

***Case No COMP/M.5467 -  
RWE / ESSENT***

Only the English text is available and authentic.

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

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ARTICLE 6(1)b DECISION  
IN CONJUNCTION WITH ARTICLE 6(2)  
NON-OPPOSITION  
Date: 23/06/2009

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23/06/2009  
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PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION IN  
CONJUNCTION WITH  
ARTICLE 6(2)

To the notifying party

Dear Sir/Madam,

**Subject: Case No COMP/M.5467 – RWE/ Essent  
Notification of 29 April 2009 pursuant to Article 4 of Council Regulation  
No 139/2004<sup>1</sup>**

- 1) On 29 April 2009 the Commission received a notification of a proposed concentration within the meaning of Article 4 of the Merger Regulation by which RWE Aktiengesellschaft ("RWE") proposes to acquire sole control of Essent N.V. ("Essent") by way of a private offer to purchase the entire issued share capital, provided that the offer is accepted for a number of shares representing at least 80%<sup>2</sup> of Essent's total number of shares (the transaction).

#### **I. THE PARTIES AND THE OPERATION**

- 2) **RWE (Germany)** is an international vertically integrated energy company active on both electricity and natural gas markets. It is mainly active in Germany but also present in all EU Member States with the exception of Cyprus, Lithuania and Malta. Its presence outside Germany is particularly focusing on the United-Kingdom, the Czech Republic and Hungary. Its presence in the Netherlands prior to the Proposed Transaction is relatively limited in terms of turnover.
- 3) **Essent (the Netherlands)** is active in the electricity, natural gas and heating businesses, primarily in the Netherlands. It is also present in Germany and Belgium. In the Netherlands, it is currently active at all levels of activity on the electricity and gas markets, although prior to the closing of the Proposed Transaction it will have divested its distribution network (gas

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<sup>1</sup> OJ L 24, 29.1.2004 p. 1.

<sup>2</sup> This has subsequently been reduced to 66%.

and electricity).<sup>3</sup> In Germany, Essent is primarily active through a 51% shareholding in Stadtwerke Bremen AG ("SWB"). SWB is an electricity generator and supplier as well as a gas supplier. It also has participations in a number of other Stadtwerke (Bielefeld, Gütersloh, Ahlen etc).

- 4) The transaction concerns the acquisition of sole control of Essent by RWE. As a result of the transaction, RWE will acquire control of at least 66% and may own up to 100% of the share capital of Essent. As a consequence, the Proposed Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

## II. COMMUNITY DIMENSION

- 5) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion<sup>4</sup> and the aggregate Community wide turnover of each party exceeds EUR 250 million.<sup>5</sup> The Parties do not achieve more than two-thirds of their consolidated Community-wide turnover within one and the same Member State. The Proposed Transaction therefore has a Community dimension pursuant to Article 1(2) of the Merger Regulation.

## III. THE RELEVANT MARKETS

- 6) The envisaged transaction relates to the following markets where the parties' activities overlap horizontally:
- **Electricity/Netherlands:** the market for generation and wholesale supply of electricity, the retail supply to small customers (kleinverbruikers), the retail supply to large customers (grootverbruikers), electricity trading and on-line trading portal products;
  - **Gas/Netherlands:** wholesale supply, trading on hub, and retail supply;
  - **Electricity/Germany:** wholesale and retail supply;
  - **Gas/Germany:** wholesale supply, retail gas supply to industrial customers, retail supply to small customers (households) and gas storage;
  - **Hungary and Czech Republic -** Electricity and Gas Markets;
  - **Other markets in Germany and the Netherlands.**

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<sup>3</sup> Together with its waste management business. As such, neither the distribution business nor the waste management business form part of the Proposed Transaction.

<sup>4</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). RWE's consolidated world-wide turnover in 2008 was EUR 48,950 million while Essent's consolidated world-wide turnover in 2007 was approximately EUR 5,727.1 million.

<sup>5</sup> RWE's Community-wide turnover in 2008 was approximately EUR [...] while Essent's Community-wide turnover in 2007 was approximately EUR [...].

- 7) The envisaged transaction gives rise to a vertical relationship:
- **Gas/Netherlands**: between wholesale supply and retail supply;
  - **Cross-border market power** (the interconnector issue) in the short and long term;
  - **Electricity/Germany**: between wholesale market and retail supply;
- 8) Given the number of markets to analyse the Commission will explain its competitive assessment and conclusions on each individual market instead than in a broad section. If appropriate a description of significant aspects of a market may also be given, for example if regulatory changes took place or other specificities are present.
- 9) As it will be explained in the present decision, the transaction as originally notified raises serious doubts as to its compatibility with the common market as regards the German wholesale electricity market due to the reinforcement of RWE's dominant position on that market and the consequent strengthening of barriers to entry. It also raises serious doubts as to its compatibility with the common market as regards the overlap created on the market for retail supply of L Gas to large customers in the Bielefeld distribution area. Finally this transaction raises serious doubts as to its compatibility with the common market as regards the vertical relationship between the upstream market for the short-distance wholesale supply of L-gas in the RWE area and the downstream markets for gas retail sales<sup>6</sup>.
- 10) In the course of the proceedings, the notifying party submitted undertakings designed to eliminate the serious doubts identified by the Commission, in accordance with Article 6(2) of the Merger Regulation. In light of these modifications, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market or with the proper functioning of the EEA Agreement.

#### A. THE NETHERLANDS - (i) Electricity Markets

##### **I General overview on the Dutch electricity sector**

###### Generation

- 11) Total installed net generation capacity in the Netherlands amounted to approx. 23,254 MW per December 31, 2007<sup>7</sup> (today approx. 23,405 MW)<sup>8</sup>; total net generation in 2007 added up to approx. 99.35 TWh. In addition, there were net imports of approx.

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<sup>6</sup> See paragraph 58 of the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), OJ of 18 October 2008 C265, pages 6 – 25

<sup>7</sup> Source: EnergieNed.

<sup>8</sup> Frontier estimate.

17.6 TWh (17,600,000 MWh).<sup>9</sup> Gas-fired generation plants (natural gas and process gas, including CHPs) make up for approx. 69% of domestic installed capacity. The remaining capacity stems from hard coal-fired plants (approx. 18%), renewables (approx. 11%) and, to a small extent, nuclear power plants (approx. 2%)<sup>10</sup>, of which there is currently only one (Borssele, Province of Zeeland).

### Transmission

- 12) The national Dutch electricity transmission system is administered by TenneT Holding B.V. (“**TenneT**”) which, therefore, is the national TSO Power in the Netherlands. TenneT is a wholly state-owned entity. As of January 1, 2009 TenneT is the designated administrator of all grids as from 110 kV.
- 13) The Dutch transmission system interconnects to Germany by three interconnectors, to Belgium by two interconnectors and through the newly built NorNed connection (operational since May, 2008), to Norway.

### Distribution

- 14) There are eight companies that are operating regional electricity distribution systems. Although Essent operates a distribution network, the latter will be carved out prior to the completion of the Transaction and will, therefore, not be acquired by RWE.

### Balancing Power System

- 15) There is only a single balancing area in the Netherlands which encompasses the entire electricity system. TenneT is responsible for balancing supply and demand in that area. To that end, TenneT contracts approx. 250-300 MW of control capacity from domestic generators which are then obliged to sell their contracted capacity into the balancing market. In addition, TenneT invites bids for the supply of balancing power if an imbalance arises.

## **II Essent's and RWE's electricity activities**

- 16) Essent is a vertically integrated electricity supplier in the Netherlands. The company has a set of generation assets, mostly gas-fired and hard coal plants; Essent also has some nuclear, hydro and, through Essent Wind Nederland B.V, wind generation capacities. Essent's total installed capacity as of January 1, 2009 in the Netherlands adds up to approx. [...] MW (looking at ownership based aggregate capacity) or [...] MW (alternatively considering secured aggregate capacity). Finally, through Westland Energie Services B.V., Essent operates a total of [...] combined heat and power plants. However, Westland does not own these CHPs.

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<sup>9</sup> See Energiekamer, 2008 National Report – Office of Energy Regulation (The Energiekamer) to the European Commission (2008 National Report NL), page 14.

<sup>10</sup> Data regarding installed net generation capacity by type of plant according to Frontier Economic's Platts database.

- 17) Essent has no stake in the Dutch transmission grid. Currently, Essent is a distribution system operator in southern, eastern and northern parts of the Netherlands, through Essent Netbeheer B.V. (as of January 1, 2009 active under the name Enexis). However, as mentioned above, Essent's entire network business will be carved out prior to the completion of the Proposed Transaction. This business is therefore not taken in account for the purposes of the present decision.
- 18) Essent trades electricity at the wholesale level and supplies balancing power. It also supplies electricity to end customers.
- 19) RWE has limited generation capacity in the Netherlands, entirely related to some small scale CHPs with a total generation capacity of no more than 20 MW which are spread throughout the East of the North-Brabant province. Through Powerhouse Holding B.V, which works as a trading platform for its customers, RWE is contracting generation capacity of some [...] MW (in 2009) from CHPs operated by greenhouse farmers, whose installations provide them with electricity as a by-product of the heat generation process. Additionally, RWE has contracted minor generation capacity based on wind power and bio mass firing ([...] MW) via Powerhouse.
- 20) RWE is neither a transmission system operator nor a DSO in the Netherlands. Nor does RWE supply balancing power. RWE is active at the wholesale and retail levels.

### **III Market definitions and assessment**

- 21) The parties consider in line with previous Commission decisions taken in relation to the scope of product and geographic markets for transmission<sup>11</sup>, distribution<sup>12</sup> and balancing power that these are distinct product markets.<sup>13</sup> Transmission and distribution are of grid wide scope. Balancing power is national where the responsibility for balancing the system rests with a national transmission system operator, as is the case in the Netherlands. The market investigation has not contradicted this approach and as such the Commission concludes that these are appropriate market definitions. There is however no overlap between the parties activities in these markets and as such they will not be treated further.
- 22) The only electricity markets in which the parties activities overlap are i) the market for generation and wholesale supply of electricity, ii) the retail market for small customers (kleinverbruikers) and iii) the retail market for large customers (grootverbruikers). These are therefore the relevant markets which are treated individually below.

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<sup>11</sup> Case M.3440 – *EDP/ENI/GDP* where the Commission found transmission to constitute a distinct product market of grid wide scope. As the Netherlands has a single transmission system, the market is therefore of national scope.

<sup>12</sup> Case M.4238 – *E.ON/Prazska Plynarenska* –where the Commission found distribution to be a single and distinct product market of grid wide scope. There are eight regional distribution systems in the Netherlands. However following the carve out of Essent's distribution company, neither Essent nor RWE will have any ownership of distribution systems in the Netherlands.

<sup>13</sup> Case M.3268 – *Sydskraft/Graninge*, where the Commission found Balancing Power to constitute a distinct product market which was national where the responsibility for balancing the system rested with a national transmission system operator, as is the case in the Netherlands. Only Essent is active in providing balancing power within the Netherlands. RWE is not active in providing balancing power within the Netherlands and as such there is no overlap between the parties in this market.

## ***Generation and Wholesale Supply of Electricity***

### ***1. Product market definition***

- 23) Both RWE and Essent are active in the wholesale electricity markets in the Netherlands. The parties consider in line with the Commission's prior decisional practice that there is a single product market for both electricity generation and wholesale supply.<sup>14</sup> This includes the electricity generated in and imported into the relevant geographic area through interconnectors.<sup>15</sup> In addition, the wholesale market includes electricity bought and sold both through energy exchanges including day-ahead, intra-day and spot market platforms<sup>16</sup> and through bilateral contracts. This approach has not been contradicted by the market investigation and as such the Commission concludes that this is an appropriate market definition.
- 24) Demand comes mainly from electricity suppliers, large industrial and commercial customers who are able to buy directly on these markets, and traders. The supply side of the market for wholesale electricity in the Netherlands is quite concentrated and is mainly comprised of gas fired generation plants (69%) with the remaining capacity sourced from coal-fired plants (18%), renewables (11%) and to a very limited extent nuclear (2%). However, in line with the Commission's decision in Iberdrola/Scottish Power<sup>17</sup> no distinction is made between the different sources of electric energy within the wholesale electricity market.
- 25) Within the market for generation and wholesale supply, the Dutch Competition Authority (the "NMa") distinguishes between "peak hours" and "off-peak hours".<sup>18</sup> In addition, they also consider the possibility of a further distinction between peak and "super-peak hours". However the response to the current market investigation in this regard was inconclusive. The definition of the relevant product market can therefore be left open, as this does not change the final assessment.

### ***2. Geographic market definition***

- 26) Whereas the Commission has previously found the market for generation and wholesale supply of electricity to be national in scope,<sup>19</sup> in the course of the procedure the parties submitted that it is likely that this market is broader than national. In particular, they have submitted evidence that wholesale spot prices in the Netherlands and Belgium are the same for a considerable percentage of the time<sup>20</sup> and that Belgium is a likely candidate for a

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<sup>14</sup> Case M.3268 – *Sydkraft/Graninge*

<sup>15</sup> Case M.3440 *ENI/EDP/GDP*

<sup>16</sup> For the Netherlands – Endex and APX.

<sup>17</sup> Case M.4517 *Iberdrola/Scottish Power*

<sup>18</sup> In its "Vision Document on Concentrations within the Energy Markets", the NMa grouped the hours in which demand is high (07.00 to 23.00 on working days) defining them as a peak market. Other hours are defined as an off-peak market. A further distinction within peak hours for so called "super peak hours" was left open. This approach was also taken in the Nuon Essent decision (6015/83).

<sup>19</sup> DG Competition Report on the Energy Sector Inquiry (January 10, 2007), SEC (2006) 1724.

<sup>20</sup> According to this, power spot prices at APX and ENDEX were the same in 83.6% of all hours in 2008. Trilateral market coupling has resulted in high convergence of power prices at APX, Belpex and Powernext.

common generation and wholesale market with the Netherlands. From this point of view national capacity shares could be said to overstate the competitive significance of a combined RWE/Essent.

- 27) Furthermore, the parties have submitted that in view of existing trilateral market coupling between the Netherlands, Belgium and France and the fact that by the end of 2009 market coupling will extend to Germany and Luxembourg, there are indications that the geographic scope of the generation and wholesale market will become wider than national.
- 28) In the course of the procedure, the Dutch Ministry of Economic Affairs indicated that they would like the Commission to take into account the potential competition effects on the hypothetical "North-West European" market, which they consider would include at least the Netherlands and Germany.
- 29) The response to the market test in this regard indicates that although many respondents are of the view that due to market coupling<sup>21</sup> and increases in the amount of capacity available over cross-border interconnectors, integration between "North-West European" markets is in progress, many were of the view that electricity markets are still national.
- 30) As noted above, however the NMa itself currently distinguishes between *peak* and *off-peak* hours. For peak hours, it has found the market to be national in scope, whereas for off-peak hours it has found the market includes both the Netherlands and Germany.<sup>22</sup> In off-peak hours the NMa considers that domestic electricity producers are disciplined to a sufficient degree, amongst others by imports from Germany, because during those hours there is more capacity available on the interconnector.
- 31) In a previous Commission decision,<sup>23</sup> the BKartA objected to this geographic market definition. In the course of this procedure, a majority of respondents who replied to the market test were found to favour it however.
- 32) There are thus two possible definitions for the geographic market : either a national scope for all hours or a national scope for peak hours and an area equal to Germany and the Netherlands for off-peak hours. For the purposes of this decision, the definition of the relevant geographic market can be left open because under either of these two decisions, the transaction will not give rise to competition concerns.

### ***3. Competitive Assessment***

#### ***a) Market Shares***

- 33) The parties' activities overlap horizontally in *the wholesale electricity markets*.

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<sup>21</sup> Market coupling as between the Netherlands, France and Belgium was introduced in 2006, and will be extended by the end 2009 to Germany and Luxembourg.

<sup>22</sup> NMa Decision 6015 – *Nuon/Essent*.

<sup>23</sup> Case M.4370 – *EBN/Cogas*



- 34) On the Dutch wholesale market as a whole, the transaction will lead to a combined market share of [20-30]% with an increment of [0-5]%. The combined entity's position on the market as a market leader would therefore be unchanged. The parties' most important competitors are Electrabel Nederland ([10-20]%), Nuon ([10-20]%), E.ON Benelux ([5-10]%), Rijnmond ([5-10]%) and Delta ([0-5]%). In addition other smaller competitors exist.
- 35) In the alternative, should the market be split between *peak* and *off-peak* hours, for the *Netherlands*, the transaction would lead to a combined market share of [20-30]% for peak hours or [20-30]% for off-peak hours.
- 36) For *peak hours* the combined entity with [20-30]% would as pre-transaction be the market leader, followed closely by Electrabel Nederland ([20-30]%), Nuon ([10-20]%), E.ON Benelux ([5-10]%), Rijnmond ([0-5]%) and Delta ([0-5]%).
- 37) Similarly for *off-peak hours* the combined entity would as pre-transaction be the market leader ([20-30]%), followed by Electrabel Nederland ([10-20]%), Nuon ([10-20]%), E.ON Benelux ([5-10]%), Rijnmond ([5-10]%) and Delta ([5-10]%).
- 38) In any case, given the very minor increment RWE would bring with it ([0-5]%) and the weak competitive constraint exercised by RWE pre-transaction, the transaction would not change the current structure of the market. It is therefore unlikely to change any incentive the combined entity would have to co-ordinate with its competitors and does not as such raise concerns for competition on the relevant market.

*Hypothetical Dutch-German market for off-peak hours*

- 39) Should we consider a hypothetical *Dutch-German* market for off-peak hours, the competitive landscape would change somewhat, giving the combined entity an estimated [30-40]%, with an increment of [5-10]%. On such a hypothetical market, the combined entity would again be followed by E.ON with an estimated [10-20]% respectively, Vattenfall with [10-15]% respectively and thereafter by EnBW/EdF ([5-10]%), GdF Suez/Electrabel ([0-5]%) and Nuon ([0-5]%).
- 40) However, in terms of the potential for co-ordination, the market investigation has confirmed that there is in fact ongoing capacity expansion and significant entry planned for the Dutch generation and wholesale market. Furthermore, on the larger hypothetical market, market shares are not very symmetric. Although there is some symmetry between the top three players in terms of integration,<sup>24</sup> half of competitors who replied have stated that they find the wholesale market to be non-transparent.
- 41) In terms of unilateral effects, whilst the parties combined market share on such a hypothetical market would be above [20-30]%, following the divestiture of SWB, as outlined further in this decision, the parties' combined market share would be below [30-40]%. The HHI would be 1,396 for off-peak hours and the delta created by the merger would be [...] respectively.

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<sup>24</sup> The combined entity would be vertically integrated as between generation/wholesale and retail markets in the Netherlands and Germany. E.ON is also integrated in both countries, whereas Vattenfall is currently integrated in Germany it would also become integrated in the Netherlands, should it acquire Nuon.

42) Given these elements and given the lower likelihood to exercise market power in off-peak hours due to excess in capacity and the rather flat nature of the supply curve in those hours, as the transaction is unlikely to cause concern.<sup>25</sup>

#### *Concerns in relation to Entry*

43) In the course of the proceedings, the Dutch Ministry of Economic Affairs raised a concern that absent the merger RWE would be the single most important potential entrant to the Dutch market for generation and wholesale supply.

44) In this regard, the Commission has taken into account the fact that regardless of the transaction RWE does have concrete capacity expansion plans for the Netherlands with projects totalling [...] MW.<sup>26</sup> While some of these projects are at an early stage, taken together, they represent a significant proportion of Essent's current capacity ([...] MW). On this basis, it could be said that in the absence of the merger, RWE could be a significant entrant to the Dutch market.<sup>27</sup> However of this capacity, only [...] MW is hard coal and the other [...] MW is wind capacity, the production of which is not constant due to weather variables which cannot be controlled. As such, the potential competitive impact of this capacity is attenuated to a certain extent.

45) Furthermore, the market investigation has confirmed that there are currently many projects already in the pipeline by more than five competitors. In addition to these capacity expansions, which potentially amount to 13'000 MW, GDF ([...] MW), Dong (JV with Eneco, [...] MW) and EDF (JV with Delta, [...] MW) have confirmed that they are planning to enter the wholesale market.

46) We therefore find that there are no serious concerns in relation to entry into the generation and wholesale market.

#### *Liquidity*

47) In response to the market investigation, some respondents voiced concern that the transaction could have a negative effect on liquidity in the Dutch electricity wholesale markets. The combined entity, with approximately [20-30]% share of trades taking place on the wholesale market could withdraw liquidity from the Dutch market place due to a centralisation of trading activities. The possible internalization of the trading activities of the parties could subsequently result in customer foreclosure.

48) The parties have confirmed that Essent's trading business will be carved out of Essent and combined with the current trading activities of RWE Supply & Trading GmbH. However the potential centralisation of activities in Germany does not per se create an incentive to integrate vertically.

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<sup>25</sup> Paragraph 20 of the Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

<sup>26</sup> RWE has permits in place for two coal-fired units at Eemshaven with a total capacity of 1560 MW, which should be operational by 2013. It also has applied for permits for a wind farm at Tromp Binnen, with a projected capacity of 295 MW. Finally, RWE Innology Benelux also plans for two offshore wind projects, each with a capacity of 750 MW.

<sup>27</sup> 'Entrant' is considered appropriate given that RWE currently only holds [0-5]% of the generation and wholesale market.

- 49) Upon request the parties provided figures which confirm that Essent is essentially [...]. Given RWE's limited capacity it sources all its retail requirements ([...] GWh) from the wholesale market and is therefore "short" in trading.
- 50) There is a potential risk that [...] net positions could be combined and internalised. When asked about future trading strategy post-transaction, RWE is unable to confirm what its plans are. It is therefore possible that the trading strategy will be changed. However, given RWE's minor share of the retail markets, the amounts which could be internalised are minor. Furthermore, both Endex and APX have a significant number of members that are registered for electricity trading (35 and 53 respectively). In addition a number of independent power producers are entering the market and will therefore sell amounts of generation greater than that which could potentially be internalised by the parties.
- 51) It is therefore unlikely that the internalisation of the negative net position of RWE would significantly affect liquidity on the Dutch electricity wholesale market and thus lead the customer foreclosure. We therefore find that there are no serious concerns in relation to liquidity in the Dutch electricity wholesale market.

### ***Financial Electricity Trading***

#### ***1. Product market definition***

- 52) In previous decisions, the Commission has found that in addition to the wholesale supply, generation and transport of electricity, it may be possible to distinguish a product market for financial trading of electricity<sup>28</sup>.

#### ***2. Geographic market definition***

- 53) Financial electricity trading, if treated as a separate product market has a potentially EEA geographic scope but could also be narrower (national).<sup>29</sup>
- 54) The definition of the relevant product market can be left open, as this does not change the final assessment.

#### ***3. Competitive Assessment***

- 55) At national level, the parties' market shares are in the range of [20-30]%.<sup>30</sup> On an EEA wide market for financial electricity trading, the parties estimate their combined market share to be less than 15% and therefore not affected.

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<sup>28</sup> M.3268 Sydkraft/Graning. While such decision considered that physical trading could also be a separate market, subsequent practice of the Commission (see inter alia Report of the Sector Inquiry) and market investigation show there is no reason to consider physical trading as distinct from other wholesale sales of electricity where two parties agree on a price and other terms for a physical supply of electricity. The following section considers thus only financial trading as a separate product market, in so far as financial trading does not entail any commitment to supply electricity.

<sup>29</sup> M.3868 DONG/Elsam/Energi E2, M.4110 E.ON/Endesa, M.4517 Iberdrola/Scottish Power.

<sup>30</sup> This range takes into account that figures differ depending on whether one takes the trading or the settlement date.

**Table 1 – Electricity Trading**

<b>Financial Trading</b>	<b>RWE</b>	<b>Essent</b>	<b>Combined</b>
<b>Netherlands</b>	[5-10]%	[10-20]%	<b>[20-30]%</b>
<b>EEA</b>	[5-10]%	[5-10]%	<b>&lt; 15%</b>

56) Given the parties' combined market shares, and also considering the numerous market players and the relatively low entry barriers, the proposed transaction would not raise serious doubts on a separate financial electricity trading market.

### **Retail Supply of Electricity**

#### **1. Product market definition**

57) At *retail* level, the Commission has previously identified separate product markets for large and small customers. In ENI/EDP/GDP<sup>31</sup>, which concerned Spain and Portugal, the Commission distinguished between i) large industrial customers which are connected to high and medium voltage and ii) smaller industrial, commercial and domestic customers which are connected to the low voltage grid. On the other hand, in a more recent case for Great Britain,<sup>32</sup> the Commission has distinguished between i) domestic customers, ii) smaller industrial and commercial customers (SMEs) which do not use "half hourly rates" and iii) large industrial and commercial ("I&C") customers which do use half hourly rates.

58) In relation to the Netherlands, the parties proposed that the most appropriate distinction can be drawn based on connection capacity and propose to use the definition recently adopted by the NMa.<sup>33</sup> For both supply and demand side reasons, the NMa distinguishes between small and large users, distinguishing between small scale users with a maximum transmission value of 3.80 A (kleinverbruikers) and large and medium sized users with a maximum transmission value of more than 3.80 A (grootverbruikers).<sup>34</sup>

59) The NMa does not currently distinguish within the first segment as between domestic and small industrial and commercial users, or between large and medium sized customers.

60) Many respondents to the market test indicated that they favoured further segmentation than that used by the NMa. Within the "kleinverbruikers" segment of the retail market, a

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<sup>31</sup> Case M.3440 - ENI/EDP/GDP

<sup>32</sup> Case M/5224 -EDF/BE

<sup>33</sup> NMa Decision 6015 – Nuon/Essent.

<sup>34</sup> Only suppliers of "kleinverbruikers" are obliged to have a licence to supply. The NMa considers that different competition conditions apply to low-volume users in relation to consumption profiles, sales and marketing, price structure and delivery conditions. Furthermore, medium and high volume end users also show more evidence of willingness to switch suppliers than low-volume users.

majority of respondents to the market test favoured a segmentation as between domestic households and small industrial and commercial customers. Reasons given indicate differences between these groups in relation to demand profile and consumption<sup>35</sup>, variations in product price and flexibility<sup>36</sup> and different approaches by energy companies in terms of approaching and managing these customers.

## **2. Geographic market definition**

61) In relation to the Netherlands, the parties agree with both the Commission and the NMa, which have both previously found the relevant retail markets to be national in scope.<sup>37</sup> The market investigation has not yielded any information which would lead the Commission to revisit its previous findings. Thus the markets will be considered to be national in scope.

## **3. Competitive Assessment**

62) In the Netherlands the parties activities overlap in the retail supply of electricity to both small (kleinverbruikers) and large customers (grootverbruikers).

63) As regards kleinverbruikers, the transaction will lead to a combined market share of [20-30]% with an increment of [0-5]%. The Parties' most important competitors are Nuon ([20-30]%) and Eneco ([20-30]%). In addition some other smaller competitors exist (Oxxio [5-10]%, Delta [0-5]%, Greenchoice [0-5]%).

64) As regards grootverbruikers, the Proposed Transaction will lead to a combined market share of [10-20]% with a minor increment of [0-5]%. The Parties' most important competitors are Electrabel ([20-30]%), Eneco ([10-20]%), Nuon ([10-20]%), E.ON ([5-10]%) and Trianel ([5-10]%). In addition some other smaller competitors exist (Delta [0-5]%, others [10-20]%).

65) Even if the market for kleinverbruikers was further segmented as between domestic and small industrial and commercial users, the competitive landscape would not change significantly however. Whereas for the NMa definition of kleinverbruikers the parties have a combined share of [20-30]%, just behind Nuon [20-30]% and Eneco [20-30]%, for the domestic household market combined shares of the parties would be [30-40]% with an increment of [0-5]%, followed by Nuon [20-30]% and Eneco [20-30]%. For the small industrial and commercial market combined shares of the parties would be [20-30]%, behind Nuon [30-40]% and Eneco [20-30]%.

66) Given the very minor increments brought about by the transaction and the weak competitive constraint exercised by RWE pre-transaction, the transaction would not change the current structure of the market. Furthermore, in addition to the main players there are a number of smaller competitors with aggressive marketing strategies.

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<sup>35</sup> One competitor indicated that domestic users consume up to 3.35 A, whereas small I&C customers consume up to 3.80 A. Many respondents stated that domestic users tend to demand more in the evening and weekends whereas small I&C use more during the daytime.

<sup>36</sup> Household products are highly standardised, whereas small I&C products tend to be slightly differentiated with regard to price options. Furthermore small I&C have access to "clickable" products.

<sup>37</sup> Case M.3440 – *ENI/EDP/GDP* and NMa Decision 2129 – *Essent N.V. - N.V. Nutsbedrijven Maastricht*.

Competition is evidenced by healthy switching rates as between the various market players and in particular towards certain smaller competitors.

- 67) It is therefore unlikely to change any incentive the combined entity would have to coordinate with its competitors and does not as such raise concerns for competition on the relevant market. This demonstrates easy market entry and indicates that there is potentially little harm to competition by the removal of RWE as a separate market player. We therefore find that there are no serious concerns in relation to the Dutch retail market/s.

### ***On-line Trading Portal Products***

#### ***1. Product Market definition***

- 68) During the course of the market investigation the Commission was made aware of a potentially emerging new market for online trading portal products. Both RWE (through Powerhouse Holding N.V) and Essent (through Westland Energies Services B.V) are active in the procurement of electricity from CHPs and greenhouse operators and subsequently acting as an agent for these CHPs in the sale of electricity on the wholesale market (APX or Endex). This is done via an online trading platform to which anyone active on the wholesale market has access, either to sell electricity or to buy it.<sup>38</sup>
- 69) According to a third party, there is a trend towards more "back delivery" through such online trading or sales portals and already apparently the majority of the back delivery electricity from small and mid-scale CHP units in the Netherlands is sold in this manner. An on-line trading platform is one of the services, which is offered through back delivery contracts. Not all energy companies offering back delivery contracts have an online trading platform, however according to one third party energy companies with an online trading platform have a competitive advantage compared to other companies active in back delivery. The development of an online trading platform requires a long timeframe and the IT costs to develop and maintain such a system are also high.
- 70) According to another competitor, the target market of online trading portals is a subgroup of the wider market. The volume of CHP is expected to grow in the future due to the positive business case analysis of commercial/market gardeners who wish to sell their electricity into the wider electricity market. In addition, renewable CHP is by law given priority for transportation capacity where there is congestion.
- 71) As such, the question is raised as to whether there is a separate product market for online trading portal products.
- 72) In response to a market test, a slight majority of respondents, including the NMa, considered online trading portal products to be an integral part of the generation and wholesale market and not a separate product market.

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<sup>38</sup> According to the parties, online trading portals are IT applications operated by energy companies that are designed to support CHP generators, notably horticulturists, to decide how to dispatch the CHP, whether to generate or not, to decide whether to sell or to buy electricity and to trade the surplus electricity they generate.

- 73) According to the NMa, the sale of electricity produced on the wholesale market can be done apart from direct access to APX or Endex via online trading platforms, traditional brokerage (such as financial institutions and specific brokers), or direct bilateral contact with potential buyers. The process of matching supply and demand changes over time due to technological developments and the development of new market places. Small scale electricity producers with or without CHPs outsource the sale and management of the sales to third parties or manage them by themselves, for instance, through an online trading platform. This, according to the NMa, is not new and not different from how other larger electricity producers trade.
- 74) In any case, for the purposes of this decision, the definition of the relevant product market can be left open. Under any reasonable definition, the transaction will not give rise to competition concerns.

## ***2. Geographic Market definition***

- 75) On the basis of the information available, the hypothetical market for online trading portal products would appear to be national given that the electricity is procured mainly from Dutch CHP and greenhouse operators and sold on the Dutch wholesale market.
- 76) For the purposes of this decision, the definition of the relevant geographic market can however be left open. Under any reasonable definition, the transaction will not give rise to competition concerns.

## ***3. Competitive Assessment***

- 77) Both RWE (through Powerhouse Holding N.V) and Essent (through Westland Energies Services B.V) operate online trading portals. According to best estimates, CHP capacity in the Netherlands amounts to approximately 6,850 MW. The parties estimate that CHP generators that procure back delivery services through Powerhouse and Westland account for approximately [...] MW (CHPs, wind parks, bio mass) and [...] MW respectively. The market investigation has shown that there are several other competitors active in back delivery and operating online trading portals: DVEP, Agro Energy, Endon, Kas Energy, Anode, Nidera and Trianel. There are no significant barriers to start such activities. On the basis of the figures provided by the parties, the parties' aggregate share of this hypothetical market is therefore in the region of [10-20]%.
- 78) As a conclusion even if there would be a separate market the transaction raises no serious concerns in relation to online trading products.

### **A. ii) THE NETHERLANDS - Gas Markets**

#### **I General overview on the Dutch gas sector**

##### **Legislation and regulator body**

- 79) The key legislative act establishing the regulatory framework governing the natural gas sector in the Netherlands is the "Act of June 22, 2000 providing rules in respect of the transmission and supply of gas" (the "Gas Act"). Exploration and production of natural gas are primarily regulated on the basis of the "Act of October 31, 2002, providing rules

in respect to exploration and production of minerals and activities similar to mining" (the "Mining Act").

- 80) Regulatory tasks with respect to the Dutch natural gas sector are entrusted to the Energiekamer of the NMa which, inter alia, monitors transport tariffs applied by gas system operators and the transmission service conditions.

#### Gas balance

- 81) About 75% of the total supply of gas of the Netherlands comes from domestic production.<sup>39</sup> Domestic production stems from the Groningen gas field, which is exploited by Nederlandse Aardolie Maatschappij B.V. ("NAM")<sup>40</sup>, and a number of smaller onshore and offshore gas fields. NAM is the largest producer in the Netherlands, others include Total, GdF and Wintershall.
- 82) There are two categories of gas qualities produced and consumed in the Netherlands, namely high calorific gas (H gas) and low calorific gas (L gas).
- 83) GasTerra is by law the sole purchaser of all Groningen gas (including other smaller onshore fields which also produce L-gas) produced by NAM.<sup>41</sup> Therefore, GasTerra is the only player with primary access to Dutch L-gas.
- 84) The Netherlands import only H gas from Norway, Russia, Germany, the UK and Denmark. On balance, however, the Netherlands are a net exporter of natural gas.<sup>42</sup> All imports into the Netherlands refer to H-Gas only, i.e. there are no imports of L-gas.<sup>43</sup>

#### Gas storage

- 85) There are 3 gas storage facilities located in the Netherlands, namely depleted gas fields (Grijpskerk, Norg and Alkmaar). Not all Dutch storage volumes are available to the market and most of the capacity is reserved to GasTerra to secure high flexibility in its export and domestic contracts. In addition, some gas storage facilities located in

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<sup>39</sup> In 2007, total domestic production amounted to 709 TWh (399 TWh of H-Gas, 310 TWh of L-Gas) - see Monitor Energy Markets 2007, page 18.

<sup>40</sup> NAM is a 50/50 joint venture of Exxon and Shell. The Groningen gas field is the largest supplier of flexible production in Western Europe.

<sup>41</sup> Dutch law requires a license for the production of gas fields in the Dutch territorial sphere (Article 6 of the Mining Act). The Dutch minister will only grant one license per geographical area for the production (extraction) of a mineral (Article 7(1) of the Mining Act). The license to exploit the Groningen gas field has been granted to NAM in 1963. Subsequently, NAM and the Dutch State contractually agreed that GasTerra (previously Gasunie) will have an exclusive purchase right on the produced gas. According to these contractual obligations, NAM is obliged to supply all the gas it produces in the Netherlands to GasTerra. In addition, as to small fields, Article 54(1)(b) of the Gas Act imposes a statutory obligation on GasTerra to procure, on the request of licensees of a Dutch gas production license, gas which was extracted from the Dutch territory, on reasonable terms and for a market price.

<sup>42</sup> In 2007, imports of natural gas amounted to approx. 232 TWh, see Monitor Energy Markets 2007, page 18.

<sup>43</sup> However, German gas storage facilities, namely the Epe gas storage, is used to supply flexibility for the Dutch L-Gas market segment. To this end, Dutch L-Gas is stored in the Epe gas storage which is only a few hundred meters away from the Dutch border and when required this Dutch L-Gas is withdrawn from the storage and transported back into the Netherlands. Thus, there are no imports of German L-Gas into the Netherlands.



Germany close to the Dutch border (in Epe, Kalle and Nüttermoor), are also used for Dutch gas activities, although on a smaller scale.

### Gas transport

- 86) There are two types of networks for transporting natural gas in the Netherlands, namely a national high pressure transmission system and several low pressure regional distribution systems. The high pressure network, in turn, consists of separate networks of pipelines for various types of natural gas, including H-Gas and L-gas from the Groningen field. The entry points of the high pressure network are the production points, gas storage facilities and import points. Exit points include export points, gas storage installations and gas receipt stations.
- 87) The Dutch national high pressure transmission systems are owned by Gasunie, one for H-Gas and one for L-gas (both systems run in parallel). However operation rests with Gas Transport Services B.V. ("GTS"), a wholly owned subsidiary of Gasunie (in turn, a wholly state-owned entity). GTS is the exclusive high pressure transmission system operator (TSO) in the Netherlands.
- 88) According to the data provided by GTS most import points are congested<sup>44</sup> or near full i.e. they are fully booked for the coming years. In order to solve congestion, GTS launched 2 open seasons in 2005 (OS 2005) and 2007 (OS 2012) which resulted into investment decisions. According to GTS, the new infrastructures of OS 2005 will be commissioned by October 2010, whereas the new infrastructures of OS 2012 will be mostly commissioned by October 2011.

### Gas quality conversion

- 89) Gas quality conversion is provided as a service by GTS, in order to make sure that end-users are provided with gas of the right calorific value. Quality conversion takes place at conversion stations.<sup>45</sup>
- 90) Until now, shippers who want to convert H gas into L gas have to book conversion capacities. Before July 2008, the capacity conversion was congested since it was fully booked, including for the coming years. Capacities tended to be fully booked, mostly by GasTerra, but booked capacities were almost never fully utilized. However, GTS and GasTerra have entered into a contractual agreement under which GTS will acquire full control over the use of quality conversion units.<sup>46</sup> Therefore since 1 July 2008 the bottleneck has been removed.
- 91) In addition, new rules for quality conversion will enter into force very soon. The NMa has decided to socialize the cost of quality conversion by means of a tariff at all entry and exit points. Accordingly when a shipper contracts entry or exit capacity with GTS, this shipper will pay a tariff including both the contracted entry or exit capacity and the

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<sup>44</sup> In the sense of contractual congestion, i.e. a situation where the level of firm capacity demand exceeds the technical capacity.

<sup>45</sup> Gas quality conversion can be achieved physically by two methods, namely mixing H-Gas and L-Gas or by thinning out H-Gas with nitrogen (nitrogen fixation). GTS is operating both mixing stations and nitrogen injection stations.

<sup>46</sup> When GTS foresees a shortage in quality conversion capacity GasTerra will swap H-Gas with L-Gas at certain entry points (or vice versa).

quality conversion. GTS will take care of the necessary conversion between these entry and exit points. Thus, it will be no longer necessary to book any capacity conversion. The socialization of quality conversion will take effect from the date the new tariffs for GTS will be published by the regulator (Energiekamer of the NMa). This is expected by 1 July 2009.<sup>47</sup>

### The Title Transfer Facility

- 92) The Title Transfer Facility (TTF) is a virtual market place where GTS offers market parties the opportunity to transfer gas that is already present in the GTS system to another party. Using TTF, gas that is brought into the national gas transmission grid via an entry point can change ownership before it leaves the national gas transmission grid at an exit point.
- 93) The fully socialisation of the gas quality conversion (see above paragraph 91) implies that there will be no longer any distinction between H gas and L gas for the nomination at the TTF and there will be only one TTF point in the very near future (scheduled for 1 July 2009).<sup>48</sup>
- 94) In addition the Dutch government has sent a proposal to the Dutch parliament in order to improve the tradability and the liquidity of the TTF. These new provisions are expected to take place by 1 October 2010.<sup>49</sup>

## **II RWE's and Essent's gas activities in the Netherlands**

- 95) Essent is a fully vertically integrated gas supplier in the Netherlands, except for exploration and production.<sup>50</sup> The company has [...] gas supply contracts with [...] under which natural gas is supplied from [...] and delivered at [...] and at the Title Transfer Facility ("TTF", a virtual trading point for natural gas in the Netherlands), all of them relating to [...] gas. In addition, Essent sources [...] gas from [...] and at the TTF.
- 96) Essent has no stake in the Dutch natural gas transmission system (high pressure), but operates a gas distribution network (low pressure) in the southern, eastern and northern parts of the Netherlands (through Enexis B.V., formerly Essent Netbeheer B.V.). However, Essent's entire network business will be carved out prior to the completion of

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<sup>47</sup> See GTS' public letter of 15 June 2009 for the attention of gas shippers.

<sup>48</sup> Ibid.

<sup>49</sup> Reply of the Dutch Ministry of economic affairs (8 June 2009) to the Commission: "*presently, a supplier of gas decides where the gas he sold leaves the transportation network. The buyer cannot bring this gas back into the market as it has to leave the network at the predetermined exit point. The buyer of gas can therefore not decide himself whether he wants to use the gas or rather sell it to a third party. His supplier would have to enable this option. The proposal for changing the Gas Act determines that each feeder and each extractor has himself the responsibility for the entry or exit programme on his connection. The entry and exit programmes are legally split.*" According to the Dutch Ministry of economic affairs, this proposal is expected to be accepted by the parliament in the first quarter of 2010. If accepted, the measures will take effect by 1 October 2010.

<sup>50</sup> Essent has some minor gas production from the Waalwijk gas field (located close to the Belgian boarder) which is operated by Northern Petroleum Nederland B.V. Essent holds via Essent Energy Gas Storage B.V. a [30-40]% interest in the production license of the Waalwijk concession. The Waalwijk gas field production represented about 0.08% of the total Dutch gas production in 2008. Furthermore this gas field is nearly depleted.

the Proposed Transaction. Accordingly this Essent's infrastructure will not be taken into account for the purposes of the present decision.

- 97) In addition Essent owns an L gas storage facility at Epe (Germany) which is connected to the Dutch transmission grid.
- 98) RWE entered the Dutch gas sector in 2000. At the wholesale level, RWE acts as a buyer and seller of natural gas. At the retail level, RWE supplies natural gas to large and small end customers. RWE sources natural gas mainly from GasTerra.
- 99) RWE has no stake in gas transmission or distribution, and does not own natural gas storage facilities in the Netherlands. However, RWE owns an H gas storage facility at Kalle (Germany) which is connected to the Dutch transmission grid.

### **III Market definitions and assessment**

- 100) According to the Commission's decision-making practice the following activities belong to separate product markets: (i) exploration/production of natural gas; (ii) gas wholesale supply, (iii) gas transmission (via high pressure systems), (iv) gas distribution (via low pressure systems), (v) gas storage / flexibility services (vi) gas trading, (vii) gas retail supply, comprising several separate markets.<sup>51</sup>
- 101) RWE and Essent own gas storage facilities located in Germany and use them for their Dutch gas activities. However they do not make them available to the market. Likewise they do not offer other gas flexibility services to the market, which in addition to gas storage services, would include swing production, gas quality conversion (between H-Gas and L-gas), import flexibility, flexible supply contracts and linepack (i.e. storage of natural gas in the transmission system by varying network pressure).<sup>52</sup>
- 102) In so far as the Proposed Transaction does not have any effects on the gas infrastructures markets, a precise definition of these markets is not necessary for the purposes of this decision. However, the situation concerning RWE's and Essent's used (booked or owned) capacities on the different infrastructures described above will be taken into account in the analysis of the effects of the merger on the markets for gas supply.

#### ***Market entry***

##### *Barriers to entry*

- 103) Some barriers to entry have been recently lowered (gas conversion) or are likely to be lowered in the future (gas conversion and import capacities). However for the time being there still remain significant barriers to entry on the Dutch gas markets.
- 104) Firstly, import capacities of H gas are congested, since all the firm capacity is fully booked for the coming years. This has been confirmed by GTS during the market investigation.

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<sup>51</sup> Case No. COMP/M.4370 – *EBN/Cogas Energy*, decision of 28 September 2006, paragraphs 11-13, 17-18.

<sup>52</sup> A product market for gas flexibility services, which would be wider than the market for gas storage services, was envisaged by the Commission in previous cases. See notably case No. COMP/M.3868 – *DONG/Elsam/Energi E2*, decision of 14 March 2006, paragraphs 50-70.

- 105) Secondly, there is very little gas storage capacity made available to the market. According to the NMa's calculation, only 4% of the total capacity is made available to the market.<sup>53</sup> This implies that market players are dependent on GasTerra, notably for their seasonal flexibility.
- 106) Thirdly, as to the market for gas supply to small customers the NMa recently underlined that there were additional specific barriers to entry. Indeed in its decision Nuon / Essent, the NMa found that considerable investment costs are necessary to build up the required client base and that GasTerra requires its purchasers to submit a bank guarantee valid for two months. In addition the NMa underlined the fact that GasTerra only delivers to suppliers that purchase more than 50 million m<sup>3</sup> per year constitutes a potential barrier to entry.
- 107) Several gas competitors questioned during the market investigation raised the barriers to entry relating to the investment costs and the bank guarantee required by GasTerra. Although a few competitors raised the fact that GasTerra would require a minimum off take volume, no evidence supporting this statement could be provided to the Commission.<sup>54</sup>

*No aggravating impact of the Proposed Transaction on barriers to entry*

- 108) Although RWE and Essent own or book some transport and storage capacities, the Proposed Transaction is not likely to aggravate the barriers to entry as explained hereafter.
- 109) As to import capacities booked by RWE and Essent, the data provided by GTS show that RWE and Essent will not be in a position to foreclose imports of H gas since they have booked a limited share of the existing firm import capacity. Indeed, they have booked together less than [5-10]% of the firm H import capacities for 2009, 2010 and 2011, including new capacities that are to be commissioned in October 2010 and October 2011 as a result of the open seasons launched by GTS.<sup>55</sup> This share is not very different when looking at the total H import capacities (firm and interruptible).
- 110) Finally, when questioned by the Commission, GTS and the NMa raised no issue as to the impact of the Proposed Transaction on the access to gas storage or flexibility services.
- 111) As to gas storage capacities used for the Netherlands, no capacity is made available to the market by RWE and Essent. Indeed these storage capacities (located at Kalle and Epe) are entirely used for RWE and Essent's needs. Although RWE and Essent have booked some gas storage capacities (in addition to their own storage facilities), it has to be underlined that the gist of the gas storage capacities is in the hands of GasTerra. Likewise gas flexibility tools are essentially in the hands of GasTerra (gas storage,

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<sup>53</sup> See Monitor Energy Markets 2007, Analysis of developments on the Dutch wholesale markets for gas and electricity, page 28 – NMa, September 2008

<sup>54</sup> When questioned by the Commission, although GasTerra indicated its preference to sell larger volumes of gas, GasTerra stated that it *"has no minimum supply threshold below which it would not sell gas to a (new) retailer"*.

<sup>55</sup> [...].

100% of the Groningen production, 90% of the small fields production) or GTS (quality conversion, line pack).

- 112) Finally, when questioned by the Commission, the NMa did not raise any issue as to the impact of the Proposed Transaction on the access to gas storage or flexibility services.
- 113) RWE and Essent have overlapping gas activities on (i) gas wholesale supply, (ii) gas trading on hub, and (iii) gas retail supply.
- 114) In addition the proposed transaction gives rise to a vertical relationship between gas wholesale supply and gas retail supply.

### ***Gas wholesale supply / gas trading on a hub***

#### ***1. Product Market definition***

- 115) In previous decisions the Commission has defined a market for gas wholesale supply, with a possible distinction between L gas and H gas.<sup>56</sup> In a Dutch context, the NMa has also defined such a market, with a possible distinction between L gas and H gas.<sup>57</sup>
- 116) The majority of the gas that is sold in the Netherlands (92% in 2007) is delivered directly on the gas receipt station<sup>58</sup> by the wholesaler. This gas is therefore not traded, but only sold and delivered (under contract). The trade in the remaining (8% in 2007) of the gas takes place on the TTF (Title Transfer Facility), a virtual gas hub on the high pressure network, where especially H gas is traded in long-term contracts via brokers.<sup>59</sup>
- 117) In previous decisions, the Commission has considered whether the trading of natural gas on hubs constitutes a product market distinct from the wholesale supply market.<sup>60</sup> In this context, the Commission defined a gas hub as an instrument which facilitates exchanges of gas amongst market players in order to allow buyers and sellers to find sufficient volume for supply or demand exceeding the capacities in the short term. The hub can be either physical in nature or a virtual trading point.
- 118) In GDF/Suez, the Commission came to the conclusion that due to the different operation of the trading hub (a more immediate meeting of supply and demand, where parties act as both sellers and buyers) and different arrangements governing the access, the hub in Zeebrugge constituted a separate product market.<sup>61</sup>
- 119) The Commission has not yet considered whether the trading of natural gas at the TTF forms a separate market distinct from the wholesale market. However, the NMa in

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<sup>56</sup> Case No. COMP/M.3297 – *Norsk Hydro/Duke Energy*, decision of 19 December 2003, paragraphs 12-13.

<sup>57</sup> Case No. 6015/*Nuon-Essent*, decision of 21 May 2007, paragraph 41.

<sup>58</sup> From the gas receipt station the gas is transported via the regional network operator's regional network to the end consumer's meter.

<sup>59</sup> See Monitor Energy Markets 2007, Analysis of developments on the Dutch wholesale markets for gas and electricity – NMa, September 2008

<sup>60</sup> Case No. COMP/M.5220 – *ENI/Distrigaz*, decision of 15 October 2008, paragraph 21.

<sup>61</sup> Case COMP/M.4180 – GDF/Suez, decision of 14 November 2006, paragraphs 70-72

its *Nuon/Essent* decision found no reasons to consider the TTF trade as a separate market, notably because (i) accession to TTF is relatively simple for market parties that wish to operate as shippers and (ii) suppliers of gas via bilateral contracts that do not trade via TTF also have the possibility to trade via this market place. Thus the NMa concluded that it was sufficiently plausible that the trade on TTF was already disciplined by the bilateral trade.

- 120) A vast majority of gas competitors questioned during the market investigation took the view (i) that prices of gas traded on the TTF are close to prices of gas purchased by other means at wholesale level in the Netherlands and (ii) that gas trading on the TTF is part of the Dutch wholesale market.
- 121) However, for the purposes of the present decision, the question whether TTF belongs to a separate product market can be left open since the Proposed Transaction is unlikely to lead to competition concerns under any alternative product market definition envisaged above.

## ***2. Geographic Market definition***

- 122) As to the geographic market delineation, in line with the Commission's and NMa's practice, RWE submits that the gas wholesale market is national in scope.
- 123) If gas trading on the TTF were to belong to a separate product market, RWE submits that it might well be part of a larger market including at least the hub at Zeebrugge (Belgium) and the NBP hub (UK). Although at the time of the case GDF/Suez, the Commission found that the TTF hub was part of a separate geographical market<sup>62</sup>, besides the Zeebrugge and NBP hubs which together constituted a separate geographic market, RWE claims that there has been significant convergence (in terms of prices) as regards the Zeebrugge, NBP and TTF hubs.
- 124) For the purposes of the present decision, the question of the exact geographic delineation of a possible market for gas trading at a hub can be left open since the proposed transaction is unlikely to give rise to competition concerns under any alternative reasonable geographic market definition.

## ***3. Competitive Assessment***

- 125) The Proposed Transaction does not give rise to any affected market when considering any possible gas wholesale market.<sup>63</sup>
- 126) When considering a separate market for trading on gas hub, the Proposed Transaction would only lead to an affected market when considering gas trading on the TTF.<sup>64</sup>

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<sup>62</sup> Case No. COMP/M.4180 – GDF/Suez, decision of 14 November 2006, paragraphs 87-99.

<sup>63</sup> According to the data provided by RWE, RWE and Essent have a combined market share of [5-10]% (Essent: [5-10]%; RWE: [0-5]%) on a wholesale market which would encompass both L gas and H gas. If a distinction between L gas and H gas is made, there is no overlap, since only Essent is active on H gas wholesale ([10-20]%) and only RWE is (very marginally) active on L gas wholesale ([0-5]%). Whatever the product market definition for gas wholesale, GasTerra is by far the main player (market shares of [70-80]% on a global wholesale market, [90-100]% on the L gas wholesale market and [90-100]% on the H gas wholesale market).

- 127) As to gas trading on the TTF, according to the data provided by RWE, RWE and Essent have a combined share higher than 15%, i.e. [20-30]% (Essent: [10-20]%; RWE: [5-10]%) in terms of gas volumes traded in 2007, only if trading on the TTF hub is considered as a separate market. According to the data provided by GTS, the parties' combined share is similar for 2008.
- 128) The proposed transaction gives rise to a moderate increment on TTF. Furthermore there are more than 60 players on TTF, some of which are significant operators.<sup>65</sup> Finally TTF has been quickly growing since 2007, in terms of both gas volumes traded and number of parties trading daily.<sup>66</sup>
- 129) In light of the above, it can be concluded that the proposed transaction is unlikely to give rise to competition concerns on the TTF.

### ***Retail supply of gas***

#### ***1. Product Market definition***

- 130) In previous cases, the Commission has distinguished between (i) the supply of gas to large power plants, (ii) the supply of gas to certain large scale industrial customers, and (iii) the supply of natural gas to smaller industrial, commercial and residential customers.<sup>67</sup>
- 131) Following the Commission's decision practice<sup>68</sup>, the NMa distinguishes within the market for supply of gas to end users between the following three segments: (i) supply of gas to small customers, (ii) supply of gas to large industrial customers and (iii) the supply of gas to power plants. The main reasons for the NMa to follow the Commission's approach are differences in consumption profiles, differences in supply terms and differences in flexibility.<sup>69</sup>
- 132) The NMa concluded that there is a separate market for small customers because different competitive parameters apply on this market (e.g. supply profiles, different pricing structures and different switching behaviour). The NMa also considered that different regulatory rules apply for the small customer segment. In particular the obligation to acquire a licence to supply end users with an annual consumption of less than 170,000 cm (Article 43(1) of the Gas Act).<sup>70</sup>

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<sup>64</sup> When other geographic markets for trading gas on hub are considered, RWE and Essent have a combined market share well below 15%. The possible alternative geographic would be (i) gas trading at the NPB and Zeebrugge or (ii) gas trading at the NPB, Zeebrugge and the TTF.

<sup>65</sup> According to the data provided by GTS (TTF Trading is done between customers of GTS, but GTS has to be notified of the transaction).

<sup>66</sup> See notably Transport insight 2008, by GTS, p.35. According to the TTF shippers list available on GTS' website, there were 64 shippers registered on 29 May 2009.

<sup>67</sup> Case No. COMP/M.4180 – GDF/Suez, decision of 14 November 2006.

<sup>68</sup> See Commission, decision of April 25, 2006, Case No. COMP/M.4110 - E.ON/ Endesa, at paragraph 13, Commission, decision of March 14, 2006, Case No. COMP/M.3868 - DONG/Elsam Energi/E2, at paragraph 122.

<sup>69</sup> NMa decision of 21 May 2007, Case No. 6015 - Nuon/Essent, paragraph 57.

<sup>70</sup> Case No. 6015 – Nuon/Essent, decision of 21 May 2007, paragraph 60.

- 133) In line with the NMa's practice, RWE submits that there is a clear delineation between users of an annual consumption of less than 170,000 cm and users with an annual consumption of more than 170,000 cm.
- 134) RWE underlines that regulation requirements apply for the supply of gas to end users with an annual consumption of less than 170,000 cm. Indeed gas suppliers are required to obtain a licence, and subject supply obligations against reasonable terms and tariffs. Also the termination of gas supply contracts is regulated.<sup>71</sup> If the NMa is of the opinion that the tariffs are unreasonable it can impose a maximum tariff on the supplier.<sup>72</sup> On the other hand these rules do not apply for the supply to end-users with an annual consumption of more than 170,000 cm.
- 135) Furthermore, RWE underlines that there are significant differences between these two categories of end customers, in terms of products, pricing and switching behaviour.
- 136) The overwhelming majority of the respondents to the market investigation confirmed the delineation submitted by RWE.
- 137) In addition, both the Commission and the NMa have raised the issue whether the retail supply markets should be further distinguished in terms of gas quality (H-Gas vs. L-gas).<sup>73</sup>
- 138) However in the Netherlands, a distinction between L gas and H gas would be not relevant for small consumers (annual consumption of less than 170,000 cm) since they consume L-gas only.<sup>74</sup>
- 139) RWE submits that from a supplier's point of view the delineation of a separate market for the supply of L-gas would not be appropriate, because there is a strong degree of supply side substitutability between H-Gas and L-gas because of quality conversion. RWE underlines that, already about 20% of the total Dutch L-gas supply account for quality conversion and quality conversion is expected to grow further as conversion from H-Gas to L-gas will develop into a standard flexibility service as of 2010.
- 140) As already mentioned in paragraph 91), quality conversion costs are being fully socialised in the near future. This means that any gas operator which books transport capacities will systematically pay a tariff including a conversion tariff. Thus it will be no longer necessary to book conversion capacities and shippers will be able to book H-Gas entry capacity and the same amount of L-gas exit capacity (or vice versa) without booking quality conversion. Accordingly one can reasonably expect that the quality conversion will grow in the next future, and this puts into question the relevance of a distinction between H and L gas, at least on the supply side.

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<sup>71</sup> Article 43(1) and Article 44(1) of the Gas Act.

<sup>72</sup> Article 44(5) Gas Act.

<sup>73</sup> Case No. COMP/M.4370 – EBN/Cogas Energy, Commission's decision of 28 September 2006; Case No. 6015/Nuon-Essent, NMa's decision of 21 May 2007, paragraphs 61-65.

<sup>74</sup> The NMa confirmed this situation. RWE explains that this is due to the technical lay-out of the network which is based on L-Gas as historically only L-Gas was available in the Netherlands because the first gas fields discovered in the Netherlands were L-Gas fields.



- 141) However, as to the conversion of H gas into L gas, it can be noted that the new rules for quality conversion will not remove the congestion of import capacities of H gas (see paragraph 88) above) as such. New import capacities are to be commissioned in the future, but not before October 2010 and October 2011. Therefore, it might be still relevant to make a distinction between H and L gas on the supply side, at least for the period running until October 2011.
- 142) Furthermore, on the demand side, the vast majority of large customers questioned during the market investigation stated that there is no substitution between H and L gas. The main reasons put forward were technical (switching to another gas quality is not technically possible), related to high switching costs and the impossibility to be connected to both H gas and L gas networks. The NMa also stated that, on the demand side, H gas and L gas are hardly substitutable to each other since, notably, H-Gas and L-gas are transported via two different infrastructures which are not interchangeable, while the large majority of customers have only a connection to one infrastructure.
- 143) For the purposes of the present decision the question whether a distinction should be made between L gas and H gas can be left open since the proposed transaction is unlikely to give rise to competition concerns under any alternative product market definition.

## ***2. Geographic Market definition***

- 144) As to the geographic delineation, the Commission and the NMa have found in previous cases that all Dutch markets for retail supply of gas were national in scope.<sup>75</sup> It can be noted that while for some other countries, like France, the Commission found that there were several geographical submarkets based on the existence of separate balancing zones<sup>76</sup>, there is one single balancing zone in the Netherlands.

## ***3. Competitive Assessment***

- 145) RWE and Essent have a combined market share below 15% on the market for supply of H gas to large customers, and the Proposed Transaction gives rise to a moderate increment (well below 5%) on this market.<sup>77</sup> This market is therefore not affected by the Proposed Transaction and will not be assessed.
- 146) RWE and Essent have a combined market share higher than 15% on the other possible markets for supply of gas to large customers. These markets are assessed in turn below.

### *Supply of L gas to large customers*

- 147) On this market, the proposed transaction would give rise to a significant increment, and the new entity would be the first player by far with a market share above 40%. The results of the market investigation showed that RWE have significantly overestimated

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<sup>75</sup> Case No. COMP/M.4370 – EBN/Cogas Energy, Commission's decision of 28 September 2006; Case No. 6015/Nuon-Essent, NMa's decision of 21 May 2007.

<sup>76</sup> See for instance case COMP/M.4180 – GDF / Suez, decision of 14 November 2006, paragraphs 380-385.

<sup>77</sup> This was confirmed during the market investigation. Eight other competitors were identified during the market investigation, the main of which are GasTerra (market share of [40-50]% in 2008), StatoilHydro ([10-20]%), Eneco ([10-20]%) and GDF Suez ([5-10]%).

some competitors' 2007 market shares (notably GasTerra, Nuon, Eneco and Oxxio) while it has underestimated 2007 market shares of other competitors (notably Delta, GDF Suez and Dong). The parties' and their competitors' market shares are set out in the table below.<sup>78</sup>

**Table 2**

	L gas large customers		
	2007		2008
	Notification	Investigation	Investigation
Essent	[20-30]%	[20-30]%	[20-30]%
RWE	[10-20]%	[10-20]%	[10-20]%
<i>Essent + RWE</i>	<i>[40-50]%</i>	<i>[40-50]%</i>	<i>[40-50]%</i>
Nuon	[10-20]%	[5-10]%	[5-10]%
GasTerra	[20-30]%	[10-20]%	[10-20]%
Eneco	[10-20]%	[5-10]%	[5-10]%
Delta	[0-5]%	[5-10]%	[5-10]%
E.On/NRE	[0-5]%	[0-5]%	[0-5]%
GDF Suez	[0-5]%	[10-20]%	[10-20]%
Oxxio	[0-5]%	---	---
DONG	*	[0-5]%	[0-5]%
Main Energie	*	[0-5]%	[0-5]%
Statoil	*	[0-5]%	[0-5]%
Total	100,0%	100,0%	100,0%

\*: These companies were not identified as competitors on this market in the Form CO

Source: Form CO and market investigation

- 148) Despite RWE's and Essent's high combined market share, the proposed transaction is unlikely to lead to competition concerns for the following reasons.
- 149) Firstly, this market is a bidding market where there are a number of other competitors which are regularly participating for the supply of important gas volumes to large customers. These customers are price sensitive and can easily switch. Thus a vast majority of customers questioned during the market investigation stated that (i) they could easily switch from a gas provider to another and (ii) that they would do it if the new entity RWE/Essent were to raise its prices by 10%. The customers switching rate provided by the parties and their competitors indicate that indeed customers do switch.<sup>79</sup> The market investigation has revealed that market shares of some competitors have significantly fluctuated between 2007 and 2008. Finally the overwhelming majority of

<sup>78</sup> The Commission asked the competitors to provide their gas sales (in volume) on each market for gas supply (H gas, L gas for large customers, L gas for small customers) and could therefore calculate their market shares.

<sup>79</sup> Form CO, paragraph 661. On this market, the contracts lost by Essent in 2007 and 2008 represented respectively [10-20]% and [20-30]% of Essent's total contracts ([10-20]% and [20-30]% of its gas volumes), while the contracts lost by RWE in 2007 and 2008 represented respectively [10-20]% and [10-20]% of RWE's total contracts ([10-20]% and [10-20]% of its gas volumes). Likewise several competitors of the parties mentioned switching rates comprised between 5% and 40% (in terms of gas volumes) in 2008.

the parties' competitors questioned stated that this market is relatively or highly competitive.<sup>80</sup>

- 150) Secondly the short duration of the contracts facilitates the customers switching. Indeed the market investigation has shown that about 80% of the volumes are sold under contracts with duration no longer than two years.<sup>81</sup>
- 151) Thirdly, customers are supplied under tailor made contracts and have a significant bargaining power. This was indeed stated by all competitors active on this market and the vast majority of customers questioned during the market investigation.
- 152) Fourthly, RWE and Essent are not the closest competitors. Indeed a vast majority of customers questioned did not see RWE and Essent as the closest competitors in terms of both services provided and prices.<sup>82</sup> This is also supported by the data provided by the parties: only a limited proportion of customers (in terms of both number of contracts and volumes) who switched from RWE chose Essent as a new gas provider in 2007 and 2008; likewise a limited proportion of customers who switched from Essent chose RWE as a new provider.<sup>83</sup>
- 153) Fifthly, although there are still non negligible barriers to entry on this market, it can be noted that, as mentioned above (see paragraphs 90) and 91)), the barrier relating to gas quality conversion has been lowered and is going to be even more lowered in the near future. This should play in favour of a better access to L gas.
- 154) Finally, no major concern was raised neither by the competitors and customers questioned nor by NMa which was also questioned.
- 155) In light of the above, the proposed transaction is unlikely to raise competition concerns on the market for supply of L gas to large customers.

#### *Supply of L and H gas to large customers*

- 156) If no distinction between H gas and L gas is made, the parties' combined market share would be by far lower, i.e. slightly above [30-40]% (about [10-20]% for RWE and about [20-30]% for Essent) according to the results of the market investigation. In addition there are several other significant players, including GasTerra ([20-30]%), GDF Suez ([10-20]%), Eneco ([5-10]%) and StatoilHydro ([5-10]%).

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<sup>80</sup> 90% of competitors questioned and active on this market made this statement.

<sup>81</sup> Out of these 80%, about one half has 2 year duration and the other half has one year duration.

<sup>82</sup> More than 80% of the respondents did not rank RWE and Essent together amongst the top 3 competitors in terms of (i) services provided and (ii) prices on the market for L gas supply to large customers.

<sup>83</sup> In 2008, amongst RWE's customers who switched to another gas provider, [10-20]% (in terms of volumes) switched to Essent, [20-30]% to Nuon, [10-20]% to GasTerra, [20-30]% to Eneco, [5-10]% to Delta, [5-10]% to E.On and [5-10]% to other competitors. The breakdown is similar for 2007. Although a breakdown is not available for Essent's customers who switched to another gas provider, it can be noted that only [10-20]% of RWE's new customers (in terms of volumes) came from Essent in 2008. Furthermore, out of [...] contracts [...] million cubic meters) lost by Essent in 2008, only [...] [...] million cubic meters) were gained by RWE in 2008. These [...] contracts represented about [5-10]% of the gas volumes lost by Essent on this market in 2008.

157) In this respect and taking into account that the arguments developed under paragraphs 149) to 154) above are also valid for this wider market, the proposed transaction is unlikely to raise competition concerns on the market for supply of (L and H) gas to large customers.

*Supply of (L) gas to small customers*

158) The market investigation confirmed the market shares of the main competitors estimated by RWE. On this market, there are three main competitors, all incumbents, namely Essent, Nuon and Eneco, with close market shares and a combined market share of around 75%. Besides there are at least nine other competitors, including RWE, which for most of them have individual market shares no higher than 5%. The parties' and their competitors' market shares are set out in the table below.

**Table 3**

	(L) gas small customers		
	2007		2008
	Notification	Investigation	Investigation
Essent	[20-30]%	[20-30]%	[20-30]%
RWE	[5-10]%	[0-5]%	[5-10]%
<i>Essent + RWE</i>	<i>[30-40]%</i>	<i>[20-30]%</i>	<i>[30-40]%</i>
Nuon	[20-30]%	[20-30]%	[20-30]%
Eneco	[20-30]%	[20-30]%	[20-30]%
Delta	[0-5]%	[0-5]%	[0-5]%
Greenchoice	[0-5]%	[0-5]%	[5-10]%
E.On/NRE	[0-5]%	[0-5]%	[0-5]%
GDF Suez	*	[0-5]%	[0-5]%
Oxxio	[0-5]%	[0-5]%	[0-5]%
DONG	*	[0-5]%	[0-5]%
NLEnergie	*	[0-5]%	[0-5]%
Main Energie	*	[0-5]%	[0-5]%
Others	[0-5]%	**	**
Total	100,0%	100,0%	100,0%

\*: no market share was estimated for these companies in the Form CO.

\*\* : no other competitors were identified during the market investigation

Source: Form CO and market investigation

159) Although it would give rise to a moderate increment (about [5-10]%), the proposed transaction would strengthen the existing oligopoly between Essent, Nuon and Eneco. The question therefore arises whether the removal of RWE, which entered recently the Dutch gas markets (in 2000), would be likely to raise competition concerns on this market, by way of unilateral or coordinated effects.

160) The proposed transaction is unlikely to lead to competition concerns for the following reasons.

161) As explained hereafter, anticompetitive unilateral effects are unlikely because RWE does not exert a specific competitive constraint on this market - and therefore is not a maverick; furthermore, there is a significant degree of competition between all gas retailers on this market.

- 162) Firstly, Essent's internal documents provided to the Commission do not see RWE as exerting the main competitive constraint on Essent.
- 163) Secondly, the previous statement is supported by Essent's internal switching data. Indeed, it does not appear that RWE is a more dynamic or challenging competitor than other suppliers. On the contrary, there is a range of other suppliers that are much more relevant from Essent's perspective, especially [three competitors] since more customers switch from Essent to these suppliers than to RWE. As a matter of fact, RWE gained only about [0-5]% of Essent's customers who switched to another gas provider in 2007 and 2008.<sup>84</sup>
- 164) Thirdly, the possibility of switching is facilitated by the fact that, according to the data gathered during the market investigation, about 80% of gas contracts (in terms of volumes) have no duration or have a duration not exceeding 1 year.<sup>85</sup> Thus such a possibility puts a competitive pressure on gas retailers. As a matter of fact, in a recent report<sup>86</sup>, the NMa noted that, due to a higher percentage of customers who switched from a gas retailer to another in 2007-2008, the competitive pressure on gas retailers increased over this period. In this report, the NMa also noted that switches took place among the three largest retailers, among the smaller suppliers and from smaller suppliers to the biggest three. Finally, when questioned by the Commission, the NMa pointed that, in 2008, a new website was set up in order to help customers to better orient on the market.<sup>87</sup>
- 165) Fourthly, the data gathered during the market investigation show that there are a number of other small competitors than RWE active on this market. Some of them like Greenchoice, Oxxio and NEM, are dynamic on this market. As a matter of fact the overwhelming majority of competitors questioned stated that this market is highly or relatively competitive, and all of them see this market as attractive, i.e. that it is worthwhile to enter or to continue to be active on it.
- 166) Fifthly, although there are still non negligible barriers to entry on this market, it can be noted that, as mentioned above (see paragraphs 90) and 91)), the barrier relating to gas quality conversion has been lowered and is going to be even more lowered in the next future.

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<sup>84</sup> See annex 6-A/B.IV.2(f)(dd)(1)(ii) of the Form CO (Overview of the switching behaviour of Essent's gas retail customers in the years 2007 and 2008). In 2008, [...] and [...] respectively picked up [30-40]% ([20-30]% in 2007) and [20-30]% ([10-20]% in 2007) of Essent's customers who switched to another gas retailer.

<sup>85</sup> 51% of contracts have no duration and 30% have a duration not exceeding 1 year. These figures are based on the responses of all competitors active on this market. As to Essent, about [50-60]% of its contracts (in terms volumes) have no duration while [30-40]% have 1 year duration. As to RWE, about [30-40]% of its contracts (in terms volumes) have no duration while [20-30]% have 1 year duration.

<sup>86</sup> NMa Market Monitor regarding small electricity and gas customers ("Marktmonitor Nederlandse kleinverbruikersmarkt voor elektriciteit en gas") over the period July 2007- June 2008 – January 2009

<sup>87</sup> The Office of Energy Regulation of the NMa has established the "energiewijzer" in cooperation with other authorities to support customers with their choice of supplier. This website offers extensive information about product offerings and some service indicators of suppliers: [http://www.consuwijzer.nl/Ik\\_wil\\_advies\\_over/Energie/Energiebedrijven\\_vergelijken\\_en overstap/Energiebedrijven\\_vergelijken/Basisinformatie/Over\\_de\\_EnergieWijzer](http://www.consuwijzer.nl/Ik_wil_advies_over/Energie/Energiebedrijven_vergelijken_en overstap/Energiebedrijven_vergelijken/Basisinformatie/Over_de_EnergieWijzer)

- 167) Finally no major concern was raised, neither by the competitors and customers questioned nor by the NMa which was also questioned.
- 168) Anticompetitive coordinated effects are also unlikely.
- 169) Firstly, the Proposed Transaction is not likely to strengthen the incentive to coordinate on this market, since as explained above (paragraphs 161) to 165)), RWE does not exert a competitive pressure significantly different than those exerted by several other small competitors.
- 170) Secondly, there is also a significant competitive pressure from the other small players than RWE, which share together more than 20% of the market. The market investigation has revealed that some of them are aggressive and have recently gained market shares from notably Essent. In this respect, this competitive constraint would make unlikely a sustainable coordination between the new entity, Eneco and Nuon.
- 171) Thirdly, on this market, the Commission has no knowledge of recent past anticompetitive coordinated behaviour between Eneco, Nuon and Essent. As a matter of fact, as mentioned above in paragraphs 164) and 165) there is a significant degree of competition between the three main players.
- 172) Finally no possible coordinated effects concern was raised by the respondents to the market investigation.
- 173) In light of the above, the proposed transaction is unlikely to raise competition concerns on the market for supply of (L) gas to small customers.

### ***Vertical relationships***

- 174) The Proposed Transaction gives rise to a vertical relationship between the upstream market for gas wholesale supply and the downstream markets for gas retail sales. However, on the gas wholesale markets, GasTerra is the dominant player while the market share of the new entity would be well under 15% except on the H gas wholesale market ([10-20]%).<sup>88</sup> However on the market for supply of H gas to large customers RWE and Essent have a market share well below 15%.<sup>89</sup>
- 175) Accordingly in light of the above, any risk of vertical foreclosure from the new entity on the upstream markets for gas wholesale and the downstream markets for gas supply to large and small customers is not likely.

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<sup>88</sup> According to the data provided by RWE, RWE and Essent have a combined market share of [5-10]% (Essent: [5-10]%; RWE: [0-5]%) on a wholesale market which would encompass both L gas and H gas. If a distinction between L gas and H gas is made, there is no overlap, since only Essent is active on H gas wholesale ([10-20]%) and only RWE is (very marginally) active on L gas wholesale ([0-5]%). Whatever the product market definition for gas wholesale, GasTerra is by far the main player (market shares of [70-80]% on a global wholesale market, [90-100]% on the L gas wholesale market and [40-50]% on the H gas wholesale market)

<sup>89</sup> According to the data provided by RWE, RWE and Essent had a combined market share of [10-20]% in 2007 (Essent: [5-10]%; RWE: [0-5]%). The market investigation has confirmed that RWE and Essent had a combined market share well below 15% in 2007 and 2008 (the market shares have been recalculated on the basis of the data gathered through the market investigation).

## **B. Cross Border Market Power – The Interconnector issue**

### ***1. Product Market definition***

- 176) RWE Transportnetz Strom's ("RWE TSO") co-owns and –operates with the Dutch electricity TSO, TenneT three of the five interconnectors on the Dutch-German border<sup>90</sup>. RWE TSO's main activity consists of managing and developing one of the four electricity transmission grids in Germany, and those interconnectors which tie the German network to other European networks from its grid area. In addition, RWE TSO is the national balancing responsible among the four German TSOs meaning that it is responsible for the overall electricity import-export balance in Germany.
- 177) In the previous decision-making practice of the Commission the relevant product market has been considered as the operation and management of the high voltage grid ("electricity transmission market")<sup>91</sup>, i.e. the transmission of electricity from some points to other points on the high voltage grid.
- 178) The electricity transmission market has been distinguished from the market for the generation and wholesale supply of electricity and the market for retail supply of electricity to end-customers<sup>92</sup>.
- 179) Furthermore, the electricity transmission market has been identified as a separate market from the market for the distribution of electricity, i.e. the operation and management of the lower voltage grids. Such a distinction between transmission and distribution is also recognized by Directive 2003/54/EC. According to the Directive the transmission system may only include extra- high and high voltage levels but not the medium and low voltage level. The latter levels are exclusively covered by the distribution system<sup>93</sup>. This difference is regularly reflected in a different topology of the networks. Transmission networks cover very few big lines whereas the distribution systems cover usually a high number of smaller lines. In addition, in the Directive 2003/54/EC transmission is defined as the transport of electricity with a view to its delivery to distributors whereas distribution is defined as the transport of electricity with

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<sup>90</sup> 380-kV Romerskirchen-Maasbracht line, 380-kV Siersdorf-Maasbracht and the 380-kV Gronau-Hengelo line

<sup>91</sup> Commission Decision of 14 August 2008 in case COMP/M.5154 – *CASC JV*, OJ C 270, 25.10.2008, p. 15, paragraph 18 et seq.; Commission Decision of 22 August 2008 in case COMP/M.4922 – *EMCC*, OJ C 288, 11.11.2008 p. 1, paragraph 12 et seq.; Commission Decision 2006/622/EC of 21 December 2005 in case COMP/M.3696 – *E.ON/MOL*, OJ L 253, 16.9.2006 p. 20, paragraph 212; and Commission Decision 2005/801/EC of 9 December 2004 in case COMP/M.3440 – *EDP/ENI/GDP*, OJ L 302, 19.11.2005 p. 69, paragraph 34.

<sup>92</sup> A further distinction between large industrial and commercial customers on the one hand and smaller industrial and commercial customers and domestic customers on the other hand was considered.

<sup>93</sup> Article 2(3) and (5) of Directive 2003/54/EC.

a view to its delivery to customers<sup>94</sup>. This means that in general production is connected to the level of the transmission networks whereas consumption takes place in general at the distribution level. Finally according to the Directive 2003/54/EC different tasks are attributed to the transmission system operators<sup>95</sup> and the distribution system operators<sup>96</sup>.

180) Therefore, for the purpose of this decision the relevant product market can be defined as the electricity transmission market including the transmission grid and the interconnectors connected to this voltage level.

## ***2. Geographic Market definition***

181) According to the previous decision making practice of the Commission the geographic scope of the electricity transmission market is confined to each transmission operator's network<sup>97</sup>. A transmission network constitutes a natural monopoly within the area it covers. For producers and users of electricity in the RWE transmission area in Germany, and importers of electricity to and from this network area, the transmission RWE TSO grid is not substitutable with any other transmission grid.

182) The Commission has also considered the existence of a separate market relating only to the transmission of electricity involving a "cross-border flow" within the meaning of Article 2(1) of Regulation 1228/2003/EC<sup>98</sup>. The geographic scope of such an activity would be limited to the transport of electricity on one specific interconnector line. It was held that it is in principle possible for market participants to substitute certain interconnectors when booking interconnector capacity by using others, although this would normally lead to an increase in the number of interconnectors that are necessary to complete the booking path. The market investigation in the present case has also pointed to a relatively high level of substitutability between the German interconnectors towards the Netherlands, e.g. the interconnectors between RWE TSO and TenneT as well as those between transpower and TenneT. Respondents nevertheless provided more differentiated replies as regards the substitutability of the interconnectors between the Netherlands and other countries: Germany, Belgium and Norway.<sup>99</sup>

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<sup>94</sup> OJ L 176/1, 15.07.2003. See in particular recital 3.

<sup>95</sup> Article 9 of Directive 2003/54/EC.

<sup>96</sup> Article 14 of Directive 2003/54/EC.

<sup>97</sup> Commission Decision 2005/801/EC of 9 December 2004 in case COMP/M.3440 – *EDP/ENI/GDP*, OJ L 302, 19.11.2005, p. 69, paragraph 75 and Commission Decision 2006/622/EC of 21 December 2005 in case COMP/M.3696 – *E.ON/MOL*, OJ L 253, 16.9.2006, p. 20, paragraph 253 where the grid was operated on a national level.

<sup>98</sup> Commission Decision of 14 August 2008 in case COMP/M.5154 – *CASC JV*, OJ C 270, 25.10.2008, p. 15, paragraph 21 et seq. and Commission Decision of 22 August 2008 in case COMP/M.4922 – *EMCC*, OJ C 288, 11.11.2008, p. 1, paragraph 14 et seq.

<sup>99</sup> Cf. replies to the questionnaire on the interconnector and the questionnaire to competitors in the Netherlands



- 183) However, the competitive analysis in this in the present case, which concerns the ability and incentive of RWE TSO to withhold interconnector capacity with a view to raising prices in the Netherlands, does not depend on whether only the RWE TSO-TenneT interconnectors or the national transmission grid is considered as the relevant geographic market. RWE TSO has the exclusive right to operate and manage all interconnectors connecting to its network. In addition (as will be shown) in recital 200)), RWE TSO is responsible for deciding (in cooperation with TenneT) the transmission capacity.
- 184) Therefore, for the purposes of present decision, it can be left open whether the product market definition is the entire transmission market or a set of interconnectors.

### **3. Competitive Assessment**

#### ***Dutch electricity wholesale market – vertical effects- Short term interconnector capacity withdrawal***

- 185) As mentioned above (cf. recital 176)) RWE TSO co-owns and –operates with TenneT three of the five interconnectors on the Dutch-German border. Through the proposed transaction RWE will get access to all of Essent's power generation capacity, which is [1-5] GW. This is in addition to the [25-35] GW of power production capacity it already has across the border in Germany. Although the spread between the Netherlands and Germany has been decreasing in recent years, the price differences, in particular during peak hours, remain.<sup>100</sup> Consequently, the Commission has investigated whether RWE's generation position in Germany, its role as the TSO for the majority of the interconnector capacity between Germany and Belgium, would post-transaction lead to an ability and an incentive for RWE to withhold interconnection capacity in order to raise prices on the Dutch market and thus reap additional profits for its power plant portfolio on the Dutch market.
- 186) It is important to note that the Commission has investigated whether RWE TSO, who is dominant in its network area and has a co-responsibility with TenneT in operating the interconnector between its grid and TenneT's grid, could have the ability or the incentive (having view to the entire RWE Group, of which RWE TSO is a part, notwithstanding the prevailing legal unbundling regime) to withhold interconnector capacity to raise prices on the Dutch wholesale market. It has been confirmed by the European Court of Justice in e.g. in *Tetra Pak*<sup>101</sup> that a behaviour committed on one market (potentially the interconnector capacity withholding in this case) having an effect on another market (the Dutch wholesale market in this case) can be an abuse.
- 187) In the past the Netherlands has indeed been importing electricity in particular from Germany.<sup>102</sup> Furthermore the average utilization rate of the interconnection capacity

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<sup>100</sup> Cf. BBH – enervis expert report of 19 May 2009, page 34.

<sup>101</sup> Judgment of the ECJ of 14 November 1996. - *Tetra Pak International SA v Commission of the European Communities*. Case C-333/94 P. *ECR 1996 Page I-05951*

<sup>102</sup> The net electricity imports to the Netherlands from Germany were 15.4 TWh in 2008, while total net imports were 14.4 TWh. This is in line with the general trend in the past years. (Cf. Form CO recital 715)

between the two countries has been 80% for imports to and 9% for export from the Netherlands during all hours in 2007.<sup>103</sup> Correspondingly the percentage of hours with congestion on the interconnector during all hours is 10% at full utilization and 46 when there is unutilized capacity.<sup>104</sup>

188) The Netherlands currently has interconnection capacities with Germany, Belgium and Norway. Currently there is a Net Transfer Capacity (NTC) of 3850 MW<sup>105</sup> on the electricity interconnectors from Germany to the Netherlands, which is 55% of the total NTC of 6950 MW with all countries.<sup>106</sup> This capacity is divided into blocks of yearly, monthly and daily capacity and allocated in explicit auctions. Yearly and monthly capacity is since 2008 allocated by the CASC CWE<sup>107</sup> joint venture, while daily capacity is allocated on behalf of RWE and transpower<sup>108</sup> by TenneT. The following table show the breakdown of capacity allocation across the interconnector:

**Table 4 – Capacity allocations on the German-Dutch electricity interconnector**

Pathway	Congestion Management Procedure	Capacity 2008 (in MW)			Exchange Volume 2007 (TWh)
		Yearly Auction	Monthly Auction	Ø Daily Capacity	
RWE TSO → TenneT	Explicit auction on yearly, monthly and daily basis, performed by TenneT TSO Auction	522	377	473	8.82

<sup>103</sup> Cf. recital 889 of the Form CO. During peak hours the corresponding values are 81% and 9%.

<sup>104</sup> Cf. Recital 890 of the Form CO. The high level of unutilized capacity is due to the explicit auction system in place on this border and has also been addressed by the Commission in the Sector Inquiry (Cf. the Final Report of the Energy Sector Inquiry, [http://ec.europa.eu/competition/sectors/energy/inquiry/full\\_report\\_part2.pdf](http://ec.europa.eu/competition/sectors/energy/inquiry/full_report_part2.pdf), recital 552)

<sup>105</sup> The 3850 NTC is derived by subtracting the safety margin (the Transmission Reliability Margin – TRM) of 250 MW from the Total Transfer Capacity (TTC) of 4100 MW on the interconnector. Furthermore there is a slight seasonal variation in the TTC and – with the TRM being constant – consequently the NTC. In winter the NTC is thus 3850 MW while in the summer the NTC is 4000. This decision will use the lower NTC value of 3850 MW in the ensuing analysis. In addition it also needs to be said that capacities on the interconnectors for flows from the Netherlands are somewhat lower in particular with respect to Germany.

<sup>106</sup> According to information submitted by the Parties, (Cf. recital 719 of the Form CO) the maximum NTC across all border for flows into the Netherlands is only 4750 MW due to wind generation in Germany.

<sup>107</sup> This is a JV of the TSOs TenneT, RWE Transportnetz Strom, E.ON Netz (now transpower), EnBW Transportnetze, (Germany) Elia (Belgium), RTE (France) and Cegeled (Luxembourg) in the northwest European electricity market. See COMP/M.5154 – CASC JV

<sup>108</sup> Formerly E.ON Netz.

E.ON Netz (transpower) → TenneT	Explicit auction on yearly, monthly and daily basis, performed by TenneT TSO Auction	310	159	353	4.85
TenneT → RWE TSO	Explicit auction on yearly, monthly and daily basis, performed by TenneT TSO Auction	522	377	1,326	0.01
TenneT →E.ON Netz (transpower)	Explicit auction on yearly, monthly and daily basis, performed by TenneT TSO Auction	310	159	794	0.01

189) The Parties have argued that any possible withdrawal strategy can only be based on the daily available capacity values as yearly and monthly pre-sold capacities cannot – as part of a sustained strategy – be reduced ex post anymore.<sup>109</sup> The Commission agrees with this assessment and has therefore focused its analysis on the possibilities of and the incentives for reducing the daily available capacities by the parties post-merger.

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<sup>109</sup> Capacities sold a year or a month in advance can only be curtailed in exceptional cases by the TSO. While the Congestion Management Guidelines (Annex to Regulation (EC) No 1228/2003) do mention such action a possibility to balance the system in case all other measures such as counter-trading or re-despatching could not be undertaken and accordingly in exceptional circumstances.

## *Incentive*

- 190) During the market investigation most respondents stated that a decrease (by 500 MW) in interconnector capacity on the RWE-TenneT profile would clearly have adverse effects on the prices in the Dutch market.<sup>110</sup> Some market players also mentioned that the combined entity (with generation assets on the two sides of the interconnector where it is the TSO, could indeed have the incentive to withhold capacity on the interconnector.<sup>111</sup>
- 191) At the request of the Commission the parties have submitted an economic model to calculate such an incentive. The model compares the load curves and prices in the two market Germany and Netherlands and simulates what effect a 500 MW<sup>112</sup> interconnector capacity withdrawal would have on the prices. Analysis carried out by the NMa in 2006<sup>113</sup> showed that the Dutch wholesale market prices are quite sensitive to a reduction of capacity offered and have significant price effects as a result of shortages of 500 MW. According to a German study, the German wholesale electricity market, given its significantly larger size, appears to show sensitivity to excess capacity of higher amounts<sup>114</sup> and thus the downward price effect caused by such excess capacity appears to be less significant.
- 192) The model takes into consideration that interconnector capacity reduction towards the Netherlands leaves more electricity in Germany, reducing the market price there, while it increases the prices due to the caused scarcity in the Netherlands. Since the size of RWE's generation portfolio in Germany is [5-10]<sup>115</sup> times larger than post-merger its fleet is in the Netherlands, the model examined the hours when this weighted average price difference was positive.
- 193) The model shows that post-merger, overall, a strategy of withholding 500 MW of interconnector capacity would be profitable in [5-10]% of all hours in a given year. In other words, the money gained on the Dutch market is on average larger than the money lost on the German market in [5-10]% of all hours. Nevertheless, the model also shows

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<sup>110</sup> Cf. Responses to the Questionnaire on Interconnector (question 5)

<sup>111</sup> Cf. Responses to the Questionnaire on Interconnector (question 8a)

<sup>112</sup> The average daily available capacity was 473 MW in 2008 on the RWE-TenneT profile. Consequently 500 MW was chosen to serve as the basis of the assessment of the incentives of the merged entity.

<sup>113</sup> Market Monitoring Report 2005, page 23 ([http://www.dte.nl/images/Marktmonitor%20elektriciteit%202005\\_tcm7-93410.pdf](http://www.dte.nl/images/Marktmonitor%20elektriciteit%202005_tcm7-93410.pdf))

<sup>114</sup> Their analysis considered 1000 MW for the German market. (Cf. Study by Niels Ehlers and Georg Erdmann of the Technical University Berlin published in *Energiewirtschaftliche Tagesfragen* Volume 57 (2007) Issue 5, page 42-45.)

<sup>115</sup> The model also examines the possible pre-merger incentives (based on the 20 MW of generation it currently has in the Netherlands) for RWE to withhold capacity on the interconnector but given that pre-merger this ratio is [1:1500-2000] it can be concluded that RWE does not have such an incentive pre-merger.

that there are particular time periods<sup>116</sup> when such withdrawal is profitable in a significantly higher number of hours. Overall however, the number of hours involved is relatively low compared to the potential of a large generator to withhold capacity in a given market because this is constrained by two markets and given that the Dutch portfolio of the merged entity would be roughly eight times smaller than the German portfolio of the merged entity, the situations where the behaviour is profitable are only those where price gradients in the Netherlands are much (more than eight times) larger than those on the German markets.

- 194) The analysis of the model conducted by the Commission has shown that it may underestimate the incentive due to the approximation made about the sensitivity of prices to quantity variations. In particular, as modelled by the parties, the price-load curves used for computation of the gradients, are polynomial functions fitted to data for each month separately. In this way they represent an average relation between the load and prices in the respective markets. However, in day to day operations, it is likely that transmission operators, on the base of historical data and other demand factors known at the time for a day-ahead market, are better able to estimate the short term gradients. Moreover, it is also likely that the configuration of price-load curves, as estimated by transmission operators in day-ahead operations is more frequently such that it would allow the TSO to profitably withhold interconnector capacity than what the model submitted by the parties predicts. The reason for that is that averaging "hides" situations in which the short term expected price-load curves are relatively steep in the Dutch and relatively flat in the German market. Nevertheless neither the Parties nor the commission has been able to improve the structure of the model during the procedure so that it would be more informative of the incentives to withhold capacity.
- 195) The Parties have argued that the model by its nature overestimates somewhat the incentive since it relies on an assumption of perfect forecast of loads, wind variations and other factors. While the Commission does acknowledge this, it notes that based on information submitted by the Parties, it can be said that RWE Transportnetz Strom is in fact quite successful in predicting such variables as wind intensity (and corresponding wind generation) and load.<sup>117</sup> At the same time the calculations also show that while the TSO is on average able to predict the load quite precisely it can experience significant margins on error in certain cases<sup>118</sup>. This consequently would lead to a higher risk on the part of the merged undertaking to be able to predict and pinpoint the hours where a withdrawal strategy would be profitable.
- 196) The Parties further argue and the Commission acknowledges that the model also does not take into account all costs that could be born by RWE: for instance the parties argue that they could not pass on fully the loss of congestion revenues due to the remuneration mechanism imposed by the regulator on TSOs. This and other costs (e.g. possible sanctions) would reduce the profit and incentive of such behaviour. Finally, the

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<sup>116</sup> For example in the month of November especially during peak hours and in April. Nevertheless, the model also shows that there is not a clear pattern in the most "promising" hours during the year or any shorter period.

<sup>117</sup> Based on historical data for 2008, the mean percentage error for day-ahead hourly wind production is at the order of 3% and the standard deviation at the order of 6%.

<sup>118</sup> In a little less than 30% of the time, the prediction is incorrect by more than 6%.

costs of setting up a strategy of withholding are also not addressed by the model and therefore are likely to lower the incentives on the part of RWE.

197) Consequently based on all the above, while there are indeed several factors limiting the incentives of RWE to withhold capacity, it can not be conclusively demonstrated that post-merger the parties would not have any incentives to withhold interconnector capacity. Even if such incentives exist however, they are limited.

### ***Ability***

198) Secondly, the Commission has also analyzed in depth whether RWE would post-merger have the ability to withhold capacity on the interconnector. As will be shown, the market investigation has provided evidence that this ability – while it theoretically exists – is extremely constrained and thus not practically existent.

199) Firstly, all TSOs, and this is also true for RWE, have the ultimate say on the respective capacity allotments for flows concerning their network area, that is both for exports and imports. On this basis, two TSOs operating on two sides of an interconnector will always have to agree on a common capacity figure. Given that each TSO has the responsibility to ensure the security of supply for its respective network area the lower of the two figures is published in case there is a divergence of the proposed available capacities. Although the TSO providing a lower figure has to reason its decision to the other TSO, the latter cannot overrule such a decision. This explicit right holds true for both TSOs. This is also true for the interconnectors operated jointly by RWE and TenneT.<sup>119</sup>

200) Since 2006 the capacity determination and allocation procedure on the interconnectors between the Netherlands and Germany as well as the Netherlands and Belgium are, as a result of an agreement between the respective TSOs: TenneT, RWE and Elia operated by TenneT. The algorithm that TenneT uses to calculate the capacity is jointly decided on by all TSOs involved. Specifically the algorithm considers 3 key parameters: (i) wind power situation in Germany; (ii) planned outages of lines and interconnectors; and (iii) revisions of planned outages of power plant units.<sup>120</sup> Correspondingly, it can be seen from the information provided by the Parties that the daily available capacity can fluctuate between 3850 MW and 2650 MW.

201) According to the information from the parties, confirmed also by TenneT, the capacity determination procedure foresees that at late morning D-2 TenneT sends its proposal for cross-border capacities to the other TSOs with the other TSOs having the possibility to confirm or reduce the proposed value by afternoon D-2<sup>121</sup>. By 8:30 D-1 TenneT finalizes and publishes it on its web site for the explicit auction, beyond which point the other TSOs do not have a possibility to modify the available capacity.

202) If RWE would modify the available capacity figure submitted by TenneT, it would have to provide certain arguments claiming that such action was necessary in order to

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<sup>119</sup> Cf. reply of TenneT of 11 May and 29 May 2009

<sup>120</sup> Cf. recital 873 of the Form CO.

<sup>121</sup> As explained before the ability of a TSO to request a reduction of capacity is constrained by the fact that only a small share of total interconnector capacity remains to be offered on the day-ahead: most of the capacity is already sold in monthly and yearly auctions.

assure supply security of the network. Nevertheless, the parties submit and the market investigation has confirmed that to date there has not been a single instance when RWE modified the proposal of TenneT. Since this in itself brought no elements to sufficiently support RWE's possible behaviour post-merger, the Commission has investigated all other factors limiting the ability of the merged entity to carry out a systematic interconnector withdrawal strategy, namely the danger of detection and the deterrence of possible punishment.

203) As regards detection, the parties have argued and this has been confirmed both by TenneT and the two competent regulators: the Bundesnetzagentur in Germany and the Energiekamer in the Netherlands, that a reduction of capacity on the interconnector for reasons other than the well known one to market participants would result in immediate scrutiny.<sup>122</sup> Traders or other stakeholders would be able to complain to the relevant authorities and the market players have sufficient incentive to make themselves be heard as they may be put in very difficult positions and be exposed to significant risks if due to such unexpected actions on the part of the TSO. In fact the market investigation has shown that traders are indeed very well informed about available capacities and several have mentioned the significant capacity reduction on 20 December 2008<sup>123</sup>, which has correspondingly lead to a very significant price spike on the Dutch market.<sup>124</sup> As mentioned above, there have not been any reduction for security grounds by RWE TSO, therefore it is very likely that such behaviour will indeed be discerned by market players. Furthermore, given – as explained above – that it is reasonable to assume that any interconnector capacity withholding strategy would only be implemented by the merged entity if it was possible do exercise it in a sustained and repetitive manner<sup>125</sup> the chances of such detection are very high.

204) The parties have also submitted that the merged entity's ability to withhold interconnector capacity would also be severely limited by the deterrence of possible prosecution by the regulator. The market investigation has indeed confirmed that § 30 (1) of the German Energy law (Energiewirtschaftsgesetz "EnWG") states a prohibition for operators of electricity networks to abuse their market position. According to the national regulator, the Bundesnetzagentur ("BNetzA"), withholding capacity by the network operator without a security justification based on §13 (2) EnWG<sup>126</sup> would constitute such an abuse. The BNetzA has to competence to pursue such violations pursuant to § 30 (2). The regulator could also fine the network operator pursuant to § 95 (1) of the EnWG up to an amount of EUR 1 million, and in excess of this amount up to three times the additional proceeds obtained as a result of the violation.<sup>127</sup> In its reply to

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<sup>122</sup> Cf. replies of the BNetzA of 28 May and 10 June 2009 and the Energiekamer of 9 June 2009.

<sup>123</sup> On that day daily available transmission capacity was severely reduced (from typically over 600 MW to 30 MW for certain hours) for security of supply reasons on the RWE TSO-TenneT profile which has caused capacity prices to reach EUR 99/MW in a few hours. (Cf. TSO Auction BV web site [http://www.tso-auction.org/images/History%20Results%20Day%20Auction%20December\\_tcm51-17491.xls](http://www.tso-auction.org/images/History%20Results%20Day%20Auction%20December_tcm51-17491.xls))

<sup>124</sup> Replies to the Questionnaire on the Interconnector (question 6)

<sup>125</sup> first because there would be a trial-and-error process at the beginning and secondly because the hours at which withdrawal is profitable are not forming a continuum

<sup>126</sup> § 13 (2) of the German Energy law (EnWG) allows any TSO to adjust electricity transits, including reductions interconnector capacity, (only) in situations in which network security is jeopardized

<sup>127</sup> Reply of the BNetzA of 28 May and 10 June 2009.

the Commission the BNetzA has confirmed to the Commission that it monitors closely interconnectors.<sup>128</sup> Moreover it has confirmed that so far it has not opened any formal proceedings against any TSO relating to interconnector capacity withholding. Furthermore, the probability that the regulator would identify any abusive behaviour with respect to undue capacity reduction by a German TSO is all the more probable as the TSO would have to present a credible security explanation that could easily be verified and checked against the repetitive nature of the behaviour. In other words, the more this behaviour would be replicated the more difficult it could be justified by legitimate reasons.

- 205) With respect to deterrence it can be added on the basis of evidence gathered in the market investigation that the Dutch regulator (Energiekamer), while only having jurisdiction over the activities of TSOs within its border, which in the case of electricity is only TenneT, has confirmed that it is also closely watching the capacity determination and allocation process. In case of suspicion based on its own information, information requested by it from TenneT or information stemming from market players, it could consult with the BNetzA within the normal protocol between regulators.
- 206) As a conclusion, based on all the facts at its disposal, the Commission takes the view that while there may possibly be an incentive to withhold interconnector capacity on the short-term there is no ability to do so. Consequently the Commission concludes that short-term interconnector capacity withholding or delay does not raise serious concerns.

#### *Long-term interconnector capacity withholding, delaying of investment*

- 207) RWE controls interconnectors between Germany and the Netherlands and has plans to expand interconnector capacity on this border. With an increase in generation capacity in the Netherlands controlled by the new entity after the merger, the new entity may have incentives to strategically limit investments into interconnector capacity between Germany and the Netherlands.
- 208) This concern is related, but not limited to, the existing plans of RWE TSO Strom, jointly with TenneT, to expand interconnection capacity between the two networks by constructing the new Niederrhein-Doetinchem interconnector. The planned investment, an MoU on which was signed by RWE and TenneT in December 2006 would increase cross-border capacity on the RWE-TenneT profile by between 1000 to 2000 MW in both directions<sup>129</sup>. These plans are at an advanced stage<sup>130</sup> and the line is currently planned to be operational by [...].

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<sup>128</sup> In its reply it also mentions a preliminary analysis it is conducting based on a complaint by EFET, the European Federation of Energy Traders, relating to a reduction of capacity on the German-Danish border from 750 MW (250 MW yearly and 500 MW monthly capacity) in 2008 to (200 MW yearly and 200 MW monthly capacity) in 2009. *"The BNetzA has asked the TSO to explain the reasons for the capacity reduction and will receive its explanation by the end of this week. Based on the information received we will decide how to proceed, including also decisions about any formal measures."* Cf. reply of the BNetzA of 10 June 2009

<sup>129</sup> Cf. MoU in Annex 7-A.6(iv) of the Form CO



- 209) The parties submitted that the plans are based on the economic viability from the point of view of the TSO, independently of its effects on profitability of the vertically linked generation business arm.<sup>131</sup> The parties further argued that the development of wholesale prices and price spreads between Germany and the Netherlands is irrelevant both for the viability and the decision of RWE TSO Strom to pursue the project (or any other grid extension plans). In support of this claim the parties asserted that legally, due to unbundling regulation, RWE TSO must not consider potential profits or costs of the RWE Group as a whole, when deciding on grid extension projects. The parties conclude that due to these reasons it is immaterial, for the operational viability and financial feasibility, whether or not RWE Group has more or less generation activities in the Netherlands. RWE has also stated that there currently are no internal bottlenecks within its German network that influence the interconnector capacity availability.<sup>132</sup>
- 210) As far as the operational viability and financial feasibility are concerned, the Commission concurs with the arguments of the parties. Indeed, due to the regulatory framework, RWE TSO is allowed to recover investment costs related to interconnectors that are efficient. As a result an efficient grid expansion would be financially viable from the perspective of RWE TSO. Moreover, there are no apparent reasons why the merger would render the expansion operationally unviable.
- 211) However, the Commission notes that for RWE TSO to invest in interconnector expansion it is not sufficient that the project be financially and operationally viable in isolation from other projects and activities of RWE group. Even if in isolation the project is financially and operationally viable, RWE TSO may not have incentives to undertake it because of its possible effect on other investment opportunities of RWE TSO and its effects on profits derived from other activities of RWE as a group.
- 212) The Commission also notes that the incentives for RWE's electricity TSO regarding interconnector expansion, if taken independently of generation, do not change after the merger. However, the incentives for RWE as a group which includes its generation arm may change. The cross border electricity flows between Germany and the Netherlands affect relative prices for electricity (and thus profits from electricity generation) in these two markets. Therefore, after the acquisition of additional generation by RWE in the Netherlands, the optimal flows of electricity across this border from the point of view of RWE group may differ from those pre-merger. Interconnector capacity is a variable which directly affects these cross border flows.

### ***Incentives***

- 213) In order to assess the effect of the proposed transaction on the incentives of RWE TSO to invest in interconnector between the Netherlands and Germany it is necessary to determine the optimal level of investments pre-merger and compare this to the optimal

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<sup>130</sup> In April 2009 an application conference between RWE TSO Strom, TenneT and the regional governments of Muenster and Düsseldorf was held to prepare the regional planning procedure.

<sup>131</sup> Cf. Form CO, 754

<sup>132</sup> Cf. Form CO recital 905

level of investments post-merger. In doing so one has to ignore institutional and legal constraints (which will be taken into account in the assessment of ability), thus assuming that the generation and transmission arms of RWE are maximizing profits jointly.

- 214) In times of higher prices in the Dutch market, export flows of electricity from Germany raise the prices in the German market. Clearly, the effect is limited by the capacity of interconnectors. Pre-merger, the larger the capacity of the interconnector, the larger the potential profits for RWE's generation arm from cross border electricity outflow, due to this positive effect on electricity prices in Germany. Because pre-merger RWE only has very limited generation in the Netherlands (cf. footnote 115), the price development on the Dutch market only has an indirect effect on RWE's profits from generation, through this mechanism. On the other hand, in times of higher relative prices in Germany, the effects of the electricity flows and interconnector capacity on the profits of RWE's generation arm are reversed.
- 215) After the merger, resulting in a significant addition to RWE's generation capacity in the Netherlands (cf. recital 185)), the new entity's generation arm will also directly benefit from a higher electricity price in the Netherlands. This element, which may change investment incentives for the RWE transmission arm, was absent pre-merger, as RWE's generation arm benefited from a higher electricity price in the Netherlands only indirectly, through the effect of the Dutch electricity prices on the prices in the markets where RWE owned generation. Contrary to the situation before the merger, the new entity will explicitly take into account the direct, negative effect of electricity flows from Germany into the Netherlands on the price in the Dutch market, and through this, on profits from its generation in the Netherlands.
- 216) Through this mechanism, given that the prices tend to be higher in the Netherlands in most periods, and thus the expected flows are mostly in the direction Germany-Netherlands, the merger is likely to decrease incentives for the integrated entity to increase interconnector capacity. There are, however, several factors which limit the incentives of the parties to delay interconnector capacity expansion.

#### Factors that limit the incentives of the new entity to delay interconnector capacity expansion

##### *1. Unbundling*

- 217) Firstly, the TSO arm is legally bound to act independently of the generation arm<sup>133</sup>. This means that, even if the TSO was taking into account the effects of its investment decisions on its generation business, the weight that the TSO would put on the effects of these investments on the TSO's own revenues could be higher than the weight it would put on the effects of the investments on generation arm's profits, which is the one that would potentially benefit from delayed investments. If the generation arm's profits are not taken into account fully this reduces the incentives for strategic delaying of investments into interconnector capacity. This argument, however, is weakened by the fact that the TSO is limited in the extent to which it can profit from the use of its

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<sup>133</sup> This is principally derived from the legal unbundling rules of the Electricity Directive 54/2003 EC, which was transformed into German sectoral legislation with the 2005 amendment of the EnWG.

infrastructure (and thus investments) by regulatory limitations related to prices for transmission and congestion fees. In this way, since the TSO may not be able to realize very high profits from transmission business, even a small weight put on the effects from expansion on the profits from generation arm may confer strong incentives for strategic delaying of investments. Thus, the Commission cannot dismiss the possibility of a significant adverse effect of the merger on investment incentives solely on the base of the argument that the TSO, due to legal obligations following unbundling, is to a large extent acting independently from generation arm.

## 2. *Alternatives to interconnectors built by RWE*

218) Secondly, there are alternatives to RWE TSO's investment in interconnector capacity, which may partially offset the possible adverse effect of the merger on RWE's incentives to expand capacity. The Commission notes that 2 of the 5 interconnectors between Germany and the Netherlands are owned and operated jointly by TenneT and Transpower, and that these are likely to have incentives to expand capacity of their interconnectors, if RWE TSO fails to invest. Moreover, the interconnectors on borders other than Germany-Netherlands are to an extent a substitute to the Germany-Netherlands interconnectors, and the TSOs operating these interconnectors<sup>134</sup> are also likely to have increased incentives to expand if RWE strategically under-invests to the extent that the economic model of these interconnectors is the same (i.e. facilitating imports into the Netherlands).

219) The parties argue<sup>135</sup> that in addition to capacity expansions with regard to Germany, the interconnector capacity can be increased between UK, Scandinavia and Belgium, and that there are a number of current projects on the way to do so. Given that in previous years and also at present, the prices tended and tend to be higher in the Netherlands, when compared to Germany, an increased interconnector capacity, even if coming online on non-German Dutch borders, would have an effect of decreasing this price difference.

220) The Commission notes that this argument is valid mostly in the sense that a substitution mechanism limits the harm to the consumers, which would potentially result from RWE's reduced investment incentives. For example: there is no harm if RWE TSO does not invest in interconnector, which has been made redundant by large investments in alternative interconnectors.

221) Thirdly, the parties argue<sup>136</sup>, that interconnector projects compete with generation projects in addition to competing with other interconnector projects. The Commission notes that there are credible plans to significantly increase generation capacity in the Netherlands. This will have an effect in the direction of decreasing the price difference between Germany and the Netherlands. For the assessment of this merger this is relevant for the following two reasons:

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<sup>134</sup> The Netherlands also has interconnections with Belgium, and Norway. There are furthermore two more project sin planning namely the BritNed cable between the Netherlands and th UK and the Cobra Cable between Denmark and the Netherlands.

<sup>135</sup> Cf. para 762. Form CO

<sup>136</sup> Cf. para 766. Form CO

- (a) The large build-up of generation capacity in the Netherlands will likely flatten the merit curve in the Netherlands and thus decrease the potential benefit of strategic reduction of flows from Germany to the Netherlands through lower interconnector capacity. This channel is relevant in circumstances in which the prices are higher in the Netherlands than in Germany.
- (b) The large build-up of generation capacity in the Netherlands is likely to increase the number of hours when electricity flows would be in the direction Netherlands-Germany (in times of higher prices in Germany). Given that such flows increase the generation profits in the Netherlands, and that post-merger RWE will have acquired some generation capacity in the Netherlands, the optimal flows in such circumstances and from the point of view of RWE post-merger are likely to be larger than in the counterfactual in which RWE did not have generation capacity in the Netherlands. Increased frequency of such direction of flows, all else given, translate into larger incentives to invest in expansion of interconnector post-merger, when compared to pre-merger.

### *3. Limited incentives for withholding investments*

- 222) Finally, it can be argued that the short run withholding incentives, as analyzed by the model provided by the parties, are indicative of the long run incentives to withhold capacity when the flows are in the direction Germany-Netherlands.
- 223) Although simulated short term withholding incentives increase post-merger (based on simulation with 2008 data), and are present in a somewhat greater number of periods than pre-merger, these incentives do not appear to be present in a sufficiently greater number of periods, for the Commission to be able to conclude that they would significantly affect long term incentives for investments in interconnector capacity.

### *Conclusion*

- 224) When determining the optimal level of investments in interconnector capacity, RWE would net the average revenues from interconnector utilization, benefits from increased price in Germany in times of flows in the direction Germany-Netherlands, and costs from a decreased price in the Netherlands, under the circumstances. It would also consider similar net effects for times when the flows are in the reverse direction (Netherlands to Germany).
- 225) Given that RWE controls larger generation capacity in Germany in comparison to its generation capacity in the Netherlands (cf. recital 192)), and given the limited number of hours in which short-term withholding appears to be profitable (cf. recitals 193)), the net trade-off is not likely to be in favour of significant restrictions of investments in interconnector capacity after the merger. This is so because a relatively lower generation capacity in the Netherlands in most periods translates into a relatively low loss of revenues from a decrease in price in the Netherlands, due to interconnector flows in that direction, in comparison to the relatively stronger positive effect of such flows on the revenues in Germany.
- 226) Overall, the market investigation has showed that it is very unlikely that RWE would have the incentive to delay an investment in interconnector capacity with a view to raise

prices in the Netherlands because there are too many uncertainties on the business model for a new interconnector on that border. Firstly, the interest to build such an interconnector is very much dependent on the investment in generation on both sides. Currently there is a significant number of large-scale generation new-build plans<sup>137</sup> in the Netherlands which could very well by themselves change the nature of flows on the interconnector (e.g. less imports from Germany into the Netherlands). Generation projects have usually shorter lead-times than interconnector projects and can thus affect the business model of the interconnector in the course of the project. Secondly, the interest to build such an interconnector is very much dependent on the investment in other interconnectors on Dutch borders. For instance, an increase in capacity on interconnectors between Norway and the Netherlands is a clear substitute to a RWE project for imports into the Netherlands. Thus the incentive is constrained by competition/substitution with other interconnectors.

227) Based on the above it can be concluded that RWE has no clear incentive to engage into long-term interconnector capacity withholding in particular by means of delaying or terminating ongoing projects.

### *Ability*

228) RWE is already in the planning process together with TenneT to install an additional interconnector between the networks of the two TSOs (cf. recital 208)) and it could hardly have financial reasons to refuse to build the interconnector as the law allows it to recoup the investment through network tariffs.<sup>138</sup> However, RWE may put forward technical reasons not to do so or at least to delay the investment due to e.g. problems of integration of the interconnector with its own network due to internal or external constraints. With respect to this, the parties submit that there are currently no internal constraints in the RWE system, which may affect the effective capacity of new interconnector capacity on the Dutch-German border. Nevertheless, RWE may submit economic excuses relying on the many uncertainties affecting the rationale of such a project (investment in other interconnectors on the Dutch border, investment in generation, etc).

229) However, with respect to the Niederrhein-Doetinchem interconnector, the ability of RWE to withhold investments is limited. The project is at an advanced stage and based on a feasibility study which identified demand for increased interconnection between Germany and the Benelux region. RWE, together with the Dutch transmission operator TenneT found that the Niederrhein-Doetinchem was viable, based on the transmission fees calculations. Furthermore, the Bundesnetzagentur has confirmed in the course of the market investigation that current German regulation makes it extremely difficult to “drop” or significantly delay an approved project.<sup>139</sup>

230) Based on the above the Commission does not see any material scope for RWE TSO to have the ability to strategically withhold investments in interconnectors between Germany and the Netherlands. As mentioned above, it is also not possible to confirm the existence of significant incentives for RWE. Consequently the Commission concludes

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<sup>137</sup> Cf. Recital 766 of the Form CO

<sup>138</sup> Cf. Reply of the Bundesnetzagentur on the incentive regulation system of 28 May and 10 June 2009

<sup>139</sup> Cf. Reply of the Bundesnetzagentur

that long-term interconnector capacity withholding or delay does not raise serious doubts.

### **C.i) GERMANY - Electricity Markets**

#### **A. Wholesale market**

##### **1. Product Market definition**

- 231) The notifying party considers, in line with the previous decision making practice of the Commission, the product market is the wholesale market for electricity (imports and generation of electricity for further resale).<sup>140</sup>
- 232) This market definition was in large part confirmed by the market investigation and the respondents furthermore stated in large part that there was no need for a further delineation of this market.<sup>141</sup>
- 233) The Bundeskartellamt (Federal Cartel Office, "BKartA") has in its recent decisions defined a first level of supply (Markt für den erstmaligen Absatz von Strom), i.e. generation and imports, to the exclusion of "pure" wholesale.<sup>142</sup> According to the BKartA, this market primarily includes the first level of supply of all electricity supply companies which have own generation capacities. Apart from the RWE Group, E.ON, EnBW and Vattenfall, this applies to all other undertakings with a generation portfolio. In addition, according to the BKartA, this market encompasses the amount of electricity available to the German electricity market via imports of electricity from abroad into the German market, and less those amounts of electricity which are exported from Germany and are thus not available to the German market any more.<sup>143</sup>
- 234) Based on the above, the relevant product market will be defined as the wholesale market for electricity (imports and generation of electricity for further resale).

##### **2. Geographic Market definition**

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<sup>140</sup> Commission, decision of 26 November 2008 Case COMP/39388 – (E.ON) German electricity wholesale market, Commission, decision of April 25, 2006, Case No. COMP/M.4110 – E.ON/Endesa, at ¶¶ 10, 11, 45, 46. See also Commission, decision of December 21, 2005, Case No. COMP/ M.3696 – E.ON/MOL, at ¶ 224 and Commission, decision of November 14, 2006, Case No. COMP/ M.4180 – Gaz de France/Suez, at ¶ 674.

<sup>141</sup> Cf. replies to the questionnaire on market definition and gas competitive assessment Germany

<sup>142</sup> See e.g. BKartA, decision of March 12, 2007, Case No. B 8 – 62/06, *RWE/SaarFerngas*, WuW/E DE-V 1357, Section B(1)(c)(cc).

<sup>143</sup> *Idem*.

- 235) As far as geographic market definition is concerned, the Commission has, in its recent decision practice found the wholesale electricity market to be national in scope.<sup>144</sup> In Germany, the Federal Court of Justice (Bundesgerichtshof, "BGH"), the Oberlandesgericht Düsseldorf (Higher Regional Court, "OLG") and the BKartA have found that the market for the generation and wholesale supply was national, but no wider than national in Germany.<sup>145</sup> The market investigation has resulted in a range of views from those confirming a national market to those arguing that at least Austria is also part of the relevant geographic market. A few companies also argued that the market was even broader.<sup>146</sup> While the Commission takes note of some of the arguments raised by the market players with respect to price convergence in the Central West Europe region, it is clear that – save for the interconnectors with Austria – cross-border flows are still typically congested at all German borders<sup>147</sup> and there is a markedly different competitive landscape in the countries surrounding Germany.
- 236) Furthermore, the parties do not dispute this market definition and since no clear indications have emerged from the market investigation pointing to the contrary, the geographic market for the wholesale supply of electricity will for the purpose of this decision be national in scope for Germany.

### ***3. Competitive Assessment***

#### *Removal of Essent/swb as an actual competitor and strengthening of the (collectively) dominant position of RWE*

- 237) The German wholesale electricity market continues to be dominated by at least RWE and E.On. These two companies hold [30-40]%<sup>148</sup> of the generation capacity. Together with the other two German incumbents – Vattenfall and EnBW – the four large vertically integrated companies continue to hold [50-60]% of the installed capacity<sup>149</sup>, control virtually all of the baseload generation (hydro power, nuclear power and lignite-fired power plants) and provide 67%<sup>150</sup> of the total production. Furthermore these

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<sup>144</sup> Cf. Case No. COMP/39388 – (E.ON) German electricity wholesale market; June 13, 2000, Case No. COMP/M.1673 – VEBA/VIAG, at ¶¶ 14, 19, 20 et seq. and also DG Competition Report on the Energy Sector Inquiry (January 10, 2007), SEC (2006) 1724, at 402 (holding that, on the basis of the analysis carried out for during the sector inquiry, all electricity wholesale markets were considered to be national in scope, except Denmark and Italy, where sub-national regional markets clearly existed).

<sup>145</sup> See OLG Düsseldorf, judgment of June 6, 2007, Case No. VI-2 Kart 7/04, E.ON/Eschwege, WuW/E DE-R 2094 and BGH, judgment of November 11, 2008, Case No. KVR 60/07, E.ON/Eschwege, WM 2008, 2383 at ¶ 24.

<sup>146</sup> Cf. replies to the questionnaire on market definition and gas competitive assessment Germany

<sup>147</sup> Cf. Bundesnetzagentur (Federal Network Agency) Monitoring Report 2008, p. 38.

<sup>148</sup> This is the market share after the E.ON divestments pursuant as part of the Commission's case. (Cf. Form CO, recital 1439.)

<sup>149</sup> Cf. Form CO recital 1439 (The figure equals [80-90]% if the total capacity of 104,400 is considered.)

<sup>150</sup> Cf. Case No. COMP/39388 – (E.ON) German electricity wholesale market, page 5.

companies also undertake the largest part of new-build projects which means that their market position is likely to remain stable.<sup>151</sup>

- 238) In the Commission's recent decision on the German electricity wholesale market<sup>152</sup>, it has considered that at least RWE and E.ON also form part of a dominant duopoly on the German wholesale market.
- 239) The BKartA has in its long-standing decision practice also held that RWE and E.ON form a dominant duopoly on the German electricity wholesale market and that any further increase in Stadtwerke participations by either of the two would further strengthen their dominant position and is thus to be prohibited. This assessment was also upheld by the BGH.<sup>153</sup> In its judgment the BGH has upheld the BKartA's view that the level of concentration on the German wholesale electricity market is so large that it essentially limits competition. With its judgment it has thus essentially confirmed the BKartA's view that even the slightest acquisition by either RWE or E.ON would be detrimental to a market already suffering from very high entry barriers and correspondingly low levels of competition as it would enable RWE and E.ON to secure their marketing channels by acquiring minority shareholdings in the utilities to be considered. The BGH's judgment has in essence enabled the BKartA to block further attempts by RWE and E.ON to expand via ownership links into the Stadtwerke sector. The significant barriers to entry on the wholesale market were also cited by the Monopolkommission – a consultative body to the German parliament – in its last report on the energy market.<sup>154</sup>
- 240) RWE is the largest German electricity producer and owns or has access to a total capacity of [25-35] GW, corresponding to a market share of [20-30]% or [30-40]%<sup>155</sup>. In particular, a significant portion of its generation capacity – 41% and 18% respectively<sup>156</sup> – is nuclear and lignite-based base load capacity. Consequently, RWE's share of actual production is even higher given that base load capacity, by its nature is running more hours in a year and therefore producing more with a MW of production capacity. The generation capacity market share of RWE and E.ON is [30-40]% or [50-60]%, after the antitrust commitments the latter has made in the above cited Commission antitrust decision.<sup>157</sup>

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<sup>151</sup> It has to be said that there have in recent years been very significant investments by other companies than the above four into especially wind-based renewable production in Germany, and this trend is set to continue. Nevertheless, given that wind power remains a price taker given that TSOs purchase wind power in their network areas in a compulsory manner according to feed-in tariffs pursuant to the regulation, electricity thus produced is not a competitive constraint in the electricity wholesale market.

<sup>152</sup> COMP/39388 – (E.ON) German electricity wholesale market

<sup>153</sup> Cf. BGH Beschluss vom 11. November 2008 – KVR 60-07.

<sup>154</sup> Sondergutachten der Monopolkommission: Strom und Gas 2007: Wettbewerbsdefizite und zögerliche Regulierung, 20 November 2007.

<sup>155</sup> Cf. Form CO recital 1417. The difference between the two figures is essentially based on whether auto-production is included or not.

<sup>156</sup> Cf. RWE Facts and Figures 2008

<sup>157</sup> Generation market share is even higher given the comparatively higher share of base load capacity for both companies



- 241) Today Essent is present in conventional generation on the German market through its 51% controlling shareholding in swb, which has [1000-1500] MW mostly coal-based generation portfolio<sup>158</sup>. Furthermore Essent holds a long term<sup>159</sup> Power Purchase Agreement ("PPA") for [0-500] MW in the new [...] power plant at [...]. Deutsche Essent is also involved primarily in wind power generation and has [0-500] MW installed capacity and further projects for [500-1000] MW. Finally Stadtwerke Bielefeld which is owned to 49.9% by swb has a electricity generation portfolio of [500-1000] MW stemming from its 16.66% ownership in the nuclear power plant Grohnde as well as the 33.33% ownership share in the power plant group Veltheim.<sup>160</sup>
- 242) With respect to the latter, the Commission notes that RWE's acquisition of the 51% of swb and with it of the Stadtwerke Bielefeld share will even further reinforce its structural links with E.ON Stadtwerke Bielefeld and E.ON co-own the company Gemeinschaftskraftwerk Weser GmbH & Co. OHG, which owns and operates a 1360MW nuclear power plant, as well as the company Gemeinschaftskraftwerk Veltheim which owns and operates a number of coal and gas-fired power plants<sup>161</sup>.
- 243) Of the [1000-1500] MW of electricity generation capacity swb owns, [0-500] MW are in the form of a customer power plant at [...] production site. The parties argue that this power plant, in view of swb's limited ability to sell it on the wholesale market, should not be counted in swb's total generation capacity. Furthermore the parties also argue that a large part of swb's power plant fleet is made up of combined heat and power plants, where electricity production is dependant on heat production, while [0-1] TWh of the [0-5] TWh is sold in the long run as one-phase electricity to Deutsche Bahn and does consequently not enter the wholesale market.
- 244) In particular the parties submit with respect to the [...] MW plant operating in the [facility] of [a customer] that the electricity generated in the plant but not needed for the [facility] is sold by [that customer] to swb. Nevertheless they emphasize that the full capacity of this plant is exclusively available to [that customer] and cannot be sold by swb on the wholesale market. [Details on the contractual relationship regarding the customer power plant]. Notwithstanding the arguments of the parties, the Commission is of the view that the mere establishment of the plant by swb already underlines the company's possibilities to act independently (or alternatively partnering with industrial clients) on the wholesale markets and therefore is a very relevant and important market player and competitor. Furthermore, as regards the specifics of the contract with [that customer], it can be said that there is indeed [details on the contractual relationship regarding the customer power plant].<sup>162163</sup>

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<sup>158</sup> Swb has a net electricity production of [1-5] TWh in 2008. It's production portfolio consists of Block 3, Block 4 and GT3 at Mittelsbüren with a capacity of [0-500] MW; the Hafen Block 5 and Block 6 coal CHPs with [0-500] MW; the Hastedt Block 14 and 15 gas and coal CHPs at [0-500] MW; and [0-50] MW Weser Wind and [0-50] MW HKMW waste incineration plant. (Cf. M.5467\_Form CO Annex 7-C.3(v) (Installed Capacity and Power Generation Portfolio of swb))

<sup>159</sup> Running until 2023

<sup>160</sup> Cf. M.5467\_Form CO Annex 7-C.3(vi) (Generation portfolio SW Bielefeld)

<sup>161</sup> As part of the Commitments E.ON has entered into vis-à-vis the Commission to settle the antitrust case brought against it, E.ON is committed to sell its share in two of the plants operated by Gemeinschaftskraftwerk Veltheim

<sup>162</sup> Cf. M.5467\_Form CO Annex 6-C\_D.V.1(d)(i) ([...])

- 245) As regards the PPA with [...] the parties have argued on the basis of the nature of the contract, that although it increases the capacity at the disposal of RWE by [...] MW<sup>164</sup>, it does not increase the ability or the incentive of RWE to withhold generation capacity. Specifically, they argue that (i) in effect the PPA is a regular wholesale contract not a drawing right that would confer special rights to its holder in particular with respect to the operation and nomination of the plant. They add that (ii) possible lower nominations by the merged entity could and would likely be countered by [...] who in the end operates, controls and nominates the plant. Finally they submit that (iii) the [80-90]% yearly minimum off-take in the take-or-pay clause of the gas supply contract of the power plant, which is linked to the PPA, provides a disincentive for the plant operator or the PPA holder to hold back generation other than when the plant is not economical to run.<sup>165</sup>
- 246) In the Commission's assessment acquisition of Essent by RWE may, through the PPA, also create a link between RWE and [...], one of the few independent generators. The parties argue that the business relation RWE and [...] would enter into does not amount to a structural link of a special nature. Specifically they argue that Essent today does not have access to much of the information concerning the operation of the power plant. Furthermore, they argue that RWE would not have access to information that would enable it to reduce the incentives of [...] to compete against it by replacing Essent (itself a new entrant on the German market) by RWE. Furthermore the parties also argue that [...] has not been the only entrant in generation new-build in Germany. While the Commission accepts that there are certain projects underway which are independent of the four large energy companies, it takes the view, and this is confirmed by the market investigation, that the number of these projects is very low, in particular in comparison to the size of the German market.
- 247) In general, the parties submit that in their view the Essent PPA with [...] and the consequent transfer thereof to RWE post-merger does not meet the substantive test, if this effect of the transaction were assessed in itself. The Commission is however of the view that a concentration has to be assessed as a whole, and therefore the elements of a transaction can be addressed as part of the whole concentration, with a view to their respective effects on competition.
- 248) Specifically as regards the [...] PPA, the Commission accepts the arguments put forward by the parties that in fact it would not likely increase RWE's incentives or ability to withhold generation capacity, nor would it likely lead to structural links between RWE and [...] that would impeded [...] from continuing as an active competitor to RWE on the German electricity market.

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<sup>163</sup> Cf. M.5467\_Form CO Annex 6-C\_D.V.1(d)(ii) (Information on Contractual Relationship swb-[that customer])

<sup>164</sup> In fact, the parties have also submitted that Essent has in January 2007 sold [...] MW of the PPA to [...] "[...] [...]." (Cf. submission by parties of 31 May and 18 June 2009)

<sup>165</sup> "[As] the [Take-or-Pay] volume has to be paid independently from the real off-take amount, it does incentivise to dispatch the plant in the event that the dark spread is not at an economic level. The [80-90]% Take-or-Pay guarantees flexibility to adapt to market conditions (e.g. fluctuations in spark-spreads) and plant outage performance." *"The gas contract includes an uneconomic dispatch protection (limited to [60-70]% of Take-or-Pay) which is, however linked to certain conditions (e.g. negative spark spreads like in the first half 2009) and a make-up condition."* (Cf. reply of the Parties of 18 June 2009)

- 249) Through swb Essent has a number projects for new generation capacity. In its business plan for the period 2009-2013 swb plans to spend altogether EUR [...] on generation investment, including [...]. Through swb Essent has been carrying out [...].
- 250) First Essent/swb, has had specific plans to build an 800 MW coal-fired power plant in Bremen (Mittelsbüren) finally called off the investment in 2008 due to greatly inflated costs. Nevertheless, Essent/swb has continued its strategy of increasing its generation capacity after the failure of the latter project. It has in April 2009 announced that it is building a 450 MW state-of-the-art gas-fired CCGT in Mittelsbüren<sup>166</sup> The plant is to be online by 2013.
- 251) The swb business plan also includes [description and details of swb's commercial strategy with regard to its generation capacity portfolio].<sup>167</sup>, <sup>168</sup>, <sup>169</sup>.
- 252) These [...] projects concern [...] which if acquired by RWE through the acquisition of swb could in particular increase the incentive and possibly ability of RWE to withdraw capacity to raise prices.
- 253) The market investigation has indicated (and this is in line with the assessment of the Commission in its recent antitrust case concerning E.ON<sup>170</sup>) that there are very significant hurdles with respect to building new generation capacities in Germany which affect entrants comparatively stronger than the incumbents. In addition, the current economic crisis has caused the cancellation of many power plant projects, in particular those of incumbents:<sup>171</sup> Therefore it is important to avoid that the merger reduces the number of independent wholesale market players and thereby impedes effective competition.
- 254) Incumbents have previously secured or have the access to brown-field sites and have already secured best green-field sites while there is a shortage of non-contested new sites
- a) No possibility of building nuclear in general and considerable risks (CO<sub>2</sub>, environmental permissions, etc.) relating to coal-fired generation capacity;
  - b) Gas-fired generation is in practice the main possibility and even gas-fired power plant projects face significant challenges with respect to access to gas and to gas transport capacity;

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<sup>166</sup> Cf. press release of swb of 27 April 2009. According to the press release, 40% of the generated electricity will be sold to Deutsche Bahn in the form of one-phase railway electricity.

<sup>167</sup> Cf. reply by Essent of 17 June 2009. This power plant is to be built according to [...].

<sup>168</sup> Cf. M.5467\_Form CO Annex 6-8 IV.(ii) (swb\_Strategic Plan 2009-2013.PDF)

<sup>169</sup> *idem*

<sup>170</sup> Cf. COMP/39388 – – (E.ON) German electricity wholesale market

<sup>171</sup> Cf. Submission of Trianel of 25 May 2009.

- c) Entrants have to secure output via long-term contracts in order to receive project financing.
- 255) A competitor Trianel has submitted a probability-weighted list of large-scale power plant projects underway by companies other than the big four vertically integrated companies. Of the 16 projects mentioned on the list, 8 are considered to have a probability of less than 10%; 2 plants are classified as 100% as they are under construction<sup>172</sup>; and a further 4 projects are estimated to have a probability of success of 50%.<sup>173</sup> Only very few entrants have actually engaged into large-scale generation projects. The international players involved are Statkraft and Electrabel, with both of whom Essent/swb have current production links or power plant projects. Therefore the Commission is of the view that it is all the more crucial that new power plant projects and cooperation between generators remain independent of and outside the business interests of the duopoly of RWE and E.ON in order to enable these competitors to establish independent positions and thus promote a more competitive landscape in the German generation sector.
- 256) Based on the above it can be said that swb has very specific plans to hold on to and further develop its position in electricity generation in Germany. In doing so it is partnering with other market players who are entrants to or smaller players in the German market. Essent, with its significant power production expertise in the Netherlands was with its control of swb a very well-placed competitor on the German wholesale electricity market which (as has been shown in the E.ON antitrust case) has experienced only very limited generation investment from companies other than the four incumbents. The effect of the transaction would therefore be – beyond the effect of removing Essent/swb as a viable competitor on the wholesale market – to give RWE access to one of the relatively few new-builds carried out by an entrant.
- 257) Based on the above, the Commission is of the view that RWE's access to Essent/swb's generation capacity will further strengthen its collective dominant position together with at least E.ON on the German electricity wholesale market and in particular increase its incentives and possibly also ability to undertake capacity withdrawal, with a view to raising prices on the wholesale market. Furthermore, the elimination of Essent/swb as a competitor on the wholesale market would significantly lessen competition on that market.
- 258) Furthermore, RWE will, with the proposed transaction take control of KOM-STROM, a specialist energy supplier in the wholesale market, catering to in particular municipal utility clients. KOM-STROM is controlled (through a [80-90]% shareholding) by Essent; its other shareholders are municipal utilities<sup>174</sup>, among them

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<sup>172</sup> Trianel's own 750 MW coal-fired plant at Lünen and Electrabel's 800 MW coal-fired plant at Wilhelmshaven.

<sup>173</sup> DONG's 1600 MW coal-fired plant at Greifswald/Lubmin, Electrabel's 800 MW coal-fired plant at Brunsbüttel; Iberdrola's 1100 MW CCGT project at Bad Hersfeld and Kraftwerke Mainz-Wiesbaden's 800 MW coal-fired plant at Mainz

<sup>174</sup> These are Stadtwerke München, Stadtwerke Neubrandenburg, Stadtwerke Schramberg, Stadtwerke Marburg, Stadtwerke Leipzig, Stadtwerke Gießen, ovag energie, Stadtwerke Augsburg, enwor, Alb Elektrizitätswerk

swb. It is a dynamically growing market player<sup>175</sup> and has conceived and executed a very clear strategy of designing product and services to cater to the needs and demand of the municipal utility sector.<sup>176</sup> KOM-STROM had in 2007 sales of 9 TWh to Stadtwerke as compared to the [60-80] TWh sold by RWE. Therefore the acquisition of the company would remove a quite significant competitor supplying this customer group and further increase RWE's (along with E.ON) dominant position in the segment.<sup>177</sup>

259) In particular KOM-STROM is marketing special "shape" (Fahrplan)<sup>178</sup> product that is important to especially smaller Stadtwerke to acquire customers. Essent itself, when deliberating the sale of KOM-STROM, outlines in the strategy document that "*[KOM-STROM is] adding to the image of Essent in Germany of being a 'Stadtwerke partner' with a long term view and provide[s] good network in this area.*"<sup>179</sup> The market investigation includes comments both by customers and competitors that KOM-STROM is a very relevant supplier to Stadtwerke and many respondents were negative with respect to KOM-STROM disappearing as an independent actor on an already very concentrated market. A competitor, who considers KOM-STROM a key competitor, mentioned that the loss of the independent position of KOM-STROM and its integration into the RWE group would further strengthen the dominant position of that company. Furthermore, the market investigation outlined that only very few competitors other than KOM-STROM offer such products, and especially in the competitive nature as does KOM-STROM.<sup>180</sup> Furthermore, KOM-STROM is also profiling itself with [...] to Stadtwerke which add to its in-depth knowledge of the Stadtwerke sector.

260) Furthermore, post transaction RWE will be in a very good position to build on the links<sup>181</sup> of Essent with its current KOM-STROM partners, and thus increase its supply position in the segment. Furthermore, RWE may have access to privileged information from Stadtwerke with the acquisition of KOM-STROM. This information in turn could be used by RWE to secure itself an entrenched supply position and dissuade the municipal utilities from considering other suppliers, thereby foreclosing competitors.

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<sup>175</sup> It's revenue has increased three-fold in the past 3 years until 2007

<sup>176</sup> Apart from supplying municipal utilities, KOM-STROM also has business with [...].

<sup>177</sup> BBH-enervis expert report, page 48 of 18 May 2009.

<sup>178</sup> The Fahrplan product consist of the Stadtwerke telling KOM-STROM in advance for the duration of the contract the amount of electricity it will want to off-take in every quarter hour and KOM-STROM consequently takes care of procuring and providing such a product.

<sup>179</sup> Cf. M.5467\_Form CO Annex 6-8 IV.(ii) (KOM-STROM and novogate\_ Proposed way forward, Executive Board)

<sup>180</sup> With respect to the electricity wholesale market in Germany, BS Energy (Cf. email of 3 June 2009) emphasized that KOM-STROM's [...] or [...] product makes it a [...]. BS Energy also underlined that it is in particular such niche products with which companies can still enter the market (and differentiate themselves) that has high entry barriers and is controlled by the large intergraded companies. However, very few wholesale companies offer these products at a price enabling retail suppliers to provide competitive offers on the retail market which is why BS Energy sees the merger of RWE and Essent and with it the integration of Kom-Strom as problematic.

<sup>181</sup> As of today it only supplying some of the co-owners

- 261) The parties have also submitted further views on why they believe that the removal of KOM-STROM will not be detrimental to competition.<sup>182</sup> Firstly they argue that neither KOM-STROM nor its product portfolio is at all unique in the market. As regards the unique knowledge KOM-STROM has built up the parties comment that it is quite likely that RWE's knowledge of the Stadtwerke sector is more profound anyway and thus it is unlikely that RWE would reasonably gain information yet unknown to it. They add that in fact other well-placed market players<sup>183</sup> offer similar products. They also note that in fact KOM-STROM has quite loose relations with its shareholders among which currently only [...] and [...]<sup>184</sup> are significant clients of KOM-STROM. According to the parties, other shareholders and in particular large companies such as [...] or [...] do not need the services of KOM-STROM as they have already built up the necessary in-house expertise and sourcing capabilities themselves. They also outline that the broad shareholding structure of KOM-STROM is more a historic element than a part of the current strategic considerations of the other owners. Furthermore they argue that KOM-STROM customers are not bound to the company and they can and would find alternative suppliers (other than the big four electricity companies) on the market. Finally the parties submit that in their view the acquisition of KOM-STROM, as part of the notified transaction, does not meet the substantive test and should not therefore give rise to serious doubts.
- 262) As regards the substantive test, the Commission is of the view that (as already mentioned in recital 247)) the proposed transaction has to be looked at in its entirety of which the acquisition of KOM-STROM is part. Nevertheless, the Commission accepts the argument of the parties there are other, strong independent market players able to offer the niche products (of energy sale and advisory services) that KOM-STROM is also marketing. Furthermore it accepts the parties arguments that that shareholders that have so far not been closely associated with KOM-STROM would unlikely put in a position post-merger where they would have no other choice than to procure from RWE. Similarly, some customers could likely also find themselves alternative suppliers.
- 263) Having weighed the arguments from the market investigation as well as the information submitted by the parties and having view to the fact that the business model and market presence of KOM-STROM (given its lack of significant capital investment or the lack of the profound uniqueness of its products), which clearly differs from that of swb, the Commission takes the view that the acquisition of KOM-STROM by RWE would not raise serious doubts as to its compatibility with the common market.
- 264) Finally, it is important to mention that Essent has also been an active trader through its trading arm (ETISA) on the German wholesale market, trading [100-250] TWh in 2008, which is augmented by the [0-50] TWh trading by KOM-STROM. Nevertheless, Essent's share of the total wholesale market trading volume (as submitted by the parties is) [0-5]% and thus not significant. Moreover, outside KOM-STROM Essent was

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<sup>182</sup> Cf. KOM-STROM memo submitted by the parties on 4 June 2009.

<sup>183</sup> Such as Trianel, Verbund, Atel, Stakraft, citiworks, MVV and DONG for the Fahrplan product; Trianel, ATel, Statkraft, MVV, and DONG for the [...]; Karl Cliem Energy, ConEnergy, Atel, EEG einkauf and SE Scherbeck energy for the [...].

<sup>184</sup> Cf. reply by KOM-STROM of 27 May 2009. In 2008 [...] had the overall largest volume of transactions with KOM-STROM, half of it stemming from the [...] product. [...] purchased exclusively standard products. Nevertheless KOM-STROM did have smaller deals with or has marketed advisory services to [...] and [...].

offering standard trading products for which there are many trading companies – both energy market players and financial institutions – active on the German power market and the entry into this market segment is not particularly difficult. Consequently, it is the Commission's view that Essent's trading activities in Germany and their subsequent combination with those of RWE as a result of the proposed transaction do not raise serious doubts.

265) As a conclusion it is probable that this transaction significantly impedes competition on the German wholesale market through the strengthening of the dominant position of RWE in particular through increased incentives to withhold generation capacity as well as the elimination of a well-placed competitor (Essent/swb). This transaction therefore raises serious doubts on the German wholesale market.

#### Vertical concerns on the German electricity wholesale market

266) As explained above in recital 239), the BKartA holds (as also upheld by the BGH) that the increase in Stadtwerke participations by in particular RWE and E.ON had a negative effect on the electricity sector, given its already highly concentrated nature, by foreclosing municipal utilities to entrants aiming to supply this key segment of the German electricity wholesale market.

267) The parties have argued in the Form CO that 1- there is not a duopoly between RWE and E.ON on the German wholesale electricity market, and 2- the "per se" limitation of further acquisitions by the two companies justified.

268) In parallel to the significant concentration in electricity generation, the four large integrated energy companies, in particular RWE and E.ON, have also built up a very significant portfolio of shareholding in German municipal utilities, which are the incumbent retail suppliers. Of the ca. 800 regional/municipal energy (electricity, gas) suppliers (Stadtwerke/Versorger) in Germany; RWE has a stake in [more than 100]<sup>185</sup> while E.ON in 213<sup>186</sup>; EnBW in 69<sup>187</sup> and Vattenfall in 2 suppliers it controls and in addition 7 municipal utilities it has minority shares in.<sup>188</sup> Firstly, the market investigation has shown that the four large vertically integrated electricity companies actually control all large regional suppliers in Germany, including also the supply

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<sup>185</sup> Of the [more than 100] shareholdings RWE has full control of [less than 30], joint control in [less than 15] and no control in [more than 75]. (Cf. reply of the parties to the questionnaire to Competitors to Retailer suppliers in Germany.)

<sup>186</sup> Not including E.ON's majority shareholding in the regional electricity and gas supply companies E.On Avacon, E.ON Edis, E.ON Bayern, E.ON Hanse, E.ON Mitte, E.ON Thüringer Energie, E.On Westfalen Weser, Ferngas Nordbayern, Saar Ferngas, Gas Union and Erdgasversorgungsgesellschaft Thüringen-Sachsen. Of the 213 Stadtwerke shareholdings there are ca. 20 that are of a "calculated-through" share of 50% or more. (Cf. Special report of the Monopolkommission of 2007 (Sondergutachten der Monopolkommission – Strom und Gas 2007: Wettbewerbsdefizite und zögerliche Regulierung, 20 November 2007, Drucksache 16/7087)

<sup>187</sup> EnBW AG holds majority shares in 11, parity in 2 and minority shares in 15 retailers/Stadtwerke. Furthermore, EnBW Regional AG holds majority shares in 8, parity in 3 and minority shares in 30 retailers/Stadtwerke. These figures only include shareholdings of above 20%. (Cf. reply of EnBW of 19 June 2009.)

<sup>188</sup> Cf. Vattenfall's reply to the questionnaire to competitors in supplying Stadtwerke in Germany.

companies in Berlin, Hamburg and Koblenz. Furthermore, of the next 20 largest municipal utilities, there are only seven <sup>189</sup> (two of which being swb and Stadtwerke Bielefeld, which Essent controls or has shares in) that are not connected to either of the four large energy companies. Consequently, the proposed transaction would lead to a further significant reduction in the number of "independent" Stadtwerke. Given that entrants need to be able place their generation output and that Stadtwerke are ideal clients with their relatively stable demand profile. It is so true that supplying Stadtwerke, requiring significant base load positions is best done through own generation portfolio. Therefore, such a further significant diminution of Stadtwerke without significant ownership influence by any of the large companies is possibly endangering the position of potential entrants on the generation market.

- 269) Data submitted by RWE shows that to the extent RWE has a participation in a supplier, [...] <sup>190</sup>. This may indicate that via access to information, (in)formal influence, RWE can and will use its participations (even if those were only minority) to secure its supplier position for these respective suppliers.
- 270) RWE and E.ON together supply 60% of all end customers in Germany <sup>191</sup>. RWE alone sold [150-200] TWh of electricity in Germany, equalling to [30-40]% of the entire German demand. Furthermore a number of some of the smaller Stadtwerke/retailers are also vertically integrated and therefore the contestable market share for wholesale supply is even more limited.
- 271) About half of the responses to the market investigation were of the view that participations by energy companies in Stadtwerke in general and the acquisition of Essent/swb by RWE in particular will negatively effect competition on the electricity market in Germany. In particular several international players, who are entrants on the German market voiced concerns over the effective control RWE and E.ON in particular have over many Stadtwerke: *"[Gaz de France Energie Deutschland (GSED)] experienced price inquiries by such retailers only for the sake of information, disapproval of contracts with GSED by supervisory boards even when best offer made by GSED. GSED therefore refrained from offers such customers during the last few years."* Similarly, Verbund, the Austrian incumbent also mentioned the difficulties resulting from the strong vertical integration: *"Vertical integration of the "Big 4" forces newcomers to cover up- and downstream markets as well, resulting in barrier to market entry."* <sup>192</sup>
- 272) Entrants in the wholesale markets need to secure the sale of their output to large buyers. There are very few such buyers which are not contracted by the four main players and the transaction would remove one of them (SW Bremen) plus potentially another one (SW München).

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<sup>189</sup> Swb, Stadtwerke Bielefeld, Stadtwerke München, EWMR Bochum, entega, Stadtwerke Leipzig and HEAG. (Cf. BDEW Jahresdaten der Stromversorger 2006 as submitted by the parties in their reply of 2 June 2009 and web sites of the Stadtwerke)

<sup>190</sup> Cf. reply by RWE to the questionnaire to retailer competitors in Germany

<sup>191</sup> Cf. press statement of the BKartA of 11 November 2008.

<sup>192</sup> Cf. reply by Gaz de France Suez und Verbund to questionnaire to competitors for supplying retailers in Germany



- 273) Through the acquisition, independent suppliers<sup>193</sup> will lose one of the very few remaining independent Stadtwerke in Germany, and thus endanger their business position and their entry plans in the highly concentrated German generation market.
- 274) Furthermore, with the exception of [...], all other German municipal suppliers, in which Essent directly or indirectly holds participations in ([...]) have a net purchasing position (their generation activity is smaller than their supply activity)<sup>194</sup>. Altogether swb and its associated Stadtwerke make up ca. [0-5]% of total German final supply.
- 275) An analysis of the current supplier relationship between RWE and the Stadtwerke in which Essent has an indirect influence shows that so far RWE has [...].
- 276) Post-merger therefore, RWE with its ownership stakes in those companies, will be in a very good position to secure the preeminent supplier position for itself and possibly foreclose competitors' access to those municipal utilities as well.
- 277) The Commission has also considered whether the acquisition of KOM-STROM could lead to customer foreclosure with respect to the shareholding partners of Essent in the company as well as the customers of KOM-STROM. Given that most KOM-STROM shareholder Stadtwerke are actually not significant customers of the company and even though KOM-STROM has indeed developed very good relationships with its customers, RWE would unlikely be able to foreclose them.
- 278) As a conclusion it cannot be excluded that this transaction results in customer foreclosure in the wholesale supply of electricity to retailers/Stadtwerke, giving RWE (together with at least E.ON) the possibility to raise prices ultimately to the detriment of the end-consumers. Consequently the Commission is of the view that the proposed transaction could raise serious doubts with respect to vertical effects concerning KOM-STROM. In order to reach a conclusion that the transaction does raise serious doubts it would however be necessary to analyse further the issues raised above as well as a number of other issues such as the position of the retailers which are not yet wholly or partly owned by the incumbents and the impact of switching at retail level on the procurement needs of retailers at wholesale level. It was not possible to do so to a reasonable degree in the limited timeframe of the investigation but it is not necessary to conclude definitively on that issue given that the transaction raises also serious doubts from a horizontal perspective on this market and that the remedy offered by the parties would meet any such vertical competition concerns.

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### ***C. Retail markets***

#### ***1. Product Market definition***

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<sup>193</sup> consisting of a few international players: Statkraft, Electrabel and some domestic ones: Trianel, MVV

<sup>194</sup> Cf. the Parties' reply of 21 May 2009; Specifically had a net [...] position of [...] GWh in 2008; Stadtwerke Bielefeld: net [...] position of [...] GWh; Stadtwerke Ahlen: net [...] position of [...] GWh; Stadtwerke Gütersloh: net [...] position of [...] GWh; Stromversorgung Greifswald: net [...] position of [...] GWh; Stadtwerke Soltau: net [...] position of [...] GWh; Gemeindewerke Lilienthal: net [...] position of [...] GWh; and Gemeindewerke Ritterhude: net [...] position of [...] GWh.

- 280) The notifying party considers, in line with previous Commission decision practice, the market for retail supply of electricity as a separate market encompassing the sale of electricity to final consumers<sup>195</sup>. Further distinctions have been made between: (i) large half-hourly metered industrial customers often connected to the high voltage grid and (ii) small commercial and domestic customers that are non-half-hourly metered and are connected to the low-voltage grid. The differentiation between the two groups is due to different needs and profiles on the demand side and different services and technologies offered on the supply side<sup>196</sup>.
- 281) The BKartA has made a distinction between (i) load measured (*leistungsgemessene*) customers and (ii) non-load measured or standard load profile (*nicht-leistungsgemessene* or *Standardlastprofil*) customers based on similar considerations to those of the Commission in its precedents<sup>197</sup>.
- 282) The notifying party agrees with such a distinction and does not see the need for a further delineation of the latter group. The market investigation has not yielded elements pointing to different segments of the retail supply markets. Consequently, the Commission considers that for the purpose of this decision the retail market for the supply of (i) large/industrial (load-measured/individually metered) customers and (ii) household/small commercial, agricultural (non-load measured) customers are the relevant product markets in retail supply of electricity, without any further sub-division.

## **2. Geographic Market definition**

- 283) The Commission has generally defined the markets for retail supply of electricity, including those for small customers, as national in scope, provided that these are fully liberalised<sup>198</sup>. Accordingly, the notifying party considers that this holds true in particular for Germany where, the liberalisation of the electricity market started already in 1998 enabling customers to freely choose their suppliers. The BKartA defines the market for the retail supply of large customers as national in terms of its geographic scope while considering the geographic market definition for the market for the supply of small customers to be delineated by each respective distribution network area (see below).
- 284) Based on the above, the geographic market definition for the supply of electricity to large customers in Germany is national in scope.

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<sup>195</sup> See cases COMP/M.5224 – EDF / British Energy, COMP/M.3440 – EDP / ENI / GDP, COMP/M.4180 – Gaz de France / Suez, COMP/M.3868 – Dong / Elsam / Energi E2, COMP/M.3696 – E.ON / MOL.

<sup>196</sup> See cases COMP/M.3440 – EDP / ENI / GDP, COMP/M.5224 – EDF / British Energy, COMP/M.4180 – Gaz de France / Suez.

<sup>197</sup> BKartA, B8-62/06, RWE Energy / SaarFerngas, decision of 12 March 2007, page 32 et seq. See also BKARTA's merger decisions B 8-93/07, RWE / Stadtwerke Krefeld-Neuss of 23 October 2007 and B 8-123/07, E.ON / Wasser und Energieversorgungs mbH Salzgitter of 19 December 2007. In particular the BKARTA argues that load measured customers have greater price elasticity, a structured demand profile due to their need of differentiated products and as a consequence different buying power and behaviour as opposed to non-load measured customers, which instead require simple products and uniform tariffs.

<sup>198</sup> See cases COMP/M.5224 – EDF / British Energy, COMP/M.4180 – Gaz de France / Suez and COMP/M.3696 – E.ON / MOL.

- 285) With respect to the market for the supply of electricity to small customers in Germany, the Commission is of the view that there are several country-specific factors pointing towards a market that is narrower than national in its geographic scope.
- 286) First it must be noted that the second amendment of the German Energy Act (*Energiewirtschaftsgesetz*, "EnWG") in 2005 led to significant improvements in grid access to suppliers<sup>199</sup>. Consequently, suppliers received equal access to the grid which enabled them to serve their customers under the same statutory requirements through standardised contracts with all the distribution system operators ("DSOs").
- 287) The notifying parties argue that the German electricity retail market for small customers is national in scope. In supporting this view, the notifying party also underlines (i) there is a wide range of suppliers customers can choose from; (ii) there are numerous "national brands" or suppliers active in numerous regions that customers can choose from.
- 288) Notwithstanding the above, precedents from the BKartA point instead to the existence of local markets<sup>200</sup> based on the following arguments: (i) the continuing dominance of the *Stadtwerke* in their municipal area; (ii) overall low and regionally different customer switching rates across Germany; (iii) local marketing strategies focusing on the territorial incumbent; and (iv) different local pricing policy according to the targeted DSO area.
- 289) The German retail electricity market is characterized by the existence of municipal utilities, *Stadtwerke*, which control the physical network and still exert significant influence on the electricity retail supply to small customers in their network area. There are currently over 800 such municipal utilities active in the electricity, gas or both sectors, which is by far more than in any other Member State.
- 290) Even if contracting with a subset of DSOs might suffice to get access to a significant share of German households, the contractual burden still remains significantly higher than in other Member States. Moreover, it is undisputed that *Stadtwerke* have preserved their strong market presence. Even ten years after liberalization on average around 80% of the households are still supplied by *Stadtwerke*, of which half are still through the universal supplier tariffs, demonstrating that *Stadtwerke* still benefit from high confidence rating from customers. This is also confirmed by a study of the customer loyalty of German electricity suppliers.<sup>201</sup> The aforementioned holds true even if there has been a slight increase in switching rates in the course of the last years from 1.8 % in

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<sup>199</sup> Contracts with the grid operators have been standardised and are subject to the same statutory requirements for each supplier. Moreover, access costs are equal to all suppliers.

<sup>200</sup> BKartA, B8-62/06, RWE Energy / SaarFerngas, decision of 12 March 2007, page 32 et seq. See also BKARTA's merger decisions B 8-93/07, RWE / Stadtwerke Krefeld-Neuss of 23 October 2007 and B 8-123/07, E.ON / Wasser und Energieversorgungs mbH Salzgitter of 19 December 2007. In particular the BKARTA argues that load measured customers have greater price elasticity, a structured demand profile due to their need of differentiated products and as a consequence different buying power and behaviour as opposed to non-load measured customers, which instead require simple products and uniform tariffs.

<sup>201</sup> Cf. M.5467\_Form CO Annex 6-8 IV.(iii) (epimo presentation), page 12 and page 14 (Nordlight Research GmbH, Stand: 08/08 und psyconomics AG 12/2008)

2006 to 3.8% in 2007 and presumably a continuation of the growth trend for 2008 as well.<sup>202</sup>

- 291) In the light of the foregoing, although recognising that competition in Germany is progressively expanding and that this could likely lead to broadening the geographic scope of the market for retail supply of electricity to small customers in the future, there are still strong indications pointing to local electricity retail markets to small customers approximately corresponding to each DSO area in Germany.
- 292) In this regards, even defining such markets as local, they would be, consistently with the Commission practice, a substantial part of the common market based on both geographic and economic considerations<sup>203</sup> Hence, Bremen/Bremerhafen is a significant city and in itself one of the federal states in Germany (the biggest Member State) with strong economic relevance<sup>204</sup> within the whole territory. This is also demonstrated by a sizable electricity consumption, which is bigger than those of some Member States<sup>205</sup>

### *Conclusion*

- 293) The geographic market definition for the supply of electricity to large customers in Germany is national in scope. As regards the relevant geographic market for the retail supply of small customers there are strong indications that this market is narrower than national and thus on the level of each distribution network area. However, for the purpose of this decision, since the transaction would under any alternative geographic market definition not raise serious doubts as to the compatibility with the common market, there is no need to come to a final determination of the relevant geographic market and it can be left open whether the geographic market is national or defined by the area of each distribution network..

## **3. Competitive Assessment**

### *The retail supply of electricity to large (metered) customers*

- 294) As regards the market for the supply to large customers, at national level RWE's current market share of [10-20]% will be increased as a result of the proposed transaction by [0-5]% to [10-20]%.<sup>206</sup> Given the large number of active suppliers and the

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<sup>202</sup> *idem*

<sup>203</sup> Cases C-179/90 – Merci Convenzionali Porto di Genova, COMP/M.1628 – TotalFina / Elf, COMP/M.3943 – Saint-Gobain / BPB - and C-475/99 – Ambulanz Glöckner.

<sup>204</sup> Especially with respect to the Bremerhafen port activities

<sup>205</sup> Population in the Bremen/Bremerhafen area: 0.6 m; Total consumption in Bremen/Bremerhafen grid area is 3.6 TWh, whereas the consumption by households in the Member State Luxembourg is 840 GWh. Based on the above population figures it also results that the number of network connections is much higher than in Malta, where it amounts to 130 000.

<sup>206</sup> The increases are due to the supply activities of Essent's subsidiary KOM-Strom, swb and SW Bielefeld.

level of the market share, at a national level it is unlikely that the proposed concentration would raise serious concerns.

#### *The retail supply of electricity to small (non-metered) customers*

- 295) On the market for the supply of electricity to small customers, if the market is considered national, Essent would only add about [0-5]% to the [10-20]% market share of RWE. Given the large number of active suppliers and the level of the market share, at a national level it is unlikely that the proposed concentration would raise serious concerns.
- 296) Nevertheless, as mentioned above, there are many indications pointing rather towards a local market. If thus the market is considered in a narrower sense to encompass each respective distribution network area only, the proposed transaction will only lead to a very minor overlap for the local market of Bremen/Bremerhaven, where swb is the incumbent supplier and has a market share of [90-100]%. RWE currently only has a [0-5]% market share with its "national" brand Eprimo. In any event, there are a number of other competitors of swb and RWE does not seem to be the best placed competitor of swb given that Yello, the "national" brand of EnBW, and Lichtblick an independent new entrant, already have market shares of [5-10]% and [0-5]% respectively.
- 297) Given the above, it is unlikely that the proposed concentration would raise serious concerns on that market, with the latter being defined either as on a distribution network level or more broadly.

#### **C.ii) GERMANY - Gas Markets**

- 298) A short description of the German gas network infrastructure, recent regulatory changes, market entry barriers and the Parties' activities on it, is necessary in view of the assessment of the Proposed Transaction.

##### **The natural gas sector in Germany**

- 299) The main characteristics of the German gas sector differ from those in other Member States. The system of local/regional supply monopolies (*Demarkationsgebiete*) in force until 1998, has led to highly fragmented transportation networks and a unique "three tier" supply structure in Germany. It comprises three levels of networks (supra-regional, regional and local) through which natural gas is transported from the production fields or import points to the final customer.
- 300) Concerning the gas transportation level, there is no single high pressure transmission grid in Germany. Instead several Transmission System Operators (TSOs) operate H-Gas and/or L-Gas high pressure transmission grids. There are currently 10 market areas (*Marktgebiete*)<sup>207</sup> as of 1 April 2009<sup>208</sup>, some of them for H-Gas and others for L-gas.

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In July 2006, the operators of the natural gas networks in Germany entered into a cooperation agreement (*Vereinbarung über die Kooperation gemäß §20 Abs.1b) EnWG zwischen den Betreibern von in Deutschland gelegenen Gasversorgungsnetzen*) which provides for the formation of so-called market areas (*Marktgebiete*).

A market area is defined as the combination of multiple operators' networks and network areas that are interconnected, technically or by means of swaps of gas quantities, either vertically (e.g., TSO-DSO) or horizontally (e.g., TSO-TSO), creating an area within which gas injected at a given entry point can exit at any exit point within the market area in question.

- 301) The following table provides a short overview of the situation at the TSO level of the German gas network:

**Table 5**

<b>German Gas Market Areas (<i>Marktgebiete</i>) as of April 1, 2009</b>		
<b>Market Area</b>	<b>TSO(s)</b>	<b>Gas Quality</b>
H-Gas Norddeutschland	Gasunie Deutschland Transport Services GmbH, DONG Energy Pipelines GmbH, StatoilHydro Deutschland GmbH	H
L-Gas Norddeutschland	Gasunie Deutschland Transport Services GmbH, EWE NETZ GmbH und Erdgas Münster Transport GmbH & Co. KG <sup>209</sup>	L
NetConnect Germany (NCG)	E.ON GT und bayernets	H
E.ON GT L-Gas	E.ON GT	L
GDF Deutschland Transport	GDF Deutschland Transport	H
GVS-ENI	GVS-ENI	H
Ontras	Ontras	H
RWE H-Gas	RWE Transportnetz Gas GmbH	H
RWE L-Gas	RWE Transportnetz Gas GmbH	L
Wingas Transport	WINGAS TRANSPORT GmbH & Co. KG	H

- 302) It has to be noted that it is intended to further reduce the number of market areas.

- 303) The German gas supply sector is characterized by a decentralized structure with about 700 utilities (regional and local distribution companies including Stadtwerke) on three levels of the value chain: (i) producers/importers, i.e. upstream wholesalers of natural gas, traditionally selling natural gas to regional wholesalers or large industrial customers (long-distance wholesale, *Ferngasstufe I*) via the long-distance high-pressure gas transmission grids; (ii) regional wholesalers supplying natural gas to industrial customers or local/municipal utilities via regional distribution grids (short-distance wholesale, *Ferngasstufe II*); (iii) finally, local/municipal utilities selling

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<sup>208</sup> As of 1 April 2009 a joint market area exists comprising Gasunie, EWE and Erdgas Münster

<sup>209</sup> As of 1 April 2009 there will be a joint market area of Gasunie, EWE and Erdgas Münster.

natural gas to households, commercial and other end-users mainly via their local distribution grids.

## **The regulatory framework**

### Liberalisation

- 304) The German gas sector has been liberalized since 1998, when all customers became eligible to choose their gas supplier. In this context, it has to be noted that there are no more regulated gas tariffs for end-consumers in Germany.

### The German Act on gas and regulatory bodies

- 305) The German energy sector is governed by the revised German Energy Industry Act (*Gesetz über die Elektrizitäts- und Gasversorgung - Energiewirtschaftsgesetz*) (hereinafter the "EnWG") which became effective on 13 July 2005. The act implements the Electricity and Gas Directives, European Community Directive 2004/67/EC and completely replaces the Energy Industry Act of 1998.
- 306) The BNetzA (*Bundesnetzagentur*) and the regulatory authorities of the Federal States are responsible for the regulation of the gas and electricity networks.

### Legal unbundling – Third Party Access

- 307) The current version of the EnWG sets out the unbundling obligations of vertically integrated energy utilities. Vertically integrated energy utilities are obliged to provide for transparent and non-discriminatory operation of their gas and electricity networks. In order to achieve the necessary independence of the network operators from the other activities of the energy utilities, the EnWG requires several unbundling measures, including legal, operational and informational unbundling as well as unbundling of accounts.
- 308) The EnWG also contains detailed requirements with respect to third party access (hereinafter "TPA") to networks. In 2005 the EnWG was modified introducing regulated TPA (including the regulation of network fees) instead of negotiated third party access. System operators must grant TPA to their network on an economically reasonable, non-discriminatory and transparent basis.
- 309) Moreover, the TPA regime provides for a system of capacity allocation and redistribution of unused capacity in the form of the "use it or lose it" rule and the so called "piggy-back" principle ("*Rucksack Prinzip*").

### Two contract model

- 310) Concerning the network access model, German TSOs had initially agreed amongst each other on an access model based on the booking of capacities for individual transport paths ("point-to-point"-model). In November 2006, the BNetzA declared the point-to-point model incompatible with the EnWG and imposed on German TSOs to apply an "Entry/Exit" (or "Two-Contract") access model, according to which transport customers could book entry capacities into the grid and exit capacities to the respective

exit point independently from the individual transport path and the number of sub-grids that had to be passed.

### **Market entry**

- 311) Notwithstanding the improving competitive conditions on the German natural gas market since 2007 via the bigger number of (potential) suppliers, increasing number of retail supplies which are less focused on the given entity's historical area, the limitation of contract duration by BKartA, the implementation of the grid access regulation, the decreasing number of market areas (10 market areas since 1 April 2009 instead of the previous 12), the German natural gas supply sector (in particular the RWE H-Gas and L-Gas grid areas) is characterised by a large number of barriers which make it very difficult for new competitors to enter the(se) market(s) mainly because of the high infrastructural fragmentation of the German natural gas market. The replies to the Commission's market investigation especially pointed out that the German L-Gas market is particularly illiquid, that transport capacity problems (congestion) remain between the different market areas, that congestion hinders entry into the RWE grid area, and that the still existing long-term contracts hinder competition. Within the course of the Commission investigation, a majority of the respondents considered that access to gas, to transport capacities, to gas storage and to flexibility tools still remain a concern and constitute high market entry barriers.

### **The Parties` activities on the German natural gas market**

#### **RWE**

- 312) As a German-based energy and utility company, RWE is primarily active in the production and supply of electricity and gas. The activities of RWE (and those of its subsidiaries) in the natural gas sector in Germany cover activities related to natural gas at essentially every level of the supply chain. RWE is a fully integrated gas company, with activities in the production and import of gas<sup>210</sup>, in the gas transmission and storage businesses as well as in the downstream gas distribution business. RWE's activities in the German energy sector have been traditionally focused on the area of North-Rhine Westphalia<sup>211</sup>, however today RWE is also active in several other Member States<sup>212</sup>.
- 313) RWE, via Transportnetz Gas GmbH ("RWE TSO Gas"), owns transmission grids for H-Gas and L-Gas, respectively the market areas (*Marktgebiete*) RWE H-Gas and RWE L-Gas, both of which are situated in Western Germany (North-Rhine-Westphalia) and have a combined length of approx. 4,100 km<sup>213</sup>. Currently, RWE is thus operating a

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<sup>210</sup> Annual gas production in 2007: 3.2 bn m<sup>3</sup> (see: RWE Facts & Figures, Update October 2008, p.252).

<sup>211</sup> In this area, RWE held a number of state-granted regional supply monopolies ("Demarkationsgebiete") under the traditional German energy supply system in force until 1998

<sup>212</sup> RWE is *inter alia* active in the gas transmission and supply businesses in the Czech Republic, the UK, Hungary and in the Netherlands

<sup>213</sup> Source: RWE Facts & Figures, Update October 2008, p.245



long-distance transmission grid for H-Gas and a long-distance transmission grid for L-Gas in the market areas: RWE H-Gas and RWE L-Gas.

- 314) RWE has committed vis-à-vis the European Commission pursuant to Article 9 of Regulation No. 1/2003 to divest its German gas transmission system in order to bring the EU proceedings over the company's natural gas interests to an end. On 18 March 2009<sup>214</sup> the European Commission has made RWE's commitment to sell its entire German high-pressure gas transmission network, including the necessary personnel and ancillary assets and services legally binding through a decision. Until the network is fully divested, it is managed by a Hold Separate Manager as if it were an operator independent from RWE.
- 315) RWE has no current LNG activities in Germany. However, RWE (RWE Supply & Trading) plans to develop an import facility for LNG at the port of Wilhelmshaven in northern Germany until 2012.
- 316) RWE's main means of providing flexibility services in the RWE L-Gas area are storage (Nievenheim storage facility), line pack flexibility, a flexible L-Gas import contract with [...] <sup>215</sup> and interruptible gas contracts with consumers in the RWE L-Gas market area. Apart from the Nievenheim storage facility, which has not been operational for several years since it is under repair, the contract with [...] is currently the [10-20]% source of import flexibility for the RWE market area of L-Gas.

### **Essent**

- 317) In Germany, Essent is primarily active in the natural gas markets through its 51% (minus one share) shareholding in Stadtwerke Bremen (hereinafter "swb"), the incumbent natural gas supplier in Bremen and Bremerhaven. swb is a shareholder in various local/municipal utilities (Stadtwerke), the largest being SW Bielefeld<sup>216</sup>, which have local distribution and retailing activities and in which swb holds a stake of 49.9%. The following table provides an overview of the shareholdings of swb and of SW Bielefeld in local/municipal utilities:

**Table 6**

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<sup>214</sup> IP/09/410 of 18 March 2009

<sup>215</sup> According to the German Federal Agency of Economics and Export Control (*Bundesamt für Wirtschaft and Ausfuhrkontrolle*), in 2007, the total imports of natural gas from the Netherlands into Germany amounted to 737,589 TJ (Terra Joule). On that basis, the imports of RWE from [...] in the amount of approx. [...] bcm, which equal an amount of approx. [...] TJ, account for a share of approx. [10-20]% of the total imports from the Netherlands.

<sup>216</sup> Cf. Case No. COMP/M.2352 – *SWB/Stadtwerke Bielefeld/JV*, notified to the Commission on 29 June 2001 and cleared on 27 July 2001.

Company	Shareholder	Shareholding	Other Shareholders
swb	Essent	51%	EWE (49%) City of Bremen (one share)
Stadtwerke Soltau	swb	49.5%	City of Soltau (50.5%)
Stromversorgung Greifswald	swb	40%	Stadtwerke Greifswald GmbH (60%), a 100% subsidiary of the City of Greifswald
SW Bielefeld	swb	49.9%	City of Bielefeld (50.1%)
Stadtwerke Gütersloh	SW Bielefeld	49.9%	City of Gütersloh (50.1%)
Stadtwerke Ahlen	SW Bielefeld	49%	City of Ahlen (51%)
Gemeindewerke Lilienthal	swb	49%	Wirtschaftsbetriebe Lilienthal GmbH (51%), a 100% subsidiary of the Municipality of Lilienthal
Gemeindewerke Ritterhude	swb	48.7%	Wirtschaftsbetriebe Ritterhude GmbH (51,3%), a 100% subsidiary of the Municipality of Ritterhude

318) Accordingly, swb has direct shareholdings of 49.5% in Stadtwerke Soltau, of 40% in Stromversorgung Greifswald and of 49.9% in Stadtwerke Bielefeld. Stadtwerke Bielefeld, in turn, holds 49.9% in Stadtwerke Gütersloh and 49% in Stadtwerke Ahlen.

319) In addition, Essent currently has a majority shareholding in, and sole control over, KOM-STROM AG (hereinafter "KOM-STROM"). KOM-STROM offers products and services such as energy procurement processes, portfolio management, consumption prognoses and grid account management. KOM-STROM's services are available throughout Germany. KOM-STROM has also extended its portfolio management services business for local/municipal utilities to cover natural gas.

320) SW Ahlen is connected to RWE TSO Gas, while SW Gütersloh is connected to RWE Transport Gas and Wingas Transport such as SW Bielefeld which, in addition, is also connected to BEB Transport. SW Bielefeld, Gütersloh and Ahlen are connected to the L-Gas grid of RWE WVE at DSO level.

321) The possibilities of Essent to provide flexibility services extend to L-Gas only and are limited to the storage contracts and [...]. Essent has neither linepack nor quality conversion capacity. Furthermore, Essent does not have any LNG activities in Germany.

322) In previous cases concerning the natural gas industry, the Commission has generally distinguished separate markets for (i) exploration and production, (ii) transmission (via

the high-pressure pipeline grid), (iii) distribution (via the low-pressure pipeline grid), (iv) storage, and (v) trading and supply<sup>217</sup>.

- 323) In so far as the Proposed Transaction does not have any effects on the gas network infrastructures markets, a precise definition of these markets is not necessary for the purposes of this decision. However, the situation concerning RWE's and Essent's used (booked or owned) capacities on the different infrastructures described above will be taken into account in the analysis of the effects of the merger on the markets for gas supply.
- 324) The Parties have combined market shares superior to 15% on the following markets: gas wholesale supply, gas retail supply gas storage. These markets will be analysed in turn.

### ***Wholesale supply of natural gas***

#### ***1. Product Market definition***

- 325) The Commission has distinguished in its previous decisions<sup>218</sup>, different product markets for (i) wholesale gas supply, which in Germany consists of two markets, namely a primary level: sales to regional wholesale companies (long-distance wholesale supply), and a secondary level: sales to LDC ("Stadtwerke") (short-distance wholesale supply); (ii) retail gas supply to industrial customers (a market which may include electricity power plants), (iii) retail supply to small customers (households)<sup>219</sup>.
- 326) As regards gas supply activities, the Commission has also drawn distinctions between customers according to their annual gas consumption and their type of activity (e.g. power plants)<sup>220</sup>.
- 327) In its recent decisions<sup>221</sup> the Commission has taken the view that distinction may be drawn with regard to the gas quality (H-Gas and L-Gas)<sup>222</sup> since they require the use of separate delivery infrastructures. H-Gas and L-Gas do not have the same characteristics or properties and facilities designed for L-Gas cannot process H-Gas, and vice versa, without expansive prior modification of the combustion systems.

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<sup>217</sup> Case COMP/M.3696 – *E.ON/MOL*, of 21 December 2005, paragraph 88

<sup>218</sup> Case COMP/M.4110 – *E.ON/Endesa*, of 25 April 2006, paragraph 13 and Case COMP/M.1383 – *Exxon/Mobil*, of 29 September 1999

<sup>219</sup> Case COMP/M.4890 – *Arcelor/Ferngas*, of 22 November 2007, paragraph 11

<sup>220</sup> Case COMP/M.3696 – *E.ON/MOL*, of 21 December 2005, paragraph 89

<sup>221</sup> Case COMP/M.4180 – *GDF/Suez*, of 14 November 2006, paragraphs 64-69

<sup>222</sup> Depending on the methane content, basically two different types of natural gas can be distinguished: high calorific gas ("H-Gas") and low calorific gas ("L-Gas"). L-Gas as a methane content of approx 79.8% to 87% by volume, while H-Gas has a methane content of approx 87% to 99.1% by volume. H-Gas and L-Gas differ with regard to their respective combustion energy output. The difference in the combustion energy output can be compared by means of the so-called "Wobbe-Index".

- 328) The Parties submitted that the substitution of L-Gas by H-Gas has further progressed and is part of an ongoing process for twenty-five years in Germany. The Parties also submitted that currently there are five quality converter stations in Germany, two of them are operated by RWE at the TSO level (Hamborn and Broichweiden) and one on the DSO level (Weine) and the conversion of L-Gas to H-Gas is ongoing in other market areas as well.
- 329) Against this background, the Commission investigation reveals on the basis of replies from the large majority of the respondents that the characteristics, storage and delivery of H-Gas and L-Gas are different (e.g. RWE has a different transmission network for L-Gas and for H-Gas: RWE L-Gas and RWE H-Gas); while it is technically possible to switch from L-Gas to H-Gas, this process is considered by market players to be expansive and relatively long (only mid-term solution) and conversion is difficult since conversion facilities are booked on a market where the liquidity of L-Gas is low. With regard to conversion of L-Gas to H-Gas, the capacity bookings on RWE TSO Gas demonstrates that in respect of Broichweiden [an operator] booked the total entry capacity to Broichweiden GMA (gas blending facility) for L-Gas between 2007 and 2013 and the corresponding exit capacities of H-Gas between the same period. All these elements plead in favour of a distinction of L-Gas and H-Gas with regard to wholesale supply.

## ***2. Geographic Market definition***

- 330) In its previous decisions, the Commission has always held that the geographic markets for gas supply were not wider than national<sup>223</sup>.
- 331) In its decision Exxon/Mobil, the Commission had found indications to the effect that the wholesale markets for natural gas were still regional in terms of their geographic scope, effectively being limited to the regions laid down in the former demarcation agreements (*Demarkationsverträge*), even though these were no longer in force at the time<sup>224</sup>. In EnBW/ENI/GVS and Arcelor/Ferngas, the Commission confirmed that the short-distance wholesale markets were regional and correspond to the grid area<sup>225</sup>. As to Germany, the Commission's decisional practice has thus defined the gas supply markets as being regional mainly divided along the former demarcation of regions which were reserved for a single supplier before the liberalisation process started in 1998 corresponding to a grid area. In particular, both the importers/suppliers (also defined as "long-distance transmission companies") and the regional suppliers (also defined "short-distance transmission companies") have been considered mainly regional: their areas of operation coincide with the geographic extension of the 19

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<sup>223</sup> Case COMP/M.5220 – *ENI/Distrigaz*, of 15 October, 2008, paragraph 25

<sup>224</sup> Case COMP/M.1383 – *Exxon/Mobil*, of 29 September 1999, paragraph 137-153

<sup>225</sup> Case No. COMP/M.2822 – *EnBW/ENI/GVS*, of 17 December 2002, paragraphs 20-31 and Case No. COMP/M.4890 – *Arcelor/Ferngas*, of 22 November 2007, paragraphs 14

demarcation regions existing before the liberalization process<sup>226</sup>, i.e. with the different grid areas.

- 332) This is also line with the constant case law of the BkartA<sup>227</sup>, for whom the relevant geographic market for wholesale supply is the relevant grid area (*Netzgebiete*) and not the market area(s) (*Marktgebiete*)<sup>228</sup>. Notwithstanding the introduction of the two contract model, the BkartA did not adhere to market areas for purposes of geographic market definition because they do not necessarily reflect supply structures.
- 333) As a conclusion, the geographic market for short-distance wholesale supply of natural gas corresponds to the grid area.

### ***3. Competitive Assessment***

#### ***Horizontal effects of the Proposed Transaction on short-distance wholesale supply of H-Gas and L-Gas in the RWE TSO area***

- 334) At the short distance wholesale level, RWE achieves [...] of its natural gas sales within its own market areas (RWE H-Gas and RWE L-Gas). RWE's market shares on the short-distance wholesale supply of L-Gas in the RWE L-Gas TSO area are very high [90-100]% while the one of H-Gas are significant [40-50]%. According to the Parties, Essent and the entities in which it has direct or indirect participations have no short-distance wholesale supplies in either of the market areas RWE L-Gas and RWE H-Gas.
- 335) Therefore, no horizontal overlap exists between the Parties' activities concerning short-distance wholesale supply of H-Gas and L-Gas in the RWE TSO area. The transaction should thus have no impact on competition on the H-Gas market given the level of the market share of RWE. However, given the very high level of the market share of RWE on the L-Gas market ([90-100]%), the Commission assessed the position of Essent as a potential supplier and the position of existing competitors of RWE.
- 336) The Commission's findings confirm that Essent could not enter the RWE market area since transport capacities on RWE TSO have not been granted to Essent in the past. As a result, Essent was not in a position to compete with RWE on the short-distance wholesale supply of natural gas, both for H-Gas and L-Gas. Essent has been intending to enter the RWE area but has not been granted the requested capacities from RWE. Essent's "Business Plan 2006" drafted in 2005, highlighted that the main entry barrier on the German gas market is inherent to network congestion problems: [...].
- 337) The analysis of Essent as a potential supplier reveals thus the difficulty of competitors of RWE to enter this market. The Commission investigation confirmed that there is little spare transport capacity on the RWE L-Gas grid since the firm capacity at entry points on the RWE L-Gas network is fully booked up to 99% [...] till 2013. It has also to be noted that the entities in which Essent has indirect participations via swb and

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<sup>226</sup> Case COMP/M.5220 – ENI/Distrigaz, of 15 October, 2008, paragraph 29

<sup>227</sup> BKartA, decision of 12 March 2007, Case No. B 8 – 62/06, *RWE/SaarFerngas*

<sup>228</sup> BKartA, decision of 5 March 2009, Case No. B 8 – 163/08, *SaarFerngas/Landau*

which are present in the RWE TSO area (SW Bielefeld, SW Ahlen and SW Gütersloh) sourced their gas from [several natural gas providers] in 2008 and did not either enter the short-distance wholesale supply of natural gas market in the given geographic zone.

- 338) That being said in the RWE L-Gas area, a number of competitors of RWE (E.ON Ruhrgas, Wingas, Shell, GDF or ExxonMobil amongst others) have been active at the wholesale level, using remaining firm and interruptible capacity or using possibilities to supply L-Gas on the fringes of the area from other areas. These operators also have some gas available for wholesale trade in Germany which Essent currently does not have.
- 339) Taking into account 1- the degree of competition in this market which is severely limited by factors external to this transaction (in particular capacity bookings) 2- the number of operators already taking advantage of the little room available to competition and 3- the position of these competitors relative to Essent, the transaction does not raise serious doubts on the short-distance wholesale supply of L-Gas in the RWE area.

*Horizontal effects of the Proposed Transaction on short-distance wholesale supply of H-Gas and L-Gas in other areas*

- 340) All of Essent's short-distance wholesale volumes in Germany were supplied by swb, mostly to local/ municipal utilities in the Bremen/Bremerhaven region which is not located in the RWE H-Gas or RWE L-Gas market areas. swb is connected to the market areas L-Gas Norddeutschland and E.ON GT L-Gas. swb sourced its gas from [several natural gas providers] in 2008<sup>229</sup> and is a relatively small wholesale supplier in those areas. RWE does not achieve any significant short-distance wholesale volumes in these market areas. In 2008, KOM-STROM carried out some minor short-distance wholesale supplies which, however, were also not made in the RWE H-Gas or RWE L-Gas market areas. In fact the areas where the sales of swb and KOM-STROM took place are dominated by other operators. The transaction does not thus raise serious doubts on the short-distance wholesale supply of H-Gas and L-Gas in other areas.

*Vertical effects of the Proposed Transaction-customer foreclosure on the market for short-distance wholesale supply of L-Gas in the RWE TSO area*

- 341) The Proposed Transaction gives rise to a vertical relationship between the upstream market for L-Gas short-distance wholesale supply and the downstream markets for L-Gas retail sales. The Proposed Transaction would result in the integration of an important customer active in the downstream markets. This integration could lead to

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<sup>229</sup> The last supply by Essent Energy Trading BV to swb occurred in 2006 for [5-10]% of the total sales

customer foreclosure to the detriment of consumers on the market for short-distance wholesale supply of L-Gas in the RWE TSO area as explained below<sup>230</sup>.

- 342) The German competition authority (BKartA) during the last years prohibited E.ON and RWE from participating in or merging with other utilities irrespectively from the reinforcement of their market shares following the given transaction(s). This prohibition is due to the joint dominant position of E.ON<sup>231</sup> and RWE<sup>232</sup> in the German electricity and gas markets declared by BKartA.
- 343) Within the course of the market investigation carried out by the Commission with regard to the Proposed Transaction some respondents have underlined that the takeover of retailers (including Stadtwerke) by a vertically integrated market player with a relatively high market presence intensifies the risk of seeing the given retailers' gas sourcing decisions influenced by the vertically integrated entity to the detriment of its competitors.
- 344) Essent/swb owns shareholdings in a number of Stadtwerke. Out of these only Stadtwerke (SW) Bielefeld, SW Gütersloh and SW Ahlen are located in the RWE area. Swb has direct shareholdings of 49.9% in SW Bielefeld which, in turn, holds 49.9% in SW Gütersloh and 49% in SW Ahlen. These three Stadtwerke are connected to the RWE L-Gas transmission grid, while SW Bielefeld and SW Ahlen are active on the downstream L-Gas supply markets.
- 345) As already mentioned above, RWE has market share of [90-100]% of in the short-distance wholesale supply of L-Gas in the RWE market area.
- 346) It has to be noted that RWE has participations in [more than 100] retailers (including Stadtwerke) in Germany. According to the Parties, out of these [more than 100] retailers, [less than 25] are situated in the RWE area while [less than 10] of them are located in the RWE L-Gas grid area and have been supplied with L-Gas by RWE in 2008<sup>233</sup>. These supplies amounted to [11.000 – 14.000] GWh <sup>234</sup> in 2008 on a market with a gas volume of [...] GWh, i.e. about [40-50]% of that market. As explained above, these sales are to a large extent secured by RWE through the shareholding of RWE in these entities. In fact all the Stadtwerke present in the RWE TSO area and in which RWE holds participations were supplied with L-Gas by RWE in both 2007 and 2008<sup>235</sup>.

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<sup>230</sup> See paragraph 58 of the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), OJ of 18 October 2008 C265, pages 6 – 25

<sup>231</sup> Decision of BKartA of 12 September 2003 – *E.ON/Stadtwerke Eschwege* (B 8 – FA – 21/03), decision upheld by Bundesgerichtshof (Federal Court of Justice) of 11 November 2008 – *E.ON/Stadtwerke Eschwege*

<sup>232</sup> Decision of BKartA of 12 March 2007 – *RWE/SaarFerngas* (B 8 – 40000 – U – 62/06)

<sup>233</sup> The remaining 13 Stadtwerke in which RWE owns a share had no L-Gas supplies both in 2007 and 2008

<sup>234</sup> No long term contracts exist outside the contracts with these retailers.

<sup>235</sup> Even the Stadtwerke in which RWE's participation is equal to [under 50]%

This fact is in line with the characteristics of the German market according to which vertically integrated companies are very often gas suppliers of their retailers.

- 347) The transaction offers the possibility to RWE to hold a share in SW Bielefeld and SW Ahlen. SW Ahlen and SW Bielefeld respectively purchase annual quantities of L-Gas of about [500-1000] GWh and [1500-2000] GWh<sup>236</sup>, together representing [5-10]% of the L-Gas supply market.
- 348) SW Ahlen's [...] supplier for 2006-2008 was RWE: the transaction gives thus a possibility for RWE to secure these supplies through a shareholding in SW Ahlen.
- 349) [Several natural gas providers] supplied SW Bielefeld with L-Gas in 2008. The supplies by competitors of RWE in 2008 amounted to [1000-1500] GWh. After this transaction RWE is likely to gain an additional market share of about [0-5]% (represented by the [1000-1500] GWh currently sourced by SW Bielefeld from competitors of RWE) in the market for short-distance wholesale supply of L-Gas, through the indirect shareholding it would hold in that entity. RWE is also likely to secure through the same indirect shareholding the remaining sales to SW Bielefeld.
- 350) As a result of the Proposed Transaction, RWE would thus be in a position to secure or further capture the sales made to the Stadtwerke in which swb has direct and indirect participations, i.e. [5-10]% of the market for short-distance wholesale supply of L-Gas.
- 351) These sales together with the gas purchases (in 2008) of the six Stadtwerke in the RWE L-Gas area in which RWE holds participations represent about [50-60]% of the short-distance wholesale supply market of RWE in its area. The transaction would thus allow RWE to raise the degree of captivity of clients through shareholdings to half of the market.
- 352) In itself, this degree of captive sales and its increase associated with the Proposed Transaction need not necessarily raise competition concerns.
- 353) However, the Commission notes that there are a number of additional factors which lead to the conclusion that such concerns in this case cannot be excluded.
- 354) There are high barriers to entry into this wholesale market. There is little spare firm transport capacity on the RWE L-Gas network, which is fully booked up to 99% [...] until 2013. There is only a marginal possibility to enter the RWE L-Gas via other networks than the one owned by RWE (BEB – Gasunie (L-Gas Norddeutschland)). SW Bielefeld is connected to the L-Gas transmission networks of RWE and BEB. Moreover, there are economies of scale characterizing this market, which make entry at a small scale non profitable. The Parties themselves acknowledge that economies of scale are relevant with regard to the sourcing of natural gas from producers. Typically, sourcing larger volumes allows for more diversification and more competitive terms and conditions.

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<sup>236</sup> SW Gütersloh [...] and probably, it is currently supplied by [...] with H-Gas and probably it will not be supplied with L-Gas in the future.



- 355) RWE, as the incumbent in the market, would be in a good position to offer attractive long term supply contracts to a select group of customers which remain contestable. This could further reduce the size of the market that the entrants can contest.
- 356) Because of fixed costs of entry and other economies of scale this, in turn, could make entry or expansion of existing competitors difficult and possibly not profitable, leading to marginalization of upstream competitors or a decision not to enter. The reason why entry may be prevented or why existing competitors may be marginalized is in the economies of scale which induce a minimal scale for profitable entry and operation. This minimal scale is in turn related to access to a sufficient customer base.
- 357) Such a strategy of offering the attractive long term contracts to a select group of customers has a potentially anticompetitive effect, because it confers a negative externality on the buyers which do not sign such contracts, through reduction in competition and resulting increase in price, following entry pre-emption or marginalization of existing of competitors.
- 358) If such a strategy is successful in pre-empting entry or in inducing exit of existing (but small) competitors, it could also be profitable for RWE, resulting in significant impediment of efficient competition. After the exit of absent threat of entry RWE could effectively act as a monopolist in the market.
- 359) The increase in the degree of captive sales, following the Proposed Transaction, makes customer foreclosure potentially more attractive from the point of view of RWE. The reason for this is in the reduction of the number of customers (contestable size of the market) to which RWE has to make attractive offers, post merger, in order to induce them into entering into long term supply agreement, foreclosing the competitors, with the view to pre-empt entry or marginalize existing competitors.
- 360) The Commission notes that such a strategy could be made unprofitable for RWE if the buyers could coordinate their purchases and RWE was not able to offer discriminatory contracts
- 361) If the buyers could coordinate and internalize this externality then collectively and individually they could be better off if none of them signed the foreclosing long term contract and as a result the contestable market would be large enough for a profitable entry. In such circumstances foreclosure by RWE would likely be unprofitable.
- 362) However, the wholesale gas market is characterized by long term contracts with different durations, which expire at different times. The buyers in this market have little ability to coordinate their purchases due to the absence of temporal coincidence of contract renewals. Moreover, discrimination is made easy, and coordination of buyers difficult, due to bilateral negotiation following the tendering process and little contractual transparency.
- 363) On the basis of the foregoing, the Proposed Transaction may lead to an increased incentive of RWE to engage in customer foreclosure, leading to the removal of its competitors or to entry pre-emption on the short-distance wholesale market of L-Gas in the RWE area.

364) Accordingly, the Proposed Transaction raises serious doubts as regards possible customer foreclosure on the market for short-distance wholesale supply of L-Gas in the RWE area.

### ***Retail supply of natural gas***

#### ***1. Product Market definition***

365) The Commission has distinguished in its previous decisions<sup>237</sup>, different product markets for (i) retail gas supply to large customers (industrial customers and electricity power plants), (ii) retail supply to small customers (households)<sup>238</sup>.

366) As regards large customers, the Commission has also drawn distinctions between industrial customers and electricity power plants according to their annual gas consumption and their type of activity<sup>239</sup>.

367) The following analysis will consider the narrowest segments possible: (i) retail gas supply to electricity power plants, (ii) retail gas supply to large industrial customers, (iii) retail gas supply to small customers (households).

368) Further, in its recent decisions<sup>240</sup> the Commission has taken the view that distinction may be drawn with regard to the gas quality (H-Gas and L-Gas)<sup>241</sup> since they require the use of separate delivery infrastructures. H-Gas and L-Gas do not have the same characteristics or properties and facilities designed for L-Gas cannot process H-Gas, and vice versa, without expansive prior modification of the combustion systems.

369) The Parties submitted that the substitution of L-Gas by H-Gas has further progressed and is part of an ongoing process for twenty-five years in Germany. The Parties also submitted that currently there are five quality converter stations in Germany, two of them are operated by RWE at the TSO level (Hamborn and Broichweiden) and one on the DSO level (Weine) and the conversion of L-Gas to H-Gas is ongoing in other market areas as well.

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<sup>237</sup> Case COMP/M.4110 – *E.ON/Endesa*, of 25 April 2006, paragraph 13 and Case COMP/M.1383 – *Exxon/Mobil*, of 29 September 1999

<sup>238</sup> Case COMP/M.4890 – *Arcelor/Ferngas*, of 22 November 2007, paragraph 11

<sup>239</sup> Case COMP/M.3696 – *E.ON/MOL*, of 21 December 2005, paragraph 89

<sup>240</sup> Case COMP/M.4180 – *GDF/Suez*, of 14 November 2006, paragraphs 64-69

<sup>241</sup> Depending on the methane content, basically two different types of natural gas can be distinguished: high calorific gas ("H-Gas") and low calorific gas ("L-Gas"). L-Gas as a methane content of approx 79.8% to 87% by volume, while H-Gas has a methane content of approx 87% to 99.1% by volume. H-Gas and L-Gas differ with regard to their respective combustion energy output. The difference in the combustion energy output can be compared by means of the so-called "Wobbe-Index".

- 370) Against this background, the Commission investigation reveals on the basis of replies from the large majority of the respondents that the characteristics, storage and delivery of H-Gas and L-Gas are different (e.g. RWE has a different transmission network for L-Gas and for H-Gas: RWE L-Gas and RWE H-Gas); while it is technically possible to switch from L-Gas to H-Gas, this process is considered by market players to be expansive and relatively long (only mid-term solution) and conversion is difficult since conversion facilities are booked on a market where the liquidity of L-Gas is low. With regard to conversion of L-Gas to H-Gas, the capacity bookings on RWE TSO Gas demonstrates that in respect of Broichweiden [an operator] booked the total entry capacity to Broichweiden GMA (gas blending facility) for L-Gas between 2007 and 2013 and the corresponding exit capacities of H-Gas between the same period.
- 371) All these elements plead in favour of a distinction of L-Gas and H-Gas with regard to retail supply.

## ***2. Geographic Market definition***

### ***Retail supply of natural gas to power plants***

- 372) In its previous decisions the Commission took the view that the market for retail supply to large customers including power plants in Germany is not wider than national. The Commission has not assessed so far the geographical scope of sales to power plants only but it cannot be wider than national either. The BKartA has also not looked into geographic market definition with respect to power plant customers as it does not define the supply of natural gas to power plants as a separate product market. However, as the supply of natural gas to large industrial customers in general is concerned, the BKartA continues to find that market to be regional or, more specifically, as corresponding to the geographic area that is covered by the distribution (or transmission) grid<sup>242</sup>. The market may thus be national or regional. Nevertheless, the precise geographic definition for the market of retail supply to power plants can be left open as the Proposed Transaction does not give rise to competition concerns under any of the possible alternative definitions.

### ***Retail supply of natural gas to large customers***

- 373) In its previous decisions the Commission took the view that the market for retail supply to large customers in Germany is not wider than national<sup>243</sup>.
- 374) As regards the supply of natural gas to large industrial customers in general is concerned, the BKartA continues to find that market to be regional or, more

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<sup>242</sup> BKartA, decision of 12 March 2007, Case No. B 8 – 62/06, RWE/SaarFerngas, Section A.1(b) and COMP/M.4890 – Arcelor/Ferngas, of 22 November 2007, paragraph 13

<sup>243</sup> COMP/M.4890 – Arcelor/Ferngas, of 22 November 2007, paragraph 13

specifically, as corresponding to the geographic area that is covered by the distribution (or transmission) grid<sup>244</sup>.

375) Some respondents to the market investigation carried out by the Commission have indicated that the geographic scope is regional.

376) It follows from the above that, in the context of a decision under Article 6(1) of the Merger Regulation, there are some indications that the relevant geographic market may be narrower than national and thus on the level of each distribution network area. However for the purpose of this decision, since the transaction as modified by the commitments entered into by RWE, would under any alternative geographic market definition not raise serious doubts as to the compatibility with the common market, there is no need to come to a final determination of the relevant geographic market.

377) In this regard, the question also arises whether the area covered by a given distribution grid may constitute a substantial part of the Common market. This question can however be left open for the purpose of this decision, since even if such areas are considered as a substantial part of the Common market, the transaction as modified by the commitments entered into by RWE, would not raise serious doubts as to the compatibility with the common market.

#### *Retail supply of natural gas to small customers*

378) With regard to Germany, the Commission has not yet decided how exactly the retail markets should be geographically defined, although it has found evidence that these markets are at least not wider than national<sup>245</sup>.

379) The BKartA continues to find the retail supply markets for both large industrial and commercial special contract customers and for residential, small commercial and heating gas customers regional in scope, using the grid area of the incumbent supplier as a point of reference. More recently, the BKartA confirmed that approach in RWE/SaarFerngas<sup>246</sup>.

380) Some respondents to the market investigation carried out by the Commission have indicated that the geographic scope is regional.

381) It follows from the above that, in the context of a decision under Article 6(1) of the Merger Regulation, there are some indications that the relevant geographic market may be narrower than national and thus on the level of each distribution network area. However for the purpose of this decision, since the transaction would under any alternative geographic market definition not lead to competition concerns, there is no need to come to a final determination of the relevant geographic market.

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<sup>244</sup> BKartA, decision of 12 March 2007, Case No. B 8 – 62/06, RWE/SaarFerngas, Section A.1(b) and COMP/M.4890 – Arcelor/Ferngas, of 22 November 2007, paragraph 13

<sup>245</sup> Case COMP/M.4110 – E.ON/Endesa, of 25 April 2006, paragraph 22 and 24

<sup>246</sup> BKartA, decision of 12 March 2007, Case No. B 8 – 62/06, RWE/SaarFerngas, Section A.1(b)

382) In this regard, the question also arises whether the area covered by a given distribution grid may constitute a substantial part of the Common market. This question can however be left open for the purpose of this decision, since even if such areas are considered as a substantial part of the Common market, the transaction is not likely to lead to competition concerns.

### ***3. Competitive Assessment***

#### ***Horizontal effects of the Proposed Transaction on the retail supply of natural gas to Power Plants (in Germany and in the RWE TSO areas)***

383) In 2008, Essent and the entities in which it holds direct and indirect participations did not supply natural gas to power plants neither in the RWE TSO areas nor in Germany. However, in 2007 [an entity] had L-Gas supplies to power plants.

384) If the market is analysed at national level the transaction does not raise competition concerns. Based on data from 2007, with a market share of [10-20]% RWE is the biggest operator on this market at national level on a very fragmented market. Nevertheless, the Proposed Transaction itself does not profoundly modify the market situation. As mentioned, in 2007, [an entity] had supplies to power plants ([0-500] GWh out of total sales of 111,000 GWh) with a market share of [0-5]%. As a consequence, the combined market shares of RWE and Essent would amount to [10-20]% while in 2008 Essent and the entities in which it holds direct and indirect participations did not supply natural gas to power plants neither in Germany nor in the RWE TSO areas. It has also to be noted that the increase (based on 2007 data) in market concentration with regard to Germany is negligible, since the post-merger HHI would only be 500, with a  $\Delta$  HHI of 9 points.

385) If the market is analysed at regional level the transaction does not raise competition concerns. In 2008 in the RWE TSO L-Gas and H-Gas areas, RWE respectively had market shares of [70-80]%<sup>247</sup> and [30-40]% with regard to retail supply of power plants while Essent and the entities in which it holds direct and indirect participations had achieved no sales. However, in 2007 in the TSO L-Gas and H-Gas areas, RWE respectively had market shares of [60-70]% and [50-60]% whereas for L-Gas Essent had a market share of [0-5]% in the RWE L-Gas. These figures show that there is no overlap for H-Gas but raise questions as regards L-Gas. These figures indeed underline the fact that RWE has significantly increased its sales between 2007 and 2008 with regard to L-Gas (+[5-10]%) and Essent through its indirect participations via swb was a competitor for L-Gas supply in 2007 and may still be a potential competitor on this segment of the market for L-Gas in the RWE L-Gas area notwithstanding the fact that it has not realised sales in 2008 in that area. It is thus necessary to assess whether Essent/swb is a potential competitor of RWE in the RWE L-Gas grid area.

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<sup>247</sup> This market share is based on a market including all gas-fired power plants in the RWE area. If only large gas-fired power plants are taken into account the share is larger, likely equal to 100%.

386) The sales achieved by Essent/swb in 2007 were made by [an entity]. As a matter-of-fact [that entity] switched its entire supplies from L-Gas to H-Gas at the beginning of the gas year 2007/2008 (i.e. as of 1 October 2007). This switch from L-Gas to H-Gas concerned all clients connected to the [that entity's] network, including the power plants to which it supplied L-Gas in the past ([that entity] is connected to these power plants via single network today switched to H-Gas). Accordingly, in the future these power plants will be supplied with H-Gas. Due to switching costs (i.a. adaption of facilities) it is unlikely that these power plants will procure L-Gas again in the future and it is also unlikely that [that entity] will again procure and supply L-Gas to that plant or to any other client for that matter. Since the switch from L-Gas to H-Gas, [that entity] has been purchasing its entire natural gas from [a new gas provider] (via the market area [...], replacing [a previous gas provider] which supplied [that entity] with L-Gas ). The contract with [the new gas provider] is effective [for several years]. Accordingly, [that entity] (and with it Essent) is not a likely potential supplier of L-gas to power plants in the RWE area in the future.

387) Consequently the Proposed Transaction does not raise competition concerns with regard to the supply of L-Gas to power plants in the RWE L-Gas grid area.

*Horizontal effects of the Proposed Transaction on the retail supply of large/medium customers of natural gas, and of L-Gas and H-Gas at local level*

388) If the market is analysed at national level the transaction does not raise competition concerns.

389) As for the market for retail supply of H-Gas to large/medium customers in Germany at national level, swb and KOM-STROM did not have any activity in 2008. Marginal supplies have occurred during the same period by [several Stadtwerke in which swb has a stake]. As a result the Parties' combined market shares in 2008 were [5-10]% of which RWE had [5-10]% with a low increment of [0-5]%.

390) Concerning the market for retail supply of L-Gas to large/medium customers in Germany, the Parties' combined market shares were [10-20]% in 2008 with an increment of [0-5]%.

391) As a consequence, the Proposed Transaction does not result in significant horizontal overlaps with regard to the retail supply of natural gas, neither for H-Gas nor for L-Gas to large/medium customers at national level in Germany.

392) If the market is analysed at grid area level, the transaction raises competition concerns.

393) At grid level the overlap of RWE and Essent for the supply of L and H-Gas to large customers exists only in one Stadtwerke distribution area in which Essent has indirect participations namely SW Bielefeld. In other Stadtwerke areas where the incumbent is owned partly by Essent ([...]) RWE is not present while at least one other entity is competing against the incumbent. In other Stadtwerke areas, Essent or the entities in which it has participations are not present.

394) In the Bielefeld distribution area where large customers are supplied with L-Gas, in the light of the market shares of SW Bielefeld ([70-80]%) and RWE ([20-30]%) with regard to supply of L-Gas to large customers, the Proposed Transaction would give rise

to a monopoly. In addition, the Proposed Transaction would remove RWE which is the best placed competitor in its own TSO area, since in particular it is very difficult for other competitors to enter the RWE TSO area due to the fact that nearly all entry firm capacities have been booked by RWE.

395) Based on the foregoing the Proposed Transaction would lead to a significant impediment of competition in the Bielefeld distribution area for the supply of L-Gas to large customers. Accordingly, the Proposed Transaction raises serious doubts on the market for retail supply of L-Gas to large customers in the Bielefeld grid area.

*Horizontal effects of the Proposed Transaction on the retail supply of small customers of natural gas, L-Gas and H-Gas (in Germany and in regional areas)*

396) If the market is analysed at national level the transaction does not raise competition concerns.

397) Both RWE and Essent (including the entities in which it holds direct and indirect participations) are present on the market for retail supply of natural gas to small customers in Germany.

398) As for the market for retail supply of H-Gas to small customers in Germany, swb and KOM-STROM did not have any activity in 2008. Supplies have been realised during the same period by SW Bielefeld, SW Gütersloh and SW Soltau. As a result the Parties' combined market shares in 2008 were [5-10]% of which RWE had [5-10]% with a low increment of [0-5]%.

399) Concerning the market for retail supply of L-Gas to small customers in Germany, the Parties' combined market shares were [10-20]% in 2008 with an increment of [0-5]%.

400) As a consequence, the Proposed Transaction does not result in significant horizontal overlaps with regard to the retail supply of natural gas, H-Gas and L-gas to small customers at national level in Germany.

401) If the market is analysed at grid area level the transaction does not raise competition concerns either.

402) The first area to be analysed concerns Bremen.

403) All of swb's retail supplies to small customers went to customers located in Bremen/Bremerhaven area, where swb is the incumbent gas supplier holding a market share of around [90-100]%. Neither RWE nor any other retail distribution of the RWE group has "classic" supply activities, i.e. locally focussed activities as a provider of basic supply of gas according to § 36 of the EnWG (*Grundversorgung*) in that region.

404) A negligible overlap exists resulting from a small number of customers that RWE's national brand eprimo has acquired in Bremen/Bremerhaven leading to a market share of approx. [0-5]% in that region. Since both Essent/swb and RWE (eprimo) do not supply H-Gas in the Bremen/Bremerhaven area, this marginal overlap is restricted to L-Gas. Given that this overlap is marginal and given that there are other competitors to swb with bigger market shares than eprimo (for example "E wie Einfach"), the

Proposed Transaction does not raise competition concerns on the retail supply of gas to small customers in the Bremen area.

- 405) The other areas to be analysed concern networks within the RWE grid area where most of the retail activity of the Parties is concentrated. There are a number of these networks.
- 406) These networks create two sorts of competitive situations: one should distinguish between the Stadtwerke owned indirectly by Essent and the other Stadtwerke. In the areas of the Stadtwerke owned indirectly by Essent, these Stadtwerke are the incumbent suppliers and RWE is an existing or potential competitor. In the areas of the Stadtwerke not owned by Essent, the incumbent is usually the Stadtwerke itself while both RWE and Essent are existing or potential competitors. The latter situation does not raise concerns given the asymmetry between the parties on the one hand and the incumbent on the other hand and the existence of a number of active competitors in the area. The competitive situation of the markets of the areas of the three Stadtwerke located in the RWE area merit further assessment.
- 407) In fact RWE is not very active for retail supply to small customers in the areas of SW Ahlen, SW Bielefeld and SW Gütersloh: it is only marginally present as regards its national eprimo brand (only in the Bielefeld area) without any specific sales effort on this area while there are a number of at least as significant competitors exercising competitive pressure on the respective Stadtwerke (for example "E wie Einfach").
- 408) In the light of all these elements, the transaction does not significantly change the conditions of competition on the retail supply of gas to small customers in the various regional areas in the RWE grid area.

#### *Conclusion on retail supply in Germany*

- 409) As a conclusion the transaction does not raise any competition concern on any of the markets of retail supply of H-Gas and L-Gas, except for the retail supply of L-Gas to large customers in the Bielefeld area.

### ***Gas storage in Germany and in the RWE TSO areas***

#### ***1. Product Market definition***

- 410) In previous cases concerning the natural gas sector, the Commission has constantly concluded that the provision of gas storage needed to be distinguished from other activities related to the operation of natural gas infrastructure, notably transmission and distribution<sup>248</sup>.

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<sup>248</sup> COMP/M.4890 – *Arcelor/Ferngas*, of 22 November 2007, paragraph 11, Case COMP/M.3696 – *E.ON/MOL*, of 21 December 2005, paragraph 99, Case COMP/M.3410 – *Total/GdF* of 8 October 2004



- 411) There are two qualities of natural gas stored and supplied in Germany, namely H-Gas and L-Gas. Storage facilities are dedicated to either H-Gas or L-Gas, so in practice, only one gas quality (L-Gas or H-Gas) is stored in one facility. This is due to the fact that there must be a constant gas quality in the German gas grids (with very little changes of the gross calorific value) because of the technical requirements of gas consumers (industrial customers, households) and accounting requirements.
- 412) With one exception, all the respondents to the market investigation carried out by the Commission indicated that there is a need to distinguish L-Gas storage from H-Gas storage. It was also underlined that while frequent changes of gas quality when filling storage are, in principle, possible, however due to technical restrictions (time of emptying, time of filling, adaption of technical equipment, costs of access to both grid systems, possibly changes in upstream grids) this will rarely make it economically viable in Germany.
- 413) Since the Proposed Transaction does not raise competition concerns under any alternatives, the question whether the product market for storage of natural gas should be divided into H-Gas and L-Gas storage in Germany can be left open.

## ***2. Geographic Market definition***

- 414) In Germany, services related to gas storages are, for the most part, performed at the TSO level, i.e. by the companies operating the long-distance transmission grids. In previous decisions with regard to Germany the Commission took the view that the storage of natural gas is regional<sup>249</sup>.
- 415) Since the Proposed Transaction does not raise competition concerns under any alternatives, the question of geographic scope of the natural gas storage market can be left open.

## ***3. Competitive Assessment***

- 416) RWE owns H-Gas underground gas storage facilities in the cities of Kalle, Epe<sup>250</sup> and Xanten (Western Germany), in the city of Staßfurt (Saxony) via RWE Energy as well as in the cities of Breitbrunn<sup>251</sup>, Inzenham<sup>252</sup> and Wolfersberg (in Bavaria) via RWE Dea. These storage capacities are thus dedicated to H-Gas. Essent, and the entities in which it holds direct and indirect participations, do not own/rent/operate H-Gas storage facilities in Germany. As a consequence, the Proposed Transaction does not have horizontal overlap in respect of the H-Gas storage in Germany.

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<sup>249</sup> Case COMP/M.1383 – Exxon/Mobil, of 29 September 1999, paragraph 262 – 263

<sup>250</sup> A German town, where several gas suppliers entertain gas storage facilities, e.g. E.ON Ruhrgas, Trianel, Nuon and RWE.

<sup>251</sup> Joint facility with ExxonMobil and E.ON Ruhrgas.

<sup>252</sup> Joint facility with E.ON Ruhrgas

- 417) However, the Proposed Transaction creates a potential overlap as regards German L-Gas storage facilities. In fact, RWE has an LNG storage facility located at Nievenheim which is connected to RWE's L-Gas transmission grid. This one and only L-Gas facility of RWE has a working volume of 14 mcm (140 GWh) and has not been operational since February/March 2004, because it is under repair. It is planned that the facility is operational again by September 2009 at the latest.
- 418) Essent, via Essent Energie Gasspeicher GmbH, rents an operating gas storage facility in the city of Epe with six caverns. These caverns are connected via stubs (*Stichleitungen*) to the Dutch transport grid of GTS but may also be temporarily used for the German market via the interconnection line to the German L-Gas grid of EGT. However, while the storage facility is technically connected to the German transmission grid, at present there is no transport capacity to Germany in place. Consequently, the caverns are currently exclusively used to supply the Dutch market. Essent seeks for the extension of the Epe site by building four new underground gas storages caverns and an expansion of "send-in and send-out capacities". It is planned that the caverns will commence operation between 2011 and 2014. While these four further caverns are to be connected to the six existing caverns and thereby indirectly to the Dutch grid, they are primarily dedicated to supply the German L-Gas market. In the Bremen area, Essent/swb also has an L-Gas storage facility with a limited capacity of 73 mcm (730GWh).
- 419) If the market is analysed at national level, the transaction does not raise competition concerns due to the size of the activities of the parties compared to those of their competitors.
- 420) Based on the current activities of the Parties in the L-Gas storage market in Germany, their combined market shares would be low compared to their actual capacities since the L-Gas storage facilities of Essent cannot be connected to the German market for the time being because of the lack of transport capacity and RWE's Nivenheim LNG facility connected to RWE's L-Gas transmission grid has not been in operation for more than five years. As a consequence, currently only the swb L-Gas facility located in the Bremen area is in operation for the German market (with a working volume of 730 GWh). On the basis of the Parties' estimation, the sum of all existing gas storage capacities for the L-Gas in Germany is 18.491 GWh (excluding the working gas volume in Nievenheim) and swb would have a relatively low market share of [0-5]% in Germany without any horizontal overlap between the Parties.
- 421) Based on the hypothesis that the currently and in the future operating L-Gas storage facilities of Essent in Epe (six and four caverns) (5.475 GWh)<sup>253</sup> would be connected to the German L-Gas grid and the Nivenheim LNG facility (140 GWh) will be operational in the near future, the Parties' combined market shares would be of [20-30]% in Germany with a very low increment of [0-5]% (RWE) on a market amounting for an annual working volume of 24.106 GWh (taking into account the working

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<sup>253</sup> Currently 3.503,3 GWh and 1.971,5 GWh between 2011 and 2014

volumes of Epe which are currently used for the sole Dutch market) with  $\Delta$  HHI of 31 points. In addition, the Parties' aggregate market share would be significantly inferior to the one of EWE with a working capacity volume of 10.800 GWh accounting for a share of 45% in Germany while E.ON and ExxonMobil also have rather important L-Gas storage facilities in Germany (respectively 4.921 GWh and 2.040 GWh). Nevertheless, this scenario obviously does not take into consideration that the competitors of RWE might also increase their L-Gas storage volumes in the following years in Germany.

422) If the market is analysed at regional level, the transaction does not raise competition concerns due to the lack of overlap.

423) Currently, only the Nievenheim LNG facility is connected to the RWE TSO L-Gas grid, while the Epe storage facilities leased by Essent are currently connected to the EGT (E.ON). While the connection of these storage facilities to the RWE TSO L-Gas would technically be possible it would, however, take from 3 to five years according to the Parties' estimation and it is not obvious that Essent, as an independent operator, would try to sell those services into the RWE area whose entry is limited by capacity bookings rather than the E.ON area for which it has direct access.

424) As a conclusion the transaction does not raise competition concerns as regards storage services.

#### **D.i) Other markets in Germany and the Netherlands**

425) The parties' activities overlap in several other markets in the Netherlands and Germany. These overlaps are summarised in the following table.

**Table 7 - Other Markets - Overlaps**

Product/Service	The Netherlands	Germany
Heat Delivery	Yes	Yes
Heating Boilers	No	Yes
Water Treatment and Drinking Water	No	Yes
Meter Reading and Billing	No	Yes
Energy Consulting Services	Yes	Yes
Street Lighting Services	No	Yes
Waste Management	No	Yes

426) As such, for the Netherlands the parties' activities overlap in relation to heat delivery, energy saving and management advice and energy consulting services.

427) For Germany, the parties' activities overlap for heat delivery, heating boilers, water treatment and drinking water, meter reading and billing, energy saving and management advice, energy consulting services, street lighting services and waste management.

428) EU-wide, the parties activities also overlap in relation to CO2 emission allowances and commodity trading.

***1.Product Market definition***

429) The parties agree with prior Commission decisions which have defined separate product markets for CO2 trading,<sup>254</sup> heat delivery,<sup>255</sup> drinking water supply,<sup>256</sup> waste water services<sup>257</sup> and meter reading.<sup>258</sup> The parties also refer to an NMa decision in

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<sup>254</sup> Case COMP/M.4110 – E.ON/ Endesa

<sup>255</sup> Case COMP/M.1402 – Gaz de France/BEWAG/GASAG

<sup>256</sup> Case COMP/M.1633 – RWE Umwelt/ Vivendi/Berliner Wasserbetriebe, where the Commission found a separate product market for water supply comprising production, treatment and distribution of water to end customers and a separate product market for waste water services comprising the drain and purification of waste water.

<sup>257</sup> Case COMP/M.1633 – RWE Umwelt/ Vivendi/Berliner Wasserbetriebe

relation to heating boilers which distinguishes between i) sale, lease and rental of boilers and ii) maintenance of heating boilers.<sup>259</sup>

- 430) In relation to Germany, the BKartA has found separate product markets for both the disposal of municipal waste in waste incineration plants and the incineration of commercial waste in waste incineration plants.<sup>260</sup> In the Netherlands, the NMa has found that there is a separate product market comprising street lighting and traffic systems.<sup>261</sup> Furthermore the NMa has found that there is a separate product market for advisory services on energy use and energy services.<sup>262</sup>
- 431) The issue whether separate product markets can be identified for energy consulting services, street lighting and waste management services can be left open as even on the narrowest conceivable product markets, the transaction will not cause competition concerns

## ***2. Geographic Market definition***

- 432) The parties agree with prior Commission decisions, which have found the relevant geographic markets for heat delivery<sup>263</sup> and transport/distribution of water to be regional in scope.<sup>264</sup> As regards water treatment, the parties have submitted that the relevant geographic markets are also therefore local in scope. The relevant geographic markets can however be left open, as on any reasonable definition, the transaction will not lead to competition concerns.
- 433) The parties also agree with the Commission's prior decision in which it defines the metering market as not wider than national in scope.<sup>265</sup>
- 434) Reference is also made to an NMa decision which has found the relevant geographic market for street lighting in the Netherlands to be national in scope.<sup>266</sup> For similar reasons (national tendering), the parties submit that the relevant German market is also national. The relevant geographic markets can however be left open, as on any reasonable definition, the transaction will not lead to competition concerns.
- 435) As regards waste management, for Germany the BKartA has previously identified regional geographic markets for the disposal of municipal waste in waste incineration

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<sup>258</sup> Case COMP/M.3874 – CVC/RuhrGas Industries

<sup>259</sup> NMa Decision 6012 – Nuon/Essent

<sup>260</sup> BKartA decision B 10 – 122/04 – *Remondis/RWE Umwelt*

<sup>261</sup> NMa Decision 3282 – Eneco/Remu

<sup>262</sup> *Ibid*

<sup>263</sup> Case COMP/M.1402

<sup>264</sup> Case COMP/M.1633 - RWE Umwelt/ Vivendi/Berliner Wasserbetriebe

<sup>265</sup> Case COMP/M.3874 – CVC/RuhrGas Industries

<sup>266</sup> NMa Decision 6012 – Nuon/Essent

plants and the incineration of commercial waste in waste incineration plants.<sup>267</sup> There are no overlaps between the parties in the Netherlands. The relevant geographic markets can however be left open, as on any reasonable definition, the transaction will not lead to competition concerns.

436) Finally, the parties agree with a previous Commission decision which found the CO<sub>2</sub> trading market to be at least EU wide.<sup>268</sup>

### ***3. Competitive Assessment***

437) Whereas there are as noted above overlaps between the parties in all of these markets in Germany and in heat delivery and energy consultancy services in the Netherlands, there are no markets in which the combined parties' market shares would exceed 15%. As such these markets are technically not affected. No competition concerns exist for these markets.<sup>269</sup>

#### **D.ii) Hungary and Czech Republic - Electricity and Gas Markets**

438) For the purpose of the present decision, the Commission assessed whether the transaction could raise any competition concerns on the Hungarian or Czech gas or electricity markets.

439) RWE has a significant position in several segments of the electricity markets. However, other than entry into the Hungarian electricity trading markets, Essent is not active in these markets.

#### ***1.Product Market definition***

440) The parties refer to traditional product and geographic markets used previously by the Commission in energy cases - transmission, distribution, balancing power, generation and wholesale supply, retail supply to large customers and retail supply to small customers (split between domestic and small industrial and commercial customers).

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<sup>267</sup> BKartA decision B 10 – 122/04 – *Remondis/RWE Umwelt*

<sup>268</sup> Case COMP/M.4110 – E.ON/Endesa

<sup>269</sup> The parties would have [20-30]% between them ([+5-10]%) on a nationwide market for commercial waste incineration in Germany. However, this market has as noted above been defined by the BKartA as regional in nature and on such a regional market there is no overlap between the parties. Even if the market would be defined as national in scope, the parties' market shares remain below 25% and therefore within the scope of the area considered to be safe under the Commission's Horizontal Guidelines.

## ***2. Geographic Market definition***

441) The parties have referred to the Energy Sector Report which has found most European energy markets to be national. For the purposes of this decision, the definition of the relevant geographic market can be left open. Under any reasonable definition, the transaction will not give rise to competition concerns.

## ***3. Competitive Assessment***

442) The only overlap between the parties exists in relation to the Hungarian electricity market, where RWE has a market share of less than [5-10]% and where Essent started trading in February 2009. Whereas RWE has substantial market shares in the Czech gas markets, there is no overlap between the parties' activities in either the Czech electricity or gas markets.

443) According to the parties Essent has no intention to further enter the Hungarian or Czech markets and its ambitions are limited, in both markets, to wholesale trading (electricity and gas respectively).

444) This submission is supported by Essent's internal documents provided by the parties upon request of the Commission, where there are no indications of any kind that would suggest that Essent intends entry into any segment of the Hungarian electricity or Czech gas markets, other than trading.

445) The market investigation supports this. Indeed, a large majority of the respondents were of the opinion that Essent could not be regarded as a potential successful entrant in the relevant markets and confirmed that they had not been contacted by Essent (or any undertaking of Essent group) for business purposes. The same majority also expressed the view that the effect of the transaction in these markets would be neutral.

446) In the light of the above, the Commission concludes that the transaction would not impede effective competition on these markets.

## **VI. REMEDIES**

### **A. Procedure**

- 447) In order to address the serious doubts as to the compatibility of the transaction, as initially notified, with the common market, identified by the Commission, RWE submitted on 2 June 2009 and modified on 19 June 2009 a remedy package consisting in the divestment of Essent's indirect controlling shareholding of 51% in swb AG, (the "Divestment Businesses"). The Commission carried out an extensive market test among the parties' competitors and customers to assess the effectiveness of the remedy package to remove the competition concerns identified.
- 448) The Commission has assessed the remedy package and has concluded that it is sufficient to remove the identified serious doubts. The Commission therefore concludes that the remedy package, as submitted on 19 June 2009, is sufficient to remove the competition doubts brought about by the proposed transaction.

### **B. Description of the revised remedy package**

- 449) As offered on 19 June 2009, the parties have offered to divest their indirect controlling shareholding of 51% in swb AG. The swb business consists of Essent's 51% controlling shareholding in swb, which is held by Essent via its wholly owned subsidiary Deutsche Essent GmbH.
- 450) These commitments are offered to take account of serious doubts, which the Commission has identified in relation 1- to the German generation and wholesale electricity market, in particular the strengthening of RWE's collectively dominant position on that market and a possible increase in RWE's ability to foreclose retail supplier customers from competitors active upstream on the wholesale market and 2- to the short-distance wholesale supply of L-gas in the RWE area, in particular as regards the increased ability of RWE to foreclose customers on that market.
- 451) As the Divestment Businesses exclusively consist of majority shareholdings, no assets or liabilities of either of these entities will be divested by the parties under these commitments.
- 452) In line with certain shareholder agreements dating back to 1995 and 2004, the sale of Essent's shareholding in swb is subject to pre-emption rights held by the city of Bremen, which gives Bremen the right to be offered Essent's shareholding prior to negotiations with any third party and a right to buy if Essent has received a binding offer in relation to its shareholding by a third party bidder. In this case, the shareholding must again be offered to Bremen under the same conditions as offered by the third party. Furthermore [...] within a period of two months. In line with the Articles of Association of swb, its supervisory board must approve the transfer of Essent's shareholding to a third party and such approval requires the approval of the Senate of Bremen. However this consent must be granted if the sale of the sake does not negatively affect the material interests of Bremen. The remaining shares in swb are held by EWE AG (49%) and Bremer Verkehrsgesellschaft GmbH, a holding company wholly owned by the city of Bremen, which holds one single share.



## **C. Assessment of the remedy package**

### ***1. Introduction***

- 453) As set out in the Commission Notice on Remedies, the Commission assesses the compatibility of a notified concentration with the Common Market in line with the terms of the Merger Regulation. Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the parties may seek to modify the concentration so as to resolve the serious doubts identified by the Commission with a view to having the merger cleared. In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise.
- 454) As concerns the different types of remedy, the most effective way to maintain effective competition is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties.
- 455) The divested activities must consist of a viable business, which if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and which is divested as a going concern. Furthermore, in order to maintain the structural effect of a remedy, the commitments have to foresee that the merged entity cannot subsequently acquire influence over the whole or parts of the divested business, unless the Commission subsequently finds that the structure of the market has changed to such an extent that the absence of influence over the divested business is no longer necessary to render the concentration compatible with the Common Market.
- 456) The Commission's assessment has concluded that the proposed remedy package as submitted by RWE on 2 June addresses all serious doubts identified during the course of the procedure and adequately deals with concerns identified by market participants in response to the remedy package. As such, the Commission has concluded that the proposed remedy package is effective in removing the serious doubts brought about by the transaction in the relevant markets.

### ***2. Independence, viability and competitiveness***

- 457) In line with the information at its disposal, the Commission is satisfied that swb would constitute an independent, viable and competitive business.
- 458) swb is the incumbent municipal utility based in Bremen and the city of Bremerhaven (and some neighbouring municipalities). It is a vertically integrated electricity and gas utility present across the generation, distribution and supply of electricity and gas and other utility services. Swb is a stand alone business and disposes of all necessary tangible and intangible assets to conduct its business and will continue to do so after divestment of Essent's 51% interest. It therefore has the essential functions required for independent operation.

### ***3. Effectiveness of the remedies in removing the identified serious doubts as to the compatibility of the transaction, as initially notified, with the common market.***

- 459) The revised remedy addresses the serious doubts identified by the Commission in relation to the German generation and wholesale electricity market, in particular the

strengthening of RWE's collectively dominant position on that market as well as a possible increase in RWE's ability to foreclose retail supplier customers from competitors active upstream on the wholesale market.

- 460) Likewise the revised remedy addresses the serious doubts identified by the Commission in relation to the creation of a monopoly in the market for retail supply of L Gas to large customers in the Bielefeld distribution area. Finally the revised remedy addresses the serious doubts identified by the Commission as regards the increase of RWE's ability to foreclose L gas wholesalers in the RWE TSO area.
- 461) Through the divestment of Essent's controlling shares in swb, the remedy package effectively removes the overlap between the parties in the relevant markets brought about by the transaction and restores competition to a level existing pre-transaction.
- 462) The results of the market test on the proposed remedy clearly indicate that most respondents believe the proposed divestment would effectively remedy competition concerns.
- 463) Further, the information available to the Commission at this stage, in particular the information submitted by the parties, does not indicate that the rights described in paragraph 452) affect the effectiveness of the remedy proposed by the parties.
- 464) In light of the above, it is concluded that the remedy package constitutes a clear cut remedy that directly and fully addresses the concerns identified by the Commission in relation to the German generation and wholesale market.

#### ***4. Conclusion***

- 465) The assessment of the proposed remedy package carried out by the Commission shows that the divestitures of indirectly controlling shares in swb, which constitute a stand alone and viable business capable of competing with the combined entity on the market for the generation and supply of electricity in Germany, constitute a clear cut remedy that directly and fully addresses the serious doubts identified by the Commission in relation to that market.

#### **D. Conditions and Obligations**

- 466) Under the first sentence of the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
- 467) It is appropriate in this case to qualify as conditions those measures that are intended to achieve a structural change in the market and to qualify as obligations the implementing or accompanying steps which are necessary to achieve this result, as well as behavioural remedies.
- 468) This decision is subject to full compliance with the conditions set out in Sections B.I, C.I and D of the commitments submitted by the notifying party and with the obligations set out in Sections, C.II, C.III, C.IV, C.V, C.VI, E.I, E.II, E.III, E.IV and F of the same commitments. The entire text of the commitments is attached in the Annex of this decision. These commitments form an integral part of this decision.

## **VI. CONCLUSION**

**469)** For the reasons set out above, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement, subject to full compliance with the commitments submitted by the notifying party. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EC) No 139/2004.

For the Commission,  
signed,  
Neelie KROES  
Member of the Commission

**By hand and by fax: 00 32 2 296 4301**

European Commission –

DG Competition

Rue Joseph II 70 Jozef-II straat

B-1000 BRUSSELS

**Case M. 5467 – RWE/Essent**  
**COMMITMENTS TO THE EUROPEAN COMMISSION**

Pursuant to Article 6(2) of Council Regulation (EC) No. 139/2004 as amended (the “*Merger Regulation*”), RWE Aktiengesellschaft hereby provides the following Commitments (the “*Commitments*”) in order to enable the European Commission (the “*Commission*”) to declare the acquisition of sole control by RWE Aktiengesellschaft over Essent N.V. (the “*Parties*”) compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation of the Merger Regulation (the “*Decision*”).

The Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No. 802/2004, as amended.

## Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

**Affiliated Undertakings:** undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the Control of Concentrations between Undertakings.

**Assets:** all assets of the Divestment Business as further described in Section B.

**Closing:** the transfer of legal title of the Divestment Business to the Purchaser.

**Divestment Business:** *Essent's* (indirect) controlling shareholding of 51% (minus one share) in swb, directly held by Deutsche Essent GmbH, a 100% subsidiary of *Essent*, as further described in Section B and the Schedule the divestiture of which *RWE* commits to procure, or, as the case may be, swb as operating entity.

**Divestiture Trustee:** one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by *RWE* and who has received from *RWE* the exclusive trustee mandate to sell the Divestment Business to a Purchaser at no minimum price.

**Effective Date:** the date of notification of the Decision.

**Essent:** Essent N.V., incorporated under the laws of the Netherlands, with its registered office at Nieuwe Stationsstraat 20, 6811KS Arnhem, the Netherlands and registered with the Commercial/Company Register at Centraal Gelderland under number 17115973.

**First Divestiture Period:** the period of [...] from the Effective Date.

**Hold Separate Manager:** the person appointed by *Essent* for the Divestment Business to manage the day-to-day business of the Divestment Business under the supervision of the Monitoring Trustee.

**Key Personnel:** all personnel necessary to maintain the viability and competitiveness of the Divestment Business, as listed in the Schedule.

**Monitoring Trustee:** one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by *RWE*, and who has the duty to monitor the Parties' compliance with the conditions and obligations attached to the Decision.

**Personnel:** all personnel currently employed by the Divestment Business, including Key Personnel, staff seconded to the Divestment Business, shared personnel and the additional personnel.

**Purchaser:** the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

**RWE:** RWE Aktiengesellschaft, incorporated under the laws of Germany, with its registered office at Opernplatz 1, 45128 Essen and registered with the Commercial Register of the Local Court (*Amtsgericht*) of Essen under number HRB 14525.

**swb:** swb AG, incorporated under the laws of Germany, with its registered office at Theodor-Heuss-Allee 20, 28215 Bremen and registered with the Commercial Register of the Local Court (*Amtsgericht*) Bremen under number HRB 4428 HB.

**Trustee(s):** the Monitoring Trustee and the Divestiture Trustee.

**Trustee Divestiture Period:** the period of [...] from the end of the First Divestiture Period.

## **Section B. The Divestment Business**

### **I. Commitment to divest**

1. In order to restore effective competition, *RWE* commits to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to the Purchaser on terms of sale and purchase that shall be consistent with the Commitments herein. To carry out the divestiture of the Divestment Business, *RWE* commits to procure that the Parties find a purchaser and enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If the Parties have not entered into such an agreement at the end of the First Divestiture Period, *RWE* shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 24 in the Trustee Divestiture Period.
2. *RWE* shall be deemed to have complied with this commitment if, before or by the end of the Trustee Divestiture Period, the Parties have entered into a final binding sale and purchase agreement for the Divestment Business, if the Commission approves the purchaser and the terms in accordance with the procedure described in paragraph 15 and if the Closing takes place within a period not exceeding [...] months after the approval of the Purchaser and the terms of sale by the Commission.
3. In order to maintain the structural effect of the Commitments, the Parties shall, for a period of 10 years after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Business, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the common market.

### **II. Structure and definition of the Divestment Business**

4. The Divestment Business consists of *Essent's* (indirect) controlling shareholding of 51% (minus one share) in *swb*, directly held by Deutsche Essent GmbH, a 100% subsidiary of *Essent*. The remaining shares in *swb* are held by EWE AG (49%) and Bremer Verkehrsgesellschaft mbH, a holding company wholly owned by Bremen, which holds one single share. *swb* is described in more detail in the Schedule.

The present legal and functional structure of the Divestment Business as operated to date is described in the Schedule. The Divestment Business, described in more detail in the Schedule, includes

- (a) all tangible and intangible assets (including intellectual property rights), which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business;
- (b) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Divestment Business;
- (c) all contracts, leases, commitments and customer orders of the Divestment Business; all customer, credit and other records of the Divestment Business (items referred to under (a)-(c) hereinafter collectively referred to as “*Assets*”); and
- (d) the Personnel.

### **Section C. Related commitments**

#### **I. Preservation of Viability, Marketability and Competitiveness**

- 5. From the Effective Date until Closing, *RWE* shall preserve or shall procure that *Essent* preserves the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular *RWE* undertakes:
  - (a) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;
  - (b) to make available sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans;
  - (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business.



## II. Hold-separate obligations of RWE

6. RWE commits to procure that, from the Effective Date until Closing, the Parties keep the Divestment Business separate from the businesses they are retaining and to ensure that Key Personnel – including the Hold Separate Manager – have no involvement in any business retained and vice versa. RWE shall also ensure that the Personnel does not report to any individual outside the Divestment Business.
7. Until Closing, RWE shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the businesses retained by RWE. RWE shall procure that Essent appoints a Hold Separate Manager who shall be responsible for the management of the Divestment Business, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties.
8. [Intentionally left blank]

## III. Ring-fencing

9. RWE shall procure that Essent implements all necessary measures to ensure that it does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business. In particular, the participation of the Divestment Business in a central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. The Parties may obtain information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to them is required by law.

## IV. Non-solicitation clause

10. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of three years after Closing.

V. Due Diligence

11. In order to enable potential purchasers of the Divestment Business to carry out a reasonable due diligence of the Divestment Business, the Parties shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:

(a) provide to potential purchasers of the Divestment Business sufficient information as regards the Divestment Business;

(b) provide to potential purchasers of the Divestment Business sufficient information relating to, and allow them reasonable access to, the Personnel of the Divestment Business.

VI. Reporting

12. *RWE* shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).

13. *RWE* shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers, except for the information memorandum that has been sent out prior to the Effective Date.

**Section D. The Purchaser**

14. In order to ensure the immediate restoration of effective competition, the Purchaser, in order to be approved by the Commission, must:

(a) be independent of and unconnected to the Parties;

(b) have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;

(c) neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the

Divestment Business (the before-mentioned criteria for the purchaser hereafter the “*Purchaser Requirements*”).

15. The final binding sale and purchase agreement for the Divestment Business shall be conditional on the Commission’s approval. When the Parties have reached an agreement with a purchaser for the Divestment Business they shall submit a fully documented and reasoned proposal, including a copy of the final agreement, to the Commission and the Monitoring Trustee. *RWE* must be able to demonstrate to the Commission that the purchaser of the Divestment Business meets the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

## **Section E. Trustee**

### **I. Appointment Procedure**

16. *RWE* shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If *Essent* has not entered into a binding sale and purchase agreement with respect to the Divestment Business one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser for the Divestment Business proposed by *RWE* at that time or thereafter, *RWE* shall appoint a Divestiture Trustee to carry out with respect to the Divestment Business the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.
17. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by *RWE* in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of the Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

### *Proposal by the Parties*

18. No later than one week after the Effective Date, *RWE* shall submit a list of one or more persons whom *RWE* proposes to appoint as the Monitoring Trustee to the Commission for

approval. No later than one month before the end of the First Divestiture Period, *RWE* shall submit a list of one or more persons whom *RWE* proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 17 and shall include:

(a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;

(b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks; and

(c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

#### *Approval or rejection by the Commission*

19. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, *RWE* shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, *RWE* shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

#### *New proposal by the Parties*

20. If all the proposed Trustees are rejected, *RWE* shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 16 and 19.

#### *Trustee nominated by the Commission*

21. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom *RWE* shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

## II. Functions of the Trustee

22. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or *RWE*, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

### *Duties and obligations of the Monitoring Trustee*

23. The Monitoring Trustee shall:

(i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.

(ii) oversee the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by the Parties with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:

(a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 5 and 6 of the Commitments;

(b) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 7 of the Commitments;

(c) (i) in consultation with *RWE*, determine all necessary measures to ensure that the Parties do not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business, in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business, and (ii) decide whether such information may be disclosed to the Parties as the disclosure is reasonably necessary to allow them to carry out the divestiture or as the disclosure is required by law; and

(d) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and *Essent* or Affiliated Undertakings;

(iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;

(iv) propose to *RWE* such measures as the Monitoring Trustee considers necessary to ensure *RWE*'s compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;

(v) review and assess potential purchasers for the Divestment Business as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, (a) potential purchasers of the Divestment Business receive sufficient information relating to the Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (b) potential purchasers of the Divestment Business are granted reasonable access to the Personnel;

(vi) provide to the Commission, sending *RWE* a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall cover the operation and management of the Divestment Business so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers of the Divestment Business. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending *RWE* a non-confidential copy at the same time, if it concludes on reasonable grounds that *RWE* is failing to comply with these Commitments; and

(vii) within one week after receipt of the documented proposal referred to in paragraph 15, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser of the Divestment Business and the viability of the Divestment Business after the sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser.

#### *Duties and obligations of the Divestiture Trustee*

24. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 15. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall

protect the legitimate financial interests of *RWE*, subject to *RWE*'s unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

25. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process of the Divestment Business. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

### III. Duties and obligations of the Parties

26. The Parties shall provide and shall cause their advisors to provide the Trustee with all such cooperation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of the Parties' or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and the Parties and the Divestment Business shall provide the Trustee upon request with copies of any document. The Parties and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
27. The Parties shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. *RWE* shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers of the Divestment Business, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers of the Divestment Business in the due diligence procedure. *RWE* shall inform the Monitoring Trustee on possible purchasers of the Divestment Business, submit a list of potential purchasers of the Divestment Business, and keep the Monitoring Trustee informed of all developments in the divestiture process.
28. *RWE* shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, *RWE* shall cause the documents required for effecting the sale and the Closing to be duly executed.
29. *RWE* shall indemnify the Trustee and its employees and agents (each an "***Indemnified Party***") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to *RWE* for any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such

liabilities result from wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

30. At the expense of *RWE*, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to *RWE*'s approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under its trustee mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should *RWE* refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard *RWE*. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 29 shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served *RWE* during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

IV. Replacement, discharge and reappointment of the Trustee

31. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:
- (a) the Commission may, after hearing the Trustee, require *RWE* to replace the Trustee; or
  - (b) *RWE*, with the prior approval of the Commission, may replace the Trustee.
32. If the Trustee is removed according to paragraph 31, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 16-21.
33. Beside the removal according to paragraph 31, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

**Section F. The Review Clause**

34. The Commission may, where appropriate, in response to a request from *RWE* showing good cause and accompanied by a report from the Monitoring Trustee:
- (i) Grant an extension of the time periods foreseen in the Commitments, or



(ii) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where *RWE* seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall *RWE* be entitled to request an extension within the last month of any period.

duly authorised for and on behalf of RWE AG

---

Dr. Christoph Stadler

1. As the Divestment Business exclusively consists of a majority shareholding in swb, no assets or liabilities of swb will be divested by the Parties under these Commitments.

The following will provide a description of the shareholding to be divested by the Parties under these Commitments as well as of the legal and functional structure of swb as operated to date.

- a) General description of the Divestment Business

The Divestment Business consists of *Essent's* controlling shareholding of 51% (minus one share) in swb, which is held by *Essent* via its wholly-owned subsidiary Deutsche Essent GmbH. swb is a German stock corporation with registered shares with no par value (*auf den Namen lautende Stückaktien*). The remaining shares in swb are held by EWE (49%) and, with one single share, Bremer Verkehrsgesellschaft mbH, held in turn by Bremen.

- b) Activities

swb (previously named "Stadtwerke Bremen") is the incumbent municipal utility based in Bremen and the city of Bremerhaven (and some neighbouring municipalities), and is a vertically integrated electricity and gas utility present across the value chain, i.e. generation, distribution and supply of electricity and gas and other utility services (like waste incineration, water supply and treatment, wastewater disposal, street lighting). swb employs approximately 2,200 people and achieved a total turnover of approximately EUR 1.1 billion and an EBITDA of EUR 185 million as per December 31, 2008.

An organizational chart is attached in **Annex 1** [*confidential*]. Further information on swb can be found at [www.swb-gruppe.de](http://www.swb-gruppe.de).

2. Following paragraph 4 of these Commitments, swb possesses

- (a) the following main tangible and intangible assets:

swb is a stand alone business and disposes of all necessary tangible and intangible assets to conduct its business and will continue to do so after divestment of *Essent's* 51 % shareholding. In essence, these assets include customer relations and databases, all relevant assets to conduct the business, i.e. real estate, personnel, IT systems, generation capacity, financial, administrative and managerial resources and all relevant trademarks and other IP rights, either owned or licensed. The vast majority of trademarks registered for the swb group (i.e. swb and its direct and

indirect subsidiaries or other entities controlled by swb) are German trademarks registered with the German Patent and Trademark Office. Only a few of the trademarks (relating to certain swb group products) are WIPO trademarks with protection in Austria, Benelux, Switzerland and/or Liechtenstein. One trademark is a community trademark. Registrations have been made for relevant goods and services suitable for the swb group's business.

swb has several direct and indirect shareholdings in various municipal utilities, the most important of which is the 49.9% shareholding in Stadtwerke Bielefeld. Pursuant to a consortium agreement between swb and the City of Bielefeld, the City of Bielefeld has a call option regarding swb's share in Stadtwerke Bielefeld, provided that more than 50% of the share capital of swb or more than 50% of the nominal capital of Deutsche Essent GmbH are being sold to a third party.

A list of swb's shareholdings is attached hereto as **Annex 2 (a)**.

(b) the following main licences, permits and authorisations:

- 1 Energy law
  - 1.1 Concession agreements
    - Concession agreement between swb and Bremen relating to the area of Bremen, excluding the port area ("Stadtbremisches Überseehafengebiet Bremerhaven")
    - Concession agreement between Stadtwerke Bremerhaven AG and the city of Bremerhaven covering the area of Bremerhaven
    - Concession agreement between the city of Bielefeld and Stadtwerke Bielefeld GmbH covering the area of Bielefeld (subject to the city of Bielefeld not exercising their change of control rights)
  - 1.2 Approvals for network access fees
    - Approval decision of the Federal Network Agency (Bundesnetzagentur) regarding the network fees swb Netze GmbH & Co. KG ("swb Netze") may charge its grid users
    - Approval decision of the Federal Network Agency for swb Netze's gas network fees
    - Approval decision of the Federal Network Agency for swb Netze Bremerhaven GmbH & Co. KG's ("swb Netze Bremerhaven") electricity network Gas network fees of swb Netze Bremerhaven
    - Approved revenue caps by the Federal Network Agency for swb Netze and swb Netze Bremerhaven
- 2 Environmental Law
  - Final (*bestandskräftig*) permit for the construction of the MKK (Mittelkalorik-Kraftwerk) pursuant to the Federal Emissions Control Act (Bundes-Immissionsschutzgesetz) is in place.
  - Permits for the construction of the [...]

- Emissions trading: Emissions allowances for a total amount of [...] tons of emissions per year for the current allocation period.

(c) the following main contracts, agreements, leases, commitments and understandings:

A list of swb's main contracts is attached hereto as **Annex 2 (c)** [*confidential*]

(d) the customer, credit and other records, including the following:

As outlined above, swb supplies energy to a large number of residential customers ([...] electricity and [...] gas customers) and large and small business customers ([...] electricity customers and [...] gas customers). Residential and small business customers are served on the basis of standardized contracts. Larger business customers are offered specific types of contracts (for example for [...]). In view of the numbers involved, swb submits that it is neither possible nor indicative for a competitive assessment to list all these customers individually.

(e) the following Personnel:

The management board of swb consists of Dr. Willem Schoeber (CEO), Dr. Torsten Köhne and Uwe Schramm. swb group (excluding Stadtwerke Bielefeld and affiliates and HanseWasser Ver- und Entsorgungs GmbH and affiliates) employed 2,427 employees as of December 31, 2008.

(f) the following Key Personnel:

A list of Key Personnel of the swb group is attached as **Annex 2 (f)** [*confidential*].

### 3. Transitional Arrangements.

As outlined above, swb is a stand alone business and has available all necessary tangible and intangible assets to conduct its business and will continue to do so after divestment of *Essent's* 51 % shareholding. No transitional agreement on the provision of services or products is necessary to maintain and operate the business of swb on a stand alone basis in relation to *Essent*. *Essent* will remain to be bound to comply with its contractual obligations vis-à-vis swb.

**Organizational Chart swb**

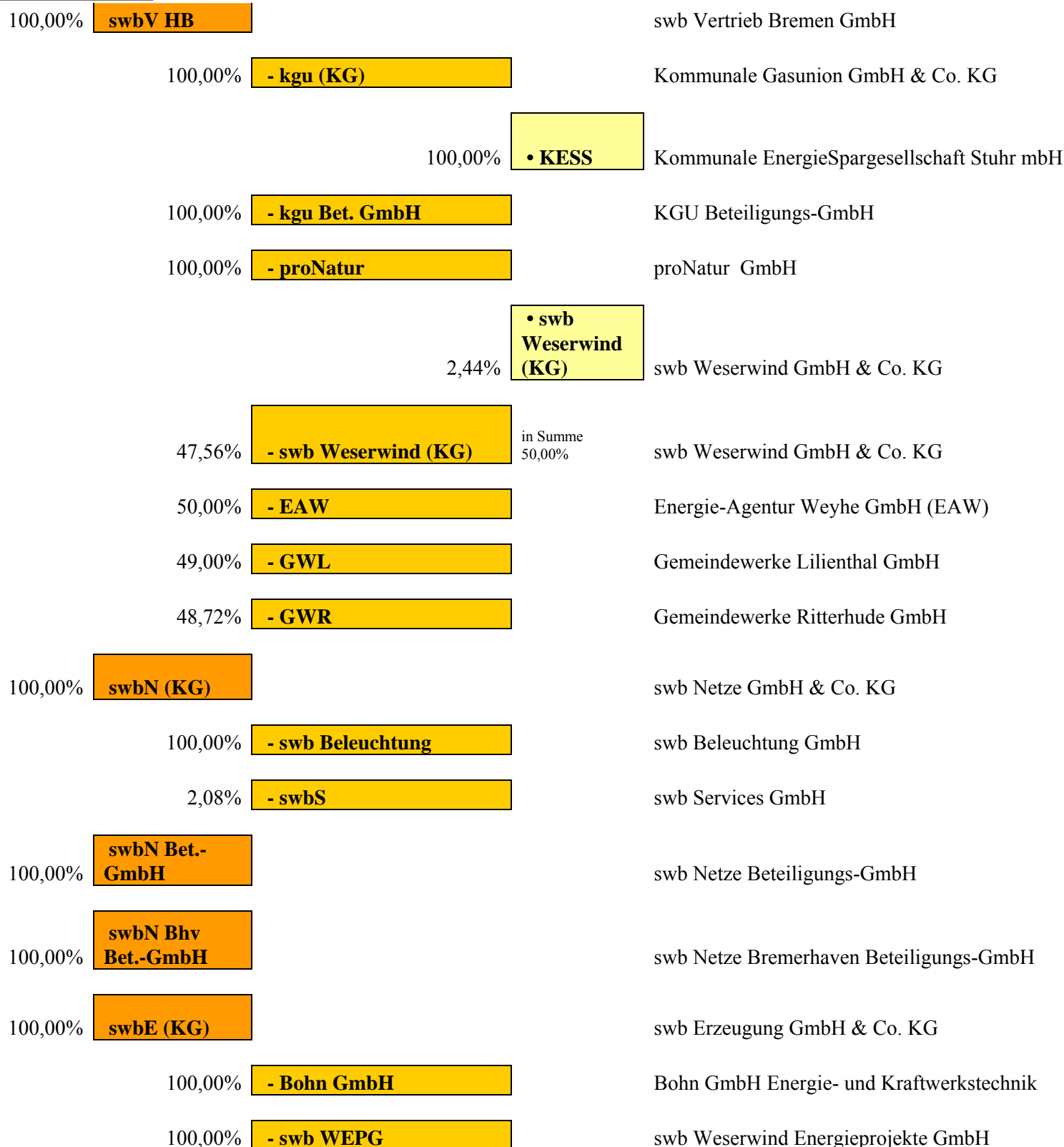
## **Organizational Chart – Holding Company swb AG**

[...]

**List of shareholdings of swb AG**

(Source: company website [www.swb-gruppe.de](http://www.swb-gruppe.de))

## Beteiligungsstrukturübersicht der swb AG mit Status 31.12.2008





50,00%	- INGAVER	Innovative Gasverwertungs-GmbH
2,08%	- swbS	swb Services GmbH
100,00%	swbE Bet.-GmbH	swb Erzeugung Beteiligungs-GmbH
100,00%	swb Bhv	swb Bremerhaven GmbH
100,00%	- swbN Bhv (KG)	swb Netze Bremerhaven GmbH & Co. KG
100,00%	- swbV Bhv (KG)	swb Vertrieb Bremerhaven GmbH & Co. KG
11,11%	- USM Bet.-GmbH	Unterweser Schiffbau- und Meerestechnik Beteiligungsgesellschaft mbH
100,00%	swb Entsorgung	swb Entsorgung GmbH (ehemals ANO)
100,00%	swb CREA	swb CREA GmbH
100,00%	swb MuA [metaCount]	swb Messung und Abrechnung GmbH [metaCount]
95,84%	swbS (KG) in Summe 100,00%	swb Services GmbH & Co. KG
100,00%	- GfV [inhome]	GfV Gesellschaft für Versorgungsdienstleistungen n [inhome]
49,00%	- FBE	Flughafen Bremen Elektrik GmbH
60,00%	SBA	swb Assekuranz Vermittlungs-GmbH
51,00%	HVE	Hansewasser Ver- und Entsorgungs-GmbH
74,90%	• hWB	hanseWasser Bremen GmbH
49,90%	SWBi	Stadtwerke Bielefeld GmbH
49,50%	SWS	Stadtwerke Soltau GmbH
49,00%	WN	WN Windnutzungsgesellschaft mbH
40,00%	BEKons	Bremer Energie-Konsens GmbH
100,00%	BEKS	BEKS: EnergieEffizienz GmbH
40,00%	SVG	Stromversorgung Greifswald GmbH

6,10%	<b>Local Energy</b>	Local Energy GmbH
24,50%	<b>WKW</b>	Weserkraftwerk Bremen GmbH & Co. KG
10,10%	<b>HWW</b>	Harzwasserwerke GmbH
1,00%	<b>KomStrom</b>	Kom-Strom AG

## Main Contracts swb

The following have been identified by swb as main contracts:

- 1 Agreements with top customers
    - *[confidential]*
  - 2 Agreements with other customers
    - *[confidential]*
  - 3 Agreements with top suppliers
    - *[confidential]*
  - 4 Agreements with other suppliers
    - *[confidential]*
- [confidential]*

## Key Personnel of swb group

### 1. MANAGEMENT BOARD SWB AG

	Name	Function
1.	Dr. Willem Schoeber	CEO
2.	Dr. Torsten Köhne	Management Board
3.	Uwe Schramm	Management Board

### 2. KEY PERSONNEL HOLDING COMPANY SWB AG

*[confidential]*

**3. KEY PERSONNEL SWB ERZEUGUNG/SWB ENTSORGUNG**

*[confidential]*

**4. KEY PERSONNEL SWB VERTRIEB BREMEN AND BREMENHAVEN**

*[confidential]*