

Memo

To: The Powernext files
From: Marc Charles, Matthieu Dautriat, Vincent Natier, Jean-Hugues de la Berge
Date: October 11, 2007
Subject: Cooperation with EEX - Accounting and tax consequences of the contemplated reorganizations

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Our References:

1. EXECUTIVE SUMMARY

- **Spot trading cooperation**

This operation should consist in a direct contribution of business from Powernext to a French SE, and a contribution of shares from EEX to SE. Final structure would consist in the SE jointly being held 50/50 by Powernext and EEX.

(i) Accounting treatment

The booking of the contributions at the level of the French SE (NBV or FMV) should be a decision taken by the parties to the agreement under the control of the auditor to the contribution (“commissaire aux apports”). Indeed, the auditor to the contribution has to make sure that the contributed assets are not over-evaluated and corresponds at least to the nominal of the newly issues shares and related contribution premium.

The applicable French accounting rules are not explicit to determine whether the contribution of the Spot trading activity / of the Spot GmbH shares to a French SE should be booked at Net Book Value or Fair Market Value.

The FMV approach would be recommended. However, to date, both decisions would be considered as acceptable, given the lack of conclusions of the French Accounting authorities in this regard.

Therefore, given the nature of the contributed businesses and the uncertainty of the applicable texts, there is a chance that the auditor to the contribution finally considers the NBV solution, should this solution be adopted by the parties.

(ii) Tax treatment

For French and German corporate income tax purposes, these contributions should be tax neutral provided certain conditions are met.

Date: October 11, 2007
Subject: Powernext – accounting and tax issues
Page: 2 of 9

From a German tax standpoint, tax neutrality should be conditioned by a NBV booking. If the condition is not met, it is likely that the operation would be fully taxable.

From a French tax standpoint, the operation could be tax neutral, provided notably:

- that the spot business contributed qualifies as an “autonomous line of business” for French tax purposes;
- and if the received shares are hold by Powernext for a minimal 3 years period

- **Future trading cooperation**

This operation should consist in a direct contribution of the “futures” business of Powernext to EDM, an entity of EEX group running the futures business. The final structure would correspond to EDM held 15/85 respectively by Powernext and EEX. However, we also understand that the French stake in EDM may change further to the initial contribution given adjustment agreement between Powernext and EEX.

- (i) Accounting treatment

The accounting treatment of the operation should depend on the German applicable rules in the accounts of the German entity.

The EDM shares received in exchange for the contribution should be booked at FMV in the Powernext accounts (please see below our analysis).

- (ii) Tax treatment

For corporate income tax purposes, the French tax neutrality of the contribution should be conditioned by a discretionary tax ruling.

Several conditions should be analyzed by the French tax authorities in order to agree on a ruling (please see below for a detailed presentation).

In the case at hand, there may be some difficulties with respect to

- Existence of an autonomous line of business
- Existence of a French Permanent Establishment in the future
- Change of the French stake in EDM

2. DETAILED REVIEW

2.1 Beethoven project on the spot trading activities

We understand that the spot trading activities of EEX and Powernext should be operated by a joint-venture company established in France; Spot Trading SE. Powernext should directly contribute its

business to this SE. EEX should in as first step spin-off its activities and create D Spot GmbH, and then contribute the D Spot GmbH shares to the SE.

2.1.1 Accounting treatment

(a) Booking of the assets and shares at the SE level

In the context of the cooperation between EEX and Powernext, the implementation of the joint-venture company Spot Trading SE between both partners raises some accounting issues as regards the valuation of the assets to be contributed by Powernext and EEX to this NewCo (Net book value vs. Fair market value).

The joint-venture company being a French entity (being a Societas Europaea registered in France), the French accounting principles shall apply to the business contribution from Powernext SA and to the shares contribution from EEX to Spot Trading SE¹.

From a legal standpoint, if the legal regime applicable to corporation split-ups is applied to the contemplated business contribution, article L 236-10 of the French Code of Commerce provides that an auditor to the contribution ("*commissaire aux apports*") shall be appointed.

Basically, the assets contributed shall be booked by the beneficiary according to the value retained in the contribution agreement, which is based on the decision taken by the parties, under the control of the "*commissaire aux apports*".

The values expressed in the agreement (i.e. NBV or FMV) depend on the applicable accounting rules.

In the absence of explicit text, the parties would have to opt between FMV and NBV.

Indeed, from an accounting standpoint, the contemplated business contribution falls under the scope of Règlement CRC 2004-01 relating to the accounting treatment of mergers and similar operations.

As a principle; the booking of the assets contributed, at FMV or at NBV, in the context of a merger or business contribution, depends inter alia of the control situation of the parties at the operation. Basically, assets shall be contributed at NBV if the parties are in a control situation (i.e. one entity controlling the other, or entities controlled by the same entity), whereas operations between independent partners shall be made at FMV.

¹ Avis CU CNC n°2005-C question n°9

Règlement CRC 2004-01 does not specify the accounting treatment in the context of a joint-venture², and there is therefore no official position on the booking of the contributed assets in this context. A working group has been set up at the “*Conseil National de la Comptabilité*” (French National Institute of Accountants) to discuss the issue in 2006. At this stage, the issue has been strongly debated, and no conclusion has been drawn.

Under a conceptual approach, the adoption of the FMV would be recommended. Indeed, in a consolidation approach, the line of business which was fully controlled by a party would only be under joint-control after the contribution. Please note in this regard that according to our experience of the operations performed over the past months, companies are booking contributed assets in this context at FMV.

However, in the lack of conclusions by the French accounting authorities, both NBV and FMV would be acceptable.

Indeed, the parties could argue that, due to the specific character of their business of electricity trading, it might be difficult to recognize a goodwill (“*fonds de commerce*” in the statutory accounts), whose valuation depends on future synergies on a growing but uncertain market. Taking this into account, the companies could take the decision under the control of the “*commissaire aux apports*” to book the business contribution from Powernext to Spot Trading SE and the shares contribution from EEX to Spot trading SE at NBV.

(b) Booking of the SE shares received by Powernext

In application of Article 332-1 of the French chart of accounts (“*plan comptable général*”), the shares received in exchange for a contribution of business shall be equal to the value of the contributed assets as per the contribution agreement.

Therefore, the received SE shares would be booked at FMV or NBV, depending on the valuation of the assets contributed, retained in the contribution agreement.

(c) Applicable consolidation rules

The effective application of the following rules are conditioned by the necessity for the Powernext group to issue consolidated financial statements.

We understand that given the assessment of the assets to be contributed to Spot Trading Se, the stake of the two partners into SE should be 50% / 50%.

Under French GAAP, Spot Trading SE should be considered as being under joint-control as defined by the Règlement CRC 99-07 related to accounting consolidation in the banking sector, provided Powernext remains subject to the

² *Fusions et opérations assimilées*, Ed. Francis Lefebvre / PwC, 2e édition, Question n° 42

application of these banking rules³. This “règlement” specifies the definition of control provided for by Article L 233-16 of the Code de Commerce. From an accounting standpoint, two major requirements must be met to be in a joint-control situation:

- control should be shared between a limited number of shareholders;
- an agreement between shareholders should foresee this joint-control, as well as specify that major decisions as regards the operating of the entity should be agreed in common.

In the case at hand, the bylaws of Spot Trading SE, as well as the shareholder’s agreement between EEX and Powernext clearly state that Spot Trading SE is jointly controlled by EEX and Powernext, and that major decisions are taken in common.

In application of article L 233-18 Code de Commerce, as well as § 110 Règlement CRC 99-07, the financial statements of joint-controlled entities should be consolidated by their shareholders according to the proportional consolidation method.

Basically, this method consists in keeping the corresponding share (i.e. for Powernext 50%) of each accounting item of the consolidated entity in the consolidated accounts.

Even if Powernext is not a listed entity and therefore not subject to the IFRS, please note that the IFRS definition of a joint-control should not lead to discrepancies with the French GAAP definition. The consolidation method to apply is optional under IFRS (IAS 31): it can be the proportional method as defined above under French GAAP, or the equity method (mise en équivalence). Should the “mise en équivalence” be applied, the interest in the jointly controlled entity is initially recorded at cost (i.e. the fair market value at the time of the contribution) and subsequently adjusted.

2.1.2 French tax treatment

In principle, a contribution of business is considered as a sale of assets which involves taxation at CIT standard rate. However, the contribution of the spot trading business from Powernext to Spot Trading SE may be tax neutral, in application of the Article 210 B French tax code (FTC) regime.

The application of this tax neutrality regime on contributions relies on the following requirements:

³ Please note that until now, Powernext was subject to the accounting banking principles since Powernext was mainly held by the Euronext group. Given the anticipated changes in this respect, Powernext could also fall into the scope of the general accounting rules. In any event, the application of these rules would likely lead to a similar outcome.

- the shares received in exchange should be held during at least 3 years;
- the assets contributed should constitute an autonomous line of business (“branche complète d’activité”).

To qualify as an autonomous line of business, a contribution should include all the assets and liabilities necessary to perform the business, so that the activity is autonomous from an internal (notably own customers, staff and equipments) and external (ability to operate the business in the economic environment) standpoint.

The qualification of an autonomous line of business depends on a factual analysis of the business. To our understanding, Powernext is confident in the ability of the Spot Trading business to constitute an autonomous line of business for French tax purposes.

If the above mentioned legal requirements are met, the business contribution made by Powernext would be tax neutral.

Furthermore, please note that if Powernext would sell its shares in Spot trading SE after the 3 years required shareholding period, the long-term tax regime on “*titres de participation*” would apply. In application of this regime, the capital gain realized would be 95% tax exempt, the remaining 5% “*quote-part de frais et charges*” being taxed at the CIT standard rate (i.e. 1,75% effective taxation).

2.1.3 German tax treatment

According to the German tax ruling communicated to us, we understand⁴ that the tax neutrality of the operation is subject to the booking of the contributed shares to the SE at NBV at the level of the SE. Otherwise, the operation would be fully taxable.

2.2 Development agreement for french electricity futures

In addition to Project Beethoven related to the Spot Trading business, EEX and Powernext have agreed to enter in cooperation on the “futures” business. EEX plans to spin-off its Derivatives business in 2008 into a separate subsidiary, EDM GmbH, established in Germany. With effect as of January 1, 2009, Powernext should contribute its “futures” business to EDM, receiving as a consideration 15% of the EDM shares. In a third step, the Powernext’s share in EDM would be adjusted corresponding to the effective volume of business contributed by Powernext for FY 2009 and 2010.

2.2.1 Accounting treatment

- (a) Booking of the contributed assets at EDM level

⁴ This has been confirmed to us by our German correspondent.

French accounting rules on mergers and contributions apply if the beneficiary is an entity established in France⁵. Please note in this regard that the legal requirement to establish a contribution agreement remains.

As EDM is an entity established in Germany, it should be further investigated whether the FMV or the NBV is applied according to the German accounting rules.

(b) Booking of the EDM shares received by Powernext

The EDM shares received by Powernext would be booked at FMV.

In this regard, the “futures” business contribution would be either a contribution of isolate assets, or a contribution of an autonomous line of business from an accounting standpoint (see below the analysis and the consequences of such qualification from a tax standpoint).

If the “futures” assets contributed are isolate, the operation would be considered as an exchange and the FMV would apply according to Article 321-3 of the French chart of accounts, provided that the operation has an economic substance (change in the future cash-flows) and the assets may be assessed properly.

If the “futures” business qualifies as an autonomous line of business, as Powernext would not control the entity benefiting from the contribution, the FMV should apply in reference with the accountings rules of Règlement CRC 2004-01 relating to the accounting treatment of mergers and similar operations.

(c) Applicable consolidation rules

As the Powernext share in EDM is 15%, this minority interest should not be consolidated in the Powernext accounts, except in the case where an agreement between shareholders would give a control of Powernext on EDM (e.g. joint-control or notable influence).

2.3 French tax treatment

The contribution of the “futures” business may be tax neutral, provided that a ruling from the French tax authorities is obtained.

In this regard, please note that there are two different types of ruling. A ruling can indeed be automatic or discretionary.

⁵ Avis CU CNC n°2005-C question n°9

Date: October 11, 2007
Subject: Powernext – accounting and tax issues
Page: 8 of 9

- An automatic ruling would be delivered in application of Article 210 B 3 FTC, subject to the following requirements:
 - The operation is justified by an economic ground;
 - It has not driven by tax considerations;
 - The modalities of the operation should allow the future taxation of the capital gain for which taxation has been postponed.

From a practical standpoint, the third requirement implies that the business contributed remains in a permanent establishment in France of the beneficiary.

Indeed, such a ruling has to be requested as the contribution of the “futures” business should be performed in favor of a foreign entity. In this context, the Article 210 B FTC neutral tax regime can apply if the general conditions are met (autonomous business line and minimal 3 years holding of the shares received), and are subject to a ruling from the tax authorities in application of Article 210 C 2 FTC.

- The above mentioned ruling would be discretionary, if the general conditions for the application of Section 210 B are not met.

In this regard, to our understanding, it is uncertain whether the “futures” business qualifies as an autonomous line of business for French tax purposes, which is a general requirement for the tax neutrality regime.

As specified above, to qualify as an autonomous line of business, a contribution should include all the assets and liabilities necessary to perform the business, so that the activity is autonomous from an internal (notably own customers, staff and equipments) and external (ability to operate the business in the economic environment) standpoint.

Please note in this regard that the mere contribution of customers, without staff and IT to operate the business, should not be sufficient to qualify as a “*branche complète d’activité*”.

Based on our understanding on the facts, the ruling to be obtain by Powernext would be a discretionary ruling. Powernext would indeed request from the French tax authorities to recognize the assets contributed as similar to an “autonomous line of business” for French tax purposes. This would depend on the ability of Powernext to demonstrate that the “futures” business is autonomous or should become autonomous due to the contribution.

Please note in this regard that the delivery of a ruling by the French “Bureau des Agréments” would be subject to various conditions to guarantee the value of EDM such as the following:

- The beneficiary should take the commitment to hold the received assets as long as Powernext holds the EDM shares received in exchange.
- The receiving entity should take the commitment not to distribute the contribution premium, or even to capitalize this premium.

Date: October 11, 2007
Subject: Powernext – accounting and tax issues
Page: 9 of 9

- In this regard, the adjustment clause would be an issue.

The adjustment clause is quite uncommon from a tax perspective and might weak the ruling request.

We understand that, according to the development agreement on French Futures, the Powernext share in EDM should be adjusted based on the business contributed by Powernext in 2009 and 2010.

It remains not settled at this stage how the adjustment should be performed. From a French tax perspective, it would be advisable, in the context of a ruling request related to the “futures business” contribution that the shareholding booked by Powernext remains unchanged.

Indeed, Powernext have to take the commitment to hold the shares received in exchange during a minimal period of 3 years, and the adjustment should take place 2 years after the contribution is performed.

However, if the adjustment in favor of Powernext is made by cancellation of shares hold by EEX in Germany; or in favor of EEX by mean of a capital increase in favor of EDM, the Powernext shareholding would not change.

- As a conclusion, the delivery of a discretionary ruling would depend on the specific conditions of the contribution and on the way the adjustment clause is implemented.

Powernext would have to demonstrate that

- the “futures” business is an autonomous line of business;
- the adjustment clause does not impact the commitment to hold the received shares for during a 3 years minimal period.

Furthermore, the following requirements should be met:

- The operation is justified by an economic ground;
- It has not driven by tax considerations;
- The modalities of the operation should allow the future taxation of the capital gain for which taxation has been postponed (i.e. permanent establishment in France of the beneficiary).

Finally, please note that, based on our experience; a presentation of the reorganizations in the context of the building of a European energy market would help to convince the tax authorities.

In any event, such an approach would be more effective than a pure technical approach.