

***Case No COMP/M.5978 – GDF SUEZ/
INTERNATIONAL POWER***

Only the English text is available and authentic.

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

Article 6(1)(b) in conjunction with Art 6(2)
Date: 26/01/2011

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EUROPEAN COMMISSION

Competition DG

Markets and cases I: Energy and Environment

Brussels, 26.01.2011
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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION IN
CONJUNCTION WITH
ARTICLE 6(2)

To the notifying party

Dear Sir/Madam,

**Subject: Case No COMP/M.5978 – GDF SUEZ/ INTERNATIONAL POWER
Notification of 29 November 2010 pursuant to Article 4 of Council
Regulation No 139/2004¹**

1. On 29 November 2010, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking GDF Suez S.A. ("GDF Suez", France) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control over International Power plc ("International Power", England and Wales) (hereinafter the "parties") by way of acquisition of 70% of the shares in International Power (hereinafter the "proposed transaction").

I. THE PARTIES AND THE OPERATION

2. **GDF Suez** is present across the entire energy chain, in electricity and in natural gas, including: (i) purchase, production and commercialization of natural gas and electricity; (ii) transport, distribution, management and development of major natural gas infrastructures; and (iii) design and commercialization of energy services and environment related services. 39.9% of GDF Suez' share capital is held by the French Government and another 51% are publicly held.
3. **International Power** is an international operator with activities in North America, Europe, Middle East, Australia and Asia. International Power is an operator of power generation facilities generating a (gross) capacity of approximately 32,000 MW.

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.

4. The proposed transaction will be implemented in two steps: (i) GDF Suez will first carry out an internal reorganisation aimed at constituting a separate subgroup of subsidiaries owning most of the international energy assets of the GDF Suez group, located mainly outside Europe; the subgroup will be held by Electrabel SA ("Electrabel"), a wholly owned subsidiary of GDF Suez. (ii) The shares in this subgroup of subsidiaries will be transferred to International Power in return for the issuance of new International Power shares representing (post-share capital increase) 70% of the share capital of International Power. GDF Suez will as a result, through Electrabel, hold 70% of the share capital of a new International Power (enlarged by the assets previously held by GDF Suez) ("New International Power").
5. The proposed transaction will lead to sole control of GDF Suez over International Power. Not only will GDF Suez hold 70% of New International Power's share capital but it will also be its only significant shareholder. The remaining 30% in New International Power will be split among the current public shareholders of International Power. The parties estimate that, on the basis of today's distribution of the shares, no shareholder will hold more than 4% of the shares in New International Power. GDF Suez will have the right to nominate [...]. GDF Suez will enjoy reserved matters at New International Power board level which require the approval of [...] which will include the approval of the annual budget and of the business plan as well as strategic transactions and capital expenditure over EUR 50 million.
6. Consequently, the proposed transaction consists in an operation of concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

II. REFERRAL REQUEST

7. On 20 December 2010, the Belgian Competition Authority requested, on the basis of Article 9(2)(a) of the Merger Regulation, a partial referral of the proposed transaction in relation to the parts of the case concerning the Belgian markets for generation and wholesale supply of electricity and the provision of balancing and ancillary services, with a view to assessing them under the Belgian competition law (the "Referral Request").
8. In the Referral Request, the Belgian Competition Authority asserted that the proposed transaction threatened to significantly affect competition in the Belgian markets for (i) generation and wholesale supply of electricity and for (ii) the provision of balancing and ancillary services, which present all the characteristics of distinct markets in accordance with Article 9(2)(a) of the Merger Regulation.
9. According to the Belgian Competition Authority's preliminary assessment, the proposed transaction threatened to affect competition in two ways. First, the Belgian Competition Authority was concerned that the proposed transaction would provide GDF Suez with the necessary information to raise the electricity prices in the wholesale market to the detriment of final consumers and, second, that such information would confer to GDF Suez the ability and the incentives to put RWE Essent at a competitive disadvantage, thereby dissuading the latter to expand in the Belgian wholesale market. Analogous concerns were expressed also in relation to the provision of balancing and ancillary services in Belgium.
10. On 19 January 2011, in the light of the Modified Commitments submitted by the parties, the Belgian Competition Authority withdrew its Referral Request.

III. EU DIMENSION

11. The undertakings concerned have a combined aggregate world-wide turnover in 2009 of more than EUR 5 000 million² (GDF Suez: EUR 79.91 billion and International Power: EUR 5.53 billion). Each of them has an EU-wide turnover in 2009 in excess of EUR 250 million (GDF Suez: EUR [...], International Power: EUR [...]), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The proposed transaction therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

IV. RELEVANT MARKETS AND COMPETITIVE ASSESSMENT

12. In previous decisions concerning the electricity sector, the Commission has considered that the following product markets should be distinguished³: (i) generation and wholesale supply of electricity⁴; (ii) transmission⁵; (iii) distribution⁶; (iv) retail supply (further subdivided according to the category of customers)⁷ and ancillary services and balancing power⁸. Each of these activities belongs to a distinct product market as they require different assets and resources. Moreover, these activities correspond to distinct market conditions and structures.
13. Both GDF Suez and International Power are active in electricity related markets in Portugal, the Netherlands, Belgium, the UK, Italy, Spain, Germany and France.
14. Given the number of markets and since the proposed transaction results in affected markets in Portugal, in the Netherlands and raises serious doubts in Belgium, the Commission proceeds to its competitive assessment with regard to these Member States by presenting its conclusions on each individual market. In the present decision, also a competitive assessment with respect to the provision of balancing power in Great Britain

² Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

³ See for instance, Case COMP/M.5224 - *EDF/BRITISH ENERGY*, 22 December 2008, Case COMP/M.3440 - *EDP/ENI/GDP*, 9 December 2004, Case COMP/M.3448 - *EDP/Hydroelectrica del Cantabrico*, 9 September 2004. Similar market definitions in Spain: See Case COMP/M.5171 - *ENEL/ACCIONA/ENDESA*, 13 June 2008; Case COMP/M.4672 - *E.ON/ENDESA EUROPA/VIESGA*, 6 August 2007.

⁴ Case COMP/M.5224 - *EDF/BRITISH ENERGY*, 22 December 2008, para. 11, Case COMP/M.4180 - *Gaz de France/Suez*, 14 November 2006, para. 674, Case COMP/M.3440 - *EDP/ENI/GDP*, 9 December 2004, para. 49. For Spain: Case COMP/M.5171 - *ENEL/ACCIONA/ENDESA*, 13 June 2008, para. 13. In more recent decision M5549 *EDF/Segebel*, electricity wholesale trading has been considered a part of this market.

⁵ Case COMP/M.3440 - *EDP/ENI/GDP*, 9 December 2004, para. 34. For Spain: Case COMP/M.5171 - *ENEL/ACCIONA/ENDESA*, 13 June 2008, para. 13.

⁶ Case COMP/M.4841 - *ENEL/EMS*, 20 December 2007, para. 8, Case COMP/M.3440 - *EDP/ENI/GDP*, 9 December 2004, para. 34. For Spain: Case COMP/M.5171 - *ENEL/ACCIONA/ENDESA*, 13 June 2008, para. 13.

⁷ Case COMP/M.5467 - *RWE/ESSENT*, 23 June 2009, para. 57, Case COMP/M.5224 - *EDF/BRITISH ENERGY*, 22 December 2008, para. 85, Case COMP/M.3440 - *EDP/ENI/GDP*, 9 December 2004, para. 33. For Spain: Case COMP/M.5171 - *ENEL/ACCIONA/ENDESA*, 13 June 2008, para. 13.

⁸ Case COMP/M.4180 - *Gaz de France / Suez*, 14 November 2006, para 683.

has been carried out since within the course of the Commission market investigation concerns have been voiced as to the impact of the proposed transaction on this potential market.

15. As it will be explained in the present decision, the proposed transaction as originally notified, raised competition concerns as regards the Belgian electricity generation and wholesale market given that it would have led to the reinforcement of GDF Suez' dominant position in the Belgian wholesale market.
16. In the course of the proceedings, the parties submitted to the Commission commitments designed to eliminate the serious doubts identified by the Commission, in accordance with Article 6(2) of the Merger Regulation. In the light of these commitments, the Commission has concluded that the proposed transaction falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the internal market or with the proper functioning of the EEA Agreement.

A. Portugal

17. Both parties are active in electricity generation and wholesale in Portugal.

Generation and wholesale of electricity

1. Product market definition

18. As already emphasized in previous decisions, the Commission has considered that electricity generation and wholesale constitute a separate product market.
19. The parties agree with the Commission's EDP/GDP decision⁹ in that, since the reform of the electricity markets in Portugal, the relevant product market for electricity wholesale should encompass the two market segments formerly distinguished, namely, the "*Sistema Eléctrico de Serviço Público*" ("SEP") and the "*Sistema Eléctrico Independente*" ("SEI")¹⁰. As regards power generation, the new legal structure distinguishes two different regimes, namely, power production under the general regime ("*produção de electricidade em regime ordinário*" or "general regime") and under the special regime ("*produção de electricidade em regime especial*" or "special regime").
20. The special regime is particular in the sense that generation assets eligible for this system, i.e., renewable resources or co-generation, are entitled to enter into a Power Purchase Agreement with the last resource supplier, the Portuguese transmission network, by which the latter agrees to purchase all power produced at a guaranteed price, pursuant to a remuneration formula set out by law. In contrast, under the general regime, there is no purchasing obligation of electricity by the National Grid and no guaranteed price. In other words, the Portuguese "special regime" concerns a support regime for certain types of generation assets similarly to other Member States (like Germany). From the outset, there seems to be no reason to distinguish between these regimes on the wholesale electricity market with regard to the proposed transaction. This

⁹ Case COMP/M.3440 - *EDP/ENI/GDP*, 9 December 2004, para. 49.

¹⁰ Whereas SEP was a regulated system composed of "bound" generators and "bound" distribution networks, SEI was composed of the unbound system which operated under free market conditions.

is also consistent with the consolidated doctrine of the Portuguese Competition Authority¹¹.

21. On the demand side, there is no need either to distinguish between the un-regulated part and the regulated parts of the market. This view can be supported by the fact that a very significant proportion of customers has recently left the regulated market, implying that suppliers in the non-regulated part of the market can also compete for customers that currently are supplied through the regulated system¹².
22. Based on the above and for the purpose of the present decision, the market for electricity generation and wholesale in Portugal is considered as a relevant product market without further segmentations.

2. Geographic market definition

23. The markets of electricity generation and wholesale have so far been considered by the Commission in its previous decisions¹³ as national in scope with Portugal being no exception¹⁴. The parties agree with this approach.
24. Consistent with the Commission precedents, the market for generation and wholesale of electricity in Portugal is considered national.

3. Competitive Assessment

25. In the table below, both GDF Suez and International Power's market position on the market for electricity generation and wholesale in Portugal are depicted.

¹¹ See for instance Decision of the Portuguese Competition Authority of 6 December 2005 in case Ccent. 65/2005 – EDP/CAIMA/EDP Bioelétrica, Decision of 30 November 2005 in case Ccent. n° 60/2005 – Enernova / Tecneira / Bolores*Eneraltius*Levante*Cabeço de Pedras*Malhadizes (Enernova II), Decision of 11 November 2005 in case Ccent. n° 16/2005 – Enernova / Ortiga*Safra (Enernoal) and the recent Decision of 25 June 2008 in case Ccent. 02/2008 EDP/Pebble Hydro H. Janeiro de Baixo.

¹² The Commission, in the past, has considered that customers may be part of a separate market if the price regulation concerned did allow customers to switch easily between the regulated and non-regulated part of the market (for instance Case COMP/M.4180 – *Gaz de France / Suez*, para 346).

¹³ Case COMP/M.5549 - *EDF/Segebel*, 12 November 2009, Case COMP/M.5224 - *EDF/British Energy*, 22 December 2008, *inter alia*.

¹⁴ Case COMP/M.2620 - *Enel/Viesgo*, 20 November 2001, para. 7, Case COMP/M.4110 - *E.On/Endesa*, para. 18 Case COMP.M/3448 - *EDP/Hidroelectrica del Cantabrico*, para. 23, Case COMP/M.3440 - *EDP/ENI/GDP*, paras. 77.

Table 1: Market for electricity generation and wholesale in Portugal

	Generation within Portugal (TWh)	Market share (%)	Imports (TWh)	Exports (TWh)	Production (generation + net imports) (TWh)	Market share (%)
GDF SUEZ	[...]	[0-5]%	[...]	[...]	[...]	[0-5]%
International Power	[...]	[10-20]%	[...]	[...]	[...]	[10-20]%
<i>GDF SUEZ + International Power</i>	[...]	[10-20]%	[...]	[...]	[...]	[10-20]%
EDP	[...]	[60-70]%	N/A	N/A	N/A	N/A
Endesa	[...]	[0-5]%	N/A	N/A	N/A	N/A
Iberdrola	[...]	[0-5]%	N/A	N/A	N/A	N/A
Others	[...]	[10-20]%	N/A	N/A	N/A	N/A
Total	48	100%	5.6	0.8	52.8	100%

Source: *Form CO*

Table 2: Total capacity of the market for electricity generation and wholesale in Portugal

	Capacity (MW)	Market share (%)
GDF SUEZ	[...]	[0-5]%
International Power	[...]	[5-10]%
<i>GDF SUEZ + International Power</i>	[...]	[10-20]%
EDP	[...]	[60-70]%
Endesa	[...]	[5-10]%
Iberdrola	[...]	[0-5]%
Others	[...]	[10-20]%
Total	16,738	100%

Source: *Form CO*

26. The parties submit that, while their combined market share exceeds 15% on the Portuguese market for generation and wholesale of electricity calculated on the basis of the production in TWh, it remains below the 15% threshold when calculated on the basis of capacity in MW.
27. Moreover, the parties argue that the electricity market in Portugal is strongly dominated by the incumbent EDP with a market share of around [60-70]% as displayed in the above tables. They also point out that EDP will by 2013 increase its generation capacity by [...] MW.
28. In view of the moderate market shares, the low increment brought about by the proposed transaction (about [0-5]%) and the strong position of the incumbent EDP, the proposed transaction is unlikely to raise competition concerns. The Commission also observes that the combined market shares of the parties have declined from 2008 to 2009.
29. It follows from the above that the proposed transaction will not significantly impede effective competition in the market for generation and wholesale of electricity in Portugal.

B. The Netherlands

30. Both GDF Suez and International Power are active in the market for electricity generation and wholesale in the Netherlands.

Generation and wholesale of electricity

1. Product market definition

31. The parties consider, in line with the Commission's prior decision-making practice, that there is a single product market for both electricity generation and wholesale¹⁵ including the electricity generated and imported into the relevant geographic area through interconnectors¹⁶.
32. For the purpose of the present decision, the market for electricity generation and wholesale in the Netherlands is considered as a relevant product market without further segmentations.

2. Geographic market definition

33. The parties also consider that the market of electricity generation and wholesale is national in scope¹⁷.
34. However, with regard to the Netherlands the Commission has left open the geographic market definition of the market for generation and wholesale of electricity by indicating that "*it is either a national scope for all hours or a national scope for peak hours and an area equal to Germany and the Netherlands for off-peak hours*"¹⁸.
35. In any event, with regard to the Netherlands the geographic scope of the market for generation and wholesale of electricity can be left open since under any of the contemplated alternatives the proposed transaction does not give rise to competition concerns.

3. Competitive Assessment

36. The parties' combined market share post-transaction is [10-20]% in terms of capacity (MW) and [10-20]% for generation and net imports both in 2009. As for peak-hours it is [20-30]% while for off-peak hours it amounts to [10-20]% in 2009.
37. While the post-transaction entity would be the market leader, the proposed transaction adds negligible increment ([0-5]%) and a large number of well established competitors

¹⁵ Case COMP/M.5827 - *ELIA/IFM/50HERTZ*, para. 11, Case COMP/M.5512 - *Electrabel/E.ON*, para.14, Case COMP/M.5604 - *DONG/KOM-STROM*, Case COMP/M.5467 - *RWE/ESSENT*, para 23, Case COMP/M.5224 - *EDF/British Energy*, Case COMP/M. 3440 - *EDP/ENI/GDP*, para. 49 (Paragraph 109 of the Form CO).

¹⁶ Case COMP/M.5224 - *EDF/British Energy*, para. 11, Case COMP/M. 3440 - *EDP/ENI/GDP*, para. 49, Case COMP/M.5467 - *RWE/ESSENT*, para 23 (Paragraph 109 of the Form CO).

¹⁷ Paragraph 111 of the Form CO.

¹⁸ Case COMP/M.5467 - *RWE/ESSENT*, para 32.

are present in the market (*inter alia* RWE Essent: [10-20]%, Vattenfall Nuon: [10-20]% and Eneco: [5-10]%)¹⁹.

38. As a consequence, the proposed transaction does not significantly impede effective competition in the Dutch market for generation and wholesale of electricity.

C. Great-Britain

39. In Great Britain, the parties' activities overlap only in relation to the markets for (i) generation and wholesale of electricity (if taken as including (ii) balancing services and (iii) electricity trading) as well as (iv) retail supply of electricity.
40. In its recent EDF/British Energy decision²⁰ the Commission considered, with regard to Great-Britain, the existence of a single product market for generation and wholesale of electricity (including the provision of balancing power as well as electricity trading) With respect to the provision of ancillary services the Commission did not conclude on whether the various types of these services constitute separate markets or are part of a single market for ancillary services²¹.
41. As regards retail supply, a further distinction has been drawn by the Commission between: (i) domestic customers, (ii) smaller industrial and commercial customers (SMEs) which do not use "half hourly rates" (i.e. do not have their electricity consumption automatically measured every half an hour) (I&C nHH) and (iii) large industrial and commercial customers which do use half hourly rates (I&C HH)²².
42. The Commission found that all the above-mentioned markets, encompass England, Wales and Scotland (but exclude Northern Ireland)²³.
43. The parties agree with the Commission market definitions used in the past.
44. There are no special circumstances that would require the Commission to review the above market definitions for the proposed transaction. Furthermore, given that the parties' combined market shares do not approach 15% in Great Britain, under any of the above-mentioned market definitions, these markets are not considered affected and will not be assessed further in the present decision, with the exception of the provision of balancing power.
45. In the course of the market investigation one respondent voiced certain concerns as to the impact of the proposed transaction with respect to the provision of balancing power in Great Britain. In this regard, the respondent interviewed claimed that despite its limited presence in the market for generation and wholesale of electricity in Great Britain (<10%), International Power is a relevant player in the provision of, in particular, standing reserve and fast reserve, given that it controls a large share (>40%) of the

¹⁹ Paragraph 244 of the Form CO (capacity in 2009).

²⁰ Case COMP/M.5224 – *EDF / British Energy*, para 14 – 19.

²¹ Case COMP/M.5224 - *EDF/BRITISH ENERGY*, 22 December 2008.

²² Case COMP/M.2890 - *EDF/Seeboard* of 25 July 2002 and Case M.5224 - *EDF/British Energy*., para 20 – 21.

²³ Case COMP/M.5224 - *EDF/British Energy* of 22 December 2008 and Case M.4517 - *Iberdrola/Scottish Power* of 26 March 2007.

highly flexible plants in Great Britain which are specifically suitable to provide those services. Also GDF Suez provides balancing services in Great Britain, however, with very marginal positions from the Shotton and Teeside plants (around £ [...] revenues in 2009).

46. In any event, for the reasons which will be explained below, no competition concerns are likely to arise from the proposed transaction either considering the provision of balancing power as a separate market from the market of generation and wholesale of electricity or considering each balancing service as a distinct product market.

Balancing Power

1. Product market definition

47. Balancing power provides the national transmission system operator (the "TSO") with means to manage the electricity transmission network. The national TSO is the sole buyer of such services.
48. Balancing power enables the TSO to increase²⁴ or decrease the electricity production in close to real time in order to maintain the overall balance between injected (produced) and withdrawn (consumed) electricity. Increases and decreases in electricity production should take place fast; therefore they require highly flexible power plants (such as hydro, pumped storage and open gas turbines). Indeed, various types of balancing services are usually distinguished based on the speed by which they can react in response to requests by the TSO.
49. Balancing power in Great Britain is provided to National Grid (the TSO in Great Britain) by generators through various balancing services types, including frequency response, standing reserves, fast reserves, and warming/Hot Standby services. As indicated by National Grid in its replies to the Commission investigation, these services are sourced through a competitive process via bilateral agreements or tender procedures²⁵.

Frequency Response

50. The TSO is required to keep the frequency of the Great Britain transmission system within statutorily defined limits. By "frequency response" is meant the ability of generators to automatically and immediately increase or decrease generation levels at short notice in order to maintain system frequency within the required limits. All power stations in Great Britain must be capable of frequency response, but the generation technologies that are able to respond most quickly, such as oil plant, coal plant and pumped storage are most suited to this role.

²⁴ An increase of electricity production seeks to re-establish the balance when electricity production is higher than its *consumption*. Of course, this balance can also be re-established by reducing consumption. TSOs therefore often also contract with large electricity consumers (like aluminium plants) to reduce their consumption if grid balance is threatened. The opposite, contracting for increases in consumption does not occur.

²⁵ The Obligatory Reactive Power Service is the only service that is not procured in a competitive manner as generators are paid at a default rate for the provision of reactive support. The default payment is referenced in industry code documentation and is updated on a monthly basis. Reactive power however is a product not immediately related to (the various types of) balancing power discussed here.

Standing Reserve/STOR

51. Short Term Operating Reserve ("STOR", National Grid's term for standing reserve service) is the ability to produce output (or reduce demand) at very short notice, e.g. between two and five minutes from a plant that is not generating. This typically entails utilising Open-Cycle Gas Turbines ("OCGT"), hydro plant, pumped-storage.

Fast Reserve

52. Fast Reserve is the rapid delivery of electricity through an increased output from generation or a reduction in consumption from demand sources, following receipt of instruction from National Grid. Fast reserve is similar to standing reserve/STOR except that it can provide an even faster response.

Warming/Hot Standby

53. "Warming/Hot Standby" is also known as "contingency reserve" and occurs where a generation unit that would ordinarily take many hours to start up keeps warm so that its notice to synchronise is short enough to be able to commence generation within, for example, one hour. The plant that is most suitable to provide "warming/hot standby" is a generation plant that would normally not be generating and which, once synchronised, can increase its output rapidly (it has a fast run-up rate). The technology most suited to this role is oil-fired plant although it could possibly be provided by fast acting coal plant.
54. The market investigation confirmed the parties' submissions as to the types of balancing services generally procured by the TSO in Great Britain.
55. However, it was not conclusive on whether balancing power should be considered as part of the wider market for electricity generation and wholesale of electricity, consistent with the Commission practice, or whether those services represent separate market(s). In relation to the first point, the parties stress that the provision of balancing power involves the electricity generating assets in the same way as they would ordinarily do for the electricity wholesale market and that the same product, namely, electricity is used for both purposes, either to be sold in the wholesale market or to National Grid to balance the transmission system. As a consequence, the parties consider that those services do not constitute relevant product markets as opposed to the market for generation and wholesale of electricity.
56. On the other hand, it has been pointed out during the market investigation that balancing power is procured through specific mechanisms pursuant to license conditions and that they are designed to meet specific technical issues arising from the management of the transmission system. As a consequence, balancing services are not exactly the same types of services which are relevant to the electricity generation and wholesale market. The majority of respondents to the market investigation confirmed using specific power plants to provide different balancing services, based on the technology which is best suited for the service to be offered. In fact, due to technical differences between specific services, balancing services are not all necessarily substitutable for each other.
57. In any event, there is no need to conclude on whether balancing services belong to the wholesale market or whether the different types of balancing services represent each a distinct market as the proposed transaction does not raise competition concerns under any alternative product market definition.

2. Geographic market definition

58. The provision of balancing power has been considered in previous Commission decisions as taking place on a national market²⁶. The parties submit that each of the services identified above are Great Britain-wide and that any asset located on the Great Britain grid (provided it is technically capable of delivering the required service) can meet demand.
59. The market investigation did not contradict the above contentions. Therefore, for the purposes of the present decision the potential market for the provision of balancing power is considered as national.

3. Competitive Assessment

60. As displayed in the table below, both GDF Suez and International Power provide the following balancing services in Great Britain, namely, frequency response and reactive power. [confidential, future strategy]. Therefore, the range of balancing services offered by the post-merger entity in Great Britain in the near future will be the same as currently.

Table 3: Types of balancing power provided by the parties in the last three years

	Frequency response	STOR/standing reserve	Fast reserve	Warming/hot standby
GDF Suez	[...]	[...]	[...]	[...]
Shotton	[...]	[...]	[...]	[...]
Teeside	[...]	[...]	[...]	[...]
	[...]	[...]	[...]	[...]
IPR	[...]	[...]	[...]	[...]
Dinorwig	[...]	[...]	[...]	[...]
Ffestiniog	[...]	[...]	[...]	[...]
Indian Queens	[...]	[...]	[...]	[...]
Rugeley	[...]	[...]	[...]	[...]
Deeside	[...]	[...]	[...]	[...]
Saltend	[...]	[...]	[...]	[...]
Derwent	[...]	[...]	[...]	[...]

Source: Form CO

61. Moreover, in order to assess the market power which the merged entity will have post-transaction in relation to the provision of balancing power, the parties provided the volume and value of bids (to reduce plant output) and offers (to increase plant output) related to the electricity used in the balancing mechanism. Those data provide an indication of the parties' market shares.

²⁶ Case COMP/M.4180 – *Gaz de France / Suez* or Case COMP/M.3440 - *EDP/ENI/GDP*.

Table 4: Breakdown of the share of the balancing mechanism Bid and Offer volumes by market player²⁷

	Bid Volumes (MWh)				Offer Volumes (MWh)			
	2008		2009		2008		2009	
	MWh	%	MWh	%	MWh	%	MWh	%
E.ON UK	[...]	[10-20]%	[...]	[10-20]%	[...]	[20-30]%	[...]	[10-20]%
SSE	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%	[...]	[20-30]%
RWE NPOWER	[...]	[10-20]%	[...]	[5-10]%	[...]	[5-10]%	[...]	[5-10]%
EDF Energy	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%	[...]	[10-20]%
CENTRICA	[...]	[0-5]%	[...]	[0-5]%	[...]	[10-20]%	[...]	[5-10]%
Scottish Power	[...]	[5-10]%	[...]	[10-20]%	[...]	[0-5]%	[...]	[5-10]%
DRAX	[...]	[10-20]%	[...]	[10-20]%	[...]	[0-5]%	[...]	[10-20]%
International Power	[...]	[0-5]%	[...]	[0-5]%	[...]	[5-10]%	[...]	[5-10]%
GDFS	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%	[...]	[0-5]%
Other	[...]	[5-10]%	[...]	[10-20]%	[...]	[5-10]%	[...]	[10-20]%
Total	7,876,477		8,144,883		4,125,499		5,086,140	

Source: Form CO

62. As shown in the above tables, the increase of International Power's market share brought about by the proposed transaction is very limited. Additionally, a number of large energy players such as E.ON, RWE, SSE will continue offering balancing power post-merger, therefore constraining the merged entity.
63. The wide majority of the competitors confirmed in the market investigation that they regularly supply balancing services to National Grid and that they do not expect any detrimental effect in relation to the provision of such services in Great Britain as a consequence of the proposed transaction. National Grid also confirmed that that it does not expect the competitiveness of any service to be reduced as a consequence of the proposed transaction.
64. The same conclusion applies even when considering the impact of the proposed transaction on a more detailed level, in particular, with regard to fast reserve and STOR/standing reserves in relation to which International Power holds a significant position.
65. According to the data provided by the parties, International Power's share in the provision of fast reserves amounted to respectively [60-70]% in 2008 and [50-60]% in 2009, while its share in the provision of STOR/standing reserves was [20-30]% in 2008 and [20-30]% in 2009.
66. However, when assessed on this detailed level and as shown at table 3 above, no overlaps occur between the parties' activities as GDF Suez has neither supplied fast

²⁷ The figures contained in the table relate to the reserve volumes held, rather than the energy volumes actually utilized that are linked with these reserve services. In other words, they measure capacity availability rather than actual output.

reserves nor STOR/standing reserves in the last three years and [confidential, future strategy]. Additionally, the latter does not own any pumped storage. Therefore, the proposed transaction does not result in a greater concentration of this type of generation assets within International Power's portfolio. The vast majority of respondents to the market investigation confirmed to provide both types of services to National Grid, exerting competitive pressure on International Power.

67. In the light of the above arguments, it can be concluded that the proposed transaction does not significantly impede effective competition with respect to the provision of balancing power in Great Britain.

D. Belgium

68. Both GDF Suez and International Power own electricity generation assets in Belgium. The former is the market leader having dominant positions in generation and wholesale supply of electricity in Belgium through its subsidiary Electrabel. The latter jointly controls (with a 33.3% stake) together with Tessengerlo Chemie N.V. ("Tessengerlo", 33.3%) and Siemens Project Ventures GmbH ("Siemens", 33.3%), a full-function joint venture called T-Power N.V. ("T-Power") which currently constructs a 420 MW gas-fired combined cycle power plant. The plant is planned to start its operations mid June 2011.

Generation and wholesale of electricity

1. Product and Geographic market definition

69. In its recent EDF/Segebel decision concerning Belgian electricity markets, the Commission distinguished a wholesale electricity market as comprising electricity generation, imports and trading on organised markets (such as the power exchange Belpex) or over the counter for both physically and financially settled products²⁸.
70. In the same decision the Commission also concluded that the Belgian electricity wholesale market is national in scope²⁹.
71. There are no special circumstances that would require the Commission to revise these market definitions for the purpose of the present decision.

2. Competitive Assessment

72. As mentioned above, the only electricity generation asset controlled by International Power in Belgium is the T-Power plant which will have a market share of [0-5]% in terms of electricity generation capacity in Belgium³⁰. This plant is foreseen to come online in the middle of 2011. On the other hand, GDF Suez controls [60-70]% of the production capacity and [70-80]% of the electricity produced of this country in 2009, making it by far the market leader and providing it with a dominant position.
73. Despite this, *prima facie*, no horizontal overlap results from the parties' activities on the wholesale market as a consequence of the proposed transaction.

²⁸ COMP/M.5549 – EDF / Segebel, para 21.

²⁹ COMP/M.5549 – EDF / Segebel, para 38.

³⁰ Capacity connected to the transmission network.

74. Indeed, although International Power will be the operator of the T-Power plant under an operation and maintenance agreement (the "O&M Agreement"), it will not benefit from the electricity produced by the plant due to a gas Tolling Agreement entered into with RWE Essent to which T-Power committed its entire electricity production for a period of 15 years³¹ (the "Tolling Agreement"). According to the Tolling Agreement the entire capacity of T-Power will be made available to RWE Essent³² which in turn will be responsible for the decisions on the volumes of electricity produced by the T-Power plant and for the gas sourcing of the plant. The owners of the plant will in return be rewarded a fee for making the generation capacity available to RWE Essent.
75. The parties submit that, by virtue of the Tolling Agreement and in their view consistent with the Commission practice³³, the T-Power plant will not confer to International Power any presence on the Belgian market for generation and wholesale of electricity as only RWE Essent will benefit of the electricity output produced by the T-Power plant. On this basis, the parties conclude that no horizontal overlap between GDF Suez' and International Power's activities will result from the proposed transaction in Belgium and therefore no competition concerns arise.
76. Notwithstanding the above, in the course of the market investigation strong concerns have been voiced by market participants as to a possible reinforcement of GDF Suez's position on the Belgian wholesale market given its commercial (through International Power's stake in T-Power) and operational involvement (through the O&M Agreement) with respect to the T-Power plant. In particular, some respondents to the market investigation stressed that post-transaction GDF Suez would be in a position to gain access to detailed information on the production patterns and availabilities of the T-Power plant, which GDF Suez might use to strengthen further its position on the wholesale market.
77. This would therefore have the same effect as a horizontal overlap between the parties' activities on this market as GDF Suez would indirectly benefit from the T-Power plant activity in coordination with its existing generation portfolio.
78. In order to verify these contentions, the Commission also analysed the contractual provisions of both the Tolling Agreement and the O&M Agreement in their proper legal and economic context and also in the light of GDF Suez' dominant position on the Belgian wholesale market. Based on the results of this analysis the Commission therefore concluded that the stipulations of both agreements would provide GDF Suez with the necessary information and discretion to (i) increase electricity prices on the

³¹ Renewable for another 5 years, depending on RWE Essent.

³² RWE Essent in turn committed to deliver [...] MW of this production to Tessenderlo Chemie.

³³ As regards tolling agreements, in the case COMP/M.3729-EDF/AEM/Edison, the Commission has considered that a tolling agreement did confer market power to the off-taker. In this case, under a tolling agreement, AEM had contractual rights to manage 20% of the generation capacity of Edipower. Even though AEM did not have complete control of the capacity of Edipower (it was limited by its quota, but also because it was not allowed to make offers in the ancillary services market), the Commission considered that AEM's presence in generation/wholesale electricity in Italy stemmed not only from the several plants it owned in the North of Italy but also because it "*manage(d) a part (20%) of Edipower's generation capacity*". In the decision, AEM's share of generation/wholesale market is shown as explicitly "*including its Edipower stake*".

Belgian wholesale market to the detriment of consumers and (ii) to put RWE Essent at a competitive disadvantage, thereby dissuading the latter to expand in the market.

Ability and incentives to increase prices on the Belgian wholesale market

79. As regards the first concern raised by the proposed transaction, the Commission analysis complemented by the results of the market investigation showed that post-merger GDF Suez will be able to raise prices on the Belgian wholesale market, for the reasons explained hereinafter.
80. According to the stipulations of the Tolling Agreement and the O&M Agreement³⁴, GDF Suez will have access to (i) the hourly gas consumption and (ii) the hourly day-ahead and intra-day generation of T-Power plant, that is to say, T-Power plant's dispatch patterns (24 observations/day, 365 days/year).
81. It is economically rational to produce electricity from a power plant only if the gas price and any other charges³⁵ to use the plant are lower than the price of electricity. As a consequence, by observing at what (publicly known) electricity price RWE Essent operates the T-Power plant, GDF Suez will be able to easily deduce the underlying gas price of RWE Essent and could therefore reverse engineer the cost structure of the T-Power plant³⁶. As a result, GDF Suez will gain a specific knowledge of the price and the volume of electricity produced by the T-Power plant.
82. In addition, GDF Suez' knowledge of RWE Essent's gas price will enable the former to easily predict the future dispatch patterns of the T-Power plant, even in the absence of formal notification by the latter in this regard.
83. Furthermore, in its quality of operator of the T-Power plant, International Power and in consequence GDF Suez, will also know (even before RWE Essent) the planned maintenance of the T-Power plant as well as the unplanned outages (occurrence, size of partial outages and duration)³⁷.
84. As a result of the above, GDF Suez will have access to privileged and detailed information on the availability of the T-Power plant and its production patterns.
85. This knowledge is market sensitive as it translates into precise knowledge about T-Power plant's trading position in the Belgian power exchange market (Belpex) that GDF Suez may exploit for its benefit. In other words, there is a risk that GDF Suez' knowledge of the T-Power plant's production patterns and outages will enable it to adapt its sales bids on the Belpex by pricing less aggressively than it would normally do in the absence of this information. This strategy will have the effect of increasing electricity prices on the Belgian wholesale market.

³⁴ [confidential, reference to relevant articles of the Tolling Agreement and the O&M Agreement].

³⁵ [confidential, reference to Tolling Agreement and O&M Agreement].

³⁶ The other items of the cost structure are technical characteristics of the plant (efficiency, emissions etc.) or costs to RWE Essent under the Tolling Agreement that can be usually known by the operator.

³⁷ [confidential, reference to relevant articles of the Tolling Agreement].

86. The described price effects can be explained with the help of the Belpex market resilience analysis which allows assessing the price impact on Belpex caused by changes in production and demand of electricity.
87. As can be seen in the table below, an additional demand of 500 MW on Belpex (due to an equivalent decrease in production) could significantly increase the price of electricity traded. Therefore, knowing when the capacity of 420 MW of the T-Power plant will not be available, it would be possible for GDF Suez to increase the price of the electricity it offers on the Belgian generation and wholesale market.

Table 5: Belpex Market Resilience Analysis

	Average Belpex Price (€)³⁸	Price (€) increase resulting from an increased demand of 500 MW at any price for each hour	Price increase (%)
2007	41,75	5,07	12.1%
2008	70,62	4,72	6.7%
2009	39,36	1,83	4.6%
2010³⁹	45,42	1,64	3.6%

Source: market resilience analysis from Belpex⁴⁰.

88. A strategy of GDF Suez of pricing less aggressively on the wholesale market in order to raise bidding prices to its own advantage appears credible as the former will have not only the ability but also the incentives to do so, for the following reasons.
89. First, the merged entity has a significant degree of market power on the Belgian market with [60-70]% of the generation capacity and [70-80]% of the electricity produced in Belgium, including a significant amount of base-load capacity. Given the Belpex price resilience, the ownership of a significant and voluminous generation portfolio as in the case of GDF Suez is a facilitating factor to exert market power on Belpex and influence its prices⁴¹.
90. Second, GDF Suez has high incentives to raise electricity prices in Belpex, as most of the electricity it produces derives from base-load (nuclear) power plants. Nuclear power

³⁸ These average prices are based on the price data available at www.belpex.be.

³⁹ Preliminary results for 2010.

⁴⁰ http://www.belpex.be/uploads/Market_resilience_analysis.pdf.

⁴¹ Small players with a portfolio of 250-500 MW may also be able to influence Belpex prices as explained at paragraph 87 of the present. In the present analysis it is assumed that the increase of price results from the increased demand due to RWE Essent's need to purchase electricity when it is unable to use the T-Power plant. This scenario is realistic as RWE Essent will have committed to supply electricity to its customers and such commitments need to be honoured regardless whether the T-Power plant is available. In addition, a similar analysis with very similar results can be made in case of reduced supply of electricity related to the non-availability of the T-Power plant. Although the price effect brought about by a given increase in demand decreases over time, any strategy aiming at increasing prices remains profitable even if it results in smaller price increases due to GDF Suez's sizeable base-load capacity.

plants generally produce electricity at lower (marginal) costs in comparison to other generation facilities, as a consequence, GDF Suez would benefit from increasing its own profits through an overall market price increase.

91. Additionally, irrespective of the quantity of electricity produced by the T-Power plant, the shareholders will benefit of fixed revenues [confidential, calculation of the revenues].
92. Moreover, a general price increase in the wholesale market which would be caused by GDF Suez behaviour post-merger would harm not only end-consumers but also competing suppliers with no or insufficient generation assets to cover their retail requirements in Belgium, which would be forced to source their electricity requirements on the market at higher prices.
93. It follows from the foregoing that the proposed transaction will provide GDF Suez with the ability and the incentives to raise electricity prices on the Belgian wholesale market.

Ability and incentives to put RWE Essent at a competitive disadvantage

94. As regards the second concern identified by the Commission, valid evidence was found in the course of the market investigation to conclude that post-transaction the merged entity would have the ability and the incentives to put RWE Essent at a competitive disadvantage on the Belgian wholesale market.
95. In this regard, it is noteworthy that under the terms of the Tolling Agreement, the operator of the T-Power plant (being International Power) has the ability to exert influence over the capacity that is made available to the toller (RWE Essent). This is the case as, according to the Tolling Agreement⁴², [confidential, details on the operation of the T-Power plant]. In other words, International Power (in its role as operator of the T-Power plant) can vary and limit the capacity available to RWE Essent of the T-Power plant.
96. As a result, GDF Suez would be able to reduce this maximum available capacity (physical withholding) in order to optimise this capacity in coordination with its own generation portfolio. Such reductions could also counter RWE Essent's plans to expand in the Belgian wholesale market.
97. This strategy would not have counterbalancing costs for GDF Suez since the O&M Agreement [confidential, provisions of the O&M Agreement^{43, 44}]. In any event, the loss of such bonuses would be outweighed by the substantial profits that GDF Suez could gain as a result of a general increase of the electricity prices on Belpex which it might cause by reducing the availability of the T-Power plant (see also above).
98. Additionally, the knowledge of the production patterns and the availability of the T-Power plant, will confer to GDF Suez valuable insights on RWE Essent's trading positions in Belgium, despite the fact that the latter also controls two other plants in

⁴² [confidential, reference to relevant articles of the Tolling Agreement].

⁴³ [confidential, reference to relevant articles of the O&M Agreement].

⁴⁴ [confidential, reference to relevant articles of the O&M Agreement].

Belgium, namely, Zandvliet and Inesco⁴⁵. This is the case because Zandvliet supplies all its output to one customer (BASF) while Inesco is a CHP plant, that is to say, a power plant whose output is primarily determined by the demand for heat, not electricity. The T-Power plant would hence be [...] flexible generation asset that would enable it to balance [...]. In addition, RWE/Essent will, within due course, have to integrate significant amounts of wind power in its generation portfolio, which generally requires an increased access to flexible production capacity to retain a company's generation portfolio in balance.

99. It follows from the foregoing, that GDF Suez will be able to strongly affect RWE Essent's overall trading position on the wholesale market as it will be able to influence the [...] flexible energy asset (the T-Power plant) under RWE Essent's control in Belgium.
100. Moreover, there are sufficient incentives for GDF Suez to adopt such a strategy since this would hamper RWE Essent's expansion in the Belgian wholesale market. Also, this strategy could also be used by GDF Suez to retaliate against RWE Essent should the latter decide to price too aggressively on the Belgian wholesale market. This might therefore deter the latter from competing with GDF Suez and in the worst scenario to stop developing its activities in Belgium.
101. It follows from the foregoing that the proposed transaction will provide GDF Suez with the ability and the incentive to put RWE Essent at a competitive disadvantage on the Belgian wholesale market.

Arguments of the parties

102. Against the above, the parties claim first, that the information available to GDF Suez post-transaction is limited (i) to the level of the electricity production requested by RWE Essent at T-Power and (ii) the maintenance schedules/plants failure of the T-Power plant.
103. However, as explained in paragraph 81 and following of the present decision, GDF Suez will be able to easily deduce the cost structure of the T-Power plant and over time to finally gain specific knowledge of the price and the volume of electricity produced by this plant which it could use to raise prices on the Belgian wholesale market to its own profit.
104. Second, the parties argue that the information which will be accessible to GDF Suez post-transaction will not have a strategic value for GDF Suez given that the Belgian TSO (Elia) publishes on its website updated information on the use of the Belgian power plants. In particular they claim that individualised and detailed data are provided to all market participants on power plants' maintenance schedules and that as of January 2011 there will also be public information on unplanned outages for each plant.
105. However, contrary to the parties' contention, the Commission noticed, consistent with the submissions of the Belgian Regulator for electricity and gas (CREG), that currently the data on planned unplanned outages are not published⁴⁶. Additionally, the

⁴⁵ Zandvliet has a total capacity of 395 MW thereof 197.5 MW controlled by RWE Essent, while Inesco has 133 MW all controlled by RWE Essent.

⁴⁶ The CREG explained in its reply to the Commission investigation that so far Elia only publishes on its site only aggregated data on the availability of production plants in Belgium in total and by fuel type but not

CREG confirmed the sensitivity of the information related to the availability of a power plant, supporting the Commission's view that GDF Suez' knowledge of T-Power planned and unplanned outages will create an information asymmetry that the former could use for its benefit on the Belpex to raise electricity prices.

106. Moreover, the parties stress that even if GDF Suez had the ability to use the T-Power plant in a detrimental way for competition in Belgium, it would be strongly deterred to do so by the contractual provisions contained in the O&M, Shareholders' and Tolling Agreements which set severe sanctions for breach of contractual obligations by each party. Therefore, they call on the Commission to take into account the deterrent effect represented by those sanctions in its assessment, consistent with the standard set by the General Court⁴⁷.
107. Finally, the parties argue that in order for GDF Suez to use the sensitive information about the T-Power plant on the Belgian wholesale market, GDF Suez should be able to get it in real time from the operation team present at the T-Power plant. This would require setting up structures and procedures that would make it obvious to T-Power that International Power is in breach of its contractual confidentiality obligations in its capacity of operator of the plant.
108. Nevertheless, also taking into account the parties' argument on this point, the Commission believes that the likelihood to detect the breach of the contractual provisions of the agreements mentioned above is extremely low and that there are no special contractual means for the other contracting party or parties to detect such conduct.
109. Also RWE Essent's ability to detect any disclosure of confidential information to the benefit of GDF Suez would be very limited as the former would be unable to discriminate between the sensitive information used by International Power to perform its duties as operator of the T-Power plant and those passed on to GDF Suez for its own commercial benefit. In fact, RWE Essent is not even a party to the Shareholders' and O&A Agreements of which, according to the parties, it is supposed to be able to detect a breach.
110. In addition, there is no authority either at national or Community level which could easily detect and impose financial sanctions which could constitute a credible disincentive for any breach of agreement by the post-merger entity.

on an individual basis. The CREG also pointed out that so far it has not been informed as to whether or when such individualised data would finally be published by Elia.

⁴⁷ The general Court has specified in respect of anticompetitive behaviour that "(...) *although it is appropriate to take account of the objective incentives to engage in anti-competitive practices which a merger creates, the Commission must also consider the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, in particular in the light of the prohibition on abuse of a dominant position laid down in Article 82 EC, of the likelihood of their detection, of action taken by the competent authorities, both at Community and national level, and of the financial penalties which could ensue (paragraph 159 of the judgment)*" (Case T-210/01 General Electric v. Commission, point 70).

111. At the same time, as demonstrated above (paragraph 79 and following), there are considerable incentives for GDF Suez to obtain and use the information.
112. Even if GDF Suez were unable to use the confidential information it has access to in real time this would not materially affect its ability to cause competitive harm. In fact, the insight into RWE Essent's operations in Belgium does not only result from its ability to use certain individual elements of information passed under the agreements but it mainly derives from its access to such sensitive information on a continuous basis.
113. On balance of the arguments above discussed, it can be concluded that the acquisition by GDF Suez of International Power will give rise to horizontal competition concerns by providing the merged entity with sensitive information which could be used (i) to raise electricity prices on the Belgian wholesale market to its own profit and (ii) to limit the competitive pressure exerted by RWE Essent on this market through its discretion over the operation of the T-Power plant.
114. It follows from the foregoing that the proposed transaction will significantly impede effective competition on the market for generation and wholesale supply of electricity in Belgium, which forms a substantial part of the EU internal market.
115. The Commission has also considered whether the proposed transaction may have effects on the provision of balancing and ancillary services in Belgium on the basis of analogous concerns as those raised in relation to the Belgian wholesale market. However, as the Modified Commitments submitted by the parties will remedy any possible concern with respect to the supply of balancing and ancillary services in Belgium a further assessment in this respect is not needed for the purposes of the present decision.

E. Other Member States

116. As indicated, the parties are also active in the electricity generation and wholesale supply markets in Italy, Spain, Germany and France. Nevertheless, in these Member States the parties' market shares are inferior to 15% under any envisageable product and geographic market definitions. In consequence, these markets are not considered affected and will not be assessed further in the present decision.

V. REMEDIES

A. PROCEDURE

117. Following its competitive assessment of the proposed transaction, the Commission concluded that there are concerns with regard to the fact that International Power owns in Belgium 33.3% of the shares in T-Power which, moreover, is also operated by International Power. The proposed transaction gives therefore GDF Suez (a) access to sensitive information and (b) control over and discretion on the operation of the T-Power plant and, thereby, over the operations of RWE Essent, the toller of the T-Power plant and an entrant on the Belgian electricity market in competition with GDF Suez.
118. Consequently, preliminary competition concerns have been identified as the proposed transaction would lead to a significant lessening of competition on the Belgian electricity markets. This raises serious doubts in that the proposed transaction would significantly impede effective competition, specifically on the Belgian wholesale and generation market. This may equally lead to secondary effects on other Belgian electricity markets.

119. In order to address the serious doubts identified by the Commission, GDF Suez and International Power submitted on 5 January 2011 a commitments package.
120. On the basis of the results of the market test, the Commission considered that certain adjustments of the proposed commitments were required. The parties submitted on 19 January 2011 a revised commitments package so as to provide increased certainty that the commitments will become timely effective and that the parties will not have access to sensitive information before full implementation of the commitments.

B. DESCRIPTION OF REMEDIES

121. As a reaction to the Commission's concerns, the parties (GDF Suez and International Power) proposed, on 5 January 2011, as a remedy (the "Commitments"), (i) the divestment of all shares in T-Power currently held by International Power accounting for 33.33% of T-Power's share capital and all corresponding rights and obligations under any agreements signed between T-Power shareholders (the "Divestment Business") and (ii) the transfer of the agreement entered into between International Power and T-Power dated 10 December 2008 for the operation and maintenance of the T-Power plant for the duration of the Tolling Agreement entered into between T-Power and RWE Essent dated 13 August 2008 (the "Transferred Contract") (the Divestment Business and the Transferred Contract together are hereinafter referred to as "Divestment Interests"). The Commitments apply as of the date at which the T-Power plant will start its commercial operations ("COD"). The "First Divestiture Period" is foreseen to end [...].
122. The parties consider that the Commitments will remove the concerns of the Commission by removing their participation in T-Power and in its operation and maintenance and thus remove any significant impediment to effective competition.

C. OUTCOME OF THE MARKET TEST ON THE COMMITMENTS

123. Respondents to the market test of the Commitments included mostly competitors of GDF Suez and International Power on the Belgian electricity generation and wholesale market.
124. Responses from market players can be considered as partly positive as to the effectiveness of the Commitments and partly negative as to the modalities of the implementation of the Commitments submitted on 5 January 2011.
125. The vast majority of the respondents are positive with respect to suitability of the Commitments to remove the competition concerns. However, the majority of the market players were negative in their responses as to the modalities of the implementation of the Commitments. Most of them pointed out in particular that certain adjustments were needed to improve the effectiveness of the Commitments. The modifications proposed by the respondents to the market test specifically relate to (i) the length and the starting date of the First Divestiture Period, (ii) the proposed timing for the appointment of the Monitoring Trustee and (iii) the ring-fencing measures to be adopted during the First Divestiture Period.
126. Pursuant to the Commitments originally submitted by the parties, the beginning of the First Divestiture Period would be set at COD and the procedure of appointment of the Monitoring Trustee would start one week following COD.
127. In this respect, while the vast majority of respondents pointed out that (i) the divestiture of the Divestment Interests should begin immediately after the adoption of

the clearance decision of the Commission, there were diverging responses as to the appropriate length of the period allowed to lapse between the Commission decision ("Effective Date") and the day the divestment becomes effective ("Closure"). Some respondents took the view that the period between the Effective Date and Closure should not extend beyond six months. A respondent considered that, while a three months period following COD is necessary but also sufficient to ensure the transfer of the operating arrangements to a new provider, the transfer of shares in T-Power should be done within a shorter time frame. Another respondent believed, instead, that the transfer of the Divestment Interests should take place before COD, as to avoid GDF Suez from accessing sensitive information regarding the T-Power plant. Finally, another entity proposed to define the First Divestiture Period as the period of seven months starting from the Effective Date.

128. In relation to (ii) the appointment of the Monitoring Trustee, none of the respondents to the market test agreed with the parties' proposal to appoint the Monitoring Trustee one week after COD.
129. With regard to the length and the starting date of the First Divestiture Period and the proposed timing for the appointment of the Monitoring Trustee, it was also pointed out that if the parties were to start the divestiture at COD and not at the Effective Date then (iii) the ring-fencing measures proposed by the parties (to undertake "*all necessary measures*") should be reinforced in order to avoid any disclosure of sensitive information during the First Divestiture Period.
130. In addition, the results to the market test showed that financial investors would be suitable purchasers of the Divestment Business while the new contractor of the O&M Agreement should have a certain technical expertise. Therefore, the participants to the market test suggested that the requirement of "proven expertise" is applied only to the acquirer of the O&M Agreement.
131. Finally, all the respondents have been positive with respect to the terms of the divestment proposed by the parties in order to preserve the viability of the Divestment Business. Additionally, they all considered the Commitments sufficiently interesting to attract potential purchasers for the Divestment Business.
132. With a view to incorporating these comments and suggestions expressed by market players, GDF Suez and International Power submitted on 19 January 2011 a revised Commitments package (the "Modified Commitments") so as to provide increased certainty that the Divestment Interests will be timely divested and that the parties will not have access to sensitive information during the First Divestiture Period. In particular, the parties amended the parts of the Commitments text which relate to the length and the starting date of the First Divestiture Period; the timing for the appointment of the Monitoring Trustee and the ring-fencing measures.
133. As regards the First Divestiture Period, the parties proposed to define it as the period starting at the Effective Date and ending [...].
134. With respect to the timing for the appointment of the Monitoring Trustee, the parties proposed, consistent with the Commission practice, to submit a list of suitable persons to be appointed as Monitoring Trustee no later than one week after the Effective Date for the Commission approval.

135. Moreover, the parties amended the Commitments text in such a way to ensure that the ring-fencing measures (including the appointment of the Hold Separate Manager) will be implemented as of the Effective Date instead of COD as originally proposed.
136. To conclude, the parties removed the requirement of "*proven expertise*" with reference to the purchaser of the Divestment Business while they kept it as a pre-requisite of the suitable purchaser of the Transferred Contract.

D. COMMISSION'S ASSESSMENT OF THE OFFERED MODIFIED COMMITMENTS

1. *Introduction*

137. As set out in the Commission Notice on Remedies⁴⁸, the Commission assesses the compatibility of a notified concentration with the internal market in line with the terms of the Merger Regulation. Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the parties may seek to modify the concentration so as to resolve the serious doubts identified by the Commission with a view to having the merger cleared. In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise.
138. Commitments which are structural in nature are preferable from the point of view of the Merger Regulation. For instance, the divestiture of a business unit must consist of a viable business, which if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and which is divested as a going concern. Furthermore, in order to maintain the structural effect of a remedy, the Commitments have to foresee that the merged entity cannot subsequently acquire influence over the whole or parts of the divested business, unless the Commission subsequently finds that the structure of the market has changed to such an extent that the absence of influence over the divested business is no longer necessary to render the concentration compatible with the internal market.
139. As concerns the different types of remedy, the most effective way to maintain effective competition is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties.

2. *Effectiveness of the Modified Commitments in removing the identified serious doubts as to the compatibility of the proposed transaction with the internal market, as initially notified*

140. The parties consider that the Commitments will remove the concerns identified by the Commission by removing their participation in T-Power and their participation in the operation and maintenance of the T-Power plant. The parties consider that the Commitments will thus remove any significant impediment to effective competition.
141. The Modified Commitments constitute both a divestment of International Power's shareholding in T-Power and a transfer of the O&M Agreement. This constitutes a structural remedy which results in a complete withdrawal of International Power from T-Power. The competition concerns identified by the Commission originate from International Power being a co-controlling shareholder and the operator of the power

⁴⁸ Commission Notice on Remedies acceptable under Council Regulation No.139/2004 and under Commission Regulation No. 802/2004, paragraph 4.

plant. International Power's withdrawal thus effectively remedies these concerns. This was broadly confirmed by the responses to the market investigation.

142. The Divestment Interests (Divestment Business and Transferred Contract) also appear to constitute a viable business which, if acquired by one or several suitable purchasers, is likely to be able to effectively compete on the Belgian electricity generation and wholesale market. The market test has not revealed any reason contradicting this assessment. Several respondents to the market test have indicated their interest in considering purchasing the Divestment Interests.
143. The Modified Commitments as offered by the parties on 19 January 2011 ensure both an effective implementation of the modalities of the divestment of the Divestments Interests and a sufficient ring-fencing before.
144. The Modified Commitments are considered proportional because they eliminate the competition concerns, without imposing conditions or obligations on the parties which go beyond this aim.
145. The Commission's assessment concludes that by divesting the Divestment Interests (Divestment Business and Transferred Contract), the parties' ability to access to sensitive information about the operation of the T-Power plant would be removed.

3. Conclusion on the Modified Commitments

146. The Commission has assessed the Modified Commitments and has concluded that it is sufficient to remove the identified serious doubts on the Belgian wholesale and generation market. The Commission considers that the Modified Commitments are appropriate and proportional.

E. CONDITIONS AND OBLIGATIONS

147. Under the first sentence of the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering a concentration compatible with the common market.
148. It is appropriate in this case to qualify as conditions those measures that are intended to achieve a structural change in the market and to qualify as obligations the implementing or accompanying steps which are necessary to achieve this result, as well as behavioural remedies. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(5) of the EC Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the EC Merger Regulation.
149. The decision is subject to full compliance with the conditions set out in Sections B and D of the Modified Commitments submitted by the parties on 19 January 2011 and with the obligations set out in the other Sections C and E of the same Commitments. The entire text of the Modified Commitments is attached in the Annex of the present decision. These Modified Commitments form an integral part of this decision.

VI. CONCLUSION

150. For the reasons set out above, the Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement, subject to full compliance with the conditions set out in Sections B and D of the Modified Commitments annexed to the present decision and with the obligations contained in the other sections of the said Modified Commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.

For the Commission,
(signed)
Joaquín Almunia
Vice-President

Dated January 19th 2011

GDF SUEZ
and
INTERNATIONAL POWER

CASE NO COMP/M.5978 – GDF SUEZ /International Power

Commitments to the European Commission

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CASE NO COMP/M. M.5978 – GDF SUEZ/ International Power

Commitments to the European Commission

Pursuant to Article 6(2) of Council Regulation (EC) No. 139/2004 as amended (the “**Merger Regulation**”), GDF SUEZ sa (“**GDF SUEZ**”) and International Power plc (“**IPR**”) (together, the “**Parties**”) hereby provide the following commitments (the “**Commitments**”) in order to enable the European Commission (the “**Commission**”) to declare the acquisition by GDF SUEZ of sole control of IPR compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (the “**Decision**”).

The Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

For the avoidance of doubt, the Parties, and particularly IPR, will exercise their rights, particularly within T-Power’s governance structures, in a way to facilitate the implementation of the Commitments.

Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertakings: undertakings controlled by or controlling the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Notice on the concept of concentration under Council Regulation (EC) No 139/2004.

Closing: the transfer of the legal title of the Divestment Business and the transfer of the Transferred Contract to the Purchaser(s).

COD: Commercial Operation Date, *i.e.* the date at which the T-Power plant will start its commercial operations.

Divestment Business: the business as defined in Section B that the Parties commit to divest as part of the Divestment Interests.

Divestment Interests: IPR’s interests in T-Power as defined in Section B that the Parties commit to divest. The Divestment Interests consist of (i) the Divestment Business and (ii) the Transferred Contract.

Divestiture Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by the Parties and who has received from the Parties the exclusive Trustee Mandate to transfer the Divestment Interests to a Purchaser at no minimum price.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: the period starting at the Effective Date and ending [CONFIDENTIAL], or at the latest on [CONFIDENTIAL].

Form RM: document relating to the information concerning the Commitments, provided pursuant to Article 10(1)(a) of Commission Regulation (EC) No 832/2004, as amended by Commission Regulation (EC) No 1033/2008.

GDF SUEZ: GDF SUEZ sa, incorporated under the laws of France, with its registered office at 1, Place Samuel de Champlain, Faubourg de l'Arche, 92930 Paris la Défense, and registered with the Commercial/Company Register at Nanterre under number 542 107 651.

Hold Separate Manager: the person or persons appointed by the Parties for the Divestment Interests to manage the day-to-day business under the supervision of the Monitoring Trustee.

IPR: International Power plc, incorporated under the laws of the United Kingdom, with its registered office at Senator House, 85 Queen Victoria Street, London EC4V 4DP, United Kingdom and registered in England under number 2366963.

Key Personnel: all personnel having access to sensitive confidential commercial or operational information regarding RWE Essent in its capacity as Toller of T-Power, or any other information of confidential or proprietary nature which is necessary to maintain the viability and competitiveness of T-Power, as listed in the Schedule or subsequently identified as Key Personnel by the Monitoring Trustee.

Monitoring Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by the Parties, and who has the duty to monitor the Parties' compliance with the conditions and obligations attached to the Decision.

Personnel: all personnel currently employed in the context of the Divestment Interests, including Key Personnel, staff seconded by IPR to T-Power, and shared personnel.

Purchaser(s): the entity(ies) approved by the Commission as acquirer(s) of the Divestment Interests in accordance with the criteria set out in Section D.

Shareholders Agreement: the agreement between T-Power, IPR, Siemens Project Ventures GmbH and Tessengerlo Chemie NV dated 18 August 2005.

Tolling Agreement: the agreement between T-Power and RWE Essent dated 13 August 2008, through which, *inter alia*, the output of the T-Power plant is reserved to RWE Essent.

Transferred Contract: the contract as defined in Section B that the Parties commit to transfer as part of the Divestment Interests.

Trustee(s): the Monitoring Trustee and the Divestiture Trustee.

Trustee Divestiture Period: the period of [CONFIDENTIAL] months following the end of the First Divestiture Period during which the Divestiture Trustee is in charge of transferring the Divestment Business and/or the Transferred Contract if so required further to Section E of the Commitments.

T-Power: T-Power NV, incorporated under the laws of Belgium, with its registered office at Troonstraat 130, 1050 Brussels and registered at the Crossroads Bank for Enterprises under enterprise number 0875.650.771.

Section B. The Divestment Interests

Commitment to divest

1. In order to address the Commission's competition concerns, the Parties commit to transfer, or procure the transfer of the Divestment Interests by the end of the Trustee Divestiture Period to a purchaser and on terms of transfer approved by the Commission in accordance with the procedure described in paragraph 16. To carry out the transfer, the Parties commit to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business and to enter into a final binding agreement for the transfer of the Transferred Contract within the First Divestiture Period. If the Parties have not entered into such agreements at the end of the First Divestiture Period, the Parties shall grant the Divestiture Trustee an exclusive mandate to transfer the Divestment Interests in accordance with the procedure described in paragraph 25 in the Trustee Divestiture Period.
2. The Parties shall be deemed to have complied with this commitment if, by the end of the Trustee Divestiture Period, IPR has entered into final binding agreement(s), if the Commission approves the Purchaser(s) and the terms in accordance with the procedure described in paragraph 16 and if closing of the transfer of the Divestment Interests takes place within a period not exceeding [CONFIDENTIAL] months after the approval of the purchaser(s) and the terms of transfer by the Commission.
3. In order to maintain the structural effect of the Commitments, the Parties shall, for a period of 10 years after the Effective Date, not acquire direct or indirect influence in the Divestment Business or in the Transferred Contract, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Interests is no longer necessary to render the proposed concentration compatible with the common market.

Structure and definition of the Divestment Interests

4. The Divestment Interests consist of the Divestment Business (4.1) and the Transferred Contract (4.2).
 - 4.1 The Divestment Business consists of all shares in T-Power currently held by IPR (through its wholly owned subsidiary, International Power Consolidated Holdings Ltd – "IPCHL"), i.e. 220 shares accounting for 33.33% of T-Power's share capital, and IPR's corresponding rights and obligations under the Shareholder Agreement and other agreements signed between T-Power shareholders. Further information on T-Power is provided in the attached Schedule, as well as in the Form RM and its annexes.
 - 4.2 The Transferred Contract consists of the agreement between IPR and T-Power dated 10 December 2008 for the operation and maintenance of the T-Power plant for the duration of the Tolling Agreement (annex 5 of the Form RM).

Section C. Related commitments

Preservation of Viability, Marketability and Competitiveness

5. From the Effective Date until Closing, the Parties shall preserve the economic viability, marketability and competitiveness of the Divestment Interests, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Interests. In particular the Parties undertake:
 - a. not to carry out any act upon their own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Interests or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of T-Power;
 - b. to make available sufficient resources for the development of the Divestment Interests, on the basis and continuation of the existing business plans;
 - c. to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Interests.

Hold-separate obligations of Parties

6. The Parties commit, from the Effective Date until Closing, to keep the Divestment Interests separate from the businesses they are retaining and to ensure that Key Personnel – including the Hold Separate Manager – have no involvement in any business retained and vice versa. The Parties shall also ensure that the Personnel does not report to any individual outside the Divestment Interests.
7. Until Closing, the Parties shall assist the Monitoring Trustee in ensuring that the Divestment Interests are managed and operated in a way distinct and easily transferable from the businesses retained by the Parties. The Parties shall appoint a Hold Separate Manager who shall be responsible for the management/operation of the Divestment Interests, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage/operate the Divestment Interests independently and in the best interest of the Divestment Interests with a view to ensuring their continued economic viability, marketability and competitiveness and their independence from the businesses retained by the Parties.
8. To ensure that the Divestment Interests are held, managed and operated separately from the Parties, the Monitoring Trustee shall exercise IPR's rights as shareholder in T-Power (except for its rights for dividends that are due before Closing), with the aim of acting in the best interest of T-Power, determined on a stand-alone basis, as an independent financial investor, and with a view to fulfilling IPR's obligations under the Commitments. Furthermore, the Monitoring Trustee shall have the power to replace members of the supervisory board or non-executive directors of the board of directors, who have been appointed on behalf of IPR. Upon request of the Monitoring Trustee, the Parties shall cause such members of the boards to resign.

Ring-fencing

9. The Parties shall implement all necessary measures to ensure that they do not, after the Effective Date, obtain any business secrets, or sensitive confidential know-how, commercial or operational information, or any other information of a confidential or proprietary nature relating

to RWE Essent. After the Effective Date, the Monitoring Trustee and/or the Hold Separate Manager and not IPR shall exercise all of IPR's information rights. The Parties may obtain information relating to the Divestment Interests which is reasonably necessary for the transfer of the Divestment Interests or whose disclosure to the Parties is required by law.

Non-solicitation clause

10. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Interests for a period of [CONFIDENTIAL] after Closing.

Due Diligence

11. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Interests, the Parties shall, subject to customary confidentiality assurances and dependent on the stage of the transfer process:
 - a. provide to potential purchasers sufficient information as regards the Divestment Interests;
 - b. provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

Reporting

12. The Parties shall submit written reports in English on potential purchasers of the Divestment Interests and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).
13. The Parties shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

Section D. The Purchaser(s)

14. In order to ensure the immediate satisfaction of the Commission's competition concerns, the Purchaser(s), in order to be approved by the Commission, must:
 - a. be independent of and unconnected to the Parties;
 - b. with regard to the Divestment Business, have the financial resources and incentives to maintain and develop T-Power so that it remains a viable and active competitive force in competition with the Parties and other competitors;
 - c. with regard to the Transferred Contract, have the financial resources, proven expertise and incentive to maintain and develop the T-Power plant as a viable and active competitive force in competition with the Parties and other competitors;
 - d. neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Interests (the before-mentioned criteria for the purchaser hereafter the "**Purchaser Requirements**").
15. The Parties shall inform the Commission of any delay concerning COD, which, as at 5 January 2011, is scheduled at 15 June 2011. As the case may be, the Commission will be provided with the reasons for such potential delay.
16. The final binding agreement(s) shall be conditional on the Commission's approval. When the Parties have reached an agreement with (a) purchaser(s), they shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. The Parties must be able to demonstrate to the Commission that the purchaser(s) meet(s) the Purchaser Requirements and that the Divestment Interests are being transferred in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser(s) fulfil(s) the Purchaser Requirements and that the Divestment Interests are being transferred in a manner consistent with the Commitments. The Commission may approve the transfer of the Divestment Interests without one or more parts of the Personnel if it does not affect the viability and competitiveness of T-Power, taking account of the proposed purchaser.

Section E. Trustee

I. Appointment Procedure

17. The Parties shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If IPR has not entered into final binding agreement(s) for the transfer of the Divestment Interests one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by the Parties at that time or thereafter, the Parties shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.
18. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by the Parties in a way that does not impede the independent and effective fulfilment of its mandate.

Proposal by the Parties

19. No later than one week after the Effective Date, the Parties shall submit a list of one or more persons whom the Parties propose to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period, the Parties shall submit a list of one or more persons whom the Parties propose to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 18 and shall include:
 - a. the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
 - b. the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
 - c. an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

20. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, the Parties shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, the Parties shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

21. If all the proposed Trustees are rejected, the Parties shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 17 and 20.

Trustee nominated by the Commission

22. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom the Parties shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

23. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or the Parties, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

24. The Monitoring Trustee shall:
 - (i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.

- (ii) oversee the on-going management/operation of the Divestment Interests with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by the Parties with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
 - a. monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Interests from the business retained by the Parties, in accordance with paragraphs 5 and 6 of the Commitments;
 - b. supervise the management/operation of the Divestment Interests as distinct and easily transferrable, in accordance with paragraph 7 of the Commitments;
 - c. (i) in consultation with the Parties, determine all necessary measures to ensure that the Parties do not after the Effective Date, obtain any business secrets, sensitive confidential know-how, commercial or operational information, or any other information of a confidential or proprietary nature relating to the Divestment Interests,

and (ii) decide whether such information may be disclosed to the Parties as the disclosure is reasonably necessary to allow the Parties to carry out the transfer or as the disclosure is required by law;
- (iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
- (iv) propose to the Parties such measures as the Monitoring Trustee considers necessary to ensure the Parties' compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Interests, the holding separate of the Divestment Interests after the Effective Date and the non-disclosure of competitively sensitive information;
- (v) review and assess potential purchasers as well as the progress of the transfer process and verify that, dependent on the stage of the transfer process, (a) potential purchasers receive sufficient information relating to the Divestment Interests and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (b) potential purchasers are granted reasonable access to the Personnel;
- (vi) provide to the Commission, sending the Parties a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall cover the operation and management of the Divestment Interests so that the Commission can assess whether the Divestment Interests are held in a manner consistent with the Commitments and the progress of the transfer process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending the Parties a non-confidential copy at the same time, if it concludes on reasonable grounds that the Parties are failing to comply with these Commitments;
- (vii) within one week after receipt of the documented proposal referred to in paragraph 16, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the competitiveness of T-Power after the Closing and as to whether the Divestment Interests are transferred in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the transfer of the Divestment Interests without not all of the Personnel affects the

viability of T-Power after the transfer of the Divestment Interests, taking account of the proposed purchaser.

Duties and obligations of the Divestiture Trustee

25. Within the Trustee Divestiture Period, the Divestiture Trustee shall transfer at no minimum price the Divestment Interests (or, if only one of these two assets remains to be transferred, the Divestment Business or the Transferred Contract) to a purchaser, provided that the Commission has approved both the purchaser(s) and the final binding agreement(s) in accordance with the procedure laid down in paragraph 16. The Divestiture Trustee shall include in the final binding agreement(s) such terms and conditions as it considers appropriate for an expedient transfer in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the final binding agreement(s) such customary representations and warranties and indemnities as are reasonable required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of the Parties, subject to the Parties' unconditional obligation to transfer at no minimum price in the Trustee Divestiture Period.
26. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

III. Duties and obligations of the Parties

27. The Parties shall provide and shall cause their advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of the Parties' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and the Parties shall provide the Trustee upon request with copies of any document. The Parties shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
28. The Parties shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Interests. This shall include all administrative support functions relating to the Divestment Interests which are currently carried out at headquarters level. The Parties shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. The Parties shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.
29. The Parties shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the transfer, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the transfer and the Closing, including the appointment of advisors to assist with the transfer process. Upon request of the Divestiture Trustee, the Parties shall cause the documents required for effecting the transfer and the Closing to be duly executed.
30. The Parties shall indemnify the Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agrees that an

Indemnified Party shall have no liability to the Parties for any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

31. At the Parties' expense, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Parties' approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should the Parties refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard the Parties. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 30 shall apply mutatis mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served the Parties during the First Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient transfer.

IV. Replacement, discharge and reappointment of the Trustee

32. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:
- a. The Commission may, after hearing the Trustee, require the Parties to replace the Trustee; or
 - b. The Parties, with the prior approval of the Commission, may replace the Trustee.
33. If the Trustee is removed according to paragraph 32, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 17 – 22.
34. Beside the removal according to paragraph 32, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section F. The Review Clause

35. The Commission may, where appropriate, in response to a request from the Parties showing good cause and accompanied by a report from the Monitoring Trustee:
- (i) Grant an extension of the time periods foreseen in the Commitments, or
 - (ii) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where the Parties seek an extension of a time period, they shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall the Parties be entitled to request an extension within the last month of any period.

Duly authorised for and on behalf of GDF SUEZ

Duly authorised for and on behalf of IPR

Schedule

1. Description of the Divestment Business

The Divestment Business comprises IPCHL's 33.33% shareholding in T-Power along with its rights and obligations under the Shareholder Agreement and other agreements signed between T-Power shareholders. T-Power has no subsidiaries or shareholdings in other legal entities.

The T-Power plant is not yet commercially operational. T-Power has [CONFIDENTIAL] employees, all of whom may be considered (at the option of the Purchaser) as Key Personnel:

[CONFIDENTIAL]

T-Power's main asset comprises a 420MW combined cycle gas turbine power station located at Tessenderlo in Eastern Belgium. This asset is currently under construction and is due to become operational in June 2011. The output of the plant is committed to RWE Essent under a 15 year Tolling Agreement.

T-Power has no relevant intangible assets.

T-Power holds an electricity generation licence from CREG and is expected to hold all necessary authorisations and permits to enable the T-Power plant to become commercially active on COD.

No transitional arrangements between GDF SUEZ/IPR and T-Power will be needed.

All the agreements concerning the Divestment Interests referred to above are annexed to the Form RM.

2. Description of the Transferred Contract

The Transferred Contract is included as Annex 5 of the Form RM. It relates to the operation and maintenance of T-Power's power station. It is intended to remain in place for the duration of the Tolling Agreement.

There are no assets owned by IPR which are used in connection with the Transferred Contract and which will need to be transferred to the Purchaser.

At COD, in addition to the Station Manager, there will be [CONFIDENTIAL] employees of International Power Global Development (an IPR subsidiary) who will be employed in connection with the Transferred Contract and who – subject to employment law and other legal requirements and at the option of the Purchaser – would be transferred to the Purchaser at Closing.

The list below shows the names and the positions held by these employees ([CONFIDENTIAL]):

[CONFIDENTIAL]

Amongst those, the following may be considered (at the option of the Purchaser) as Key Personnel (in addition to the [CONFIDENTIAL] T-Power employees mentioned above):

[CONFIDENTIAL]