

***Case No COMP/M.4370 -  
EBN / COGAS ENERGY***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 28/09/2006

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## COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28-IX-2006  
SG-Greffe(2006) D/205430

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

### To the notifying parties

**Subject: Case No COMP/M.4370 – ENB/ Cogas Energy  
Notification of 25.8.2006 pursuant to Article 4 of Council Regulation  
No 139/2004<sup>1</sup>**

1. On 25 August 2006, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation 139/2004, by which Electrabel Nederland Beheermaatschappij B.V. (“ENB” the Netherlands), controlled by Electrabel S.A. (“Electrabel”, Belgium) acquires within the meaning of Article 3(1)(b) of the Council Regulation control over Cogas Energy (“Cogas Energy”, Netherlands), which is part of Centraal Overijsselse Nutsbedrijven N.V. (“Cogas”, Netherlands), by way of purchase of shares and assets.

### I. THE PARTIES

2. **ENB** is a holding and finance company that is a subsidiary of **Electrabel**, a European energy and energy services group. Electrabel’s core business consists in the generation of electricity, retail supply of electricity, natural gas and energy products and services, trading of electricity and natural gas and the management of distribution networks for electricity and natural gas. Electrabel is in turn a subsidiary of **SUEZ**, an international industrial and services group active in the management of public utilities in electricity, gas, energy services, water and waste management.

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<sup>1</sup> OJ L 24, 29.1.2004 p. 1.

3. **Cogas Energy** is comprised of a subsidiary, *Cogas Energie B.V.*, and the assets relating to the retail supply of electricity and gas held by another subsidiary of Cogas, *Cogas Facilitaire B.V.* Active in retail supply of electricity and gas, Cogas Energy is part of Cogas, whose activities comprise the generation of electricity, the retail supply of electricity and natural gas, the maintenance and development of electricity and gas distribution networks, the supply of energy advisory services and the exploitation of a TV and radio cable network within the Netherlands.

## II. THE OPERATION AND CONCENTRATION

4. The proposed operation consists of the purchase by ENB of Cogas Energy, indirectly through its directly held subsidiary, Electrabel Nederland Retail B.V. [...]. In this regard, an Asset Purchase Agreement has been entered into by the parties on 20 July 2006.
5. The operation involves the acquisition of sole control by ENB over Cogas Energy and therefore constitutes a concentration within the meaning of Article 3.1(b) of Council Regulation 139/2004.

## III. COMMUNITY DIMENSION

6. The parties have a combined worldwide turnover of more than EUR €5 billion (SUEZ € [...] million; Cogas Energy € [...] million). The individual Community-wide turnover for each of at least two of the undertakings concerned exceeds EUR €250 million (SUEZ € [...] million; Cogas Energy € [...] million). Furthermore, there is no single Member State in which each of these parties achieves more than two thirds of their turnover. The concentration therefore has a Community dimension within the meaning of Article 1(2) of Council Regulation 139/2004.

## IV. COMPETITIVE ASSESSMENT

### *A. Relevant product markets*

7. Horizontally, the transaction concerns the markets for the retail supply of electricity and natural gas. On a vertical level, Electrabel is active on the markets for the generation and wholesale of electricity and the wholesale of natural gas in the Netherlands. As Cogas is a customer in those markets, these are vertically concerned markets.

### Retail supply of electricity

8. Previous Commission decisions have considered that the market for the retail supply of electricity may be further divided into two smaller markets; (a) supply to large industrial customers connected to the high and medium voltage grid and (b) supply to smaller industrial, commercial and domestic customers connected to the low-voltage grid.<sup>2</sup>
9. Alternative sub-divisions used by the Dutch Competition Authority (“NMa”) are based on consumption and EnergieNed, a trade association, segments the market in terms of grid connection capacity. These sub-divisions are: (i) the market for the retail supply to large

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<sup>2</sup> Case COMP/3440 ENI/EDP/GDP, Case COMP/M.4110 E.On Endesa

customers with an annual consumption greater than 10 GWh, (ii) the market for the retail supply to medium sized customers with an annual consumption between 10 MWh and 10 GWh and (iii) the market for retail supply to small customers with a yearly consumption below 10 MWh *or* (i) large customers with a grid connection capacity of more than 3 \* 80 A and (ii) smaller customers with a grid connection capacity of 3 \* 80 A or less.

10. Ultimately, the definition of the relevant product markets can be left open, since the transaction will not give rise to competition concerns on any of the above considered market definitions.

#### Retail supply of natural gas

11. In previous cases, the Commission has considered that the market for the supply of natural gas may be subdivided into the markets for the supply of natural gas to a) large industrial customers, b) small customers and c) to electricity generation plants using combined cycle gas turbines (“CCGTs”).<sup>3</sup> It is also possible to *further* sub-divide the market for the retail supply of natural gas on the basis of the quality of the gas supplied. In particular, the parties distinguish between the market for the retail supply of H-gas (high calorific value) and the market for the retail supply of L-gas (low calorific value).<sup>4</sup>

12. The categories considered by the NMa are narrower, covering a) large industrial customers with an annual consumption of more than 10 million m<sup>3</sup>, b) middle sized customers with an annual consumption of more than 1 million m<sup>3</sup> and less than 10 million m<sup>3</sup> and c) small customers with an annual consumption of less than 1 million m<sup>3</sup> per year.

13. Ultimately, the definition of the relevant product markets can be left open, since the transaction will not give rise to competition concerns on any of the above considered market definitions.

#### Generation and wholesale of electricity

14. In previous cases, the Commission has considered the market for the generation and wholesale of electricity to be part of the same market.<sup>5</sup>

15. The NMa has suggested in its Consultation Document<sup>6</sup>, that this market may be subdivided into markets for peak hours and off-peak hours.

16. Ultimately, the definition of the relevant product markets can be left open, since the transaction will not give rise to competition concerns on either of the above considered market definitions.

#### Wholesale of natural gas

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<sup>3</sup> Case COMP/M ENI/EDP/GDP and Case COMP/M.3696 E.On/Mol

<sup>4</sup> This distinction was also contemplated in COMP/M.3883 GDF/Centrica/SPE for the Belgian gas market

<sup>5</sup> Case COMP/M.3268 Sydkraft/- Granninge

<sup>6</sup> Consultatiedocument Concentraties Energiemarkten, June 2006 (NMa).

17. The Commission has in previous decisions considered the market for the wholesale of natural gas to be a separate product market.<sup>7</sup> The regulating authority of the Dutch energy sector (the “DTe”) also takes this approach.<sup>8</sup> The Dutch wholesale market of natural gas is defined as the sale of gas by producers and traders to non-end users.

18. Ultimately, the definition of the relevant product markets can be left open, since the transaction will not give rise to competition concerns on any reasonable definition.

### *B. Relevant geographic markets*

#### Retail supply of electricity

19. Previous Commission decisions have found the geographic market for the retail supply of electricity to be national.<sup>9</sup>

20. Given the relatively small size of the Dutch electricity market, it is unlikely that the geographic market would be smaller than national. The NMa has itself previously found the geographic market for the retail supply of electricity in the Netherlands to be national in scope.<sup>10</sup>

21. Ultimately, the definition of the relevant geographic markets can be left open however, as on any reasonable definition, the transaction will not give rise to competition concerns.

#### Retail supply of natural gas

22. Previous Commission decisions have generally found the relevant geographic market for the retail supply of gas to be national.<sup>11</sup> With respect to the Netherlands, the NMa has also found that the geographic market for the retail supply of gas is national in scope.<sup>12</sup>

23. Ultimately, the definition of the relevant geographic markets can be left open however, as on any possible definition, the transaction will not give rise to competition concerns.

#### Generation and wholesale of electricity

24. In past decisions, both the Commission<sup>13</sup> and the NMa<sup>14</sup> have considered the market for the generation and wholesale of electricity to be no wider than national in scope. A recent sector enquiry on the gas and electricity markets conducted by the Commission has also confirmed

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<sup>7</sup> Case COMP/M.4110 E.On/Endesa

<sup>8</sup> Onderzoek marktwerking groothandelsmarkt gas, DTe, Den Haag maart 2005.

<sup>9</sup> Case COMP/M.3440 ENI/EDP/GDP, Case COMP/M.4110 E.On/Endesa

<sup>10</sup> Case 2129 Essent N.V. –N.V. Nutsdedrijven Maastricht, Case 3282 Eneco -Remu

<sup>11</sup> Case COMP/M.4110 E.On/Endesa, Case COMP/M.3268 Sydkraft/Graninge

<sup>12</sup> Case 2129 Essent N.V. –N.V. Nutsdedrijven Maastricht, Case 3282 Eneco -Remu

<sup>13</sup> Case COMP/M.3268 Sydkraft/Graninge, Case COMP/M.2890 EDF-Seeboard

<sup>14</sup> Case 3282 Eneco -Remu

that the geographic market for the generation and wholesale of electricity is national with respect to the majority of member states.<sup>15</sup>

25. On the other hand, the parties consider that the market for generation and wholesale of electricity in off-peak hours could alternatively be defined as the Dutch-German market.<sup>16</sup>
26. The latter assertion has however been refuted by the Bundeskartellamt, which is of the opinion that no such geographic market exists due to numerous barriers to trade such as different system design, congestion at points in the grid and differing supply and demand on both sides of inter-connector points.
27. Ultimately, the definition of the relevant product markets can be left open, since the transaction will not give rise to competition concerns on any of the above considered market definitions.

#### Wholesale of natural gas

28. The Commission has in previous decisions considered the market for the wholesale of natural gas to be no wider than national, whilst acknowledging the possibility that the liberalisation and internationalisation of the gas market may in time lead to a widening of the geographic scope.<sup>17</sup>
29. According to a report by the DTe, Dutch imports of natural gas have risen from less than 10% to more than 25% of the total gas supply in the period 1997-2003, although a minor relapse of imports was signalled in 2003.<sup>18</sup>
30. In any case, the definition of the relevant geographic markets can be left open, as on any reasonable definition, the transaction will not give rise to competition concerns.

#### ***C. Assessment***

31. The proposed transaction does not lead to a significant structural change on the markets described above. On the relevant markets, Electrabel is one of the main players but Cogas Energy is rather minor, with the result that the increment in market share as a result of the transaction would be quite low. In relation to retail supply of electricity and gas where the overlaps occur, the combined market share nationally is relatively low and below a level indicating market power. The transaction will not result in a significant impediment to competition in the Common Market or in a substantial part of it.
32. Market shares used for the analysis are based upon the parties' best estimates.

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<sup>15</sup> DG COMP Preliminary Report - Sector Inquiry under Art 17 Regulation 1/2003 on the gas and electricity markets', DG February 16 2006, p 117.

<sup>16</sup> "Factors Affecting Geographic Market Definition and Merger Control for the Dutch Electricity Sector", (The Brattle Group, 2006), which has found that during off-peak hours the inter-connector capacity is sufficient for suppliers in Germany to fulfil the demands of customers in the Netherlands and vice versa.

<sup>17</sup> Case COMP/M.4110 E.On/Endesa

<sup>18</sup> Onderzoek marktwerking groothandelsmarkt gas.

### Horizontal Relationship

33. There are horizontal overlaps between the parties on the Dutch market in the retail supply of electricity and gas.

#### Retail supply of electricity

34. The market as previously defined by the Commission for the retail supply of electricity segments into: (a) supply to *large* industrial customers connected to the high and medium voltage grid and (b) supply to *smaller* industrial, commercial and domestic customers connected to the low-voltage grid.<sup>19</sup> Whereas the parties have provided market shares according to the subdivision considered by EnergieNed, which divides the market between i) supply to large customers (grid connection capacity > 3\*80A. and ii) supply to smaller customers (3\*80A. or less), these are considered to be an acceptable proxy for the market as defined by the Commission.

#### **Dutch market shares for retail supply to large customers (capacity > 3\*80A) 2005**

Company	GWh	Market Share
Electrabel	[...]	[15-25]%
Cogas Energy	[...]	[0-10]%
<b>Post Merger</b>	[...]	<b>[15-25]%</b>
Essent	[...]	[20-30]%
Nuon	[...]	[15-25]%
Eneco	[...]	[10-20]%
Delta	[...]	[5-15]%
Oxxio	[...]	[0-10]%
Others	[...]	[5-15]%
<b>Total Market</b>	[...]	100%

35. As can be seen from the above table, as regards retail supply of electricity to *large* customers (grid connection capacity > 3\*80A), post transaction the parties will have a combined market share of [15-25]%, which brings them on a parallel with Essent, the largest player on the market with [15-25]%. Other competitors follow closely, in particular, Nuon [15-25]%, Eneco [10-20]% and thereafter Delta [5-15]% and Oxxio [0-10]%. With an increment of less than [5-15]%, the transaction would thus not make a significant difference to Electrabel's current placement as one of the leading competitors on the Dutch retail electricity market.

36. In the market for retail supply of electricity to *smaller* customers (3\*80A or less), the parties combined market share post-transaction will be about [0-10]%, a minor share of the market with an increment of only [0-10]% from the addition of Cogas Energy.

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<sup>19</sup> Case COMP/3440 ENI/EDP/GDP, Case COMP/M.4110 E.On Endesa

Competitors Nuon ([25-35]-[35-45]%), Eneco ([15-25]-[25-35]%) and Essent ([15-25]-[25-35]%) are estimated to have much higher shares in this market. As such, the transaction would not pose any competition problems for the smaller customer segmentation of the market.

37. On retail supply market to *large* customers with an annual consumption of more than 10GWh, post-transaction the parties will have a combined market share of [20-30]%, with an increment of [0-10]% from Cogas Energy. This would not significantly change the structure of the market, given that Electrabel is currently already the largest player with [15-25]% on this market. Post-transaction, there would continue to be healthy competition from other players on the market, namely Delta [15-25%], Essent [15-25]%, Nuon [10-20]% and Eneco [10-20]%).
38. On the retail supply market to *medium* sized customers with an annual consumption of between 10MWh and 10GWh, post-transaction the parties will have a combined market share of [5-15]%, with an increment of only [0-10]%. Competitors Nuon [25-35]%, Essent [20-30]% and Eneco [15-25]% all have significantly higher shares. Thus the transaction would to a minor extent strengthen Electrabel's position, but would not change its' current placing as fourth largest competitor on the market.
39. The same can be said of the subdivision for supply of electricity to *small* customers with an annual consumption of less than 10 MWh, where post-transaction the parties will have a combined market share of about [0-10]%. The leading competitors on this market have much higher market shares, in particular Nuon [25-35]%), Essent [25-35]% and Eneco [20-30]%. Thus, the transaction will not effect the parties' current position as a minor player on the market to small customers in the Netherlands.
40. In summary, the transaction does not raise competition concerns as the combined market shares in question are below a level which would indicate market power and the increment to market share brought about by the transaction would be quite minor. Moreover, the markets for supply to large customers, where the combined market shares of the parties are highest, are characterised by a relatively high number of players with quite substantial market shares and low barriers to entry.

#### Retail supply of natural gas

41. Market shares have been provided by the parties for the product markets considered by the NMa. Even if these segmentations are not fully in line with the market definition of the Commission, these shares give suitable indications for the strength of the parties in the markets as defined by the Commission.
42. In addition, market shares have been given according to the segmentation used by the Commission in relation to the retail supply of natural gas to electricity generation plants.



### *Large industrial customers*

43. On the Dutch retail market for supply of *large* industrial customers (with a consumption of >10 million m<sup>3</sup>)<sup>20</sup> the parties have a very minor part of the market, with only [0-10]% between them. This would not pose competitive problems.

### *Middle-sized customers*

44. Post-transaction, the parties' combined market shares for Dutch retail supply to *middle* sized customers (annual consumption >1 million m<sup>3</sup> and <10 million m<sup>3</sup>) are also minor, standing at [0-10]%.

### *Small customers*

45. As regards small customers (annual consumption <1 million m<sup>3</sup>), post-merger the combined parties will hold [0-10]% of the market.

46. Thus, for all three segments considered above, the parties are minor players with low market shares and the transaction would not cause competition concerns.

### *Electricity Generation Plants*

47. On the Dutch retail market for supply of natural gas to electricity generation plants, Electrabel holds [35-45]% of the market. However, Cogas is not active on this market and as such there is no overlap between the parties.

### *L-gas and H-gas*

48. The product market segmentations discussed above can be further narrowed down into markets for L-gas and H-gas.

#### **Dutch market shares for retail supply L-gas to large customers (>10 million m<sup>3</sup>) 2005<sup>21</sup>**

<b>Company</b>	<b>Mm3</b>	<b>Market Share</b>
<b>Electrabel</b>	[...]	[0-10]%
<b>Cogas Energy</b>	[...]	[0-10]%
<b>Post Merger</b>	[...]	<b>[0-10]%</b>
<b>Total Market</b>	[...]	100%

49. On the market for the retail supply of L-gas to large customers (>10 million m<sup>3</sup> p/a), the parties have a very minor part of the market, with [0-10]% combined. However, given the very minor market shares of the parties, this would not raise competition concerns.

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<sup>20</sup> Excluding electricity generation plants.

<sup>21</sup> Excluding electricity generation plants.

50. On the market for the retail supply of L-gas to middle sized customers ( $>1$  million  $m^3$ ,  $<10$  million  $m^3$  p.a.), the parties have a very minor part of the market, with about [0-10]% combined. Thus, given the very minor market shares of the parties, the transaction would not raise competition concerns in this market segment.
51. On the market for the retail supply of L-gas to small customers ( $<1$  million  $m^3$  p.a.), the parties also have a very minor part of the market, with [0.10]% combined. Thus, given the very minor market shares of the parties, the transaction would not raise competition concerns.
52. Whilst Electrabel holds [10-20]% of the market for retail supply of L-gas to electricity generation plants, Cogas Energy is not active in this market. Thus, there is no overlap between the parties and the transaction will have no bearing on market shares in this segment.
53. Similarly, whereas Electrabel has [0-10]% of the market for H-gas to large industrial customers in the Netherlands as defined above, Cogas Energy is not active on that market, with the result that there is no overlap between the parties. Thus, the transaction would not raise competition concerns in this market segment.
54. Neither of the parties are active on the market for retail supply of H-gas to middle-sized customers ( $>1$  million  $m^3$ ,  $<10$  million  $m^3$  p.a.) or small customers ( $<1$  million  $m^3$  p.a.), thus no competition issues arise in these market segments.
55. Whilst Electrabel holds [45-55]% of the Dutch market for retail supply of H-gas to electricity generation plants, Cogas Energy is not active in this market segment, resulting in no overlaps. Thus the transaction could not raise competition issues in this regard.
56. In summary, the transaction does not raise competition concerns as the combined market shares in question are below a level which would indicate market power and the increment to market share brought about by the transaction would be quite minor. It can be concluded that the transaction would not cause a significant impediment to effective competition in the common market or in a substantial part of it.

### *Vertical Relationship*

#### Generation and wholesale of electricity

57. Electrabel is active upstream in the generation and wholesale supply of electricity. On the supply side, the wholesale market consists of electricity generators and importers. On the demand side, it consists of retailers who buy power to sell on to smaller customers. Both Electrabel and Cogas are active downstream in the retail supply of electricity. As such, there is a vertical relationship between Electrabel as an upstream generator and wholesaler of electricity and the combined Electrabel/Cogas Energy entity as a retailer of electricity.
58. As discussed above, whilst the Commission has considered the market for the generation and wholesale of electricity to be part of the same market,<sup>22</sup> the NMa has suggested that this may be broken down into two narrower markets, namely i) a market for on-peak

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<sup>22</sup> Case COMP/M.3268 Sydkraft/- Grønting

generation and wholesale of electricity and ii) a market for off-peak generation and wholesale of electricity.

59. On the hypothetical Dutch market for generation and wholesale of electricity during *peak hours*, Electrabel has [15-25]% of the market. There is a relatively low level of concentration in this market with main competitors Essent holding [15-25]%, Nuon [10-20]% and E-On [5-15]% of the market. In this context, [15-25]% of the market is not indicative of market power. Smaller competitors Delta, Eneco and Statkraft hold [0-5]%, [0-10]% and [0-10]% of the market respectively. Given the size and number of alternative suppliers, it is unlikely that there would be upstream foreclosure of Electrabel/Cogas Energy's competitors in the Dutch electricity retail market by Electrabel as an upstream generator and wholesaler of electricity.
60. On the hypothetical Dutch market for generation and wholesale of electricity during *off-peak hours*, Electrabel has [5-15]% of the market. There is also a relatively low level of concentration in this market with main competitors Essent holding higher shares of [15-25]%, Nuon [10-20]% and E-On [10-20]% of the market. In this context, [5-15]% of the market is not indicative of market power. Smaller competitors Delta, Eneco and Statkraft hold [5-15]%, [0-10]% and [0-10]% of the market respectively. Given the size and number of alternative suppliers, it is unlikely that there would be upstream foreclosure of Electrabel/Cogas Energy's competitors in the Dutch electricity retail market by Electrabel as an upstream generator and wholesaler of electricity.
61. On the so-called hypothetical Dutch-German market for generation and wholesale of electricity during *off-peak* hours, Electrabel is estimated to hold a minor share of about [0-10]%. It is thus unlikely that there would be any upstream foreclosure of Electrabel/Cogas Energy's competitors in the Dutch electricity retail market by Electrabel as a minor upstream generator and wholesaler of electricity in such a market.

#### Wholesale of natural gas

62. Electrabel is active upstream in both purchase and sale on the Dutch wholesale gas market. The wholesale gas market encompasses natural gas sold by producers and traders to non-end users, such as retailers. Both Cogas Energy and Electrabel are active downstream as retailers on the Dutch gas retail supply market and therefore there is a vertical relationship between Electrabel as a wholesaler and the parties as downstream retailers.
63. Gas is traded on the wholesale market either directly (by way of bilateral contracts) or through the market place, such as Title Transfer Facility (TTF; a virtual market place) or Eurohub. The volume traded on the entire wholesale market is approximately 47.4 billion m<sup>3</sup>. This strongest player on this market is the incumbent Gasunie Trade & Supply B.V. (currently named GasTerra), which has a market share of about [65-75]%.
64. Electrabel sold about [...] billion m<sup>3</sup> of natural gas on the Dutch wholesale gas market in 2005, which amounts to [5-15]% of all gas traded in that market that year. In the particular context of the strength of Gasunie Trade & Supply B.V., the upstream market share of Electrabel is not high enough to create a risk of upstream foreclosure by Electrabel of Electrabel and Cogas Energy's competitors in the Dutch retail gas supply market.
65. There are no further vertical relationships between the parties, since neither party is engaged in business activities in a product market, which is upstream or downstream of a

product market in which any other party to the concentration is engaged, and in which any of their individual or combined market shares at either level is 25% or more.

66. In addition, bearing in mind that GDF and Suez are in the process of seeking clearance for a merger, it is noted that should that merger go through, GDF's market shares in all the above mentioned horizontal and vertical markets are not of an order that would effect the outcome of this competitive analysis.<sup>23</sup>

67. Hence, the notified transaction does not significantly impede competition in the relevant markets.

## **V. CONCLUSION**

68. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the Common Market and with the EEA Agreement. This decision is adopted in application of Article 6(1) (b) of Council Regulation (EC) No 139/2004.

For the Commission  
(signed)  
Neelie KROES  
Member of the Commission

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<sup>23</sup> GDF has a limited presence in the Dutch energy market by way of its wholly owned subsidiaries Gas de France Supply Trading & Marketing B.V. and Gas de France Production Nederland B.V. In addition, GDF has a 38.6% stake in Noordgastransport B.V. – a gas transportation company.