commission has found that there is a separate electricity trading market¹⁴ and it may also be possible to distinguish a product market for financial trading from physical trading of electricity¹⁵. In two more recent decisions, the Commission concluded that the electricity trading market could as well be part of the wholesale electricity market¹⁶.
29. However, the Notifying Parties submit that in a German context the Commission does not need to reach a conclusion on this point since the proposed transaction would not raise competition concerns irrespective of whether the Commission found the electricity trading market to be part of the broader wholesale market or analyzed as a separate market(s).
30. Indeed, for the purposes of the present decision, the precise product market definition can be left open, since the proposed transaction will not lead to competition concerns under any alternative product market definition.

2. *Geographic market definition*

31. Assuming that electricity trading is part of the wholesale market, the relevant product market would be national in scope (see above). In case a separate product market for financial electricity trading is considered, the Commission left open whether such a market should be considered as EEA-wide in scope¹⁷. The Commission considered that a market for physical trading of electricity, if treated separately, should be nation-wide in scope.
32. The Notifying Parties submit that the market for physical trading, if a separate market, should be regarded as national in scope. With regard to financial trading, it is submitted that such a market would be larger than national, possibly EEA-wide.
33. In the present case, the geographic market definition with regard to electricity trading can be left open since the proposed transaction does not raise competition concerns under any possible geographic market definition.

3. *Competitive assessment*

a) *Horizontal overlaps*

34. The proposed transaction gives rise to a horizontal overlap between RWE/Süwag's and Ensys' activities in the trading of electricity.
35. In electricity trading the aggregated market share of RWE/Süwag and Ensys would be [10-20] %, with an increment of [0-5] %. If electricity trading were to be delineated further, RWE/Süwag and Ensys would have a combined market share of less than 15% in financial

¹⁴ COMP/JV.28 - *Sydkraft/HEW/Hansa Energy Trading*, para 20.

¹⁵ COMP/M.3268 - *Sydkraft/Granninge*, para 65; COMP/M.4180 – *Gaz de France/Suez*, para 677.

¹⁶ COMP/M.5224 – *EDF/British Energy* and COMP/M.5549 – *EDF/Segebel*, para 21 .

¹⁷ COMP/M.3268 – *Sydkraft/Granninge*.

trading (either in Germany or in the EEA), and [5-10]% in physical trading in Germany. Given the very limited increase in market share brought about by the proposed transaction and considering that there are many other players¹⁸ on the trading market in Germany, the proposed transaction does not raise concerns that it would lead to an impediment of effective competition with regard to electricity trading.

b) Vertical relationships

36. RWE/Süwag's wholesale activity in electricity is in a vertical relationship with Ensys's activity in trading of electricity.
37. There is a supplier/customer relationship between RWE/Süwag and Ensys. In 2008, RWE/Süwag accounted for approx. [20-30] % of Ensys' total electricity sourcing. As described above, Ensys has a very limited presence in this segment of the market ([0-5] %). The market investigation did not raise any concerns that would result from the vertical relationship between RWE/Süwag and Ensys with regard to Ensys' trading activities.
38. Therefore, and especially in the light of Ensys' insignificant market shares in the trading of electricity and the results of the market investigation, the proposed transaction does not raise any vertical concerns.

C. RETAIL SUPPLY OF ELECTRICITY IN GERMANY

1. Product market definition

39. As regards the retail supply of electricity, this market comprises sales of electricity to final consumers. In its recent decisions in a German context, the Commission further distinguished the market for retail supply to (i) large/industrial (load-measured) customers and (ii) household/small commercial, agricultural (non-load measured) customers¹⁹.
40. The Notifying Parties submit that the Commission should define the following electricity retail product market for the purpose of the proposed transaction: retail supply of large/industrial (load measured) customers (*Stromgroßkundenmarkt*) and retail supply of household/small commercial/agricultural (non load-measured) customers (*Stromkleinkundenmarkt*).
41. The market investigation has not put into question such a product market definition.
42. Therefore, the Commission considers in the context of the assessment of the proposed transaction that the relevant markets for retail supply of electricity should be regarded as: (i) retail supply of electricity to large/industrial (load-measured) customers and (ii) retail supply of electricity to household/small commercial, agricultural (non-load measured) customers.

2. Geographic market definition

43. According to the Commission's decision making practice, the markets for retail supply of electricity are national in scope provided that they are fully liberalised²⁰. Therefore, the

¹⁸ By way of example, in 2009, EEX had 188 trading participants, out of which 99 were active on the spot markets, 140 were active as regards power derivatives and 138 were active on the derivatives markets.

¹⁹ COMP/M.5496 - *Vattenfall/Nuon Energy*, para 14 or COMP/M.5467 – *RWE/Essent*, para 282.

²⁰ COMP/M.5224 – *EDF/British Energy* or COMP/M.4180 – *Gaz de France/Suez*.

geographic market definition for the supply of electricity to large customers in Germany is national in scope²¹. The geographical scope of the market for retail supply of electricity to small customers may be narrower than national in scope, as the existence of local markets corresponding to each DSO area was not excluded in the recent past²².

44. The Notifying Parties submit that the market for retail supply of electricity to small customers should be regarded as national in scope.
45. While the majority of the customers replying to the market investigation carried out by the Commission in the present case considered that retail supply of electricity to household/small commercial, agricultural (non-load measured) customers should be national in scope, the competitors' answers within the same market investigation were more nuanced.
46. However, for the purposes of the present decision this question can be left open since under any alternative geographic market definition the proposed transaction does not raise competition concerns.

3. *Competitive assessment*

a) *Horizontal overlaps*

47. The proposed transaction gives rise to a horizontal overlaps between RWE/Süwag's and Ensys' activities in the retail supply of electricity.

(i) Retail supply of electricity to large customers in Germany

48. In the retail supply of electricity to large customers, the aggregated market share of RWE/Süwag and Ensys would amount to [10-20] %, with an increment of [0-5] % at national level. The Parties' most important competitors are E.ON ([10-20]%) and EnBW ([10-20] %) while other smaller competitors are also active in the market.
49. Furthermore, the Notifying Parties submit that in the RWE/Essent case²³ the Commission concluded that an increase of RWE's market share in the retail supply of electricity to large customers by [0-5] % would not raise competition concerns²⁴ and therefore the same reasoning should apply to the proposed transaction. The increase of [0-5] % was due to the supply activities of Essent's subsidiaries²⁵, KOM-Strom, swb and SW Bielefeld (entities all divested following the RWE/Essent transaction). The market investigation confirmed that the proposed transaction does not modify the competitive conditions on the market for retail supply of electricity to large customers in Germany to any appreciable degree.
50. It follows that the proposed transaction does not raise any competition concerns with regard to retail supply of electricity to large customers in Germany.

²¹ COMP/M.5467 – *RWE/Essent*, para 284.

²² COMP/M.5496 - *Vattenfal-Nuon* - para 39, 40 and COMP/M.5467 - *RWE/Essent*, para 294.

²³ COMP/M.5467 – *RWE/Essent*.

²⁴ COMP/M.5467 – *RWE/Essent*, para 294.

²⁵ KOM-Strom has already been sold to DONG Naturgas A/S. This transaction (M.5604 – Dong/Kom-Strom of 15 September 2009) was notified to and cleared by the Commission.

(ii) Retail supply of electricity to small customers

51. In the retail supply of electricity to small customers the aggregated market share of RWE and Ensys (nation-wide) would amount to [10-20] % with an increment slightly above [0-5] % ([0-5] %). The Parties' most important competitors are E.ON ([10-20] %) and EnBW ([5-10] %). In addition, some other smaller competitors exist.
52. The Notifying Parties submit for the sake of comparison that the increment in market share brought by Essent in COMP/M.5467 – *RWE/Essent* was [0-5] % in Germany, much higher than Ensys's market share in the proposed transaction.
53. At local level (DSO²⁶ area) in the retail supply of electricity to small customers, the Parties have overlapping activities in some localities.

Table1 Market shares of the Parties in the DSO areas where both Parties have sales to small customers resulting in combined market shares above 5%.

Localities	Number of inhabitants	RWE's estimated market share	Ensys' estimated market share	The Parties' combined market share
Pegau	4.684	[50-60] %	[0-5] %	[50-60] %
Peißen	1.050	[70-80]%	[0-5] %	[70-80] %
Schermbeck	13.714	[60-70]%	[0-5] %	[60-70] %
Drensteinfurt	15.342	[60-70]%	[0-5] %	[60-70] %
Bohmte	13.158	[50-60]%	[0-5] %	[50-60] %
Gerolstein	7.497	[70-80]%	[0-5] %	[70-80] %
Bad Marienberg	5.694	[60-70]%	[0-5] %	[60-70] %

54. As illustrated in the table above (Table 1), the increments brought about by the proposed transaction are negligible in localities where the RWE/Süwag and Ensys are active in the retail supply of electricity to small customers. In addition, given the very low number of inhabitants in these areas and their small geographic scope, they do not form a substantial part of the Common Market²⁷.
55. The Commission's market investigation largely confirmed that Ensys is a very small player in the retail supply of electricity to small customers in Germany.

²⁶ Distribution System Operator.

²⁷ COMP/M.5496 – *Vattenfall/Nuon*, para 42 and footnote 55.

56. In light of the above, the proposed transaction does not raise competition concerns in the Common Market or any substantial part of it as regards the retail supply of electricity to small customers in Germany as a whole or any local (DSO) area.

b) Vertical relationships

57. Taking into account Ensys' insignificant market shares in the retail supply of electricity to both large and small customers, the proposed transaction does not raise vertical concerns.

V. CONCLUSION

58. For the reasons set out above, 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 the EC Merger Regulation.

For the Commission,
(signed)
Neelie Kroes
Member of the Commission