EUROPEAN COMMISSION
DG Competition

Case M.9626 - PKN ORLEN / ENERGA

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 31/03/2020

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EUROPEAN COMMISSION

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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

<u>Subject</u>: **Case M.9626 – PKN Orlen/Energa**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 26 February 2020, the Commission received the notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which PKN Orlen S.A. ("Orlen", Poland, also referred to as the "Notifying Party") acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of Energa S.A. ("Energa", Poland). Orlen and Energa are designated hereinafter as the "Parties" to the proposed transaction.[3] The concentration is accomplished by way of a public bid announced on 5 December 2019.

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

2 OJ L 1, 3.1.1994, p. 3 (the "EEA Agreement").

3 Publication in the Official Journal of the European Union No C72, 5.3.2020, p. 9.

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1. THE PARTIES

(2) Orlen is an oil and gas company active on the wholesale and retail markets for refined oil products in Poland, Austria, Czechia, Estonia, Latvia, Lithuania, Germany and Slovakia. It is also active in the generation and wholesale supply of electricity in Poland.

(3) Energa is an energy company active in the generation and wholesale supply, distribution, and retail supply of electricity and other energy-related activities in Poland.

(4) Energa is currently majority-owned by the Polish State, which holds 51.52% of the share capital, representing 64.09% of the number of votes at the general meeting of shareholders. The Notifying Party claims that the Polish State Treasury has direct and sole control over Energa.[4] Even though the State Treasury holds a stake of 32,42% in Orlen,[5] for the reasons explained below, both Parties constitute different economic units having an independent power of decision.

(5) The Notifying Party submits that Orlen and Energa have separate management boards, which do not coordinate their commercial strategy and day-to-day business conduct.[6] Moreover, the Parties are mainly active on different markets. The Notifying Party further submits that there has not been, in the last 10 years, anyone who has belonged to the management or supervisory boards of both Orlen and Energa at the same time.[7] Finally, the Notifying Party submits that Orlen and Energa respect rules on access to sensitive information, and are bound by general provisions of law regarding the disclosure and protection of confidential information, including competition law.[8]

(6) Moreover, both Parties are publicly listed companies and the Transaction is being carried out under Polish rules on public offerings. Orlen has launched a public takeover bid, to which Energa shareholders may choose to subscribe.

(7) The Commission therefore considers that Orlen and Energa form part of different economic units having an independent power of decision and the Transaction leads to a concentration in the meaning of Article 3 of the Merger Regulation.

2. THE OPERATION AND THE CONCENTRATION

(8) The concentration involves the acquisition of sole control (via an acquisition of majority of the shares representing the majority of the total number of votes at the general meeting of shareholders, up to the maximum of all of the shares) of Energa directly by Orlen (the “Transaction”).

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4 Form CO, paragraph 91.

5 The State Treasury directly holds 27.52% of Orlen shares and a further 4.9% are indirectly held by the State Treasury through PERN Spółka Akcyjna ("PERN"), which is 100% owned by the State Treasury.

6 Form CO, paragraphs 83-84.

7 Form CO, paragraphs 85-87.

8 Form CO, paragraphs 88-90.

(9) On 5 December 2019, Orlen made a tender offer for all issued shares in Energa, under Polish rules on public takeovers. The Notifying Party expects that the State Treasury, which is the majority shareholder in Energa, will subscribe for the sale of its shares under the tender offer, along with several minority shareholders. Orlen will therefore acquire sole control of Energa regardless of the volume of subscriptions for shares made by the other shareholders of Energa pursuant to the tender offer. After the clearance of the tender offer Orlen will own shares representing at least 66% of the total number of votes at the general meeting of shareholders of Energa.

(10) Therefore, the Transaction constitutes a concentration pursuant to Article 3(1)(b) of the Merger Regulation.

3. EU DIMENSION

(11) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million[9]. Each of them has an EU-wide turnover in excess of EUR 250 million, but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

4. MARKET DEFINITION

(12) The Transaction would give rise to a horizontally affected market in balancing and ancillary services in Poland.

(13) The Transaction would also give rise to a number of vertically affected markets between:

(a) at the upstream level, a number of inputs for which Orlen[*] has market shares in excess of 30%: (i) the wholesale supply of heavy fuel oil ("HFO") for industrial processes in Poland ([80-90]%), (ii) the wholesale supply of light heating oil ("LHO") in Poland ([70-80]%), and (iii) the supply of industrial lubricants in Poland ([40-50]%); and

(b) at the downstream level (i) the generation and wholesale supply of electricity in Poland (on which the Parties have a combined [5-10]% market share) and (ii) the generation, transmission, distribution and supply of heat (on which such a district heating network constitutes a natural monopoly).

4.1. Generation and wholesale supply of electricity

(14) In previous decisions, the Commission has considered that electricity generation and wholesale supply constitutes a distinct product market from transmission and distribution and retail supply of electricity.[10]

9 Turnover calculated in accordance with Article 5 of the Merger Regulation.

* Should read "Orlen (combined with Grupa Lotos)".

10 M.6984 – *EPH/Stredoslovenska*; M.5978 – *GDF Suez/International Power*.

(15) In one decision, the Commission considered a possible segmentation of the generation and wholesale supply market based on off-peak, peak and super-peak transactions, but ultimately left the precise market definition open.[11] In one decision concerning the Polish market, the Commission judged such a distinction not to be relevant to the Polish market, on the basis that available capacity during peak and off-peak hours was similar.[12]

(16) The Notifying Party does not contest the above market definitions.

(17) Therefore, the Commission considers the relevant product market to be generation and wholesale supply of electricity.

(18) The Commission has previously considered the market for generation and wholesale supply of electricity to be national in scope.[13] The Polish Competition Authority has also concluded in its decisions that the market for generation and wholesale supply of electricity is national in scope in Poland.[14]

(19) The Notifying Party does not contest the above market definitions.

(20) The Commission therefore considers the relevant geographic market for generation and wholesale supply of electricity to be national in scope.

4.2. Balancing and ancillary services

(21) Balancing and ancillary services can be defined as the services consisting in maintaining the voltage in the grid within a very narrow bandwidth.[15] Transmission System Operators ("TSOs") purchase electricity, on a balancing exchange or bilaterally, in order to cover deviations between production and consumption within their control areas. In previous decisions, the Commission has treated balancing and ancillary services as a separate product market from that for the generation and wholesale supply of electricity.[16]

(22) The Commission has identified different categories of balancing and ancillary services, namely primary (frequency containment reserve), secondary (automatic frequency restoration reserve) and tertiary (manual frequency restoration reserve, fast active disturbance reserve and peak load reserve), on the basis of the order of activation and the magnitude of frequency deviation. The Commission has however left open whether the market for these different categories of balancing and ancillary services could correspond to distinct product markets.

(23) The approach of the Polish Competition Authority has also been to define balancing and ancillary services as a distinct product market, which it examined as one overall market, while mentioning that a further distinction could be drawn between

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11 M.5467 – *RWE/Essent*.

12 M.5979 – *KGHM/Tauron Wytwarzanie*, paragraphs 19-20.

13 M.5467 – RWE/ESSENT; M.5978 – GDF Suez/International Power.

14 UOKiK decision of 6 September 2018 in case DKK-159/2018 – *PGE/Polenergia*, p. 7.

15 M.7927, *EPH/Enel/SE*, paras. 24-27.

16 M.8660 *Fortum/Uniper ;* M.5979 *KGHM/Tauron Wytwarzanie* ; M.5827 - *Gaz de France/Suez*.

operational reserve, primary and secondary regulation as well as automatic power and voltage regulation. [17]

(24) The Notifying Party does not contest the above market definitions though it has also provided separate market shares for balancing and for ancillary services.[18] The Notifying Party was unable to provide market shares for further sub-segments of ancillary services on which the Parties' activities overlap, namely operational reserve, primary and secondary regulation, and automatic power and voltage regulation.[19]

(25) For the purposes of the present decision, the precise product market definition can be left open as the Transaction does not lead to serious doubts as to its compatibility with the internal market under any plausible market definition.

(26) In previous decisions, the Commission has considered that the market for balancing and ancillary services is at most national in scope. Balancing and ancillary services can be provided only by the entities which are connected to the national power system, and can only be provided to PSE, the sole TSO in Poland.

(27) The Notifying Party does not contest the above market definitions.

(28) The Commission considers the relevant geographic market for the provision of balancing and ancillary services to be national in scope.

4.3. Generation, transmission, distribution and supply of heat on a district heating network

(29) In previous decisions, the Commission has concluded that district heating constitutes a separate product market, which includes the distribution of thermal energy in the form of steam and/or hot water from central or decentralised sources of production (heating plants) through a network to multiple buildings or sites for use of space or process heating.[20]

(30) The Notifying Party does not contest the above market definitions.

(31) Therefore, the Commission considers the relevant product market to be generation, transmission, distribution and supply of heat on a district heating network.

(32) In previous decisions, the Commission has considered the geographic scope of the district heating market to be limited to the specific district heating network to which

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[17] Decision of 22 December 2006, (DOK-163/2006) *PGE and others*, decision of 13 January 2011 (DKK-1/2011), *PGE/ENERGA*; decision of 6 September 2018 (DKK-159/2018), *PGE/Polenergia*.

[18] The Parties estimate that their combined market shares in the possible markets for balancing services and ancillary services would be [20-30]% and [10-20]%, respectively. In the market comprising both balancing and ancillary services their combined market share would be [20-30]% according to the Parties and below 20% according to the TSO.

[19] The Notifying Party submits that it cannot provide reliable market share data relating to these possible sub-segments. It claims that in any event, the Parties' shares in these markets do not exceed their share in the overall balancing and ancillary services market. The TSO submitted that the Parties' combined market shares in the possible sub-segments for primary and secondary regulation would be lower than 20%, and that these shares are representative of the Parties' competitive position on the ancillary services market.

[20] M.7745 – *Fortum/Lietuvos Energija* ; M.4238 – *E.ON/Prazka Plynarenska.*

the plant is linked, as different networks usually cover different geographical areas and are not connected to each other.[21]

(33) The Notifying Party does not contest the above market definitions.

(34) The Commission therefore considers the relevant geographic market for generation, transmission, distribution and supply of heat on a district heating network to be limited to each specific district heating network.

4.4. Wholesale supply of HFO for industrial processes

(35) HFO is a fuel product which results from the process of refining crude oil. Each refinery produces a fixed proportion of different fuel products (e.g. diesel, gasoline, HFO, LHO) out of a given volume of crude oil. HFO is a fuel with particularly high viscosity and density. It is used to generate motion and/or heat and is mainly used to fuel ships and power generation facilities and as feedstock for further processing. Because HFO is considered a by-product of crude oil refining it is relatively inexpensive and sold at negative margin compared to crude oil.

(36) In previous decisions, the Commission has defined relevant product markets for the wholesale supply of fuels as separate from the retail supply of fuels.[22] The Commission has further divided the market for the wholesale supply of fuels by fuel type, i.e. (i) supply of gasoline, (ii) supply of diesel, (iii) supply of liquefied petroleum gas (LPG), (iv) supply of LHO and (v) supply of HFO due to their different characteristics, use and purchasers.[23]

(37) With respect to HFO, a distinction should be made between on the one hand, HFO used as a motor fuel for large marine engines, and one the other hand, HFO used as an energy source/fuel for inland industrial processes (e.g. power plants, horticulture, industrial laundry, etc.).[24]

(38) The Commission has previously distinguished two different levels of wholesale distribution of refined fuel products: (i) ex-refinery sales (primary level of distribution) and (ii) non-retail sales (secondary level of distribution).[25] It has previously doubted whether this distinction would also apply to wholesale sales of fuel in Poland, but decided to leave the precise market definition open.[26]

(39) The Notifying Party does not contest the above market definitions, though it did not identify a possible distinction between HFO for marine engines and HFO for industrial uses. The Notifying Party does not believe that any non-retail sales of HFO take place in Poland, and has therefore only provided data for sales made on an ex-refinery basis. The Notifying Party also believes that the demand for HFO in Poland is solely from industrial customers.

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21 M.7745 – *Fortum/Lietuvos Energija/JV*; M.4238 – *E.ON/Prazka Plynarenska*.

22 M.4545 – *Statoil/Hydro*; M.4348 – *PKN Orlen/Mazeikiu.*

23 M.7318 – *Rosneft/Morgan Stanley Global Oil Merchanting Unit*; M.6801 – *Rosneft/TNK-BP*; M.4348 – *PKN Orlen/Mazeikiu*; M.6261 – *North Sea Group/Argos Groep/JV*.

24 M.7603 – *Statoil Fuel and Retail/Dansk Fuel*, paragraphs 18-19; M.5689 – *Bominflot/SBI Holding*, paragraphs 9-13.

25 M.7311 - *MOL/Eni Ceska/Eni Romania/Eni Slovensko*.

26 M.4348 – *PKN Orlen/Mazeikiu.*

(40) For the purposes of this decision, the precise product market definition between ex-refinery and non-retail sales can be left open, as the Transaction does not lead to serious doubts as to its compatibility with the internal market under any plausible market definition.[27]

(41) The Commission has previously concluded that a possible market for non-retail sales of HFO would be national in scope,[28] and that a possible ex-refinery market for this product could be broader (Western Europe-wide, EU-wide or EEA-wide).[29]

(42) The Notifying Party does not contest the above market definitions.

(43) For the purposes of this decision, the precise geographic market definition can be left open, as the Transaction does not lead to serious doubts as to its compatibility with the internal market under any plausible market definition.[30]

4.5. Wholesale supply of LHO

(44) LHO is a low viscosity, liquid petroleum product which can be used as fuel oil for furnaces or boilers in buildings is usually burned for the purpose of heating. As mentioned above in relation to HFO, the Commission has previously divided the market for the wholesale supply of fuels by fuel type, including LHO. It has also previously distinguished between ex-refinery and non-retail sales of LHO.

(45) On the non-retail level, previous decisions considered that LHO may consist of two segments: (i) heating oil light ("HOL") and (ii) heating oil extra light ("HOEL").[31]

(46) The Notifying Party does not contest the above market definitions. Orlen only produces and sells HOEL, and it is not aware of any sales of HOL in Poland.

(47) For the purposes of this decision, the precise market definition can be left open, as the Transaction does not lead to serious doubts as to its compatibility with the internal market under any plausible market definition.[32]

(48) The Commission has previously concluded that the possible geographic market for non-retail sales of fuel products would be national in scope while that for ex-refinery sales would be potentially EEA-wide.

(49) The Notifying Party does not contest the above market definitions.

(50) For the purposes of this decision, the precise geographic market definition can be left open, as the Transaction does not lead to serious doubts as to its compatibility with the internal market under any plausible market definition.[33]

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27 Below, the Commission will examine the impact of the Transaction on the narrowest plausible market, that is the market for ex-refinery sales of HFO for industrial uses.

28 M.4348 – *PKN Orlen/Mazeikiu*.

29 M.7318 – *Rosneft/Morgan Stanley Global Oil Merchanting Unit*.

30 Below, the Commission will examine the impact of the Transaction on the narrowest plausible market, i.e. on a national basis.

31 M.1819 – *Rheinbraun/OMG/Cokowi*.

32 Below, the Commission will examine the impact of the Transaction on the narrowest plausible market, i.e. the market for the non-retail supply of HOEL.

4.6. Supply of industrial lubricants in Poland

(51) In previous decisions, the Commission has concluded that lubricants constitute a separate market different from base oils and chemical additives.[34]

(52) The Commission has also defined separate markets for lubricants based on their application, i.e. (i) automotive lubricants, (ii) industrial lubricants, (iii) marine lubricants and (iv) aviation lubricants.[35] The Parties are only active in industrial lubricants.

(53) Previous decisions have also considered a possible further distinction based on the base stock employed, i.e. between (i) mineral and (ii) synthetic lubricants, leaving the market definition open .[36]

(54) The Notifying Party submits that there is no need for the purposes of the present decision to distinguish between mineral and synthetic lubricants, as, among other reasons, the Notifying Party submits that it only sells mineral lubricants.

(55) For the purposes of this decision, the Commission considers that the precise product market definition can be left open, as the Transaction does not lead to serious doubts as to its compatibility with the internal market under any plausible market definition.[37]

(56) The Commission has previously considered the geographic scope of the market for industrial lubricants to be at least national and possibly EEA-wide in scope, although it has ultimately left the exact geographic market definition open.[38]

(57) The Notifying Party does not contest the above market definitions.

(58) For the purposes of this decision, the Commission considers that the precise geographic market definition between EEA-wide or national can be left open, as the Transaction does not lead to serious doubts as to its compatibility with the internal market under any plausible market definition.[39]

5. COMPETITIVE ASSESSMENT

5.1. Horizontal effects - balancing and ancillary services

(59) The Transaction gives rise to a horizontally affected market due to the Parties' activities in the supply of balancing and ancillary services in Poland.

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33 Below; the Commission will examine the impact of the Transaction on the narrowest plausible market, i.e. on a national basis.

34 M.8261 – *Lanxess/Chemtura*.

35 M.1383 – Exxon/Mobil.

36 M.8261 – *Lanxess/Chemtura*; M.5927 – *BASF/Cognis*.

37 Below, the Commission will examine the impact of the Transaction on the narrowest plausible market, i.e. the market for mineral industrial lubricants.

38 M.8261 – *Lanxess/Chemtura*.

39 Below, the Commission will examine the impact of the Transaction on the narrowest plausible market, i.e. on a national basis.

(60) In Poland, the rules governing: 1) the balancing mechanism, 2) the provision of ancillary services and 3) sales of energy for balancing purposes, are determined by the national TSO – Polskie Sieci Elektroenergetyczne ("PSE") – in the national transmission network code. This provides instructions for network participants specifying the conditions for the use, operation, operation and planning of network development as well as the principles of system balancing and management and system restrictions.

(61) PSE is the sole buyer of balancing and ancillary services in Poland. In order to sell electricity on the wholesale or retail markets, the Parties need to conclude transmission contracts with PSE which entitle PSE to physical supply or collection of energy by the balancing mechanism participants. Ancillary services are contracted by PSE by means of public tenders, where providers are remunerated separately for activation of the services and for energy exchanged.

(62) The Parties provide their combined market share on this market based on their volumes of sales of balancing services. The Parties estimate that they had a combined market share of [20-30]% (with an increment of [0-5]%) in 2018, the last year for which data was available.

(63) Given the nature of ancillary services, the Parties are not able to provide reliable data in this regard. However, the Notifying Party submits that their shares in possible markets for these services would not exceed their shares on an overall balancing and ancillary services market. Moreover, the Notifying Party understands that following the introduction of a new capacity mechanism in Poland, ancillary services will be replaced by the new capacity mechanism. Based on contracted capacity under auctions for the new capacity mechanism, the Notifying Party estimates that the Parties' combined shares will amount to 7.66% in 2021, 7.67% in 2022, and 11.44% in 2023.[40]

(64) In response to the Commission's market investigation, PSE expressed the view that an assessment of the Parties' potential market power should be based on the technical capabilities of their centrally dispatched generating units, compared to the total technical capabilities of all centrally dispatched generating units in Poland. On this basis, PSE estimated the Parties' combined market share to be significantly lower than 20%, regardless of the precise product market definition. PSE did not believe that the Transaction would have a significant impact on effective competition.

(65) Transactions such as the present one, where the market share of the undertakings concerned does not exceed 25%, may generally be presumed to be compatible with the internal market.[41] The fact that the terms on which prices and volumes are set in this market are largely determined by a single buyer, PSE, in line with the national transmission network code, is a further indication that the Transaction is unlikely to lead to the creation of market power.

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[40] Therefore, even on a narrower plausible market definition for ancillary services, there would be no affected market.

[41] C f. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ [2004] C 31, pages 5-18, paragraph 18.

(66) Therefore, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in relation to the market for balancing and ancillary services in Poland and its possible sub-segments.

5.2. Vertical effects

(67) According to the Non-Horizontal Merger Guidelines, input foreclosure occurs when actual or potential rivals' access to supplies or markets is hampered, thereby reducing those companies' ability and/or incentive to compete. Such foreclosure may discourage entry or expansion of rivals or encourage their exit.[42]

(68) In addition, the Non-Horizontal Guidelines identify customer foreclosure as occurring where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base.[43]

(69) In order for foreclosure to be a concern, three conditions need to be met post-merger: (i) the merged entity needs to have the ability to foreclose its rivals; (ii) the merged entity needs to have the incentive to foreclose its rivals; and (iii) the foreclosure strategy needs to have a negative impact on effective competition leading to an increase in downstream prices charged to consumers. In practice, these factors are often examined together since they are closely intertwined.

(70) The Transaction gives rise to a vertical relationship between the Parties' activities. At the downstream level, the Parties are active in the generation and wholesale supply of electricity in Poland (on which the Parties have a combined [5-10]% market share) and the generation, transmission, distribution and supply of heat (on which district heating networks constitute a natural monopoly). At the upstream level, the Parties also provide a number of inputs for these downstream processes, and have market shares in excess of 30% on the following markets:

(a) the wholesale supply of Heavy Fuel Oil (HFO) for industrial processes in Poland ([80-90]% market share),[44]

(b) the wholesale supply of Light Heating Oil (LHO) in Poland ([70-80]% market share),[45] and

(c) the supply of industrial lubricants in Poland (below [40-50]% market share).[46]

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[42] See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ [2008] C 265, pages 6-25 ("Non-Horizontal Merger Guidelines"), paragraphs 29-30.

[43] See Non-Horizontal Merger Guidelines, paragraph 30.

[44] As mentioned in section 4.4 above, the Notifying Party only provides market shares for ex-refinery sales of HFO, as it does not make non-retail sales of HFO in Poland.

[45] As mentioned in section 4.5 above, the Notifying Party only provides market shares for non-retail sales of HOEL.

[46] As mentioned in section 4.6 above, the Notifying Party only provides market shares for sales of mineral lubricants, as it does not sell synthetic lubricants.

5.2.1. *Vertical relationship regarding HFO as an input for the generation of electricity and heat*

The Notifying Party's views

(71) The Notifying Party submits that the Transaction does not raise any competition concerns, and that there is no risk of input and/or customer foreclosure.

(72) Energa produces electricity at its power plants located in Poland, and it is also active in the market for generation of heat. The fuels used for both these activities are primarily hard coal and hydropower (ca. 90% of fuel used) and Energa does not operate any HFO-fuelled power plant. Energa does however use HFO for firing up the boilers utilised by Energa Elektrownie Ostrołęka in its coal-fired plant. This activity takes place approximately […] times per year.

(73) The Notifying Party explains that Energa could theoretically replace HFO as an input for its boilers in its Ostrołęka power plant. It would be technically possible to modify current installations to use LHO as an input, instead of HFO. However, Energa assesses that such a modification is currently not financially reasonable, as it would require an investment of approximately EUR […]. There are currently no such ongoing investments in Energa's power plants.

(74) The Notifying Party submits that Energa's demand for HFO is too low for there to be a risk of customer foreclosure. Energa's purchases of HFO account for approximately [0-5]% of Polish demand. Moreover, prior to the Transaction, Energa sourced [a great proportion] of its HFO needs from Orlen. Therefore, the Transaction would not deprive competitors of a significant customer, and they would continue to have access to sufficient alternative customers.

(75) The Notifying Party further argues that there is no risk of input foreclosure. The Notifying Party argues that HFO is not an important input for the downstream electricity and heat generation activities. Energa's limited reliance on HFO for these activities is illustrative. HFO accounts for approximately [0-5]% of the costs of Energa's power and heat generation activities (and [0-5]% of energy generated). Energa's consumption of HFO amounted to […] t in 2018, or [0-5]% of total Polish demand.

The Commission's assessment

(76) No respondent to the market investigation expressed concerns that the Transaction could result in in input or customer foreclosure on these markets.

(77) There does not appear to be a risk of customer foreclosure. In particular, the Commission considers that the merged entity would not have the ability to foreclose its competitors in the market for supply of HFO. Energa buys only very limited volumes ([0-5]% of total Polish demand). Moreover, Energa currently sources [a great proportion] of its HFO needs from Orlen, and so the Transaction will not change the situation for competing suppliers of HFO.

(78) Nor does there appear to be a risk of input foreclosure. Orlen would not have the ability to foreclose downstream competitors. Input foreclosure may raise competition

problems only if it concerns an important input for the downstream product.[47] This is the case, for example, when the input concerned represents a significant cost factor relative to the price of the downstream product. Irrespective of its cost, an input may also be sufficiently important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market, or it may represent a significant source of product differentiation for the downstream product. It may also be that the cost of switching to alternative inputs is relatively high.

(79) HFO is not an important input for the downstream electricity and heat generation businesses. It does not represent a significant cost factor in electricity and heat generation. Nor would the cost of switching away from it be so high as to make HFO a critical component: although Energa estimates the cost as being currently unreasonable, competitors would be likely to take a different view were the price of HFO to increase such as to put them at a disadvantage in the downstream markets. Therefore, Orlen would not have the ability to foreclose competition on the downstream markets by withholding supplies of HFO. Moreover, post-transaction, other sources of HFO would remain available in the Polish market.

(80) Any attempt at input foreclosure by the Parties would be unlikely to lead to increased prices in the downstream markets. Companies acting in the downstream markets account for a small proportion of overall demand for HFO for industrial uses and could continue to source from other providers. Moreover, HFO accounts for a very small proportion of costs in the downstream market, and can be replaced by other fuels following limited investments. Therefore, any attempt at foreclosure by the Parties would not have an impact on competition.

(81) Therefore, the Commission considers that the Transaction will not result in input or customer foreclosure with regards to supplies of HFO for industrial uses.

5.2.2. Vertical relationship regarding LHO as an input for the generation of electricity and heat

The Notifying Party's views

(82) The Notifying Party submits that the Transaction does not raise any competition concerns, and that there is no risk of input and/or customer foreclosure.

(83) The Notifying Party submits that Energa's demand for LHO is too low for there to be a risk of customer foreclosure. In 2018, Energa sourced […] t of LHO, accounting for approximately [0-5]% of total demand in Poland. Therefore, the Transaction would not deprive competitors of a significant customer, and they would continue to have access to sufficient alternative customers.

(84) The Notifying Party submits that there is no risk of input foreclosure, as LHO is not an important input for electricity and heat generation. Similarly to HFO, LHO is not regarded by Energa as a primary fuel used in generation of energy or heat. LHO is used by Energa in its power plants to start the boilers. After these boilers are launched and they have met their optimal conditions, LHO is no longer used, and the

[47] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ [2008] C 265, pages 6-25, paragraph 34.

burners which feed LHO to these boilers are turned off. After the start-up only the primary fuel is put into the boiler.

(85) With regard to heat generation, LHO is used only by back-up heat generating boilers in its Ostrołęka plant. These boilers are used by Energa in case of downtime of all blocks used in Ostrołęka plant

(86) Although it would be difficult for Energa to substitute LHO for other fuels, the Notifying Party submits that it is an insignificant input in Energa's plants. LHO accounts for approximately [0-5]% of the costs of Energa's power and heat generation activities. It accounts for approximately [0-5]% of heat generated by Energa.

(87) The Notifying Party believes that Energa's competitors in electricity and heating markets could continue to source LHO from other sources, and that their combined demand does not account for a significant part of LHO sales in Poland.

The Commission's assessment

(88) No respondent to the market investigation expressed concerns that the Transaction could result in in input or customer foreclosure on these markets.

(89) There does not appear to be a risk of customer foreclosure. In particular, the Commission considers that the merged entity would not have the ability to foreclose its competitors in the market for supply of LHO. Energa buys only very limited volumes of LHO ([0-5]% of total Polish demand). Post Transaction, competing suppliers of LHO in Poland will still have access to sufficient alternative customers to remain competitive.

(90) Nor does there appear to be a risk of input foreclosure. LHO is not an important input (as defined at paragraph (78) above) for the downstream electricity and heat generation businesses. It does not represent a significant cost factor in electricity and heat generation. Therefore, Orlen would not have the ability to foreclose competition on the downstream markets by withholding supplies of LHO, or worsening the terms on which it is supplied. Moreover, post-transaction, other sources of LHO would remain available in the Polish market.

(91) Any attempt at input foreclosure by the Parties would be unlikely to lead to increased prices in the downstream markets. Companies acting in the downstream markets account for a small proportion of overall demand for LHO and could continue to source from other providers. Moreover, LHO accounts for a very small proportion of costs in the downstream market. Therefore, any attempt at foreclosure by the Parties would not have an impact on competition.

(92) Therefore, the Commission considers that the Transaction will not result in input or customer foreclosure with regards to supplies of LHO.

5.2.3. *Vertical relationship regarding industrial lubricants as an input for the generation of electricity and heat*

The Notifying Party's views

(93) The Notifying Party submits that the Transaction does not raise any competition concerns, and that there is no risk of input and/or customer foreclosure.

(94) The Notifying Party submits that there is no risk of input foreclosure, as industrial lubricants are not an important input for electricity and heat generation. Energa uses industrial lubricants only to a limited extent in its electricity and heat generation activities. Energa uses industrial lubricants for the same purposes as any other industrial or production plants. They are used for such purposes as isolation, cooling, caulking, lubricating etc. Industrial lubricants serve to ensure the proper functioning of different types of installations or devices in accordance with their application and producers' recommendations.

(95) The Notifying Party claims that their role in activities related to generation of heat and generation of electricity is purely supportive. Industrial lubricants account for approximately [0-5]% of the costs of Energa's power and heat generation activities.

(96) The Notifying Party submits that Energa's demand for industrial lubricants is too low for there to be a risk of customer foreclosure. In 2018, Energa sourced […] t of industrial lubricants, accounting for approximately [0-5]% of total demand in Poland. Therefore, the Transaction would not deprive competitors of a significant customer, and they would continue to have access to sufficient alternative customers.

The Commission's assessment

(97) No respondent to the market investigation expressed concerns that the Transaction could result in in input or customer foreclosure on these markets.

(98) There does not appear to be a risk of customer foreclosure. In particular, the Commission considers that the merged entity would not have the ability to foreclose its competitors in the market for supply of industrial lubricants. Energa buys only very limited volumes of industrial lubricants ([0-5]% of total Polish demand). Post Transaction, competing suppliers of industrial lubricants in Poland will still have access to sufficient alternative customers to remain competitive.

(99) Nor does there appear to be a risk of input foreclosure. Industrial lubricants are not an important input (as defined in paragraph (78) above) for the downstream electricity and heat generation businesses. It does not represent a significant cost factor in electricity and heat generation. Therefore, Orlen would not have the ability to foreclose competition on the downstream markets by withholding supplies of industrial lubricants, or worsening the terms on which they are supplied. Moreover, post-transaction, other sources of industrial lubricants would remain available in the Polish market.

(100) Any attempt at input foreclosure by the Parties would be unlikely to lead to increased prices in the downstream markets. Companies acting in the downstream markets account for a small proportion of overall demand for industrial lubricants and could continue to source from other providers. Moreover, industrial lubricants

account for a very small proportion of costs in the downstream market. Therefore, any attempt at foreclosure by the Parties would not have an impact on competition.

(101) Therefore, the Commission considers that regardless of the precise product market definition, the Transaction will not result in input or customer foreclosure with regards to supplies of industrial lubricants.

5.2.4. Conclusion on vertical effects

(102) Based on the above, the Commission concludes that the proposed transaction does not give rise to serious doubts as to its compatibility with the internal market on these vertically affected markets.

6. CONCLUSION

(103) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President