

Commission Decision

of 11.10.2007

relating to a proceeding pursuant to Article 82 of the EC Treaty

(Case COMP/B-1/37966 – Distrigaz)

(Only the English text is authentic)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty¹, in particular Article 9(1) thereof,

Having regard to the Commission Decisions of 26 February 2004 and 8 May 2006 to initiate proceedings in this case,

Having expressed concerns in the Statement of Objections of 26 February 2004, the preliminary assessment of 30 June 2005 and the supplementary statement of objections of 8 May 2006,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003²,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

WHEREAS:

1. SUBJECT MATTER

- (1) This Decision is addressed to Distrigaz S.A. / Distrigas N.V. (hereafter "Distrigas"). On 26 February 2004 the Commission opened proceedings by adopting a Statement of Objections concerning Distrigas' gas supply contracts with an industrial customer. On 30 June 2005 the Commission adopted a preliminary assessment concerning Distrigas' gas supply contracts with a variety of customers (industrial users, electricity producers, resellers) in Belgium. On 8 May 2006 the Commission adopted a supplementary Statement of Objections focusing on Distrigas' gas supply contracts with industrial users in Belgium. Those three documents are preliminary assessments within the meaning of Article 9(1) of Regulation (EC) No 1/2003.
- (2) According to these preliminary assessments, Distrigas is dominant on the market for the supply of gas to large customers in Belgium (possibly sub-divided into separate markets for different types of customer such as industrial customers, electricity producers and resellers). With very few exceptions, customers only have one gas supplier and therefore competition in the gas supply market only

¹ OJ L 1, 4.1.2003, p.1, as amended by Regulation (EC) No 411/2004 (OJ L 68, 8.3.2004, p.1)

² OJ C 77, 5.4.2007, p.48.

takes place when a contract expires and a new contract is concluded. The preliminary assessments expressed the concern that Distrigas' long-term gas supply contracts would prevent customers from switching supplier and would thereby limit the scope for other gas suppliers to conclude contracts with customers and so foreclose their access to the market.

2. PARTIES

- (3) Distrigas is part of the Suez group, which includes Electrabel, the main electricity generator and supplier in Belgium, and Electrabel Customer Solutions N.V. (hereafter "ECS"), a gas and electricity reseller. Prior to liberalisation of the gas sector as a result of the transposition of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas³, Distrigas had the exclusive right to transport and store gas underground in Belgium and was the only supplier of gas to large customers. Since liberalisation, Distrigas remains the largest gas importer and supplier in Belgium. It is also active on the gas supply markets in France, Germany and the Netherlands, and on the gas transit and Liquefied Natural Gas markets. In 2006 Distrigas had a turnover of € 4 626 million, of which € 3 691 million was in Belgium.
- (4) On 14 November 2006 the Commission approved a merger between Suez and Gaz de France (hereafter "GDF"), subject to a number of conditions⁴. The conditions include the divestment of Distrigas, the divestment of SPE (the second largest electricity producer in Belgium, partly owned by GDF), the relinquishment of control over Fluxys (the owner and operator of the Belgian gas network), and the conclusion of long-term gas supply contracts between Distrigas and GDF/Suez intended to cover part of the needs of Electrabel and ECS. Those remedies are to be applicable on completion of the merger. In the meantime Distrigas is managed independently of the rest of the Suez group under the supervision of a trustee.

3. INVESTIGATED PRACTICES

- (5) The investigated practices are Distrigas' long-term gas supply contracts with large gas customers in Belgium. The concern is that the effect of these long-term contracts could be to foreclose the market to alternative suppliers and therefore hinder the development of competition following liberalisation of the gas sector.

³ OJ L 204, 21.7.1998, p. 1. Directive repealed and replaced by Directive 2003/55/EC from 1 July 2004 (OJ L 176, 15.7.2003, p. 57).

⁴ Commission Decision of 14 November 2006 in case COMP/M.4180 Gaz de France / Suez at: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4180_20061114_20600_fr.pdf

4. PROCEDURAL STEPS UNDER REGULATION NO 17/62⁵ AND REGULATION (EC) NO 1/2003

- (6) On 26 February 2004 the Commission opened proceedings by adopting a Statement of Objections concerning Distrigas' gas supply contracts with an industrial customer. On 30 June 2005 the Commission adopted a preliminary assessment concerning Distrigas' gas supply contracts with a variety of customers (industrial users, electricity producers, resellers) in Belgium. On 8 May 2006 the Commission adopted a supplementary Statement of Objections focusing on Distrigas' gas supply contracts with industrial users in Belgium and opened proceedings concerning all Distrigas' gas supply contracts in Belgium. Those three documents are preliminary assessments within the meaning of Article 9(1) of Regulation (EC) No 1/2003.
- (7) On 1 March 2007 Distrigas submitted a proposal for commitments in response to the preliminary assessments.
- (8) On 5 April 2007 the Commission published a notice⁶ in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the commitments proposed by Distrigas and inviting interested third parties to give their observations on the commitments within one month of publication of the notice.
- (9) On 15 May 2007 the Commission informed Distrigas of the observations received from interested third parties following publication of the notice. On 12 June 2007 Distrigas submitted an amended proposal for commitments.
- (10) On 17 September 2007 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 25 September 2007 the Hearing Officer issued her final report.

5. PRELIMINARY ASSESSMENT

5.1. Relevant markets

Product market

- (11) The relevant product market was considered to be the supply of high-calorific gas (hereafter "H-gas") – in contrast to low-calorific gas (hereafter "L-gas") – to customers connected to the transport network or connected to the distribution network and having an annual gas consumption of over 1 million m³ (possibly sub-divided into separate markets for different types of customer such as industrial customers, electricity producers and resellers). The precise market definition can be left open for the purpose of these proceedings.

Geographic market

⁵ OJ L3, 21.2.1962, p.204/62. Regulation as last amended by Regulation (EC) No 1/2003.

⁶ See footnote 2.

- (12) The relevant geographic market was considered to be Belgium, based on the legal and regulatory regime, the structure of the market and the price differences between Belgium and neighbouring Member States. This market definition is consistent with the Commission's practice in other competition cases⁷.

5.2. Dominant Position

- (13) In the preliminary assessments the Commission took the view that Distrigas was dominant on the relevant market(s), within the meaning of Article 82 of the Treaty. This view was based on (a) Distrigas' very high market share more than five years after liberalisation of the gas sector, (b) the considerable barriers to entry to the relevant market and (c) other factors such as the vertical integration of Distrigas within the Suez group which strengthened Distrigas' position on the market.
- (14) Distrigas' market share on the relevant market (or segment) for industrial customers in 2004 was [55-65]* percent. In addition, ECS, another member of the Suez group, had a market share of [5-15]* percent. So the total market share of Distrigas and connected undertakings was [70-80]* percent. In contrast, the next largest supplier on the relevant market had a market share of [5-15]* percent.
- (15) Barriers to entry identified in the preliminary assessments include:
- the balancing regime on the transport network;
 - the difficulty in using gas in transit to supply customers in Belgium;
 - congestion on the entry points into the Belgian gas transport network;
 - the lack of liquidity on the Zeebrugge Hub which made it an unreliable source of gas for suppliers in Belgium; and
 - the lack of effective competition in the L-gas market, which spilled over to the H-gas market as some customers with multiple sites wanted a single supplier for all their sites in Belgium, some of which were connected to the L-gas network and some to the H-gas network.
- (16) Distrigas' position as a member of the Suez group strengthened its position on the market(s). Other members of the Suez group include: Electrabel, the largest gas consumer in Belgium for its gas-fired electricity generation; and ECS, one of the largest gas resellers operating around Belgium. In addition, many of the local distribution companies have or had structural links with the Suez group. Distrigas is assured of a large and regular off-take of gas to large gas customers in the group, and potential competitors are unlikely to have access to these customers. If the GDF/Suez merger is completed Distrigas will be divested. This

⁷ For example, Gaz de France / Suez - COMP/M.4180.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

will address the concerns about vertical integration strengthening Distrigas' dominant position but will not remove the dominant position itself.

5.3. Practices raising concerns

- (17) In the original Statement of Objections the Commission had considered two issues: foreclosure of the market and use and resale restrictions in Distrigas' contract with a large energy consumer. Before the Statement of Objections was sent Distrigas removed the use and resale restrictions in its contracts with the customer concerned and informally undertook to do the same for other customers. Thereafter the case focused on the foreclosure of the market.
- (18) Distrigas had concluded a portfolio of contracts with customers in the relevant market(s) for varying durations, which require customers to purchase certain volumes of gas from Distrigas. Given the market position of Distrigas, the Commission's concern is that access to customers could be foreclosed due to the combination of two factors: the duration of the contracts and the volumes of gas tied to Distrigas. Alternative suppliers could therefore find it difficult to build up a viable customer base.

Volume tied under Distrigas' contracts

- (19) Distrigas' contracts with customers on the relevant market fell broadly into two categories. A few contracts had explicit clauses requiring the customer to buy all their gas from Distrigas. Most contracts had a fixed annual contractual quantity (ACQ) and an annual minimum quantity (AMQ) [...]*. At the same time Distrigas was obliged to supply under the contract up to a maximum quantity [...]*. In this way, the contract obliged the customer to buy minimum quantities from Distrigas and allowed it to cover all its requirements from Distrigas although it was impossible to know in advance exactly what its annual consumption would be. A few customers had [...]*. Under those contracts no volumes were thus tied.
- (20) With very few exceptions, customers only have one gas supplier. The market investigation suggested that only the very largest customers, with an annual consumption of over 500 GWh of gas, could in practice be supplied by more than one supplier. Customers with an annual consumption below this threshold were therefore considered to be de facto obliged to purchase all their gas from their supplier until they terminated their contract, unless [...]*. Customers with an annual consumption above this threshold were considered obliged to purchase the AMQ from their supplier during the term of the contract.

Duration of Distrigas' contracts

- (21) Gas supply contracts require matching gas transport contracts to allow the supplier to transport the gas to the customer's site. In Belgium the standard duration of a gas transport contract with Fluxys, the network operator, is one year. Shorter contracts are available but are much more expensive than one year contracts. The minimum normal duration for gas supply contracts in Belgium was therefore considered to be one year.
- (22) Some contracts had tacit renewal clauses (whereby the contract was renewed automatically when it terminated, unless one of the parties explicitly terminated

the contract) and others had no specified date of termination (the contract remained in force unless one of the parties explicitly terminated it). Both those types of contract might have been considered to be of indefinite duration. However, when calculating the level of foreclosure in the market in this case a conservative approach was taken. Given that the customers concerned in the relevant market(s) were professional buyers and gas represented a significant part of their overall costs, it was assumed that they would terminate a contract when they were able to do so if it was in their economic interest. Customers were therefore considered to be tied under their contracts until the first opportunity they had to terminate the contract (taking into account the notice periods in the contracts).

Foreclosure effect of Distrigas' contracts

- (23) In the preliminary assessments the Commission calculated the proportion of the relevant market tied to Distrigas by its existing contracts on 1 January 2005 for various dates in the future as shown in the following table.

Period	Proportion of the market already tied to Distrigas under the contracts in force on 1 January 2005
Six months ahead – 1 July 2005	[50-60%]*
One year ahead – 1 January 2006	[35-45%]*
18 months ahead – 1 July 2006	[30-40%]*
Two years ahead – 1 January 2007	[20-30%]*
Three years ahead – 1 January 2008	[20-30%]*

- (24) On that basis, and in view of Distrigas' position on the relevant market, the Commission considered that the contracts concluded by Distrigas significantly foreclosed the relevant market in a way that could constitute an abuse of its dominant position. It should be noted that the table in recital (23) is based on Distrigas' contracts in force on 1 January 2005 and not on Distrigas later contracts. The table therefore does not represent Distrigas' forecast market share at these points in the future, but rather Distrigas' tied market share at the start of 2005.

5.4. Effect on trade between Member States

- (25) In its preliminary assessments the Commission considered that the practices in question could have an effect on trade between Member States given that abuses of a dominant position which have an exclusionary effect tend to give rise to different patterns of trade from those that would have resulted from a market open to competition.

6. COMMITMENTS PROPOSED ON 1 MARCH 2007

- (26) On 1 March 2007 Distrigas proposed commitments within the meaning of Article 9(1) of Regulation (EC) No 1/2003.
- (27) The key elements of the commitments were as follows.

- Distrigas will ensure that for each calendar year a minimum of 65% and on average for all calendar years a minimum of 70% of the gas volumes supplied by itself and connected undertakings to industrial users and electricity producers in Belgium will return to the market, that is to say, alternative suppliers can make a competing offer to the customers concerned.
- The volumes will be calculated on the basis of Distrigas' annual contract quantities (including existing contracts) and Distrigas has some flexibility to account for fluctuations over the years.
- No new contract with industrial users and electricity producers can be longer than five years. Existing customers who have contracts with a duration of five years or more are granted unilateral termination rights with prior notice and without indemnity, which allows Distrigas as a transitional measure to treat them as one year contracts.
- If Distrigas' total sales decrease from their 2007 level, then Distrigas will not be deemed to have violated the commitments if the volume that does not return to the market is not more than a certain fixed volume of gas sales (adjusted during the interim period prior to either the completion of the merger between Suez and Gaz de France or the decision that the merger should not go ahead), which represents less than 20% of the total market(s) concerned.
- Distrigas will not conclude any gas supply agreements with resellers with a duration of over two years.
- Distrigas will not include any use, resale or destination clauses or any tacit renewal clauses in future gas supply agreements and will remove (or not enforce) any such clauses from existing gas supply agreements.
- The following sales are not covered by the commitments: (1) Volumes supplied to industrial customers with a consumption of less than 12 GWh, (2) electricity producers buying gas for a new installation exceeding 10 MW, (3) intra-group sales and sales to Electrabel and Electrabel Customer Solutions as specifically referred to in the remedies in the merger between Suez and Gaz de France (unless such remedies cease to be of effect), (4) Distrigas' trading activities and (5) sales outside Belgium.
- The commitments are to have a duration of four years from the start of 2007. They are to apply as long as Distrigas holds a share of more than 40 percent of the market and at least 20 percent more than the share of its nearest competitor.
- If Distrigas is acquired following divestment from Gaz de France / Suez then the future sales by the purchaser in the relevant market in Belgium will be included in the commitments. The purchaser's existing contracts will be included after a one year transitional period unless the purchaser's existing contracts represent no more than five percent of Distrigas' sales in 2007.

7. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003 AND AMENDED COMMITMENTS

- (28) In response to the publication on 5 April 2007 of a notice according to Article 27(4) of Regulation (EC) No 1/2003, the Commission received eight responses from interested third parties. The respondents generally welcomed the proposed commitments, which they believed would address the concerns expressed by the Commission.
- (29) Additional proposals were made with a view to further improve the effectiveness of the remedies proposed by Distrigas. A number of them (for example, ownership unbundling or improved access to storage and gas) would have been pro-competitive, but were outside the scope of the investigation.
- (30) One respondent was concerned that the commitments could pose problems for customers who would prefer long-term gas supply contracts, for example when they invest in new production capacity but also possibly when gas represents an important share of their production costs.
- (31) Some respondents were concerned that the proposed commitments would not apply to the contracts concluded between Distrigas and Electrabel and ECS, as specified in the GDF/Suez merger, if the merger went ahead and Distrigas was divested. However, these contracts are merger-specific and so it is natural to exclude them from the remedy in this case.
- (32) Some respondents were concerned that the limit in the proposed commitments on the duration of gas supply contracts to resellers to a maximum of two years may hinder the ability of the gas resellers to offer contracts exceeding two years to their customers.
- (33) In response to the comments received pursuant to the Article 27(4) Notice, Distrigas modified its proposed commitments with a revised proposal on 12 June 2007 that clarified the scope of the commitment on resale restrictions in point 2.1.1 (use and resale restrictions and delivery points) and introduced a safeguard in point 3.2 (sales outside Belgium). The aim when changing footnote 2 concerning use restrictions was to clarify that nothing in the commitments offered by Distrigas will oblige it to remove point of delivery clauses from its contracts. The compatibility of such clauses with the competition rules was not examined in the investigation.

8. PROPORTIONALITY OF THE AMENDED COMMITMENTS

- (34) The commitments in their final form are sufficient to address the concerns identified by the Commission in its preliminary assessments without being excessive. The main elements of the commitments are: (a) adequate volumes return to the market every year; (b) the maximum duration of contracts with industrial customers and electricity generators (apart from new installations) is five years; (c) the maximum duration of contracts with gas resellers is two years; (d) no supply contracts contain resale or use restrictions; and (e) the commitments are binding until the end of 2010.

- (35) As regards the obligation to ensure that adequate volumes come back to the market every year, it is recalled that the effect of the commitments is to oblige Distrigas on average not to tie more than 20 percent of the total market or 30 percent of its own sales portfolio more than one year ahead, thresholds that were exceeded by Distrigas at the start of 2005 (see table at recital 23). The effect of the commitments will be to reduce the level of foreclosure of the customers in the market significantly with the exact level depending on how Distrigas' market share develops. Alternative suppliers will have the possibility to build up a significant customer base in Belgium within a reasonable period if they are competitive. However, this commitment still gives Distrigas considerable flexibility in how to contract with its customers⁸. The commitments also allow Distrigas to compete for the customers once existing contracts come to an end, as the commitments merely ensure contestability of the market. Also the commitments provide some flexibility to Distrigas, should it be unable to meet the applicable threshold during a given year. In its preliminary assessment, the Commission was concerned that Distrigas was dominant and that there could be significant anti-competitive effects if a dominant undertaking could tie more than 20 to 30 percent of the total market (depending on Distrigas' actual market share).
- (36) The limit on the maximum duration of contracts with electricity generators and industrial consumers to five years means that Distrigas will not be able to tie any customer for an excessively long period. All relevant customers will return to the market and so are contestable. This will ensure that alternative suppliers will be able to offer to supply even the most attractive customers (for example, the largest with the most stable off-take). Provision of that sort is necessary in the market for the supply of gas as with very few exceptions customers have only one supplier who de facto supplies their total demand (see recital 20), that is to say, once they conclude a supply contract with Distrigas, de facto their entire demand is tied to Distrigas. It should also be noted that at the start of 2005 Distrigas had only one contract that would be affected by the commitments⁹, which ended more than five years later (and which was due to terminate after five years and three months). The main impact of this element of the commitments is therefore to ensure that Distrigas does not modify its pre-commitment behaviour by choosing to tie the most attractive customers and so undermine the effect of the commitments on the market. However, the Commission would be ready to reopen the proceedings, in line with Article 9(2)(a) of Regulation 1/2003, if industrial users could demonstrate that there is good cause, which has not yet been examined, to re-examine the remedy.
- (37) The proposed commitments specifically do not apply to gas supply agreements with customers which are for the supply of gas for new investment in electricity generation capacity of over 10 MW. Such agreements are subject to a case-by-case appreciation taking into account that the investment might not go ahead, unless greater predictability of prices and possibly increased security of supply is

⁸ For example, Distrigas could conclude one year contracts for 40 percent of its sales and two year contracts for 60 percent of its sales; or, as another example, it could conclude one year contracts for 62.5 percent of its sales and five year contracts for 37.5 percent of its sales.

⁹ This does not include, for example, intra-group sales or contracts [...] as such contracts do not contribute to the foreclosure of the markets as explained in recital 19.

guaranteed for the investor. It also needs to be taken into account that Distrigas could sell gas on a long term basis to power plants operated by affiliated companies without limitations in time, which would give these power plants an unwarranted competitive advantage, particularly if Distrigas is affiliated with Electrabel. For industrial users no such exclusion is provided for in the commitments, but given the time taken to build new production capacity and that no energy intensive industrial user came forward to present concrete projects to build new industrial production facilities, it is assumed that no such new capacity will be constructed during the life time of the commitments. If this were to change, the Commission is ready to reopen the proceedings on the grounds that there has been a material change in the facts on which the decision was based, in line with Article 9(2)(a) of Regulation (EC) No 1/2003, provided the industrial user can demonstrate that it needs a gas supply contract with a duration of over five years and it needs to include Distrigas in the procurement process for this contract. In this respect it is recalled that nothing in these commitments would prevent customers from contracting with other gas suppliers in Belgium for periods over five years.

- (38) The limitation of the maximum duration of contracts with gas resellers to two years ensures that large gas companies that would like to supply gas resellers are able to offer to do so every other year and so to build up a significant customer base in Belgium within a reasonable period if they are competitive. Moreover, this commitment is consistent with Distrigas' behaviour before it offered the commitments. Between [...] and the beginning of 2005 Distrigas concluded [...] gas supply contracts with gas resellers, each for a period of two years. The main effect of the commitment is therefore to ensure that Distrigas does not modify its behaviour to cherry pick the most attractive customers with long-term contracts. It is therefore proportionate.
- (39) The commitment to remove or not enforce any use, resale or destination clauses from existing contracts and not to include such provisions in future contracts is consistent with Community competition rules and its main effect is thus to help to clarify the existing legal requirements on Distrigas. That commitment is therefore proportionate.
- (40) The commitments should be made binding on Distrigas for a total period of four years. The gas market in Belgium has been in the process of liberalisation since 2000 when Belgium transposed Directive 98/30/EC. Competition is gradually developing and could take off rapidly under the right conditions. It is therefore important to ensure that alternative suppliers are not faced with barriers to entry due to foreclosure of customers during this period of liberalisation. The period until the end of 2010 is therefore crucial and should be covered by the commitments. If the commitments were binding for a shorter period they would not ensure that alternative suppliers have access to a sufficient number of customers to build up their presence in the market and so help to promote competition.
- (41) The remaining elements of the commitments were mainly ancillary, transitional or specifically related to the GDF/Suez merger¹⁰. These other elements are

¹⁰ See footnote 4.

therefore to be considered as part of the overall package of the remedies. The market test confirmed that the overall balance of the commitments was sufficient to address the Commission's concerns without imposing disproportionate conditions on either Distrigas or third parties.

9. CONCLUSION

- (42) On 12 June 2007 Distrigas confirmed that the commitments, as reproduced in the Annex, are to be construed as commitments within the meaning of Article 9(1) of Regulation (EC) No 1/2003. The commitments are an amended version of the commitments on which interested third parties were invited to comment in the Notice published pursuant to Article 27(4) of Regulation (EC) No 1/2003 and have been offered by Distrigas to meet the concerns expressed to it by the Commission in its preliminary assessments. The Commission can therefore proceed to adopt a Decision pursuant to Article 9 of Regulation (EC) No 1/2003.
- (43) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the preamble to Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.
- (44) In this case, the Commission's concern regarding the practices identified in the preliminary assessment was that Distrigas' gas supply agreements may give rise to foreclosure of the relevant gas supply markets in Belgium. The observations received from third parties following the publication of the notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 were not such as to make the Commission reconsider its concern.
- (45) In its proposed commitments, Distrigas has undertaken to modify its market conduct in a number of ways. The Commission considers that the commitments offered on 12 June 2007 are sufficient to address the concern identified in its preliminary assessments. First, on average a minimum of 70% of the gas volumes supplied by Distrigas and connected undertakings to industrial users and electricity producers in Belgium will return to the market each year. If Distrigas' total sales decrease from their 2007 level, then Distrigas will be able to tie a certain fixed volume of gas sales, which represents less than 20% of the total market concerned. Secondly, contracts with industrial users and electricity producers cannot be longer than five years. Thirdly, Distrigas undertakes not to conclude any gas supply agreements with resellers with a duration of over two years.
- (46) In the light of the commitments offered, the Commission considers that there are no longer grounds for action on its part and that, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.

- (47) This Decision should apply from the date on which it is notified to Distrigas until 31 December 2010. That period is considered to be sufficient for the commitments to have effects on competition in the markets.
- (48) The Commission retains full discretion to investigate and open proceedings under Article 82 of the Treaty as regards practices that are not the subject-matter of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The commitments set out in the Annex shall be binding on Dstrigaz S.A. / Dstrigas N.V.

Article 2

The proceedings in the present case shall be brought to an end.

Article 3

This Decision shall apply until 31 December 2010.

Article 4

This Decision is addressed to:

Dstrigaz S.A. / Dstrigas N.V.
Rue de l'Industrie 10
1000 Brussels
Belgium

Done at Brussels, 11.10.2007

For the Commission
Neelie Kroes
Member of the Commission

DISTRIGAS – COMP / B-1 / 37.966

COMMITMENTS UNDER ARTICLE 9 OF COUNCIL REGULATION N°1/2003

INTRODUCTION

In accordance with Article 9 of Council Regulation N°1/2003 (*Article 9*), Distrigas SA/NV (*Distrigas*) offers the following commitments (*Commitments*) to the European Commission (the *Commission*) provided that the Commission will adopt a decision (*Article 9 Decision*) confirming that the Commitments meet the concerns as expressed by the Commission in its Preliminary Assessment dated 1 July 2005, Statement of Objections dated 27 February 2004 and Supplementary Statement of Objections dated 8 May 2006 in the context of its investigation in Case COMP/B-1/37.966.

Consistent with Article 9, these Commitments may not be interpreted as an acknowledgement by Distrigas that it has infringed competition law. By accepting these Commitments, the Commission confirms that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement under Article 81(1) or 82 EC Treaty.

These Commitments take account of the undertakings contained in the decision of the Commission in case COMP/M.4180 Gaz de France/Suez dated 14 November 2006 pursuant to which (i) the merged Suez/GDF group will sell the participation held by Suez in Distrigas' share capital, (ii) an independent third party trustee has been appointed to monitor the compliance by the merging parties with the abovementioned decision of the Commission (including the management of Distrigas by a hold separate manager) and (iii) prior to the divestiture of its stake in Distrigas, the merged entity will conclude one or more supply contracts with Distrigas, intended to cover part of the needs of Electrabel SA (*Electrabel*) for its gas-fired power plants and part of the needs of Electrabel Customer Solutions SA (*ECS*) to serve its customers (the *Merger Remedies*).

1. DEFINITIONS

For the purpose of these Commitments, the following terms will have the meaning indicated below:

- **Annual Contract Quantity(ies) (ACQ)** means the annualised contractual reference quantity(ies) as set out in Gas Supply Agreements.
- **Annual Total Quantity(ies) (ATQ)** means the total quantity(ies) actually offtaken by a Customer in a contract year under a Gas Supply Agreement.
- **Connected Undertaking** means any company within the Distrigas group of companies as defined in Article 11 of Regulation N°2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.
- **Customer** means any industrial consumer of gas with a consumption in Belgium of more than 12 GWh / year (irrespective of the number of sites of consumption) or Power Producer.

- **Date of Transfer of Distrigas** means the date of the transfer of the ownership of the shares held by Suez in Distrigas' share capital to a purchaser in accordance with the Merger Remedies.
- **Distrigas** means Distrigas SA/NV and any undertaking in which Distrigas holds the rights and / or powers listed in Article 11.2(a) of Regulation N°2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.
- **Effective Date** means the date upon which Distrigas receives formal notification of the Article 9 Decision from the Commission accepting these Commitments.
- **Existing Gas Supply Agreement** means any agreement for the supply of gas between Distrigas and a Customer or a Reseller under which gas is supplied during the calendar year 2007.
- **Gas Supply Agreement** means any agreement for the supply of low calorific and / or high calorific natural gas entered into or to be entered into by Distrigas with either a Customer or a Reseller other than an Intra-Group Agreement.
- **Intra-group Agreement** means any gas supply agreement entered into or to be entered into between Distrigas as seller and a Connected Undertaking as buyer. Gas Supply Agreements under which gas is supplied on 1 March 2007 between Distrigas as seller and Electrabel, ECS and their connected undertakings as buyer will be deemed Intra-Group Agreements.
- **Power Producer** means an entity that purchases gas from Distrigas for the purpose of power generation in Belgium.
- **Relevant Volume** means for any calendar year the aggregate of the Annual Contract Quantities during that calendar year in Gas Supply Agreements with Customers excluding the quantities supplied under gas supply agreements provided for under Paragraphs 3.2, 3.3 and 3.4.
- **Relevant Reference Volume** means [45-55]* TWh being the Relevant Volume for the calendar year 2007. Should the Merger Remedies cease to be of effect as provided for in the Merger Remedies¹¹, the Relevant Reference Volume will be [50-60]* TWh as of the date of such cessation. Should such date of cessation not occur on 1 January, the Relevant Reference Volumes shall be prorated for that calendar year.
- **Reseller** means an entity that purchases gas from Distrigas essentially for the purpose of reselling that gas to end consumers in Belgium. For the avoidance of doubt, any gas sales to a company within a group of companies whereby the gas

¹¹ Last paragraph of page 289 of the decision of the Commission in Case COMP/M.4180, Suez / Gaz de France, dated 14 November 2006: “*si l’Opération [the Suez/GDF merger] est abandonnée, abrogée, non autorisée par une autorité gouvernementale compétente ou n’est pas mise en oeuvre pour quelque raison que ce soit, les Engagements seront automatiquement caducs et n’auront pas à être mis en oeuvre.*”

is transferred within that group before being resold to end consumers in Belgium shall be sales to a Reseller.

- **Tacit Renewal Clause** means any clause providing that a Gas Supply Agreement is automatically renewed for a specific duration at the next contractual termination date unless one of the parties gives prior notice of termination to the other, or any clause providing for a negotiation between a Customer or Reseller and Distrigas prior to the next contractual termination date with the aim of concluding a new Gas Supply Agreement.

2. COMMITMENTS

2.1 Specific clauses

2.1.1 Distrigas undertakes not to include in any new Gas Supply Agreement any clauses whereby the Customer or Reseller is restricted in the use, resale or destination of the gas purchased from Distrigas¹². Distrigas shall take all measures that are within its control to procure that Existing Gas Supply Agreements are amended to remove such clauses and shall not enforce such clauses in any Existing Gas Supply Agreement.

2.1.2 Distrigas undertakes not to include in any new Gas Supply Agreement any Tacit Renewal Clause. Distrigas shall take all measures that are within its control to procure that Existing Gas Supply Agreements are amended to remove such clauses or shall give notice of termination, with effect at the next contractual termination date, for any Existing Gas Supply Agreements from which such clauses are not removed.

2.2 Gas Supply Agreements with Customers

2.2.1 Distrigas undertakes that, under this Paragraph 2.2, a certain volume of gas shall return to the market each calendar year in accordance with the following provisions.

2.2.2 Distrigas undertakes that for each calendar year in which these Commitments are applicable a minimum of 65 % of the Relevant Volume and on average for all the calendar years during which the Commitments apply a minimum of 70 % of the Relevant Volume will be supplied under Gas Supply Agreements with Customers which fall under the following categories:

- agreements with a duration of n years, for which ACQ/n will be taken into account for the calculation of the abovementioned percentages of the Relevant Volume;
and/or
- agreements with a duration of n years, starting or ending in the course of any calendar year, for which ACQ/n will be taken into account pro rata temporis for the respective first and last calendar year of those contracts for the calculation of the abovementioned percentages of the Relevant Volume.

2.2.3 If during any calendar year, the Relevant Volume is below the Relevant Reference Volume, in order to determine whether Distrigas has fulfilled its undertaking under Paragraph 2.2.2, Distrigas shall have the option to replace the expressions “65% of

¹² It being understood that a clause which merely designates the point of delivery of the gas is not in conflict with the obligations under Paragraph 2.1.1 of these Commitments.

the Relevant Volume” and “70% of the Relevant Volume” referred to under Paragraph 2.2.2 with “the Relevant Volume minus [13-18]* TWh” or, as from the earlier of the date at which the Merger Remedies cease to be of effect as provided for under the Merger Remedies or the Date of Transfer of Distrigas, with “the Relevant Volume minus [15-20]* TWh”.

2.2.4 If the sum of the ATQs in Gas Supply Agreements with Customers exceeds the Relevant Volume by more than 10%, then for each Gas Supply Agreement with a Customer where the ATQ exceeds the ACQ by more than 10%, the quantities above such 10% excess shall be added to the ACQ and to the Relevant Volume in applying Paragraph 2.2.2.

2.2.5 Distrigas undertakes not to conclude new Gas Supply Agreements with Customers with a duration of more than 5 years (other than Intra-group Agreements and Gas Supply Agreements for the purpose of the supply of gas to Electrabel’s electricity generation plants as explicitly referred to in section C.II.2 of the Merger Remedies).

2.3 Gas Supply Agreements with Resellers

Distrigas undertakes not to conclude new Gas Supply Agreements with Resellers with a duration of more than two years (other than Intra-group Agreements and Gas Supply Agreements for the purpose of the supply of gas to ECS as explicitly referred to in section C.II.2 of the Merger Remedies). Distrigas confirms that at the Effective Date, it does not have any Gas Supply Agreements with Resellers with an initial duration of more than three years and a remaining duration of more than two years.

2.4 Existing Gas Supply Agreements

For Existing Gas Supply Agreements with a Customer with a duration of five years or more, Distrigas shall grant the Customer a unilateral right to terminate such Gas Supply Agreement without compensation with effect at each anniversary of the starting date of such Gas Supply Agreements upon giving Distrigas six months’ prior notice of termination. For the purpose of the application of Paragraph 2.2, such Existing Gas Supply Agreements shall be deemed to be concluded for one year. Distrigas confirms that at the Effective Date, it does not have any Gas Supply Agreements with a duration of more than five years, other than Existing Gas Supply Agreements referred to under this Paragraph 2.4, without prejudice to the provisions of Paragraphs 3.2, 3.3 and 3.4.

3. DURATION AND SCOPE

3.1 These Commitments will be applicable for a duration of four years as from 1 January 2007.

3.2 These Commitments are not applicable to (i) any gas sales trading activities on the Zeebrugge Hub, or other gas hubs in Belgium or at any other relevant border points in Belgium other than sales to Customers or (ii) sales outside Belgium¹³.

3.3 These Commitments are not applicable to Gas Supply Agreements with Customers to the extent that they require the supply of gas for new investment in power

¹³ It being understood that Distrigas will not actively solicit sales outside Belgium with the intention of circumventing these Commitments.

generation capacity provided that the new investment¹⁴ represents an installed electrical generation capacity of at least 10 MW.

3.4 These Commitments are not applicable to Intra-group Agreements and to Gas Supply Agreements as explicitly referred to in section C.II.2 of the Merger Remedies.

3.5 Should the Merger Remedies cease to be of effect as provided for in the Merger Remedies, for the purpose of the application of Paragraph 2.2:

- gas supply agreements entered into by Connected Undertakings with Customers shall be deemed to be Gas Supply Agreements. For that purpose, the Annual Contract Quantities shall be added to the Relevant Volume; and
- gas supply agreements under which gas is supplied during the calendar year 2007 for which a Connected Undertaking has granted the Customer a right to terminate the agreement, with six months' prior notice and without compensation, with effect at each anniversary of the starting date of such agreement, shall be deemed to be concluded for one year.

3.6 For the purpose of the application of Paragraph 2.2, as from the Date of Transfer of Distrigas:

- new gas supply agreements entered into by Connected Undertakings with Customers after the Date of Transfer of Distrigas shall be deemed to be Gas Supply Agreements. For that purpose, the corresponding Annual Contract Quantities shall be added to the Relevant Volume; and
- existing gas supply agreements entered into by Connected Undertakings with Customers before the Date of Transfer of Distrigas shall be considered to be Gas Supply Agreements 12 months after the Date of Transfer of Distrigas if the sum of the Annual Contract Quantities of such existing Gas Supply Agreements exceeds five per cent of the Relevant Reference Volume and the corresponding Annual Contract Quantities shall be added to the Relevant Volume and to the Relevant Reference Volume. For the purpose of the application of this Paragraph 3.6 second indent, said Gas Supply Agreements pursuant to which the Customer is granted a right to terminate the agreement, with six months' prior notice and without compensation, with effect at each anniversary of the starting date of such agreement, shall be deemed to be concluded for one year.

3.7 These Commitments shall be binding on Distrigas only to the extent that and as long as Distrigas holds a share of more than 40% and at least 20% more than the share of its nearest competitor on the market in Belgium for the supply of natural gas to Customers. For the purpose of the application of this Paragraph 3.7, sales by Connected Undertakings to Customers shall be added to Distrigas' sales and to the size of the market in Belgium but Intra-group Agreements and Gas Supply Agreements as explicitly referred to in section C.II.2 of the Merger Remedies shall not be added to Distrigas' sales or the size of the market in Belgium.

¹⁴ For the purpose of this Paragraph 3.3, investment in new power generation capacity for which commercial operations have started after 1 January 2006, shall be considered to be new investment in power generation capacity.

4. MONITORING PROVISIONS

Distrigas will prepare an annual report on compliance with the Commitments, which it will provide to the Commission by 15 February every year for the previous calendar year. The first such report will be provided on 15 February 2008 for the calendar year 2007 or within one month of the Effective Date whichever is the later.

5. REVIEW MECHANISMS

Pursuant to Article 9.2(a) of Council Regulation (EC) 1/2003, Distrigas may request the Commission to reopen the proceedings with a view to modifying these Commitments where there has been a material change in any of the facts, including the market structure, on which the Commission's decision pursuant to Article 9(1) of that Regulation is based.