



Final Report of the Hearing Officer¹

E.ON / INNOGY

(Case M.8870)

1. On 31 January 2019 the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation² by which E.ON SE ("E.ON", Germany) will acquire sole control over the distribution and consumer solutions business and certain electricity generation assets of innogy SE ("Innogy", Germany) (the "Proposed Transaction").³
2. On 7 March 2019, the Commission decided to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation (the "Article 6(1)(c) Decision"). In that decision, the Commission concluded that the Proposed Transaction raised serious doubts as to its compatibility with the internal market and with the functioning of the EEA Agreement as a result of horizontal non-coordinated effects on various retail supply markets for electricity and gas in Czechia, Germany, Hungary and Slovakia.
3. On 20 March 2019, E.ON submitted its response to the Article 6(1)(c) Decision.
4. On 25 and 29 March 2019, following failures by E.ON and Innogy to provide complete information in response to information requests, the Commission adopted two decisions pursuant to Article 11(3) of the Merger Regulation, the first one addressed to E.ON and the second one addressed to E.ON and Innogy. These decisions suspended the time limits referred to in the first subparagraph of Article 10(3) of the Merger Regulation. E.ON (jointly with Innogy as regards the decision addressed to both E.ON and Innogy) submitted complete responses on 5 and 11 April 2019, respectively. The first suspension accordingly lasted from 22 March to the end of 11 April 2019.
5. On 30 April 2019, following a failure by RWE and Innogy to provide complete information in response to an information request, the Commission adopted another decision pursuant to Article 11(3) of the Merger Regulation. This decision likewise suspended the time limits referred to in the first subparagraph of Article 10(3) of the Merger Regulation. Innogy submitted a complete response on 8 May 2019, and this second suspension accordingly lasted from 29 April to the end of 8 May 2019.

¹ Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 ("Decision 2011/695/EU").

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").

³ Innogy is currently controlled by RWE AG ("RWE", Germany). The Proposed Transaction is part of a complex asset swap between RWE and E.ON. In a separate case (Case M.8871), RWE notified to the Commission the proposed acquisition of joint or sole control over certain generation assets of E.ON, which acquisition was approved by the Commission without conditions on 26 February 2019.

6. Between 7 February and 14 May 2019, I admitted 18 companies active in the same or related markets as interested third persons pursuant to Article 5 of Decision 2011/695/EU. The Commission had several interactions with these persons during the procedure, both orally and in writing, which allowed them to express their views on the Proposed Transaction, in accordance with Article 16(1) of the Merger Implementing Regulation.⁴
7. On 7 June 2019, the Commission extended the time period for adopting a final decision by 20 working days in accordance with Article 10(3), second subparagraph, third sentence, of the Merger Regulation.
8. On 20 June 2019, E.ON submitted a first formal set of proposed commitments to the Commission, which the Commission market-tested on 21 June 2019. On 3 July 2019, E.ON submitted revised commitments to the Commission, taking into account the feedback received from the market test (the "Final Commitments").
9. The Commission did not issue a statement of objections pursuant to Article 13(2) of the Merger Implementing Regulation.⁵ There was therefore no formal oral hearing in accordance with Article 14 of that regulation.
10. On 7 August 2019, the Hearing Officer rejected a joint request by two interested third persons to grant them access to the Commission's reasoning, preliminary conclusions of the investigation and its intended decision, under application of Article 7(2)(d) and (3) of Decision 2011/695/EU. Given the specific interactions with these interested third persons (described more generally in paragraph 6 above), they had been adequately informed about the nature and the subject matter of the procedure and been enabled to effectively exercise their right to make known their views on the harmful effects on them of the notified concentration. The right of interested third persons to be heard does not cover a right to be informed about the Commission's intended decision or its underlying grounds.⁶
11. In the draft decision, the Commission concludes that the Final Commitments remove the significant impediments to effective competition in the internal market or in a substantial part of it to which the Proposed Transaction would otherwise have given rise. As a result, the draft decision declares the Proposed Transaction compatible with the internal market and the functioning of the EEA Agreement, subject to full compliance with the Final Commitments.

⁴ 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 "Merger Implementing Regulation").

⁵ Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p.1; corrigendum OJ L 172, 6.5.2004, p. 9).

⁶ See judgment in *Kaysersberg v Commission*, T-290/94, EU:T:1997:186, paras. 105-109.

12. Overall, I consider that the effective exercise of procedural rights has been respected during the present proceedings.

Brussels, 5 September 2019

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