



EUROPEAN COMMISSION

DG Competition

***Case M.8870 – E.ON / INNOGY***

Only the English text is available and authentic.

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

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Decision on the implementation of the commitments -  
Purchaser approval

Date: 12/08/2020



Brussels, 12.8.2020  
C(2020) 5654 final

**PUBLIC VERSION**

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

**To the notifying party**

Dear Sir/Madam,

**Subject: Case M.8870 – E.ON/Innogy**  
**Approval of Audax Renewables as purchaser of the Hungarian Divestment Business following your letter of 13 July 2020 and the Trustee's opinion of 28 July 2020**

**I. FACTS AND PROCEDURE**

1. On 31 January 2019, the Commission received notification of an intended concentration, pursuant to Article 4 of the Regulation (EC) No 139/2004 ('the Merger Regulation'), by which E.ON SE ("E.ON", Germany) acquired, within the meaning of Article 3(1)(b) of the Merger Regulation, sole control over the distribution and consumer solutions business and certain electricity generation assets of Innogy SE ("Innogy", Germany). By decision of 17 September 2019 ("the Decision") adopted in application of Article 8 (2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings<sup>1</sup> ("the Merger Regulation"), the Commission declared the Transaction compatible with the internal market subject to conditions and obligations (the "Commitments").
2. Under the Commitments, E.ON committed *inter alia* to divest E.ON's activities in the retail supply of electricity in Hungary to (i) Competitive-SME Customers, and (ii)

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<sup>1</sup> L 24, 29.1.2004, p. 1-22.

Large Customers (the “Hungarian Divestment Business”). More specifically, the Commitments provide that the Hungarian Divestment Business includes all assets and staff that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Hungarian Divestment Business, in particular:

- (i) the following main tangible assets:
    - (a) lease agreements for one call centre and a customer service point for the Competitive Offering as well as other office space owned or leased by E.ON EKER for the Competitive Offering;
    - (a) IT systems and material software used by the Hungarian Divestment Business. The Hungarian Divestment Business will also include the supply of IT transitional services for a period of up to 24 months after the Closing for the Hungarian Divestment Business.
  - (ii) the following main intangible assets:
    - (a) the following main licences, permits and authorisations: the Competitive retail electricity open market licence;
    - (b) the main contracts, agreements, leases, commitments and understandings include: (i) customer contracts for electricity retail supply in the Competitive Offering; and (ii) electricity procurement contracts for the Competitive Offering;
    - (c) an exclusive, non-revocable licence in relation to the intellectual property rights together with the trademark rights (including logos) relating to the “E.ON” trademarks owned by E.ON or its Affiliated Undertakings in Hungary for a transitional period of up to two years, at the option of the Purchaser.
    - (d) other brand and IP rights together with the trademark rights and other intellectual property rights (including logos), if any, held by the Hungarian Divestment Business; and
    - (e) customer, credit and other records relating to the Hungarian Divestment Business.
  - (iii) the Key Personnel and personnel of the Hungarian Divestment Business;
  - (iv) the arrangements, at the option of the Purchaser for the Hungarian Divestment Business, for the supply of transitional services (i.e. IT, legal services, HR, Finance, tax, accounting, non-energy procurement services) by or on behalf of E.ON or its Affiliated Undertakings for a transitional period of up to 24 months after Closing for the Hungarian Divestment Business.
3. By letter of 13 July 2020, E.ON proposed Audax Renovables S.A. (“**Audax**” or the “**Purchaser**”) for approval by the Commission as purchaser of the Hungarian Divestment Business and submitted the Quota Sale and Purchase Agreement (“QSPA”), and certain ancillary agreements including the Power Purchase Agreement

(“PPA”), the balance group membership agreement (“BGA”) and the Transitional Service Agreements (“TSA”), together, the “Transaction Documents”. [...].

4. Alcis Advisers, the appointed Monitoring Trustee (the "Trustee"), submitted on 28 July 2020 an assessment of Audax’s suitability as a purchaser (the "Reasoned Opinion"). It concluded that Audax meets the purchaser criteria set out in Section D of the Commitments. In its Reasoned Opinion, the Trustee also indicated that, on the basis of the Transaction Documents, the Hungarian Divestment Business would be sold in a manner consistent with the Commitments.

## II. ASSESSMENT OF THE PROPOSAL

5. Audax Group is a vertically integrated energy group and mainly active in renewable energy generation and in retail energy. According to its own assessment, in 2019, Audax was the [...] retail energy supplier in the Spanish market. In the retail energy segment for small and medium enterprise (“SME”) customers, Audax’ assessed its market share in Spain to have amounted to [0-5]% in 2018.
6. In the year 2019, Audax generated an operating income of some EUR 1,044 millions. Already since the year 2013, Audax is internationalizing its footprint, initially by starting its activities in Portugal. In subsequent years, Audax has expanded further into five additional European countries as well as Panama, both by means of inorganic (i.e. through acquisitions) as well as organic growth. Audax has operations in Portugal, Italy, Poland, Germany and the Netherlands in the retail segment, and in France and Poland in the generation segment.
7. In order to be approved by the Commission, the Purchaser must fulfil the following criteria:<sup>2</sup>
  - a. the Purchaser shall be independent and unconnected to E.ON and its Affiliated Undertakings as well as to competitors that may create *prima facie* competition concerns;
  - b. the Purchaser shall have the financial resources, the required expertise and incentive to maintain and develop the Hungarian Divestment Business;
  - c. the Purchaser shall be in the position and have capabilities to continue the Hungarian Divestment Business as a viable and effective competitor;
  - d. the Purchaser of the Hungarian Divestment Business shall have proven experience and existing established activities in the energy sector;
  - e. the Purchaser must neither be likely to create *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Hungarian Divestment Business.

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<sup>2</sup> Paragraph 34 of the Commitments.

**(a) Independence from the Parties**

8. The Trustee in its Reasoned Opinion concluded that there is no structural links between Audax and E.ON (and its Affiliated Undertakings). The information collected by the Trustee confirms that E.ON (and its Affiliated Undertakings) and Audax:
  - a. do not have any cross-shareholdings,
  - b. do not have any joint ventures and partnerships and
  - c. do not have any common directors, members of management, or members of supervisory board
9. Moreover, commercial relationships between E.ON, Innogy and their Affiliated Undertakings on the one hand and Audax on the other are limited. [...]. As Audax currently procures more than [...]TWh of energy per year in the Spanish market from [...], the procurement volume with Innogy represents less than [0-5]% of Audax' total volume purchased in Spain each year. The existing commercial business relationship with Innogy can therefore be considered immaterial with respect to independence.
10. The Trustee also concluded in its Reasoned Opinion that Audax is currently not active in the Hungarian energy market at all. Moreover, [...].
11. Based on the above considerations, the Trustee considers that Audax is independent of and unconnected to E.ON, its Affiliated Undertakings, as well to parties that may give rise to prima facie competition concerns in the Hungarian market.
12. In light of the above, the Commission concludes that Audax is independent and unconnected to E.ON (and its Affiliated Undertakings), as well as to competitors that may create prima facie competition concerns.

**(b) Financial resources, proven expertise, and incentive to maintain and develop the Hungarian Divestment Business**

13. The Trustee considers in its Reasoned Opinion that Audax has significant free cash flow and ample financial resources to maintain and develop the Hungarian Divestment Business. Audax would also have the incentive to maintain and develop the Hungarian Divestment Business. A number of elements point to Audax having the financial resources, proven expertise and incentive to maintain and develop the Hungarian Divestment Business as a viable and active competitive force in competition with E.ON and other competitors on the market.
14. First, Audax has stable profitability and a solid balance sheet. In 2019, Audax' ordinary income amounted to EUR 1,041 million and achieved an EBITDA of EUR 73 million and an operating profit (EBIT) of around EUR 47 million. Over the past 3 fiscal years, ordinary income, EBITDA and EBIT have all increased significantly. Audax has sufficient cash to finance the purchase price from its own sources and will not need any additional financing for the purchase of the Hungarian Divestment Business. The purchase price will be financed 100% with available cash on hand by Audax. Moreover, the Hungarian Divestment Business is cash-generating and largely self-financing and it will have sufficient resources to cover for monthly cash swings inherent in its business model. Based on that, no additional working capital or capex funding by Audax will likely be needed. [...]. The Trustee considers that the

Divestment Business is not likely to need additional funding (e.g. for potential losses or other sources of liquidity squeezes). However, considering its solid financial position, in case an additional funding need would arise, Audax would have sufficient financial resources to cover for it.

15. Second, Audax has significant expertise and solid capabilities in operating as an energy retailer. Audax is an established company in the energy sector with activities in seven European countries as well as in Panama, mostly in the field of energy retail (as the Divestment Business). In 2019, Audax was the [...] retail energy supplier in the Spanish market. In the retail energy segment for small and medium enterprise (“SME”) customers, Audax’ assessed its market share in Spain to have amounted to [0-5]% in 2018. Besides its experience in the retail supply of electricity and gas, Audax also is active in the generation of renewable energy, mainly from wind and solar sources.
16. Third, Audax has a proven track record of successful and profitable operations. In fact, since 2014, Audax has built a track record of successful acquisitions and subsequent development of acquired companies. In Italy, Audax acquired Big Energia in 2014 and a customer portfolio from Compagnia Energetica Italiana in 2015. In Poland, Audax started its activities with the acquisition of Deltis Sp. Z.o.o. in 2016. In the Netherlands, Audax acquired MAIN Energie in 2017. In Spain, Audax has also further grown its activities with the acquisition of two further companies, namely, FERSA Energias Renovables S.A. in 2016 and Grupo Unielectrica in 2018. Further, in 2019, Audax purchased three photovoltaic projects.
17. Finally, Audax is likely to have the incentive to maintain and develop the Hungarian Divestment Business. In its Reasoned Opinion, the Trustee confirms that Audax has the capabilities and the proper incentives to maintain and develop the Hungarian Divestment Business. Audax has substantial experience in the energy sector, both in retail energy and generation, successfully acquired and developed other locally or nationally active companies in the past and has the necessary resources and skilled senior management to support and manage the portfolio through the transition and going forward. Audax therefore comes well prepared to successfully integrate and maintain the Hungarian Divestment Business as a significant viable competitor in the future. Moreover, [...].
18. Based on the above considerations, the Trustee considers that Audax has the financial resources, proven expertise and incentive to maintain and develop the Hungarian Divestment Business.
19. In light of all the above, the Commission concludes that Audax has the financial resources, proven expertise and incentive to maintain and develop the Hungarian Divestment Business.

**(c) Position and capabilities to continue the Divestment Business as a viable and effective competitor**

20. The Trustee considers in its Reasoned Opinion that Audax is in a position and has the capabilities to continue the Hungarian Divestment Business as a viable and effective competitor.
21. As of today, Audax is one of the largest independent energy groups in Spain, with an international footprint in electricity generation and retail of energy, both electricity

and gas. Audax is currently active in seven European countries as well as in Panama. [...]. Both of its major segments (Retail and Generation) have effectively been operated and further developed over several years.

22. Since commencing its internationalization in 2013, Audax Group grew significantly. Between 2013 and 2018, Audax' number of customers as well as its energy supplied increased [1-10] times or more, revenues and profitability (EBITDA) increased around [1-10] times and the relative profitability (EBITDA margin) has increased from [...] % to [...] %.
23. Based on the above considerations, the Trustee considers that Audax is in a position and has the capabilities to continue the Hungarian Divestment Business as a viable and effective competitor.
24. In light of all the above, the Commission concludes that Audax is in the position and has the capabilities to continue the Hungarian Divestment Business as a viable and effective competitor.

**(d) the Purchaser shall have proven experience and existing established activities in the energy sector**

25. The Trustee considers in its Reasoned Opinion that Audax has proven experience and existing established activities in the energy sector.
26. As explained above in sections II.b and II.c, Audax is currently active in seven European countries as well as in Panama in electricity generation and retail of energy, both electricity and gas and has a proven track record of successful acquisitions of companies active in the energy sector. Audax is a significant player in the Spanish energy retail market and has implemented successfully an internationalization strategy in the last years.
27. Based on the above considerations, the Trustee considers that has proven experience and existing established activities in the energy sector.
28. In light of all the above, the Commission concludes that Audax has proven experience and existing established activities in the retail supply of electricity.

**(e) Absence of *prima facie* competition concerns**

29. The Trustee considers in its Reasoned Opinion that the acquisition of the Hungarian Divestment Business by Audax does not raise *prima facie* competition concerns.
30. Audax is not present in the Hungarian energy market, neither through investments nor through any other commercial activities. Therefore, there are no horizontal or verticals overlaps between Audax and the Hungarian Divestment Business.
31. Based on the above considerations, the Trustee considers that the acquisition of the Hungarian Divestment Business by Audax does not raise *prima facie* competition concerns.
32. In light of the above, the Commission concludes that the acquisition of the Hungarian Divestment Business by Audax does not raise *prima facie* competition concerns.

**(f) Consistency with the Commitments**

33. The Trustee considers in its Reasoned Opinion that the Transaction Documents, [...], are consistent and compliant with the Commitments.
34. The Hold Separate Manager has also confirmed that the terms and conditions of the Transaction Documents are suitable to ensure Divestment Business' continued economic viability, marketability and competitiveness.
35. The Commission and the Trustee initially expressed concerns with regards to the potential effects generated by a clause included in [...]. This section of the PPA [...].
36. Following consultation with the Trustee and concerns expressed by the Commission, [...]. Therefore the concerns about such limitation, as expressed by the Trustee and the Commission, were resolved [...].
37. There are also two deviations from the Commitments that, however, are to the benefits of the Hungarian Divestment Business:
  - a. The PPA comes into force on the Closing Date ([...]) and terminates on [...]. It may therefore be in place [...] than the maximum transitional services duration of 24 months stipulated in the Commitments. The Trustee considers that in line with industry practice, this slightly extended duration allows the Divestment Business to match the duration of their procurement positions to be concluded with E.ON with the duration of their customer contracts which typically end [...]. Therefore, the Trustee considers that the additional [...] of PPA duration are to the benefit of the Divestment Business and do not give rise to competition or independence concerns. The Commission agrees with the conclusion of the Trustee.
  - b. The BGA ends on [...], and may be extended for additional [...] at the request of the Divestment Business. The Trustee considers that the resulting business relationship between E.ON and E.ON EKER will not affect negatively the independence of the Divestment Business, as the terms of the BGA are [...]. Moreover, the Trustee considers that the extended duration of the BGA is to the benefit of the Divestment Business, given that alternative balancing groups in Hungary are extremely scarce, with MVM to date being the manager of the only other sizable balancing group.
38. Based on the above considerations, the Trustee considers that the Transaction Documents [...] are consistent with the Commitments.
39. In light of the above, the Commission concludes that the Transaction Documents [...] are consistent with the Commitments.

**III. CONCLUSION**

40. On the basis of the above assessment, the Commission approves Audax as a suitable purchaser of the Hungarian Divestment Business.
41. On the basis of the Transaction Documents, the Commission further concludes that the Hungarian Divestment Business is being sold in a manner consistent with the Commitments.



42. This decision only constitutes approval of the proposed purchaser identified herein and of the Transaction Documents. This decision does not constitute a confirmation that E.ON has complied with its Commitments.
43. This decision is based on paragraph 35 of the Commitments attached to the Commission Decision of 17 September 2019.

*For the Commission*

*(Signed)*  
*Olivier GUERSENT*  
*Director-General*