

***Case No COMP/M.5793 -
DALKIA CZ/ NWR
ENERGY***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 12/05/2010

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sir/Madam,

**Subject: Case No COMP/M.5793 - DALKIA CZ/ NWR ENERGY
Notification of 8 April 2010 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 8 April 2010, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Dalkia Česká republika, a.s. ("Dalkia CZ", Czech Republic), which is ultimately controlled by Electricité de France S.A. ("EDF", France) and Veolia Environnement S.A. ("Veolia", France), acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the undertaking NWR Energy, a.s. ("NWR Energy", Czech Republic), currently controlled by New World Resources N.V. ("NWR", Czech Republic), by way of a purchase of shares.

I. THE PARTIES

2. Dalkia CZ is predominantly active in the Czech Republic. It is primarily involved in the provision of district heat to end customers in several Czech municipalities, in the generation, wholesale and retail supply of electricity, the provision of ancillary services, the maintenance and repair of technology equipment in the energy sector and the trading of electricity, as well as of CO₂ emission rights.

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.

3. Pražská teplárenská a.s.² ("PT"), together with its subsidiary, Energotrans, a.s., is a Czech company jointly controlled by EnBW, J&T Financial Group and the municipality of Prague. PT is active in district heating in Prague and Neratovice and in the generation and wholesale of electricity in the Czech Republic. EnBW, who jointly controls PT, is ultimately controlled by EdF, which in turn also controls Dalkia CZ.
4. NWR Energy is primarily active in the provision of district heat, the distribution, retail supply and trading of electricity, as well as the trading in CO₂ emission rights. It is currently controlled by NWR. Czech Karbon, a 100% subsidiary of NWR Energy, is active in the retail supply of electricity and the trading of electricity and of CO₂ emission rights in the Czech Republic, and, marginally, in electricity trading in Poland and Germany. NWR Energetyka PL, also a 100% subsidiary of NWR Energy, based in Poland, is active in the distribution of electricity and the retail supply of electricity in Poland, although to a limited extent.
5. OKD a.s. (OKD), another subsidiary of NWR, is active in the mining of hard coal and coking coal in the Czech Republic. OKK Koksovny a.s. (OKK), also a subsidiary of NWR, is a producer of coke, coking gas, coal tar, benzole, sulphate and sulphur.

II. THE OPERATION AND THE CONCENTRATION

6. Under the terms of a Share Purchase Agreement (the "SPA"), signed on 8 January 2010, between Dalkia CZ and NWR, Dalkia CZ will acquire sole control of NWR Energy (together the "Parties") by purchasing 100% of the shares of NWR Energy currently held by NWR. Therefore, if the transaction is successfully completed, Dalkia CZ will have sole control over NWR.
7. Based on the above, the operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. EU DIMENSION

8. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5,000 million³ (Veolia: EUR 35,846 million, EDF: EUR 64,279 million, NWR Energy: EUR 394 million). Each of them has a EU-wide turnover in excess of EUR 250 million (Veolia: EUR [...], EDF: EUR [...], NWR Energy: EUR [...]), and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has a EU dimension pursuant to Article 1(2) of the Merger Regulation.

² [...].

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25).

IV. COMPETITIVE ASSESSMENT

Vertical links

9. The Parties have a 100% market share in their respective district heat distribution networks. Due to this, all those markets which are related up- or downstream to the provisioning of district heat, and in which one of the Parties is active, give rise to vertically affected markets. This is the case for the markets of trading in CO₂ emissions rights and maintenance and repair of energy equipment.
10. In addition, the Parties also have a 100% market share in the electricity distribution networks of NWR Energy and that of PRE (a joint venture of EnBW⁴ and the City of Prague), thereby giving raise to vertically affected markets in relation to the markets for the generation and wholesale supply of electricity, maintenance and repair of energy equipment and the retail supply of electricity to end-users.
11. Furthermore, if the retail supply of electricity at regional distribution network level were to be considered as separate market, Dalkia CZ would have a [80-90] % market share in the area covered by PRE's distribution network, thereby giving raise to vertically affected markets in relation to the upstream markets for the generation and wholesale supply of electricity and for the distribution of electricity.

⁴ EnBW is jointly controlled by EDF, which also controls Dalkia CZ;

12. The following table shows the vertical relations between various markets:

Product Markets	Geographic Market	Market Shares of the Parties			Vertically related to	Geographic Market	Market Shares of the Parties		
		Dalkia CZ *	NWR Energy	Total*			Dalkia CZ *	NWR Energy	Total*
Provision of district heat	Heat networks of Dalkia CZ in the relevant cities	100%	0%	100%	Trading of CO ₂	EU	[5-10]%	[0-5]%	[5-10]%
					Maintenance	Czech Republic	[5-10]%**	[0-5]%^***	[5-10]%**
	Heat networks of NWR Energy in the relevant cities	0%	100%	100%	Trading of CO ₂	EU	[5-10]%	[0-5]%	[5-10]%
					Maintenance	Czech Republic	[5-10]%**	[0-5]%^***	[5-10]%**
	Heat networks of Pražská teplotárenská and Energotrans in Prague and Neratovice	100%	0%	100%	Trading of CO ₂	EU	[5-10]	[0-5]%	[5-10]%
					Maintenance	Czech Republic	[5-10]%**	[0-5]%^***	[5-10]%**
Distribution of electricity	Electricity distribution network of NWR Energy	0%	100%	100%	Retail	Czech Republic	[10-20]%	[0-5]%	[10-20]%
					Maintenance	Czech Republic	[5-10]%**	[0-5]%^***	[5-10]%**
					Wholesale	Czech Republic	[5-10]%	[0-5]%	[5-10]%
	Prague and Roztoky	100%	0%	100%	Retail	Czech Republic	[10-20]%	[0-5]%	[10-20]%
					Maintenance	Czech Republic	[5-10]%**	[0-5]%^***	[5-10]%**
Generation and wholesale supply of electricity	Czech Republic	[5-10]%	[0-5]%	[5-10]%	Retail	Czech Republic	[10-20]%	[0-5]%	[10-20]%
					Maintenance	Czech Republic	[5-10]%**	[0-5]%^***	[5-10]%**
					Distribution	network of NWR or PRE	0 / 100 %	0 / 100 %	100%
Retail supply of electricity	Czech Republic	[10-20]%	[0-5]%	[10-20]%	Distribution	network of NWR or PRE	0 / 100 %	0 / 100 %	100%
					Wholesale	Czech Republic	[5-10]%	[0-5]%	[5-10]%
	Prague (PREdistribuce)	[80-90]%	[0-5]%	[80-90]%	Distribution	network of NWR or PRE	0 / 100 %	0 / 100 %	100%
					Wholesale	Czech Republic	[5-10]%	[0-5]%	[5-10]%
Trading CO ₂ emission rights	EU	[5-10]%	[0-5]%	[5-10]%	District heating	network of Dalkia CZ or NWR	0 / 100 %	0 / 100 %	100%
Maintenance and repair of technology equipment in energy sector	Czech Republic	[5-10]%*	[0-5]%^***	[5-10]%**	Distribution	network of NWR or PRE	0 / 100 %	0 / 100 %	100%
					Retail	Czech Republic	[10-20]%	[0-5]%	[10-20]%
					District heating	network of Dalkia CZ or NWR	0 / 100 %	0 / 100 %	100%

* including EnBW Group; **including in-house; ***in-house only

Vertical relationships

1. Provision of district heat (upstream) – trading of CO₂ emissions rights (downstream)

Relevant product and geographic market

Provision of district heat

13. District heating plants distribute steam or hot water to a number of buildings. To produce steam or hot water, the heating production plants use a variety of fuels, including hard coal, brown coal, natural gas, coke-oven gas and degasification gas, biomass and light fuel oil.
14. The heat is distributed via separate networks owned by the local distributor. Different networks cover different geographic areas. They are not usually connected to one another for technical reasons and, therefore, cannot be considered as substitutable. Therefore, each district heating network may be viewed as a separate market for the provision of district heat, and may be considered to comprise only the area covered by the network in question. In very specific circumstances, it may be technically possible to link neighbouring district heating networks. However, the consequences would be high development costs and lower energy efficiency because the heat would have to be transported over large distances, incurring great heat losses in transmission. Moreover, the feasibility of connecting adjacent district heating networks is also limited due to regulatory reasons.
15. Although district heating networks are considered 'natural' monopolies, according to the Parties, there exists some degree of competition between district heating networks and smaller decentralised generation units (usually for a single building or apartment). District heat customers may switch from an existing district heat supplier to decentralised (private) heating. This practice is limited due to the investment costs involved in purchasing a new, decentralised production unit (a boiler) and the generally higher operating costs of decentralised heating in cases where centralised district heating networks are readily accessible. Switching to decentralised heating also generally results in higher fuel costs since only gas or electricity is typically used as opposed to cheaper brown coal, which is used predominantly for the generation of district heat.⁵ Nevertheless, decentralised heating systems offer relative flexibility in terms of usage, customers being able to choose when to use the heating system and thus can better manage heating costs.
16. The Parties consider the market for district heat as separate product market. Concerning the geographic scope of the market, they consider that it is confined to the local network.
17. In past decisions, the Commission has taken the view that the provision of district heat is a separate product market.⁶ With regard to the geographic scope of the market, in the past, the market for the provision of district heat has been defined by the Commission as

⁵ The use of gas and electricity instead of coal is preferred in new, decentralised heating systems in cities, for environmental protection reasons;

⁶ COMP/M.5365-IPO/EnBW/PRAHA/PT, paragraph 16 and COMP/M. 2701– VATTENFALL/BEWAG, paragraph 7;

local and limited to the relevant network.⁷ For the purpose of this transaction these market definitions can be maintained.

Trading of CO₂ emissions rights

18. The Commission defined the market for the trading of CO₂ emission rights as the market that includes EU emission allowances ("EUAs") issued for trade under the EU Emission Trading Scheme ("EU ETS")⁸, and potentially including Certified Emission Reductions ("CERs") issued under the global mechanisms⁹ set up by the Kyoto Protocol.¹⁰ However, in a previous decision the Commission ultimately left open the question of whether CERs should be included with EUAs in the relevant product market due to their supplementary nature.¹¹
19. With regard to the geographic scope of the relevant market, the Commission considered that the market for the trading of CO₂ emission rights is EU wide.¹²
20. The Parties agree with the Commission's approach. It is not necessary to conclude on the product market definition in this case, as under any alternative delineation there would be no competition concerns. As for the geographic market scope, it will be considered as being EU-wide in line with prior Commission practice.

Assessment

21. Dalkia CZ operates district heat networks in Frýdek-Místek, Havířov, Karviná, Kolín, Krnov, Mariánské Lázně, Nový Jičín, Olomouc, Ostrava, Prague, Přerov and Ústí nad Labem.¹³ NWR Energy operates district heat networks in Český Těšín, Frýdek-Místek, Havířov, Karviná, Opava, Ostrava and Těrlicko, and also provides district heat in the areas in the vicinity of OKD's four hard coal mines (i.e. the Paskov mine, the ČSM mine, the Karviná mine and the Darkov mine). In all mentioned areas/networks each party has a market share of 100%.
22. The Parties' combined market shares in trading of CO₂ emissions rights are [5-10]% EU-wide (Dalkia-[0-5]%, NWR Energy-[0-5]% and EnBW¹⁴-[0-5]%). If a wider market encompassing CERs were to be considered, the Parties' market shares would be further diluted.

7 COMP/M.5365 - IPO/EnBW/PRAHA/PT, paragraph 16;

8 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, page 32);

9 This scheme includes instruments with international aspects transcending EU boundaries, in particular the JI (joint implementation) and the CDM (clean development mechanism);

10 See COMP/M.5224 – EdF/British Energy, paragraphs 138 to 140; COMP/M.3868 – DONG/Elsam/Energi E2, paragraph 277; and COMP/M.5496 - VATTENFALL/NUON ENERGY, paragraph 9;

11 See COMP/M.5224 – EdF/British Energy, paragraph 139;

12 See COMP/M.5224–EdF/British Energy, paragraph 140 and COMP/M.3868 – DONG/Elsam/Energi E2, paragraph 280;

13 Dalkia CZ entered into an agreement with ČEZ, a.s. on the sale of a 85% share of Dalkia Ústí nad Labem, a.s.. Once this transaction is completed, Dalkia CZ will no longer be active on the market for the provision of district heat in the relevant network in Ústí nad Labem;

14 Jointly controlled by EDF, which also controls Dalkia CZ;

23. In view of the above, both customer and input foreclosure seem unlikely in this case. The Commission therefore considers that the transaction does not raise serious doubts as to its compatibility with the internal market as regards the vertical relationship between the market for the provision of district heat and the market for the trading of CO₂ emissions rights.

2. Provision of district heat (upstream) – maintenance and repair of technology equipment in the energy sector (downstream)

Relevant product and geographic market

Maintenance and repair of technology equipment in the energy sector

24. The Parties submit that maintenance and repair of technology equipment in the energy sector (M&R) should be considered as a separate market, and that the geographic scope of this market should be the Czech Republic.
25. The Parties submit that there are no substantial constraints on competition in the Czech market, therefore players can be active in all the regions of the Czech Republic. As well, there exist several competitors of AmpluServis a.s. (the wholly-owned subsidiary of Dalkia CZ which is active in this market) that have customers across the country, as well as outside the Czech Republic.
26. The Commission has not yet defined M&R as separate market¹⁵. However, in relation to utility networks, markets for the maintenance, construction and operation of networks were considered as separate markets.¹⁶ By analogy, M&R could also represent a separate market as far as the energy sector is concerned. Regarding the geographic scope of the market, the market for M&R of technology equipment in the energy sector could be considered as, at least, national in scope in the case of the Czech Republic. In any event the precise market definition can be left open in the present case as the proposed transaction will not lead to any competition concerns under any alternative market definition.

Assessment

27. Dalkia CZ is active in the market for maintenance and repair of technology equipment in the energy sector through AmpluServis, a.s., a wholly-owned subsidiary. AmpluServis provides most of the maintenance and repair services internally, with only approximately [less than 50%] of its services provided to third parties in 2008.
28. Dalkia CZ's market share, via AmpluServis a.s., in the market for the maintenance and repair of technology equipment in the energy sector in the Czech Republic did not exceed [0-5]% in 2008.

¹⁵ In Comp/M.5365-IPO/EnBW/PRAHA/PT, paragraph 25, the Commission considered that the maintenance and repair of technology in the energy sector in the Czech Republic may represent a separate product market, but ultimately left the exact market definition open;

¹⁶ COMP/JV.36 TXZ Europe/EdF-London Investments;

29. Termonta Praha, a.s. (a wholly-owned subsidiary of Pražská teplárenská a.s.¹⁷) and PREměření, a.s. and PREdistribuce, a.s. (both wholly-owned subsidiaries of Prazska energetika, a.s.¹⁸) are also active in this market. If these companies are taken into account, the share of sales to third parties of Dalkia CZ would not exceed a market share of [0-5]%. If in-house services were considered also, the share of Dalkia CZ would not exceed a market share of [5-10]%.
30. NWR Energy does not provide any M&R services to third parties; it provides itself [the majority] of its M&R needs and outsources the remaining [part] from third companies. In any case, its M&R needs are not significant, since they only represent [0-5]% of the total demand of the M&R Czech Market. Thus, the Parties' combined market share in the market for M&R of technology equipment in the energy sector would not exceed, in any case, [5-10]% of the market.
31. The Parties submit that there is no risk of customer foreclosure should AmpluServis decide to discontinue the provision of its services to third parties. A number of independent service providers operating in this market would be able to service NWR Energy's competitors such as Siemens s.r.o., Alstom s.r.o., Energetické Opravny a.s., ABB s.r.o., Škoda JS a.s., Škoda Praha a.s., ČEZ Energoservis s.r.o., ZAT a.s., I & C Energo a.s., Elektrovod, a.s. and DTZ Liberec s.r.o. In addition, the Parties' competitors could also internalise part or all of their maintenance and repair services.
32. Moreover, competitors of AmpluServis would not be foreclosed should NWR Energy contract exclusively with AmpluServis, since NWR Energy represents less than [0-5]% of the total demand for maintenance and repair services in the energy sector in the Czech Republic.¹⁹
33. In view of the above, both customer and input foreclosure seem unlikely. The Commission therefore considers that the transaction does not raise serious doubts as to its compatibility with the internal market as regards the vertical relationship between the market for the provision of district heat and the market for maintenance and repair services in the energy sector.

17 PT has a market share of [0-5]% in the Czech market, however, EnBW is currently planning to sell its stake in PT to a third party.

18 Jointly controlled by the City of Prague and EnBW;

19 According to the Parties' estimates, NWR Energy purchased approximately EUR [...] worth of maintenance and repair services from third parties in 2008, with an estimated additional EUR [...] worth of services provided by NWR Energy internally;

3. Distribution of electricity (upstream) - retail supply of electricity in the Czech Republic (downstream)

Relevant product and geographic market

Distribution of electricity

34. The Parties submit that, for the purpose of the proposed transaction, the relevant product market should include the electricity distribution network, as well as interconnectors connected to electricity distribution networks.²⁰
35. The Commission has considered the distribution of electricity as a separate market²¹. For the distribution of electricity the Commission considered that the relevant geographic area is the relevant distribution network²². The Parties do not contest the Commission's geographic market definition.
36. In any case, there is no need to conclude whether the relevant product market should include the distribution interconnectors, since no competitions concerns arise from the proposed transaction under any alternative market definition. As for the geographic scope, for the purpose of the proposed transaction, the market definition described above will be maintained.

Retail supply of electricity to end-users

37. The market for the retail supply of electricity involves the sale of electricity to the final customer.²³ In relation to the Czech market, retail supply of electricity has, in the past, been further sub-divided into the supply of electricity to large industrial customers connected directly to the high-voltage and medium-voltage network and the supply of electricity to smaller industrial, commercial and domestic customers connected to the low-voltage network (i.e. below 1kV).²⁴ The Parties do not contest these product market definitions.
38. The Parties submit that the geographic scope of the market for the retail supply of electricity should be at least national, regardless of the type of end customer. In support of their claim, they provide the following arguments:
- i) the full liberalisation of the retail market since 2006, thus all customers being able to choose suppliers;
 - ii) relatively high rates of large and medium industrial customers changing suppliers;
 - iii) the existence of homogenous conditions of competitions across the Czech distribution system;

20 The Commission included the interconnectors connected to the voltage level of the transmission network as a part of the market for electricity transmission in COMP/M.5467 – RWE/ Essent, paragraph 180;

21 COMP/M.3696 - E.ON/MOL, paragraph 62 and COMP/M. 4110 – E.ON/ENDESA, paragraphs 10 and 11;

22 M.3440 EDP/ENI/GDP, paragraph 63;

23 COMP/M.3440- EDP/ENI/GDP, paragraph 54;

24 COMP/M. 4238 - E.ON/Pražská Plynárenská, paragraph 18;

iv) the existence of a large number of suppliers to choose from²⁵.

39. Given the above arguments, the Parties claim that there exist indications pointing towards a national-wide market for retail supply in the Czech Republic, however, the mere possibility to switch supplier does not by itself imply that a market is national in scope, since what matters is whether customers turn to suppliers from across the country or instead have to rely on suppliers in their vicinity.
40. In this regard, the Commission has generally defined the markets for retail supply of electricity as national in scope, provided that they are fully liberalised.²⁶ With respect to the Czech electricity sector, in an earlier decision the Commission has left the geographic definition of the market for the retail supply of electricity open²⁷, considering both national and local levels (which, in the latter case, coincided with the areas covered by each of the regional distribution networks).²⁸
41. 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. Thus, the competition analysis will be made at both national and local distribution level.

Assessment

42. PREdistribuce, a.s., a wholly-owned subsidiary of Pražská energetika a.s.²⁹, part of the group to which Dalkia CZ belongs, is active in the market for the distribution of electricity in Prague and Roztoky u Prahy. It is one of the three regional unbundled DSOs which supplied [...] TWh of electricity in 2008. The other two regional DSOs are ČEZ Distribuce, a.s. and E.ON Distribuce, a.s..
43. NWR Energy is active in the market for the distribution of electricity in local electricity distribution networks in the east of the Czech Republic (notably in the municipal districts of Ostrava, Frýdek-Místek and Karviná) and one local electricity distribution network in the south of Poland (in the municipal district of Kaczyce). NWR Energy predominantly provides distribution services to OKD for its hard coal mining and coking activities and, to a lesser extent, to third parties³⁰. The Parties submit that the market for distribution of electricity also includes [an interconnector], which is connected to the local electricity distribution network of NWR Energy. NWR Energy is one of 277 local DSOs, with approximately [...] TWh of electricity distributed in 2008.
44. Each Party has a market share of 100% in its respective distribution network. However, the Parties' respective distribution networks are not neighbouring, and therefore, not connected. Additionally, as a result of the requirement of the Electricity Directive

25 The Parties submit that more than 300 licensed electricity traders were registered in 2008, with around 20 being independent (some of which operate at national level). However, while The Czech Energy Report (2008) confirms that a sufficient number of traders operate in the segments of large and medium industrial customers, it notes that there was a relatively low number of traders in the segment of small industrial customers and households;

26 COMP/M.5467 – RWE/ Essent, paragraph 283;

27 COMP/M.4238 - E.ON/Pražská Plynárenská, paragraph 20;

28 COMP/M.5365 - IPO/EnBW/PRAHA/PT, paragraph 32;

29 Jointly controlled by the City of Prague and EnBW;

30 NWR Energy only distributed [a small part] of the electricity to third parties in 2008;

2003/54/EC, DSOs must grant access to their grids on non-discriminatory basis and at regulated tariffs.

45. In the retail market for electricity in the Czech Republic, the Parties' combined market shares would be [10-20]% (Dalkia-[0-5]%)³¹, NWR Energy-[0-5]% and EnBW Group-[10-20]%). If the market were to be divided into supplies for high/medium voltage customers and low-voltage customers, the combined shares of the Parties would amount to [10-20]% and [10-20]%, respectively.
46. The following table provides an overview of the Parties' and their competitors' shares on the market for the retail supply of electricity in the Czech Republic for 2008:

Retail supply of electricity	(high and medium voltage)		(low-voltage)		Total	
	(TWh)	%	(TWh)	%	(TWh)	%
Dalkia CZ	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
NWR Energy	[...]	[0-5]	[...]	[0-5]	[...]	[0-5] ³²
Parties' total (without EnBW)	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
PRE	[...]	[10-20]	[...]	[10-20]	[...]	[10-20]
Energotrans, a.s./Pražská teplárenská a.s. ³³	[...]	[0-5]	[...]	[0-5]	[...]	[0-5]
Parties' total (with EnBW)	[...]	[10-20]	[...]	[10-20]	[...]	[10-20]
ČEZ, a.s.	n/a	n/a	n/a	n/a	[...]	[40-50]
E.ON Energie, a.s.	n/a	n/a	n/a	n/a	[...]	[20-30]
Others	n/a	n/a	n/a	n/a	n/a	[10-20]
Total ³⁴	35.8	100	23.2	100	59.7	100

Source: Parties' estimates, ERU, Pražská energetika, a. s., ČEZ, a.s., E.ON Česká republika, s.r.o.

47. Given the low market shares in the market for retail supply of electricity, the regulatory framework for distribution services, and considering that the Parties only have two distribution networks (of which NWR Energy's distribution network currently provides distribution services almost exclusively to OKD, a subsidiary of NWR), both customer and input foreclosure appear unlikely in this case. The Commission, therefore, considers that the transaction does not raise serious doubts as to its compatibility with the internal market as regards the vertical relationship between the market for distribution of electricity and the market for retail sale of electricity in the Czech Republic.

4. Distribution of electricity (upstream) – maintenance and repair of technology equipment in the energy sector (downstream)

48. The markets have been defined above in paragraphs 24-26 and 34-36.

31 Dalkia CZ and NWR energy are mainly present on this market because they produce electricity alongside heat in their cogeneration plants and units;

32 Approximately [less than half] of the retail sales of NWR Energy (in volume) accounted for sales to third parties;

33 In 2008, Pražská teplárenská a.s. supplied [...] TWh of electricity to final customers outside its group and [...] TWh to Teplo Neratovices spol. s r.o., its 100% subsidiary. It currently does not supply electricity to third party final customers;

34 Annual Balance of Electricity of ERU at http://www.eru.cz/user_data/files/statistika_elektro/rocní_zprava/2008/energie/2.htm;

Assessment

49. NWR Energy is active in the market for the distribution of electricity in local electricity distribution networks in the east of the Czech Republic, whereas Dalkia is active in the market for the distribution of electricity in Prague and Rožtoky u Prahy. In each distribution network each Party has a market share of 100%; however, the Parties' respective distribution networks are not connected.
50. Regarding the market for M&R, Dalkia CZ's market share does not exceed 5% in the Czech Republic. NWR Energy does not provide M&R services to third parties. If in-house services were to be included, Dalkia would have a market share of ca. [5-10]%, while NWR Energy would only have a share of [0-5]% of the market.
51. NWR Energy's purchase from third parties account for only [a small part] of its M&R needs, which is a negligible [0-5]% of the total M&R Czech demand. Thus, even if Dalkia were to take over the provision of these services there would be no significant change in the market situation.
52. Given the low market shares in the market for M&R of technology equipment in the energy sector, and the negligible increment due to the transaction ([0-5]% in the case in-house services were to be considered), both customer and input foreclosure appear unlikely in this case.
53. The Commission therefore considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as regards the vertical relationship between the market for distribution of electricity and the market for maintenance and repair of technology equipment in the energy sector.

5. Generation and wholesale supply of electricity (upstream) - Distribution of electricity (downstream)

Relevant product and geographic market

54. In previous decisions, the Commission has stated that the generation and wholesale supply of electricity should be regarded as a separate market³⁵, and would comprise the upstream supply of electricity (mainly generation and imports of electricity for further resale).³⁶
55. The Parties do not contest the Commission's precedents for the market for generation and wholesale supply of electricity. Concerning the geographic scope of the market, the Parties consider that it is at least national in scope (i.e. at least at the level of the Czech Republic).
56. Concerning the geographic market, the Commission has defined the market for generation and wholesale supply of electricity as being national in scope and, although it

35 COMP/M.3696 - E.ON/MOL, paragraph 62; Cases COMP/M.5604 - DONG/KOM-STROM, paragraph 6; COMP/M.5512 - Electrabel/E.ON, paragraph 14; COMP/M. 5467-RWE/ESSENT, paragraph 234

36 Cases COMP/M.5604 - DONG/KOM-STROM, paragraph 6; COMP/M.5512 - Electrabel/E.ON, paragraph 14; COMP/M. 5467-RWE/ESSENT, paragraph 234

did not exclude a wider scope for the Czech generation and wholesale supply of electricity, the Commission has left the geographic market definition open³⁷.

57. Given that even under a national wide geographic market definition there will be no competition concerns, the geographic market definition will be left open for the purpose of the proposed transaction.

Assessment

58. The Parties submit that a small volume of electricity from Dalkia's generation units ([...]) transits NWR Energy's distribution network. This physical flow concerns only a negligible part of electricity generated in these units ([...] TWh). Thus, the market share of the units directly connected to NWR Energy's distribution network amounts to less than [0-5]% in the market for generation and wholesale supply of electricity in the Czech Republic³⁸.
59. Dalkia has no customers directly connected to NWR Energy's electricity distribution network. It provides electricity to its customers via various distribution networks, which are, in turn, connected to NWR Energy's electricity distribution network. As well, there is neither a trading nor commercial agreement between NWR Energy and Dalkia on sales of electricity from Dalkia's generation units to NWR Energy's distribution network.
60. Given that (i) this vertical relationship only concerns the physical flow of electricity from the cogeneration plants of Dalkia CZ through NWR's distribution network, to other distribution networks which are connected to Dalkia's end customers, (ii) Dalkia's very low market share in total electricity production, and (iii) the regulated nature of electricity distribution in the Czech Republic (see paragraph 44), both input and customer foreclosure appear unlikely in this case.
61. The Commission therefore considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as regards the potential vertical relationship between the market for distribution of electricity and the market for generation and wholesale supply of electricity.

6. Distribution of electricity in Prague and Rostoky (upstream) - Retail supply of electricity in Prague (downstream)

62. The markets have been defined above in paragraphs 34-41.

Assessment

63. If a local market for retail supply of electricity encompassing the city of Prague would be defined, Dalkia would have a [80-90]% (ca. [70-80]% for high/medium voltage level and [90-100]% for the low voltage level customers) market share. NWR Energy is not active in this area. In the upstream market for electricity distribution in the relevant distribution network, PREdistribuce (joint venture of EnBW³⁹ and the City of Prague)

37 COMP/M.3665 - ENEL/SLOVENSKE ELEKTARNE, paragraph 15 and COMP/M.4238 - E.ON/Pražská Plynárenská, paragraphs 19 and 20;

38 The total size of the market is 85.5 TWh;

39 Jointly controlled by EDF, who also controls Dalkia CZ;

would have a 100% market share. Nevertheless, this vertical link is pre-existent to the transaction whereas the distribution network of NWR Energy does not overlap with that of PREdistribuce (not even neighbouring). Therefore, the proposed transaction does not alter the competition conditions at the local distribution level in the city of Prague.

64. In view of the above, the Commission considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as regards the vertical relationship between the market for distribution of electricity in Prague and Rostoky and the market for the retail supply of electricity in Prague.

7. Generation and wholesale supply of electricity (upstream) - Retail supply of electricity in Prague (downstream)

Relevant product and geographic market

65. The markets have been defined above in paragraphs 37-41 and 54-57

Assessment

66. In the Czech market, the Parties have a combined [5-10]% market share in the generation and wholesale supply of electricity ([0-5]% Dalkia CZ⁴⁰, [0-5]% NWR, [0-5]% Pražská energetika a.s.⁴¹ and [0-5]% Pražská Teplárenská, a.s.⁴²), whereas in the downstream market for the retail supply of electricity Dalkia would have a market share of [80-90]% in Prague⁴³.
67. NWR Energy is active in the market for the generation and wholesale supply of electricity in the Czech Republic only through imports of electricity from [...], and, marginally, from [...] (of [...] TWh and [...] TWh respectively). The electricity imported by NWR Energy from [...] through [...] is supplied on a virtually exclusive basis for the needs of the two largest hard coal mines of OKD⁴⁴.
68. In view of the low market shares in the upstream market for the generation and wholesale of electricity, both input and customer foreclosure can be excluded in this case. The Commission therefore considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as regards the vertical relationship between the market for retail supply of electricity in Prague and the upstream market for generation and wholesale supply of electricity in the Czech Republic.

⁴⁰ Dalkia has sold its stake in Ústí nad Labem, a.s. to a third party. When this transaction is implemented, Dalkia CZ will no longer control Ústí nad Labem, and its share in this market will decrease by [0-5]%;

⁴¹ Jointly controlled by the City of Prague and EnBW;

⁴² [...];

⁴³ NWR Energy is active in market for retail supply of electricity, however its market shares at local level are minimal (less than [0-5]%). Thus, the vertical links between NWR Energy's activities in the market for retail supply of electricity and the Parties' activities in the upstream market for generation and wholesale supply of electricity do not give rise to a vertically affected market;

⁴⁴ Subsidiary of NWR;

Horizontal overlaps

69. The Parties' activities overlap in the following markets: (i) generation and wholesale supply of electricity; (ii) retail supply of electricity; (iii) electricity trading and (iv) trading of CO₂ emission rights. However, none of these markets is affected, as the Parties' combined market share in each of these markets is below 15% (as illustrated in the table below).

Product Markets	Geographic Market	Market Shares of the Parties			Affected Market (above 15%)
		Dalkia CZ *	NWR Energy	Combined Market Share*	
Generation and wholesale supply of electricity	Czech Republic	[5-10]%	[0-5]%	[5-10]%	NO
Retail supply of electricity	Czech Republic	[10-20]%	[0-5]%	[10-20]%	NO
Electricity trading	Czech Republic	[5-10]%	[0-5]%	[10-20]%	NO
Trading of CO ₂ emission rights	EU	[5-10]%	[0-5]%	[5-10]%	NO

*including EnBW Group

V. ANCILLARY RESTRAINTS

70. NWR Energy, together with its subsidiaries, Czech Karbon s.r.o. and NWR Energetyka PL Sp. z o.o., is involved in the production of certain utilities and the provision of certain services to third parties⁴⁵ and to OKD, a.s. ("OKD") and OKK Koksovny a.s. ("OKK"), which are subsidiaries of NWR. OKD is active in hard coal mining and coking while OKK is a producer of coke, coking gas, coal tar, benzole, sulphate and sulphur.
71. The SPA provides that NWR Energy and its subsidiary, CZECH KARBON s.r.o. ("Czech Karbon"), will [enter into a] supply agreement [...] with OKD for the supply of certain utilities, [...] (together the "Utilities") to OKD for use in its four hard coal mines located in the eastern part of the Czech Republic (the [Supply Agreement]). The [Supply Agreement] also envisages that OKD will supply to NWR Energy raw materials, [...] which are necessary for the production of the relevant Utilities. It is intended that [the Supply Agreement] will enter into force when the shares of NWR Energy are transferred to Dalkia CZ.
72. The notifying Party submits that these terms are necessary and directly related to the implementation of the proposed transaction. The [Supply Agreement] serves, according to the notifying Party, to assure continuity of supply for OKD post-merger and allows NWR Energy to make a large amount of continuous planned investments in its own assets and assets leased from OKD.
73. The issue as to whether the terms of the [Supply Agreement] are strictly necessary in the sense of the Commission Notice on restrictions directly related and necessary to concentrations⁴⁶ (the Notice) in order to ensure continuity of supply for a transitional

⁴⁵ The sales of products and services provided to third parties accounted for approximately [more than a half]% of NWR Energy's total turnover in 2008;

⁴⁶ Commission Notice on restrictions directly related and necessary to concentrations, paragraphs 32-35;

period needs to be assessed bearing in mind both the scope and duration of the [Supply Agreement].

74. The notifying Party has mentioned several exceptional circumstances that may justify such a long duration of the Agreement, which exceeds the five year maximum period foreseen in the Notice⁴⁷. Among these would be the lack of alternative sources of supply and demand. The notifying Party claims that there is no alternative supplier of the Utilities available to OKD (with the possible exception of the supply of [...]). The Utilities supplied by NWR Energy have so far been captive sales and OKD cannot realistically replace this supply from alternative sources in the future. This is because no other supplier is likely to make the large investments necessary to build the infrastructure needed to provide the Utilities to OKD.
75. Furthermore, there is no alternative customer for the Utilities produced by NWR Energy. [...] The relevant infrastructure is thus located in the vicinity of OKD's coal mines and on land owned by OKD. This is geographically distant from residential or commercial areas, and, therefore, from other potential customers.
76. However, a period of [...] goes clearly beyond any transitory period that might be required either for the replacement of the current relationship of dependency of OKD on the utilities provided by NWR Energy, or for NWR Energy on the raw materials provided by OKD.
77. The [Supply Agreement] foresees that NWR Energy and Czech Karbon will enjoy an exclusive-supplier status for OKD's requirements of the Utilities and OKD will enjoy an exclusive-supplier status in relation to the raw materials supplied to NWR Energy. The Notice, however, clearly states at paragraph 34 that purchase and supply obligations providing for *"exclusivity or conferring preferred-supplier or preferred-purchaser status, are not necessary to the implementation of the concentration."*
78. In conclusion, the scope and long duration of the [Supply Agreement] mean that they go significantly beyond what would be reasonably necessary to ensure a transitory period of continuity of supply with utilities (for OKD) and supply of raw materials (for NWR Energy) after a break-up of NWR Energy from NWR.
79. Therefore, the [Supply Agreement] cannot be considered directly related and necessary to the implementation of the concentration and is therefore not covered by this Decision. Consequently, and as provided for in paragraph 7 of the Notice, such an Agreement remains subject to Articles 101 and 102 TFEU (formerly 81 and 82 of the EC Treaty) without prejudice to their compatibility or otherwise with said Articles.

47 Commission Notice on restrictions directly related and necessary to concentrations, paragraph 33 ;

VI. CONCLUSION

80. 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