



EUROPEAN COMMISSION
DG Competition

***CASE M.8436 – GENERAL ELECTRIC
COMPANY / LM WIND POWER
HOLDING***

(Only the English text is authentic)

**MERGER PROCEDURE
REGULATION (EC) 139/2004**

Article 14(1) Regulation (EC) 139/2004

Date: 08/04/2019

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Brussels, 8.4.2019
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PUBLIC VERSION

COMMISSION DECISION

of 8.4.2019

**imposing fines under Article 14(1) of Council Regulation (EC) No 139/2004 for the
supply by an undertaking of incorrect information
(Case M.8436 – GENERAL ELECTRIC COMPANY / LM WIND POWER HOLDING)**

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TABLE OF CONTENTS

1.	Introduction	4
2.	Background	5
2.1.	The role of innovation in the offshore wind turbine market	5
2.2.	Parallel transactions	6
2.2.1.	The GE/LM Transaction	6
2.2.2.	The Siemens/Gamesa Transaction	6
2.2.3.	The interplay between M.8283 – GE/LM and M.8134 – Siemens/Gamesa	7
2.2.4.	GE’s submissions in the Siemens/Gamesa Investigation.....	8
3.	The merger review proceedings in GE/LM	8
3.1.	Pre-notification submissions in the GE/LM Investigation.....	8
3.2.	The Original Notification	8
3.3.	Submissions between the first notification and the withdrawal.....	9
3.4.	Events between the withdrawal and the Revised Notification.....	10
3.5.	The Revised Notification and subsequent events.....	10
4.	The Current proceedings	10
5.	Legal assessment	12
5.1.	Procedural obligations.....	12
5.2.	The infringement.....	12
5.2.1.	Legal framework	12
5.2.2.	Incorrect information in the Original Form CO.....	13
5.2.2.1.	Statements in the Original Form CO.....	13
5.2.2.2.	GE's actual development plans	14
5.2.3.	The context of the infringement.....	19
5.2.4.	GE's arguments	23
5.2.5.	The Commission's assessment of GE's arguments.....	23
5.2.6.	Conclusion.....	25
5.3.	GE negligently submitted incorrect information.....	25
5.3.1.	GE's arguments	26
5.3.2.	The Commission's assessment of GE's arguments.....	26
5.3.3.	Conclusion on the negligent nature of GE's submission of incorrect information ...	26
5.4.	Conclusion.....	27
6.	Decision to impose fines	27
6.1.	The nature of the infringement.....	27
6.2.	The gravity of the infringement	28
6.2.1.	The Commission's view	28

6.2.2.	GE's arguments	29
6.2.3.	The Commission's assessment	29
6.2.4.	Conclusion.....	30
6.3.	The duration of the infringement	30
6.4.	Mitigating circumstances	30
6.4.1.	The Commission's view	30
6.4.2.	GE's view	31
6.4.3.	The Commission's assessment	31
6.5.	Aggravating circumstances	33
6.6.	Liability	33
6.7.	Conclusion.....	33
7.	Procedural Rights	33
8.	Amount of the fines.....	35

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings,¹ and in particular Article 14(1) thereof,

Having given General Electric Company the opportunity in accordance with Article 18 of Regulation (EC) No 139/2004, to make known its views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations,²

Having regard to the final report of the Hearing Officer in this case,³

Whereas:

1. INTRODUCTION

- (1) This Decision is adopted pursuant to Article 14(1) of the Merger Regulation⁴ and addresses General Electric Company's ("GE") submission of incorrect information in the notification of Case COMP/M.8283 – General Electric Company/LM Wind Power Holding ("GE/LM Investigation" or the "GE/LM Transaction").
- (2) The GE/LM Transaction was first notified on 11 January 2017 (the "Original Notification") and was subsequently withdrawn on 2 February 2017. It was re-notified on 13 February 2017 (the "Revised Notification") and cleared unconditionally on 20 March 2017, pursuant to Article 6(1)(b) of the Merger Regulation (the "GE/LM Decision").
- (3) As set out in this Decision, the Commission has come to the conclusion that:
 - (1) GE has negligently supplied incorrect information in the Original Notification of case M.8283 – *General Electric Company/LM Wind Power Holding* in

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

² OJ C200. , p....

³ OJ C200. , p....

⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1)("the Merger Regulation").

violation of Article 4(1) of Commission Regulation (EC) No 802/2004 ("the Implementing Regulation");⁵

- (2) a fine should be imposed on GE in accordance with Article 14(1)(a) of the Merger Regulation.
- (4) The incorrect information submitted by GE concerned the statements in the Original Notification of the GE/LM Transaction that it had no offshore wind turbine in development with higher power output than its 6MW rated turbine. On the contrary, the Commission was made aware that at the time of that notification GE was actively developing and marketing a 12MW rated turbine for offshore applications. That information was thereafter confirmed in the Revised Notification.

2. BACKGROUND

2.1. The role of innovation in the offshore wind turbine market

- (5) The market for offshore wind turbines is a fast-paced environment driven by innovation. Suppliers need to constantly innovate in order to develop ever-larger and more powerful wind turbines so as to remain competitive.⁶
- (6) *First*, contrary to onshore wind turbines which are smaller in size due to regulation and limitations in space, offshore wind turbines continue to evolve into bigger turbines capable of producing more electricity.
- (7) Bigger turbines with a higher output are capable of delivering more electricity while the offshore installation costs are only marginally increased by the increase in size. Installing larger turbines therefore allows the high costs of the development of an offshore project to be recouped more efficiently than with smaller turbines. The power rating of the generator and the rotor size are the two main characteristics defining the turbine performance.
- (8) The reduction in costs and increased profitability of wind projects are becoming essential as Member States progressively and significantly reduce, or phase out completely, state subsidies for their development, thereby increasing the pressure on the wind sector to become profitable by itself. Wind parks projects are awarded to developers following a competitive auction where a crucial aspect for the award is the levelised cost of energy ("LCoE").⁷ In recent years, LCoE levels offered by developers have decreased dramatically. As an example, in Denmark, Vattenfall won the auction for the Horns Rev 3 offshore wind park in 2015 with an LCoE of 103.1€/MWh, while in 2016 it won the Kriegers Flak project by offering an LCoE of 49.9€/MWh.
- (9) Such a dramatic decrease is at least partially driven by the installation of larger turbines producing more electricity for similar installation costs. Therefore, the competitiveness of suppliers of offshore wind turbines is tightly linked to their capacity to offer new, bigger turbines, capable of complying with these LCoE values.

⁵ Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.04.2004, p. 1) (the "Implementing Regulation"),

⁶ For further reference, see the results of the market investigation on the market for offshore wind turbines as described in the decision M.8134 – Siemens/Gamesa, paragraphs 82 to 90 and 120 to 126.

⁷ LCoE is the net cost of electricity per unit over the lifetime of the generating asset.

- (10) *Second*, the offshore market is also characterised by very long development lead times. Offshore projects take, on average, five years from the date they are awarded until their installation. Therefore, suppliers often bid for projects using pipeline products that are not fully developed at the time of the tender as considerable lead times allow turbines to be finalised, certified and enter into serial production.
- (11) Competitive dynamics on the market are strongly influenced by product development cycles. The first supplier to introduce a new platform will generally gain a first-mover advantage that will enable it to gain significant market shares. Similarly, other competitors can take over when a new platform with a higher-rated output is introduced.
- (12) Consequently, due to the specific features of the market, namely the importance of innovation and the long development lead times, the competitive analysis of the market for offshore wind turbines is mostly forward-looking. The competitiveness of suppliers for offshore wind turbines is assessed not only with regard to their current portfolio but most importantly relies on the products in the pipeline, which will be installed within 3 to 5 years, but are offered to the market in tenders well in advance.
- (13) In the case at hand, GE's pipeline information was important to correctly assess its competitive position on the downstream market for offshore wind turbines. That information was particularly important in determining GE's potential ability and incentive to foreclose downstream rivals by withholding LM Wind Power Holding blades post-Transaction. GE's current portfolio and future turbine development were therefore equally important to assess the dynamics of this forward-looking market. Therefore, it was relevant for taking a decision on the GE/LM Transaction.⁸

2.2. Parallel transactions

2.2.1. The GE/LM Transaction

- (14) **GE** is a global diversified company comprising a number of business units, each with its own divisions. GE Renewable Energy is the business unit that produces and supplies wind turbines on a global basis. GE Offshore Wind is the business unit within GE Renewable Energy that is responsible for manufacturing and supplying offshore wind turbines.
- (15) **LM Wind Power Holding A/S ("LM")** is active in the design, testing, manufacturing and supply of wind turbine blades, both in the European Economic Area ("EEA") and worldwide.
- (16) The acquisition by GE of sole control over LM, within the meaning of Article 3(1)(b) of the Merger Regulation, was reviewed by the Commission during the GE/LM Investigation.

2.2.2. The Siemens/Gamesa Transaction

- (17) By way of background, it should also be observed that the Commission was, at the same time, reviewing another transaction taking place on the market for onshore and offshore wind turbines. That parallel investigation related to the acquisition by Siemens Aktiengesellschaft ("Siemens") of Gamesa Corporación Tecnológica, S.A. ("Gamesa") under Case COMP/M.8134 – Siemens/Gamesa.

⁸ Recital 5 of the Implementing Regulation.

- (18) **Siemens** is active in a number of industrial areas including the supply of onshore and offshore wind turbines through its Wind Power and Renewables division in the EEA and worldwide.
- (19) **Gamesa** is primarily active in the supply of products and advanced solutions in the renewable energy sector, particularly of onshore wind turbines. It is also active in the supply of offshore wind turbines through its subsidiary Adwen Offshore SL ("Adwen"). Gamesa (and Adwen) is currently solely controlled by Siemens.
- (20) The acquisition of sole control, within the meaning of Article 3(1)(b) of the Merger Regulation, by Siemens over Gamesa was formally notified to the Commission on 6 February 2017 and cleared unconditionally on 13 March 2017 pursuant to Article 6(1)(b) of the Merger Regulation (the "Siemens/Gamesa Decision").

2.2.3. *The interplay between M.8283 – GE/LM and M.8134 – Siemens/Gamesa*

- (21) The present Decision concerns solely GE's infringement of Article 14(1) of the Merger Regulation in the context of the investigation of the GE/LM Transaction. The Siemens/Gamesa transaction is not the object of the present Decision and it is described solely for the purpose of providing the context in which the infringement took place during the GE/LM Investigation.
- (22) Both the GE/LM Transaction and the Siemens/Gamesa Transaction concerned the market for wind turbines and ran largely in parallel.
- (23) Siemens and Gamesa were GE's competitors on the markets for onshore and offshore wind turbines. With regard to the market for offshore wind turbines, there were five suppliers competing in the EEA at the time when both merger proceedings took place: Siemens, MHI/Vestas, Adwen, GE and Senvion. That number was to be reduced to four after Siemens' acquisition of Adwen as part of the Siemens/Gamesa Transaction.
- (24) At the time of both merger proceedings, LM was the only independent producer of wind blades. In particular, LM was supplying blades to:
- (1) Adwen's offshore turbine AD8-180, to be acquired by Siemens in the course of the Siemens/Gamesa Transaction; LM was the sole supplier of blades for that turbine, although a final supply agreement between LM and Adwen had not yet been signed;
 - (2) a number of Gamesa's onshore turbines.⁹
- (25) In addition, LM was also a marginal supplier of certain Siemens onshore wind turbines.¹⁰
- (26) GE was the Notifying Party in the GE/LM Investigation but was also actively involved in the Siemens/Gamesa Investigation as a third party, that is to say a competitor of both Siemens and Gamesa in the onshore and the offshore wind turbine markets in the EEA. Conversely, Siemens and Gamesa were both part of the GE/LM Investigation as customers of LM for wind turbine blades and as competitors of GE in the downstream market of both onshore and offshore wind turbines.

⁹ For further explanations on the absence of foreclosure risk of Gamesa's wind turbines, see paragraphs 132-134 of Case COMP/M.8283 – GE/LM.

¹⁰ For further explanations on the absence of foreclosure risk of Siemens' wind turbines, see paragraphs 135-138 of Case COMP/M.8283 – GE/LM.

(27) The pre-notification contacts with the Commission started in July 2016 for the Siemens/Gamesa Investigation and in October 2016 for the GE/LM Investigation. The first contact with GE in the Siemens/Gamesa Investigation took place in September 2016, slightly ahead of the beginning of pre-notification contacts for the GE/LM Investigation.

2.2.4. *GE's submissions in the Siemens/Gamesa Investigation*

(28) On 7 October 2016, the Commission held a conference call with representatives of GE to obtain information relevant to the investigation, including details of GE's product development plans for offshore wind turbines (the "October 7 Call").

(29) During the pre-notification period of the Siemens/Gamesa Investigation, the Commission sent a request for information to GE on 22 November 2016. That first request for information included questions and requests for documents in relation to GE's offshore wind turbine product development plans.

(30) GE submitted partial replies to that first request for information and a final reply to all questions on 12 December 2016, still during pre-notification. In that reply, GE confirmed statements made during the October 7 Call that it had no higher output offshore wind turbine in development. For further detail, it informed the Commission that the [Company] had rejected "*the initial proposal for GE to develop a new offshore turbine*" in September 2016.¹¹ GE also provided four internal documents related to its product development plans for a new, higher power output than its 6MW rated offshore wind turbine, code-named "Project Vera", [...] pre-dating the rejection of the proposal by the [Company].¹²

(31) Ultimately, as will be explained in more detail in Section 3, the Commission was made aware thanks to a third party on 20 January 2017 that it had been provided incorrect information by GE.

3. THE MERGER REVIEW PROCEEDINGS IN GE/LM

3.1. Pre-notification submissions in the GE/LM Investigation

(32) On 18 October 2016, GE first contacted the Commission with respect to its intention to acquire control over LM.

(33) GE submitted a first draft Form CO of the GE/LM Transaction on 31 October 2016 and a second draft Form CO on 17 November 2016. Both drafts contained the statements that GE had no higher output offshore platforms in development.

3.2. The Original Notification

(34) GE formally notified the GE/LM Transaction on 11 January 2017 by submitting a notification form (the "Original Form CO") pursuant to the provisions of the Merger Regulation.¹³

(35) GE explained that it did not have any higher output offshore wind turbine in development in Sections 8.7 and 8.9, as well as in the competitive assessment and Annex 6.D.15 of that Original Form CO. GE explicitly stated in Section 8.7 that it

¹¹ GE's response to the first request for information, 12 December 2016, Question 3.

¹² GE's response to the first request for information submitted in the Siemens/Gamesa Investigation was transferred to the case file of the GE/LM Investigation on 16 December 2016 with GE's counsel's agreement (email from GE's counsel to the case team, dated 16 December 2016).

¹³ Original Form CO, dated 11 January 2017.

did "not currently have any higher power output offshore wind turbine platforms in development."¹⁴

3.3. Submissions between the first notification and the withdrawal

- (36) On 16 January 2017, following a request from the Commission made over the phone, GE's [counsel] sent a letter to the Commission submitting a "hypothetical" foreclosure analysis.
- (37) That analysis was based on a hypothetical scenario where GE would develop a higher output offshore wind turbine and the consequences on GE's incentives to foreclose its competitors on the downstream market of offshore wind turbines in the long term. GE argued that no foreclosure would be possible in any case, and largely restated prior submissions that there was no higher output offshore turbine in development. The letter only referred to a "*hypothetical 10-12MW turbine*".¹⁵
- (38) Following a call with GE's counsel, on 20 January 2017, GE sent to the Commission an email with an attached letter dated 19 December 2016 from [public entity providing the funding], advising of funding obtained by GE from the French government ('the GE submission of 20 January 2017'). The French funding was related to research and development activities with respect to a new, higher output offshore wind turbine platform.¹⁶ The funding was presented by GE's counsel as making up for "*a small share of the overall funding GE will need to successfully take the project forward to commercialisation*".¹⁷ The funds were described by GE as accounting for a very small part of the overall R&D costs needed and therefore not significant, or in any way decisive, for the successful development of a higher output offshore wind turbine.
- (39) Later on the same day (that is to say on 20 January 2017), [customer name], a customer of offshore wind turbines that had been in contact with the Commission in the context of the Siemens/Gamesa Investigation, spontaneously reached out to the Commission. [Customer name] submitted a letter explaining how "*GE has provided insight in their technology and plans to go to market which give us certainty that they could become a future supplier of offshore wind turbine generators. GE is very committed to enter the [offshore wind turbine] market and we are now convinced to see them as bidders in our future projects*".¹⁸ That letter led the case team to realise that the information submitted by GE might not accurately portray the status of its development plans.
- (40) As a result of that letter, on 27 January 2017, the Commission sent a request for information to GE pursuant to Article 11(2) of the Merger Regulation, focused on GE's product development plans, and in particular contacts with potential customers. GE replied to that request on 30 January 2017. In its reply, GE submitted letters it had already sent to potential customers between 21 December 2016 and 20 January 2017, with regard to GE's pipeline turbine.
- (41) In those letters, GE offered a 12MW offshore wind turbine for bids taking place as early as the end of the first trimester of 2017.

¹⁴ Original Form CO, dated 11 January 2017, paragraph 624, at page 215.

¹⁵ Letter from GE's counsel to the case team, dated 16 January 2017.

¹⁶ Email from GE's counsel to the case team, dated 20 January 2017.

¹⁷ Email from GE's counsel to the case team, dated 20 January 2017.

¹⁸ Letter from [customer name] to the case team, dated 20 January 2017.

- (42) On 31 January 2017, the Commission sent a further request for information to GE, pursuant to Article 11(2) of the Merger Regulation, focusing exclusively on GE's product development plans. GE provided replies to this request for information on 31 January 2017, 7 February and 10 February 2017, which included over 350 internal documents dating from between April 2016 and the beginning of 2017, providing a comprehensive picture of the continuous advancement GE had made in the development of its new turbine.
- (43) On 1 February 2017, the counsels of GE and LM, as well as business representatives of GE, met with the case team to discuss the state of play of the GE/LM Investigation. The Commission informed GE that in view of its failure to provide the correct information on the status of development of its new turbine in the Original Form CO, it would consider the possibility of opening an infringement investigation for the submission of incorrect or misleading information in the notification of the GE/LM Transaction.
- (44) On 2 February 2017, GE withdrew its formal notification of the GE/LM Transaction.

3.4. Events between the withdrawal and the Revised Notification

- (45) On 3 February 2017, the Commission sent a request for information to GE, by which it asked for a comprehensive list of upcoming offshore wind project tenders and GE's bidding strategy for each listed tender, including whether or not it intended to bid for projects with its prospective higher output turbine and if so, when. GE replied to that request on 13 and 14 February 2017.

3.5. The Revised Notification and subsequent events

- (46) GE formally filed a revised Form CO on 13 February 2017, adding the information on the development of a 12MW offshore wind turbine (the "Revised Form CO").
- (47) On the same date, the Commission sent a request for information to GE pursuant to Article 11(2) of the Merger Regulation requesting clarification on the documents produced by GE in its reply to the request for information of 31 January 2017. GE replied to that request on 15 February 2017.
- (48) On 9 March 2017, the Commission opened an investigation into the possibility of GE having provided incorrect and/or misleading information. The Commission informed GE by letter.
- (49) On 20 March 2017, the Commission adopted a decision pursuant to Article 6(1)(b) of the Merger Regulation declaring the GE/LM Transaction compatible with the internal market and the EEA Agreement.
- (50) The period between the first call with GE (7 October 2016) and the date of the GE/LM Clearance Decision (20 March 2017) is referred to hereinafter as the "Merger Review Proceedings".

4. THE CURRENT PROCEEDINGS

- (51) On 9 March 2017, the Commission informed GE of the on-going investigation into the potential infringement of its obligation to submit accurate and complete information which might lead to the imposition of a fine pursuant to Article 14(1)(a) of the Merger Regulation.
- (52) On 30 June 2017, a state of play meeting was held between the Commission and GE.
- (53) On 6 July 2017, the Commission adopted a Statement of Objections addressed to GE, pursuant to Article 18 of the Merger Regulation. In the Statement of Objections, the

Commission came to the preliminary view that, with respect to information on its offshore product development plans:

- (1) GE had intentionally or at least negligently supplied incorrect or misleading information in the Original Form CO submitted in the GE/LM Investigation;
 - (2) fines should be imposed on GE in accordance with Article 14(1)(a) of the Merger Regulation.
- (54) In the letter accompanying the Statement of Objections, the Commission offered GE the opportunity to submit observations on the objections raised, in accordance with Article 18 of the Merger Regulation and Articles 13 and 14 of the Implementing Regulation, both in writing and at an oral hearing in front of the Hearing Officer.
- (55) In order to assist GE in the preparation of its observations, the Commission also gave GE the opportunity to consult non-confidential versions of the documents in the Commission's file, in accordance with Article 18 of the Merger Regulation and Article 17 of the Implementing Regulation ("access to the file").
- (56) The possibility of a cooperation procedure was discussed with GE as early as 4 April 2017 and again during subsequent meetings on 30 June 2017 and 27 October 2017. GE submitted two papers on alleged mitigating circumstances to the potential infringement on 23 August 2017 and 7 December 2017. An additional meeting was held between the Commission and GE on 7 February 2018 where the Commission communicated the range of fines and the reduction offered to GE in case of cooperation.
- (57) On 12 March 2018, GE announced to the Commission that it declined cooperation and would submit a full reply to the Statement of Objections. Consequently, the infringement case thereby reverted to the standard procedure. The deadline for GE to reply to the Statement of Objections was set at 6 April 2018.
- (58) On 6 April 2018, GE submitted its reply to the Statement of Objections ("reply to the SO"). In its reply, GE explained its disagreement with the preliminary conclusions reached by the Commission.¹⁹ In addition, GE declined the possibility to be heard in an oral hearing.
- (59) The Advisory Committee discussed the draft of this Decision on 20 February and on 29 March 2019, and issued a positive opinion.
- (60) The proceedings concerning the investigation of the potential infringement of GE's obligation to submit correct information, initiated on 9 March 2017 and running until the adoption of this Decision, are referred to hereinafter as the "Current Proceedings".

5. LEGAL ASSESSMENT

5.1. Procedural obligations

- (61) Recital 5 of the Implementing Regulation states that "*[i]t is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration.*"

¹⁹ GE's procedural and substantial arguments will be further discussed throughout this Decision.

- (62) Article 3(1) of the Implementing Regulation provides that the notifications "*shall be submitted in the manner prescribed by Form CO as set out in Annex I*" and Article 4(1) of that Regulation provides that the information contained in notifications "*shall be correct and complete*". Article 5(4) of the Implementing Regulation provides that "*incorrect or misleading information shall be considered to be incomplete information.*"
- (63) Annex I of the Implementing Regulation ("Form CO") requires the following declaration to be signed by or on behalf of all the notifying parties: "*[t]he notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by Form CO have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.*"²⁰
- (64) Point (a) of Article 14(1) of the Merger Regulation allows the Commission to impose fines on the persons referred to in Article 3(1)(b) of that Regulation, undertakings or associations of undertakings "*where, intentionally or negligently:*
- (a) *they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3).*"

5.2. The infringement

5.2.1. Legal framework

- (65) Within the legal framework referred to in Section 5.1, the Commission considers, with respect to the development of an offshore wind turbine rated higher than its 6MW offshore turbine:
- (1) GE has negligently supplied incorrect information in the Original Form CO in the GE/LM Investigation;
- (2) a fine should be imposed on GE in accordance with Article 14(1)(a) of the Merger Regulation.
- (66) The infringement consists of GE's incorrect statements in the Original Form CO that it did not have any higher power output offshore wind turbine platforms in development.²¹
- (67) The Commission's analysis will first focus on the incorrect provisions in the Original Form CO (see Section 5.2.2). GE's submissions other than the Original Form CO will also be presented (see Section 5.2.3), insofar as they illustrate GE's understatements concerning the status of development which culminated in the provision of incorrect information in the Original Form CO.
- (68) However, the Commission does not consider those other submissions of GE, excluding the Original Form CO, to constitute infringements under the Merger Regulation. Those submissions are analysed in the present Decision to illustrate the understatements concerning the status of development of Project Vera, which ultimately culminated in GE's provision of incorrect information in the Original Form CO.

²⁰ Implementing Regulation, Annex I, Form CO relating to the notification of a concentration pursuant to Regulation (EC) No 139/2004, Section 11.

²¹ Original Form CO, dated 11 January 2017, paragraph 624.

- (69) Moreover, it is clear on the basis of the submissions other than the Original Form CO (see section 5.2.3) that the provision of incorrect information in the Original Form CO according to which GE did not have at that time "*any higher power output offshore wind turbine platforms in development*" could not be interpreted differently than what is the normal meaning of this statement. Reading this statement in the Form CO, in the light of the pre-notification submissions, only corroborated GE's claim that it did not have any such platforms in development.
- (70) In addition, submissions other than the Original Form CO are discussed because GE relies on them in its argument that the Commission was aware of the status of its development plans.

5.2.2. *Incorrect information in the Original Form CO*

5.2.2.1. Statements in the Original Form CO

- (71) The Original Form CO, filed on 11 January 2017, contained the same information as was submitted in the first and second Draft Form CO with respect to GE's pipeline products and research and development activities.

Section 8.7 of the Original Form CO

- (72) Section 8.7 requested GE to "[e]xplain whether any of the parties to the concentration, or any of the competitors, have products likely to be brought to market in the short or medium term ('pipeline products'), or plans to expand production or sales capacity in any of the affected markets. If so, provide an estimate of the projected sales and market shares of the parties to the concentration over the next three to five years" (emphasis added).
- (73) In reply to that question, GE focused on its 6MW offshore wind turbine (called the "Haliade 150") explaining it was "*for the first time installing the Haliade 150 in a commercial scale wind park.*"²² GE also stated that it is "*a relatively new supplier in the offshore space*". The concluding sentence of that paragraph stated that GE "*does not currently have any higher power output offshore wind turbine platforms in development.*"²³

Section 8.9 of the Original Form CO

- (74) Section 8.9 further requested GE to "[g]ive an account for the affected markets of the importance of research and development in firms' ability to compete in the long term. Explain the nature of the research and development in affected markets carried out by the parties to the concentration. In so doing, take account of the following, where appropriate: [...] (b) the course of technological development for these markets over an appropriate time period (including the frequency of introduction of new products and/or services, developments in products and/or services, production processes, distribution systems, and so on)" (emphasis added).
- (75) In reply to that question, GE extensively shared with the Commission its internal intelligence on competitors' plans to market higher output offshore wind turbines in the 10+MW (and even 15MW) class. In particular, GE explained that "*within offshore, the R&D cycle is typically three to four years. For every new cycle, larger turbines are brought to market. In between cycles, existing turbines may be upgraded, within limits which the platform allows. For example, Siemens has upgraded its 6MW platform to 7MW and recently upgraded it further to 8MW. [...]*"

²² *Ibid.*

²³ Original Form CO, dated 11 January 2017, paragraph 624.

Meanwhile, Siemens is understood to also be working on the development of a new platform, likely to be at 10MW or more and expected to launch around 2021. Similarly, MHI-Vestas is understood to also be working on a +10MW turbine for 2021 and possibly also an even larger turbine in the 15MW class, which is unlikely to reach market before 2025 however"²⁴ (emphasis added).

- (76) Where asked about "*the parties' own research and planning priorities over the next three years*",²⁵ GE merely focused on its lack of 8MW product development: "[i]n the offshore space, GE does not currently have an 8MW platform. It also is not currently actively developing one, given that by the time GE could expect to develop and bring to market an 8MW machine ([...]), GE expects the majority of demand to have moved to larger turbines at 10MW or more. [...] GE is currently assessing its options on how best to continue to invest in future offshore development, to ensure it is able to compete effectively with its much larger rivals, notably Siemens and MHI-Vestas."²⁶

Other parts of the Form CO

- (77) GE also reconfirmed it "*does not have any feasibility studies, paper turbine, or prototype for a turbine ranging from 7 to 12MW output*" in the competitive assessment, as well as in Annex 6.D.15 to the Form CO containing an economic submission on input foreclosure.²⁷

Conclusion

- (78) Throughout different sections of the Original Form CO, GE consistently described its development plans for a higher power output offshore wind turbine as essentially non-existent.
- (79) While it described development projects from competitors up until 2025, regarding its own plans GE failed to mention any higher power output offshore wind turbine platforms in development at any point of these sections dealing with development plans "*in the next three to five years*".
- (80) As will be developed in Section 5.2.2.2, at the time of the filing of the Original Form CO, the development of Project Vera was at a more advanced stage than submitted by GE, as GE was already actively marketing and offering a higher output offshore turbine to customers. It follows that GE's statements in the Original Form CO were incorrect.

5.2.2.2. GE's actual development plans

- (81) GE claimed in the Original Form CO filed on 11 January 2017 that it did "*not currently have any higher power output offshore wind turbine platforms in development.*" However, the status of GE's Project Vera at the time prior to the formal filing did not correspond to that description.
- (82) On the contrary, GE was approaching customers and offering them its new higher output offshore turbine in development. GE's internal documents show that the development of Project Vera was maintained and kept advancing during the pre-notification period.

²⁴ Original Form CO, dated 11 January 2017, paragraph 640.

²⁵ Original Form CO, dated 11 January 2017, section 8.9, question (c).

²⁶ Original Form CO, dated 11 January 2017, paragraph 649.

²⁷ Original Form CO, dated 11 January 2017, paragraph 394 and Annex 6.D.15, page 8.

GE had started marketing Project Vera before filing the Original Form CO

- (83) Following the [customer letter] of 20 January 2017, stating that a new higher output turbine was already offered to the market by GE,²⁸ the Commission sought to address the discrepancies between GE's statements and its apparent actions on the market.
- (84) Consequently, in its request for information of 27 January 2017, the Commission requested an update from GE with respect to its product development plans. GE's reply contained new information related to Project Vera, including information dating prior to the filing of the Original Form CO.
- (85) In particular, the Commission sought more information in that request about GE's discussions with customers about its new higher output offshore platform.²⁹ In reply, GE provided information about its contacts with several potential launch customers.³⁰
- (86) Specifically, GE submitted letters to certain potential launch customers, namely [customer 1], with regard to its [project 1]; [customer 2], for [project 2], and [customer 3], for [projects 3A and 3B]. Those letters were dated, respectively, 21, 23 December 2016 and 27 January 2017.
- (87) Thus, the [letters from GE to customers] offering Project Vera, pre-dated GE's filing of the Original Form CO where it declared to have no development projects for higher power output turbines.³¹ On the contrary, the content of these letters explicitly showed GE marketing its upcoming, higher output platform in 2017.
- (88) It results that, before the filing of the Original Form CO, GE had been actively reaching out to customers to market its 12MW offshore wind turbine. For example, GE indicated in its letter of 23 December 2016 to the Project [2] developers that "*GE would be keen to present its new product for your consideration, which is due for commercial release at the end of Q1 2017.*"³²
- (89) In addition, [GE Offshore Wind], indicated in a letter of 21 December 2016 to [customer 1],³³ that "*GE Renewable Energy, Wind Offshore intends to deliver a bid for [project 1]*" and that "*[...] [its] competitive bid for the [project 1] will be based on [its] new generation offshore wind turbine generator.*"³⁴
- (90) GE's internal documents submitted in the reply to the request for information of 31 January 2017 also demonstrate that the sales and marketing team responsible for Project Vera's launch was working to [description of internal GE process] in order to submit a formal bid to [customer 4], a potential [...] launch customer. In its reply to the request for information of 13 February 2017, GE indicated that "[description of internal GE process]."
- (91) GE was thus already actively offering an offshore wind turbine with a higher output than its 6MW turbine to the market, even before the filing of the Original Form CO, in contradiction to what was stated therein. The information on the development of a

²⁸ [Customer letter] to the case team, dated 20 January 2017.

²⁹ Request for information to GE, dated 27 January 2017, question 4. (ID181)

³⁰ GE Reply to request for information of 27.1.2017, dated 30 January 2017. (ID141)

³¹ GE Reply to request of information of 27 January 2017, dated 30 January 2017, Annexes 1, 2, 3 and 4.

³² GE Reply request of information of 27 January 2017, dated 30 January 2017, Annex 1. Project [2] is a prospective offshore wind farm to be built off the coast of [location].

³³ [Description of customer 1].

³⁴ GE Reply to request of information of 27 January 2017, dated 30 January 2017, Annex 2.

higher output offshore turbine should therefore have been included in the Original Form CO for it to be correct.

- (92) More precisely, Project Vera consisted of the development of a 12MW turbine that was meant to be bid in tenders as early as the first quarter of 2017, as indicated to customers. Therefore, it fell within the scope of the sections of the Form CO referring to R&D and pipeline projects. In fact, as it turned out, GE's statement explaining that no future project existed was at odds with the facts and GE's actions with regard to Project Vera.
- (93) GE's statements in the Original Form CO were thus incorrect.

GE continuously developed Project Vera after the rejection by the [Company]

- (94) In its replies to the requests for information of 27 January and 31 January 2017, GE provided a clear picture of the continuous development of Project Vera throughout the pre-notification period. However, despite repeated requests by the Commission, GE had not submitted any such information at an earlier stage.

Request for information of 27 January 2017

- (95) In that request, the Commission had asked GE to "*provide an update of the estimated development timeline of GE's next generation turbine.*"³⁵ In reply to that question, GE referred to its reply to the first information request of 26 November 2016 and to its submission of 20 January 2017. GE further indicated that "*[a]s anticipated in our last update, GE is since continuing work to complete the concept design. It has completed [description of internal GE process]³⁶ and is working towards [description of internal GE process], securing a launch customer [description of internal GE process] would be a significant factor in establishing a stronger business case. [Description of internal GE process]. Consistent with our previous updates, GE is working towards [description of internal GE process] at the end of Q1 2017*"³⁷ (emphasis added).
- (96) GE also added further detail to its prior statements related to the rejection of its proposal to the [Company] with respect to the way forward for Project Vera: "*GE Offshore Wind is working towards [description of internal GE process]. It is constantly updating its draft business plan, checking and updating assumptions made on key parameters such as sales volume, pricing and cost, working towards [description of internal GE process], expected to take place at the end of Q1 2017 when GE hopes to reach [description of internal GE process]. At that time, GE would need to make a "go/no-go" decision. The GE Offshore Wind business does not expect corporate approval before successfully reaching [description of internal GE process]*"³⁸ (emphasis added).
- (97) The Commission had also asked GE to "*estimate when [it] will be able to offer its next generation turbine in bids and for which earliest installation date.*"³⁹
- (98) In reply to that question, GE stated that "*[a]ssuming a positive decision by GE management at the end of Q1 2017 when GE hopes to reach [description of internal GE process], it would expect the next generation turbine to then be released*"

³⁵ Request for information to GE, dated 27 January 2017, question 1.

³⁶ [...].

³⁷ GE Reply to request of information of 27 January 2017, dated 30 January 2017.

³⁸ GE Reply to request of information of 27 January 2017, dated 30 January 2017.

³⁹ Request for information to GE, dated 27 January 2017, question 3.

commercially allowing the Offshore Wind business to participate in tenders"⁴⁰
(emphasis added).

- (99) Considering such development timeline, information on Project Vera should have been included by GE in section 8 of the Form CO, which concerns pipeline products expected to be released to the market in the next three to five years.

Request for information of 31 January 2017

- (100) The Commission followed up on GE's submission of 20 January 2017 with another request for information on 31 January 2017. In that request, the Commission asked GE to submit *inter alia* internal documents related to its application for the research and development grant from the [public entity providing the funding] and the development of a wind turbine above 6MW irrespective of the stage of development of the product, including any related communications with third parties. The Commission also requested a list of tenders for which GE planned to offer its anticipated higher output offshore turbine and tenders for which GE did not plan to bid because the turbine in question would not be ready.
- (101) GE provided an initial reply the same day. In that narrative reply, GE indicated that "[description of internal GE decision and process]."⁴¹
- (102) GE's reply to the request for information of 31 January 2017 contained over 350 internal documents related to product development. Those documents pertained to technical development, marketing and commercialisation timelines and strategy, as well as internal communications and exchanges with potential customers for the new Project Vera offshore turbine.
- (103) GE provided an explanatory note related to a number of documents evidencing product development work that took place prior to the filing of the Original Form CO. With regard to the award in December 2016 of the [public entity] grant, GE indicated that "[i]n June 2016, GE submitted an application to [public entity providing the funding]. Its proposal was based on the development of a +10MW offshore wind turbine prototype; [description of internal GE process and public entity providing the funding]. On 19 December 2016 its application was met with a positive decision."⁴²
- (104) GE further noted that "[i]n September 2016, an initial business case was presented to the [Company] [description of internal GE process] for the continuation of work on the potential next generation turbine. Instead of [description of internal GE process], the initial business case was rejected and a directive was given to the business to [description of internal GE process] as a precondition for approval."⁴³
- (105) GE's replies to the request for information of 31 January 2017 thus provided more detailed information, namely that what GE had termed to be a rejection by the [Company] was in fact limited in scope, as well as indications that after September 2016 GE had pursued the development of the project. That information provided in reply to the request for information of 31 January 2017 was not previously known by the Commission.

⁴⁰ GE Reply to request of information of 27 January 2017, dated 30 January 2017.

⁴¹ GE Reply to request for information of 31 January 2017, dated 31 January 2017.

⁴² Explanatory Note, GE Reply to request of information of 27 January 2017, dated 7 February 2017, page 4. (ID170-14) [...].

⁴³ Explanatory Note, GE Reply to request of information of 27 January 2017, dated 7 February 2017, page 6. (ID170-14)

- (106) Similarly, GE further clarified its business development plan and process, especially prior to December 2016: "*A launch customer is the essential backbone for any major technology development such as this. GE has therefore made a choice to focus its early efforts on a small number of "inner circle" customers: [customer names]. Some of these efforts started before it was clear that GE would not reach [description of internal GE process].*"⁴⁴
- (107) Indeed, in October 2016, a member of the sales and marketing team of Project Vera already contemplated that the new turbine could be commercialised to launch customers in the first quarter of 2017: "*The objective here [...] is to get shortlisted and called to the table. The way to do that for the forthcoming set of client milestones is to present a compliant bid by end of this year, over November and December, via a competitive offering. This will be done with the available product offering we have [...]. [Description regarding timing and product development]*⁴⁵. *By then the client will have received enough confidence from [description regarding timing and product development]. We will then be in Q1 2017, the watershed that allows commercialisation of the Project Vera turbine*"⁴⁶ (emphasis added).
- (108) GE was active in the product development and commercial outreach operations with respect to Project Vera prior to notification. That continued development took place following what GE had described as a rejection from the [Company], in September 2016, to move forward with the development of a higher output offshore wind turbine, as described in recitals (123) to (136). The development of the project continued during the period leading up to the filing of the Original Form CO.
- (109) GE's internal documents dated after September 2016 demonstrate that the [Company's] rejection of the proposed way forward had minimal apparent effects on the progress of Project Vera. Indeed, prior to the submission of the Original Form CO, GE's so-called Integrated Program Schedule for Project Vera remained unchanged before and after the [Company's] rejection, in September,⁴⁷ October,⁴⁸ and November 2016.⁴⁹
- (110) Those monthly update documents present the progress and steps of the development of Project Vera and give a clear view on where it stood in terms of deliverables. The presentations between September and December illustrate that work on the project did not stop after the rejection and that continuous development progress was achieved during September,⁵⁰ October,⁵¹ November,⁵² and December 2016.⁵³
- (111) The documents show continuous work on the project as well as concrete achievements during the months following the presentation to the [Company] and what GE described as [its] decision to reject the project. The overall project schedule did not change after the [Company's] decision. GE continued to move forward with

⁴⁴ Explanatory Note, GE Reply to the request for information of 27 January 2017, dated 7 February 2017, page 6. (ID170-14)

⁴⁵ "BoP" stands for balance of plant which corresponds to the cost of infrastructures and facilities of a windfarm with the exception of the turbine, foundations, etc.

⁴⁶ [...], dated 17 October 2016, submitted as part of the Reply to the request for information of 27 January 2017. (ID173-415)

⁴⁷ [...] (ID 173-540).

⁴⁸ [...] (ID 170-3).

⁴⁹ [...] (ID 173-556).

⁵⁰ [...] (ID 173-540).

⁵¹ [...] (ID 170-3).

⁵² [...] (ID173-556).

⁵³ [...] (ID208).

the development of the higher output offshore wind turbine and its search for launch customers for that product.

- (112) This is further confirmed by documents produced by GE, which, in addition to the letters to customers submitted to the Commission in the reply to the request for information of 27 January 2017, show that between the September 2016 decision by the [Company], and before filing the Original Form CO, GE was actively engaging with potential launch customers.⁵⁴

5.2.3. *The context of the infringement*

- (113) As explained in recital (67), the submissions other than the Original Form CO made by GE do not form part of the infringement addressed by the present Decision.
- (114) However, they depict the context of the infringement that culminated in GE's statements in the Original Form CO. They also show that GE repeatedly provided the Commission with understatement concerning the status of development of Project Vera and, hence, that the submission in the Form CO could not be understood in any other way than that GE indeed had no concrete plans of a higher output turbine in development.

GE's submissions before the Original Notification

- (115) In view of the innovative nature of the offshore wind turbines market, the Commission considered it essential to understand not only GE's current product offering but also its pipeline products and those of its competitors.
- (116) GE made several submissions in the pre-notification phase of the Merger Review Proceedings (namely from beginning October 2016 until 10 January 2017) in response to the Commission's questions related to GE's product development plans, repeatedly and consistently downplaying their status.

October 7 Call

- (117) GE first provided its position with respect to its product development plans in the context of the Siemens/Gamesa Investigation. During the October 7 Call with the Commission, GE indicated that "[t]he decision on the further developments will be taken in the next 6-12 months, for the moment the company is not committed yet to any 10+MW projects as it wants to assess first the recently introduced 6MW turbine".⁵⁵

Draft Form COs submissions

- (118) As of end October 2016, GE submitted its First Draft Form CO. Each draft Form CO contained the same incorrect statements and, in particular, that GE "*does not currently have any higher power output offshore wind turbine platforms in development.*"⁵⁶
- (119) One day after submitting the Second Draft Form CO (that is to say on 18 November 2016), in an email to Commission representatives, GE's [counsel] re-emphasised that the product development process of a new generation offshore turbine was at an

⁵⁴ [Description of a communication from GE to a customer].

⁵⁵ Agreed minutes of a conference call with GE on 7 October 2016. The Commission repeatedly asked GE to submit the revised/confirmed minutes on 7 and 16 November 2016: Email from the case team to GE's counsel on 7 November 2016 (following to a phone conversation where the case team asked GE for the revised minutes); and email from the case team to GE's counsel on 16 November 2016.

⁵⁶ Draft Form CO, dated 31 October 2016, paragraph 520.

extremely early, embryonic stage: "*I understand we are not yet even at a feasibility study stage re a new generation of offshore turbines; current steps appear to be more modest than that.*"⁵⁷ (emphasis added)

The first request for information

- (120) Following these pre-notification submissions (recitals (117) to (119)) and with the aim of obtaining written confirmation, the Commission asked product development-related questions in its first request for information of 22 November 2016.
- (121) The relevance of those questions and answers for the competitive assessment of the market of offshore wind turbines was expressly underlined to GE in the body of the email sending the first request for information of 22 November 2016 as follows: "*As announced during our phone call yesterday, please find attached questions on GE's future development in the offshore market for wind turbines. In the interest of time, if the gathering of internal documents takes too much time, feel free to provide the rest of the answers in an advanced document. Also, we would like to emphasize this information is important for our investigation and we would greatly appreciate getting this as soon as possible*"⁵⁸ (emphasis added).

Question 1(a) of the first request for information

- (122) In that request the Commission first followed up on the information provided by GE in the October 7 Call and asked the following question (question 1(a) of the first request for information): "*[...] you explained that from "GE's side, there is no feasibility study for the moment for a 10MW turbine, it is just a concept with some basic characteristics (nameplate, rotor diameter, etc.) being frozen. [...] Please explain whether there are any feasibility studies, paper turbine, or prototype for a turbine ranging from 7 to 12MW output at GE*"⁵⁹ (emphasis added).
- (123) GE's [counsel] first replied to this question separately and advised Commission representatives that "*GE does not currently have any "feasibility studies, paper turbine, or prototype for a turbine ranging from 7 to 12MW output."* As stated, the possibility for a new offshore turbine is being discussed within GE (likely to be for 10+/12+ MW), however GE has not yet completed the early concept design phase and so far there is no internal approval to proceed."⁶⁰
- (124) In reply to question 1(a) of that first request, GE expressly stated that, with respect to Project Vera, "[a]n initial proposal to the [Company] was made by the GE Offshore

⁵⁷ Email from GE's counsel to the case team dated 18 November 2016.

⁵⁸ Email from the case team to GE's counsel dated 22 November 2016.

⁵⁹ First request for information sent to GE, dated 22 November 2016, question 1(a).

⁶⁰ Email from GE's counsel to members of the case team, dated 2 December 2016. It may also be useful to note that GE's economic advisors used, in a paper which GE submitted to the Commission, the information provided by GE to the Commission in the e-mail of 2 December 2016 mentioned in the previous paragraph to conclude that the GE/LM Transaction would not give rise to vertical input foreclosure: "*As recently confirmed to the Commission, GE does not have any feasibility studies, paper turbine, or prototype for a turbine ranging from 7 to 12 MW output*"; [GE's economic advisors], COMP/M.8283 – General Electric/LM Wind Power, Scope for post-merger input foreclosure, page 8. In this context, also their following remark can be noted: "*Specifically, in the offshore segment, the only hypothetical target of foreclosure beyond the very near future would be AdWen, with which LM Wind is engaged in a blade development programme. This blade is for an 8MW AdWen turbine, for which GE (which offers only 6 MW offshore turbines at this time) has no current or planned equivalent.*" (Emphasis added), dated 9 December 2016, page 3.

Wind business in September 2016. It was rejected. Work is now undertaken to explore whether [description of internal GE process]"⁶¹ (emphasis added).

- (125) GE explained that a proposal to develop a higher output offshore turbine was presented to the [Company], but that this was rejected.
- (126) GE also stated that "*work is now undertaken to explore [description of internal GE process],⁶² to revert to the [Company] in order to gain approval to proceed. The wording used by GE suggested the uncertainty of these development plans.*

Question 1(b) of the first request for information

- (127) By question 1(b) the Commission asked GE to "*please confirm there is no project for new product in GE's pipeline above its 6MW turbine for offshore applications that would go further than the basic characteristics described in the above quote.*"⁶³
- (128) GE replied that "*[t]he 6MW wind turbine is the only current product of the GE Renewable Offshore Wind business. The process of exploring the potential for a next generation product has been described above. There is an overall schedule outlined for the time after a concept design expected mid-2017 which also includes an initial estimate for R&D and Prototype costs as well as the required manufacturing infrastructure. [Description of internal GE process] has not been concluded at this time*"⁶⁴ (emphasis added).
- (129) GE thereby referred to its reply to question 1(a) of the first request for information (see recitals (122) to (126)) where different stages were described. However, while that previous reply mentions that GE is "*assessing its options*", it also repeatedly states that the [Company] rejected the development project and that there was no approval to move forward. As per GE's own words, the status of its development plans were thus pictured as very broad and undefined, which was also in accordance with GE's previous submissions.
- (130) This was in particular in line with the contemporaneous draft Form COs submitted by GE that established Project Vera as not responsive to sections on pipeline products to be marketed in the next three to five years.

Question 3 of the first request for information

- (131) Finally, in question 3 the Commission asked GE to "*provide internal documents from GE explaining its (potential) strategy(ies) of development in the offshore wind turbine market, especially through the development of a new turbine ranging from 7 to 12MW (both power output included).*" This question was designed to capture all relevant internal documents indicating any form of current development of a higher power output wind turbine and its status.
- (132) GE replied to this question by providing four internal documents, all of which dated from or before September 2016, when the [Company], according to GE, rejected the project going forward.
- (133) The most complete of those documents was "Annex 4", which was also the oldest. It consisted of a presentation dated [date of document] summarising GE's general product development process, [description of internal GE process].⁶⁵ This document

⁶¹ GE Reply to first request for information, 12 December 2016, Question 1(a).

⁶² GE Reply to first request for information, 12 December 2016, Question 1(a).

⁶³ First request for information sent to GE, dated 22 November 2016, question 1(b).

⁶⁴ GE Reply to first request for information, 12 December 2016, Question 1(b).

⁶⁵ GE Reply to first request for information, 12 December 2016, Confidential Annex 4.

also lays out the marketing and communications strategy and timeline for the new offshore platform, which suggests *inter alia* that GE planned to engage with customers in 2017, and possibly as early as the second half of 2016.

- (134) The document also described the work done to date with regard to a new higher output offshore wind platform. For example, GE already noted at that stage that "[customer name] *are keen to be involved in the design process*" and that "[a]lternative launch partners are being evaluated". GE proposed to "[b]uild upon current collaboration agreement with [customer name]" and to "approach [customer name] during Q3 [2016] to secure launch customer agreement, before [internal GE process]".⁶⁶
- (135) However, that document, along with the three others, could not be considered as accurately describing the status of development of Project Vera at the time it was submitted. This is because [...] documents submitted pre-dated the [Company's] rejection, and the reply to the first request for information accompanying these documents explained that "[g]iven that the plan was rejected, the document is not current any longer and included for illustration purposes" (emphasis added). This statement was specifically referring to Annex 4.
- (136) In view of the submissions and explanations provided by GE, the Commission concluded that the - according to GE - rejection of the [Company] had altered the development plans presented in September 2016, to the point that the documents submitted were outdated and the timelines included therein were no longer valid.

GE's submissions after the Original Notification

- (137) Representatives of GE engaged with the Commission on several occasions following GE's submission of the Original Form CO (from 11 January 2017 onwards).

16 January Letter

- (138) On 16 January 2017, the [counsel] of GE sent a letter to the Commission, in reply to a question raised during a phone conversation between GE and the Commission. The Commission had asked GE to submit a foreclosure analysis considering a potential future scenario where GE would develop a higher output offshore turbine and how that would alter its incentives to foreclose GE's competitors on the downstream market for offshore wind turbines in the long term. The letter largely reconfirmed GE's prior submissions with regard to project development.⁶⁷ In the body of the letter, GE's [counsel] advised that "*GE's Offshore Wind business is hopeful that it could introduce technology that would allow it to remain in this market and compete successfully in the future. However, GE does not currently have any feasibility studies, paper turbine, or prototype for a larger offshore turbine. Any new wind turbine development initiated in the industry currently is understood to be for turbines with a size of 10-12MW (e.g. Siemens has revealed plans for a >10MW platform).*"⁶⁸

⁶⁶ GE Reply to first request for information, 12 December 2016, Confidential Annex 4, slide 22.

⁶⁷ Letter from GE's counsel to the case team, dated 16 January 2017.

⁶⁸ Letter from GE's counsel to the case team, dated 16 January 2017.

- (139) In order to assess the eventual scenario of GE having a higher output turbine, the letter mentioned a "*hypothetical 10-12MW*" turbine, which seemed to indicate that GE had not yet even decided on the output.⁶⁹
- (140) Considering that almost one month earlier GE had already reached out to customers offering a 12MW turbine with a rotor of 220m diameter, the description of the specificities of its future product offering to the Commission was unnecessarily evasive and vague.
- (141) GE's [counsel] added that "[description of status of GE's development project]."⁷⁰ That statement further confirmed the Commission's previous understanding (based on the statements included in the Original Form CO) that GE did not have any concrete development project of a higher output offshore turbine.

GE Submission of 20 January 2017

- (142) Four days later, the Commission received GE's submission of 20 January 2017. In that submission, the [counsel] for GE advised that "[a] *call for proposals was issued by the [public entity providing the funding] in November 2015, covering among other projects to develop a prototype for a new large offshore turbine of 7MW or more. GE submitted a proposal to develop a +10MW offshore wind turbine prototype.*"⁷¹ (emphasis added). The [counsel] for GE attached a letter from the [public entity awarding the funding] confirming the funding award, of an amount of EUR [amount] million.
- (143) The letter from the [public entity providing the funding] to GE confirming the funding award is dated 19 December 2016 – that is, before GE submitted the Original Form CO. There was however no mention of this application for funding in the Original Form CO. In addition, no documents in relation to this application for research and development funding were submitted to the Commission in response to the first request for information or at any time during the Merger Review Proceedings prior to the GE Submission of 20 January 2017.
- (144) GE's [counsel] explained in that Submission, that the funding was still "*a small share of the overall funding GE will need to successfully take the project forward to commercialisation. Total project costs are estimated at [EUR 100-250 million] at least*".⁷² GE's [counsel] also explained that the funding was conditioned on GE concluding a contract with the [public entity providing the funding] which it had not yet received.

5.2.4. *GE's arguments*

- (145) It should be noted that GE "*freely admitted [...] that the Original Form CO filed in January 2017 was in limited respects inaccurate in terms of the clarity and level of detail that was provided on the advancement of a single pipeline project: the higher output offshore wind NPI*"⁷³.⁷⁴

⁶⁹ Letter from GE's counsel to the case team, dated 16 January 2017. In a footnote, it was reiterated that "[t]he possibility for a new offshore turbine is being discussed within GE for 10+/12+ MW, however GE has not yet completed the early concept design phase and so far there is no internal approval to proceed. An initial proposal to the [Company] was presented in September 2016 but was not approved. Work is now undertaken to explore whether [description of internal GE process]." (emphasis added).

⁷⁰ Letter from GE's counsel to the case team, dated 16 January 2017, footnote 5.

⁷¹ Email from GE's counsel to the case team, dated 20 January 2017.

⁷² Email from GE's counsel to the case team, dated 20 January 2017.

⁷³ "NPI" stands for New Product Introduction.

- (146) GE explained in its reply to the SO that the incorrect information on Project Vera constitutes "*minor inaccuracies*". GE considers the submission of incorrect information to be at least understandable and of a technical nature.⁷⁵
- (147) In its reply, GE argues that it did not mislead the Commission about [the Company's] non-approval of Project Vera, because:
- (a) GE's explanations did not imply Project Vera had been disrupted completely;
 - (b) the reply to the first request for information showed the proposal [description of internal GE decision and process];
 - (c) GE had explained they were now [description of internal GE process];
 - (d) GE believed the Commission had understood the status of Project Vera and the Commission should have asked further questions or accepted the offer of GE to have another meeting.

5.2.5. *The Commission's assessment of GE's arguments*

- (148) The Commission considers that GE's arguments concerning the pre-notification submissions, which, as indicated, do not form part of the infringement but simply provide the context of the latter, have to be rejected for the following reasons.
- (149) Contrary to GE's argument, the pre-notification contacts with the Commission did not correctly depict the status of development of Project Vera. Rather, those pre-notification contacts illustrate the understatement concerning the status of development of Project Vera by GE. The submissions made by GE presented Project Vera's early development, but qualified it as having been rejected in September 2016 by the [Company].
- (150) *First*, contrary to GE's arguments, the reply to the first request for information does not clearly state that the [description of internal GE decision and process].
- (151) *Second*, GE argues that it had explained that it was exploring whether an "[description of internal GE process]." That statement is vague and implies uncertainty. It does not reflect the actual development plans and marketing which were taking place. Therefore, it cannot be accepted as accurately describing the development of Project Vera. It is also in contrast with the explanation provided later in the reply to the request for information of 31 January 2017 (see recital (104)) stating that the business had received a "[description of internal GE process]."⁷⁶
- (152) *Third*, the rejection of the project by the [Company] in September 2016 is emphasised and repeated five times in GE's reply to the two questions of the first request for information related to product development.⁷⁷ Furthermore, no document showing the continued development of the project after the rejection date was submitted.
- (153) GE claims that the Commission should have asked for further information in case of doubt. However, the Commission explicitly requested information on the development status through various means during pre-notification. For instance, in

⁷⁴ Reply to the SO, paragraph 6.

⁷⁵ Reply to the SO, paragraphs 3, 6 and 19.

⁷⁶ Explanatory Note, GE Response to RFI 8, dated 7 February 2017, page 6. (ID170-14)

⁷⁷ First request of information sent to GE, dated 22 November 2016, contained 3 questions. Questions 1 and 3 related to product development, question 2 related to confidentiality claims with regard to the conference call of 7 October 2016.

the October 7 Call, followed by agreed minutes, the question of GE's pipeline products was raised. The Commission followed up on these minutes, for clarification purposes and to ask for internal documents, with its first request for information. The Commission reminded GE of the importance of that information for its investigation while also repeatedly asking for the submission of those internal documents.⁷⁸ Furthermore, it should be remembered that the burden to provide correct information in the Form CO lies with the Notifying Party, that is to say GE. The Commission could not be expected to have to extract R&D information from GE that should have been in the Form CO in the first place.

- (154) As a result, in view of the repeated requests from the Commission and considering that the importance of the information was explicitly pointed out to GE, it should have known that the information pertaining to its development project was relevant and needed to be mentioned in the Original Form CO.
- (155) For these reasons, the Commission also considers that the provision of incorrect information in the Original Form CO according to which GE did not have at that time any higher power output offshore wind turbine platforms in development, cannot amount to a clerical error.
- (156) As indicated, the incorrect information was repeated throughout the Original Form CO, including Section 8, and is consistent with GE's incorrect information provided during the pre-notification stage.

5.2.6. *Conclusion*

- (157) Project Vera was responsive to Section 8 of the Form CO. The fact that it was excluded from GE's Original Form CO, and that as a result GE provided the Commission with a description of GE's pipeline products that was incorrect, constitutes a breach of GE's obligation to submit correct information.
- (158) The Commission concludes that GE submitted incorrect information in its notification of the Original Form CO in the GE/LM Investigation.
- (159) Furthermore, GE's arguments that the pre-notification contacts had accurately described the status of development of Project Vera have to be rejected.

5.3. **GE negligently submitted incorrect information**

- (160) The Commission considers that GE acted negligently in submitting incorrect information in the notification of the GE/LM Transaction.
- (161) As explained in Section 5.2.2 of this Decision, GE failed to provide accurate information when replying to sections 8.7 and 8.9 of the Original Form CO, which explicitly relate to innovation and product development. Instead, GE described at length the pipeline products of its competitors to be released within the same timeframe (or beyond) as Project Vera, while it limited the information on its own pipeline products to explaining that no 8MW turbine was in development.

5.3.1. *GE's arguments*

- (162) GE submits that the errors in the Original Form CO were not intentional, but inadvertent and explicable in the circumstances. GE argues that it did not have the intention of misleading the Commission.

⁷⁸ Email from the case team to GE's counsel, dated 22 November 2016.

(163) GE submits that it actively cooperated with the Commission throughout the Merger Review Proceedings, including by sending on 16 January 2017 a letter concerning a foreclosure analysis based on the hypothetical scenario that GE would develop a new offshore turbine.

5.3.2. *The Commission's assessment of GE's arguments*

(164) The Commission considers that GE acted negligently in providing incorrect information with regard to its pipeline products for the following reasons.

(165) *First*, sections 8.7 and 8.9 are standard sections in the Form CO and are self-explanatory. The questions asked in those sections are explicit and applicable to every merger notification. Moreover, GE has extensive experience with EU merger proceedings and is familiar with the standards required in a Form CO. GE notified several transactions to the Commission, including transactions involving the detailed assessment of pipeline products and development projects.⁷⁹

(166) *Second*, GE extensively described its competitors' pipeline products as well as its reasoning regarding the development, or lack thereof, of an 8MW turbine. In doing so, GE showed good understanding of the purpose and meaning of Sections 8.7 and 8.9 of the Form CO.

(167) *Third*, as described in Section 5.2.3, the Commission repeatedly asked GE for clarity as to its development plans but the replies were always consistent in that, allegedly, there were no concrete development plans.

(168) *Fourth*, GE should have known that the information requested was important in determining GE's potential ability and incentive to foreclose downstream rivals by withholding LM blades post-transaction and therefore that it was relevant for taking a decision on the GE/LM Transaction. The Commission explicitly insisted on its relevance in its first request for information. In addition, as an active market player, GE should have known about the importance of innovation to compete on the market for offshore turbines. This is notwithstanding the fact that the incorrect information concerned the very core of the market assessed, given that it related to information about the development of an offshore wind turbine, on the market for offshore wind turbines.

(169) *Finally*, GE had been explicitly informed about the importance of supplying information that was correct and not misleading, and warned about the possibility of fines. By signing the final Form CO, GE's [counsel], on behalf of GE, declared that, to the best of [their] knowledge and belief, the information given in the notification was true, correct, and complete and that [they were] aware of the provisions of Article 14(1)(a) of the Merger Regulation.⁸⁰ It follows that GE was aware of its obligations under the Merger Regulation and of the consequences attached.

(170) In light of all these points, the Commission concludes that the incorrect information was submitted as a result of conduct which was negligent on the part of GE.

5.3.3. *Conclusion on the negligent nature of GE's submission of incorrect information*

(171) For the reasons set out in Section 5.3, the Commission concludes that GE acted negligently in submitting incorrect information in the notification of the GE/LM Transaction.

⁷⁹ See for example Case COMP/M.7278 - GE/Alstom.

⁸⁰ The final Form CO submitted on 11 January 2017, including Section 11, was signed on behalf of the Notifying Party by GE's [counsel].

5.4. Conclusion

(172) To conclude, the Commission considers that GE negligently submitted incorrect information pursuant to Article 4 of the Merger Regulation in the Form CO of the GE/LM Transaction with respect to its development plans of a higher output offshore wind turbine, in violation of Article 4(1) of the Implementing Regulation.

6. DECISION TO IMPOSE FINES

(173) Article 14(1) of the Merger Regulation provides that in the case of intentional or negligent conduct of a kind described in points (a) to (f) of that Article, the Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, fines not exceeding 1% of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5. In this regard, the Commission notes that GE's 2018 turnover amounted to EUR 102.976 billion.⁸¹

(174) The Commission notes that, under Article 1 of Council Regulation (EEC) No 2988/74,⁸² in the case of infringements of provisions concerning notifications of undertakings or associations of undertakings or requests for information, the limitation period for the Commission to pursue an infringement is three years. Furthermore, Article 2 of that Regulation provides that any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement interrupts the limitation period in proceedings. The infringement in this case took place on 11 January 2017 (when the Original Form CO was notified), that is to say less than three years before the date of adoption of this Decision. Therefore, the infringement identified in this Decision is not time-barred and fines can be imposed.

(175) As regards the appropriate level of the fines to be imposed on GE, Article 14(3) of the Merger Regulation provides that in fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement. Each of these elements is assessed in turn in the following.

6.1. The nature of the infringement

(176) The Commission considers that the infringement committed by GE, an undertaking in the sense of Article 14(1) of the Merger Regulation, is of a serious nature.

(177) The obligation to provide information that is correct and not misleading in a merger investigation is essential for the Commission to be able to review mergers effectively. A notification form is an essential source of information for the Commission and is the starting point for its investigation. Therefore, the provision of incorrect information in a notification form is in itself a serious infringement because it prevents the Commission from having information necessary to assess a transaction. Under the tight deadlines of a merger investigation, it is particularly

⁸¹ According to its 2018 annual report (available at: https://www.ge.com/investor-relations/sites/default/files/GE_AR18.pdf, page 3, last downloaded on 18 March 2019), GE's 2018 turnover amounted to USD 121.615 billion, equal to EUR 102.976 billion (conversion using the average ECB exchange rate during 2018, namely 1 EUR = USD 1.1810, see https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-usd.en.html).

⁸² Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).

important that the Commission can rely on the accuracy of the information provided, in particular by the Notifying Party.⁸³ This principle is also set out in the preamble to the Implementing Regulation, which states in recital 5 that it "*is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration.*"

(178) The Commission considers that the infringement committed by GE is serious.

6.2. The gravity of the infringement

6.2.1. The Commission's view

(179) With regard to the gravity of the infringement committed by GE, the Commission considers the following.

(180) *First*, and as explained in detail in Section 5.3, the Commission considers that GE negligently provided the incorrect information.

(181) Contrary to GE's claims and as explained in detail in Section 5.2.2, the incorrect information provided in the Original Form CO was not "*purely formal in nature.*"⁸⁴ The Commission does not dispute the fact that GE mentioned its development plans on various occasions, and in particular in the October 7 Call, in the draft Form COs, in reply to the first request for information and in the letter of 16 January 2017. However, and as explained in detail in Section 5.2.3, GE provided the Commission with understatements concerning the status of development of Project Vera, which culminated in the provision of incorrect information in the Original Form CO. The incorrect information had the effect of preventing the Commission from correctly assessing the competitive landscape on the market for offshore wind turbines, by downplaying GE's competitiveness.

(182) *Second*, the Commission stresses that the incorrect information relates to development projects of GE.

(183) Given its in-depth knowledge of the wind turbine markets, and especially the dynamism of the offshore market, GE should have been aware of the importance for the Commission's assessment of the transaction of providing correct information with regard to any development project it might have had. Furthermore, the Commission's requests for information in both the GE/LM Investigation and the Siemens/Gamesa Investigation, running in parallel, made it very clear that this information was important for the Commission to understand the competitive landscape of the affected markets. Indeed, despite GE's repetitive answers consistently understating the stage of its development project, the Commission had a strong focus on this topic and sought to acquire this information through many different means, using all of its investigative powers (see Section 3). The incorrect information submitted concerned the very core product subject to investigation, namely offshore wind turbines.

⁸³ As regards the provision of incorrect or misleading information in the notification form, see Cases No. M.2624 - *BP/Erdölchemie*, Commission's decision of 19 June 2002, recital 48 and M.3255 - *Tetra Laval/Sidel*, Commission's decision of 7 July 2004, recital 108.

See also recital 38 of the Merger Regulation stating that, "[i]n order properly to appraise concentrations, the Commission should have the right to request all necessary information." Such power would be meaningless if the information received by the Commission could be incorrect or misleading.

⁸⁴ Reply to the SO, paragraph 128.

- (184) The Commission further notes that the Parties to a concentration have a very high responsibility of diligently providing accurate and complete information with regard to section 8.9 on R&D, given that, due to the secret nature and sensitivity of pipeline products, the only way for the Commission to obtain this information is often from the Parties themselves.
- (185) The fact that in the current proceedings the Commission was actually informed by a customer is coincidental, and only evidences the advanced and determined process of GE's development plans as compared with the picture described by GE to the Commission. However, the fact that the Commission eventually found out about the actual status of GE's development project cannot be invoked by GE for dismissing its responsibility of providing correct and complete information in the Form CO.
- (186) *Third*, GE did not at any point reveal the actual status of its pipeline project. The Commission found out from a statement of a customer that it had been provided incorrect information by GE. Based on the incorrect information of the Original Form CO and the understatements concerning the status of development of Project Vera by GE in the pre-notification, the Commission would likely not have been able to reach that conclusion without that unsolicited intervention from a third party.
- (187) *Finally*, the Commission considers that although the outcome of the GE/LM Investigation remained unchanged, the competitive assessment would have been inaccurate without the relevant information.

6.2.2. *GE's arguments*

- (188) GE submits that the gravity of the infringement is at the lowest end of the scale as:
- (a) GE had already informed the Commission about its development plans prior to the submission of the Revised Form CO;
 - (b) GE did not mislead the Commission and the Commission had no cause to be misled by its submission;
 - (c) the provision of the incorrect or misleading information was inadvertent and explicable by the circumstances;
 - (d) the incorrect or misleading information had no impact on the GE/LM Transaction;
 - (e) the incorrect or misleading information regarding its development plans constituted only a minor element of the GE/LM Transaction.⁸⁵

6.2.3. *The Commission's assessment*

- (189) *First*, the Commission again emphasises that the infringement consisted in the provision of incorrect information in the formal notification; any additional information provided by GE outside of the context of the Original Form CO does not result in compliance with Article 14(1)(a) of the Merger Regulation. Furthermore, as discussed in detail in Section 5.2.3, the Commission takes the view that the additional information provided by GE before the Original Form CO constituted understatements as far as the stage of development of its new offshore turbine was concerned. The earlier submissions had the effect of preventing the Commission from detecting that the information included in the Original Form CO was incorrect.

⁸⁵ Reply to the SO, paragraphs 127-130.

- (190) *Second*, and as discussed in detail in Section 5.3, the provision of incorrect information cannot be considered as an error which was "*inadvertent and explicable in the circumstances*",⁸⁶ but is a serious breach of the obligation under Article 14(1)(a) of the Merger Regulation.
- (191) *Third*, with regard to the alleged lack of any impact of the submission of the incorrect information, the Commission firstly considers, in line with its previous decisional practice,⁸⁷ that the information requirements set out in the Form CO, which Article 14(1)(a) of the Merger Regulation serves to protect and enforce, do not differentiate according to the likely outcome of the competition analysis. As in the *BP/Erdölchemie* case, the mere fact that the complete information which was provided by GE with the Revised Form CO did not lead to, for example, the necessity of providing remedies, does not mean that no infringement of Article 14 of the Merger Regulation occurred in the first place.
- (192) Finally, the infringement, had it not been detected and corrected, would have had an impact on the content and reasoning of the assessment of the GE/LM Investigation even though the outcome would have been the same. In the present context, the information omitted was important in determining GE's potential ability and incentive to foreclose downstream rivals by withholding LM blades post-Transaction. Therefore, it was relevant for taking a decision on the GE/LM proposed concentration. In addition, the gravity of the infringement depends on the importance of the information for the investigation and assessment, regardless of the final outcome of this assessment.

6.2.4. *Conclusion*

- (193) Based on Section 6.2, the Commission considers with regard to the gravity of the infringement committed by GE the elements referred to in Section 6.2.1.

6.3. The duration of the infringement

- (194) In line with its practice,⁸⁸ the Commission considers that the submission of incorrect information is by its nature an instantaneous infringement, which is committed at the very moment the incorrect information is submitted.
- (195) In this case, the Commission considers that GE committed the infringement on 11 January 2017, when the Original Form CO was formally notified.⁸⁹

6.4. Mitigating circumstances

6.4.1. *The Commission's view*

- (196) The Commission considers that there are no mitigating factors to be taken into account in the present case.

⁸⁶ Reply to the SO, paragraph 128.

⁸⁷ Case M.2624 – *BP/Erdölchemie*, paragraphs 51-52.

⁸⁸ See Cases M.8228 – *Facebook/Whatsapp*, Commission's decision of 17 May 2017, M.1543 - *Sanofi/Synthelabo*, Commission's decision of 28 July 1999, M.1608 - *KLM/Martinair*, Commission's decision of 14 December 1999, M.1610 - *Deutsche Post/Trans-O-Flex*, Commission's decision of 14 December 1999, M.2624 - *BP/Erdölchemie*, Commission's decision of 19 June 2002, M.3255 - *Tetra Laval/Sidel*, Commission's decision of 7 July 2004.

⁸⁹ GE acknowledges the Commission's position that the infringement was instantaneous (reply to the SO, paragraph 131).

6.4.2. *GE's view*

(197) GE submits that the fact that it retained and relied upon [counsel], as well as its "*genuine and proactive cooperation*" should be taken into account as mitigating factors.⁹⁰

6.4.3. *The Commission's assessment*

(198) As a preliminary comment, the fact that GE employed [counsel] does not constitute a mitigating factor.

(199) Under Article 14(1)(a) of the Merger Regulation, it is the obligation of the undertaking to provide correct and not misleading information in the notification and therefore GE is liable for the infringement.⁹¹ Based on the decisional practice of the Court, "[a]n undertaking may not escape imposition of a fine where the infringement of the competition rules has resulted from that undertaking erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer."⁹² Furthermore, as already discussed in recital (165), GE is a sophisticated company with extensive experience with merger control proceedings, and therefore should have been aware of the amount and clarity of information required in the notification.

(200) As for the cooperation of GE throughout the Merger Review Proceedings, the Commission notes the following.

(201) *First*, the Commission emphasises that it is an obligation under the Merger Regulation to provide correct and not misleading information in the notification, as well as in reply to requests for information. Therefore, the fact that for instance GE "*frankly accepted responsibility for the inadvertent errors contained in the Original Form CO*" cannot be taken into account as a mitigating factor.⁹³

(202) Furthermore, as explained in detail in Section 5.2.3 and contrary to GE's claim that it had previously submitted the relevant information to the Commission,⁹⁴ the Commission considers that the information provided by GE outside the scope of the Original Form CO constituted understatements as far as the status of development of Project Vera is concerned. In addition, the Commission considers that offering an additional meeting⁹⁵ does not exempt GE from its procedural obligation of providing correct and not misleading information.

⁹⁰ Reply to the SO, paragraph 133.

⁹¹ A comparison can be drawn with the provisions of Article 11(4) of the Merger Regulation that states with regard to requests for information that "[p]ersons duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading."

⁹² Judgement of 26 October 2017, *Marine Harvest v Commission*, T-704/14, EU:T:2017:753, paragraph 238. See also, Case T-138/07, *Schindler Holding Ltd and Others v European Commission*, paragraph 22: "[t]he adoption, by an undertaking that has infringed the EU competition rules, of a compliance programme does not oblige the Commission to grant a reduction in the fine on that account. Moreover, whilst it is important that an undertaking take steps to prevent fresh infringements of EU competition law from being committed in the future by members of its staff, the taking of such steps does not alter the fact that an infringement has been committed. The Commission is not, therefore, bound to consider such a factor as a mitigating circumstance, all the more so when the infringements found in the contested decision are a clear infringement of Article 81 EC." (emphasis added).

⁹³ Reply to the SO, paragraph 88, see also GE's submission on 23 August 2017, paragraphs 10-13.

⁹⁴ Reply to the SO, paragraph 88.

⁹⁵ Reply to the SO, paragraph 88.

- (203) Therefore, although not disputing that GE had mentioned certain aspects of its development plans on several occasions, the Commission considers that GE did not assist the Commission in establishing the accurate status of its development plans, despite the Commission's repeated efforts to acquire the relevant information. Indeed, it was thanks to a third party intervention that the Commission discovered the accurate stage of the development project of GE.
- (204) *Second*, the Commission notes that GE has not disputed the importance of the information requested by the Commission and has "*frankly admitted responsibility for the inadvertent errors contained in the Original Form CO*".⁹⁶ Whilst the GE/LM Transaction gave rise only to two vertically affected markets,⁹⁷ the incorrect information related to the core of the downstream market, namely the manufacturing of offshore wind turbines, and in particular to research and development plans, to which separate sections are dedicated in the notification.
- (205) It should moreover be noted that due to the instantaneous nature of the infringement and its immediate impact (see Section 6.2.3), such acceptance of responsibility on GE's part did not prevent or resolve the impact caused by the provision of incorrect information.
- (206) *Third*, after the State of Play meeting of 1 February 2017, GE withdrew its notification on 2 February 2017 and then promptly refiled the concentration, on 13 February 2017 (see also Section 3). Contrary to GE's argument that this proves GE's genuine and proactive cooperation,⁹⁸ the Commission considers that the withdrawal of the notification could be *inter alia* the result of the fact that the Commission informed GE at the said State of Play meeting on 1 February 2017 that it would consider the possibility of opening an infringement investigation against it for its submission of incorrect or misleading information in the notification of the GE/LM Transaction.
- (207) With regard to the speedy re-filing of the concentration, the Commission again emphasises that the procedural infringement in this case is instantaneous and therefore duration is not a relevant factor. Moreover, GE's decision to quickly re-file the notification does not alleviate it from its procedural obligations. Additionally, a prompt re-filing is rather in line with the Notifying Party's own interest in obtaining a timely final decision from the Commission so as to allow the closing of the Transaction.
- (208) *Fourth*, as to GE's statement that it [description of GE's actions] and apologised to the Commission,⁹⁹ the Commission takes the view that such measures may help prevent future infringements but cannot be taken into account as mitigating factors. Indeed, they do not have any positive impact on the infringement committed in the Original Form CO, nor on the Current Proceedings.

⁹⁶ Reply to the SO, paragraph 88.

⁹⁷ In Case M.2624 – *BP/Erdölchemie*, the Commission took into account as an attenuating circumstance that Deutsche BP did not dispute the facts discovered by the Commission and agreed that the relevant information should have been included in the Form CO (paragraph 54). However, and quite contrary to the GE/LM Transaction, the BP/Erdölchemie transaction affected a large number of different products which had to be discussed in the notification, and the incorrect or misleading information related to only one of them (paragraph 41).

⁹⁸ Reply to the SO paragraph 88.

⁹⁹ GE's submission on 12 July 2017, Section 2(i)(iii)-(v).

(209) Therefore, the Commission considers that no mitigating factors can be considered in the Current Proceedings.

6.5. Aggravating circumstances

(210) The Commission has not identified any aggravating circumstances in the Current Proceedings.¹⁰⁰

6.6. Liability

(211) The Commission considers that GE (and not the Target) is liable for the negligent submission of incorrect information to the Commission for the following reasons.

(212) *First*, the notification of the Transaction was prepared and submitted by GE and the declaration at the end of the Original Form CO was signed by GE's [counsel] on behalf of GE.

(213) *Second*, the relevant information in the Merger Review proceedings was in any case in GE's sphere.

6.7. Conclusion

(214) The Commission therefore considers that GE negligently infringed Article 14(1)(a) of the Merger Regulation by providing incorrect information in the Original Form CO of the GE/LM Transaction.

(215) This infringement is serious in nature, in particular because it relates to research and development plans of GE, which were important to assess its competitiveness, and in view of the impact on the content and reasoning of the assessment of the GE/LM Investigation the incorrect information would have had had it not being detected. The infringement was instantaneous and was committed by GE on 11 January 2017.

7. PROCEDURAL RIGHTS

(216) GE argues that the Commission infringed its right to be heard and that the Commission's case team was not impartial.

Right to be heard

(217) GE argues that, in the course of the cooperation procedure it should have been heard before the College of Commissioners approved the fine amount and reduction on which the cooperation would be based. Moreover, GE submits that the fact that the College of Commissioners already approved an amount of fine in the context of the cooperation procedure will taint their thinking when it comes to deciding on the final fine.

(218) The Commission considers that GE's argument with regard to the right to be heard has to be rejected.

(219) *First*, the decision of the College of Commissioners on the fine range only concerned the scenario in which GE would have chosen to accept the cooperation offer. In order to give GE the option to accept or refuse a cooperation procedure, it needed to be aware of the full consequences, including the preliminary objections raised by the Commission that it would have to accept and the fine that would be imposed on it.

¹⁰⁰ GE agrees that there are no aggravating factors to be taken into account (Reply to the SO, paragraph 132).

For that matter, the College of Commissioners needed to approve a fine pursuant to that hypothetical scenario that GE would accept the cooperation procedure.

- (220) If GE had chosen this scenario, GE's fundamental right to be heard would have been respected given that GE had received the Statement of Objections, it was informed of the conditions of the cooperation procedure, and it would have freely decided to accept the cooperation offer.
- (221) GE's decision not to enter into a cooperation procedure reverted the case to a standard procedure where GE could submit a full reply to the Statement of Objections, which it did, and benefit from an oral hearing in front of the Hearing Officer, which it declined. In line with the case law of the Court of Justice, GE thus has in no way been legally harmed in the procedure.¹⁰¹
- (222) *Second*, there is no link between the fine and reduction offered in the course of the cooperation procedure and the fine in the course of the standard procedure. The decision of the College of Commissioners only concerned the case of a cooperation procedure. As GE refused the cooperation procedure, the case reverted to a standard procedure and the decision of the College in the former procedure is no longer applicable.
- (223) The case law of the General Court established that "*the range [of the fine] notified during the settlement procedure is irrelevant, since it is an instrument specific to that procedure. It would therefore be illogical, and even inappropriate [...], that the Commission be required to apply, or to refer to, a range of fines falling within the scope of another procedure now abandoned.*"¹⁰² The College of Commissioners' mandate was only valid for the cooperation procedure that GE rejected. Consistent with the case law, the situation after GE's rejection of that procedure was that of a "*tabula rasa*",¹⁰³ where the fine would be decided through a new procedure after receiving GE's comments on the Statement of Objections.
- (224) Therefore, GE's argument on the interaction between the communicated range of fines for the cooperation procedure and a possible fine in the standard procedure, cannot be accepted.

No lack of impartiality

- (225) GE argues that the assignment of the same case team for the substantive case and the infringement case has given rise to a conflict of interest as the case team is supposed to judge the diligence of its own conduct.
- (226) The Commission considers that GE's argument with regard to a conflict of interest has to be rejected.
- (227) The retention of the same case team serves efficiency goals, as it is instrumental in retaining knowledge of the case and thus speeds up the administrative process, which is also to the benefit of GE.
- (228) Moreover, different individuals with the Directorate General for Competition, as well as other services of the Commission are consulted, review, decide, and actually lead the decision-making process, throughout the numerous internal procedural steps, for such cases.

¹⁰¹ See by analogy, Case C-411/15 - Timab Industries et CFPR / Commission, paragraph 121.

¹⁰² T-456/10 - Timab Industries et CFPR / Commission, paragraph 105.

¹⁰³ T-456/10 - Timab Industries et CFPR / Commission, paragraph 104.

- (229) The case team is also not acting independently from the Commission's internal checks and balances. In addition, the final decision is taken by the College of Commissioners.
- (230) Consequently, any hypothetical impropriety or bias of the case team would in any case not affect the final assessment of GE's behaviour and the decision on the infringement.

8. AMOUNT OF THE FINES

- (231) When imposing penalties under Article 14 of the Merger Regulation, the Commission takes into account the need to ensure that fines have a sufficiently punishing and deterring effect.
- (232) When calculating the fine, the Commission has also taken into consideration the arguments set forth by GE with regard to proportionality, notably the value of the Transaction as well as the turnover of the relevant business in relation to the aggregate turnover of GE.¹⁰⁴ Therefore, in order to impose a sufficient penalty for the infringement and deter any recurrence of it, and given the specific circumstances of this case, the Commission considers it appropriate to impose a fine under Article 14(1) of the Merger Regulation of EUR 52 000 000 for the infringement falling within Article 14(1)(a) of the Merger Regulation and Article 4(1) of the Implementing Regulation,

HAS ADOPTED THIS DECISION:

Article 1

General Electric Company negligently submitted incorrect information in the notification of 11 January 2017 made pursuant to Article 4 of Regulation (EC) No 139/2004 in Case M.8283 – *General Electric Company/LM Wind Power Holding* in violation of Article 4(1) of Regulation (EC) 802/2004.

Article 2

A fine of EUR 52 000 000 is imposed on General Electric Company pursuant to Article 14(1)(a) of Regulation (EC) No 139/2004 for the infringement referred to in Article 1 of this Decision.

The fine shall be credited, in euro, within three months of the date of notification of this Decision to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI/M.8436

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

¹⁰⁴ Reply to the SO, paragraphs 134-141.

Where General Electric Company lodges an appeal, it shall cover the fine by the due date either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council.¹⁰⁵

Article 3

This Decision is addressed to:

General Electric Company
41 Farnsworth Street
Boston, Massachusetts – 02210
United States of America

This Decision shall be enforceable pursuant to Article 299 of the Treaty.

Done at Brussels, 8.4.2019

For the Commission

(Signed)
Margrethe VESTAGER
Member of the Commission

¹⁰⁵ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 80).