***Case No COMP/M.5549 - EDF/ Segebel***

Only the English text is available and authentic.

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

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Article 9 (3)
Date: 12/11/2009

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12/11/2009

C(2009) 8954

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

# COMMISSION DECISION

## of 12.11.2009

## rejecting the request of the competent authorities of Belgium asking for the partial referral of case No COMP/M.5549 - EDF/ Segebel pursuant to Article 9 of Regulation (EC) No 139/2004

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**rejecting the request of the competent authorities of Belgium asking for the partial referral of case No COMP/M.5549 - EDF/ Segebel pursuant to Article 9 of Regulation (EC) No 139/2004**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)[1], and in particular Article 9(3)(a) thereof,

Having regard to the notification made by Electricité de France S.A on 23 September 2009, pursuant to Article 4 of the EC Merger Regulation,

Having regard to the Referral Request of the College of Competition Prosecutors of the Belgian National Competition Authority of 14 October 2009,

WHEREAS:

1. On 23 September 2009, the Commission received a notification of a transaction whereby Electricité de France S.A. ('EDF'), a French company, will acquire exclusive control of Segebel, a Belgian holding company, whose only asset is a 51% stake in SPE S.A (`SPE`) (the 'Proposed Transaction'). SPE is the second

[1] OJ L 24, 29.1.2004, p.1

biggest electricity operator in Belgium, after the incumbent operator GDF Suez (Electrabel).

2. By letter of 14 October 2009, the Belgian authorities, via the head of the prosecuting body of the Belgian National Competition Authority ('the Belgian NCA`), submitted that the Proposed Transaction threatens to significantly affect competition in several Belgian electricity markets, which present all the characteristics of distinct markets in accordance with Article 9(2)(a) of the EC Merger Regulation (the `Referral Request').

3. Therefore, the Belgian NCA requested the Commission to refer partially the Proposed Transaction to the Belgian NCA as far as the Belgian electricity markets are concerned, pursuant to Article 9(3)(b) of the EC Merger Regulation, with a view to assessing it under Belgian competition law.

## I THE PARTIES TO THE CONCENTRATION AND THE OPERATION

4. **EDF** and its subsidiaries are active in the generation and wholesale trading of electricity and in the transmission, distribution and retail supply of electricity, as well as in the provision of other electricity-related services, in France and other countries. EDF is also active, to a lesser extent, in the natural gas retail and wholesale markets.

5. **Segebel** is a holding company whose only asset is a 51% equity interest in SPE. SPE is a Belgian company active in the production of electricity and in the trading and supply of electricity and gas in Belgium. SPE produces electricity through a portfolio of power plants in Flanders and Wallonia, composed of thermal facilities and renewable energy facilities such as hydro and wind. SPE also holds drawing rights in nuclear power plants in Belgium. SPE is currently controlled exclusively by Centrica[2].

6. The Proposed Transaction concerns the acquisition of Centrica's 100% shareholding in Segebel, following which EDF will enjoy the same rights and obligations which Centrica currently has in Segebel. […].

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[2] The acquisition of exclusive control by Centrica over SPE was approved by the European Commission in its decision COMP/M.5324 of 14 January 2009, *Centrica/Segebel*. The remaining 49% of SPE's shares are held by SPE's historical shareholders (Publilec S.C.R.L., SOCOFE S.A.,

7. The Proposed Transaction will thus result in EDF acquiring sole control over SPE. It therefore qualifies as a concentration within the meaning of Article 3(2) of the EC Merger Regulation.

## II COMMUNITY DIMENSION

8. The Proposed Transaction has a Community dimension pursuant to Article 1(2) of the EC Merger Regulation. The parties to the concentration had a combined aggregate worldwide turnover in excess of EUR 5 billion in 2008 and each of the undertakings concerned had a Community-wide turnover in excess of EUR 250 million in 2008. The parties to the concentration do not achieve more than two-thirds of their respective Community-wide turnover in one and the same Member State.

## III PROCEDURE

9. On 23 September 2009, the Proposed Transaction was notified by EDF to the European Commission under Article 4 of the EC Merger Regulation for a decision under Article 6 of the EC Merger Regulation.

10. On 23 October 2009, EDF proposed commitments to divest or procure the divestiture of the assets belonging to one of its two companies currently carrying out Combined Cycle Gas Turbine Plant (hereafter "CCGT") projects in Belgium. In addition, EDF proposed to divest or procure the divestiture of the assets of the other company carrying out the other CCGT project in the event that EDF would not have taken a final investment decision or have taken a negative investment decision by […] for that project in order to address the competition concerns identified by the Commission.

11. On 14 October 2009, pursuant to Article 9(2) (a) of the EC Merger Regulation, the Belgian NCA submitted a request to partially refer the Proposed Transaction to the Belgian NCA, in accordance with the provisions of Article 9(3)(b) of the EC Merger Regulation, with a view to assessing the Proposed Transaction under Belgian competition law, as far as the Belgian electricity markets are concerned.

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VEH C.V.B.A., Dexia Banque S.A., ETHIAS Assurance S.A., PUBLILUM S.A. and ALG S.C.R.L.).

12. On 26 October 2009, EDF, in its capacity as a notifying party, submitted its views on the Referral Request to the Commission services.

13. On 27 October 2009, the Belgian authorities informed the Commission that they exceptionally accept that the present Decision is adopted in the English language.

14. Pursuant to Article 9(3) of the EC Merger Regulation the Commission can refer the whole or part of a case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law where an operation of concentration threatens to affect significantly competition in a market within the relevant Member State which represents all the characteristics of a distinct market.

15. In assessing a request under Article 9(2)(a) of the EC Merger Regulation, the Commission is first required to determine whether there is a distinct market within the given Member State which presents all the characteristics of a distinct market. According to the case-law of the Court of First Instance (`CFI`)[3], the Commission has to evaluate this on the basis of a definition of the market for the relevant product or services and a definition of the geographical reference market. The Commission must then verify whether the transaction at stake threatens to significantly affect competition.

16. The present Decision sets out the arguments put forward in the Referral Request and the views expressed by EDF and then it focuses on the product/service and geographic market segmentations of the markets affected by the Proposed Transaction. A competitive assessment of the Proposed Transaction is carried out with a view to deciding whether it should be partially referred to Belgium for assessment under the Belgian competition law, on the basis of Article 9(3) of the EC Merger Regulation.

17. In the assessment of the Referral Request, all the arguments received from the notifying party, including the notification submitted on 23 September 2009, the Belgian NCA and comments from third parties are considered.

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[3] Joined cases T-346/02 and T-347/02 Cableuropa SA and others

## IV THE REFERRAL REQUEST

18. By a letter dated 14 October 2009 and received on the same day, the Belgian NCA asked for a partial referral of the Proposed Transaction to the Belgian NCA. The Referral Request is limited to the effects of the Proposed Transaction on the Belgian electricity markets. The Belgian NCA submitted that, pursuant to Article 9(2)(a) of the EC Merger Regulation, the Proposed Transaction would significantly affect competition on several Belgian electricity markets which present all the characteristics of a distinct market.

19. The Referral Request identifies the following distinct markets:

(i) the Belgian electricity generation and wholesale market;

(ii) the Belgian electricity trading market;

(iii) the Belgian electricity balancing and ancillary services market;

(iv) the Belgian market for the supply of electricity to large commercial and industrial customers;

(v) the Belgian market for the supply of electricity to small, commercial and industrial customers; and

(vi) the Belgian market for the supply of electricity to households.

20. With regard to the Belgian electricity generation and wholesale market, and the Belgian electricity trading market the Referral Request emphasises that their geographic scope is national.

21. The Belgian NCA states that the Proposed Transaction falls within the ambit of its national merger control laws. The Belgian NCA states that the relevant Belgian law binds the Belgian NCA to automatically approve an operation of concentration where the parties to the concentration control less than 25% of a relevant market. However, after reviewing the Form CO it was considered by the Belgian NCA that EDF and Segebel/SPE control more than 25% of the electricity market, given in particular the fact that on the market for electricity trading they have a combined market share of [20-30]%[4]. It may be added that, according to the Belgian NCA,

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[4] Form CO para 384

the parties to the Proposed Transaction will have a market share of [20-30]% in terms of installed generation capacity by 2014. Therefore, the Belgian NCA considers it necessary that on the basis of its Referral Request the Commission should decide to partially refer the Proposed Transaction.

22. The Belgian NCA considers that the Proposed Transaction threatens to significantly affect competition because of the effects on the relevant markets set out below.

### A. HORIZONTAL UNILATERAL EFFECTS ON THE BELGIAN ELECTRICITY GENERATION AND WHOLESALE MARKET

23. The Belgian NCA considers that EDF would be able to effectively constrain GDF Suez (Electrabel) and SPE without acquiring SPE taking into account the fact that EDF could have a generation portfolio of more than 3 000 MW (i.e. [3.100-3.200] MW) in the near future[5] if its future power plant investment projects in Belgium are included.

24. With regard to the investment projects of EDF, the Belgian NCA considers that it would be economically rational for EDF to cancel them (the two CCGT projects of [1.800-1.900] MW) and that elimination of capacities would result in higher electricity prices in Belgium. Consequently, the continued presence of the two separate companies in the market would lead to higher production capacities than there would be if EDF acquires SPE.

### B. HORIZONTAL UNILATERAL EFFECTS ON THE BELGIAN ELECTRICITY BALANCING AND ANCILLARY SERVICES MARKET

25. The Belgian NCA also considers that the Proposed Transaction threatens to significantly affect the balancing market since competition in Belgium is mostly achieved via CCGTs and as it has been underlined both EDF and SPE plan to build CCGTs in the future. However, as submitted by the Belgian NCA, the Proposed Transaction would prejudice such investment projects and therefore this would also

[5] It comprises 500 MW (175 of monthly capacity and 325 of annual capacity). Moreover, EDF is in a position to use trilateral market coupling to import a significant amount of electricity from France to Belgium (around 200 MW) and finally EDF is planning to invest for approximately [1.800-1.900] MW in CCGT power plants in Belgium which could be operational in [2010-2020].

have significant negative effects on the balancing and ancillary services markets in Belgium.

26. In addition, the Belgian NCA refers to SPE's alleged role as 'price setter' on the intra-day segment, without developing this further.

### C. HORIZONTAL UNILATERAL EFFECTS ON THE BELGIAN ELECTRICITY TRADING MARKET

27. The Belgian NCA considers furthermore that the size of the merged entity will lead to an increasing incentive to withdraw capacity and to the submitting of high purchase orders on the Belgian spot exchange (Belpex) in order to increase the spot exchange prices in Belgium. As further submitted, currently SPE has little incentive for withholding capacity because, as SPE has limited production capacity and thus the benefits for doing so are low. However, according to the Belgian NCA, if EDF acquires SPE, it will have a very high incentive for withholding capacity since it will have low costs and very high benefits for doing so due to the large amount of production capacity post-operation.

### D. COORDINATED EFFECTS ON THE BELGIAN ELECTRICITY GENERATION AND WHOLESALE, AND TRADING MARKETS

28. The Belgian NCA also considers that the Proposed Transaction increases the likelihood that SPE and GDF Suez (Electrabel) would be able to coordinate their behaviour with the aim of selling electricity at increased prices in order to collectively maximise their profits in the long term.

29. In reaching this conclusion the Belgian NCA assesses the possibility of reaching terms of coordination and whether the coordination is likely to be sustainable.

*Terms of coordination*

30. The Belgian NCA stresses the fact that the Proposed Transaction will reduce the number of players in most of the Belgian electricity markets; that the electricity market consists of a homogeneous product; and that important capacity constraints are facilitating factors in establishing coordination.

31. In addition to these elements, the Belgian NCA submits that the Proposed Transaction would create a `structural link` between the two "incumbents" Belgian

electricity producers (GDF Suez (Electrabel) and SPE), given the shareholding of the French State in both companies. Accordingly, the Belgian NCA submits that this would increase the likelihood of mutual coordination, or strengthen it. It is explained that such mutual coordination would take place at both operational and strategic levels.

32. As submitted by the Belgian NCA, the French State's shareholdings in both companies (EDF and GDF Suez (Electrabel)) are managed by the French Government's Shareholding Agency (*Agence des Participations de l'Etat*, 'APE'). The APE takes care of the French State's assets and maximises their value. As the French State is the largest (or even the controlling) shareholder of both EDF and GDF Suez (Electrabel), the Belgian NCA submits that it would be rational for the APE to maximise its profits on the Belgian market (i.e. to facilitate explicit or tacit collusion between EDF and GDF Suez (Electrabel) in Belgium). It is further argued that because electricity prices are still regulated in France, the motivation for APE to do so is even greater. Price regulation, according to the Belgian NCA, means that possible means of making profits (for example financing acquisitions and investments in the constantly changing energy sector) are very limited on the French electricity market. Accordingly, it is submitted by the Belgian NCA that EDF and GDF Suez (Electrabel) could cross-subsidise the regulated prices in France by charging high prices for electricity and gas in the non-regulated foreign markets, in particular in the post-merger Belgian market where the APE would have a quasi-monopoly. The Belgian NCA states that there is no significant competitive constraint by EDF on the Belgian electricity markets.

*Sustainability*

33. The Belgian NCA assesses three conditions in this regard: (1) whether the coordinating firms are able to monitor to a sufficient extent whether the terms of coordination are being adhered to, (2) whether there is some form of credible deterrent mechanism that can be activated in case deviation is detected and (3) whether current and future competitors which are not part of the coordination are in a position to prejudice the results of such coordination.

34. As for the first condition for coordination to be successful, the Belgian NCA considers that the merged entity (i.e EDF and SPE post transaction), on the one

hand, and GDF Suez (Electrabel), on the other, would be able to monitor to a sufficient degree whether the terms of coordination are being adhered to due to the transparency of the Belgian electricity markets[6] and the elimination of a competitor on several markets since the Belgian electricity market is transparent. The Belgian NCA argues that the Belgian electricity market is transparent since (i) it is a small market (ii) the Belgian Transmission System Operator ('TSO'), ELIA, has made significant efforts to make the market more transparent and (iii) the creation of a public trading platform for the Belpex spot products and for the derivates on Endex Power BE has also significantly improved the transparency on the market.

35. Regarding the existence of a credible deterrent mechanism, the Belgian NCA submits that there are monitoring and retaliation mechanisms. The Proposed Transaction will increase the number of multi-market contacts between the two players in the duopoly[7] (e.g., EDF will enter the Belgian household customer supply market and SPE through EDF will be in contact with GDF Suez (Electrabel) in foreign markets) and, second, it will also make it easier to reach a common understanding so as to monitor any deviation and to retaliate (in other markets).

36. Concerning the ability of outsiders to jeopardise the results expected from the coordination, the Belgian NCA considers that to be unlikely. First, it argues that investments in additional production capacities are considerable and cannot be planned in the short term. Secondly, it argues that although competition might come from imports of electricity, with respect to electricity coming from France, it points out that only EDF and GDF Suez (Electrabel) are credible exporters.

37. In sum, the Belgian NCA considers that the Proposed Transaction would increase the likelihood that GDF Suez (Electrabel) and SPE are able to coordinate their behaviour with the aim of selling at increased prices, in order to collectively maximise their profits in the long term.

38. With regard to all these coordinated effects the Belgian NCA pleads that (i) there is a strengthening of a pre-merger collective dominant position or (ii) there is a creation of a collective dominant position as a result of the Proposed Transaction.

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6 Horizontal Merger Guidelines, § 50 (See also Commission decision 2000/42/CE in case M.1313, - *Danish Crown/Vestjyske Slagterier*, OJ L 20 of 25.1.2000, p. 1, §§ 176-179).

7 Horizontal Merger Guidelines, § 55.

(i) Strengthening of a pre-merger collective dominant position

39. The Belgian NCA emphasises that there already exists tacit or explicit collusion (described as a collective dominant position) between GDF Suez (Electrabel) and SPE and that the Proposed Transaction would strengthen it.

40. The Belgian NCA argues that until recently SPE was not strong enough to be an ambitious competitor of GDF Suez (Electrabel) on the Belgian electricity market. It also argues that SPE generates less electricity than it would be able to in the light of its production capacity (in 2008 [4-9] TWh while it could have produced [6-14] TWh). However, as noted by the Belgian NCA, [Information on SPE's sourcing], SPE could have more than [10-20] TWh which would be superior to its retail needs.

41. The Belgian NCA also states that recent industry policy efforts of the Belgian Government sought to make SPE a more ambitious player through the *Pax Electrica II* by providing to SPE sufficient base-load power and the Navagne project which will be realised by [2010-2020]. Thus, the Belgian NCA submits that SPE will have a greater incentive to sell cheap electricity in Belgium as a result of the size of its generation portfolio being superior to its own retail needs.

42. As argued by the Belgian NCA, the Proposed Transaction would be jeopardising such efforts to strengthen SPE and reinforce the pre-existing collective dominant position.

(ii) Creation of a collective dominant position

43. For the above reasons, the Belgian NCA argues that if there was a no-pre existing collective dominant position, the Proposed Transaction would increase the likelihood that a collective dominant position would be created post merger. Specifically, the Belgian NCA emphasises that GDF Suez (Electrabel) and SPE are able to coordinate their behaviour aimed at selling electricity at increased prices in order to collectively maximise their profits in the long-term.

### E. NON-HORIZONTAL UNILATERAL EFFECTS ON THE BELGIAN ELECTRICITY TRADING MARKET

44. The Belgian NCA also considers that the Proposed Transaction would create additional possibilities and incentives to withhold substantial production capacity and, in this way, to manipulate electricity prices on Belpex through the submission of purchase bids for large volumes at a very high price. At the same time, it is argued that as long as SPE and EDF remain two stand-alone companies, withholding substantial capacities by SPE would increase prices on the spot market and would lead to financial losses for SPE. Moreover, it is argued that SPE would have to buy at these increased prices on the very same spot market. On the other hand, the Belgian NCA argues that following the Proposed Transaction and the resulting further integration in the adjacent power exchanges (Powernext and APX), such a strategy of withholding capacity could easily be carried out without significant financial losses for SPE and EDF respectively[8].

45. The anticompetitive strategy described above is, according to the Belgian NCA, a non-horizontal input foreclosure strategy, resulting from the vertical integration of EDF, which is significantly active on the French electricity trading market, and of SPE, which is a significant operator of the Belgian electricity trading market.

## V. THE NOTIFYING PARTY'S COMMENTS TO THE REFERRAL REQUEST

46. The notifying party (EDF) was informed of the Referral Request by a letter dated 19 October 2009. It accordingly submitted its observations to the Commission by e-mail of 26 October 2009.

47. EDF considers that the Commission should not refer the case to Belgium since the Commission is the authority best placed to review the Proposed Transaction since (i) it has developed over the last years significant expertise in the Belgian

8 The mechanism would work as follows: during the same hours, EDF sells the same volume of electricity on Powernext (*France*) as SPE withholds in Belgium and purchases on Belpex (Belgium). EDF sells this energy at a very low price (e.g. 0.01 EUR/MWh) on Powernext and SPE purchases the same volume of electricity at a very high price (e.g. 3 000 EUR/MWh) on Belpex. By withholding capacity in Belgium, prices on Belpex will go up, and SPE will pay these higher prices. But this loss will be compensated by the fact EDF is selling the same amount of energy on Powernext, compensating the financial loss of SPE.

electricity and gas markets[9] and (ii) the competition concerns highlighted by the Belgian NCA are not limited to Belgium or at least require a cross border analysis.

48. In addition, it considers that there are no exceptional circumstances that would justify a referral to Belgium, that the Proposed Transaction does not raise significant competition issues in any relevant market in Belgium and that; in any event, the proposed commitments by EDF address the competition concerns identified by the Commission. The views of the notifying party can be summarised as follows:

### A. THE EUROPEAN COMMISSION IS THE BEST PLACED AUTHORITY TO REVIEW THE EFFECTS OF THE PROPOSED TRANSACTION

49. EDF argues that the Referral Request confirms its view in that the relevant markets related to the Proposed Transaction are national in scope.

50. However, EDF states that competition concerns are not limited to Belgium or at least require a cross-border analysis. In fact, according to EDF, the Referral Request deals with several cross-border issues which can be better dealt with by the Commission. As EDF explains, such issues include the electricity physically imported from interconnectors; the trilateral market coupling between Belgium, France and the Netherlands; the assessment of the theoretical risk of duopoly suggesting the implication of the French State in the market behaviour of both GDF Suez (Electrabel) and EDF on the Belgian electricity market in the light of the regulated electricity prices in France; and, the incentives related to the antitrust concerns identified by the Belgian NCA on the Belgian trading market that are triggered by the end of the Tartam[10], the effect of which is that the French and Belgian spot prices will be the reference for a large number of customers.

51. Nevertheless, as EDF notes, pursuant to the Commission decisional practice, a referral request is not granted when a transaction raises competition concerns in several Member States and, thus, requires a coordinated investigation and/or remedial action in accordance with the `one- stop-shop` principle.

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[9] COMP/M.4180 – *Gaz de France/Suez*, COMP/M.5519 - *E.ON/Electrabel*, COMP/M.5324 - *Centrica/Segebel* or Case COMP/M.5467 - *RWE/Essent*.

[10] Tartam stands for *'Tarif réglementé transitoire d'ajustement du marché'* and is a tariff applicable to final consumers which will be phased out by 1 July 2010.

52. Moreover EDF states that the Commission has a specific and recent expertise on the Belgian energy markets pleading also in favour of the refusal of the referral.

53. Finally, EDF emphasised that the proposed commitments would resolve the competition concerns identified. In accordance with the Commission's decision making practice, in such instances the Referral Request made by a Member State should be refused[11]. The combined effect of the proposed commitments is that a potential maximum generation capacity of up to [1.800-1.900] MW will be made available to the market (about [10-20]% of the actual Belgian generation capacity) and this completely addresses the concerns identified by the Commission.

### B. THE PROPOSED TRANSACTION DOES NOT RAISE SIGNIFICANT COMPETITION ISSUES IN ANY RELEVANT MARKET IN BELGIUM

54. EDF also submits that, in accordance with the Commission's decision making practice, a referral request is not granted where a proposed concentration for which the referral is requested is unlikely to have an impact on competition on the relevant markets.

55. EDF submits that the Proposed Transaction would not have any significant adverse impact on any relevant market in Belgium, in particular the electricity markets.

56. EDF submits that in the Referral Request there were a number of "*errors and wrong assessment of the functioning of the Belgian electricity markets*" and challenges whether the Proposed Transaction would significantly affect the relevant markets for which the Referral Request is made.

*Rectifications sought by EDF*

57. EDF seeks to challenge the views expressed by the Belgian NCA in the Referral Request with regard to (i) EDF`s alleged "*suspicious behaviour*", (ii) definition of relevant markets and the position of the parties to the concentration and (iii) the competitive analysis by the Belgian NCA of the Proposed Transaction.

[11] COMP/M.1920 – *Nabisco/United Biscuits*

(i) EDF`s alleged "*suspicious behaviour*"

58. With regard to the benefits from a potential duopolistic situation and reluctance to compete with GDF Suez (Electrabel) in Belgium, EDF underlines that all competitors face difficult market conditions compared with the incumbent operator, GDF Suez (Electrabel). While a solution to this could have been to import electricity from France by using the explicit auctions on the interconnection or the spread forward product, EDF underlines that explicit auctions are not a solution to provide and import peak products since such products are too expensive whereas forward spread products do not exist for peak-load.

59. With regard to the argument made by the Belgian NCA that EDF did not use the full interconnection capacity, EDF submits that this argument is based upon a wrong assumption. EDF, probably in line with any other market participants, does not buy electricity to the extent of the maximum authorised volume accessible through explicit auctions of 325MW because of risks to lock-in significant capacities in a given direction when market prices tend to converge between France and Belgium.

60. EDF also submits that the long-term sale of electricity to […], out of its drawing right from the Tihange 1 nuclear power plant operated by Electrabel, contributes to […]`s own commercial development and trading activities on the Belgian wholesale market.

61. EDF submits that its market presence on the Belgian trading market is limited ([10-20]% in 2008 with regard to the physical electricity trading) and that its activity on the Belgian wholesale market should not be only assessed through purchases but also through its sales activities.

(ii) Definition of relevant markets / position of EDF

62. Against the view taken in the Referral Request that SPE is a 'price setter' on the Belgian electricity balancing and ancillary services market, EDF submits that in the Belgian balancing mechanism there is no price setter and the market is competitive in the light of a note of 22 July 2007 by ELIA, the Belgian TSO.

63. While in the Referral Request, EDF is portrayed as not fully using its available import capacities at the French-Belgian border, EDF underlines that EDF has been

reselling its interconnection capacities on a daily basis in order to capture the market spread between the French and Belgian markets. In consequence, it pleads that the capacities were fully and efficiently used. In addition, it states that the volumes of 325 MW for the monthly and yearly auctions are not cumulative but alternative, contrary to what is stated in the Referral Request.

(iii) Competitive analysis of the Proposed Transaction

64. With regard to the potential coordinated effects as identified by the Belgian NCA, EDF submits that in its competitive analysis the Referral Request did not take into account the competitive effect of other market players and of the coupling mechanism and also the anonymity of the wholesale market. In particular, as EDF notes, the Referral Request ignores the effects of the acquisition of ENI by Distrigaz in 2008 and the swap of power-plants, drawing and portfolio rights attached to power-plants between GDF Suez (Electrabel) and the E.ON group[12].

65. As for the potential non-coordinated effects and the alleged ability and incentives to engage in withdrawing of capacity practices with a view to artificially increasing prices, EDF submits that if it sells at a very low price it will tend to decrease the market price. Consequently, SPE`s purchases will only compensate this additional offer from EDF and the market price will remain identical but EDF will lose money by selling below its normal generation costs. It is also submitted that SPE may also lose money if it cannot resell these volumes at higher prices, and in the meantime the market will not be affected.

*The Proposed Transaction does not significantly affect competition*

66. EDF challenges the views expressed by the Belgian NCA which submits that, following the Proposed Transaction EDF would (i) cancel its investment projects in Belgium, (ii) be in a better position to withhold capacities through additional capacities of SPE and (iii) enhance its ability to coordinate with GDF Suez (Electrabel).

12 COMP/M.5519 – *E.ON/Electrabel*

(i) Cancelling EDF's investment projects in Belgium

67. EDF submits that there is a contradiction between the concerns raised in the Referral Request. On the one hand, the Belgian NCA states that EDF will reduce its investment projects in Belgium following the Proposed Transaction, and, on the other, the Belgian NCA argues that the Proposed Transaction will significantly increase the generation capacity of the post-merger entity and hence its ability and incentive to withhold capacity and/or increase electricity prices in Belgium either through unilateral or coordinated effects.

68. EDF furthermore argues that it has on several occasions in the past few years tried to gain access to generation capacity in Belgium by jointly developing three CCGT projects with other players (without any success) and through land acquisition efforts with a view to developing power plants. As noted by EDF, the Proposed Transaction and the long-lasting interest of EDF for acquiring SPE also indicates that EDF is willing to develop its wholesale and retail presence in Belgium.

69. EDF also submits that it will continue to assess its CCGT projects on a stand-alone basis following the Proposed Transaction. The decision of investing or not in new projects is irrespective of the Proposed Transaction since other investments in generation capacity are currently being undertaken or planned in Belgium and EDF will take its decisions on the basis of the profitability of such investments. As EDF stresses, investment projects in electricity generation have to take into consideration the following conditions: obtaining of all of the necessary authorisations and permits, profitability at the time of the decision, based upon the economic growth, fuel prices, investment costs and performances.

(ii) Changes regarding the ability or incentive of EDF to withhold capacity in Belgium

70. EDF states that the incentive to withhold capacity, as presented by the Belgian NCA, would come from a "*very large production park in [France]*" combined with the Tartam regime in France. According to EDF, such strategy is not relevant since the market coupling of France, Belgium and the Netherlands introduced a more efficient competition on the wholesale electricity markets with a lower influence of EDF's generation in France. EDF also states that market prices in Belgium are also influenced by other connected markets to the Netherlands and France. Moreover,

EDF states that the future extension of market coupling to Germany is likely to enhance competition on spot markets and that most of EDF's generation assets are nuclear power plants with a very limited role on system marginal costs taking into account their `must run` nature.

(iii) Changes regarding the ability or incentive of EDF to coordinate with GDF Suez (Electrabel)

71. In relation to the potential risk of collusion between EDF and GDF Suez (Electrabel) that would arise from the Proposed Transaction, EDF refers to the arguments in the notification which show that the presence of the French State as shareholder of both EDF and GDF Suez (Electrabel) will not affect the independence of the two groups.

## VI RELEVANT MARKETS

72. The Proposed Transaction creates overlaps between the activities of the parties to the concentration in energy markets (electricity and gas) in France, Belgium and the Netherlands.

73. However, as the Referral Request relates exclusively to the Belgian electricity markets, only those markets are analysed for the purposes of this Decision.

### A. RELEVANT PRODUCT MARKETS

74. EDF is currently active in Belgium in the electricity wholesale market (generation/wholesale supply of electricity, electricity trading) and in various electricity supply markets.

75. SPE is active on the Belgian electricity wholesale market (generation and wholesale supply of electricity, electricity trading), the market for balancing power and ancillary services and in various electricity supply markets.

76. Regarding the relevant electricity supply markets to end customers in Belgium, the Proposed Transaction only creates overlaps in the markets for the supply of electricity to small as well as large  industrial and commercial customers (`I & C`) due to the fact that EDF is not present in the markets for supply to household customers.

*Electricity Generation and Wholesale and Electricity Trading*

77. In previous decisions concerning Belgian electricity markets[13], the Commission distinguished a wholesale electricity market as comprising electricity generation and electricity imported to be sold on to retailers. It also distinguished an electricity trading market, where electricity is bought and sold, not necessarily with a view to being supplied to a final customer. It was left open whether within the trading market separate markets for the trading of physical and financial products existed.

78. EDF argues that it should be left open whether electricity trading, on the one hand, and wholesale (generation and imports), on the other, constitute separate markets[14]. The Commission, in a more recent case concerning the British electricity markets, considered the wholesale market as comprising electricity generation and imports, as well as trading[15].

79. Within the course of the Commission's market test of the Proposed Transaction, it has been investigated whether the activity of trading electricity contracts (either over the counter ('OTC') trading or trading on organised markets such as BELPEX) should be considered as taking place on a separate market. The prevailing opinion[16] was that also in Belgium the conditions of competition are homogeneous enough so that electricity trading does not have to be distinguished from other wholesale activities, like generation and imports.

80. The market test also inquired as to whether other potential distinctions within a wholesale market would be pertinent, namely: (i) a distinction on the basis of the different sources of electrical energy (such as nuclear power stations, gas-fired power stations, coal-fired power stations, hydroelectric or wind farms) and (ii) distinctions, within the activity of trading electricity, for example (a) based on trading channels: non-standard, non-brokered (or 'structured contracts'), OTC brokered, and products traded on organised market, like BELPEX; or (b) between products for physical delivery, on the one hand, and so-called financial contracts

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[13] In particular COMP/M.4180 – *Gaz de France/Suez*

[14] Form CO § 301

[15] COMP/M.5224 – *EDF/British Energy*. This distinction was also used in COMP/M.3268 - *Sydkraft/Graninge*

[16] See market investigation replies to Questionnaire to electricity competitors/suppliers.

(that concern electricity but in which contract settlement takes place financially), on the other.

81. It appears from the market investigation that a significant interaction exits between OTC traded electricity products and electricity products traded on organised markets[17]. Similarly, sufficient interaction exists between financial and physical products as the former use the latter as underlying products.

82. For these reasons, as well as on the basis of the results of the market test more generally[18], it is considered that the market test did not provide grounds that a further market segmentation would need to be considered.

83. On the basis of the above it is considered that, for the purposes of the present decision, the wholesale market is comprised of electricity generation, imports and trading on organised markets or OTC for both physically and financially settled products.

*Balancing and ancillary services*

84. In accordance with previous decisions of the Commission, the notifying party defines a market for ancillary services and balancing power[19] comprising, as defined in Belgian law[20], of primary frequency control, secondary control, tertiary reserves, voltage control and reactive power and black start services. ELIA, the Belgian TSO, is the sole buyer of these services and it procures such services by tendering.

85. EDF[21] considers the supply of electricity for compensating network losses as also forming part of this market. Whereas it is true that the sole buyers of electricity for compensating network losses (like in the case of ancillary services and balancing power) are network operators (in the case of Belgium, only operators of distribution networks[22]), the supply side of this market is substantially different from the one for providing ancillary services and balancing power.

17 Document 674, reply to questions 9 and 11.

18 See market investigation replies to Questionnaire to electricity competitors/suppliers.

19 COMP/M.4180 – *Gaz de France/Suez*, paragraphs 683 – 687.

20 Article 231 of the Royal Order of 19 December 2002 establishing technical regulations for operating the electricity transmission system and access thereto

21 Form CO 283 - 286

22 The Belgian regulatory framework foresees that access responsible parties compensate network losses on the transmission network in kind. Consequently, they are not procured separately.

86. With the exception of tertiary reserves (where interruptible customers can provide - limited amounts of - upward regulation[23]), suppliers of ancillary services and balancing power can only be operators of power plants connected to the Belgian transmission network[24]. The technical ability and economic incentive to provide such services depends on the technical specification of a power plant (its flexibility and place in the merit order) and, also on the number of such suitable plants in a suppliers' generation portfolio, to guarantee the supply in case of maintenance and failure. Consequently, the number of potential suppliers of ancillary services and balancing power is very limited[25].

87. However, the ability to supply network losses is not constrained in the same way as in the case of ancillary services and balancing power. Suppliers include, for instance, financial players active in electricity trading[26] that have no own generation capacity. Buyers of network losses essentially behave like final customers when purchasing electricity for compensating network losses[27].

88. Consequently, the supply of network losses is not part of the market for ancillary services and balancing power. Ultimately, whether network operators are present on the demand side of the electricity wholesale market or in (one of the) retail supply markets can be left open as the volumes concerned (estimated to be 4.4 TWh[28]) are limited and will not materially affect the assessment of the Proposed Transaction.

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23 Balancing power is used by a TSO to maintain a (close to) real time balance between electricity injected (produced) and withdrawn (consumed) electric power. The provision of balancing power concerns in essence the service to reduce injections (downward regulation) and the service to increase production (upward regulation) or, what amounts to the same for the TSO, the service to reduce withdrawals on short notice. Whereas large electricity intensive consumers can contract to reduce their withdrawals (upward regulation), they can in reality not contract to increase them. Indeed, this would imply a (nearly) continuous underutilisation of the production capacity in their main line of business.

24 http://www.elia.be/repository/pages/cd2a2505af9449c6a5930663b59b1e32.aspx. See also COMP/M.4180 – *Gaz de France/Suez*, § 733- 736

25 See COMP/M.4180 – *Gaz de France Suez*, § 764-789

26 It is noted that the procurement by ELIA concerns base-load and product (Form CO § 284) and thus, apparently, concerns the procurement of standardised products as usual in electricity trading.

27 See market investigation reply from an electricity competitor.

28 Form CO § 284 and 285

*Retail markets to small and large industrial and commercial customers*

89. The notifying party considers, in line with previous decisional practice of the Commission[29], that the market for the supply of electricity in Belgium can be segmented along the following lines: (i) the market for the supply of electricity to large commercial and industrial customers connected to the transmission network (at above 70kV), (ii) the market for the supply of electricity to small commercial and industrial customers connected to the distribution networks (below 70 kV) and (iii) the market for the supply of electricity to eligible household customers.

90. The results of the market investigation did not bring into question this market definition. Therefore, the Commission does not consider it necessary to depart from this segmentation of the retail electricity markets in Belgium.

## B. RELEVANT GEOGRAPHIC MARKETS

*Electricity Generation and Wholesale and Electricity Trading*

91. In accordance with previous Commission decisions, the parties to the concentration consider the wholesale market to be national in scope[30]. This line was also followed in the most recent case concerning Belgian electricity markets[31]. It is recalled that in the Gaz de France/Suez Decision[32], it was held that there exists a national geographical scope of the market given the limited interconnection capacity and the risks assumed when taking longer term commitments based on imported electricity (a risk that affects entrants asymmetrically) in particular when liquidity of traded electricity products is low[33].

92. Belgium is interconnected with France and the Netherlands[34]. Interconnections capacity available for commercial usage has not significantly increased since the

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29 COMP/M.4180 – *Gaz de France/Suez*, para. 688-695 and COMP/M.3883 *GDF/Centrica/SPE* of 7 September 2005, para. 14.

30 COMP/M.4180 - *Gaz de France/Suez*

31 COMP/M.5519 - *E.ON / ELECTRABEL ACQUIRED ASSETS*

32 COMP/M. 4180 – *Gaz de France/Suez*

33 COMP/M.4180 – *Gaz de France/Suez* paragraphs 696-732.

34 Strictly speaking it is also interconnected also with Luxembourg. However, in practise the part of the Luxembourgish net to which it is connected is integrated with the Belgian network. Via Luxembourg, no interconnection exists with Germany. See form CO 278-280 and COMP/M.4180 - *Gaz de France/Suez*, § 699.

Gaz de France/Suez Decision[35]. Projects that could significantly increase this capacity in the near future do not appear to be envisaged either[36].

93. Against this background, it is useful to add that the market test did not really provide grounds that consider that the Proposed Transaction is likely to affect the ability of market participants to utilise the interconnectors[37]. The (annual and monthly) capacity that a single operator can acquire is capped both on the French-Belgian border, as well as the Belgian-Dutch border[38].

94. In order to assess the geographical scope of the generation and wholesale market, the effects of market coupling and the pertinent facts as regards liquidity in traded electricity products will be described in turn.

(i) Effects of market coupling

95. Over the course of the market investigation, several respondents argued for a geographical scope of the market being larger than Belgium and, at least, comprising France, Belgium and the Netherlands and Luxembourg (to the extent connected to the Belgian transmission grid) or even wider[39]. The arguments put forward by these market participants relate primarily to the introduction of so-called "market coupling" between these Member States. It is useful to add that the currently existing market coupling arrangement between France, Belgium, the Netherlands and Luxembourg is expected to be extended to Germany (and the Luxembourgish grid connected to Germany) during 2010[40].

96. The implementation of market coupling was envisaged at the time of the Gaz de France/Suez Decision[41]. The Commission concluded at that time that market coupling did not change the geographic scope of this market which remained national in scope. This was for two reasons (i) in cases concerning electricity markets where systems similar to market coupling were already in existence at the

35 See Form CO § 268 for capacities on Belgium's border with France and documents referred to in fn 102 for its border with the Netherlands.

36 Form CO 271 – 273 for the French-Belgian border. See reply from an electricity competitor to the market investigation

37 See market investigation replies from electricity competitors/suppliers.

38 Form CO fn 223. 325 MW on the French Belgian border (cap applies to aggregated volumes of both monthly and annual capacity) and 400MW on the Dutch-Belgian border. See also decision (B)051201-CDC-494 from CREG.

39 See market investigation replies from electricity competitors/suppliers to question.

40 Form CO § 253

time (Nordpool) the Commission had decided upon national markets, even in cases where interconnection capacity was significantly greater in Belgium than at the time of the Gaz de France/Suez Decision (and still now) existed in Belgium (ii) market coupling leaves unaffected the physical constraints on the transmission networks and, hence, the level of congestion. However, it appears pertinent, now that market coupling is put in place, to reassess this situation.

97. Market coupling concerns essentially the day-ahead allocation of interconnection capacity. Interconnection capacity for longer periods (generally up to one year) is allocated by an (explicit) auction[42]. Subsequently, the successful bidder of interconnection capacity may (or may not[43]) use the capacity to import or export electricity. In market coupling, market participants submit bids for the purchase and/or sale of electricity for injection or delivery the next day to the power exchange in the 'coupled' markets which then, on the basis of aggregated demand and supply curves, clear the markets under the constraint of the available interconnection capacity.

98. If interconnection capacity is not constrained, the volumes of imports and export can be set at levels that, in each coupled market, allows prices to equalise. If interconnection capacity is constrained, prices will be set at a level that the resulting adjustments in the volumes demanded and supplied on a given exchange (and hence volumes that need to be imported or exported to make demand and supply meet on that exchange) will equal the available interconnection capacity for imports or exports. Interconnection capacity is thus not made available to specific market participants but sold implicitly (hence the name `implicit auction`) together with the electricity supplied to or off-taken by the successful bidders on the power exchange.

99. Market coupling increases the efficiency of interconnection usage[44] as import and export decisions are no longer taken on the basis of decentralised (and therefore not necessarily consistent) predictions of price levels in the interconnected countries

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41 COMP/M. 4180 – *Gaz de France/Suez*

42 Caps apply for the amount of (annual plus monthly) capacity that can be owned by a single market operator.

43 Capacity holders can sell the capacity on the secondary market ([…], see Form CO § 92). Non-used capacity is made available for the (day-ahead) market coupling at a price equivalent to price difference between coupled counties for which capacity was held. Submission EDF 9 October 2009 13:22 reply to question 5(c)

the next day but by a central agency (a not so 'invisible hand') that decides on the usage of interconnection capacity on the basis of known plans of all market participants and known price levels.

100. Whether ultimately related to the introduction of market coupling or not, the fact remains that since its introduction the three coupled areas (Belgium, France and the Netherlands) had identical prices about 69% of all hours during 2008 (i.e. there was no congestion between any of these three areas). Belgium had identical prices with France for 15.4% of all hours (but not the Netherlands, i.e. there was congestion on Belgium's north border), and 14.7%% of all hours prices between Belgium and the Netherlands were identical (but not with France i.e. there was congestion on Belgian's south border). Only in less then 0.8% of all hours did Belgium have different prices compared with both France and the Netherlands (congestion on both of Belgium's borders)[45].

101. Whereas this mechanism without doubt improves the efficiency with which interconnection capacity is used and the accuracy by which imports and exports react to price signals, it directly deals only with the trading of electricity for delivery the next day. Other electricity products, such as products with longer maturity, represent the more than two thirds of electricity exchanged in Belgium[46] and are not subject to such coupling mechanisms. Moreover market coupling does not change the available interconnection capacity.

(ii) Liquidity of traded wholesale market products

102. In the Gaz de France/Suez Decision[47] it has been established in detail that the Belgian traded market is illiquid, in particular with regards to products other then base-load (such as peak and off-peak products) and products with delivery further in the future[48].

103. EDF confirmed in the Form CO that Belgian wholesale markets have remained illiquid and that the sole liquid product is the 5 MW base- load calendar product. (i.e. the right to be supplied on the Belgium transmission network with 5 MW of

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44 EDF Submission of 22 October 2009, reply to question 5.

45 Document 674 reply to question 14.

46 Document 674 p. 11

47 COMP/M.4180 – *Gaz de France/Suez*

48 COMP/M.4180 *Gaz de France/Suez*, paragraphs 558-898.

electricity power during all the hours of the next calendar year). Even if market liquidity for day-ahead products may have developed positively in recent years, the fact that liquidity remains low for virtually all other products was clearly confirmed in the market test.

104. When accumulating volumes traded on Global Vision (a trading application allowing the bringing together of various broker services for 'futures' and 'forwards' on ENDEX) and on BELPEX, it appears that total traded volumes amounted to about 36.8 TWh in 2008. However, 72% of all trades are concentrated on either the year-ahead calendar year or BELPEX (i.e. day-ahead). Even though BELPEX allows the buying and selling of an (hourly) profile, futures and forward contracts other than base-load ones are (virtually) not traded[49].

105. In contrast, the liquidity of traded electricity products in electricity markets adjoining or nearing Belgium, in particular France, the Netherlands (with which it is directly interconnected) but also Germany , even if not always optimal, is clearly better in particular also in trade of electricity products other than base-load year-ahead products[50].

106. The fact that electricity wholesale markets in Belgium, on the one hand, and those of surrounding countries, on the other, show very different patterns of liquidity of wholesale market products, demonstrates that these electricity wholesale markets are insufficiently homogeneous and do not allow for the substitution of traded products available in adjoining electricity markets. The no or low-availability of, for instance, peak-load products and products with longer time horizons within Belgium constitutes therefore a strong indication that the Belgian wholesale electricity market, despite the improved liquidity on the day-ahead market, is not integrated to a large extent with neighbouring electricity generation and wholesale markets. In other words, by merely focussing on market coupling and the benefits this may have brought to liquidity and market integration for day-ahead contracts, it cannot be concluded that the Belgian electricity wholesale market at large is fully integrated and constitutes merely a part of a larger geographical market.

49 See replies from electricity competitors/suppliers to market investigation.

50 In view of the fact that liquidity has not markedly improved in Belgium (see § 103 of this Decision) the conclusions as to the state relative to other Member States described in M4180 GDF SUEZ § 885 and following still holds.

107. Moreover, the relative illiquid state of trading in Belgian electricity products constitutes, as has been established in previous decisions of the Commission[51], a significant barrier to entry in the market for generation and wholesale, further reinforcing the view that the geographical scope of the market for electricity generation and wholesale is national in scope.

108. Consequently, the geographical scope of the Belgian electricity wholesale market, including electricity trading, is considered to be national in scope.

*Balancing power and ancillary services*

109. As explained above, suppliers that seek to offer ancillary services and balancing power can currently do so only from generation units/interruptible customer sites located within the Belgian balancing zone[52]. Consequently, the market for ancillary services and balancing power is national in scope.

*Retail markets to small and large industrial and commercial customers*

110. For retail supply of electricity, the Commission has generally defined these markets as national in scope, provided that these markets are fully liberalised[53] and if the conditions of competition are found to be uniform throughout the relevant territory.

111. Regarding the geographic scope of retail electricity supply to industrial and commercial customers in Belgium, the notifying party considers that the markets for supply of electricity to small, as well as to large, industrial and commercial customers are national in scope given that retail markets are now completely liberalised in all three regions and for all categories of customers in Belgium. In this respect, the notifying party referred to the Gaz de France/Suez Decision[54] in which, as it emphasised, the Commission in undertaking its competitive assessment has looked into the markets for the supply of electricity to I & C customers (large

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51 See in particular COMP/M.4180 - *Gaz de France/Suez*, § 898.

52 http://www.elia.be/repository/pages/cd2a2505af9449c6a5930663b59b1e32.aspx. See also COMP/M.4180 – *Gaz de France/Suez*, § 733- 736

53 See cases COMP/M.5224 – *EDF / British Energy*, COMP/M.4180 – *Gaz de France/Suez* and COMP/M.3696 – *E.ON / MOL*. However, in recent decisions (see COMP/M.5496 – *VATTENFALL/ NUON*; COMP/M.5467 – *RWE/Essent*) with respect to the market for the supply of electricity in Germany, the Commission has considered that there are specific factors in Germany pointing towards a market that is narrower than national in scope, such as (i) the continuing dominance of the Stadtwerke in their municipal area; (ii) overall low and regionally different customer switching rates across Germany; (iii) local marketing strategies focusing on the territorial incumbent; and (iv) different local pricing policy according to the targeted area.

and small) only at national level in accordance with previous Commission decisions[55].

112. Regarding the geographic scope of these markets, respondents to the Commission's market investigation have provided mixed comments. On the one hand, the overwhelming majority of respondents submitted that for large I & C customers the relevant market should be the whole of Belgium. On the other hand, regarding small I & C, it was noted that the relevant geographic market could be considered to be sub-national in scope and that it could be split into the three regions of Brussels, Flanders and Wallonia. In addition to the language differences between the relevant regions, market respondents who pleaded in favour of a sub-national market definition for the supply to small I & C customers based their view on the divergent regulatory conditions and the existence of separate licensing authorities in these three regions. It was further argued that there are differences in prices and costs from region to region and that not all suppliers have entered all three regions. Moreover, as it is demonstrated from the market shares, EDF has managed to acquire higher market shares in Wallonia.

113. In response to the Commission's requests for information following the market investigation, by analogy, EDF has referred to the fact that the Commission has examined the question as to whether household supply markets (which are in any case not affected in the Proposed Transaction) can be defined as regional in scope on the basis of differences in regulatory conditions which were not homogeneous across the three Belgian regions at the time of the Gaz de France/Suez Decision[56]. For example, at the time of the Gaz de France/Suez Decision there were differences in the level of liberalisation of the market for this customer group in these regions. Given that the market is now completely liberalised in all three regions of Belgium, EDF considers that the market for the supply of electricity could be defined as national for all customers. The notifying party further submits that with respect to large industrial and commercial customers, such a national definition is also supported by the existence of a national transmission network to which all these customers are connected.

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54 COMP/M.4180 – *Gaz de France/Suez.*

55 See cases COMP/M. 3075-3080 – *ECS/Intercommunales*, COMP/M.3883 - *GDF/Centrica/SPE,* paragraph 24, COMP/M.2857 – *ECS/IEH*, COMP/M.3318 – *ECS/Sibelga.*

56 COMP/M.4180 – *Gaz de France/Suez.*

114. It should be stressed that the finding in the Gaz de France/Suez Decision[57] that competition would have been significantly impeded by reference to a national definition of the market for the supply to small I & C customers does not prevent the Commission, in the present case, from looking into the smallest possible geographic definition for that market. Against this background and based on the results of the market investigation on this point, for the purposes of the present decision it can be left open whether the market for the retail supply of electricity to small I & C customers in Belgium should be defined as sub-national in scope given that the Proposed Transaction does not raise serious doubts as to its compatibility with the common market under any alternative market definition.

115. Regarding the geographic scope of the retail market to large industrial and commercial customers in Belgium, in line with previous practice and the results of the market investigation, the Commission does not consider it necessary to look into a segmentation which is smaller than Belgium.

## VII. COMPETITIVE ASSESSMENT

116. Before proceeding with the assessment, it is necessary to put in perspective the existing and future generation capacities of the market players on the Belgian electricity market including the capacities of the parties to the Proposed Transaction and those of their competitors.

### A. GENERATION CAPACITY AND PROJECTS

117. The below information on current and future generation capacity and construction projects derives from the Form CO (often figures or estimates from public sources) and the responses to the market investigation undertaken by the Commission.

57 COMP/M.4180 – *Gaz de France/Suez*

*The Parties to the Proposed Transaction*

(i) EDF

(a) Current generation portfolio

118. EDF's sole generation assets located in Belgium concern co-ownership with GDF Suez (Electrabel) (that also acts as operator) of the Tihange 1 nuclear power plant. EDF is entitled to 50% of the output of this reactor. EDF's share is […] 419 MW[58] and the maximal nominal capacity to which EDF is entitled to is [450-550] MW[59].

119. Prior to the Proposed Transaction, EDF sold the 419 MW (i.e. its entire […] supply from its rights on the Tihange 1 nuclear power plant) to […] under a long term contract expiring in 2015 prior to the Proposed Transaction[60]. [Information on the Tihange agreement][61].

(b) Projects being developed

120. EDF develops two sites for the construction of CCGT generation units.

1. One site located in Dilsen-Stokkem developed by [CCGT 1 Company] foreseen with two CCGT units of each [400-500] MW capacity (' [CCGT 1] project') and

2. One site located at [Western part of Flanders], developed by [CCGT 2 Company], also foreseen for two CCGT units of each [400-500] MW (' [CCGT 1] project').

121. The final investment decision on these projects has not yet been taken[62]. The total capacity being considered that could be built amounts to [1,800-1,900] MW. Current schedules foresee operation to start at the end of [2010-2020] or at the beginning of [2010-2020] should the projects be pursued.

58 Form CO p. 78
59 Form CO par. 338
60 Form CO § 338
61 Form CO appendix 14
62 Form CO § 350

122. EDF has in the past years tried to develop other projects within Belgium with the objective of obtaining access to generation capacity[63]. Notably, EDF has tried to:

- Acquire a stake in SPE in 2003. The stake was ultimately acquired by GDF (now GDF Suez (Electrabel)). Develop a Coal fired plant of 900MW (in the Ghent region). This project was abandoned, primarily for environmental reasons.

- Develop a CCGT project jointly with Arcelor Mittal (Sidmar). This project is now being developed by GDF Suez (Electrabel).

- Develop a CCGT project jointly with Duferco (Marcinelle-Marchienne). The project is now being developed by ENEL.

- Devolop a CCGT project jointly with T-Power (Tessenderloo). Now being developed by Essent.

123. Moreover, […].

124. Thus, whereas a number of these projects were or are currently being considered by EDF, this has not (so far) provided EDF with additional generation capacity located within Belgium. They do however bear witness to the fact that EDF has persistently tried to enter the Belgian generation and wholesale market.

(ii) SPE

(a) Current generation portfolio

125. SPE currently has access to a combined capacity (including the capacity available under its effective *Pax Electrica II* agreements with GDF Suez (Electrabel)) of [1,800-2,200] MW[64]. […].

(b) Projects being developed

126. SPE is currently developing three projects. They are:

63 Form CO § 142-144 and § 353-356
64 Form CO figure 2.

1. The Angleur project concerns the building of a peak unit of 126 MW[65]. For this project, the final investment decision has already been taken[66]. It is expected to become operational before the end of 2011.

2. A very similar project is currently built in Ham (126 MW) and is expected to become operational during 2009. As building is ongoing it is obvious that the investment decision has already been taken.

3. The Navagne project has obtained almost all of the necessary permits[67] and the preparations to start building the site have already started. The Navagne project concerns the building of an 850 MW CCGT unit. The final investment decision has however not yet been taken[68].

127. SPE also has various wind generation projects under development. Even though these are projects whose realisation is difficult to predict with precision, the parties to the concentration estimate that by 2011 [10-50] MW will be developed and [50-100] MW by 2015[69].

*Competitors of EDF and SPE*

128. The main competitors of EDF and SPE in Belgium are: GDF Suez (Electrabel), RWE(Essent), Vattenfall(Nuon). Other relevant companies are ENEL and E.ON.

(i) GDF Suez (Electrabel)

129. GDF Suez (Electrabel) is the historical operator in the Belgian electricity markets. It owns and operates the largest (13500 MW) and most varied portfolio of generation assets.

(ii) RWE (Essent)

130. RWE (including the Belgian assets of Essent that it recently acquired[70]). Prior to the acquisition of Essent, RWE was mainly present in Belgium through its participation in a gas fired power plant at Zandvliet (214 MW), as a joint venture

65 Form CO figure 25.
66 Reply SPE to questionnaire of 7.10.2009. Q(6)(b)
67 One appeal is pending and not all appeal delays have expired. Form CO §§ 362
68 Form CO § 505
69 Form CO fn 179 and 182
70 COMP/M.5467 – *RWE/Essent*

with GDF Suez (Electrabel); this was intended mainly to supply a single industrial customer, BASF[71]. Prior to the merger, Essent built a 149MW (Inesco) generation unit. Consequently, RWE/Essent can dispose of a total of 363 MW gas fired capacity within the Belgian balancing zone[72].

131. Essent intends to increase its presence in Belgium by constructing a new CCGT unit in Genk-Zuid[73]. The status of this project is unknown but, in any event, it is not to become operational before 2012[74].

(iii) E.ON

132. At present, E.ON has a marginal presence in the Belgian electricity markets. However, it will soon have at its disposal the capacity it recently acquired from GDF Suez (Electrabel) generation assets in a transaction approved by the Commission in its Decision of 13 October 2009 in case COMP/M.5519 - *E.ON Electrabel Acquired Assets*.

133. The assets that are acquired by E.ON concern (in Belgium) the hard coal power plant Langerloo (556 MW capacity) and the gas power plant Vilvoorde (385 MW capacity) and drawing rights for a capacity on Doel 1, and Doel 2 and Tihange 1 of, in total, 500 MW for delivery in Belgium[75]. All these power plants are situated in Belgium. Consequently, E.ON has acquired in total 1441 MW[76] of generation capacity in Belgium.

(iv) Vattenfall(Nuon)

134. Vattenfall is present in the Belgian electricity markets via its recent acquisition of Nuon. According to the notifying party[77], Nuon is planning to invest in a new generation plant in Seneffe/Manage (450 MW). The status of this project is unknown but, in any event, it is not to come on line before 2012[78].

71 COMP/M.4180 – *Gaz de France/Suez*, § 716
72 Form CO p 75
73 Form CO § 766
74 Form CO figure 24. Annual report Essent 2008 p. 32
75 E.ON also acquired drawing rights amounting to 270 MW in the Netherlands. These are however immaterial for the present case. COMP/M.5519 – *E.ON/Electrabel* (check final not public version)
76 COMP/M.5519 – *E.ON/Electrabel*.

(v) ENEL

135. ENEL is not yet present in the Belgian electricity markets. However it is currently developing a 420 MW CCGT at Marcinelle. This plant is expected to become operational in 2011[79]. […][80].

*Current and future shares in generation capacity and electricity production/imports in Belgium*

136. On the basis of the above information, and the Form CO, Table 1 below shows current (2008) shares in generation capacity by the parties and their competitors. Table 1 does not take into account the fact that the capacity owned by EDF on the Tihange 1 reactor is contracted until 2015 to […]**.**

**Belgium 2008 Electricity Generation Capacity (MW)** Table 1

| Company | MW | % share |
|---|---|---|
| EDF Group | […] | [0-5]% |
| SPE | […] | [10-20]% |
| **Combined** | **[…]** | **[10-20]%** |
| GDF Suez (Electrabel) | […] | [80-90]% |
| RWE/Essent | […] | [0-5]% |
| Others | […] | [0-5]% |
| **Total** | **16,501** | **100%** |

*Source: EDF estimates on the basis of information published by the CREG and Febeg (table 26 Form CO)*

137. Table 2 shows the parties` share in the generation and import of electricity in Belgium for 2008, taking account of the fact that generation capacity, depending on its place in the merit order, may result in different volumes of produced electricity and the share of the parties to the concentration in (net) imports of electricity into Belgium[81].

77 Form CO § 764

78 Form CO figure 24.

79 Form CO figure 24. Reply by an electricity competitor.

80 Form CO § 365-359.

81 In table 4 of its request, the Belgian NCA attributes 700 MW of import capacity to the market share to EDF. This is based on EDF's presumed ability to procure 500 MW interconnection capacity (175 MW monthly and 325 MW yearly) as well as import 200 MW through implicit auctioning mechanism.

(i) First of all, according to EDF, the total interconnection capacity that can be acquired by a single operator on the French-Belgian border is capped at 325 MW (yearly and monthly accumulated) for each single hourly block.

(ii) The attribution of monthly and annual interconnection capacity follows a non-discriminatory auction process and any party can procure interconnection capacity. France also has a wholesale market and, thus, electricity to export is available to any party as well. It is thus not clear why this volume should be added to EDF's market share only.

**Belgium 2008 Net Electricity Generation/Import** Table 2

| | TWh | % |
|---|---|---|
| **Net Electricity Production in Belgium** | 77.5 | 88.07% |
| EDF Group | […] | [0-5]% |
| SPE | […] | [5-10]% |
| **Combined** | […] | [10-20]% |
| GDF Suez (Electrabel) | […] | [70-80]% |
| Others (RWE, decentralized production) | […] | [0-5]% |
| **Net imports** | 10.5 | 11.93% |
| EDF Group | […] | [0-5]% |
| SPE | […] | [-5-0]% |
| **Combined** | […] | [-5-0]% |
| **Total production and net imports** | 88 | 100% |
| EDF group | […] | [0-5]% |
| SPE | […] | [5-10]% |
| **Combined** | […] | [10-20]% |

*Source: Form CO table 23 EDF estimates on the basis of information published by the CREG*

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(iii) Should the underlying idea have been that EDF owns/operates most capacity in France and, thus, the electricity exported is likely to have been produced by EDF, this remains an arbitrary way of proceeding. Indeed, despite the fact that GDF Suez (Electabel), RWE/Essent and Vattenfall/Nuon have substantial generation capacity in the Netherlands, the Belgian NCA fails to add the maximum interconnection capacity available on the Belgian-Dutch border for a single operator (400 MW) to the market shares of those parties.

(iv) No limits apply to purchases on Belpex and the figure of 200 MW that EDF could import' via the implicit day-ahead auctioning mechanism is thus without any factual ground. Even if market coupling may result in imports or exports, these are decided by the TSO on the basis of all bids available to it. Imports or exports cannot be attributed to a single market participant. The mechanism proposed in footnote 18 of the Referral Request does not appear a rational business decision. Indeed, the merged entity appears to be bound to make a net loss on the mechanism proposed unless it results in market outcomes in the day-ahead market of EUR 3 000 in both France and Belgium which, in view of the fact that EDF bids in France at 0.01 €/MWh, does not appear the most likely scenario.

More in general, the Belgian NCA presumes that the mere possibility of acquiring interconnection capacity should result in a higher market share. This ignores economic reality. First, the acquisition of interconnection capacity can have other legitimate business objectives than directly importing electricity (such as providing a hedge against price risks) Secondly, it assumes that importing electricity is always an economic rational act. This is obviously not the case. For instance, imports of electricity are not rational when prices in France are higher then in Belgium. Imports can also expose a market participant to risks. For instance, as has been elaborated in the Case COMP/M.4180 – *Gaz de France Suez* § 710 and following, entrants like EDF run specific risks if they choose to supply a downstream portfolio solely through electricity imported through interconnectors. The same reasoning applies if imports are to serve to supply other long term supply commitments, such as traded electricity forward products. The Commission therefore uses real imported volumes only.

138. On the basis of the above, and the Form CO, Table 3 shows the future share of the parties in generation capacity[82].

**Current and Projected generation capacity in Belgium (assuming all projects will be realised)**

Table 3

| | 2008 | | 2009 | | 2011 | | 2014 | |
|---|---|---|---|---|---|---|---|---|
| | MW | % | MW | % | MW | % | MW | % |
| EDF | […] | [0-5]% | […] | [0-5]% | […] | [0-5]% | […] | [10-20]% |
| SPE | […] | [10-20]% | […] | [10-20]% | […] | [10-20]% | […] | [10-20]% |
| Combined | […] | [10-20]% | […] | [10-20]% | […] | [10-20]% | […] | [20-30]% |
| E.ON | 0 | 0 | 0 | 0 | […] | [5-10]% | […] | [5-10]% |
| GDF Suez (Electrabel) | […] | [80-90]% | […] | [80-90]% | […] | [60-70]% | […] | [60-70]% |
| Other | […] | [5-10]% | […] | [5-10]% | […] | [5-10]% | […] | [5-10]% |
| Total | 16501 | 100,0% | 16793 | 100,0% | 18508 | 100,0% | 21258 | 100,0% |

Source: Form CO figures 2, 20, 24, 25, 26 as well as current capacity and future projects of third parties mentioned above.

## B. ASSESSMENT

*Overlap between the parties to the Proposed Transaction*

139. In view of the fact that the current generation capacity at the disposal of EDF within Belgium is contracted until 2015 ( i.e. for the foreseeable future) to […]

[82] The Belgian NCA, even though it claims to have used the same source as the Commission, provides somewhat different figures in its referral request:

(i) [Capacity according to Belgian NCA]. However the sources referred to mention the figures as in Table 3. The difference (for both years 286 MW) can be explained by a supply agreement of 285 MW concluded between SPE and GDF Suez (Electrabel) in the context of Pax Electrica II (as mentioned on page 2 of the NCA's request). However, it is not clear at this stage whether this agreement will ever become effective however and has not been considered here. [Assesement capacity according to Belgian NCA] Other agreements concluded in the context of Pax Electrica II are included in the figures as from 2009 as they took effect early that year.

(ii) As regards EDF, the Belgian NCA mentions for 2011 a capacity of [450-500] MW whereas Table 3 mentions [600-650] MW. The difference is explained by the fact that the Belgian NCA does not count [Belgian NCA capacity figures].

(iii [Belgian NCA capacity figures]

(iv) The Belgian NCA does not take into account capacity constructed by GDF Suez (Electrabel) (as shown in table 24 of the Form CO) that will come on line by 2011 (Amercoeur (420 MW) and Arcelor Mittal (ex-Sidmar) (310 MW)). The figures in this table for 2011 and 2014 are the net of its existing capacity in 2008 (13500 MW), the additions by 2011 (Amercoeur and Arcelor Mittal) minus the capacity swapped with E.ON.

(v) The parties to the Proposed Transaction use figures derived from a Belgian government study. *(FPS Economy, projet d'étude sur les perspectives d'approvisionnement en électricité 2008-2017 (version 3 décembre 2008*), pages 105-106 (as cited in the Form CO § 364). Here simply the totals are taken. For 2011, these totals are however coherent with the projections as used by the parties to the Proposed Transaction. For 2014, the figures here are larger than those of the most optimistic given by the Belgian government.

there is no real significant overlap of the parties to the Proposed Transaction in the Belgian electricity wholesale market when only current generation capacity is considered.

140. The main overlapping activities that must therefore be the subject of a competitive analysis are the various projects for the development of new generation capacity in this market. This is particularly true to the extent that these may constitute projects that are similar in nature i.e. the three projects of the parties to the Proposed Transaction to develop CCGT generation capacity relating to the Dilsen-Stokkem, [CCGT 2] and Navagne projects.

*Assessment of EDF's position as an entrant in the absence of the Proposed Transaction*

141. Based on the above, it can therefore be deduced that:

1. Prior to the Proposed Transaction, EDF had a very modest foothold in the Belgian electricity wholesale market (see recitals 136 and 137), but it has persistently tried to increase its access to generation capacity in various projects (see recitals 122, 123 and 124)

2. EDF is developing two projects (see recital120) which, if realised, would create an important extension of its position in the Belgian electricity wholesale market (see recital 138) with a generation capacity of [2,125 – 4,255] MW, that is [10-20] % of the capacity expected to be on line by [2010-2020].

3. When the project of other market participants are considered (see recitals128 to 134) the realisation of these projects would render EDF easily the most important entrant in the market for electricity generation and wholesale. None of the other market participants have projects that foresee the construction of generation capacity as ambitiously as EDF.

142. It can therefore be concluded that the Proposed Transaction will risk removing from the market the most ambitious entrant from the Belgian wholesale market.

143. The entrant in terms of capacity that comes closest in terms of generation capacity is E.ON that recently acquired 1441 MW of capacity located in Belgium from GDF Suez (Electrabel). Whereas it cannot be ignored that E.ON is also a significant entrant, in terms of effect on the market, this entrant must be assessed in different manner than EDF in the absence of the Proposed Transaction. While E.ON's entry does not bring new capacity to Belgium, EDF would have done so absent the Proposed Transaction. EDF would therefore bring not just more, but also more effective competitive pressure to the market as the additional capacity directly affects the balance between supply and demand within the Belgian electricity generation and wholesale markets. Consequently, the mere entry of E.ON cannot off-set the negative effects the Proposed Transaction may have on the ambitious expansion strategy of EDF in the absence of the Proposed Transaction.

*Horizontal unilateral effects on electricity generation and wholesale market, on electricity trading market and on market for ancillary and balancing services*

(i) Counterfactual to the Proposed Transaction

144. The assessment of the potential horizontal unilateral effects of the Proposed Transaction requires a comparison with a counterfactual which describes the most likely market outcome(s) in the absence of the Proposed Transaction.

145. The structural changes which would be caused by the Proposed Transaction are threefold. First, before 2015, the Proposed Transaction brings together production assets of SPE in Belgium into EDF's production assets elsewhere, especially in France.

146. Second, in 2015, the Commission understands that the long term supply agreement by which EDF sells the production of its 50% share in the nuclear power plant Tihange-1 to […] will end. This nuclear power plant has been recently authorised to run for another 10 years after 2015, which was its initially expected expiration date. As a consequence, at some point in the near future EDF will have to decide how to best use this production asset after 2015.

147. Third, EDF currently develops two sites for possible investments in CCGT production assets. According to the time line of these two projects, EDF envisages

taking an investment decision in [2010-2020] and, in case a positive decision is taken, to put the additional capacity on stream in [2010-2020].

148. The combination of these elements, […] is that EDF will have to decide on (1) its 50% share of Tihange-1 ( [450-550] MW), (2) possible investment for the [CCGT 2] site ( [900-950] MW) and (3) possible investment for the Dilsen-Stokkem site ( [900-950] MW).

149. As a consequence, different likely counterfactuals are to be envisaged at this stage: (i) EDF does not invest in CCGTs and sells its share of Tihange-1; (ii) EDF keeps Tihange-1 but does not invest in CCGTs; (iii) EDF keeps Tihange-1 and invests in one CCGT; (iv) EDF keeps Tihange-1 and invests in two CCGTs.

150. Irrespectively of which counterfactual is the most likely to occur, the competitive position of SPE is degraded in the absence of the Proposed Transaction: [Information related to SPE's sourcing].

(ii) Investment in additional production capacity

151. In the Referral Request the Belgian NCA notes, in section V.A, page 6, that "*[g]iven the long-term contract with […] and the low utilisation rate of import capacities by EDF, the concentration does not result in significant horizontal overlaps on the generation and wholesale market […]. However, both SPE and EDF have their respective projects to increase their generation capacities in Belgium […] and this could have significant impact on competition*".

152. When assessing the financial impact of bringing additional capacities on the market, an undertaking mainly takes into account two elements:

(a) The profits it expects from this production asset(s), which depend on the expected demand pattern and electricity prices, as well as other factors such as cost of inputs and cost of $CO_2$; and

(b) The impact of this additional capacity on the revenues of its entire production portfolio, as adding capacity usually exerts a downward pressure on electricity prices.

153. The Commission's review of SPE's pending investment decision regarding the Navagne project, which would have to be taken by EDF should the Proposed

Transaction be authorised, allows a conclusion that such capacity has been necessitated to cover SPE's own customers' demand. Moreover, before [2010-2020], the Proposed Transaction would not bring any structural change in the production of electricity in Belgium, and thus the Proposed Transaction cannot change the benefits of such an investment for the next [0-10] years at least. Eventually, such capacity would come on-stream far earlier than EDF's (stand-alone) contemplated CCGTs. As a consequence, it is considered that the merged entity would have no incentive to delay or decline such an investment, should the Proposed Transaction be authorised.

154. For the purpose of assessing the effect of the Proposed Transaction on EDF's incentives to develop further its two CCGT projects, the Commission has used a tool (hereinafter the `model` or `EDF's model`) developed and used by EDF for long-term market forecasts. […][83],[Information on the functioning of EDF’s internal model].

155. More specifically, the Commission has requested EDF to provide results of the model for the following cases:

- Case (i): all EDF's CCGT projects in Belgium + all SPE's projects;
- Case (ii): one EDF's CCGT project in Belgium (**[**900-950] MW) + all SPE's projects;
- Case (iii): one unit of one EDF's CCGT project in Belgium ([400-500] MW) + all SPE's projects;
- Case (iv): none of EDF's projects in Belgium and all SPE's projects.

156. Given the inherent limitations of EDF's model, the Commission has not focused its analysis on absolute price levels that resulted from the model but rather on changes in levels between different scenarios.

157. The analysis of the results first shows that, should an investment decision be taken before the completion of the Proposed Transaction by EDF on a stand-alone basis, the viability of the two CCGTs would not be completely secured. In particular, under a range of plausible scenarios, the gross margins anticipated for these projects are very close to the amount necessary to recover the expected investment. Specifically, the results of the simulation exercise described above indicate that, for

a commissioning date of 2015, in the base demand scenario, Case (i) would appear risky and other cases would appear borderline, while in a high demand scenario, Case (i) would become borderline and other cases more favourable[84].

158. EDF emphasised that, irrespectively of the impact of additional capacities on revenues of existing production portfolio, elements unrelated to the Proposed Transaction will have a major influence on the viability of EDF's CCGT projects and, ultimately, on the investment decisions that EDF has scheduled to take in [2010-2020]. EDF points to two key elements: the speed of the economic recovery from the current crisis as well as the evolution of the cost of equipment, in particular the investment cost of a CCGT Unit. [Information as to possible positive scenarios]. Thus, if for instance these positive developments materialise, there are scenarios where EDF would, in the absence of the Proposed Transaction, decide to invest in the additional generation capacities.

159. Whereas, as with any projected investment decision to be made in the future, it cannot be guaranteed with full certainty that it will materialise in all scenarios in the future, it can however already be considered at this stage that the Proposed Transaction will affect the incentives to invest in *any* of those scenarios. When the merged entity considers investing in new generation capacity, it will take into account not only the stream of revenue generated on the project itself (as an entrant without any installed capacity would do), but also the impact of the added capacity on the profits earned by all the plants in its portfolio. In this respect, the analysis carried out by the Commission indicates that the impact of EDF's CCGT(s) projects on the revenues of SPE is not marginal. The additional capacities considered by EDF would have a significant impact on prices in Belgium, so that margins earned by SPE's plants would be significantly reduced as a result.[85] The loss of gross margins[86] by SPE could represent […] % to […] % of the project-specific gross margins, using EDF's model. As a consequence, the incentives of the combined entity to develop further the CCGT projects currently considered by EDF are significantly lowered by the Proposed Transaction.

83 [Information on the functioning of EDF’s internal model].

84 [Information on the functioning of EDF’s internal model].

85 In addition, some of SPE's plants would be pushed higher up the merit curve as a result of the added capacity and would, in some instances, no longer be infra-marginal.

160. Although the precise likelihood of market conditions resulting in first, EDF on a stand-alone basis developing one or both CCGT projects and, second, the merged entity not developing the same projects, are difficult to assess, the results of the modelling exercise described above nevertheless indicate that there are a number of plausible scenarios under which the incentive for EDF to develop one or two of its CCGT projects appears borderline pre-merger and is significantly reduced post-merger as a result of the combined entity taking into account the negative price impact of additional capacity on its entire generation portfolio. It is therefore considered that there are serious doubts with regard to the incentives of the merged entity to further develop EDF's CCGT projects. The Notifying Party has submitted commitments to address this concern.

(iii) Short-term unilateral effect

161. Until [2010-2020] (i.e. before the earliest date at which current project developments in Belgium would become operational if EDF were to proceed with the investment decision as currently scheduled) the only unilateral effect is to combine SPE's portfolio with EDF's share of Tihange of [450-550] MW. However, this capacity is not only a very small share of the Belgian total generation capacity (of approximately 16 500MW), but it is also […] sold under long-term contract to […], so that any unilateral effect on the Belgian market considered in isolation can readily be excluded.

162. With respect to the potential unilateral effects of the Proposed Transaction, the Belgian NCA notes, in section V.B of the Referral Request, page 7, that "*[a]s the transaction will lead to a concentration of the sale and purchase orders of both SPE and EDF and given the practices revealed by the CREG on Belpex, the size of the merged entity will lead to an increase of its interest in withdrawing capacities and submitting high purchase orders in Belpex in order to increase the spot exchange price*".

163. The above argument of the Belgian NCA relies on the position of the parties to the Proposed Transaction in both France and Belgium. In particular, the Referral Request indicates that although SPE currently has little incentive to withhold capacity, "*[i]f SPE will merge with EDF, the merged company will have very high*

[86] Gross margins take into cumulated revenues resulting from the positive difference between hourly

*incentive for withholding capacity: low cost (SPE's CCGTs) and very high benefits due to the very large production park*".

164. It has been assessed whether EDF's presence in France could lead to an increase of electricity prices in Belgium as a result of the Proposed Transaction. On the basis of an analysis of the French and Belgium cost curves, that a merger-specific withholding strategy using SPE's mid-curve portfolio would be unlikely to be profitable for the merged entity, in particular as it would have little impact on French prices, if it were conducted on the electricity generation taken as a whole. The impact of strategies consisting of withholding the highest cost infra-marginal SPE generation units was assessed, based on the very conservative assumption that this would result in an equivalent increase of demand on the electricity generation market in France[87]. A wide variety of demand scenarios were considered, and it was found that these strategies would not be profitable for the merged entity, as the profit loss resulting from such a withholding strategy in Belgium would be greater than the gain for EDF in France[88].

165. In light of the above arguments, it is concluded that the Proposed Transaction would not lead to any anticompetitive unilateral effects in the short term.

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equilibrium prices series and the variable cost of each production unit.

87 Taking into account congestion for imports into Belgium from France reduces the price increase in France following a withholding of SPE's capacity in Belgium and, thus, any benefits that the combined entity may realise from this strategy.

88 If, as in the Referral Request, one were to consider a withholding strategy in Belgium (in order to affect French prices) specifically linked to the spot exchange, one has to consider the size of the withholding considered here is very substantial compared to the size of the day-ahead volume (which represent only 12% of the total generation capacity), and therefore unlikely to be profitable for the merged entity (in particular given that in the absence of a withdrawal strategy specific to OTC products, a strategy of manipulation of BELPEX prices could only affect OTC prices durably if it triggers a substitution from the spot market to OTC products, which would in turn reduce the price impact of the withholding strategy on the spot exchange). Furthermore, any potential incentive that the merged entity may have to withhold capacity in Belgium to increase prices in France may be reduced by imports from the Netherlands and Germany, reinforced, as of April 2010, by the introduction of market coupling with Germany. It is to be noted in the context that both Germany and the Netherlands have a large installed capacity of thermal power plant that may replace SPE's withdrawn capacity.

*<u>Coordinated effects on the electricity generation and the wholesale markets, on (the) electricity trading (market) and on the market for ancillary and balancing services</u>*

(i) Possible coordination risks due to shareholdings by the French State in both GDF Suez (Electrabel) and of EDF

*<u>(a) Arguments in the Referral Request and by EDF</u>*

166. As explained above by the Belgian NCA, the Belgian NCA submits that the creation of a `*structural link*` between the two incumbent Belgian electricity producers (GDF Suez (Electrabel) and SPE), due to the shareholding of the French State in both companies[89] via the APE, is an even more important element which increases the likelihood of coordination or strengthens coordination.

167. In response to the arguments put forward by the Belgian NCA, EDF has emphasised that the French State's role as owner of both companies does not have any impact on their commercial autonomy on the relevant markets and that the representation of the French State and its intervention within each group is clearly defined in a way that preserves their independence.

168. EDF argues furthermore that the shareholdings of the French State in the capital of EDF and GDF Suez (Electrabel) are held directly by the French State and are not gathered within a single holding company. According to EDF, the two groups are not part of a wider industrial group and do not belong to an economic unit with an independent power of decision within the meaning of EU competition law. As EDF further stresses, the APE asssumes the shareholder role of the Government for a defined number of companies including EDF and GDF Suez (Electrabel) as the APE has been created with a view to improving the global effectiveness and transparency of the French State as a shareholder, without however affecting the autonomy of the companies, whose strategy is defined by their Board of Directors and implemented on a day-to-day basis by the management team.

169. EDF also submits that none of the representatives of the French State appointed to the Board of Directors of EDF is a member of the Board of Directors of GDF Suez

89 The French State currently holds 84,6% of the issued ordinary shares of EDF. In GDF, the French State remains the main shareholder, with a stake of 35.91% as of August 2009.

(Electrabel), and *vice versa*. Moreover, as emphasised by EDF, the representatives of the French State are not in a position, individually or collectively, to veto the strategic decisions of the companies, since they represent together at most one third of the members of the Boards of Directors. Along these lines, EDF also states that the representatives of the French State on the Board of Directors of EDF are bound, like any other member of the Board, by strict governance principles relating to confidentiality and independence. Consequently, EDF argues that GDF Suez (Electrabel) is one of the most active competitors of EDF in the energy sector in France, which proves the complete strategic and commercial autonomy of the two companies.

170. EDF states that it has not experienced in the past any pressure from the French State in relation to a potential coordination of commercial behaviours of EDF and GDF Suez (Electrabel).

171. Finally, as EDF notes that, although the French State is involved in the definition of the global strategy of EDF through its representatives to the Board of Directors, the implementation of this strategy on a day-to-day basis is carried out by their respective management.

*(b) Assessment*

172. The fact that GDF Suez (Electrabel) and EDF have a common shareholder, the French State, is the reason why the Belgian NCA considers that there is a risk of coordination between the two companies in their strategic business decisions. It is also argued that this would be facilitated by the management of the French State shareholdings through the same agency, APE.

173. In order to analyse these claims it is necessary to ascertain, whether an undertaking whose majority shareholdings (84.66%)[90] are held by a State (EDF), or where the State is the major shareholder (35%) (GDF Suez (Electrabel)) can still be considered to have an independent power of decision in relation to other undertakings where the same State is the main or a major shareholder. That will be the case if this undertaking sets by itself its business plan, budget, and strategy, in its own commercial interests, independently from other undertakings owned by the same State entity.

174. The requirement that the business plans, budget and strategy must be set independently implies that the acquiring State entity cannot (directly or indirectly) impose or facilitate coordination between any other undertakings which are owned by it. Relevant factors that may be taken into account when assessing the independent power of decision include, but are not necessarily limited to: (i) the existence of interlocking directorships between undertakings owned by the same acquiring entity; and (ii) the existence of adequate safeguards ensuring that commercially sensitive information is not shared between such undertakings. In any event, the exercise of supervisory powers by the State will not exclude the ability of such undertaking to set its strategy independently where such powers are limited to the protection of interests analogous to those of a minority shareholder[91].

175. Therefore, when an undertaking fulfils the abovementioned requirements it could be concluded that it has an independent power of decision, regardless of the fact that the State owns it or is a majority shareholder. In the Gaz de France/Suez Decision[92], the Commission considered EDF and GDF Suez (Electrabel) as competing undertakings. In that decision, in the market for supply of gas to industrial customers, the Commission regarded EDF as one of the main competitors of GDF Suez (Electrabel), together with Total, Distrigaz, EON or BP. In the market for the supply of gas to household customers, the Commission considered that EDF constituted together with Distrigaz one of the main competitors of GDF.[93] In the market of supply of gas to electricity customers, EDF expressed its concerns that "*the GDF/Suez merger would strengthen the control each of the parties has over the gas system (supply, access, transmission and storage) in which they operate in France and the whole North-West of Europe, giving the new entity in essential segments of the corresponding value chain a virtual monopoly*"[94]. In EDF Document de Reference for 2008, it is noted that "*EDF`s main competitors on the French market are GDF Suez, Endesa/SNET, Atel, HEW Energies, Poweo, Direct Energie, and local distribution companies (LDCs). With the recent completion of the merger between Suez and Gaz de*

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90 Form CO, paragraph 39

91 cf. Jurisdictional Notice §§ 66, 71.

92 COMP/M.4180 – *Gaz de France/Suez*

93 "*La Commission estime cependant que Distrigaz est, avec EDF, l'opérateur le mieux placé pour pénétrer les marchés de la fourniture aux clients résidentiels à compter du 1er juillet 2007.*", COMP/M.4180 Gaz de France/Suez, par.452.

94 COMP/M.4180 – *Gaz de France/Suez*, para. 465.

*France, the energy landscape has changed due to the emergence of a first-rate competitor for EDF*"[95].

176. It can be added that, as it has been described above, EDF has ambitious plans to expand its business in Belgium by preparing the construction of [1,800-1,900] MW generation capacity. Additional capacity is most likely to affect the revenues of GDF Suez (Electrabel) more than any other market participant in the Belgian generation and wholesale market. Indeed, as is apparent from the Commission's simulations, the construction of new power plants affects the wholesale price and, by these means, the revenues of other participants. The larger the pre-existing portfolio of a market participant, the larger the expected revenue losses are likely to be. GDF Suez (Electrabel) has, by far, the largest generation portfolio within Belgium. The fact that EDF has an ambitious expansion policy within Belgium (which was started after the Gaz de France/Suez merger[96] and has since continued) contradicts therefore the fact that the French State exerts influence with a view to increasing profits of both groups.

177. As to the submission that the French State may cross-subsidise regulated prices for electricity and gas in France by charging high prices in foreign non-regulated markets it is useful to note that the French Government has recently undertaken to largely phase out such regulated prices by 2015. The Tartam is currently scheduled to be phased out by 1 July 2010.

178. As regards the existence of interlocking directorships, none of the representatives of the French State appointed to the Board of Directors of EDF is a member of the Board of Directors of GDF Suez (Electrabel), and *vice versa*. Further, they are bound by governance principles relating to confidentiality and independence, in accordance with corporate governance principles applicable to listed companies[97].

179. The information provided by EDF with regard to the Proposed Transaction indicates that EDF is able to independently set its business plans in relation to

95 See EDF *Document de Référence* for 2008, para. 6.2.1.2.1, page 55.

96 EDF Submission of 9 October 2009 reply to question 6(c)

97 They follow the governance principles applicable to listed companies, as described in the guidelines published on 17 December 2003, entitled “Enforcement of the Financial Security Act with regard to the chairman’s report on internal control procedures established by the company” by the *Association Française des Entreprises Privée* (AFEP) and the *Mouvement des Entreprises de France* (MEDEF)

GDF/Suez (Electrabel), and in accordance with its own commercial interests. The Commission did not receive any evidence as to the contrary during the market investigation.

180. The fact that a governmental agency (APE) is responsible for the managing of the French State's shareholdings in EDF and GDF Suez (Electrabel) cannot put such conclusion into question as far as its role is clearly limited and it does not appear to affect, as is the case here, the commercial and business autonomy of these companies.

181. Consequently, since EDF can be regarded as a company with an independent power of decision in relation to GDF Suez (Electrabel), and which is an actual competitor of GDF Suez (Electrabel), the alleged risk of coordination with GDF Suez (Electrabel) in the Belgian electricity markets due to the shareholding structure is not founded.

(ii) Coordinated effects on electricity generation and wholesale market, on electricity trading market and on market for ancillary and balancing services

182. As detailed in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ('Horizontal Merger Guidelines')[98], four cumulative conditions are necessary for coordination to emerge and be sustainable: the ability to reach an understanding on the terms of coordination, the ability to monitor deviations, the existence of deterrent mechanisms and the absence of any ability or incentive for outsiders to destabilise the coordination. These four conditions have to be considered within a plausible mechanism for coordination.

183. The Referral Request by the Belgian NCA argues that the markets concerned have characteristics that are conducive to tacit collusion. In particular, the Referral Request argues that a mutual understanding on the terms of coordination is likely given the limited number of companies active on the market and the homogeneous nature of electricity and given that the market is sufficiently transparent to monitor deviations from the collusive agreement, that there are credible deterrent credible mechanisms and that the reaction of outsiders would not jeopardise the results

expected from coordination. The Referral Request does not however provide a detailed description of how coordination would work in practice, in particular with respect to the mechanism and variables on which the colluding partners would tacitly agree the mechanism for detecting deviations and the means of retaliation[99].

184. Contrary to the arguments set out in the Referral Request, EDF argues that the electricity market is not conducive to collusion. In particular, they stress that reaching the terms of coordination would be difficult in the absence of an obvious focal point (in particular given the demand and cost fluctuations, and the substantial degree of differentiation of the contracts offered on the market), that the market is not transparent because the majority of transactions in Belgium and France take place through OTC trade, that there are no effective deterrent mechanisms (in particular because deviation could take part through long-term forward contract), and that any attempt to raise prices by EDF and GDF Suez (Electrabel) would trigger reactions from outsiders (in particular, through an increase in imports and rival entry and expansions in the medium term).

185. As stated in the Horizontal Merger Guidelines[100], when the Commission examines whether it would be possible to reach terms of coordination and whether the coordination is likely to be sustainable, it has to consider the changes that the merger brings about. For the purpose of reviewing the Proposed Transaction, the Commission's assessment of potential coordinated effects therefore focuses on the merger specific effects of the Proposed Transaction.

186. Because of the very limited presence of EDF in Belgium electricity markets, any merger specific effect of the Proposed Transaction, as far as coordination is involved, is likely to be limited. In particular, in addition to the `structural link` addressed above, the main potential merger specific effect with respect to coordination derives from the increase in multi-market contacts between EDF and GDF Suez (Electrabel) in France and Belgium[101].

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98 OJ C 31, 5.2.2004, p.5, paragraph 41.

99 For example, for the generation and wholesale market, the Referral Request indicates that the coordination mechanism would involve GDF Suez (Electrabel) and SPE coordinating their investments, without further details as to how such a strategy could be carried out in practice.

100 Horizontal Merger Guidelines, § 42.

101 Technically, the Proposed Transaction will also lead to the disappearance of one competitor on Belgian electricity markets. However, given the very small size of EDF in Belgium and the fact that it is […] selling all its production under a long term contract to […], the role that EDF could play, in the

187. The Referral Request argues that, as the Proposed Transaction will increase the number of multi-market contacts between EDF/SPE and GDF Suez (Electrabel), it is going to be easier for these companies to reach a common understanding, to monitor each others' behaviour and to retaliate in case of deviation. The Referral Request also argues that "*the competition in the Belgium market (where GDF Suez/Electrabel is the first operator which can be retrieved at the bottom and the middle of the supply curve and EDF/SPE, which is the second operator, can be found on the top of the supply curve) will become the mirror image of the competitive situation in France (where EDF/SPE is the first operator which can be retrieved on the bottom and the middle of the supply curve and GDF/Electrabel, which is the second operator, which can be found on top of the supply curve).*"

188. The Commission therefore assesses whether the increase of multi-market contacts (defined as interactions on different markets) between EDF and GDF Suez (Electrabel) as a result of the Proposed Transaction is likely to significantly impede effective competition by making coordination easier, more stable or more effective. As mentioned in the Horizontal Merger Guidelines[102], multi-market contacts may reinforce the scope for retaliation in case of deviation from a collusive agreement (e.g. by linking the strategies on the different markets and triggering retaliation on all markets in response to a deviation on one market). However, economic theory shows that multi-market contacts also increase the gain for deviation from a collusive agreement (as not only retaliations but also deviations are possible on a higher number of markets), which implies that multi-market contacts could lead to coordinated effects only under specific circumstances.

189. An increase in symmetry between the parties to the concentration would not be sufficient in itself to consider that the Proposed Transaction is likely to lead to coordinated effects. Rather, to increase the scope for collusion, a coordination mechanism linking the two separate markets is necessary in order to reduce the incentive constraint of the relevant players (e.g. if one participant would not have an incentive to collude on one market, but would have an incentive to engage in collusion if a collusion mechanism involved linking both markets). As far as the Proposed Transaction is concerned however, the market investigation did not

absence of the Proposed Transaction, in terms of destabilizing a collusive agreement between SPE and GDF Suez (Electrabel) is most likely negligible. Therefore, this can not be considered a sufficient element for the Proposed Transaction to create or reinforce the scope for collusion.

provide any indication that the incentive constraints of EDF or GDF Suez (Electrabel) would be relaxed by the merger specific increase in multi-market contacts in a way that would make coordination easier, more stable or more effective.

190. In light of these arguments, it is concluded that the Proposed Transaction is unlikely to lead to coordinated effects.

*Non-horizontal unilateral effects on the Belgian electricity trading market*

191. EDF and SPE are active in both upstream (generation) and downstream (supply to final customers) markets in Belgium and/or France. The Referral Request argues that the combination of the activities of the parties' to the concentration will lead to a non-horizontal input foreclosure strategy by the merged entity, which would consist in withholding electricity by SPE on the Belpex in order to increase the input price of its competitors active on the downstream supply market. According to the Referral Request, this input foreclosure strategy would significantly impede competition because the competitors that would be foreclosed play an important role on the electricity supply markets and because such manipulation of the spot exchange price would increase volatility and hence increase barriers to entry or expansion for potential and current competitors.

192. Moreover, some concerns have been raised that the Proposed Transaction could limit the liquidity available on the wholesale market[103].

193. The Proposed Transaction would not impede competition as a result of such an input foreclosure strategy.

194. First, currently SPE buys more than it sells on the wholesale market, and as a consequence has decided to invest in new capacity located at Navagne, while EDF has no production facility at its disposal in Belgium and supply its customers from imports and the wholesale market. Therefore, any negative effect of the Proposed Transaction on the liquidity of the Belgian wholesale exchange is unlikely before new investments from either party come on-stream. At that time, each party will have the possibility to supply its customers partly through its own electricity, either

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102 Horizontal Merger Guidelines, § 55.

103 An electricity competitor's response to the market test of commitments submitted by EDF. This concern is however not supported by replies to the market test by other market participants

on a stand-alone basis or as a merged entity. The main effect of these investments is that less electricity will be bought from the wholesale market by the parties to the concentration, which in turn means that more electricity would be made available for the remaining buyers. The Proposed Transaction's only effect, for a given level of investment from both parties, relates to the coordination of production and consumption portfolios of each company, which increases the number of instances where the merged entity would use its own electricity to supply its customers. The main effect of the Proposed Transaction would be to increase the quantity of electricity available on the Belgian wholesale market for other distributors.

195. Moreover, the merged entity would not have the ability to foreclose its downstream competitors as it lacks market power given its relatively limited size on the electricity generation market in Belgium. Furthermore, even if it had such an ability, the merged entity would not have an incentive to engage in such strategy given the limited impact of a withholding strategy in Belgium on electricity prices in France, in particular taking into account, on the one hand, the constraint imposed by the size of interconnectors between France and Belgium and, on the other, the constraint imposed by the optimisation of imports from other neighbouring countries[104]. Finally, there is no evidence that a reduction of liquidity as a result of such a strategy would foreclose competitors or potential entrants.

196. E.ON recently acquired a significant quantity of generation capacity of significant size in Belgium. As E.ON does not have a significant downstream portfolio, this adds a market participant with a structurally long position in Belgium that is thus likely to contribute to the liquidity of traded electricity products in Belgium.

197. It is therefore concluded that the Proposed Transaction is unlikely to lead to non-horizontal unilateral effects on the Belgian electricity trading market.

[104] As far as the spot market is concerned, the future development of market coupling with Germany is an additional factor limiting the incentive for the parties to engage in input foreclosure

*Balancing and ancillary services*

198. In view of the constraints that exist to supply ancillary services and balancing power, essentially[105] only GDF Suez (Electrabel) and SPE supply such services to their sole buyer, ELIA. EDF is currently not present on this market.

199. EDF's (and SPE's) projected generation units are technically and economically suited to supply all ancillary and balancing services (with the exception of black start)[106]. Indeed, the supply of such services is economically attractive as such revenues can represent (EUR [5-25] kW/y) a significant share of a power plant's revenues[107].

200. In order to guarantee the supply of balancing power in case of plant failure and maintenance, possessing several generation units capable of supplying balancing power is a prerequisite, or at least a competitive advantage, when supplying such services to the network operator ELIA. EDF plans to construct four CCGT units. In view of the limited suppliers of ancillary services and balancing power and the generation portfolio expected to come on line by other entrants in the near future, EDF therefore appears to be the best placed entrant in the market for ancillary services and balancing power. In view of the fact that the Proposed Transaction affects the incentives for EDF to invest in the planned generation units, the Proposed Transaction will significantly affect competitive conditions on the market for ancillary services and balancing power.

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202. The Belgian NCA also states the fact that *'SPE is known to be the 'price setter' in the 'intra-day'* segment. It considers that it therefore has some market power and

[105] With the exception of limited amounts of upward regulation provided by interruptible customers.
[106] Document n° 576 reply to Q 5 in particular.
[107] EDF's answers to Q 2(h) of the request for information dated 14 October 2009.

that its market position is significantly larger[108]. The Belgian NCA apparently refers here to SPE's role as a market maker in Belgian intra-day traded electricity products[109]. A market maker contributes to the liquidity of the traded products by quoting competitive sales or purchase orders (with prices) in order to guarantee the availability of a counterparty to other market participants. Such a role (a positive contribution to Belgium's illiquid electricity trading), should not lead to any different assessment with regard to the Proposed Transaction.

203. Consequently, any concerns regarding the market for ancillary services and balancing power are removed by the commitments addressing the concerns on the generation and wholesale market.

*Retail Supply of Electricity in Belgium*

204. SPE is active on all the electricity supply markets in Belgium. EDF is only active on (i) the market for the supply of electricity to large industrial customers (connected at above 70 kV) and (ii) the market for the supply of electricity to small industrial and commercial customers (connected at below 70 kV). The Proposed Transaction therefore leads to horizontal overlaps on the Belgian markets for the supply of electricity to large industrial customers and the market for the supply of electricity to small industrial and commercial customers.

(i) Large industrial customers market

205. Regarding supply of electricity to large industrial customers, the increment added by EDF's presence is a mere [0-5]%, while SPE's market share is found to be just below [5-10]%.

206. The Proposed Transaction will not lead to competition problems in this market, given the relatively low combined market shares and the minor increment resulting from it. The market investigation did not identify any serious doubts for this market.

108 Page 5 of the Referral Request
109 http://www.belpex.be/index.php?id=91

(ii) Small industrial and commercial customers market

207. As regards the retail market to small industrial and commercial customers (connected at below 70 kV)), if a national market definition is adopted, the increment added by EDF's presence would be a mere [0-5]%. SPE's market share on this market is just above [10-20]%, therefore no competition issues appear to arise if a national definition is adopted.

208. At the smallest possible geographic definition, the parties to the concentration overlaps for the Brussels region are found to be even smaller (EDF [0-5]% and SPE [5-10]%), while for the Flanders region EDF would add a mere [0-5]% to SPE which has a presence of just above [10-20]%. It is therefore clear that even if a definition which is smaller than national is applicable for small I & C then no competition issues arise with respect to the Flanders and the Brussels regions. However, by reference to the smallest possible geographic definition, as regards Wallonia the figures are higher than at national level since the combined presence would be [10-20]%. EDF has a presence of [5-10]%, while SPE's presence is around [10-20]%. A number of respondents have noted that the Proposed Transaction will lead to a decrease in the number of suppliers given that EDF is currently a credible alternative supplier to SPE.

209. Nevertheless, the combined market shares of EDF and SPE in Wallonia (which is at [10-20]%) cannot by itself be considered to be high enough so as to create doubts.

210. First, GDF Suez (Electrabel), the incumbent supplier, has a total presence of [60-70]% in the Walloon region and [70-80]% nationally in the retail market to small industrial and commercial customers. This is a very high figure which cannot be considered comparable to that of the merged entity.

211. Second, as confirmed by numerous respondents to the Commission's market investigation, the merged entity (EDF and SPE) would be better placed to compete with the incumbent post merger than EDF and SPE competing individually with GDF Suez (Electrabel). Moreover, the Proposed Transaction creates better opportunities from the current situation for EDF to expand further its retail supply business in the short to medium term given that it currently lacks the necessary and

suitable generation capacity. Possessing own generation capacity is clearly a very important factor for materially expanding a downstream supply business.

212. Third, it is to be noted that EDF and SPE are not the only retail suppliers to small I & C customers currently competing with GDF Suez (Electrabel). At national level, EON has a presence in the range of [0-5]% while RWE (Essent) and Vattenfal (Nuon) have market shares of [0-5]% and [0-5]% respectively. Moreover, a number of other smaller suppliers are estimated to have a total presence of just [5-10]%. Specifically in relation to the Walloon region, where the merged entity would have a market share of [10-20]% in the sub-national geographic definition, E.ON has a presence of [0-5]% RWE (Essent) [0-5]% and Vattenfal (Nuon) just above [0-5]%. These remaining competitors active in the market, are sufficient to ensure that competition will be maintained. The potential of these remaining competitors to further develop their presence in retail supply markets for small I & C is also relevant given their planned entry and expansions in the generation and wholesale market. This argument is particularly relevant for E.ON which recently acquired sole control over two power plants and certain drawing rights[110] in Belgium.

213. For these reasons, the Proposed Transaction does not give rise to serious doubts for the market of supply to small industrial and commercial customers.

(iii) Secondary effects on retail markets

214. The Proposed Transaction has its primary effects on the Belgian generation and wholesale market.

215. However, EDF has a strategy to enter markets vertically integrated. In order to secure optimal revenues for its generation capacity, it deems it necessary to develop a consistent retail business which, thanks to the ability to secure prices through a large number of contracts with different maturities and limited churn rates provide a natural financial hedge against wholesale volatility[111]. EDF's retail portfolio today is insufficient (to very large extent) to absorb the generation capacity it is planning to bring on line. Whereas its current portfolio amounts to a

[110] See COMP/M.5519 – *E.ON/Electrabel Acquired Assets*

[111] EDF's answers to Q 1 of the request for information dated 14 October 2009.

mere 1.55 TWh, it can be estimated that EDF may be able to produce between [5-15] TWh/y by [2010-2020][112] when its planned CCGTs come online.

216. Consequently, the effects the Proposed Transaction may have on the parties' incentives to expand generation capacity in the wholesale and generation market are likely to also have effects on EDF's entry and expansion on the various Belgian retail markets.

217. These secondary concerns regarding the retail markets are addressed by EDF's commitments which address all concerns on the generation and wholesale market.

(iv) Conclusion on retail markets

218. The Proposed Transaction does not raise serious doubts as to its compatibility with the common market in any of the retail markets in Belgium.

*Conclusion on competition concerns of the Commission*

219. As a result of the detailed assessment of the Proposed Transaction, with regard to the horizontal unilateral effect of the Proposed Transaction it is concluded that there are serious doubts concerning the incentives of the post-merger entity to further develop EDF's CCGT projects. The Notifying Party has submitted commitments to address this concern.

220. However, the assessment of the Proposed Transaction did not identify serious doubts with respect to the coordinated effects and non-horizontal unilateral effects of the Proposed Transaction on the different Belgian electricity markets.

## VIII REMEDIES OFFERED BY EDF / MARKET TEST

### A. DESCRIPTION OF REMEDIES

221. Currently, EDF is developing two sites in Belgium with a view to constructing up to [1,800-1,900] MW of CCGT based generation capacity. One site located at Dilsen-Stokkem and one site located at [Western part of Flanders]. All current

[112] These figures are estimated on the basis that EDF expects that its projected CCGT will run between [4000 – 7000] hours per year (Presentation project […] 13 October 2009, p 6). It does not include its capacity on the Tihange reactor as this will still be contracted to […] by [2010-2020]. Including this capacity (presumed to run at all hours) leads to estimated production between [10-20] TWh/y.

assets related to these development projects are located in two separate companies, [CCGT 1 Company] and [CCGT 2 Company] respectively, which are both owned at 100% (minus one share) by EDF Belgium. SPE is also developing one site (in Navagne) capable of receiving generation capacity up to 850 MW site. The final decision to construct generation capacity on these sites has not been taken for any of these projects, nor have they obtained all the necessary permits..

222. The Proposed Transaction removes EDF as an ambitious entrant from various Belgian electricity markets because incentives for the merged entity to develop new generation capacity in Belgium will be significantly reduced in comparison to the incentives that EDF had pre-merger. Consequently, preliminary competition concerns have been identified as the Proposed Transaction may lead to significant lessening of competition on the Belgian electricity markets.

223. In order to remove the competition concerns identified by the Commission in respect of the Proposed Transaction, EDF has provided Commitments. The Commitments consist of:

(a) The immediate divestiture of the assets of either [CCGT 1 Company] or [CCGT 2 Company], and;

(b) The divestiture of the assets of the remaining of these two companies if, by a certain date, EDF has not taken a final investment decision or has taken a negative final investment decision with regard to the remaining site.

224. The combined effect of the Commitments is that a potential maximum generation capacity of up to [1,800-1,900] MW will be made available to the market (constituting approximately [10-20]% of the existing Belgian generation capacity). As a result, EDF considers that this completely addresses the Commission's concern regarding the potential removal of EDF as an ambitious entrant in the generation and wholesale market in Belgium.

225. EDF believes that the divestiture of the assets of either [CCGT 1 Company] or [CCGT 2 Company] would be attractive to a purchaser looking to develop CCGT in Belgium for the following reasons; (i) the two sites identified by EDF […] benefit from an optimal situation and are particularly suited for the development of CCGTs, (ii) EDF has already received a positive reaction from Belgian local

administrations, and believes that a suitable purchaser would also benefit from such a positive reaction, (iii) EDF furthermore believes there will be capacity shortage in the medium term in Belgium, which should enhance the attractiveness of the divestiture sites for a suitable purchaser.

226. Consequently EDF considers that a suitable purchaser approved by the Commission will be interested in acquiring the assets of any of the two companies in charge of the CCGT Projects ( [CCGT 1 Company] or [CCGT 2 Company]) within the time-frame proposed by the Commitments.

### B. OUTCOME OF THE MARKET TEST ON THE COMMITMENTS

*Comments by market players to the Commitments*

227. Respondents to the market test of the Commitments included mostly competitors of EDF and SPE on the Belgian electricity generation and wholesale market and on the markets for the supply of electricity to end customers.

228. Responses from market players can be considered as partly positive and partly negative.

229. Some of the respondents are positive to the Commitments. They agree that the Commitments remove the identified concerns, for example, by stating that that an "*Invest or divest*" type of remedy is appropriate to counteract the reduced incentives to build generation capacity due to the Proposed Transaction. Moreover, the overwhelming majority of respondents agreed that the immediate divestiture of the assets of the company carrying out one of the two of EDF's CCGT projects is a positive element of the Commitments.

230. However, some players were negative in their responses. They emphasise theories of harm for which the Commission's first phase investigation did not identify any concerns (and accordingly did not consider remedies to be necessary for addressing those alleged concerns) or they seek to challenge the adequacy of the Commitments to address the concerns which the Commission has identified. For example, some players argue that the Commitments are not sufficient in removing their alleged (additional) concerns for which the Commission did not identify serious doubts or they see the commitments offered only as a partial remedy as they consider that the two sites are insufficient in creating enough options in order for a third party to

reach a substantial generation market share. Additionally, it was noted that an "*Invest*" decision was not considered as a remedy at all or that an "*Invest or divest*" commitment would not change the alleged strengthened position of EDF post merger.

231. As regards the effectiveness of the Commitments to address the Commission's identified concerns, it has been noted that an "*Invest or divest*" type of remedy – envisaged in the proposed commitments for a second site- is not appropriate to counteract the reduced incentives to build generation capacity due to the Proposed Transaction, as the time to take the decision will slow down the market strategy of competitors.

232. The market test did demonstrate that a preliminary interest by potential buyers exists to buy a site that is divested immediately, as well as one later (if EDF does decide not to build a generation unit by a certain date on that site). Specifically, the majority of competitors of EDF and SPE on the wholesale and generation market appear to be willing to consider acquiring the site(s) to be divested by stating their preliminary interest.

233. The majority of the participants of the market test indicated that sites for building generation capacity in Belgium can be considered as scarce. To explain this scarcity, respondents referred to a number of characteristics which a site would need to possess in order to be considered as suitable for building a gas fired power plant. These included, the sites' location relative to the high pressure gas network, the site location close to the high voltage grid (and existence of available capacity on the grid) and to cooling water, the non-proximity to urbanised areas and the need for a positive attitude of local public authorities. Many sites would be unsuitable due to them being either close to habitable areas, due to the high density of population in Belgium, or close to nature protection areas (e.g. Nature 2000 areas).

234. It was also noted that GDF Suez (Electrabel) may need to be excluded as suitable buyer as a purchase by GDF Suez (Electrabel) may create a competition concern in view of its current position in Belgium's market for generation and wholesale.

*Comments of the Belgian NCA to the commitments offered by EDF*

235. On 3 November 2009, the Belgian NCA submitted its comments to the Commission on the Commitments. In sum, the Belgian NCA considers that the Commitments are not sufficient to remove either the Commission's concerns or the additional competition concerns identified by the Belgian NCA and accordingly proposes alternative commitments.

236. As regards the concerns identified by the Commission, it is argued that there is a lot of uncertainty with the respect to the projects materialising (i.e building CCGTs) on the site(s) that would be divested) and that the proposed commitments will not be enough to make the potential buyer a likely new entrant in the generation and wholesale market in Belgium. For example, the Belgian NCA states that the submitted commitments are unlikely to eliminate the competition concerns identified because they do not guarantee that a competitor will have additional production capacities following the divestment, given that it is not certain that the federal government and local authorities will grant permits to EDF’s CCGT projects.

237. Accordingly the Belgian NCA proposes alternative remedies to address those competition concerns. They suggest a divestiture by EDF of its share in Tihange 1 nuclear power plant and the divestiture of SPE's Navagne site.

238. The views of the Belgian NCA cannot be accepted. The basis for the Commission's concerns is the reduction of incentives of EDF post merger to pursue these projects. In view of the fact that the final investment decision is to be made in the future, which is uncertain by definition, the Commission's concerns are not based on a finding that the projects would be realised under all possible scenarios. What the Commission seeks to ensure with the Commitments instead is that the incentive to pursue the projects is not affected by the Proposed Transaction. By replacing EDF as the developer of the site (immediately and, possibly, later) with a market participant that has the same incentive to develop the sites as EDF had prior to the Proposed Transaction, the Commission's concerns are addressed.

### C. MODIFICATION OF THE COMMITMENTS FOLLOWING THE MARKET TEST

239. Pursuant to the Commitments, the divestiture of the assets of the company carrying out the remaining of the two projects would take place if, by a certain date, EDF has not taken a final investment decision or has taken a negative final investment decision with regard to the remaining project .

240. The original text of the Commitments proposed by EDF did not specify in more detail what constitutes a final investment decision. Therefore, during the market test of the Commitments the Commission enquired as what constitutes an irrevocable decision to invest in building a power plant and whether the entering into a final investment decision by a company is a sufficient guarantee that the project would be pursued. This is important as the market test indicated that the "*Invest or divest*" type of remedy may delay the entry of competitors should EDF finally decide not pursue its investment on the second site.

241. By rendering the decision irrevocable or, at least, by rendering it very unlikely that EDF could delay or withdraw completely from its decision to invest, EDF will not be able to delay/prevent the entry of others by stating that it has taken a final decision by the specified date when in fact its decision to invest would be merely provisional.

242. Even though it is impossible to ensure that a final investment decision always results in the actual investment materialising, the market test has shown that once a company has entered into binding contracts for the building of a power plant (e.g. a so called EPC[113] contract) it is very unlikely that it can delay or abandon the project. It was emphasised that it is standard practice that delays caused by the purchaser lead to financial penalties being imposed after a binding contract has been signed with the contractor building the power plant. In line with the market test results, it can therefore be considered that the final investment decision is essentially the mandate to enter into a binding EPC agreement.

243. With a view to incorporating these comments and suggestions expressed by market players, EDF submitted on 9 November 2009 a revised commitments package so as to provide increased certainty that a final investment decision will result in the actual materialising of the investment. In particular EDF amended the part of the

Commitments text which relates to the final investment decision. EDF undertakes to sign an unconditional binding purchase contract for the essential components of a CCGT of a potential maximum capacity of [900-950] MW dedicated to the [CCGT 1] Project or the [CCGT 2] Project, within […] months from "The Final Investment Decision Date". In case that contract is not entered into in that period, EDF will be deemed to have taken a "Negative Final Investment Decision" and would thus be obliged to divest the second site.

244. This modification guarantees with a sufficient high degree of certainty that a final decision to invest constitutes a true commitment to pursue the building of a power plant. This will ensure that EDF will not be able to delay or prevent the entry of other competitors.

### D. COMMISSION'S ASSESSMENT OF THE PROPOSED MODIFIED COMMITMENTS

245. By acquiring SPE, which possesses the second biggest installed generation capacity in Belgium, as well as a site prepared for the construction of an 850 MW CCGT generation plant, the incentives for the combined entity to develop also EDF's sites would be reduced. This is primarily because of downward price effects on the electricity wholesale market that the additional generation units would have and the resulting loss of revenues on the generation portfolio of EDF when combined with that of SPE.

246. As the disincentive is connected directly with the ownership of other generation units within Belgium, the divestiture of the assets of the company carrying out one of the two of EDF's CCGT projects to an appropriate buyer – or the assets of both companies should EDF decide not to invest in the remaining one - would replace EDF by another owner that would have incentives to develop the projects equivalent to those of EDF prior to the Proposed Transaction.

247. Due to the need to have clear-cut remedies that eliminate the competition concerns, the Commission considers it preferable to have a firm divestiture of the assets of one of the two EDF companies carrying out the CCGT projects immediately. In that way, EDF is immediately replaced by a different owner with incentives equivalent to those of EDF pre-merger for one of the two sites. In view of the uncertainties related to future investment decisions, it cannot be excluded at this

[113] EPC stands for Engineering, Procurement and Construction contract.

stage that EDF has sufficient incentives to only invest in the second site. Should EDF however decide not to invest in the second site, then it must be ensured that this negative investment decision is not as a result of the Proposed Transaction reducing its incentives to do so. Consequently, as a safeguard, a contingent and future divestiture of the assets of the company carrying out the second of the two projects (in other words, replacing EDF by another owner that would have incentives equivalent to those of EDF pre-merger) is adequate.

248. The [CCGT 1] and [CCGT 2] power plant projects constitute viable divestment businesses to suitable purchasers looking to build generation capacity in Belgium as transactions involving power plant projects in various stages of development are quite commonplace in the industry. Firstly, the immediate sale of one of the projects will result in a competitor in gaining access to one of the few suitable green-field large-scale power plant construction sites and taking over the project at its early stage of development. Secondly, the invest or divest remedy will, in case of non-investment by EDF, assure that a mature, marketable project can be built by an interested competitor, which will in this manner assure itself a quicker entry into the Belgian power generation segment.

249. The confirmation by the market test that suitable sites to construct generation capacity in Belgium are scarce confirms that a divestment of sites to suitable buyers means that an acquirer is likely to develop it and would significantly affect the potential of other competitors to enter the market.

250. Moreover, the modifications that EDF has proposed to the Commitments after the market test ensure that EDF can retain the second remaining site only if a high degree of probability exists that it will invest to construct a power plant. Failing this, EDF will also be replaced for this site by another owner that has incentives equivalent to those of EDF prior to the Proposed Transaction.

251. The divestiture of more or other sites would not be proportional given that the two sites of EDF subject to divestiture essentially constitute the overlap between the two merging parties. By the (potential) divestiture of the assets of the two companies carrying EDF's CCGT projects, the incentives for any remaining sites (i.e the sites that SPE had before the Proposed Transaction) will also have been restored to the level that existed prior to the Proposed Transaction.

252. Despite the immediate divestiture of one site, and the potential divestiture of the remaining site, there is little risk that the merged entity will be constrained should it seeks to expand its business. The construction of new generation capacity on sites on which other units are already constructed (brown sites) often constitutes a significant advantage in comparison to the construction of generation capacity on sites where this is not the case (green field sites). Brown sites, for instance, have pre-existing connections to the electricity transmission grid, (water) cooling opportunities and, possibly, pre-existing connections to the gas transmission grid. Building a generation unit on a brown field site can also provide savings in operation costs (pooling of operating staff). […][114].

253. Specifically as regards the alternative remedies suggested by the Belgian NCA to address the Commission's concerns, such alternatives are not merger specific or proportionate to the indentified competition concerns.

254. First, EDF's capacity of Tihange 1 is […] contracted (until 2015) with […] and, thus, not merger specific. To replace EDF as an entrant, the focus must be its incentives to develop its sites under development.

255. Second, as regards the Navagne site, it is true that this site has obtained (nearly) all the necessary permits and is therefore a more viable business than the two (less developed) sites of EDF that are currently proposed for divestiture. However, the competition concerns identified and analysed in the competitive assessment are closely linked to the reduced incentives of EDF to develop generation capacity in addition to SPE's Navagne site. It is considered that the merged entity’s incentive to develop the Navagne site will not be reduced compared to SPE’s pre-merger incentive as it is the only site available to the parties post-merger for immediate development. This is the contrary situation vis-à-vis the divestiture sites, where the final investment decision will take place later. A divestiture of Navagne site would be likely to mean that the current investment plans will be substantially delayed due to the inevitable period needed for a divestiture and the fact that a acquirer will have to prepare a new investment decision (all elements for a final investment decision to be taken appear already prepared by SPE). The EDF-SPE entity would also be delayed by several years to build new capacity (as there is no other fully permitted site for new capacity in its portfolio).

[114] Reply of the parties of 5 November 2009.

256. Consequently, it is considered that the remedies suggested by the Belgian NCA are disproportionate and unrelated to the identified competition concerns with regard to the Proposed Transaction and could even defy the objective of the remedies.

257. For the above reasons, the Commission considers that the Commitments, including the modifications of 9 November 2009, address the concerns identified by the Commission with regard to the Proposed Transaction.

## IX ASSESSMENT OF THE REFERRAL REQUEST

258. Pursuant to Article 9(3) of the EC Merger Regulation, the Commission can refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law if a concentration threatens to affect significantly competition in a market within the relevant Member State which represents all the characteristics of a distinct market.

259. The relevant electricity markets with regard to the Proposed Transaction are at most national as for their geographic scope. Moreover, there are serious doubts with regard to the horizontal unilateral effect of the Proposed Transaction. It is concluded that that the conditions laid down in the EC Merger Regulation for referral under Article 9(2)(a) of the EC Merger Regulation are fulfilled since the geographic scope of the relevant service markets is at most national. Further, there are serious doubts with regard to the incentives of the post-merger entity to further develop EDF's CCGT projects (horizontal unilateral effects of the Proposed Transaction) which threaten to affect significantly competition on a number of relevant electricity markets in Belgium, which present all the characteristics of a distinct market.

260. Therefore, the criteria provided for in Article 9(2)(a) of the EC Merger Regulation for referral are fulfilled with regard to the Proposed Transaction. Nevertheless, the Commission has to analyse whether it is appropriate to refer a given case pursuant to the provisions of Article 9(3)(a) of the EC Merger Regulation.

261. It has to be emphasised in this respect that in accordance with the case-law of the CFI, the "*referral conditions laid down in Article 9(2)(a) and (b) of Regulation 4064/89 should be interpreted restrictively so that referrals to national authorities*

*of concentrations with a Community dimension are limited to exceptional circumstances*"[115].

262. The Commission is the authority best placed to review the Proposed Transaction since (i) it has developed over the last years significant expertise in the Belgian electricity markets[116] and there are no compelling reasons to refer the Proposed Transaction[117]; and (ii) the competition concerns highlighted by the Belgian NCA go beyond the Belgian national markets thus requiring a cross border analysis if the case were to be referred to the Belgian NCA for which the latter authority has insufficient investigative means[118].

263. Moreover, under Belgian national merger law, in case a notified operation does not lead to market shares higher than 25% of any of the markets concerned, the operation is automatically cleared. The Belgian NCA requests the referral on the basis of the market for electricity trading where the Parties have a combined market share of [20-30]%. This is the sole market in which current market shares are superior to 25%. However, whereas EDF for the purpose of the Proposed Transaction mentions a trading market, it argues that electricity trading is merely a part of the larger electricity wholesale and generation market and that it should be left open whether electricity trading constitutes a separate market. The fact that electricity trading is an activity that is part of a larger market for generation and wholesale is in fact adopted in the present decision. On this larger market, the parties' market share is very likely to be lower than 25%[119]. Market shares lower than 25% as such do not render the Referral Request unfounded or invalid. Consequently, a referral would entail a risk that the Proposed Transaction will have to be cleared automatically under Belgian national law, i.e. without the Belgian

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115 Case T-119/02 Royal Philips Electronics NV, point 354

116 COMP/M.4180 – *Gaz de France/Suez*, COMP/M.5519 - *E.ON/Electrabel*, COMP/M.5324 - *Centrica/Segebel* or Case COMP/M.5467 - *RWE/Essent*.

117 Point 13 of the Commission Notice on Case Referral in respect of concentrations (2005/C 56/02), OJ C 56, p. 2

118 Interconnection capacities, trilateral market coupling or the competitive situation in France are taken into account in the Referral Request.

119 The parties' share in electricity trading is [20-30]%. However, their share in electricity production/imports is [10-20]% (2008). By mathematical necessity, however these figures are combined to a market share for generation, wholesale and trading, the resulting market share will be lower than [20-30]%. Moreover, the parties' share in electricity trading includes purchases as well as sales of electricity contracts, with purchases predominating (Form CO Figure 30). They are therefore more present on the demand side of electricity trading.

NCA being in a position to require any remedies, including those that were secured by the Commission with regard to the Proposed Transaction.

264. The Commission should deal with the Proposed Transaction itself since (i) it is the best placed authority to review the effects of the Proposed Transaction in the Community, and, (ii) in order to maintain effective competition on the market concerned in accordance with the provisions of Article 9(3)(a) of the EC Merger Regulation since the Commitments and their modifications proposed by EDF on 9 November 2009 in order to tackle the competition concerns identified by the Commission solve all competition concerns raised by the Proposed Transaction, the referral to Belgium would no longer be justified[120].

## X CONCLUSION

265. It follows that the conditions to request a referral under Article 9(2) (a) of the EC Merger Regulation are met. Nevertheless, and in application of Article 9 (3) of the EC Merger Regulation, the Commission should not refer the case to Belgium.

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[120] COMP/M.1920 – *Nabisco/United Biscuits*, para 3

HAS ADOPTED THIS DECISION:

**Article 1**

The Proposed Transaction resulting in the acquisition of control of Segebel (SPE) by EDF is not referred to the competent authorities of Belgium, pursuant to Article 9(3) (a) of the EC Merger Regulation.

**Article 2**

This Decision is addressed to Belgium.

Done at Brussels, 12/11/2009

For the Commission

(signed)

Neelie KROES

Member of the Commission