Opinion of the Advisory Committee on Concentrations given at its 137th meeting on 1 March 2006 concerning a draft decision relating to Case COMP/M.3868 — DONG/Elsam/Energy E2

Rapporteur: Hungary

(2007/C 115/05)

1. The Advisory Committee agrees with the Commission that the notified operation constitutes a concentration within the meaning of Article 3(1)(b) of Council Regulation (EC) No 139/2004 (1) and that it has a Community dimension.

2. The Advisory Committee agrees with the Commission that for the purposes of assessing the present operation, the relevant product markets are:

   in the natural gas sector:
   a) the market for storage or alternatively the market for flexibility of natural gas;
   b) the wholesale market of natural gas;
   c) the market for the supply of natural gas to central combined heat and power plants (CHPs);
   d) the market or markets for the supply of natural gas to large industrial customers and to decentralized CHPs;
   e) the market or markets for the supply of natural gas to non-metered small business customers and to households;

   in the electricity sector:
   f) the wholesale market of electricity (irrespective of whether it includes or not bilateral wholesales and ancillary services, constituting possibly separate markets),
   g) the market for financial derivatives of electricity (irrespective of whether it includes or not CfDs constituting a possibly separate market),
   h) the retail market for electricity sales to metered (business) customers,
   i) the retail market for electricity sales to non-metered (predominantly household) customers;

   for other markets:
   j) the market for district heating,
   k) the market for fly ash production,
   l) the market for trading of CO₂ emission rights.

3. The Advisory Committee agrees with the Commission that for the purposes of assessing the present operation, the relevant geographic markets are:

   in the natural gas sector:
   a) the market for storage, or alternatively the Danish market for flexibility of natural gas, for Denmark is Danish;
   b) the market for storage or alternatively the Swedish market for flexibility of natural gas for Sweden is Swedish or alternatively Swedish-Danish in scope;
   c) the wholesale market for natural gas for Denmark is Danish in scope;
   d) the wholesale market for natural gas for Sweden is Swedish or alternatively Swedish-Danish in scope;

e) the market for the supply of natural gas to Danish central CHPs is Danish;

f) the market for the supply of natural gas to Swedish central CHPs is Swedish or alternatively Swedish-Danish in scope;

g) the market or markets for the supply of natural gas to large industrial customers and to decentralized CHPs is Danish in scope;

h) the market or markets for the supply of natural gas to small business customers and to households is Danes-national or Danish-regional in scope;

in the electricity sector:

i) the wholesale market of electricity is East Danish and West Danish or wider; if ancillary services constitute one or more relevant markets then the geographic scope of such market(s) is East Danish and West Danish;

j) the market for financial derivatives of electricity encompasses the Nord Pool area if excluding CfDs; if CfDs constitute a separate market then the relevant markets are the individual NordPool areas, i.e. East Danish and West Danish;

k) the retail market for electricity sales to metered (business) customers is Danish in scope;

l) the retail market for electricity sales to non-metered (predominantly household) customers is Danish-national or Danish-regional in scope;

for other markets:

m) the market for district heating is local;

n) the scope of the geographic market for fly ash production can be left open;

o) the market for CO₂ trading is EU-wide.

4. The Advisory Committee agrees with the Commission that DONG has a dominant position:

in the natural gas sector:

a) on the market for gas storage or gas flexibility for Denmark;

b) on the wholesale market of natural gas for Denmark;

c) on the market or markets for the supply of natural gas to large industrial customers and decentralized CHPs in Denmark;

d) on the market or markets for the supply of natural gas to small business customers and/or households on two of the five Danish regional areas (single dominance) or alternatively on a national market with HNG/MN? (joint dominance),

e) and that the question for the markets for gas storage or gas flexibility and gas wholesale for Sweden can remain open as any commitments which are sufficient to remedy the competition concerns on the respective markets for Denmark also solve such problems on the markets for Sweden.

5. The Advisory Committee agrees with the Commission that the transaction will give DONG the ability and incentive on the Danish gas storage or gas flexibility market to raise rivals’ costs of storage post merger, increase storage tariffs in Denmark and to use the central CHP plants owned by Elsam and Energi E2 for flexibility purposes and that the transaction would thus strengthen DONG’s dominant position on the possible Danish market for storage or on the possible Danish market for storage/flexibility and would lead to a significant impediment to effective competition.
6. The Advisory Committee agrees with the Commission that the transaction will strengthen DONG’s
dominant position on the Danish wholesale market especially through removing significant actual and
potential competitive constraints to DONG and through foreclosure of demand and that this is likely to
lead to a significant impediment to effective competition.

7. The Advisory Committee agrees with the Commission that the concentration does not lead to a signifi-
cant impediment of effective competition on the markets for natural gas supplies to central CHPs either
in Denmark or in Sweden.

8. The Advisory Committee agrees with the Commission that the concentration will lead to a significant
impediment of effective competition on the market or markets of the supply of natural gas to large
industrial customers and decentralised CHPs especially through raising entry barriers and eliminating
potential competition.

9. The Advisory Committee agrees with the Commission that the concentration will significantly impede
competition on the market or markets for the supply of natural gas to households and small business
customers irrespective of whether these markets are defined as regional or as national in particular
through the strengthening of a dominant position.

10. The Advisory Committee agrees with the Commission that the notified concentration does not lead to a
significant impediment of effective competition, in particular as a result of the creation or strengthening
of a dominant position on either any possible affected market for physical electricity or for financial
derivatives of electricity.

11. The Advisory Committee agrees with the Commission that in the absence of competition concerns it is
not necessary to examine further the effect of the concentration on the markets for district heating, fly
ash production and CO2 trading.

12. The majority of the Advisory Committee agrees with the Commission that the commitments submitted
by the parties concerning storage divestiture and the gas release programme are suitable and in combi-
nation with each other sufficient to remove the identified competition problems on the following
markets:

   a) market for gas storage or gas flexibility irrespective of whether only for Denmark or also for
      Sweden;
   b) the wholesale markets of natural gas for Denmark and potentially also for Sweden;
   c) the market or markets for the supply of natural gas to large industrial customers and/or decentralised
      CHPs in Denmark;
   d) the market or markets for supply of natural gas to small business customers and/or households in
      Denmark.

A minority disagrees with point b).

13. The Advisory Committee agrees with the Commission that, subject to full compliance with the commit-
ments offered by the parties the proposed concentration does not significantly impede effective competi-
tion and as a result the proposed concentration can be declared compatible with the common market
and the functioning of the EEA Agreement.

14. The Advisory Committee asks the Commission to take into account all the other points raised during
the discussion.