

***Case No COMP/M.5911 -
TENNET/ ELIA/
GASUNIE/ APX-ENDEX***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 15/09/2010

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EUROPEAN COMMISSION

Brussels, 15.09.2010

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties:

Dear Sir/Madam,

**Subject: Case No COMP/M.5911 - TENNET/ ELIA/ GASUNIE/ APX-ENDEX
Notification of 11 August 2010 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 11 August 2010, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004² (the "Merger Regulation") by which the undertakings TenneT Holding B.V. ("TenneT", the Netherlands), N.V. Nederlandse Gasunie ("Gasunie", the Netherlands) and Elia System Operator N.V./S.A. ("Elia", Belgium) acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control over APX B.V. ("APX", the Netherlands), currently jointly controlled by TenneT and Gasunie, following the acquisition of all shares by APX in Belpex S.A./N.V. ("Belpex", Belgium) currently controlled by Elia by way of purchase of shares (the "proposed transaction") (TenneT, Elia and Gasunie are designated hereinafter as the "notifying parties" or "parties to the proposed transaction").

¹ OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

² OJ L 24, 29.1.2004, p. 1.

I. THE PARTIES

2. TenneT is an entity controlled by the State of the Netherlands (Ministry of Finance). It is primarily active as the transmission system operator ("TSO") of the extra-high and high voltage electricity transmission networks in the Netherlands and one of the four electricity transmission networks in Germany (Transpower).
3. APX facilitates the trading of energy by offering a trading platform and services related to trading of electricity and gas for delivery in the Netherlands and Belgium, and to trading of gas only for delivery in the United Kingdom. In the Netherlands, APX facilitates trading in both short-term (auction, day-ahead/weekend and intra-day) and long-term electricity products (month, quarters, years, etc.). In Belgium, it facilitates only the trading of long-term products.
4. Elia is an investor-owned company. [...]³. Elia is primarily active as the electricity TSO in Belgium, it also operates network assets in the South-Eastern part of Luxembourg as well as related activities, and jointly controls one of the four electricity transmission networks in Germany (50Hertz) together with Industry Funds Management Pty Ltd ("IFM", Australia)⁴.
5. Belpex facilitates trading electricity by offering a trading platform and services facilitating the trading of short-term electricity products in Belgium. Belpex does not facilitate the trading of longer-term electricity products.
6. Gasunie is an entity controlled by the State of the Netherlands (Ministry of Finance). It is the system operator of a large gas network, comprised of pipelines and connected installations in the Netherlands and Northern Germany.

II. THE OPERATION

7. TenneT is currently the majority shareholder of APX with 70.06% of the shares, while Gasunie and Fluxys N.V./S.A. ("Fluxys", the operator of the natural gas transmission system in Belgium) hold the remaining 26.10% and 3.84 %, respectively.
8. Elia is currently the majority shareholder of Belpex holding 60% of its shares. The remaining shares in Belpex are held by TenneT, APX, RTE (Réseau de transport d'électricité, France) and Powernext (France) at 10% each.
9. The proposed transaction involves the acquisition of all shares in Belpex by APX and the simultaneous acquisition of shares in APX by Elia by subscription to a capital increase outside preferential rights in APX and a shareholders` agreement between the (new) shareholders in APX. TenneT, Elia, RTE and Powernext will be offered an exit for cash with respect to their respective participations in Belpex.
10. As a result of the proposed transaction the new shareholder structure of APX/Belpex (the "merged entity") will be as follows: TenneT (56.1%), Gasunie (20.9%), Elia (20%) and Fluxys (3%).

III. CONCENTRATION

³ [...].

⁴ COMP/M.5827 – *Elia/IFM/50Hertz*.

11. Decisions regarding appointments to the merged entity's management board⁵ as well as decisions regarding the general policy and business strategy of the merged entity and its subsidiaries⁶ require [...] of the shares. Decisions that concern the general policy and business strategy include establishing and changing the business plan of the merged entity and any of its subsidiaries⁷. Other decisions of the merged entity and its subsidiaries requiring the same majority and quorum⁸ include (i) [...], (ii) [...], (iii) [...]. Insofar as such decisions may be taken by the Board of Directors or Supervisory Board of APX or its subsidiaries, they must be submitted to the shareholders meeting for prior approval⁹. Such an approval also requires [...].
12. [...], TenneT, Gasunie and Elia (but not Fluxys) can block any decisions regarding appointments in the management board or the general policy and business strategy of the merged entity¹⁰ and thus has the ability of exercising decisive influence over the merged entity and its subsidiaries. TenneT, Gasunie and Elia will therefore control the merged entity within the meaning of Article 3(1)(b) of the Merger Regulation.
13. Following the proposed transaction, APX/Belpex will continue to have an autonomous Management Board, Supervisory Board, Audit Committee and Remuneration Committee. It will have its own presence on the market and the revenue generated from services rendered to its parent companies does not constitute the majority of APX' total revenues. The merged entity will therefore perform all the functions of an autonomous economic entity and constitute a full-function joint venture within the meaning of Article 3(4) of the Merger Regulation.
14. The proposed transaction consists of the acquisition of sole control by APX of Belpex and the simultaneous acquisition of joint control by TenneT, Gasunie and Elia of APX (including Belpex) within the meaning of Article 3(1)(b) of the Merger Regulation, resulting in the creation of a full function joint venture within the meaning of Article 3(4) of the same Regulation.
15. The proposed transaction constitutes thus an operation of concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. EU DIMENSION

16. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million in 2009 (TenneT Group (including APX and Transpower): EUR 6 978.6 million, Elia (including Belpex and 50Hertz): EUR 2 857.2 million and Gasunie: EUR 1 668.7 million). Moreover, the aggregate Union-wide turnover of the undertakings is more than EUR 250 million (TenneT Group (including APX and Transpower): EUR 6 978.6 million, Elia (including Belpex and 50Hertz): EUR 2 857.2

⁵ Article 2.1 of the Shareholders' Agreement.

⁶ Article 2.4 and 4.1 of the Shareholders' Agreement.

⁷ Annexe 4 of the Shareholders' Agreement.

⁸ Article 2.4 and 4.5 of the Shareholders' Agreement.

⁹ Article 2.4, 4.4 and 4.6 of the Shareholders' Agreement.

¹⁰ Paragraph 61 of the Form CO.

million and Gasunie: EUR 1 668.7 million). The notifying parties do not achieve more than two-thirds of their aggregate Union-wide turnover in one and same Member State.

17. It follows that the proposed transaction has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

V. COMPETITIVE ASSESSMENT

Relevant markets

18. APX provides services facilitating the trading of electricity in the Netherlands, the United Kingdom and Belgium, by offering a trading platform and related services. Belpex facilitates electricity trading only in Belgium. Both facilitate trading in short-term electricity contracts, including daily auctions, day-ahead markets, and intra-day markets (Belpex in Belgium and APX in the Netherlands and the UK). APX also facilitates trading in long-term electricity contracts in Belgium, the Netherlands and the UK.
19. In addition, both Belpex and APX are active in ensuring the so-called market coupling¹¹, currently between Belgium, the Netherlands and France, in conjunction with the prospective parents of the merged entity, TenneT and Elia, in their capacity as TSOs in the Netherlands, Belgium, Germany and Luxembourg.
20. For the purpose of the competitive assessment of the possible horizontal overlaps and vertical relationships resulting from the proposed transaction, the following product and geographic markets are subject of analysis.

Relevant product markets

Introduction on markets for electricity

21. The Commission has in the past distinguished separate product markets for the generation and wholesale supply of electricity (i.e., production of electricity in power plants and physical import of electricity through inter-connectors and its sale on the wholesale market to traders, distribution companies or large industrial end-users), transmission of electricity (via high-voltage grids); distribution of electricity (via low-voltage grids), retail supply of electricity (to large and small commercial and industrial users and residential customers) and the provision of balancing power and auxiliary services¹².
22. The notifying parties are not active in any of these well-defined markets except transmission. The parties to the proposed transaction are active on previously undefined product markets, i.e. the facilitation of wholesale electricity trading. These

¹¹ "Market coupling (or implicit auctioning) is both a mechanism for matching orders on power exchanges and an implicit cross-border capacity allocation mechanism" (paragraph 120 of the Form CO). In consequence, "[m]arket coupling calls upon core tasks of both TSOs and power exchanges. In order to have implicit allocation of cross-border capacity as part of electricity spot trading via power exchanges, a collaboration between TSOs and power exchanges is needed" (paragraph 129 of the Form CO).

¹² Case COMP/M.3268 - *Sydkraft/Grainige*, Case COMP/M.3440 - *ENI / EDP / GDP*, Case COMP/M.3696 - *E.ON/MOL*, paragraph 209. M.4180 - *Gaz de France / Suez*, paragraph 683.

potential product markets are related to the wholesale electricity markets but are distinct from them. Indeed, to the extent that the Commission referred to electricity trading in its previous decisions, this was done with reference to the electricity that was traded, not the activity of facilitating this trade.

Market(s) for facilitating electricity trading

23. In previous decisions, the Commission has expressed the view that electricity can be traded in three ways: (i) bilaterally, (ii) brokered, or (iii) via an exchange¹³. The first two trading channels are commonly referred to as "Over-The-Counter" trading ("OTC"), i.e. off-exchange trade directly between two parties (brokered or non-brokered).
24. Electricity trading through brokers or exchanges concerns the trading of standardized products, which can be traded via an electronic platform. The traded products are contracts for electricity. These contracts always make reference to the transmission network on which the electricity must be delivered, when the contract matures and the timeframe during the day (peak hours, base load, off-peak hours, etc.) or week (week day, weekend) the delivery has to take place at maturity.
25. The notifying parties define a possible product market in which power exchanges exercise their activity in a market for facilitating electricity trading, more specifically offering a trading platform and related services to their members¹⁴. The services to facilitate such trading can also include acting as central counterparty and ensuring the settlement of the trades made.
26. The notifying parties argue that electronic trading via an exchange platform is complementary to other forms of (electronic) servicing the wholesale market for electricity¹⁵ and, in particular, OTC trading. In short, the two forms of trading differ in the method by which bids are matched but both result in contracts for delivery of electricity. However, the notifying parties consider that any activities related to facilitating gas trading and facilitating trade in longer-term electricity products fall outside the scope of this market. In their view, only facilitating short-term products (exchange-based trading and the facilitation of day-ahead and intra-day electricity trading) would fall within the relevant product markets.
27. Given that the activity of the notifying parties is related to wholesale electricity markets, it is useful to refer to previous decisions regarding those markets given that it provides indications on the demand side for the trading facilitation services. The Commission has indicated that the market for traded electricity is a market where the electricity bought and sold is not necessarily intended for the final consumer¹⁶.
28. The Commission has not previously dealt with relevant product markets for trading facilitation services¹⁷. However, it is possible to distinguish between various different

¹³ Case COMP/M.5224 – *EDF/British Energy*, paragraph 13.

¹⁴ Paragraph 157 of the Form CO.

¹⁵ Paragraph 153 of the Form CO.

¹⁶ Case COMP/M.4180 – *Gaz de France/Suez*, paragraph 677.

¹⁷ Case COMP/M.4922 – *EMCC*; paragraph 16 and paragraph 153 of the Form CO.

services offered by companies facilitating electricity trading: (i) the facilitation of short-term products trading (including day-ahead auctions, intra-day trading and day-ahead trading), (ii) the facilitation of long-term physically settled contracts and (iii) the facilitation of long-term financially settled contracts.

29. The activities of Belpex and APX are summarised in the table below.

Country	Activity: facilitation of trading of	APX	Belpex
Belgium	Electricity – short-term (day-ahead auctions, intra day and day-ahead)		x
	Electricity – longer-term, physically settled	x	
	Electricity – longer-term, financially settled		
	Gas	x	
Netherlands	Electricity – short-term (day-ahead auctions, intra day and day-ahead)	x	
	Electricity – longer-term (physically settled)	x	
	Electricity – longer-term (financially settled)		
	Gas	x	
UK	Electricity – short-term (day-ahead auctions, intra day and day-ahead)	x	
	Electricity – longer-term, physically settled	x	
	Electricity – longer-term, financially settled		
	Gas	x	

The distinction between short-term and longer-term electricity products

30. The notifying parties argue on the basis of Directive 2004/39/EC¹⁸ adopted on 21 April 2004 (the "MiFID directive"), that a distinction in Belgium should be made between "physical" trading (by which they mean short-term trading: auctions, day-ahead and intra-day trading) and "financial"¹⁹ contracts (by which they mean the trading of long-term, physically as well as financially settled, electricity contracts) and

¹⁸ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1) (the "MiFID Directive").

¹⁹ The notifying parties consider as "financial" electricity all electricity traded by products that fall within the scope of the MiFID directive, regardless as to whether the products are settled financially or physically.

consider their views supported by the Commission's previous decision making practice.

31. The Commission considers that, even though a distinction between facilitating trading of short-term and long-term electricity products can indeed be made, this distinction is not supported by the Commission's previous decision making practice. In the Commission's previous decision making practice, the distinction between financial and physical electricity products was based on the method of settlement of the contracts traded²⁰, but not - as the notifying parties seek to argue - the applicable regulatory regime and, by consequence, short-term and longer-term electricity products.
32. The Commission has suggested before with regard to Belgium that a possible distinction can be drawn between physically settled electricity trading and financially settled electricity trading²¹. However, there is virtually no financial electricity trading in Belgium²². In this situation it could be concluded on the basis of the *Gaz de France/Suez* and *EDF/Segebel* decisions that there are no separate markets for physically and financially settled electricity in Belgium²³.
33. The market inquiry carried out with regard to the proposed transaction does not support either the view according to which the distinction between physical and financial products coincides with the distinction between short-term and longer-term products. While it is correct that short-term products are usually physically settled, longer-term products can be settled both financially and physically²⁴. Instead of coinciding with short-term and longer-term products, the financial or physical nature of the product appears to coincide with the nature of the settlement process²⁵, as argued by the Commission in previous cases²⁶.
34. It equally appeared from the market inquiry that the vast majority of users that responded to the market inquiry considers the distinction between financial and physically settled products to be of little practical value. Significant barriers to switch between these physical (spot) and financial (derivative) products do not appear to exist, while financially and physically settled products are traded primarily for the

²⁰ Case COMP/M.4180 – *Gaz de France/Suez*, paragraph 682 and Case COMP/M.5549 – *EDF/Segebel*, paragraph 21. It is in fact on the same part of the *Gaz de France/Suez* decision that the notifying parties rely to argue that facilitating short-term trading takes place in a different market than that of physically and financially settled trading. This part of the decision does not however concern the market delineation as proposed by the notifying parties and, hence, cannot support their views. In fact, the decision even explicitly qualifies the longer-term products whose trade is facilitated by the notifying parties (ENDEX) as physically settled products.

²¹ Case COMP/M.4180 – *Gaz de France/Suez*, paragraph 677.

²² Case COMP/M.4180 – *Gaz de France/Suez*, paragraph 682.

²³ Case COMP/M.4180 – *Gaz de France/Suez*, paragraph 682 and Case COMP/M.5549 – *EDF/Segebel*, paragraph 21.

²⁴ Comments to question 15 in questionnaire to users. Reply to question 24 in questionnaire to brokers.

²⁵ Comments to question 15 in questionnaire to users. Reply to question 24 in questionnaire to brokers. In fact, even Annex 12 to the Form CO in which the notifying parties explain electricity trading makes a distinction between financially and physically settled products along much the same lines as drawn by the Commission.

²⁶ Case COMP/M.4180 – *Gaz de France/Suez*, paragraph 682.

same purposes²⁷. Though they differ in method of settlement, they both essentially allow purchasers of such contracts to cover their price risks.

35. It follows that the fact that contracts are "financial" or "physical" is not pertinent in the context of the electricity wholesale markets investigated in this case regardless as to whether this distinction is made on the basis of the method of settlement (as in the past considered but rejected by the Commission for Belgium²⁸) or the applicable regulatory regime (as is argued by the notifying parties).
36. Even if the market investigation does not support making distinctions on the basis of whether the products are "financial" or "physical", a distinction between (the facilitation of trading in) short-term products and long-term products can be made. However, the market investigation results were inconclusive as regards the question whether short-term electricity products and longer-term products belong to the same market Respondents are split as to whether short-term electricity products belong to the same market as longer-term products²⁹.

Conclusion on relevant product markets for the facilitation of trading electricity products.

37. In the view of the results of the market investigation carried out by the Commission with regard to the proposed transaction, it can be concluded that a separate market for the provision of facilitation services for electricity trading exists. In its widest scope, it includes short-term (exchange-based, day-ahead and intra-day) as well as longer-term physically and financially settled products, however on its further sub-segmentation the outcome of the market investigation was not conclusive. Accordingly, the Commission has examined the effects of the proposed transaction on the following markets:
 - A market for the provision of facilitation services for electricity trading, including short-term (exchange-based, day-ahead and intra-day) as well as longer-term physically and financially settled products;
 - Separate markets for, on the one hand, the provision of facilitation services for only short-term (exchange based, intra-day and day-ahead) electricity trading and, on the other hand, the provision of facilitation services for longer-term physically and financially settled trading.

All of these markets may include brokers and exchanges, as they all facilitate the trading of electricity.

Electricity transmission market

38. As two of the parent companies (TenneT and Elia) are involved in the transmission of electricity, it is also necessary to determine the appropriate product market definition for this activity.

²⁷ Questions 15.2, 15.6, 15.7 in questionnaire to users.

²⁸ Case COMP/M.4180 – *Gaz de France/Suez*, paragraph 682 and Case COMP/M.5549 – *EDF/Segebel*, paragraph 21.

²⁹ Question 16.7 of questionnaire to users.

39. The Commission has previously considered the relevant product market to be the operation and management of the high voltage grid ("electricity transmission market"), i.e. the point-to-point transmission of electricity on the high voltage grid³⁰. This activity constitutes a natural monopoly in the area it covers³¹ and uses the transmission grid and the interconnectors connected to this voltage level³².
40. The Commission has in the past viewed the electricity transmission market as separate from other electricity markets (generation and wholesale supply, and retail supply) and from the distribution of electricity³³.

Relevant geographic markets

Market(s) for facilitating electricity trading

41. The notifying parties argue that, since electricity trading is inextricably linked to physical availability, production and delivery of the contracted electricity to the grid and involved parties, the geographic scope of any relevant market for the services provided by the power exchanges will coincide with the market for generation and wholesale supply of electricity (including traded electricity)³⁴. According to the notifying parties it therefore follows that the markets for facilitating the trading of electricity would also be national in scope.
42. In the view of the Commission, the trading of electricity involves contracts that specify the network in which the electricity needs to be delivered (see paragraph 24 above). In terms of demand side substitutability, contracts for electricity requiring delivery on different (geographically separate) transmission networks can only be deemed substitutes to the extent they are traded on networks that are part of the same wholesale electricity market. In the past, the Commission has considered that the geographic scope of these markets is national³⁵.
43. Wider geographic markets for the facilitation of electricity trading may only exist if supply side substitutability is easy. However, barriers to supply side substitutability have been identified during the course of the market investigation with regard to the proposed transaction. The mere fact of being present in a neighbouring market for facilitating electricity trading is not considered as an advantage when considering to supply services in a different geographic market (see paragraph 68 below). Indeed, entry in different geographic areas entails overcoming significant regulatory, organisational and economic barriers (see paragraph 67 below)³⁶. It follows that there

³⁰ Case COMP/M.5467 – *RWE/Essent*, paragraph 177 or Case COMP/M.3696 – *E.ON/MOL*, paragraph 212.

³¹ Case COMP/M.3696 – *E.ON/MOL*, paragraph 212.

³² Case COMP/M.5467 – *RWE/Essent*, paragraph 180.

³³ Case COMP/M.5467 – *RWE/Essent*, paragraphs 178 - 179.

³⁴ Paragraph 154 of the Form CO.

³⁵ Case COMP/M.4180 – *Gaz de France / Suez*, paragraphs 726 and 728, Case COMP/M.5549 – *EDF/Segebel*, paragraph 38, Case COMP/M.4370 – *EBN/Cogas Energy*, paragraph 24.

³⁶ See also paragraphs 179 and following of the Form CO.

are no grounds to consider that markets for the facilitating of electricity trading are larger than national.

44. In conclusion, it follows from the above that markets for the facilitation of electricity trading are national in scope and include, on the supply side, all those entities that facilitate trading in electricity products for delivery on a given transmission network and, on the demand side, all those entities interested in trading such contracts.

Electricity transmission market

45. According to the previous decision making practice of the Commission, the geographic scope of the electricity transmission market is confined to each transmission operator's network³⁷ since, as already mentioned in paragraph 39 above, a transmission network constitutes a natural monopoly within the area it covers.

ASSESSMENT

Horizontal relationships

The Netherlands and the UK

46. As only APX is involved in providing services facilitating gas trading, these markets will not be further examined in the present.
47. Markets for the facilitation of electricity trading are national in scope and only APX has activities in the Netherlands and the United Kingdom. Regardless whether separate markets exist for facilitating trading in short- and long-term electricity products, or whether these activities are part of a single market, as currently no horizontal overlaps exist in the UK and the Netherlands the proposed transaction could only affect competition in the UK and the Netherlands if it removes Belpex as a potential entrant from these markets. It is thus necessary to assess the ability and incentive of Belpex to enter these geographic markets in comparison to other entities that are active in facilitating electricity trading.
48. Belpex is an organisation that provides services to facilitate trading of electricity only in Belgium. To a very large extent its activities concern only electricity traded in its daily auctions³⁸. It has never been active in facilitating electricity trading for products outside Belgium or longer-term electricity products nor does it appear to have plans to do so.
49. In any event, even if Belpex would have had plans to enter other geographical markets, a sufficient number of other potential competitors exist that can maintain competitive pressure. The following entities which facilitate the trading of electricity products have either more extensive experience than Belpex and/or have a track record of entering different geographic markets as they already have cross-border operations today:

³⁷ Case COMP/M.5467 – *RWE/Essent*, paragraph 181 or Case COMP/M.3440 - *ENI / EDP / GDP*, paragraph 75.

³⁸ The notifying parties' e-mail of 23/08/2010, in particular Annex 1 to 'table scenario 5' and 'explanatory note on table provided re Hypothetical scenario 5'. as well as notifying parties' e-mail of 02/09/2010.

- EPEX, a company jointly operated by EEX (Germany) and Powernext (France), facilitates short-term electricity products for delivery in Germany, Switzerland and France, and recently started a trading platform in Hungary together with HUPX³⁹. EEX facilitates longer-term products for delivery in France, Germany and Austria.
- Nordpool Spot facilitates trading of short-term electricity products in Norway, Sweden, Denmark, Finland and Estonia. It also recently started offering such services in the UK through an operation called N2EX in collaboration with the NASDAQ OMX group. It also facilitates intra-day electricity trading for products with delivery in Germany⁴⁰.
- Nordpool ASA, part of the NASDAQ OMX group⁴¹, offers longer-term financially settled products for Germany, the Nordic region and the Netherlands⁴² and has announced its intention to do so for the UK⁴³.
- EXAA, the Austrian power exchange, also facilitates trading in short-term electricity contracts for delivery in Hungary, together with PXE⁴⁴.
- Spectron facilitates OTC trades for electricity to be delivered in Austria, Belgium, Czech Republic, Denmark, the Netherlands, France, Germany, the Nordic countries, Switzerland and the UK. At least for Belgium and the Netherlands, its offering includes short-term and longer-term products⁴⁵.
- Powerhouse, an RWE group company, supplies a trading platform for customers who have flexibility in their energy portfolio that includes short-term and longer-term products for physical delivery in the Netherlands and Belgium⁴⁶.
- OMIP operates the MIBEL, a market for longer-term electricity products which offers a trading platform and services related to electricity trading in Portugal and Spain⁴⁷.
- GFI acts as a broker for electricity products for delivery in the UK, Germany, France, the Netherlands, Belgium, Switzerland, Italy, Spain, Czech Republic, Poland, Hungary, Slovakia and Romania. GFI's product offering includes facilitating both short-term and longer-term products for delivery in the Netherlands and Belgium⁴⁸.

³⁹ Paragraph 185 of the Form CO.

⁴⁰ Reply during market investigation to questions 3 and 7 of the questionnaire for brokers.

⁴¹ <http://www.nordpool.com/about/ourhistory/>.

⁴² <http://www.nordpool.com/trading/marketprices/>.

⁴³ <http://www.n2ex.com/aboutn2ex/>.

⁴⁴ Paragraph 182 of the Form CO.

⁴⁵ Reply during the market investigation to questions 3 and 7 of the questionnaire for brokers.

⁴⁶ Reply during the market investigation to questions 3 and 7 of the questionnaire for brokers.

⁴⁷ Reply during the market investigation to the questionnaire to brokers.

⁴⁸ Reply during the market investigation to questions 3 and 7 in the questionnaire to brokers.

- ICAP brokers products for delivery in the Netherlands, Belgium, France, Germany, Poland, Czech Republic, Serbia, Slovak Republic, Austria, Switzerland, Italy and Romania. It facilitates short-term and longer-term electricity products for Belgium and the Netherlands.
50. It should be added that APX supplies to Belpex the trading platform technology⁴⁹ and provides services for its daily operations, including clearing and settlement of transactions concluded on Belpex's day-ahead and continuous market⁵⁰. The role APX plays in important parts of Belpex's operations may provide a strong disincentive for Belpex to enter geographic (as well as product) markets in which APX is already present, further underlining that Belpex is not well placed as an entrant into geographic markets outside Belgium, at least not those where APX is present.
 51. Finally, in the UK, a day-ahead auction is an unfamiliar product and most trading takes place via continuous trading mechanisms⁵¹. This means that Belpex' expertise, which primarily relates to exchange based trading, appears less suited for entering the UK market.
 52. It follows from the above that Belpex is not well placed or, at least, not better placed than other market participants (such as those listed in § 49 above) to enter the Dutch and the UK markets for facilitating electricity trading. These markets will therefore not be analysed further.
 53. Certain respondents in the market inquiry have emphasised factors that may increase barriers for entry in general, and in the Netherlands in particular. Reference was made to the regulatory requirements for setting up power exchanges, the need to collaborate with TSOs when setting up exchange-based trading (in particular in relation to offering market coupling related products - see also in the section discussing vertical links below) and the regulatory requirement that certain day-ahead imported electricity must be traded on APX. These factors may well reduce the effectiveness of entry as a competitive constraint on APX⁵². However, these difficulties do not appear to result from proposed transaction and, thus, are not merger specific.

Belgium: single market for the provision of facilitation services for electricity trading

54. On a market that would comprise the facilitating of short- as well as long-term electricity products, the proposed transaction would give rise to a horizontal overlap in Belgium where both Belpex and APX's subsidiary Endex operate. The market shares of Belpex & APX are presented in table 1 below. Their combined market shares are relatively modest on the widely defined market. Moreover, the products that they offer to the market are not close substitutes as Belpex only facilitates short-term electricity products, whereas APX (Endex) facilitates longer-term products.

49 The Belpex market runs on EuroLight, the trading system of APX (Parties submission of 23 August 2010).

50 Paragraph 45 of the Form CO, Annex 16 page 4.

51 Paragraph 54 of the Form CO.

52 Reply to questions 14, 19, 25(d) and (m), 26 and 27 of the questionnaire to brokers.

Table 1: Volumes (MWh) of (short- and longer-term) contracts bought and sold⁵³

Year	Belpex	Endex	Total parties	OTC traded
2008	[10-20]%	[0-5]%	[10-20]%	[80-90]%
2009	[5-10]%	[5-10]%	[10-20]%	[80-90]%

Source: figures parties and market investigation

55. It follows that the proposed transaction does not raise competition concerns if assessed on the Belgian electricity market including the facilitation of services for electricity trading including both short- and long-term electricity products.

Separate Belgian markets for the facilitation of trading in short-term and long-term electricity products

56. If there are separate markets for the facilitation of trading in short-term and long-term electricity products, there would be no overlap between the notifying parties' activities. Facilitating trade in longer-term electricity products, offered by APX (Endex) in Belgium, would be part of a market different from the one in which Belpex offers its services in Belgium. For both these markets, the only question is whether the proposed transaction would eliminate a potential entrant that, in the absence of the proposed transaction, would have exerted a significant competitive constraint on the other party to the operation.

Belgian market for the facilitation of short-term electricity trading

57. The market shares of Belpex on a market for facilitating short-term electricity products are presented in table 2 below.

Table 2: Volumes (MWh) of short-term contracts bought and sold

Year	Short-term electricity products	
	Belpex	OTC traded
2008	[90-95]%	[5-10]%
2009	[90-95]%	[5-10]%

Source: figures parties and market investigation

58. APX, through Endex, is already established in Belgium, provides services important to the functioning of Belpex (see paragraph 50 above) and has experience with facilitating trade in short-term electricity products acquired in the Netherlands and the UK. In particular, it has experience in exchange-based electricity trading, which

⁵³ The market share figures depicted in table 1, table 2 and table 3 are reconstructed by combining data from the notifying parties on their own activities with data obtained through the market investigation. The notifying parties have not been able to provide market share figures themselves, other than for a market for facilitating trading in short-term electricity products in the Netherlands, for which the Commission also reconstituted market share figures (not reported elsewhere in this decision). The Commission is confident that the present figures reflect the actual market share of the notifying parties as the reconstituted figures for the Netherlands ([70-80]% and [70-80]% for 2008 respectively 2009) correspond closely to those provided by the notifying parties (approximately [70-80]%, paragraph 216 of the Form CO). The respondents to the market investigation also included all brokers identified by the notifying parties in Annex 12 to the Form CO.

currently constitutes a very significant part of short-term electricity trading in Belgium.

59. The Commission nonetheless considers that the removal of APX as a potential entrant to the Belgian market for facilitating trading in short-term products will not give rise to competition concerns for the following reasons.

(a) APX has no incentive to enter the Belgian market

60. Currently, APX is supplying services to Belpex worth EUR [...]⁵⁴ or [...]⁵⁵ of Belpex's revenues from facilitating trading in the short-term market in Belgium. APX also has a stake of 10% in Belpex, currently valued at EUR [...]⁵⁶.
61. If APX were to enter the Belgian market for facilitating the trading of short-term products and compete head-on with Belpex, it would in all probability lose the contract to supply services to Belpex and would run a very high risk of reducing the value of its stake in Belpex.
62. Even if it were to succeed in capturing all the Belpex business its profits would be roughly equivalent to those currently made by Belpex (about EUR 0.6 million). This would be hardly enough to compensate for the loss of income from service provision to Belpex and the significant reduction of the value of its shareholding in Belpex which would likely occur. In addition, this best-case scenario is extremely unlikely. APX could not capture all the Belpex business without this competition lowering the fees per MWh traded that it can charge to customers and, thus, expected revenues. Secondly, respondents to the Commission's market investigation have stated that it is not easy to attract volumes from other trading platforms⁵⁷.
63. It follows that APX has little, if any, incentive to enter the Belgian market for facilitating short-term electricity trading.

(b) The proposed transaction will improve incentives for other parties to enter the Belgian market(s)

64. The proposed transaction will provide an exit for cash from the share capital of Belpex by Powernext and RTE, that each currently holds a share in Belpex of 10%⁵⁸. RTE, via its parent EDF SA, also holds a (modest) interest in Powernext. Powernext is the owner, with EEX, of EPEX. EPEX is a significant supplier of services for facilitating trading in short-term electricity products active in facilitating trading of products for delivery in Germany, France and Switzerland. The possible exit of Powernext and RTE will remove the disincentive for EPEX to enter the Belgian market for facilitating trading of short-term electricity contracts. Indeed, as already set

⁵⁴ Page 13 of the Deloitte valuation report provided in Annex 16 to the Form CO.

⁵⁵ Revenues for services provided by APX to Belpex (Page 13 of the Deloitte valuation report provided in Annex 16 to the Form CO) as a percentage of the amount reported under 'spot market voor elektriciteit' in section 6.1 of Annex 11 to the Form CO.

⁵⁶ 10% of EUR [...], the value of Belpex mentioned in the heads of the agreement (Annex 2 to the Form CO).

⁵⁷ Replies to questions 17, 25(e) and (f) of the questionnaire to brokers.

⁵⁸ Paragraph 63 of the Form CO.

out as regards APX above, minority stakes in Belpex create disincentives to compete with that company. As the cumulative stake of Powernext and RTE is larger than the present stake of APX, the disincentive the proposed transaction will remove may be significant.

(c) APX has not overcome the most important barriers to entry identified

65. In addition to APX's disincentives to enter the market for facilitating short-term electricity trading, it would also face the same entry barriers as other potential entrants.
66. According to the notifying parties⁵⁹ entry barriers include IT systems, the need for extensive knowledge of the market, applicable regulation, good relations with the customer, suitable product offer and a competitive fee structure.
67. The responses to the market investigation highlighted the procedural difficulties in obtaining the necessary licence to operate an exchange-based trading system in Belgium (see also below). Potential exchange operators must deal with the Ministry for Energy, Elia and the CREG. Respondents considered this to be an important entry barrier⁶⁰. Other barriers to entry mentioned include administrative procedures, regulatory barriers, and establishing links with clearing houses, central counterparties, settlement systems, TSO etc⁶¹. On the incentives to enter, several parties mention the need to attract sufficient volumes on a new platform and the difficulty to do so in Belgium as the market(s) for facilitating electricity trading appear(s) saturated.⁶²
68. The respondents to the market investigation did not consider being active in the neighbouring market for facilitating longer-term products in the same geographic area or offering short-term products in another geographic market as elements that would significantly affect ease of entry into the Belgian market for facilitating trading on short-term electricity products⁶³. It follows that the mere fact that APX is active in neighbouring product and geographic markets does not give it an advantage over other companies when considering entering the Belgian market for facilitating trading short-term electricity products.
69. It follows that APX is not particularly well placed, or at least not better placed than any other potential entrants (such as those mentioned in paragraph 49 above), to enter the Belgian market for providing facilitation of services for trading short-term electricity products.

⁵⁹ Paragraph 232 of the Form CO

⁶⁰ Reply during market inquiry to question 14 of the questionnaire for brokers. However, entry as a facilitator of OTC based short-term electricity products is not subject to this regulatory barrier.

⁶¹ Replies to questions 17, 25(e) and 25(f) of the questionnaire for brokers.

⁶² Replies to questions 17, 25(e) and 25(f) of the questionnaire for brokers.

⁶³ Replies to questions 25(e) and (f) of the questionnaire for brokers.

(d) Belgian short-term electricity trading is a market where OTC platform based competition still has to develop

70. The notifying parties consider that the Dutch and Belgian markets for trading short-term electricity are currently at different stages of development⁶⁴. The Dutch market is considered relatively developed and mature (APX started facilitating electricity trading in 1999, in 2009 24.8% of the Dutch electricity consumption was traded on APX's Dutch exchange) in comparison with the Belgian market (Belpex only started facilitating electricity trading on 21 November 2006⁶⁵ and, in 2009 14.4% of Belgian's electricity consumption was facilitated by Belpex). This is further confirmed by the fact that, in several decisions in the past, the Commission also found that the Belgian market(s) for electricity trading are illiquid relative to other EU Member States⁶⁶.
71. It is on this basis that the notifying parties expect only a limited increase in the volumes traded on APX's Dutch exchange⁶⁷. In contrast, the Belpex electricity exchange is relatively young and its short-term market is still developing and the parties expect the volumes traded on Belpex to increase in the near future up to maturity and to reach [...] % of Belgian's electricity consumption by 2013⁶⁸. Such a growth and the projected level of traded volumes relative to national consumption in Belgium for Belpex by 2013 is consistent, in broad terms, with the growth achieved by [...] when the [...] traded volumes only were [...] %⁶⁹ of national electricity consumption, and [...], when it had reached [...] %.
72. Liquidity in a product gives participants the confidence that they can buy and sell at prices that reflect underlying demand and supply conditions. A liquid market or product also provides transparent prices, perceived as reliable.
73. Exchange-based trading results, such as prices, volumes and number of contracts are systematically made public on public websites. In contrast, even if brokers have much information about the trades, positions, etc. of market participants, such information will generally not be public⁷⁰. Consequently, in particular in immature markets like Belgium, electricity exchanges, such as Belpex, are the primary (if not the only) source of reliable price signals.
74. A large majority of respondents have confirmed that, once a reliable source of price signals has been established, the OTC trade in electricity products is facilitated⁷¹. This

⁶⁴ The fact is substantiated by an assessment of the parties with volumes traded on electricity exchanges elsewhere in the EU (Submission by the Parties of 7 September 2010).

⁶⁵ Footnote 74 of the Form CO.

⁶⁶ Case COMP/M.4180 – *Gaz de France / Suez*, paragraph 886-898, Case COMP/M.5549 – *EDF / Segebel*, paragraph 32 and following.

⁶⁷ Paragraph 159 of the Form CO and Deloitte report provided as Annex 16 to the Form CO, page 24.

⁶⁸ Paragraph 160 of the Form CO and ING Report as provided in Annex 16 to the Form CO, page 6.

⁶⁹ Paragraph 159 of the Form CO.

⁷⁰ Companies such as Platts publish certain data derived from the OTC market. However, this information does not provide a systematic objective overview or is free of subjective judgement in all respects.

⁷¹ Question 16.8 of the questionnaire for users.

lends support to the view of the notifying parties⁷² that OTC trade is likely to develop once an exchange-based electricity trading provides sufficient price transparency. This is consistent also with the finding of the Commission that trade facilitated by OTC brokers have acquired a substantial larger market share in the Netherlands⁷³.

75. It follows that the low level of OTC-based competition in Belgium probably reflects the immature stage of development of the Belgian electricity wholesale market. As the market develops further, OTC entry is likely to occur and competitive pressure will develop. The notifying parties expect that [...] traded volumes in Belgium will reach [...] where OTC facilitated short-term electricity trading has developed to a greater degree than in Belgium
76. In conclusion, the Commission considers that the merged entity will face sufficient competitive constraints and that in particular the removal of APX as a potential entrant will have little if any competitive effects on the Belgian electricity market.

(e) The role of regulatory control

77. Belgian power exchanges are regulated by the Royal Decree of 26 October 2005⁷⁴ (hereafter the "Royal Decree"). The Royal Decree seeks to ensure⁷⁵ the trustworthiness, transparency, efficiency and correct functioning of electricity markets⁷⁶.
78. In accordance with the Royal Decree, an electricity exchange in Belgium must obtain (in contrast to OTC traders) a licence from the Ministry of Economy, the granting of which is subject to fulfilling the conditions laid down in Article 4 of the Royal Decree, such as conditions related *inter alia* to its independence from other types of market participants, financial means, type of activities, and professional competence. In addition to the granting of a licence to operate an exchange, the Ministry of Economy has, pursuant to Article 8, certain competences in respect of the functioning of the licensed electricity exchange, in particular, it grants the approval of the exchange's market rules and is able, after consulting the CREG and the CBFA, to impose changes to the market rules. These market rules *inter alia* concern (i) rules of conduct for executing transactions by market participants, and the supervision and sanctioning by the exchange of infringements thereof, (ii) rules to ensure market transparency, (iii) rules to ensure non-discriminatory treatment, including market access for market participants by the exchange and (iv) the treatment of confidential information. Perhaps most important in the present context, the market rules that the Minister for the Economy must approve include the general rules as regards the entry fees and the

⁷² Paragraph 166 and 229 of the Form CO.

⁷³ For the Netherlands, approximately [20-30]% (see footnote 53, table 2), For Belgium, see table 2.

⁷⁴ Koninklijk besluit met betrekking tot de oprichting en de organisatie van een Belgische markt voor de uitwisseling van energieblokken / Arrêté royal relatif à la création et à l'organisation d'un marché belge d'échange de blocs d'énergie) *Belgian State Gazette*, 26 October 2005.

⁷⁵ Verslag aan de Koning/ Rapport au Roi of Royal Decree.

⁷⁶ The law incidentally also recognises (like the argument developed above) that market trading of derivative products (longer-term products as meant in this decision) will only develop once an exchange is sufficiently liquid. Verslag aan de Koning/ Rapport au Roi of Royal Decree.

remuneration and costs for the functioning of the market (Article 8(1)(3) of the Royal Decree).

79. Articles 17 and 18 of the Royal Decree provide that the licensed electricity exchange shall have certain investigative powers to ensure the proper functioning of the exchange and to ensure that transactions are made in accordance with the market rules. The exchange can also impose certain sanctions. The exchange has a duty to report irregularities to the Minister and the CREG. In accordance with Article 19 of the Royal Decree, the CREG supervises the licensed entity and has certain investigative powers.
80. Finally, Elia, [...], retains joint control over APX allowing it to determine APX's business strategy. Moreover, the Shareholders' Agreement provides that [....].
81. It follows that Belpex is a closely regulated and supervised entity, [...]. Consequently, even if the rules that apply to Belgian exchanges do not foresee the regulation of the fees it charges for its services and, thus, it cannot be said that their regulation and supervision preclude the abuse of market power, it appears unlikely that Belpex has the ability or incentive to do so. Moreover, it appears that the market rules that the Minister must approve include the general rules as regards entry fees and the remuneration and costs for the functioning of the market, which suggests that the Minister may be able to exert a certain influence on the fees charged by the merged entity and counter-act abusive price increases. In this context, it is also pertinent that the market test revealed that a large majority of the respondents considered that Belpex and APX are well regulated entities, preventing any negative impact, if any, that the proposed transaction may have on the market⁷⁷.
82. Therefore, it appears that Belpex would not have the ability to raise prices subsequent to the proposed transaction.

Conclusion as to the market for facilitating the trading of short-term electricity contracts

83. It follows that the proposed transaction does not raise competition concerns on a Belgian market for the facilitation of trade in short-term electricity products.

Market for the facilitation of longer-term electricity trading

84. The market shares of APX (Endex) in a market for facilitating [...] electricity products is presented in table 3 below.

⁷⁷ Question 16.9 of the questionnaire for users.

* Clerical mistake: should read [longer-term].

Table 3: Volumes (MWh) of longer-term contracts bought and sold

Year	Longer-term electricity products	
	APX(Endex)	OTC traded
2008	[0-5]%	[95-100]%
2009	[5-10]%	[90-95]%

Source: figures parties and market investigation

85. Contrary to other market participants (see paragraph 49 above) that facilitate trade in longer-term electricity products elsewhere, Belpex has currently no activities in facilitating trade in longer-term electricity products. Consequently, Belpex is not well-placed to start such activities and enter the Belgian market for facilitating trading in longer-term electricity products.
86. The argument developed in paragraph 50 above with regard to disincentives for Belpex to enter the UK and the Netherlands applies *mutatis mutandis* as APX is already present on the Belgian market for the facilitation of longer-term electricity trading.
87. In any event, in view of the market share of APX (Endex) on a market for facilitating longer-term electricity trading, the proposed transaction would not give rise to competition concerns in view of APX (Endex)'s modest market share on such a market.
88. It follows that the proposed transaction does not raise competition concerns on the Belgian market for the facilitation of trade in longer-term electricity products.

Markets for electricity transmission

Horizontal relationships

89. Two of the parents of the post-merger JV, Elia and TenneT operate electricity transmission networks in the Netherlands, Germany and Belgium (including parts of Luxembourg). As each of these constitutes geographically separate markets in which the parents operate regulated monopolies, the operation does not give rise to unilateral effects. Moreover, the size of the APX/Belpex joint-venture is small in terms of turnover in comparison with the other activities of the parents, making it difficult to conceive that it will give rise to incentives for the parents to coordinate their business conduct⁷⁸.
90. The Commission has investigated certain scenarios in which Elia and TenneT might coordinate their conduct to increase their revenues from congestion rents. However, the regulatory framework⁷⁹ foresees that such revenues can only be used for

⁷⁸ Table 1 in paragraph 70 and paragraph 287 of the Form CO.

⁷⁹ Article 6(6) of Council Regulation (EC) No. 1228/2003 of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity. Article 31(6) and (7) of the Dutch Electricity Act (Elektriciteitswet 1998). Article 2, 1, 11° of the Belgian Royal Decree of 8 June 2007 and § 5 III of the German Anreizregulierungs-Verordnung (AregV).

designated purposes. It follows that, regardless of any ability to engage in such conduct, no incentives to do so exist.

Vertical relationship

91. The proposed transaction gives rise to a vertical relationship with regard to market coupling since the latter (through implicit auctioning) is both a mechanism for matching orders on power exchanges and an implicit cross-border capacity allocation mechanism. In consequence, both TSOs and power exchanges are essential for effective market coupling⁸⁰. In order to have implicit allocation of cross-border capacity as part of electricity spot trading via power exchanges, collaboration between TSOs and power exchanges is needed.
92. Certain respondents to the market inquiry carried out with regard to the proposed transaction have pointed to the fact that market coupling requires intensive collaboration with local TSOs and the exchange-based trading systems⁸¹. The market investigation confirmed that the ability to use market coupling mechanisms gives power exchanges a significant advantage over OTC platforms⁸². Respondents also considered that the vertical relationships between exchanges and TSOs may affect the incentives for TSOs to collaborate with third parties.
93. In this context it must be reiterated that prior to the proposed transaction Elia, the Belgian TSO, already controlled Belpex and that TenneT, jointly with Gasunie, controlled APX. Post-transaction, the merged entity will also be jointly controlled by Elia and TenneT. It follows that the proposed transaction does not materially affect the vertical links between exchanges and TSO in this case and thus, that any effect of these links on the conditions to offer exchanged based electricity trading or offer market coupling linked products is not affected by the proposed transaction.

⁸⁰ Paragraph 129 of the Form CO.

⁸¹ Reply during the market investigation to questions 14,19, 25(d) and (m)), 26 and 27 of the questionnaire for brokers.

⁸² Question 16.4 of the questionnaire for users.

VI. CONCLUSION

94. For the above reasons, the European Commission has decided not to oppose the proposed transaction and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

For the Commission,
(Signed)
Algirdas ŠEMETA
Member of the Commission