

***Case No COMP/M.5827 -  
ELIA/ IFM/ 50HERTZ***

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 10/05/2010

***In electronic form on the EUR-Lex website under  
document number 32010M5827***



EUROPEAN COMMISSION

Brussels, 10.05.2010

SG-Greffe(2010) D/6778/9  
C(2010) 3162

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PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

**To the notifying parties:**

Dear Sir/Madam,

**Subject: Case No COMP/M.5827 - ELIA/ IFM/ 50HERTZ  
Notification of 06/04/2010 pursuant to Article 4 of Council Regulation  
No 139/2004<sup>1</sup>**

1. On 6 April 2010, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Elia System Operator SA/NV, ("Elia", Belgium) and Industry Funds Management Pty Ltd ("IFM", Australia) acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of the whole of the undertaking 50Hertz Transmission GmbH, ("50Hertz", Germany) by way of purchase of shares.

**I. THE PARTIES**

2. Elia is ultimately controlled<sup>2</sup>, through Electrabel, by GDF Suez ("GDF Suez", France) and Publi-T SCRL ("Publi-T", Belgium)<sup>3</sup>. Elia is the transmission system operator

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

2 Case COMP/M.4180-GDF/Suez, para 634 et seq.

("TSO") in Belgium and it is a TSO in Luxembourg. Elia is also active in electricity distribution and in balancing services.

3. IFM is a global infrastructure investment manager. IFM is controlled by Industry Super Holdings Pty. Ltd., Australia. The investors in Industry Super Holdings Pty. Ltd. are ultimately Australian pension funds.
4. 50Hertz is a TSO in Germany<sup>4</sup> and it is currently controlled by Vattenfall AB ("Vattenfall", Sweden).

## **II. THE OPERATION**

5. The envisaged operation involves the acquisition by Elia and IFM of the whole of 50Hertz by way of purchase of shares.
6. If the transaction is successfully completed, Elia and IFM will have joint control over 50Hertz. As a consequence, the operation constitutes a concentration within the meaning of Articles 3(1)(b), (4) of the Merger Regulation.

## **III. EU DIMENSION**

7. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>5</sup> (GDF Suez: EUR 83 053 Million, Publi-T: EUR 18.9 million; IFM: EUR [...] million; 50Hertz: EUR 3 631 million, in 2008), and at least two of them have a Union-wide turnover in excess of EUR 250 million (GDF Suez: EUR 70 030 million, Publi-T: EUR 18.9 million; 50Hertz: EUR 3 631 million in 2008), but they do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension in the meaning of article 1(2) of the Merger Regulation and falls into its scope.

## **RELEVANT MARKETS**

8. The Parties' activities do not overlap. 50Hertz is one of the four TSOs in Germany, whilst Elia is the official TSO in Belgium. There are no interconnectors between the two

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<sup>3</sup> Publi-T is a cooperative company with limited liability representing a number of municipalities. Its shareholders are the funding intermunicipal companies of the mixed Flemish sector (30%), the Intermunicipal Holding (25%), the Flemish intermunicipal companies and the Flemish Energy Holding VEH (15%), Socofe (12.5%), the funding intermunicipal companies of the Walloon intercommunals (10%) and the funding intermunicipal companies of the mixed Brussels sector (7.5%).

<sup>4</sup> With its length of approx. 9,500 km, 50Hertz's transmission grid (380/220 kV) covers a total area of approx. 109,000 km<sup>2</sup> in the German federal states of Thuringia, Saxony, Saxony-Anhalt, Brandenburg, Berlin, Mecklenburg-Western Pomerania and Hamburg.

<sup>5</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation.

systems. Both companies are members of a different auction office<sup>6</sup> (active in the market for the provision of congestion management services for cross border electricity transmission).

9. For these reasons, the transaction does not give rise to any horizontal overlap of activities. However, the transaction gives rise to the following vertical links:
- (i) Generation and wholesale supply of electricity (upstream) – Transmission of electricity (downstream);
  - (ii) Balancing power and ancillary services (upstream) – Transmission of electricity (downstream);
  - (iii) Transmission of electricity (upstream) and distribution of electricity (downstream).
  - (iv) Generation and wholesale of electricity (upstream) – Retail supply of electricity (downstream).
  - (v) Distribution of electricity (upstream) – Retail supply of electricity to end-users (downstream)

### **Relevant product market**

10. According to its past practice<sup>7</sup> the Commission distinguishes the following product markets in the electricity sector: (i) generation and wholesale supply, (ii) transmission, (iii) distribution (iv) balancing power and ancillary services and (v) retail supply of electricity to end-users.
11. Generation and wholesale supply of electricity: In previous decisions the Commission has found that this market comprises an upstream supply of electricity, mainly generation and imports of electricity for further resale.<sup>8</sup> The Parties' views are in line with the Commission precedents.
12. Transmission system operation: In prior decisions, the Commission has defined a distinct product market for the transmission of electricity, i.e. the operation and management of the high-voltage grid (extra-high-voltage and high-voltage lines).<sup>9</sup> The Parties' views are in line with the Commission precedents.

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<sup>6</sup> 50Hertz is a member of the EMCC and CAO auction offices and Elia is a member of the CASC CWE auction office.

<sup>7</sup> Cases COMP/M.5512 - Electrabel/E.ON para 14; COMP/M.3696 - E.ON/MOL para 210; COMP/M.3440 ENI / EDP / GDP para 31.

<sup>8</sup> Cases COMP/M.5604 - DONG/KOM-STROM, para. 6; COMP/M.5512 - Electrabel/E.ON, para.14; COMP/M. 5467-RWE/ESSENT, para 234

<sup>9</sup> Cases COMP/M.5154 - CASC JV, para. 18; COMP/M.4922 - EMCC, para. 11; COMP/M.4672 E.ON/Endesa Europa/Viesgo, para. 9; COMP/M.3696 - E.ON/MOL, para. 212;

13. Balancing power and ancillary services: In its precedents, the Commission has identified a separate market for balancing power and ancillary services.<sup>10</sup> The balancing power is used to cover the deviations between production and consumption in a TSO's control area. As there is no possibility to store electricity, the electricity volumes generated (i.e. fed in) must correspond to the electricity volumes consumed (i.e. taken off) by the customers. Each TSO is obliged to cover the imbalances (i.e. maintain the power balance in the network). Thus, in case of an imbalance, the TSO should balance the power in the grid by feeding-in or taking off electricity volumes.
14. In a previous decision, and with reference to the legal situation in Belgium, the Commission has made the distinction between the following services in the balancing power market (i) provision of primary reserve<sup>11</sup>, (ii) provision of secondary reserve<sup>12</sup> within the Belgian zone (balancing current), (iii) provision of tertiary reserve,<sup>13</sup> (iv) voltage control and reactive power control and (v) congestion management and the black start service, without however defining the different markets.<sup>14</sup>
15. According to the parties, German law also makes a difference between the provision of primary, secondary and tertiary reserve. As well, and in order to safeguard the stability of the network system, network operators must control both voltage and frequency. Congestion management is dealt with by Sec.15 of the Ordinance on Electricity Network Access (*Stromnetzzugangsverordnung*).<sup>15</sup> German energy law does, however, not define reactive power or black start services. Both are considered by the Federal Network Agency (*Bundesnetzagentur*) as services rendered by third party service providers to transmission system operators.
16. If the sub-segments described above were to be considered as separate product markets, only the market for the provision of tertiary power would be affected<sup>16</sup>. In the Energy Sector Inquiry the Commission defined tertiary power in the following way: *"Tertiary power is less immediate power and can be called up by TSOs with some delay. This type*

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10 Cases COMP/M.3696 - E.ON/MOL, para. 222 for Hungary, COMP/M. 4180 - GDF/Suez, para. 683 for Belgium.

11 Primary control is sufficient to stabilise the system where there is only a brief power deficit or surplus. The primary reserve is continually activated. The facilities that TSO assigns to this reserve detect frequency variations automatically and react to them within a specified time measured in seconds.

12 If a longer disturbance occurs secondary control is activated after a defined period (max 30 secs) or simultaneously with the primary control. However, it can take several minutes to restore frequency stability.

13 If the power flow deviation lasts for an extended period (more than 15 minutes) secondary gives way to tertiary control. Tertiary control is activated either automatically or manually. It must be deployed in time to contribute to restoring balance no more than 15 minutes after the start of the deviation in the control area, and up to several hours if required.

14 Case COMP/M.4180 – Gaz de France/Suez, para 684

15 This ordinance has been enacted in order to further implement the provisions of the Energy Industry Act (*Energiewirtschaftsgesetz*) regarding electricity network access.

16 On the balancing market, GDF Suez, through its subsidiary GDF Suez Energie Deutschland AG (GSED), has sold [...] tertiary power reserve, and 50Hertz has [...] bought balancing power to cover the imbalances in its grid.

*of power frees secondary control by re-scheduling power plants manually. Plants must meet a set of technical criteria in order to qualify for the provisions of these balancing services.*"<sup>17</sup>

17. In any case, there is no need to conclude whether balancing power and ancillary services including all types of balancing power should be considered as a relevant product market or whether the provision of tertiary power should be defined as a separate product market, since no competition concerns would arise under any alternative product market definition.
18. Distribution of electricity: In previous decisions, the Commission has identified a separate market for the distribution of electricity,<sup>18</sup> namely the operation and management of the lower voltage grids. Such a distinction between transmission and distribution is also recognized by Directive 2003/54/EC and in the Energy Sector Inquiry<sup>19</sup>. The Parties agree to the definitions in these Commission decisions.
19. Retail supply of electricity to end-users: The market for the retail supply of electricity involves the sale of electricity to the final customers. In previous decisions regarding Germany, the Commission has further subdivided this market into retail supply to large industrial customers (connected directly to the high-voltage and medium-voltage networks) and retail supply to small industrial, commercial and domestic customers (connected to the low-voltage networks).<sup>20</sup> The Parties do not question this product market definition. The Commission does not see any reasons for deviating from its earlier practice.

### **Relevant geographic market**

20. Generation and wholesale supply of electricity: The Commission has previously defined the market for the generation and wholesale supply of electricity in Germany as national in scope.<sup>21</sup> The Parties also consider that Germany constitutes a separate geographic market.
21. Transmission system operation: The Commission has stated that the transmission system operation is a natural monopoly, being regional within the limits of the area covered by the respective grid<sup>22</sup>. The Parties submit that, for the transmission grid operated by 50Hertz, the geographic scope would encompass the German federal states of Thuringia, Saxony, Saxony-Anhalt, Brandenburg, Berlin, Mecklenburg-Western Pomerania and Hamburg.

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17 Energy Sector Inquiry, para 969

18 Cases COMP/M.5512 - ELECTRABEL/ E.ON, para 14; COMP/M.5467 - RWE / ESSENT, para 440, COMP/M.3696 para 215

19 Directive 2003/54/EC Article 2(3) and (5) and Energy Sector Inquiry para 321

20 Cases COMP/M.5496 – VATTENFALL/ NUON ENERGY, para 14; COMP/M. 5467. RWE/Essent, para 22, COMP/M.5604 - DONG/KOM-STROM, para. 9)

21 Cases COMP/M.5604 - DONG/KOM-STROM, para. 7; COMP/M.5467 -RWE/Essent, paras. 231-232;

22 Cases COMP/M. 5707-TENNE-T/E.ON, paras. 6-7, COMP/M.5154 - CASC JV, para. 19; COMP/M.4922 - EMCC, para. 12;

22. Balancing power and ancillary services: In its previous decisions the Commission has stated that for balancing power the relevant geographic market is at most national in scope. Due to the flexibility required for balancing power, it cannot be substituted by imported electricity from outside the balancing area.<sup>23</sup> For the purpose of this Notification, the geographic market definition can be left open, as under any potential geographic market definition (regional<sup>24</sup>, national, or limited to the TSO's control area) no competition concerns would raise.
23. Distribution: For the distribution of electricity the Commission considered that the relevant geographic market is the relevant distribution network, as for any given customer distribution through one distribution grid is not substitutable with distribution through another grid.<sup>25</sup>
24. Retail supply of electricity to end-users: The Commission has generally defined the markets for retail supply of electricity as national in scope, provided that they are fully liberalised.<sup>26</sup> However, with respect to the Germany, the Commission considered a narrower scope of the market for retail supply of electricity, which coincided with the areas covered by each of the regional distribution networks, however it ultimately left the market definition open<sup>27</sup>.
25. The precise market definitions can be left open in the present case, as the proposed transaction will not lead to any concerns under any alternative market definition. The competition analysis will be made at both national and local distribution level.

## V. COMPETITIVE ASSESSMENT

### Vertical relationships

#### *(i) Generation and wholesale supply of electricity (upstream) – Transmission of electricity (downstream)*

26. GDF Suez has electricity generation and wholesale supply activities in Germany through its subsidiary GDF Suez Energie Deutschland AG (GSED). However, its market share in the generation and wholesale supply of electricity in Germany is very low (below 5%). 50Hertz, Elia and IFM have no electricity generation and wholesale supply activities in Germany.<sup>28</sup>

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23 Cases No. COMP/M.4180 - GDF/Suez, paras. 737 and 932; COMP/M.3696 - E.ON/MOL, para. 255.

24 Cases COMP/M.5707.Tennet-EON, para 12.

25 Cases COMP/M. 5467 -RWE / ESSENT para 21, COMP/M.3440 – EDP / ENI / GDP, paras. 34 and 75;

26 COMP/M.5467 – RWE/ Essent, para. 283.

27 COMP/M.5467 -RWE/Essent, paras. 283-293; COMP/M.5496 – Vattenfall/ Nuon Energy paras. 40-42.

28 As required by regulatory law (Ausgleichsmechanismusverordnung, Regulation on the equalisation mechanism), 50Hertz is selling at power exchanges renewable energy generated by power plants within the geographic area of its grid.

27. 50Hertz is the Transmission System Operator (TSO) in the German federal states of Thuringia, Saxony, Saxony-Anhalt, Brandenburg, Berlin, Mecklenburg-Western Pomerania and Hamburg, in which it has a market share of 100%.
28. The Parties consider that, as a result of the requirement of the Electricity Directive 2003/54/EC, TSOs must grant access to their grids on a non-discriminatory basis and at regulated tariffs. Therefore, given the low market shares in the upstream market for the generation and wholesale supply of electricity, it would be unlikely that the transaction would lead to input foreclosure in any of the German federal states where the other TSOs<sup>29</sup> are active. As well, due to the regulatory framework for the transmission of electricity, customer foreclosure is excluded in this case.
29. Therefore, the Commission considers that the transaction does not raise serious doubts as to its compatibility with the internal market as regards the markets for the generation and wholesale supply of electricity as well as the transmission of electricity in Germany.

*(ii) Balancing power and ancillary services (upstream) – Transmission of electricity (downstream)*

30. The German balancing power market comprises three types of balancing power (primary reserve, secondary reserve and tertiary reserve) requested by the four German TSOs, which are necessary for the operation of their grids at any given time. Elia is not active on the market for balancing power in Germany, whereas GDF Suez is active as a provider of balancing services in German via its subsidiary GSED.
31. GSED has offered tertiary reserve ([...] MW) [...], however, its market share is insignificant ([0-5]% of the total balancing market). In 2010, GSED offered [...] primary reserve capacity of [...] MW<sup>30</sup>, however [...], no market share could be attributed to GSED on the primary reserve market [...]. GSED has not offered secondary reserve on the German market [...]. 50Hertz is one of the four TSOs that purchase electricity on the market for balancing power in Germany, and it uses all three types of balancing power<sup>31</sup>. 50Hertz accounts for about [10-20]% of overall balancing power purchases in Germany. In 2009, GSED sold [0-5]% of its tertiary reserve to 50Hertz, which represents less than [0-5]% of the total balancing power requested by 50Hertz.
32. Under the narrowest potential product market for the provision of the tertiary reserve, GSED's market share in 2009 would be also insignificant ([0-5]% of the total tertiary reserve on the German balancing power market).
33. Alternatively, under a narrower than national-wide geographic market definition (regional-wide or control area of the TSO) there would be no direct vertical link. The relevant GSED generation capacity, which is prequalified to provide tertiary reserve (for

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29 Transpower Stromübertragungs GmbH, Amprion GmbH, and EnBW Transportnetze AG.

30 Primary balancing power purchased by 50Hertz in 2009 represented [...] MW.

31 With respect to the three types of balancing power which 50Hertz purchased in 2009, primary balancing power represented [5-10]%, secondary balancing power [40-50]% and tertiary balancing power [50-60]%



balancing power purposes), is located outside the 50Hertz control area<sup>32</sup>;[...]. However, there exist an indirect vertical link, since 50Hertz can acquire (and has acquired) balancing power from outside its control area. At this regard, it should be noted that only [0-5]% of the tertiary reserve offered by GSED in 2009 was sold to 50Hertz<sup>33</sup>, which in turn represented less than [5-10]% of the tertiary balancing power requirements of 50Hertz.

34. In addition, balancing operations of TSOs are regulated in Germany. They are legally obliged to use transparent, non-discriminatory and market-based methods when procuring balancing energy. As required by law, 50Hertz procures balancing power by means of bidding competitions in the German balancing power sector with the involvement of both power plant operators and power customers. The German regulator has required the four German TSOs to cooperate in balancing their individual control areas through a common platform<sup>34</sup>. Under the applicable merit order procedure<sup>35</sup>, market participants offer capacities to all four TSOs. The price of the capacities purchased by the TSOs is determined on the basis of a merit order-structure and each TSO only receives the capacities required. Any influence on prices by the TSOs is excluded through this merit order procedure.
35. Given the low market shares of GSED in the upstream market under any alternative market definition and the regulatory framework in balancing power services, both input and customer foreclosure are not likely to arise in this case. Thus, the transaction does not raise serious doubts as to its compatibility with the internal market as regards the markets for balancing power and ancillary services and the transmission of electricity.

***(iii) Transmission of electricity (upstream) - Distribution of electricity (downstream).***

36. 50Hertz is the TSO in the German federal states of Thuringia, Saxony, Saxony-Anhalt, Brandenburg, Berlin, Mecklenburg-Western Pomerania and Hamburg, where it has a

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32 GSED is located in the Transpower control area. GSED has therefore entered into a direct agreement to provide balancing power with Transpower.

33 The remaining tertiary reserve was sold to the other German TSOs: Transpower Stromübertragungs GmbH, Amprion GmbH, and EnBW Transportnetze AG.

34 In order to reduce the cost of balancing energy, the German regulator BNetzA has requested the four German TSOs to take measures against counterbalancing (a practice whereby each TSO procures its required balancing electricity from third parties, without first taking into account balancing energy available from or required by the other TSOs in the German control block).

35 To meet the requirement against counterbalancing of the BNetzA, three German TSOs - namely 50Hertz, EnBW Transportnetze and transpower - had agreed on a joint Grid Control Co-operation (Netzregelverbund), whilst Amprion preferred to apply the concept of Central Grid Control (Zentralregler). Grid Control Co-operation, comprises four modules, whereby, Module 4 which was introduced in October 2009, creates a merit order-system for secondary balancing energy. Under this merit order-system, TSOs purchase the secondary balancing energy needed based on a price-orientated list of providers and the respective capacities offered. On 16 March 2010, the BNetzA rendered a decision (BK6-08-111) making Grid Control Co-operation mandatory for the control areas of all four German TSOs, including Amprion, and imposing implementation by 31 May 2010 at the latest. Moreover, the four German TSOs are obliged to cooperate more closely in balancing their individual control areas. Thus, the decision leads to the creation of a German-wide market for balancing energy.

market share of 100%, whereas GSED [holds a 49.9% share in the municipal utility Energieversorgung Gera GmbH, which holds 100% of GeraNetz GmbH, the] distribution network of the Gera region. The grid of Gera is connected to Thüringer Energie Netze, which is in turn connected to 50Hertz' transmission grid. As a consequence, there is no direct physical linkage between the GeraNetz grid and 50Hertz, nor any contractual relationship between them.

37. Additionally, the requirements of the Electricity Directive 2003/54/EC, similarly as for the transmission activities, ensure that there is free access to the distribution network, the price for distribution is regulated and end users have a free choice of the electricity supplier no matter who owns or operates the distribution network to which they are connected.
38. According to the Parties, there is no vertical link between TSOs and DSOs in Germany. First, the Parties consider that albeit the historical vertical links between generation and transmission services, and between distribution and retail supply of electricity have resulted in strict unbundling requirements (i.e. a separation of (i) generation from transmission and (ii) the distribution from retail activities), neither the common rules for the internal market in electricity, nor German regulatory law, stipulate an obligation to unbundle transmission from distribution. Based on the latter, the Parties consider that there is no vertical link between transmission and distribution. Second, to exclude any discrimination and secure effective third party access to the networks, the business of network operators (both transmission and distribution) is regulated. Finally, from a practical point of view, the contractual relationship between DSOs and TSOs would not raise any competition concerns even though DSOs may enter into usage agreements<sup>36</sup> with TSOs, since this type of contract is (i) concluded only in the interest of the final network users, (ii) they are standardised, (iii) there exists a regulated network fee which is calculated on the basis of all costs the DSO has to bear, and (iv) they have an indefinite term.
39. The Commission considers that customer foreclosure is unlikely in the present case, as the activities of the parties in the field of electricity distribution are limited to only one region within Germany (Gera). In addition, input foreclosure is excluded due to the regulatory framework in which the distribution network is operated. As a result, the transaction does not raise serious doubts as to its compatibility with the internal market as regards the markets for the transmission and distribution of electricity.

***(iv) Generation and wholesale supply of electricity (upstream) – Retail supply of electricity to end-users (downstream)***

40. If a local market for retail supply of electricity were to be considered, there would be a pre-existing vertical link in the Gera region between the market for the generation and wholesale supply of electricity and the retail supply of electricity to end-users. GSED has a market share of less than 5% in electricity generation in Germany, whereas in retail supply GSED has a market share of 80-90% in the Gera region.

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<sup>36</sup> Under some contracts with suppliers and/or energy trading companies, the Distribution System Operator (DSO) undertakes to provide the entire transport of electricity to customers. In this case, suppliers and/or energy traders do not have to conclude further contracts with the TSOs, as the DSOs have entered into network usage agreements with the TSOs in order to be able to provide the entire transport to the customer.

41. Nevertheless, this vertical link is pre-existent to the transaction. Therefore, the proposed transaction does not alter the competition conditions at the local retail level in the region of Gera.
42. In view of the above, the transaction does not raise serious doubts as to its compatibility with the internal market as regards the above mentioned markets.

***(v) Distribution of electricity (upstream) – Retail supply of electricity to end-users (downstream)***

43. If a local market for retail supply of electricity were to be considered, the transaction would give rise to a vertical link between the market for the distribution of electricity (where GSED [holds a 49.9% share in the municipal utility Energieversorgung Gera GmbH, which holds 100% of GeraNetz GmbH,] the distribution network of Gera) and the retail supply of electricity to end-users in the Gera Region, in which GSED has a market share of 80-90%.
44. However, this vertical link is, pre-existent to the transaction. Thus, the proposed transaction does not alter the competition conditions at the local retail level in the region of Gera.
45. In view of the above, the transaction does not raise serious doubts as to its compatibility with the internal market as regards the above mentioned markets.

**VI. CONCLUSION**

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

For the European Commission,  
(signed)  
Joaquín ALMUNIA  
Vice-President of the European  
Commission