Gaz de France/Suez: Keeping energy markets in Belgium and France open and contestable through far-reaching remedies (1)

Kirsten BACHOUR, Giuseppe CONTE, Peter EBERL, Clémentine MARTINI, Alessandro PAOLICCHI, Philippe REDONDO, Augustijn VAN HAASTEREN, Geert WILS, Directorate-General for Competition

1. Introduction

Following an in-depth investigation, the Commission approved under the EU Merger Regulation the merger between Gaz de France (‘GDF’) and the Suez Group on 14 November 2006.

GDF is active in the gas sector at all levels, in electricity generation and retail, and in energy services. It operates throughout Europe, but mainly in France and Belgium. In Belgium, GDF, along with Centrica, has joint control over SPE, the second biggest player in the Belgian electricity and gas markets.

The Suez group is active in the gas and electricity sectors, in energy services and in water and environmental services, and operates mainly in Belgium and France. Suez’ main energy subsidiaries are Electrabel (electricity and gas), Distrigaz (gas), Fluxys (gas infrastructures).

The Commission analysed the impact of the proposed operation on the gas and electricity markets in Belgium and France and concluded that the transaction would significantly impede effective competition, both due to horizontal and vertical effects. Conversely, no negative impact would arise in the other countries concerned, i.e. the UK, Luxembourg, the Netherlands and Hungary.

To avoid such an impediment to effective competition, GDF and Suez offered a comprehensive and far-reaching package of remedies. Most notably, the merged entity will divest Suez’s gas supply business Distrigaz (including its French activities) and relinquish control over the Belgian gas transmission network operator, Fluxys. It will further divest GDF’s shareholding in the Belgian electricity supplier SPE and, in order to address competition concerns identified by the Commission in the district heating market, it will also divest GDF’s subsidiary Cofathec Coriance. Furthermore, a series of investment projects will be carried out both in Belgium and in France with a view to increasing infrastructure capacities, thereby facilitating the entry of new competitors onto the market and fostering competition. Most notably, the functioning of the Zeebrugge hub will be enhanced through the creation of a single entry point linking all networks converging on Zeebrugge and through the operation of the hub by an independent operator, Fluxys, which will no longer be controlled by Suez.

The Commission carefully assessed these remedies and concluded that they would be sufficient to remove all competition concerns in a clear-cut manner.

From a remedies policy viewpoint, this case is interesting because the far-reaching remedy package inter alia includes, through the divestiture of Distrigaz, the severing of the link between the Belgian gas network infrastructure and the main supplier of gas in Belgium, thereby bringing about a form of effective unbundling.

It is important to highlight that, in spite of the delay and the uncertainty as regards the closing of the merger (2), the Commission decision still stands. However, the postponement of the closing may have an impact on the calendar of the remedies implementation.

This article will first sketch out the main relevant features of the European, Belgian and French regulatory environments in the energy sector; it will subsequently briefly describe the competitive assessment carried out by the Commission; and it will finally focus on the remedy package.

---

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

a members of the Directorate-General for Competition at the time of writing.

b Unit C-4
c Unit B-4
d Unit B-3
e Unit B-1

(2) By means of its decision of 30 November 2006 the French Constitutional Court (“Conseil constitutionnel”) effectively delayed the closing of the GDF/Suez transaction until after 1 July 2007, by stating that “… ce n’est qu’au 1er juillet 2007 que Gaz de France perdra sa qualité de service public national; que dès lors le transfert effectif au secteur privé de cette entreprise ne pourra prendre effet avant cette date” (Considérant 26).
2. The pre-merger: situation economic context and regulatory framework in Belgium and France

Belgium

Gas

Belgium imports all of the natural gas it consumes, either via gas pipeline or as liquefied natural gas (LNG). The Belgian market is characterised by the coexistence of two networks: an “H” gas network (“high” nominal calorific value of 11.63 kWh/m³(n)) and an “L” gas network (“low” nominal calorific value of 9.769 kWh/m³(n)).

Large customers directly connected to the natural gas transmission network have been eligible (i.e. they can choose their supplier) since 1 July 2004. In the Flemish Region, the market has been liberalised completely, i.e. also on the level of the distribution network, since 1 July 2003. In the Walloon Region and in the Brussels Region, large industrial customers have been eligible since 1 July 2004, whereas residential customers have become eligible on 1 January 2007 in both Wallonia and in Brussels.

Fluxys (a subsidiary of Suez) is responsible for managing, maintaining and developing the transmission network. Fluxys has also been managing, on a transitional basis, the two Belgian storage sites for H-gas (Belgium has no L-gas storage).

The Belgian gas network is used for international transit as well as domestic transmission with the transit volume being three times as large as the domestic consumption. Transit reservations are marketed by Suez’ subsidiary Distrigaz &Co. Belgium has eighteen entry points (which are part of the transmission/transit network), fifteen for H gas and three for L gas.

The Zeebrugge hub is the largest gas trading place in Continental Europe and was initially designed to route British gas towards the continent (‘forward flow’) and continental gas towards Great Britain (‘reverse flow’) via a submarine pipeline (“Interconnector”). The hub is now also connected to the Belgian gas network but still most of the traded volumes are shipped abroad.

In sum, the Suez group controls the incumbent gas supplier (Distrigaz) and the infrastructure operator (Fluxys). Beside through Distrigaz, Suez is also active in retail supply through ECS (Electrabel Customer Solutions).

Electricity

When the operation was notified, all Belgium consumers were eligible with the exception of household customers in the Brussels and the Walloon region. The latter became eligible on 1 January 2007.

The Belgian transmission network is interconnected with those of the Netherlands and France and one of the transmission networks in Luxembourg. There is no interconnection between the Belgian transmission system and the German and UK systems.

Elia is the transmission system operator (for voltages above 70 kV) and the distribution network operator for voltages between 30 and 70 kV. Distribution of electricity at voltages below 30 kV is in the hands of a number of different distribution network operators which take the form of associations of local authorities known as ‘intercommunales’.

Suez holds a minority share of 27.45% in Elia, the transmission system operator, and has stakes in various network operators known as ‘intercommunales mixtes’ (as opposed to the ‘intercommunales pures’ which are owned entirely by the public sector).

In sum, as regards the activities of the Parties, the Suez group controls Electrabel, the incumbent electricity player and has a large minority participation in Elia, the transmission system operator and in certain distribution system operators. GDF is active in the Belgian electricity sector through its participation in SPE, the second largest electricity player.

France

Gas

France’s regulatory framework provides for the eligibility of all gas purchasers, irrespective of their gas consumption threshold, with the exception of residential customers, for whom full liberalisation will become effective on 1 July 2007.

Eligible customers have the option not to exercise their eligibility. In this case they remain subject to regulated tariffs. On the other hand, once they decide to exercise their eligibility, they are irrevocably under the liberalised tariff regime.

There are five gas entry points in France and two natural gas transmission system operators in France: GDF transmission network (GRTgaz) operates most of the gas network, and Total Infra-

Footnotes:

1 Health care

2 As to France, only the gas sector was negatively affected by the merger, whereas the electricity markets were not.
structures Gaz France (TIGF) operates the network in the South West of France. GRTgaz and TIGF are 100% subsidiaries of GDF and Total respectively.

The transmission networks currently comprise five balancing zones, within which operators must (with limited tolerance) inject as much gas as they withdraw. The network operated by GRTgaz has four balancing zones (North, West, East and South) while TIGF’s network constitutes a single balancing zone (South-West). There are plans to reduce the number of GRTgaz zones down to two (North and South) in 2009, with the current North, West and East zones to be merged into a single North zone. The transmission network carries high calorific value gas (H gas) into each of the five zones. In the North zone there is also a specific network for low calorific value gas (L gas).

There are currently two methane terminals in France, which are owned and managed by GDF. In addition, GDF has begun building a third methane terminal, which should come on stream at the end of 2007.

In addition, there are fifteen gas storage facilities of which thirteen are owned and managed by GDF inside the four GRTgaz balancing zones. The other two, which are located in the South-West zone, are owned and managed by TIGF.

In sum, as regards the activities of the Parties, GDF is the incumbent player in most of the French territory and in most French relevant markets. GDF also owns and operates the vast majority of the French gas infrastructures. The Suez group has recently become active in France through Distrigaz, in each balancing zone, and has built up strong positions in the East and the North.

3. The impact of the merger: the competitive assessment of the Decision

In its decision, the Commission reached the conclusion that the merger would significantly impede effective competition in four areas: gas in Belgium, gas in France, electricity in Belgium and district heating in France (5).

Gas in Belgium

As regards the gas sector in Belgium, the Commission identified significant impediments to effective competition on the following (nation-ally defined) markets for supply of H and/or L gas: to intermediary resellers (i.e. the “intercommunales”, “default suppliers” such as ECS (Electrabel Customer Solutions) and newcomers on the gas supply market in Belgium such as Essent and Nuon, to gas-fired electricity power plants; to large industrial customers; to small industrial and commercial customers; to residential customers (the latter market being potentially regional).

In all these markets, the Parties would have very high combined market shares (in most cases above 80%) and the already dominant position of Suez would be strengthened by the merger.

As a matter of fact, the merger would remove the best placed competitor (GDF) of the incumbent (Suez). No other company would be able to reproduce the same level of competitive constraint as GDF. The Commission found that the significant positions of GDF in the various markets are due to a number of specific assets and advantages enjoyed by GDF which no other new entrant would combine to the same extent. In particular, GDF is the historical operator in the only neighbouring country with no capacity constraints at the Belgian border; GDF has access to a large and diversified gas portfolio, including LNG; GDF has priority access to H gas storage in Belgium; it owns L gas storage capacity in France near the border with Belgium; it is co-owner of certain transit pipelines (SEGEO) through Belgium and shares control of certain entry points, with concomitant capacity reservations on entry points. Moreover, for L gas, Suez and GDF are the only sources for new competitors on the Belgian market, such as Nuon and Essent.

Furthermore, the Commission found that the very high barriers to entry existing in the market would further strengthen the horizontal effects caused by the combination of market shares resulting from the merger. These barriers relate to access to gas (the merging parties have access to most of the gas imported into Belgium, and they hold almost all the long-term import contracts), access to infrastructures (including Suez’ control over Fluxys, the network operator, management of the transit network by Distrigaz, insufficient entry capacity, network congestion), access to LNG (the only terminal in Belgium, in Zeebrugge, is managed by Fluxys LNG, a Suez affiliate), access to H gas storage in Belgium (the French storage capacity, owned by GDF, is the best alternative outside Belgium), quality specifications and the lack of liquidity on the Zeebrugge hub. While many

(5) In France and in the Walloon and Brussels regions of Belgium, the markets for the supply of electricity and gas to residential customers were only to be opened only as from 1 July 2007 (in France) and 1 January 2007 (Brussels and Walloon regions). However, the various players were already preparing for this event. In such a situation, the merger would lead to the disappearance of the main potential competitors for the incumbent in the market for these residential customers. The merger was therefore deemed to have effects also on these prospective markets.
of these entry barriers pre-existed the merger, a number of them would be strengthened by it (e.g. pipeline ownership, capacity and storage reservations).

Gas in France

As regards gas in France, the Commission assessed the impact of the merger on the basis of the division of the country into five balancing zones, North, West, East, South and South-West as the Commission found that the five balancing zones remain characterized by differing competitive conditions, and congestions occur between the different zones. As already indicated, four of the five transport networks are owned and managed by GDF, the fifth one being owned and managed by Total.

Taking into account this geographic subdivision into five zones, the Commission identified significant impediments to effective competition on the following markets: the supply of H gas to large customers who have exercised their eligibility in the zones North, East, West and South, as well as for L gas in the North; the supply of H gas to small customers who have exercised their eligibility in each of the five zones, as well as for L gas in the North; the supply of H gas to intermediary resellers (“entreprises locales de distribution”) who have exercised their eligibility in the zones North and East, as well as for L gas in the Northern zone; the supply of H gas to gas-fired power plants in the Eastern and Northern zones as well as the supply of L gas in the Northern zone; the supply of H gas to residential customers as of 1st of July 2007 in each of the five geographical zones, as well as for L gas in the Northern zone.

On most of these markets, already pre-merger GDF enjoyed a dominant position. The disappearance of Suez (Distrigaz) from the market would strengthen GDF’s dominant position by removing one of the best-placed and strongest alternative players.

Furthermore, similarly to Belgium, the Commission also found that important barriers to entry, relating to access to gas and infrastructures, would strengthen the horizontal effects of the merger. As far as access to gas is concerned, the merging parties have access to most of the gas imported into France, and they hold almost all the long-term import contracts. As far as infrastructure is concerned, almost all of these (except for the South-West) are owned by GDF, either directly or via its 100% subsidiary GRTgaz, and are essentially booked by GDF. Moreover, although GRTgaz has planned to expand gas transport capacities, these new infrastructures will not be available before the end of 2008 and GDF competitors would benefit from these additional infrastructures only to a limited extent. Finally, as some of GDF’s regulated tariffs do not incorporate the totality of gas procurement costs, they constitute a barrier to entry on the liberalised markets.

Electricity in Belgium

The Commission identified significant impediments to effective competition on a number of electricity markets, on which the parties’ combined market shares would be above 80% and the already dominant position of Suez would be strengthened by the merger.

On the national Belgian market for production and wholesale of electricity, the Belgian incumbent Electrabel (Suez) would acquire joint control, through the merger, over its largest competitor (SPE), whose power plants are situated on the mid-merit and peak-load section of the merit curve. This would further strengthen the merged entity’s capacity to determine prices on the Belgian wholesale market for electricity.

On the national market for auxiliary and balancing power, the merger would combine the only two suppliers of these services to the transmission network operator Elia.

On the national market for supply of electricity to large commercial and industrial customers, the existing dominant position of Electrabel (Suez) would be further strengthened by the elimination of one of the two companies (SPE) capable of exercising competitive pressure on Electrabel (the other one being EDF).

On the national market for supply of electricity to small commercial and industrial customers (<70kV), the market share of SPE would strengthen the already dominant market position of Suez.

As to the supply of electricity to eligible residential customers, the merged entity would have a dominant position both on the basis of regional definitions of the relevant geographical market as well as on a national basis.

In addition to these horizontal effects, the Commission also found that a number of vertical effects of the merger would strengthen the already dominant position of Suez on the electricity markets in Belgium.

Most notably, since gas is an input for electricity generation, the Commission found that the parties would have the ability and the incentives to increase the cost of gas to other electricity sup-

(6) RWE, also present in this market, cannot exercise any competitive pressure because the entire output of its sole power plant is committed to a single customer.
pliers and in particular to increase the cost of the flexible supply of gas to gas-fired power plants of their competitors.

The decision also highlights that the parties would have access to detailed information on the cost and usage of its rivals’ gas-fired power plants, and, hence, their prices and production policy.

The parties are the prime suppliers of auxiliary services and balancing power to Elia. The decision identifies the ability and the incentives for the parties to increase the cost for auxiliary services and balancing power and, as these costs are passed through by Elia to the parties’ rivals, to raise their costs.

Finally, the Commission also found that significant barriers to entry relating to (i) access to electricity generation capacity, (ii) green and combined heat and power (CHP) certificates, (iii) the illiquid nature of the electricity trading market, and (iv) access to transmission and distribution infrastructure would further strengthen the anti-competitive effects of the merger. Also in view of the effects of the merger on the market for supplies to gas-fired electricity plants, the merger would still increase these entry barriers.

District Heating in France

Among the several “energy-related services” in which both parties are active, the Commission concluded that one market would raise competition concerns: the nationally defined market for district heating networks in France (“réseaux de chaleur”) (7). The long-term contracts (12-24 years) to manage district heating systems are granted by the municipalities concerned, after an official tendering process, in which in practice only a handful of France-based specialised companies participate. These suppliers are: Dalkia (Veolia group), SES-Elyo (Suez group), Socram (Thion — Ne Varietur group) and Cofathec-Coriance, (Cogac, GDF group). Cogac (GDF group) has a substantial shareholding in, and arguably joint control of, Socram (Thion — Ne Varietur group). After the merger, the parties would be the largest player in the market. The merger would remove Cofathec-Coriance (GDF group) which has acted as a “maverick” in the market, thus leading to non-coordinated effects. Moreover, the Commission found that the position of GDF as the dominant supplier of gas to anyone participating in a tender to manage a district heating system in France would be a further factor reducing competitive pressures in the market for district heating.

4. The Remedies: a far-reaching package

In order to remedy the competition concerns identified by the Commission, the parties submitted commitments on 20 September 2006. The market test carried out by the Commission showed that these initial commitments were not sufficient to remove the competition concerns raised by the merger. The parties modified their initial commitments on 13 October 2006 to take into account the results of the market test. These commitments were fine-tuned and submitted again on 6 November 2006.

The commitments offered on 13 October 2006 (re-submitted on 6 November)

The commitments offered by the parties consist of five main elements:

i) divestiture of the Suez group’s shareholding in Distrigaz;

ii) divestiture of GDF’s shareholding (via Segelb) in SPE;

iii) restructuring of the activities of Fluxys and relinquishing of Suez’ control over the company;

iv) a series of additional measures (most notably investments) relating to the gas infrastructures in Belgium and France;

v) divestiture of Cofathec Coriance.

Divestiture of Distrigaz

Suez will divest its holding in Distrigaz to a third party, which must have relevant expertise in the energy sector and in particular in the downstream supply to final customers. The candidate purchaser will be subject to the Commission’s approval.

Distrigaz will be divested in its entirety, with all tangible and intangible assets, including the upstream supply contracts currently in its procurement portfolio.

Prior to the divestiture of its stake in Distrigaz, the merged entity will conclude one or more supply contracts with Distrigaz, intended to cover part of Electrabel’s needs for its gas-fired power plants and the needs of Electrabel Customer Solutions (ECS) to serve its (mainly residential) customers. These contracts will decrease over time and, after five years, only a small volume will remain in place.

Lastly, the parties undertake to transfer to Distrigaz, immediately upon request, the storage capacity in Belgium and the corresponding volumes being stored, relating to any existing ECS

(7) District heating networks are collective systems for the distribution of heat generated in the form of steam or hot water by centralised generating units.
public supply customer in Belgium which might be acquired by Distrigaz or by one of the resellers supplied by it.

**Divestiture of SPE**

GDF will relinquish its 50% shareholding in the capital of Segebel, a company which itself has a 51% shareholding in SPE’s capital.

**Reorganisation of Fluxys’ activities and loss of control of Fluxys**

Fluxys’ activities will be reorganised into two entities, Fluxys and Fluxys International. Fluxys International will own the Zeebrugge LNG terminal and the non-regulated Belgian and international assets (BBL, Huberator, Gas Management Services Limited, Belgian Pipe Control, C4Gas and Endex). The other entity (Fluxys) will own the entire Belgian gas transmission/transit system as well as the Belgian gas storage infrastructure. To this end, GDF will transfer to Fluxys its 25% holding in Segeo (natural gas transmission/transit operator) while Suez will transfer Distrigaz & Co (which markets transit capacity on the Troll and rTr routes).

Fluxys will operate all the infrastructures regulated under Belgian law (transmission/transit system, storage, LNG terminal).

The parties have undertaken not to control Fluxys, either *de facto or de jure* or by a shareholders agreement. In order to substantiate this commitment, the parties have undertaken:

a) as regards Fluxys:
   - not to hold more than 45% of Fluxys’ capital;
   - not to have more than seven representatives out of 21 on the Board, and not to make proposals for the nomination of the seven independent directors of the Board;
   - that no Fluxys director will have any responsibility in gas supply activities;
   - to set up an executive committee (“comité de direction”) within Fluxys with exclusive powers as regards (i) the management (including commercial strategy) of the regulated infrastructures and (ii) the overall investment plan for regulated infrastructures in Belgium. The Board will not be in a position to reject the overall investment plan except on the grounds of the impact any such investment would have on the company (financial interests of shareholders acting as investors). In the latter case the parties will vote to allow the investments to be financed by a third party and if necessary to allow the capital of Fluxys to be opened to third parties with the specific objective of financing these investments;
   - not to control the executive committee, either *de facto or de jure* or by a shareholders agreement.

b) as regards Fluxys International, the parties have undertaken that:
   - the merged entity will hold not more than 60% of the company’s capital;
   - Fluxys’s executive committee, referred to above, will draw up an overall investment plan for the LNG terminal and the Zeebrugge hub, which the Board of Fluxys International will not be in a position to reject except on grounds of its financial impact on the company (financial interests of shareholders acting as investors). On its own initiative, the executive committee of Fluxys will also be able to propose additional investment in the regulated and unregulated assets owned by Fluxys International or its subsidiaries. Should these investments be rejected by the Board of Fluxys International, the representatives of the merged entity will vote to allow the financing of such investment by a third party and if necessary to allow the capital of Fluxys International to be opened to third parties with the specific objective of financing these investments.

**Additional measures relating to gas infrastructure**

The parties have committed to put in place a number of additional measures relating to gas infrastructure. Most importantly, the parties have undertaken to create a single point of entry at Zeebrugge bringing together the pipeline hub, the LNG terminal, the point of arrival of the Interconnector Zeebrugge Terminal (IZT) and the point of arrival of the Zeepipe Terminal (ZPT).

Moreover, the parties have also undertaken to carry out a number of investments in the gas infrastructure in France, with a view to enhancing the capacity and the functioning of the network (*).

---

(*) The parties have undertaken, inter alia, to develop new storage capacity (80 Mm³ at the Trois Fontaines site, available at the end of 2009, and 60 Mm³ at the Alsace site, available at the latest in 2018) and new capacity at the Montoir terminal (available as from 2007), and to offer this new capacity on the market prior to their availability, partly already before end of 2007. The parties have undertaken to adopt a variety of measures designed to improve the operation of the ‘use it or lose it’ mechanisms and the returnable capacities of the GRTgaz network. Moreover, GRTgaz will install a deodorisation plant at the Taisnières H entry point which will be able to provide a physical flow towards Belgium of 300,000 m³ per hour.
**District heating networks**

The parties have undertaken to divest Cofathec Coriance (excluding its holding in district cooling networks) and the five district heating networks operated by Cofathec Services, as well as the staff associated with the operation of these networks.

**The Commission’s assessment of the commitments**

On the basis of the assessment of the information obtained through the investigation, and, in particular, of the results of a market test, the Commission concluded that the modified commitments were sufficient to remove in a clear-cut manner the competition concerns raised by the merger, both in Belgium and in France.

It must be stressed that these commitments go far beyond the removal of the sheer horizontal overlaps arising from the merger. This proved necessary, in the light of the results of the investigation, to compensate for the major impact that the merger would have had, in the absence of remedies, owing to the removal not only of an actual competitor of the incumbent in both Belgium and France, but also of one of the best placed (if not the best placed) potential competitor in both national markets. This removal of potential competition, combined with the very high barriers to entry (due essentially to the vertical integration of the two merging groups) called, in the opinion of the Commission, for a far-reaching package of commitments, including the divestiture of the incumbent Distrigaz and the restructuring of Fluxys, accompanied by infrastructure — related measures. Moreover, it was indispensable to ensure the viability of any divested business so as to enable it to exert competitive pressure on the merged entity. The Commission concluded, in this respect, that Distrigaz would be the only divested business capable of ensuring the necessary long term viability.

**Competitiveness and viability of Distrigaz**

The Commission concluded that Suez’ divestiture of its majority shareholding in Distrigaz constitutes an appropriate remedy to the loss of competitive pressure on the French and Belgian gas markets and the foreclosure problems on the Belgian electricity markets resulting from the merger. Distrigaz is a going concern which possesses all the requisite assets (in particular supply contracts with producers, gas infrastructure reservations and an existing customer base) to be able to compete effectively with the merged Suez/GDF entity in both countries.

Distrigaz’ viability will not be jeopardised by the supply contracts to be stipulated with Electrabel and ECS. These contracts concern the supply of gas to Electrabel and to ECS. The volumes covered by the supply contracts would amount to about a third of the total volume supplied by Distrigaz in 2005 and less than 45% of its current supplies under contracts, i.e. excluding spot purchases. The volumes of gas available to Distrigaz will be sufficient to supply all its existing customers in France and Belgium, including SPE and to meet rising demand. Distrigaz will be able to meet such additional demand through its existing contracts and through purchases on the Zeebrugge hub, as it does today. Furthermore, the buyer of Distrigaz must possess proven experience in the energy sectors and therefore be capable of extending existing contracts or concluding new ones with producers.

Finally, the volume of the supply contracts will be gradually decreasing, owing to the expiry of Distrigaz’ upstream contracts and ECS’ foreseen loss of residential customers in the wake of the liberalisation in Brussels and Wallonia.

While it is true that most of Distrigaz’ current customers are industrial customers, Distrigaz will, however, keep its contracts for the supply of dealers such as Nuon and Essent and continue to cover part of the gas needs of Electrabel and SPE power stations under back-to-back contracts. Moreover, Distrigaz will also be able to compete on the markets for gas supply to household customers and small industrial and commercial customers. This will be facilitated by the retention of the ‘Distrigaz’ brand, which is well known in Belgium and France. Distrigaz will therefore be able to put together a balanced customer portfolio.

In sum, the Commission concluded that Distrigaz will remain a viable business and be able to compete effectively with the new GDF/Suez entity in Belgium and France. Its competitiveness will be enhanced by the proven expertise in the energy sector required of the purchaser. Moreover, the commitments relating to access to infrastructure will lower the barriers to entry and thereby allow Distrigaz to operate in a viable and competitive matter.

**Divestment of SPE**

The Commission considered that the divestment of GDF’s holding in SPE was necessary to eliminate the problems identified in the Belgian gas and electricity markets, as it would eliminate a clear horizontal overlaps in those markets.

However, as also highlighted by the market test, the Commission considered that the effectiveness
of the divestment of SPE in restoring competition
to the electricity sector and to the supply of gas
to small customers — by eliminating the current
horizontal overlaps — must be assessed not in iso-
lation, but in conjunction with the other remedies
in the other affected gas markets in Belgium.

As a matter of fact, thanks to the implementation
of the commitment to divest Distrigaz, SPE will be
able to benefit from the competition between the
merged entity and Distrigaz so as to obtain sup-
plies of gas and flexibility for its gas-fired power
plants and its own customers at competitive terms.
In the light of this, the Commission concluded
that SPE will be able to compete with the parties
in the Belgian electricity markets as effectively as
did with Suez prior to the merger.

Fluxys

The Commission considered that the commit-
ments concerning Fluxys and Fluxys International
will contribute to lowering the barriers to entry
to the Belgian gas markets, barriers which were very
high already before the merger and some of which
would have been exacerbated by the merger.

The restructuring of Fluxys, in line with the
commitments and the parties’ undertaking not
to control Fluxys and its management commit-
tee, will contribute to ensuring the independent
management of the regulated gas infrastructure.
Moreover, the divestment of Distrigaz will lead to
the effective unbundling of the transport operator
(Fluxys) from the main gas supplier (Distrigaz).
The remedies will therefore lower the barriers to
entry in the gas supply business and will contrib-
ute to creating a level playing field for all competi-
tors as regards access to infrastructure.

As regards the commitment not to control Fluxys,
while the merged entity and Publigaz are cur-
cently the main shareholders of Fluxys, it must
be stressed that joint control by the merged entity
and Publigaz by means of shareholders agreement
would be in breach of the commitments. In addi-
tion, the merged entity will not have a majority
on the board of directors of Fluxys, but will only
appoint one third of its directors (7 out of 21).
This creates the possibility of shifting majorities.
Moreover, the parties have undertaken that the
merged entity will relinquish the right to appoint
independent directors for the board. This will also
ensure the genuine independence (before and
after nomination) of the seven independent direc-
tors. It is also provided that the CREG will cer-
tify the independence of candidates for the post of
independent director. As a consequence, only one
third of the directors will represent the merged
entity on the board of directors, opening the way
to shifting majorities and preventing the merged
entity from exercising any veto power.

As a further guarantee of their commitment not
to control Fluxys either in law or in fact or by
shareholder agreement, the parties offered to set
up a “comité de direction” within the meaning of
Article 524bis of the Belgian Company Code. It is
provided that this “comité de direction” will have
exclusive powers to manage all aspects of the com-
pany’s activities in Belgium regarding transport/
transit infrastructure, storage and the LNG termi-
nal. As already pointed out above, the “comité de
direction” will also draw up the investment plan.
The system proposed by the parties for appointing
members of the “comité de direction” will guaran-
tee its independence from the board of directors.
The appointment procedure will contain four suc-
cessive safeguards to ensure the committee’s inde-
pendence from the parties: proposal by the remu-
neration committee; opinion from the corporate
governance committee; approval by the CREG;
and abstention of the merged entity in the vote.

This system of governance in Fluxys will in
practice remove from the board of directors any
powers over matters entrusted to the “comité de
direction”. As a result, the merged entity will have
no right of veto over the commercial strategy of
 Fluxys and no decisive influence in matters that
fall within the responsibility of the “comité de
direction”.

The Commission concluded that the set of meas-
ures regarding the governance of Fluxys described
above will guarantee that the merged entity will
not control Fluxys.

As regards Fluxys International formed from
the present Fluxys LNG, which will own the LNG ter-
minal in Zeebrugge and the non-regulated Bel-
gian and international assets, The merged entity
will own no more than 60% of its share capital.

Nevertheless, according to the commitments,
Fluxys International will grant Fluxys all the
requisite rights to use installations and equip-
ment regulated under Belgian law and delegate
to Fluxys all the tasks necessary for it to perform
its role as manager of the LNG terminal in Zee-
brugge. The system of governance proposed for
Fluxys will therefore also apply to Fluxys Inter-
national, which will in practice be managed inde-
pendently of the parties, as decisions by Fluxys
concerning the management of Fluxys Interna-
tional on the above-mentioned issues, which are
the sole responsibility of the “comité de direction”
of Fluxys, will not be subject to the control of the
merged entity.
Moreover, the parties will not be able to block investment decisions relating to infrastructure controlled by Fluxys and Fluxys International. The commitments provide that decisions on investments concerning the infrastructures owned by Fluxys and Fluxys International will be delegated to the “comité de direction” of Fluxys. The commitments also provide a further procedure whereby any investments deemed necessary can be financed by opening up the capital of Fluxys and Fluxys International to third parties.

Finally, the commitments relating to transit (the transfer to Fluxys of Distrigaz &Co and of GDF’s stake in Segeo and the commitment by Fluxys to apply the code of conduct, currently applicable to transmission, to new transit contracts) will strengthen the legal framework for the transit of gas in Belgium (the importance of this aspect was stressed by many third parties throughout the proceedings).

Commitments on investments

As indicated, the parties undertook to make a series of investments to increase Belgian and French gas infrastructure capacity.

Most importantly, these include the creation in Zeebrugge of a single entry point, thereby making it possible to link the hub, the LNG terminal, the arrival point of the Interconnector Zeebrugge Terminal (‘IZT’) and the arrival point of the Zeepipe Terminal (‘ZPT’). This will help solve the difficulties resulting from the lack of access capacity at the hub. The single entry point will make it possible to transfer volumes within this area from any point bordering the Zeebrugge zone, at a ‘commodity’ tariff and without having to reserve capacity. This connection will improve liquidity at the hub, since all operators active on the other terminals will be able to negotiate on the hub without having to overcome existing barriers to entry.

In addition, Fluxys has committed to making the necessary investments to improve the interconnection of the three terminals (Interconnector Zeebrugge Terminal, Zeepipe Terminal and LNG terminal) by October 2010 at the latest. Such interconnection will increase liquidity on the Belgian and French markets.

District heating

The commitment proposed for eliminating the problems identified in the market for district heating in France (by divesting GDF’s subsidiary, Cofathec Coriance) would remove the horizontal overlap created by the transaction. The number of networks and the volume of heat production to be divested will ensure the viability of the divested business. The divested entity will therefore be able to play a credible role in tendering procedures. Since this commitment entirely eliminates the horizontal overlap in a structural and well defined manner, the Commission concluded that it would be sufficient to eliminate the concerns identified in this market.

5. Conclusion

The Commission concluded that the commitments submitted by GDF and Suez were sufficient to address all competition concerns raised by the concentration and therefore declared the transaction compatible with the common market and the functioning of the EEA Agreement pursuant to Article 8 (2) of the Merger Regulation.

The experience and knowledge acquired with this case will undoubtedly prove useful in future merger cases and beyond. The results of the energy sector inquiry (*) have provided indications that the gas and electricity markets are still not working as they should. While the Commission supports European integration and restructuring of the energy sector, it must ensure that any competition concerns are remedied, and that consumers are protected. The remedies of this case are consistent with the findings of the energy sector inquiry which emphasise the need for i) structural solutions, such as ownership unbundling, aiming at severing the link between supply and infrastructure and ii) greater investment in infrastructure capacities to secure pro-competitive conditions for the sustainable development of energy markets.

(*) On 10 January 2007, the Commission published its final report on the energy sector competition inquiry, concluding that consumers and businesses are losing out because of inefficient and expensive gas and electricity markets. Particular problems include high levels of market concentration; vertical integration of supply, generation and infrastructure leading to a lack of equal access to, and insufficient investment in infrastructure; and, possible collusion between incumbent operators to share markets.

The final report is available on DG Competition’s website at: http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html