

***Case No COMP/M.5549 -
EDF/ SEGEBEL***

Only the English text is available and authentic.

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

Article 6(1)(b) in conjunction with Art 6(2)
Date: 12/11/2009

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12/11/2009

SG-Greffe(2009) D/8838
C(2009)9059

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(2) DECISION

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.5549 – EDF/ Segebel
Notification of 23 September 2009 pursuant to Article 4 of Council
Regulation No 139/2004¹**

1. On 23 September 2009, the Commission received a notification of a proposed concentration within the meaning of Article 4 of the Council Regulation 139/2004 (the "EC Merger Regulation") whereby Electricité de France S.A. ("EDF", France) will acquire exclusive control of Segebel, a holding company of which its only asset is a 51% stake in SPE S.A. (the "proposed transaction"). SPE is the second biggest electricity operator in Belgium, after the incumbent operator GDF Suez (Electrabel). It is present in the market with its brand Luminus.

I. THE PARTIES

2. EDF and its subsidiaries are active in the generation and wholesale trading of electricity and in the transmission, distribution and retail supply of electricity, as well as in the provision of other electricity-related services, in France and other countries. EDF is also active, to a lesser extent, in the natural gas retail and wholesale markets.
3. Segebel is a holding company whose only asset is a 51% equity interest in SPE S.A. ("SPE"). SPE is a Belgian company active in the production of electricity and in the trading and supply of electricity and gas in Belgium. SPE produces electricity through a portfolio of power plants in Flanders and Wallonia, composed of thermal facilities and renewable energy facilities such as hydro and wind. SPE also holds drawing rights in nuclear power plants in Belgium. SPE is currently controlled exclusively by Centrica².

¹ OJ L 24, 29.1.2004 p. 1.

² The acquisition of exclusive control by Centrica over SPE was approved by the European Commission in its Decision in case COMP/M.532 – *Centrica / Segebel* of 14 January 2009. The remaining 49% of SPE's Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.

II. THE OPERATION

4. The proposed transaction concerns the acquisition of Centrica's 100% shareholding in Segebel, following which EDF will enjoy the same rights and obligations, which Centrica currently has in Segebel. [...].
5. The proposed transaction will thus result in EDF acquiring sole control over SPE. It therefore qualifies as a concentration within the meaning of Article 3(2) of the Merger Regulation.

III. COMMUNITY DIMENSION

6. The proposed transaction has a Community dimension pursuant to Article 1(2) of the EC Merger Regulation. The parties to the concentration had a combined aggregate worldwide turnover in excess of EUR 5 billion in 2008 and each of the undertakings concerned had a Community-wide turnover in excess of EUR 250 million in 2008. The parties to the concentration do not achieve more than two thirds of their respective Community-wide turnover in one and the same Member State.

IV. PROCEDURE

7. On 23 September 2009 the proposed transaction was notified by EDF to the European Commission under Article 4 of the Merger Regulation for a decision under Article 6 of the EC Merger Regulation.
8. On 14 October 2009, pursuant to Article 9(2)(a) of the EC Merger Regulation, the Belgian National Competition Authority ("Belgian NCA") submitted a request to partially refer the proposed transaction from the Commission in accordance with the provisions of Article 9(3)(b) of the EC Merger Regulation to the Belgian NCA with a view to assessing the proposed transaction under Belgian competition law as far as the Belgian electricity markets are concerned (the "Referral Request").
9. On the same day of adoption of the present decision, the Commission has decided not to partially refer the proposed transaction to the Belgian NCA, in application of Article 9(3)(a) of the EC Merger Regulation.

V. COMPETITIVE ASSESSMENT

A. RELEVANT MARKETS

10. The proposed transaction creates overlaps between the parties' to the concentration activities in energy markets (electricity and gas) in France, Belgium and the Netherlands.
11. EDF, for the purposes of the proposed transaction is active on the following markets in France, Belgium and the Netherlands:
 - Belgium: electricity and gas wholesale markets (generation/wholesale supply of electricity, electricity and gas trading), electricity and gas supply markets (except to household customers);

shares are held by SPE's historical shareholders (Publilec S.C.R.L., SOCOFE S.A., VEH C.V.B.A., Dexia Banque S.A., ETHIAS Assurance S.A., PUBLILUM S.A. and ALG S.C.R.L.).

- France: electricity and gas wholesale markets (generation/wholesale supply of electricity, electricity and gas trading), transmission and distribution of electricity, electricity and gas supply markets and the market for ancillary services and balancing power;
 - The Netherlands: electricity and gas trading markets.
12. SPE is active on the following markets in Belgium, France, and the Netherlands:
- Belgium: electricity and gas wholesale markets (generation and wholesale supply of electricity, electricity and gas trading), electricity balancing power and ancillary services, electricity and gas supply markets;
 - France: electricity and gas wholesale markets (generation and wholesale supply of electricity and electricity and gas trading);
 - The Netherlands: electricity trading.
13. In respect of **electricity markets**, only the relevant Belgian electricity markets are fully analyzed for the purposes of the competitive analysis of the proposed transaction. As regards the electricity markets in France, although EDF is the dominant player and SPE was present until recently on the French wholesale and generation market, these markets are only briefly analyzed given that at present SPE has no generation capacity in France. The same applies for electricity trading given that SPE's activities are very limited. In the Dutch electricity markets, there is only a very limited overlap of the parties to the proposed transaction on the physical electricity trading, considering the very limited addition of market share in view of SPE's activities (less than [0-5]%).
14. Regarding **gas markets**, both parties have overlapping activities in the Belgian gas markets. In that respect certain of these overlaps create horizontally affected markets in Belgium. However, in the gas markets in France, the combined market share of the parties to the proposed transaction is below [10-20]% (gas trading) or there are no overlaps (gas supply). In the Dutch gas markets the market share of EDF is around [0-5]% of all traded volumes and SPE is not active in that market.

B. ELECTRICITY GENERATION AND WHOLESALE AND TRADING MARKET(S) IN BELGIUM

1. *Product market definition*

15. In previous decisions concerning Belgian electricity markets³, the Commission distinguished a wholesale electricity market as comprising electricity generation and electricity imported to be sold on to retailers. It also distinguished an electricity trading market, where electricity is bought and sold, not necessarily with a view to being supplied to a final customer. It was left open whether within the trading market separate markets for the trading of physical and financial products existed.
16. EDF argues that it should be left open whether electricity trading, on the one hand, and wholesale (generation and imports), on the other hand, constitute separate markets or not⁴. The Commission, in a more recent case concerning the British electricity markets,

³ In particular COMP/M.4180 – *Gaz de France / Suez*.

⁴ Form CO, paragraph 301.

considered the wholesale market as comprising electricity generation and imports as well as trading⁵.

17. Within the course of the Commission's market investigation of the proposed transaction, it has been investigated whether the activity of trading electricity contracts, either over the counter ("OTC") trading or trading on organised markets such as Belpex⁶, should be considered as taking place on a separate market. The prevailing opinion⁷ was that also in Belgium the conditions of competition are homogeneous enough so that electricity trading does not have to be distinguished from other wholesale activities, like generation and imports.
18. The market test also inquired as to whether other potential distinctions within a wholesale market would be pertinent, namely: (i) a distinction on the basis of the different sources of electrical energy (such as nuclear power stations, gas-fired power stations, coal-fired power stations, hydroelectric or wind farms) and (ii) distinctions, within the activity of trading electricity, for example (a) based on trading channels (non-standard, non-brokered (or "structured contracts"), OTC brokered, and products traded on organised market, like Belpex); or (b) between products for physical delivery, on the one hand, and so-called financial contracts (that concern electricity but in which contract settlement takes place financially), on the other hand.
19. It appears from the market investigation that a significant interaction exists between OTC traded electricity products and electricity products traded on organised markets⁸. Similarly, sufficient interaction exists between financial and physical products as the former use the latter as underlying products.
20. For these reasons, and on the basis of the results of the market investigation more generally⁹, it is considered that the market investigation did not provide grounds that a further market segmentation would need to be considered.
21. On the basis of the above, the Commission concludes that, for the purposes of the present decision, the wholesale market is comprised of electricity generation, imports and trading on organised markets or OTC for both physically and financially settled products.

2. Geographic market definition

22. In accordance with previous Commission decisions, the parties to the concentration consider the wholesale market to be national in scope¹⁰. This line was also followed in the most recent case concerning Belgian electricity markets¹¹. It is recalled that in the *Gaz de France / Suez Decision*¹², it was held that there exists a national geographical scope of the market given the limited interconnection capacity and the risks assumed when taking

⁵ Case COMP/M.5224 – *EDF / British Energy*. This distinction was also used in COMP/M.3268 – *Sydskraft / Granninge*.

⁶ Belpex is the Belgian Power Exchange for anonymous, cleared trading in day-ahead electricity, providing the market with a transparent reference price. See <http://www.belpex.be/>.

⁷ See market investigation replies to Questionnaire to electricity competitors/suppliers.

⁸ Document 674 reply to question 9 and 11.

⁹ See market investigation replies to Questionnaire to electricity competitors/suppliers.

¹⁰ Case COMP/M.4180 – *Gaz de France / Suez*.

¹¹ Case COMP/M.5519 – *E.ON / Electrabel Acquired Assets*.

¹² Case COMP/M.4180 – *Gaz de France / Suez*.

longer term commitments based on imported electricity (a risk that affects entrants asymmetrically) in particular when liquidity of traded electricity products is low¹³.

23. Belgium is interconnected with France and the Netherlands¹⁴. Interconnections capacity available for commercial usage has not significantly increased since the *Gaz de France / Suez Decision*¹⁵. Projects that could significantly increase this capacity in the near future do not appear to be envisaged either¹⁶. The (annual and monthly) capacity that a single operator can acquire is capped both on the French-Belgian as well as the Belgian-Dutch borders¹⁷
24. In order to assess the geographical scope of the generation and wholesale market, the effects of market coupling and the pertinent facts as regards liquidity in traded electricity products will be described in turn.

a) Effects of market coupling

25. Over the course of the market investigation, several respondents argued for a geographical scope of the market being larger than Belgium and, at least, comprising France, Belgium, the Netherlands and Luxembourg (to the extent connected to the Belgian transmission grid) or even wider¹⁸. The arguments put forward by these market participants relate primarily to the introduction of so-called "market coupling" between these Member States. It is useful to add that the currently existing market coupling arrangement between France, Belgium, the Netherlands and Luxembourg is expected to be extended to Germany (and the Luxembourgish grid connected to Germany) during 2010¹⁹.
26. The implementation of market coupling was envisaged at the time of the *Gaz de France / Suez Decision*²⁰. The Commission concluded at that time that market coupling did not change the geographic scope of this market which remained national in scope. This was for two reasons: (i) in cases concerning electricity markets where systems similar to market coupling were already in existence at the time (Nordpool²¹), the Commission had decided upon national markets, even in cases where interconnection capacity was significantly greater in Belgium than at the time of the GDF/Suez decision (and still now) existed in Belgium; and (ii) market coupling leaves unaffected the physical constraints on the transmission networks and, hence, the level of congestion. It appears however pertinent, now that market coupling is put in place, to reassess this situation.

¹³ Case COMP/M.4180 – *Gaz de France / Suez*, recitals 696-732.

¹⁴ Strictly speaking it is also interconnected with Luxembourg. However, in practise the part of the Luxembourgish net to which it is connected is integrated with the Belgian network. Via Luxembourg, no interconnection exists with Germany. See Form CO, paragraphs 278-280 and case COMP/M.4180 – *Gaz de France / Suez*, recital 699.

¹⁵ See Form CO, paragraph 268 for capacities on Belgium's border with France and documents referred to in footnote 102 for its border with the Netherlands.

¹⁶ Form CO, paragraphs 271-273 for the French-Belgian border. See reply from an electricity competitor to the market investigation.

¹⁷ Form CO, footnote 223. 325 MW on the French-Belgian border (cap applies to aggregated volumes of both monthly and annual capacity) and 400 MW on the Dutch-Belgian border. See also decision (B)051201-CDC-494 from CREG..

¹⁸ See market investigation replies from electricity competitors/suppliers to question.

¹⁹ Form CO, paragraph 253

²⁰ Case COMP/M.4180 – *Gaz de France / Suez*.

²¹ Nordpool is a Nordic power exchange which provides market places for trading in physical and financial contracts in the Nordic countries (Finland, Sweden, Denmark and Norway). See <http://www.nordpool.com/>.

27. Market coupling concerns essentially the day-ahead allocation of interconnection capacity. Interconnection capacity for longer periods (generally up to one year) is allocated by an (explicit) auction²². Subsequently, the successful bidder of interconnection capacity may (or may not²³) use the capacity to import or export electricity. In market coupling, market participants submit bids for the purchase and/or sale of electricity for injection or delivery the next day to the power exchange in the "coupled" markets which then, on the basis of aggregated demand and supply curves, clear the markets under the constraint of the available interconnection capacity.
28. If interconnection capacity is not constrained, the volumes of imports and exports can be set at levels that, in each coupled market, allow prices to equalise. If interconnection capacity is constrained, prices will be set at a level that the resulting adjustments in the volumes demanded and supplied on a given exchange (and hence volumes that need to be imported or exported to make demand and supply meet on that exchange) will equal the available interconnection capacity for imports or exports. Interconnection capacity is thus not made available to specific market participants but sold implicitly (hereinafter "implicit auction") together with the electricity supplied to or off-taken by the successful bidders on the power exchange.
29. Market coupling increases the efficiency of interconnection usage²⁴ as import and export decisions are no longer taken on the basis of decentralised (and therefore not necessarily consistent) predictions of price levels in the interconnected countries the next day but by a central agency that decides on the usage of interconnection capacity on the basis of known plans of all market participants and known price levels.
30. Whether ultimately related to the introduction of market coupling or not, the fact remains that since its introduction the three coupled areas (Belgium, France and the Netherlands) had identical prices about 69% of all hours during 2008 (i.e. there was no congestion between any of these three areas). Belgium had identical prices with France for 15.4% of all hours (but not the Netherlands, i.e. there was congestion on Belgium's North border) during 2008 and 14.7% of all hours during 2008 prices between Belgium and the Netherlands were identical (but not with France i.e. there was congestion on Belgian's South border). Only in less than 0.8% of all hours during 2008 did Belgium have different prices compared with both France and the Netherlands (congestion occurred on both of Belgium's borders)²⁵.
31. Whereas this mechanism without doubt improves the efficiency with which interconnection capacity is used and the accuracy by which imports and exports react to price signals, it directly deals only with the trading of electricity for delivery the next day. Other electricity products, such as products with longer maturity, represent the more than two thirds of electricity exchanged in Belgium²⁶ and are not subject to such coupling mechanisms. Moreover market coupling does not change the available interconnection capacity.

²² Caps apply for the amount of (annual plus monthly) capacity that can be owned by a single market operator.

²³ Capacity holders can sell the capacity on the secondary market [...], see Form CO paragraph 92). Non-used capacity is made available for the (day-ahead) market coupling at a price equivalent to price difference between coupled countries for which capacity was held. Submission EDF dated 9 October 2009 (13:22) reply Q 5(c).

²⁴ Submission EDF of 22 October 2009, reply to question 5.

²⁵ Document 674 reply to question 14.

²⁶ Document 674 p. 11.

b) Liquidity of traded electricity wholesale market products

32. In the *Gaz de France / Suez Decision*²⁷, it has been established in detail that the Belgian traded market is illiquid, in particular with regard to products other than base-load (such as peak and off-peak products) and products with delivery further in the future²⁸.
33. EDF confirmed in the Form CO that Belgian wholesale markets have remained illiquid and that the sole liquid product is the 5 MW base-load calendar product (i.e. the right to be supplied on the Belgium transmission network with the 5 MW of electricity power during all the hours of the next calendar year). Even if market liquidity for day-ahead products may have developed positively in recent years, the fact that liquidity remains low for virtually all other products was clearly confirmed in the market test.
34. When accumulating volumes traded on Global Vision (a trading application allowing the bringing together "futures" on ENDEX²⁹ and the offers of various broker services for "forwards"³⁰) and on Belpex, it appears that total traded volumes amounted to about 36.8 TWh in 2008. However, 72% of all trades are concentrated on either the year-ahead calendar year or Belpex (i.e. day-ahead). Even though Belpex allows the buying and selling an hourly profile, futures and forward contracts other than base-load ones are (virtually) not traded³¹.
35. In contrast, the liquidity of traded electricity products in electricity markets adjoining or nearing Belgium, in particular France, the Netherlands (with which it is directly interconnected) but also Germany, even if maybe not always optimal, is clearly better in particular also in trade of electricity products other than base-load year-ahead products³².
36. The fact that electricity wholesale markets in Belgium, on the one hand, and those of surrounding countries, on the other, show very different patterns of liquidity of wholesale market products, demonstrates that these electricity wholesale markets are insufficiently homogeneous and do not allow for the substitution of traded products available in adjoining electricity markets. The absence or limited availability of, for instance, peak-load products and products with longer time horizons within Belgium constitutes therefore a strong indication that the Belgian wholesale electricity market, despite the improved liquidity on the day-ahead market, is not integrated to a large extent with neighbouring electricity generation and wholesale markets. In other words, by merely focussing on market coupling and the benefits this may have brought to liquidity and market integration for day-ahead contracts, it cannot be concluded that the Belgian electricity wholesale market at large is fully integrated and constitutes merely a part of a larger geographical market.
37. Moreover, the relative illiquid state of trading in Belgian electricity products constitutes, as established in previous decisions of the Commission³³, a significant barrier to entry in

²⁷ Case COMP/M.4180 – *Gaz de France / Suez*.

²⁸ Case COMP/M.4180 – *Gaz de France / Suez*, recitals 558-898.

²⁹ ENDEX is the Amsterdam-based European Energy Derivatives Exchange for wholesale market participants. ENDEX offers its members Exchange trading and OTC clearing of Dutch and Belgian power futures and TTF gas futures. See <http://www.endex.nl/>.

³⁰ See document 674, page 6.

³¹ See replies from electricity competitors/suppliers to market investigation.

³² In view of the fact that liquidity has not markedly improved in Belgium (see recital 103), the conclusions as to the state relative to other Member States described in case COMP/M.4180 – *Gaz de France / Suez*, recitals 885 and following, still holds.

³³ See in particular case COMP/M.4180 – *Gaz de France / Suez*, recital 898.

the market for generation and the wholesale market, further reinforcing the view that these markets are national in scope.

38. Consequently, the geographical scope of the Belgian electricity wholesale market, including electricity trading, is considered to be national in scope.

3. *Competitive assessment*

39. Before proceeding with the substance of the competitive assessment, it is necessary to put in perspective the existing and future generation capacities of the market players on the Belgian electricity market including the capacities of the parties to the proposed transaction and those of their competitors.
40. The below information on current and future generation capacity and construction projects derives from the Form CO (often figures from or estimates using public sources) and the responses to the market investigation undertaken by the Commission.

a) The parties to the proposed transaction

(1) EDF

(a) Current generation portfolio

41. EDF's sole generation assets located in Belgium concern co-ownership with GDF Suez (Electrabel), which also acts as operator, of the Tihange-1 nuclear power plant. EDF is entitled to 50% of the output of this reactor. EDF's share is [...] 419 MW³⁴ and the maximal nominal capacity to which EDF is entitled equals to [450-550] MW³⁵.
42. Prior to the proposed transaction, EDF sold 419 MW, its entire [...] supply from its rights on the Tihange-1 nuclear power plant, to [...] under a long term contract expiring in 2015³⁶. **[Information on the Tihange agreement]**³⁷.

(b) Projects being developed

43. Prior to the proposed transaction, EDF initiated the development of two sites for the purpose of constructing Combined Cycle Gas Turbine generation units ("CCGTs"):
- One site located in Dilsen-Stokkem, developed by [CCGT1 Company] (100% EDF owned company, minus one share), foreseen with two CCGT units of each [400-500] MW capacity ("[CCGT 1] project"); and
 - One site located at [Western Part of Flanders], developed by [CCGT2 Company] (100% EDF owned company, minus one share), also foreseen for two CCGT units of each [400-500] MW ("[CCGT 2] project").
44. The final investment decision on these projects has not yet been taken³⁸. The total capacity being considered that could be built amounts to [1,800 – 1,900] MW. Current schedules foresee operation to start at the end of [2010-2020] or at the beginning of [2010-2020] should the projects be pursued.

³⁴ Form CO, p. 78.

³⁵ Form CO, paragraph 338.

³⁶ Form CO, paragraph 338.

³⁷ Form CO, appendix 14.

³⁸ Form CO, paragraph 350.

45. EDF has in the past years tried to develop other projects within Belgium with the objective of obtaining access to generation capacity³⁹. Notably, EDF has tried to:
- Acquire a stake in SPE in 2003. The stake was ultimately acquired by GDF, now GDF Suez (Electrabel);
 - Develop a coal fired plant of 900 MW in the Ghent region. This project was abandoned, primarily for environmental reasons;
 - Develop a CCGT project jointly with Arcelor Mittal (Sidmar), which is now being developed by GDF Suez (Electrabel);
 - Develop a CCGT project jointly with Duferco (Marcinelle-Marchienne), which is now being developed by ENEL;
 - Develop a CCGT project jointly with T-Power (Tessenderloo), which is now being developed by Essent.
46. Moreover, [...].
47. Thus, whereas a number of these projects were or are currently being considered by EDF, this has not (so far) provided EDF with additional generation capacity located within Belgium. They do however bear witness to the fact that EDF has persistently tried to enter the Belgian generation market.

(2) SPE

(a) Current generation portfolio

48. SPE currently has access to a combined capacity (including the capacity available under its effective *Pax Electrica II* agreements with GDF Suez (Electrabel)) of [1,800 – 2,200] MW⁴⁰. [...].

(b) Projects being developed

49. SPE is currently developing three projects.
- The Angleur project concerns the building of a peak unit of 126 MW⁴¹. For this project, the final investment decision has already been taken⁴². It is expected to become operational before the end of 2011;
 - A very similar project is currently built in Ham (126 MW) and expected to become operational during 2009. The investment decision has already been taken;
 - The Navagne project is currently virtually⁴³ fully permitted and the preparations to start building the site have already started. The Navagne project concerns the

³⁹ Form CO, paragraphs 142-144 and paragraphs 353-356.

⁴⁰ Form CO, figure 2.

⁴¹ Form CO, figure 25.

⁴² Reply from SPE to question 6(b) to the request for information dated 7 October 2009.

⁴³ One appeal is pending and not all appeal delays have expired. Form CO, paragraph 362.

building of an 850 MW CCGT unit. The final investment decision has however not yet been taken⁴⁴.

50. SPE also has various wind generation projects under development. Even though these are projects whose realisation is difficult to predict with precision, the parties to the concentration estimate that, by 2011, [10-50] MW will be developed and an additional [50-100] MW by 2015⁴⁵.

b) Competitors of EDF and SPE

51. Currently, the main competitors of EDF and SPE in Belgium are: GDF Suez (Electrabel), RWE (Essent), Vattenfall (Nuon). Other relevant companies are ENEL and E.ON.

(1) GDF Suez (Electrabel)

52. GDF Suez (Electrabel) is the historical operator in the Belgian electricity markets. It owns and operates the largest (13,500 MW) and most varied portfolio of generation assets.

(2) RWE (Essent)

53. Prior to the acquisition of Essent⁴⁶, RWE was mainly present in Belgium through its participation in a gas fired power plant at Zandvliet (214 MW), as a joint venture with GDF Suez (Electrabel). This was intended mainly to supply a single industrial customer, BASF⁴⁷. Prior to the merger, Essent built a 149 MW (Inesco) generation unit. Consequently, RWE (Essent) can dispose a total of 363 MW gas fired CCGT capacity within the Belgian balancing zone⁴⁸.

54. Essent intends to increase its presence in Belgium by constructing a new CCGT unit in Genk-Zuid⁴⁹. The status of this project is unknown but, in any event, it is not to become operational before 2012⁵⁰.

(3) E.ON

55. At present, E.ON has a marginal presence in the Belgian electricity markets. However, it will soon have at its disposal the capacity it recently acquired from GDF Suez (Electrabel) generation assets in a transaction approved by the Commission⁵¹.

56. The assets that are acquired by E.ON concern (in Belgium) the hard coal power plant Langerloo (556 MW capacity) and the gas power plant Vilvoorde (385 MW capacity) and drawing rights for a capacity on Doel-1, and Doel-2 and Tihange-1 of, in total, 500 MW for delivery in Belgium⁵². All these power plants are situated in Belgium. Consequently, E.ON has acquired in total 1,441 MW⁵³ of generation capacity in Belgium.

⁴⁴ Form CO, paragraph 505.

⁴⁵ Form CO, footnote 179 and footnote 182.

⁴⁶ Case COMP/M.5467 – *RWE / Essent*.

⁴⁷ Case COMP/M.4180 – *Gaz de France / Suez*, recital 716.

⁴⁸ Form CO, p 75.

⁴⁹ Form CO, paragraph 766.

⁵⁰ Form CO figure 24. Annual report Essent 2008 page 32.

⁵¹ Case COMP/M.5519 – *E.ON / Electrabel Acquired Assets*, Decision of 13 October 2009.

⁵² E.ON also acquired drawing rights amounting to 270 MW in the Netherlands. These are however immaterial for the present case. See case COMP/M.5519 – *E.ON / Electrabel*.

⁵³ Case COMP/M.5519 – *E.ON / Electrabel*.

(4) Vattenfall (Nuon)

57. Vattenfall is present in the Belgian electricity markets via its recent acquisition of Nuon⁵⁴. According to the notifying party⁵⁵, Nuon is planning to invest in a new generation plant in Seneffe/Manage (450 MW). The status of this project is unknown but, in any event, it is not to come on line before 2012⁵⁶.

(5) ENEL

58. ENEL is not yet present in the Belgian electricity markets. However, it is currently developing a 420 MW CCGT at Marcinelle. This plant is expected to become operational in 2011⁵⁷. [...] ⁵⁸.

c) Current and future shares in generation capacity and electricity production/imports in Belgium

59. On the basis of the above information, and the Form CO, Table 1 shows current (2008) shares in generation capacity by the parties to the proposed transaction and their competitors. Table 1 does not take into account the fact that the capacity owned by EDF on the Tihange-1 reactor is contracted until 2015 to [...].

Table 1. Belgium 2008 Electricity Generation Capacity (MW)

Company	MW	% share
EDF Group	[0-825]	[0-5]%
SPE	[1,650-3,300]	[10-20]%
Combined	[1,650-3,300]	[10-20]%
GDF Suez (Electrabel)	[13,200-14,850]	[80-90]%
RWE/Essent	[0-825]	[0-5]%
Others	[0-825]	[0-5]%
TOTAL	16,501	100 %

Source: EDF estimates on the basis of information published by the CREG and Febeg (table 26 Form CO)

60. Table 2 shows parties' share in the generation and import of electricity in Belgium for 2008, taking account of the fact that generation capacity, depending on its place in the merit order may result in different volumes of produced electricity and parties' share in (net) imports of electricity into Belgium⁵⁹.

⁵⁴ Case COMP/M.5496 – Vattenfall / Nuon.

⁵⁵ Form CO, paragraph 764.

⁵⁶ Form CO, figure 24.

⁵⁷ Form CO, figure 24. Reply by an electricity competitor.

⁵⁸ Form CO, paragraphs 365-359.

⁵⁹ The Belgian NCA provides somewhat different figures for EDF's share in the generation and import of electricity in its referral request. These differences are explained in more detail in the Commission's Decision of 12 November 2009 refusing this referral request, in particular footnote 81 thereof.

Table 2. Belgium 2008 Net Electricity Generation/Import

	TWh	%
Net Electricity Production in Belgium	77.5	88.07%
EDF Group	[0-4]	[0-5]%
SPE	[4-9]	[5-10]%
Combined	[9-17]	[10-20]%
GDF Suez (Electrabel)	[62-70]	[70-80]%
Others (RWE, decentralized production)	[0-4]	[0-5]%
Net imports	10.5	11.93%
EDF Group	[0-4]	[0-5]%
SPE	[-4-0]	[-5-0]%
Combined	[-4-0]	[-5-0]%
Total production and net imports	88	100%
EDF Group	[0-4]	[0-5]%
SPE	[4-9]	[5-10]%
Combined	[9-17]	[10-20]%

Source: Form CO table 23 EDF estimates on the basis of information published by the CREG

61. On the basis of the above and the Form CO, Table 3 shows the future share of the parties to the transaction in terms of generation capacity⁶⁰.

Table 3. Current and Projected generation capacity in Belgium (assuming all projects will be realised)

	2008		2009		2011		2014	
	MW	%	MW	%	MW	%	MW	%
EDF	[0-825]	[0-5]%	[0-840]	[0-5]%	[0-925]	[0-5]%	[2125-4,255]	[10-20]%
SPE	[1,650-3,300]	[10-20]%	[1,680-3,360]	[10-20],%	[1850-3,700]	[10-20]%	[2,125-4,255]	[10-20]%
Combined	[1,650-3,300]	[10-20]%	[1,680-3,360]	[10-20]%	[1850-3,700]	[10-20]%	[4,255-6,380]	[20-30]%
E.ON	0	0,0%	0	0,0%	[925-1,850]	[5-10]%	[1,060-2,125]	[5-10]%
GDF Suez (Electrabel)	[13,200-14,850]	[80-90],%	[13,435-15,115]	[80-90]%	[11,105-12,955]	[60-70],%	[12,755-14,880]	[60-70]%
Other	[825-1,650]	[5-10]%	[840-1,680]	[5-10]%	[925-1,850]	[5-10]%	[1,060-2,125]	[5-10]%
Total	16501	100,0%	16793	100,0%	18508	100,0%	21258	100,0%

Source: Form CO figures 2, 20, 24, 25,26 as well as current capacity and future projects of third parties mentioned above.

d) Overlap between the parties to the proposed transaction

62. In view of the fact that the current generation capacity at the disposal of EDF within Belgium is contracted until 2015 (i.e. for the foreseeable future) to [...], there is no real significant overlap of the parties to the proposed transaction in the Belgian generation and wholesale market when only **current** generation capacity is considered.
63. However, the parties have various projects for the **future development of generation capacity**. The main overlapping activities that must form part of a competitive analysis are the various projects for the development of new generation capacity. This is particularly true to the extent that these may constitute projects that are similar in nature i.e. the three projects of the parties to the proposed transaction to develop CCGT generation capacity relating to the [CCGT 1], [CCGT 2] and Navagne projects.

⁶⁰ The Belgian NCA provides somewhat different figures for various market participant's generation capacity in its referral request. These differences are explained in more detail in the Commission's Decision of 12 November 2009 refusing this referral request, in particular footnote 82 thereof.

e) Assessment of EDF's position as an entrant in the absence of the proposed transaction

64. Based on the above, it can therefore be deduced that:

- Prior to the proposed transaction, EDF had a very modest foothold in the Belgian electricity wholesale market (see recitals 59 and 60) but it has persistently tried to increase its access to generation capacity in various projects (see recitals 45, 46 and 47);
- EDF is developing two projects (see recitals 43) which, if realised, would create an important extension of its position in the Belgian electricity wholesale market (see recital 61) with a generation capacity of [2450-2550] MW, that is [10-20]% of the capacity expected to be on line by [2010-2020];
- When projects of other market participants are considered (see recitals 51 to 58), the realisation of these projects would render EDF easily the most ambitious entrant in the market for electricity generation and wholesale. None of the other market participants have projects that foresee the construction of generation capacity as ambitiously as EDF.

65. The entrant in terms of capacity that comes closest in terms of generation capacity is E.ON that recently acquired 1,441 MW of capacity located in Belgium from GDF Suez (Electrabel). Whereas it cannot be ignored that E.ON is also a significant entrant, the effect on the market of this entrant must be assessed in different manner than EDF in the absence of the proposed transaction. While E.ON's entry does not bring new capacity to Belgium, EDF would bring new capacity even in the absence of the proposed transaction. EDF would therefore bring not just one more supplier on the market, but also more effective competitive pressure to the market as the additional capacity affects directly the supply demand balance within the Belgian electricity generation and wholesale market. Consequently, the mere entry of E.ON cannot offset the negative effects the proposed transaction may have on the ambitious expansion strategy of EDF absent the proposed transaction.

f) Horizontal unilateral effects on electricity generation and wholesale market and on electricity trading

(1) Counterfactual to the proposed transaction

66. The assessment of the potential horizontal unilateral effects of the proposed transaction requires a comparison with a counterfactual which describes the most likely market outcome(s) in the absence of the proposed transaction.

67. The structural changes which would be brought by the proposed transaction are threefold. First, before 2015, the proposed transaction brings together production assets of SPE in Belgium into EDF's production assets elsewhere, especially in France.

68. Second, in 2015, the Commission understands that the long term supply agreement by which EDF sells the production of its 50% share in the nuclear power plant Tihange-1 to [...] will end. This nuclear power plant has been recently authorised to run for another 10 years after 2015, which was its initially expected expiration date. As a consequence, at some point in the near future EDF will have to decide how to best use this production asset after 2015.

69. Third, EDF currently develops two sites for possible investments in CCGT production assets. According to the time line of these two projects, EDF envisages taking an investment decision in [2010-2020] and, in case a positive decision is taken, to put the additional capacity on stream in [2010-2020].
70. The combination of these elements, [...], is that EDF will have to decide on (1) its 50% share of Tihange-1 ([450-550] MW), (2) possible investment for the [CCGT 2] site ([900-950] MW) and (3) possible investment for the [CCGT 1] site ([900-950] MW).
71. As a consequence, different likely counterfactuals situations are to be envisaged at this stage: (i) EDF does not invest in CCGTs and sells its share of Tihange-1; (ii) EDF keeps Tihange-1 but does not invest in CCGTs; (iii) EDF keeps Tihange-1 and invests in one CCGT; (iv) EDF keeps Tihange-1 and invests in two CCGTs.
72. Irrespectively of which counterfactual situation is the most likely to occur, the competitive position of SPE is degraded absent the proposed transaction: ***[Information related to SPE's sourcing]***.

(2) Investment in additional production capacity

73. The Belgian NCA notes⁶¹ that "[g]iven the long-term contract with [...] and the low utilisation rate of import capacities by EDF, the concentration does not result in significant horizontal overlaps on the generation and wholesale market [...]. However, both SPE and EDF have their respective projects to increase their generation capacities in Belgium [...] and this could have significant impact on competition".
74. When assessing the financial impact of bringing additional capacities on the market, an undertaking mainly takes into account two elements:
 - The profits it expects from this production asset(s), which depends on the expected demand pattern and electricity prices, as well as other factors such as cost of inputs and cost of CO₂; and
 - The impact of this additional capacity on the revenues of its entire production portfolio, as adding capacity usually exerts a downward pressure on electricity prices.
75. The Commission's review of SPE's pending investment decision regarding the Navagne project, which would have to be taken by EDF post-transaction, allows us to conclude that such capacity has been necessitated to cover SPE's own customers' demand. Moreover, before [2010-2020], the proposed transaction would not bring any structural change in the production of electricity in Belgium, and thus the proposed transaction cannot change the benefits of such an investment for the next [0-10] years at least. Eventually, such capacity would come on-stream far earlier than EDF's (stand-alone) contemplated CCGTs. As a consequence, it is considered that the merged entity would have no incentive to delay or decline such an investment.
76. For the purpose of assessing the effect of the proposed transaction on EDF's incentives to develop further its two CCGT projects, the Commission has used a tool (hereinafter the

⁶¹ Referral Request, section V.A page 6.

"model" or "EDF's model") developed and used by EDF for long-term market forecasts. [Information on the functioning of EDF's internal model]⁶², [...].

77. [Information on the functioning of EDF's internal model] [...].
78. More specifically, the Commission has requested EDF to provide results of the model for the following cases:
- Case (i): all EDF's CCGT projects in Belgium and all SPE's projects;
 - Case (ii): one EDF's CCGT project in Belgium ([900-950] MW) and all SPE's projects;
 - Case (iii): one unit of one EDF's CCGT project in Belgium [400-500] MW) and all SPE's projects;
 - Case (iv): none of EDF's projects in Belgium and all SPE's projects.
79. The analysis of the results first shows that, should an investment decision be taken before the completion of the proposed transaction by EDF on a stand-alone basis, the viability of the two CCGTs would not be completely secured. In particular, under a range of plausible scenarios, the gross margins anticipated for these projects are very close to the amount necessary to recover the expected investment. Specifically, the results of the simulation exercise described above indicate that, for a commissioning date of [2010-2020], in the base demand scenario, case (i) would appear risky and other cases would appear borderline, while in a high demand scenario, case (i) would become borderline and other cases more favourable⁶³.
80. EDF emphasised that, irrespectively of the impact of additional capacities on revenues of existing production portfolio, elements unrelated to the proposed transaction will have a major influence on the viability of EDF's CCGT projects and, ultimately, on the investment decisions that EDF has scheduled to take in [2010-2020]. EDF points to two key elements: the speed of the economic recovery from the current crisis as well as the evolution of the cost of equipment, in particular the investment cost of a CCGT Unit. [Information as to possible positive scenarios]. Thus, if for instance these positive developments would materialise, there are scenarios where EDF would, in the absence of the merger, decide to invest in the additional generation capacities.
81. Whereas, as with any projected investment decision to be made in the future, it cannot be guaranteed with full certainty that it will materialise in all scenarios in the future, it can however already be considered at this stage that the proposed transaction will affect the incentives to invest in *any* of those scenario's. When the merged entity considers investing in new generation capacity, it will take into account not only the stream of revenue generated on the project itself (as an entrant without any installed capacity would do) but also the impact of the added capacity on the profits earned by all the plants in its portfolio. In this respect, the analysis indicates that the impact of EDF's CCGT(s) projects on the revenues of SPE is not marginal. The additional capacities considered by EDF would have a significant impact on prices in Belgium so that margins earned by SPE's plants would be significantly reduced⁶⁴. The loss of gross margins⁶⁵ by SPE can represent [...]%

⁶² [Information on the functioning of EDF's internal model] [...].

⁶³ [Information on the functioning of EDF's internal model] [...].

⁶⁴ In addition, some of SPE's plants would be pushed higher up the merit curve as a result of the added capacity and would, in some instances, no longer be infra-marginal.

to [...] % of the project-specific gross margins, using EDF's model. As a consequence, the incentives of the combined entity to develop further the CCGT projects currently considered by EDF are significantly lowered by the proposed transaction.

82. Although the precise likelihood of market conditions leading to, on the one hand, EDF on a stand-alone basis developing one or both CCGT projects and, on the other hand, the merged entity not developing the same project(s), is difficult to assess, the results of the modelling exercise described above nevertheless indicate that there exists a number of plausible scenarios under which the incentive for EDF to develop one or two of its CCGT projects appears borderline pre-merger and is significantly reduced post-merger as a result of the combined entity taking into account the negative price impact of additional capacity on its entire generation portfolio. It is therefore considered that there are serious doubts with regard to the incentives of the merged entity to further develop EDF's CCGT projects. The notifying party has submitted Commitments to address this concern.
83. In view of the fact that EDF is currently the most ambitious entrant in the Belgian wholesale and generation market and the fact that the proposed concentration affects significantly merged entity's incentives to develop generation capacity, the proposed transaction would remove the most ambitious entrant in the Belgian wholesale and generation market

(3) Short-term unilateral effect

84. Until [2010-2020], before the earliest date at which current project developments in Belgium would become operational if EDF were to proceed with the investment decision as currently scheduled, the only unilateral effect is to combine SPE's portfolio with EDF's share of Tihange-1 of [450-550] MW. However, this capacity is not only a very small share of the Belgian total generation capacity (of approximately 16,500 MW), but it is also [...] sold under long-term contract to [...], so that any unilateral effect on the Belgian market considered in isolation can readily be excluded.
85. With respect to the potential unilateral effects of the proposed transaction, the Belgian NCA notes⁶⁵ that the size of the merged entity will lead to an increase of its interest in withdrawing capacities and submitting high purchase orders in Belpex in order to increase the spot exchange price.
86. This argument of the Belgian NCA relies on the position of the parties to the proposed transaction in both France and Belgium. In particular, the Belgian NCA indicates that although SPE currently has little incentive to withhold capacity, "*if SPE will merge with EDF, the merged company will have very high incentive for withholding capacity: low cost (SPE's CCGTs) and very high benefits due to the very large production park*".
87. It has been assessed whether EDF's presence in France could lead to an increase of electricity prices in Belgium as a result of the proposed transaction. On the basis of an analysis of the French and Belgium cost curves, that a merger-specific withholding strategy using SPE's mid-curve portfolio would be unlikely to be profitable for the merged entity, in particular as it would have little impact on French prices, if it were conducted on the electricity generation taken as a whole. The impact of strategies consisting of withholding the highest cost infra-marginal SPE generation units was assessed, based on the very conservative assumption that this would result in an

⁶⁵ Gross margins take into cumulated revenues resulting from the positive difference between hourly equilibrium prices series and the variable cost of each production unit.

⁶⁶ Referral Request, section V.B page 7.

equivalent increase of demand on the electricity generation market in France⁶⁷. A wide variety of demand scenarios were considered, and it was found that these strategies would not be profitable for the merged entity, as the profit loss resulting from such a withholding strategy in Belgium would be greater than the gain for EDF in France.⁶⁸

88. In light of the above arguments, it is concluded that the proposed transaction would not lead to any anticompetitive unilateral effects in the short term.

g) Coordinated effects on the electricity generation and the wholesale market and on electricity trading

- (1) Possible coordination risks due to shareholdings by the French State in both GDF Suez (Electrabel) and of EDF

89. The Belgian NCA submits that the creation of a "*structural link*" between the two incumbent Belgian electricity producers (GDF Suez (Electrabel) and SPE), due to the shareholding of the French State in both companies⁶⁹, could amount to an even more important element which (i) increases the likelihood of coordination or (ii) strengthens coordination.
90. The French State shareholdings of both companies are managed by Government Shareholding Agency ("*Agence des Participations de l'Etat*" or "APE"). The APE takes care for the interest of France's assets and maximizes their value
91. The fact that GDF Suez (Electrabel) and EDF have a common shareholder, the French State, is the reason why the Belgian NCA considers that there is a risk of coordination between the two companies in their strategic business decisions. It is also argued that this risk of coordination would be facilitated by the management of the French State shareholdings through the same agency, APE.
92. In order to analyse these claims it is necessary to ascertain, whether an undertaking whose majority shareholdings (84.66%)⁷⁰ are held by a State (EDF), or where the State is the major shareholder (35%) (GDF Suez (Electrabel)) can still be considered to have an independent power of decision in relation to other undertakings where the same State is the main or a major shareholder. That will be the case if this undertaking sets by itself its business plan, budget, and strategy, in its own commercial interests, independently from other undertakings owned by the same State entity.

⁶⁷ Taking into account congestion for imports into Belgium from France reduces the price increase in France following a withholding of SPE's capacity in Belgium and, thus, any benefits that the combined entity may realise from this strategy.

⁶⁸ If, as in the Referral Request, one were to consider a withholding strategy in Belgium (in order to affect French prices) specifically linked to the spot exchange, one has to consider the size of the withholding considered here is very substantial compared to the size of the day-ahead volume (which represent only 12% of the total generation capacity), and therefore unlikely to be profitable for the merged entity (in particular given that in the absence of a withdrawal strategy specific to OTC products, a strategy of manipulation of Belpex prices could only affect OTC prices durably if it triggers a substitution from the spot market to OTC products, which would in turn reduce the price impact of the withholding strategy on the spot exchange). Furthermore, any potential incentive that the merged entity may have to withhold capacity in Belgium to increase prices in France may be reduced by imports from the Netherlands and Germany, reinforced, as of April 2010, by the introduction of market coupling with Germany. It is to be noted in the context that both Germany and the Netherlands have a large installed capacity of thermal power plant that may replace SPE's withdrawn capacity.

⁶⁹ The French State currently holds 84,6% of the issued ordinary shares of EDF. In GDF, the French State remains the main shareholder, with a stake of 35.91% as of August 2009.

⁷⁰ Form CO, paragraph 39

93. The requirement that the business plans, budget and strategy must be set independently implies that the acquiring State entity cannot (directly or indirectly) impose or facilitate coordination between any other undertakings which are owned by it. Relevant factors that may be taken into account when assessing the independent power of decision include, but are not necessarily limited to: (i) the existence of interlocking directorships between undertakings owned by the same acquiring entity; and (ii) the existence of adequate safeguards ensuring that commercially sensitive information is not shared between such undertakings. In any event, the exercise of supervisory powers by the State will not exclude the ability of such undertaking to set its strategy independently where such powers are limited to the protection of interests analogous to those of a minority shareholder⁷¹.
94. Therefore, when an undertaking fulfils the abovementioned requirements it could be concluded that it has an independent power of decision, regardless of the fact that the State owns it or is a majority shareholder. In the *Gaz de France / Suez Decision*⁷², the Commission considered EDF and GDF Suez (Electrabel) as competing undertakings. In that decision, in the market for supply of gas to industrial customers, the Commission regarded EDF as one of the main competitors of GDF Suez (Electrabel), together with Total, Distrigaz, E.ON or BP. In the market for the supply of gas to household customers, the Commission considered that EDF constituted together with Distrigaz one of the main competitors of GDF.⁷³ In the market of supply of gas to electricity customers, EDF expressed its concerns that *"the GDF/Suez merger would strengthen the control each of the parties has over the gas system (supply, access, transmission and storage) in which they operate in France and the whole North-West of Europe, giving the new entity in essential segments of the corresponding value chain a virtual monopoly"*⁷⁴. In EDF's *Document de Référence* for 2008, it is noted that *"EDF's main competitors on the French market are GDF Suez, Endesa/SNET, Atel, HEW Energies, Poweo, Direct Energie, and local distribution companies (LDCs). With the recent completion of the merger between Suez and Gaz de France, the energy landscape has changed due to the emergence of a first-rate competitor for EDF"*⁷⁵.
95. It can be added that, as it has been described above, EDF has ambitious plans to expand its business in Belgium by preparing the construction of [1,800-1,900] MW generation capacity. Additional capacity is most likely to affect the revenues of GDF Suez (Electrabel) more than any other market participant in the Belgian generation and wholesale market. Indeed, as is apparent from the Commission's simulations, the construction of new power plants affects the wholesale price and, by these means, the revenues of other participants. The larger the pre-existing portfolio of a market participant, the larger the expected revenue losses are likely to be. GDF Suez (Electrabel) has, by far, the largest generation portfolio within Belgium. The fact that EDF has an ambitious expansion policy within Belgium, which commenced after the *Gaz de France / Suez merger*⁷⁶ and has since continued, contradicts therefore the allegation of the Belgian NCA that the French State exerts influence with a view to increasing profits of both groups.

⁷¹ Jurisdictional Notice, paragraph 66 and paragraph 71.

⁷² Case COMP/M.4180 – *Gaz de France / Suez*.

⁷³ *"La Commission estime cependant que Distrigaz est, avec EDF, l'opérateur le mieux placé pour pénétrer les marchés de la fourniture aux clients résidentiels à compter du 1^{er} juillet 2007"*, case COMP/M.4180 – *Gaz de France / Suez*, recital 452.

⁷⁴ Case COMP/M.4180 – *Gaz de France / Suez*, recital 465.

⁷⁵ EDF *Document de Référence* for 2008, paragraph 6.2.1.2.1, page 55.

⁷⁶ EDF's submission of 9 October 2009 reply to question 6(c)

96. As regards, the existence of interlocking directorships, none of the representatives of the French State appointed to the Board of Directors of EDF is also a member of the Board of Directors of GDF Suez (Electrabel), and *vice versa*. Further, they are bound by governance principles relating to confidentiality and independence, in accordance with corporate governance principles applicable to listed companies⁷⁷.
97. The information provided by EDF with regard to the proposed transaction indicates that EDF is able to independently set its business plans in relation to GDF Suez (Electrabel), and in accordance with its own commercial interests. The Commission did not receive any evidence as to the contrary during the market investigation.
98. The fact that a governmental agency (APE) is responsible for the managing of the French State's shareholdings in EDF and GDF Suez (Electrabel) cannot put such conclusion into question as far as its role is clearly limited and it does not appear to affect, as is the case here, the commercial and business autonomy of these companies.
99. Consequently, since EDF can be regarded as a company with an independent power of decision in relation to GDF Suez (Electrabel), and which is an actual competitor of GDF Suez (Electrabel), the alleged risk of coordination with GDF Suez (Electrabel) in the Belgian electricity markets due to the shareholding structure is not founded.

(2) Coordinated effects on electricity generation and wholesale market and on electricity trading

100. As detailed in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"⁷⁸), four cumulative conditions are necessary for coordination to emerge and be sustainable: the ability to reach an understanding on the terms of coordination, the ability to monitor deviations, the existence of deterrent mechanisms and the absence of any ability or incentive for outsiders to destabilize the coordination. These four conditions have to be considered within a plausible mechanism for coordination.
101. The Belgian NCA argues that the markets concerned have characteristics that are conducive to tacit collusion. In particular, it is argued that a mutual understanding on the terms of coordination is likely given the limited number of companies active on the market and the homogeneous nature of electricity and given that the market is sufficiently transparent to monitor deviations from the collusive agreement, that there are credible deterrent credible mechanisms and that the reaction of outsiders would not jeopardize the results expected from coordination. The Belgian NCA does not however provide a detailed description of how coordination would work in practice, in particular with respect to the mechanism and variables on which the colluding partners would tacitly agree the mechanism for detecting deviations and the means of retaliation⁷⁹.
102. Contrary to the arguments set out by the Belgian NCA, EDF argues that the electricity market is not conducive to collusion. In particular, EDF emphasises that reaching the

⁷⁷ They follow the governance principles applicable to listed companies, as described in the guidelines published on 17 December 2003, entitled "Enforcement of the Financial Security Act with regard to the chairman's report on internal control procedures established by the company" by the *Association Française des Entreprises Privée* (AFEP) and the *Mouvement des Entreprises de France* (MEDEF).

⁷⁸ Horizontal Merger Guidelines, paragraph 41.

⁷⁹ For example, for the generation and wholesale market, the Referral Request indicates that the coordination mechanism would involve GDF Suez (Electrabel) and SPE coordinating their investments, without further details as to how such a strategy could be carried out in practice.

terms of coordination would be difficult in the absence of an obvious focal point (in particular given the demand and cost fluctuations, and the substantial degree of differentiation of the contracts offered on the market), that the market is not transparent because the majority of transactions in Belgium and France take place through OTC trade, that there are no effective deterrent mechanisms (in particular because deviation could take part through long-term forward contract), and that any attempt to raise prices by EDF and GDF Suez (Electrabel) would trigger reactions from outsiders (in particular, through an increase in imports and rival entry and expansions in the medium term).

103. As stated in the Horizontal Merger Guidelines⁸⁰, when the Commission examines whether it would be possible to reach terms of coordination and whether the coordination is likely to be sustainable, it has to consider the changes that the merger brings about. For the purpose of reviewing the proposed transaction, the Commission's assessment of potential coordinated effects therefore focused on the merger specific effects of the proposed transaction.
104. Because of the very limited presence of EDF in Belgium electricity markets, any merger specific effect of the proposed transaction, as far as coordination is involved, is likely to be limited. In particular, in addition to the "structural link" addressed above, the main potential merger specific effect with respect to coordination derives from the increase in multi-market contacts between EDF and GDF Suez (Electrabel) in France and Belgium⁸¹.
105. The Belgian NCA argues that, as the proposed transaction will increase the number of multi-market contacts between EDF/SPE and GDF Suez (Electrabel), it is going to be easier for these companies to reach a common understanding, to monitor each others' behaviour and to retaliate in case of deviation⁸².
106. The Commission therefore assessed whether the increase of multi-market contacts (defined as interactions on different markets) between EDF and GDF Suez (Electrabel) as a result of the proposed transaction is likely to significantly impede effective competition by making coordination easier, more stable or more effective. As mentioned in the Horizontal Merger Guidelines⁸³, multi-market contacts may reinforce the scope for retaliation in case of deviation from a collusive agreement (e.g. by linking the strategies on the different markets and triggering retaliation on all markets in response to a deviation on one market). However, economic theory shows that multimarket contacts also increase the gain for deviation from a collusive agreement (as not only retaliations but also deviations are possible on a higher number of markets), which implies that multi-market contacts could lead to coordinated effects only under specific circumstances.

⁸⁰ Horizontal Merger Guidelines, paragraph 42.

⁸¹ Technically, the proposed transaction will also lead to the disappearance of one competitor on Belgian electricity markets. However, given the very small size of EDF in Belgium and the fact that it is [...] selling all its production under a long term contract to [...], the role that EDF could play, in the absence of the proposed transaction, in terms of destabilizing a collusive agreement between SPE and GDF Suez (Electrabel) is most likely negligible. Therefore, this can not be considered a sufficient element for the proposed transaction to create or reinforce the scope for collusion.

⁸² In this respect, the Belgian NCA also argues that "*the competition in the Belgium market (where GDF Suez/Electrabel is the first operator which can be retrieved at the bottom and the middle of the supply curve and EDF/SPE, which is the second operator, can be found on the top of the supply curve) will become the mirror image of the competitive situation in France (where EDF/SPE is the first operator which can be retrieved on the bottom and the middle of the supply curve and GDF/Electrabel, which is the second operator, which can be found on top of the supply curve).*"

⁸³ Horizontal Merger Guidelines, paragraph 55.

107. An increase in symmetry between the parties to the concentration would not be sufficient in itself to consider that the proposed transaction is likely to lead to coordinated effects. Rather, to increase the scope for collusion, a coordination mechanism linking the two separate markets need to loosen the incentive constraint of the relevant players (e.g. if one participant would not have an incentive to collude on one market, but would have an incentive to engage in collusion if a collusion mechanism involved linking both markets). However, the market investigation did not provide any credible indication that factors which currently constrain the incentives of EDF or GDF Suez (Electrabel) to coordinate would be relaxed by the post-transaction increase in multi-market contacts in a way that would make coordination easier, more stable or more effective.
108. In light of these arguments, it is concluded that the proposed transaction is unlikely to lead to coordinated effects.

h) Non-horizontal unilateral effects on electricity trading activities in Belgium

109. EDF and SPE are active in both upstream (generation) and downstream (supply to final customers) markets in Belgium and/or France. the Commission, further to submissions by the Belgian NCA, has looked at whether the combination of the activities of the parties' to the concentration will lead to a non-horizontal input foreclosure strategy by the merged entity, which would consist in withholding electricity by SPE on the Belpex in order to increase the input price of its competitors active on the downstream supply market. According to the Belgian NCA, this input foreclosure strategy would significantly impede competition because the competitors that would be foreclosed play an important role on the electricity supply markets and because such manipulation of the spot exchange price would increase volatility and hence increase barriers to entry or expansion for potential and current competitors.
110. Moreover, some concerns have been raised that the proposed transaction could limit the liquidity available on the wholesale market⁸⁴.
111. The proposed transaction would not impede competition as a result of the alleged input foreclosure strategy.
112. First, currently SPE buys more than it sells on the wholesale market, and as a consequence has decided to invest in new capacity located at Navagne, while EDF has no production facility at its disposal in Belgium and thus supplies its customers from imports and the wholesale market. Therefore, any negative effect of the proposed transaction on the liquidity of the Belgian wholesale exchange is unlikely before a new investment from either party come on-stream. At that time, each party will have the possibility to supply its customers partly through its own electricity, either on a stand-alone basis or as a merged entity. The main effect of an investment in generation is that less electricity will be bought from the wholesale market by the parties to the concentration, which in turn means that more electricity would be made available for the remaining buyers. The proposed transaction's only effect, for a given level of investment from both parties, relates to the coordination of production and consumption portfolios of each company, which increases the number of instances where the merged entity would use its own electricity to supply its customers. The main effect of the proposed transaction would be to increase the quantity of electricity available on the Belgian wholesale market for other distributors.

⁸⁴ An electricity competitor's response to the market test of Commitments submitted by EDF. This concern is however not supported by replies to the market test by other market participants.

113. Moreover, the merged entity would not have the ability to foreclose its downstream competitors as it lacks market power given its relatively limited size on the electricity generation and wholesale market in Belgium. Furthermore, even if it had such an ability, the merged entity would not have an incentive to engage in such strategy given the limited impact of a withholding strategy in Belgium on electricity prices in France, in particular taking into account, on the one hand, the constraint imposed by the size of interconnectors between France and Belgium and, on the other, the constraint imposed by the optimization of imports from other neighbouring countries⁸⁵. Finally, there is no evidence that a reduction of liquidity as a result of such a strategy would foreclose competitors or potential entrants.
114. E.ON recently acquired a significant quantity of generation capacity of significant size in Belgium. As E.ON does not have a significant downstream portfolio, this adds a market participant with a structurally long position in Belgium that is thus likely to contribute to the liquidity of traded electricity products in Belgium.
115. It is therefore concluded that the proposed transaction is unlikely to lead to non-horizontal unilateral effects on the Belgian electricity trading.

i) Conclusion on competition concerns of the Commission on the generation and wholesale electricity markets in Belgium

116. As a result of the detailed assessment of the proposed transaction with regard to the horizontal unilateral effect of the proposed transaction it is concluded that there are serious doubts concerning the incentives of the post-merger entity to further develop EDF's CCGT projects. The notifying party has submitted Commitments to address this concern.
117. However, the assessment of the proposed transaction did not identify serious doubts with respect to the coordinated effects and non-horizontal unilateral effects of the proposed transaction on the different relevant Belgian electricity markets.

C. BALANCING AND ANCILLARY SERVICES IN BELGIUM

1. *Product market definition*

118. In accordance with previous decisions of the Commission, the notifying party defines a market for ancillary services and balancing power⁸⁶ comprising, as defined in Belgian law⁸⁷, of primary frequency control, secondary control, tertiary reserves, voltage control and reactive power and black start services. Elia, the Belgian Transmission System Operator ("TSO"), is the sole buyer of these services and it procures such services by tendering.
119. EDF⁸⁸ considers the supply of electricity for compensating network losses as also forming part of this market. Whereas it is true that the sole buyers of electricity for compensating network losses (like in the case of ancillary services and balancing power) are network

⁸⁵ As far as the spot market is concerned, the future development of market coupling with Germany is an additional factor limiting the incentive for the parties to engage in input foreclosure.

⁸⁶ Case COMP/M.4180 – *Gaz de France / Suez*, recitals 683-687.

⁸⁷ Article 231 of the Royal Order of 19 December 2002 establishing technical regulations for operating the electricity transmission system and access thereto .

⁸⁸ Form CO, paragraphs 283-286.

operators (in the case of Belgium, only operators of distribution networks⁸⁹), the supply side of this market is substantially different from the one for providing ancillary services and balancing power.

120. With the exception of tertiary reserves (where interruptible customers can provide - limited amounts of - upward regulation⁹⁰), suppliers of ancillary services and balancing power can only be operators of power plants connected to the Belgian transmission network⁹¹. The technical ability and economic incentive to provide such services depends on the technical specification of a power plant (its flexibility and place in the merit order) and, also on the number of such suitable plants in a supplier's generation portfolio to guarantee the supply in case of maintenance and failure. Consequently, the number of potential suppliers of ancillary services and balancing power is very limited⁹².
121. However, the ability to supply network losses is not constrained in the same way as in the case of ancillary services and balancing power. Suppliers include, for instance, financial players active in electricity trading⁹³ that have no own generation capacity. Buyers of network losses essentially behave like final customers when purchasing electricity for compensating network losses⁹⁴.
122. Consequently, the supply of network losses is not part of the market for ancillary services and balancing power. Ultimately, whether network operators are present on the demand side of the electricity wholesale market or in (one of the) retail supply markets can be left open as the volumes concerned (estimated to be 4.4 TWh⁹⁵) are limited and will not materially affect the assessment of the proposed transaction.

2. Geographic market definition

123. As explained above, suppliers that seek to offer ancillary services and balancing power can currently do so only from generation units/interruptible customer sites located within the Belgian balancing zone⁹⁶. Consequently, the market for ancillary services and balancing power is national in scope.

⁸⁹ The Belgian regulatory framework foresees that access responsible parties compensate network losses on the transmission network in kind. Consequently, they are not procured separately.

⁹⁰ Balancing power is used by a TSO to maintain a (close to) real time balance between electricity injected (produced) and withdrawn (consumed) electric power. The provision of balancing power concerns in essence the service to reduce injections (downward regulation) and the service to increase production (upward regulation) or, what amounts to the same for the TSO, the service to reduce withdrawals on short notice. Whereas large electricity intensive consumers can contract to reduce their withdrawals (upward regulation), they can in reality not contract to increase them. Indeed, this would imply a (nearly) continuous underutilisation of the production capacity in their main line of business.

⁹¹ Please refer to Elia's website for further details on energy purchases: <http://www.elia.be/repository/pages/cd2a2505af9449c6a5930663b59b1e32.aspx>. See also case COMP/M.4180 – *Gaz de France / Suez*, recitals 733- 736.

⁹² See case COMP/M.4180 – *Gaz de France / Suez*, recitals 764-789.

⁹³ It is noted that the procurement by Elia concerns base-load and product (Form CO, paragraph 284) and thus, apparently, concerns the procurement of standardised products as usual in electricity trading.

⁹⁴ See market investigation reply from a electricity competitor.

⁹⁵ Form CO, paragraphs 284 and 285.

⁹⁶ Please refer to Elia's website for further details on energy purchases: <http://www.elia.be/repository/pages/cd2a2505af9449c6a5930663b59b1e32.aspx>. See also case COMP/M.4180 – *Gaz de France / Suez*, recitals 733- 736.

3. *Competitive assessment*

a) **Primary effect on the Belgian market for balancing and ancillary services**

124. In view of the constraints that exist to supply ancillary services and balancing power, essentially⁹⁷ only GDF Suez (Electrabel) and SPE supply such services to their sole buyer, Elia. EDF is currently not present on this market. Consequently, the proposed transaction does not give rise to serious doubts for the market for balancing and ancillary services.

b) **Secondary effects on the Belgian market for balancing and ancillary services**

125. EDF's (and SPE's) planned generation units are technically and economically suited to supply all ancillary and balancing services (with the exception of black start)⁹⁸. Indeed, the supply of such services is economically attractive as such revenues can represent ([5-25]€/kW/y) a significant share of a power plant's revenues⁹⁹.

126. In order to guarantee the supply of balancing power in case of plant failure and maintenance, possessing several generation units capable of supplying balancing power is a prerequisite, or at least a competitive advantage, when supplying such services to the network operator Elia. EDF is projecting to construct four CCGT units.

127. In view of the limited suppliers of ancillary services and balancing power and the generation portfolio expected to come on line by other entrants in the near future, EDF appears to be the best placed entrant in the market for ancillary services and balancing power.

128. In view of the fact that the proposed transaction affects the incentives for EDF to invest in the planned generation units, the proposed transaction will significantly affect the competitive conditions on the market for ancillary services and balancing power.

129. The Belgian NCA also states that "*SPE is known to be the 'price setter' in the 'intra-day' segment*". It considers that it therefore has some market power and that its market position is significantly larger than it appears to be¹⁰⁰. The Belgian NCA apparently refers here to SPE's role as a market maker in Belgian intra-day traded electricity products¹⁰¹. A market maker contributes to the liquidity of the traded products by quoting competitive sales or purchase orders (with prices) in order to guarantee the availability of a counterparty to other market participant. Such a role (a positive contribution to Belgium's illiquid electricity trading) should not lead to any different assessment with regard to the proposed transaction.

4. *Conclusion on balancing and ancillary services markets in Belgium*

130. Except for secondary effects, the proposed transaction does not raise serious doubts as to its compatibility with the common market for the Belgian market for balancing and ancillary services.

⁹⁷ With the exception of limited amounts of upward regulation provided by interruptible customers.

⁹⁸ Document n° 576 reply to Q 5 in particular.

⁹⁹ EDF's answers to question 2(h) of the request for information dated 14 October 2009.

¹⁰⁰ Referral Request, page 5.

¹⁰¹ <http://www.belpex.be/index.php?id=91>

D. ELECTRICITY RETAIL SUPPLY MARKETS TO SMALL AND LARGE INDUSTRIAL CUSTOMERS IN BELGIUM

1. *Product market definition*

131. The notifying party considers, in line with previous decisional practice of the Commission¹⁰², that the market for the supply of electricity in Belgium can be segmented along the following lines: (i) the market for the supply of electricity to large industrial and commercial customers connected to the transmission network (at above 70 kV), (ii) the market for the supply of electricity to small industrial and commercial customers connected to the distribution networks (below 70 kV) and (iii) the market for the supply of electricity to eligible household customers.
132. The results of the market investigation did not put into question this market definition. Therefore, the Commission does not consider it necessary to depart from this segmentation of the retail electricity markets in Belgium.

2. *Geographic market definition*

133. For retail supply of electricity, the Commission has generally defined these markets as national in scope, provided that these markets are fully liberalised¹⁰³ and if the conditions of competition are found to be uniform throughout the relevant territory.
134. Regarding the geographic scope of retail electricity supply to industrial and commercial customers (hereafter "I&C customers") in Belgium, the notifying party considers that the markets for supply of electricity to small, as well as to large, I&C customers are national in scope given that retail markets are now completely liberalised in all three regions and for all categories of customers in Belgium. In this respect, the notifying party referred to the *Gaz de France / Suez Decision*¹⁰⁴ in which, as it emphasized, the Commission in undertaking its competitive assessment has looked into the markets for the supply of electricity to I&C customers (large and small) only at national level in accordance with previous Commission decisions¹⁰⁵.
135. Regarding the geographic scope of these markets, respondents to the Commission's market investigation have provided mixed comments. On the one hand, the overwhelming majority of respondents submitted that for large I&C customers the relevant market should be the whole of Belgium. On the other hand, regarding small I&C, it was noted that the relevant geographic market could be considered to be sub-national in scope and that it could be split into the three regions of Brussels, Flanders and Wallonia. In addition to the language differences between the relevant regions, market respondents who pleaded in favour of a sub-national market definition for the supply to small I&C customers based

¹⁰² Case COMP/M.4180 – *Gaz de France / Suez*, recitals 688-695 and case COMP/M.3883 *GDF / Centrica / SPE* of 7 September 2005, recital 14.

¹⁰³ See cases COMP/M.5224 – *EDF / British Energy*, COMP/M.4180 – *Gaz de France / Suez* and COMP/M.3696 – *E.ON / MOL*. However, in recent decisions (see COMP/M.5496 – *Vattenfall / Nuon*; COMP/M.5467 – *RWE / Essent*) with respect to the market for the supply of electricity in Germany, the Commission has considered that there are specific factors in Germany pointing towards a market that is narrower than national in scope, such as (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 area.

¹⁰⁴ Case COMP/M.4180 – *Gaz de France / Suez*.

¹⁰⁵ See cases COMP/M.3075-3080 – *ECS / Intercommunales*, COMP/M.3883 – *GDF / Centrica / SPE*, recital 24, COMP/M.2857 – *ECS / IEH*, COMP/M.3318 – *ECS / Sibelga*.

their view on the divergent regulatory conditions and the existence of separate licensing authorities in these three regions. It was further argued that there are differences in prices and costs from region to region and that not all suppliers have entered all three regions. Moreover, as it is demonstrated from the market shares, EDF has managed to acquire higher market shares in Wallonia.

136. In response to the Commission's requests for information following the market investigation, by analogy, EDF has referred to the fact that the Commission has examined the question as to whether household supply markets (which are in any case not affected in the proposed transaction) can be defined as regional in scope on the basis of differences in regulatory conditions which were not homogeneous across the three Belgian regions at the time of the *Gaz de France / Suez Decision*¹⁰⁶. For example, at the time of the *Gaz de France / Suez Decision* there were differences in the level of liberalisation of the market for this customer group in these regions. Given that the market is now completely liberalised in all three regions of Belgium, EDF considers that the market for the supply of electricity could be defined as national for all customers. The notifying party further submits that with respect to large I&C customers, such a national definition is also supported by the existence of a national transmission network to which all these customers are connected.
137. The fact that in the *Gaz de France / Suez Decision*¹⁰⁷ the Commission based its assessment on a national market definition (for the supply to small I&C customers), does not prevent the Commission, in the case at hand, to look into a narrower geographic definition for that supply market. Against this background and based on the results of the market investigation on this point, for the purposes of the present decision it can be left open whether the market for the retail supply of electricity to small I&C customers in Belgium should be defined as sub-national in scope given that the proposed transaction does not raise serious doubts as to its compatibility with the common market under any alternative market definition.
138. Regarding the geographic scope of the retail market to large I&C customers in Belgium, in line with previous practice and the results of the market investigation, the Commission does not consider it necessary to look into a segmentation which is smaller than Belgium.

3. *Competitive Assessment*

139. SPE is active on all the electricity supply markets in Belgium. EDF is only active on (i) the market for the supply of electricity to large I&C customers (connected at above 70 kV) and (ii) the market for the supply of electricity to small I&C customers (connected at below 70 kV). The proposed transaction therefore leads to horizontal overlaps on the Belgian markets for the supply of electricity to large I&C customers and the market for the supply of electricity to small I&C customers.

a) Large industrial and commercial (I&C) customers market

140. Regarding supply of electricity to large I&C customers, the increment added by EDF's presence is a mere [0-5]%, while SPE's market share is found to be just below [5-10]%.
141. The proposed transaction will not lead to competition problems in this market, given the relatively low combined market shares and the minor increment resulting from it. The market investigation did not identify any serious doubts for this market.

¹⁰⁶ Case COMP/M.4180 – *Gaz de France / Suez*.

¹⁰⁷ Case COMP/M.4180 – *Gaz de France / Suez*.

b) Small industrial and commercial (I&C) customers market

142. As regards the retail market to small I&C customers (connected at below 70 kV), if a national market definition is adopted, the increment added by EDF's presence would be a mere [0-5]%. SPE's market share on this market is [10-20]%, therefore no competition issues appear to arise in case a national definition is adopted.
143. At the smallest possible geographic definition, the parties to the concentration overlaps for the Brussels region are found to be even smaller (EDF [0-5]% and SPE [5-10]%), while for the Flanders region EDF would add a mere [0-5]% to SPE which has a presence of just [10-20]%. It is therefore clear that even if a definition which is smaller than national is applicable for small I&C then no competition issues arise with respect to the Flanders and the Brussels regions. However, by reference to the smallest possible geographic definition, as regards Wallonia the figures are higher than at national level since the combined presence would be [10-20]%. EDF has a presence of [5-10]%, while SPE's presence is around [10-20]%. A number of respondents have noted that the proposed transaction will lead to a decrease in the number of suppliers given that EDF is currently a credible alternative supplier to SPE.
144. Nevertheless, the combined market share of EDF and SPE in Wallonia (which is at [10-20]%) cannot by itself be considered to be high enough so as to create doubts.
145. First, GDF Suez (Electrabel), the incumbent supplier, has a total presence of [60-70]% in the Walloon region and [70-80]% nationally in the retail market to small I&C customers. This is a very high figure which cannot be considered comparable to that of the merged entity. Therefore, the concentration does not affect the competitive structure of the market which is already characterised by only one large player.
146. Second, as confirmed by numerous respondents to the Commission's market investigation, the merged entity (EDF and SPE) would, post merger, be able to exert more competitive pressure on the incumbent GDF Suez (Eletrabel) than in the current situation where EDF and SPE compete individually with GDF Suez (Electrabel). Moreover, the proposed transaction creates better opportunities from the current situation for EDF to expand further its retail supply business in the short to medium term given that it currently lacks the necessary and suitable generation capacity. Possessing own generation capacity is clearly a very important factor for materially expanding a downstream supply business.
147. Third, it is to be noted that EDF and SPE are not the only retail suppliers to small I&C customers currently competing with GDF Suez (Electrabel). At national level, E.ON has a presence in the range of [0-5]% while RWE (Essent) and Vattenfall (Nuon) have market shares of [0-5]% and [0-5]% respectively. Moreover, a number of other smaller suppliers are estimated to have a total presence of just [5-10]%. Specifically in relation to the Walloon region, where the merged entity would have a market share of [10-20]% in the sub-national geographic definition, E.ON has a presence of [0-5]%, RWE (Essent) [0-5]% and Vattenfall (Nuon) just above [0-5]%. These remaining competitors active in the market, are sufficient to ensure that competition will be maintained. The potential of these remaining competitors, to further develop their presence in retail supply markets for small I&C is also relevant given their planned entry and expansions in the generation and wholesale market. This argument is particularly relevant for E.ON which recently acquired sole control over two power plants and certain drawing rights¹⁰⁸ in Belgium.

¹⁰⁸ See case COMP/M.5519 – *E.ON / Electrabel Acquired Assets*.

148. For these reasons, the proposed transaction does not give rise to serious doubts for the market of supply to small I&C customers.

c) Secondary effects on retail markets

149. The proposed transaction has its primary effects on the Belgian generation and wholesale market.

150. However, EDF has a strategy of entering markets vertically integrated, hence both with a generation portfolio and a retail business. Indeed, in order to secure optimal revenues for its generation capacity, it deems it necessary to develop a consistent retail business which, thanks to the ability to secure prices through a large number of contracts with different maturities and limited churn rates, provide a natural financial hedge against wholesale volatility¹⁰⁹. EDF's retail portfolio today is insufficient (to very large extent) to absorb the generation capacity it is planning to bring on line. Whereas its current portfolio amounts to a mere 1.55 TWh, it can be estimated that EDF may be able to produce between [5] and [15] TWh/y by [2010-2020]¹¹⁰ when its planned CCGTs come online.

151. Consequently, the effects the proposed transaction may have on the parties to the concentration's incentives to expand generation capacity in the wholesale and generation market are likely to also have effects on EDF's entry and expansion on the various Belgian retail markets.

4. Conclusion on retail markets

152. Except for secondary effects, the proposed transaction does not raise serious doubts as to its compatibility with the common market in any of the retail markets in Belgium.

E. ELECTRICITY GENERATION AND WHOLESALE AND TRADING MARKETS IN FRANCE

1. Product and geographic markets definition

153. For the purposes of the present decision, the precise definition of these markets in France can be left open since SPE has no generation capacity and its position in electricity trading is very limited.

2. Competitive assessment

154. EDF is currently active in electricity generation and electricity trading in France. SPE has no longer production capacity in France as a result of an agreement¹¹¹ whereby SPE's share of 100 MW of the Chooz B nuclear plant in France has been swapped for an equivalent capacity made available by Electrabel in Belgium on February 2009. The Transaction will therefore have no impact on the production capacity held by EDF in France.

¹⁰⁹ EDF's answers to question 1 of the request for information dated 14 October 2009.

¹¹⁰ These figures are estimated on the basis that EDF expects that its projected CCGT will run between [4,000] and [7,000] hours per year (Presentation project [...] 13 October 2009, page 6). It does not include its capacity on the Tihange reactor as this will still be contracted to [...] by 2014. Including this capacity (presumed to run at all hours) leads to estimated production between [10] and [20] TWh/y.

¹¹¹ An agreement that effectively is part of the implementation of the Pax Electrica II package concluded between the Belgian government and GDF Suez.

155. SPE's position in electricity trading is very limited (below [0-5]%) and, from 2010, SPE's activities in physical electricity trading should be reduced because of the Chooz B related swapped volumes.
156. It is thus considered that the concentration does not raise competition concerns for the electricity markets in France.

F. ELECTRICITY GENERATION AND WHOLESALE AND TRADING MARKETS IN THE NETHERLANDS

1. *Product and geographic markets definition*

157. For the purposes of the present decision, the precise definition of these markets in the Netherlands can be left open, since SPE has no generation capacity and its position in electricity trading is very limited.

2. *Competitive assessment*

158. In the Dutch electricity markets, the only very limited overlap of the parties to the proposed transaction is on the physical electricity trading, where the combined activities of the parties to the proposed transaction reach around [5-10]% of the traded volumes on the Dutch market, with a very limited addition of market share in consideration of SPE's activity ([0-5]).
159. It is thus considered that the concentration does not raise serious doubts for the electricity markets in the Netherlands.

G. GAS MARKETS IN BELGIUM

1. *Natural gas sector in Belgium*

a) *Natural gas import to Belgium*

160. There is no domestic production in Belgium. Belgium's main suppliers in 2008 were the Netherlands (33.8%), Norway (32.2%). Other bigger suppliers were Qatar (10.3%) and Algeria (5.7%) whereas in these cases the gas is delivered to Belgium via LNG tankers. The similar amount of gas, i.e. 6.6% of all imports, was delivered to Belgium from Russia and the United-Kingdom.
161. The biggest importer of the gas into Belgium in 2008 was Distrigaz with 72% of all imports even though this share has progressively decreased over the last five years (it amounted to 88.1% in 2004). Other bigger importers, enjoying a strong position in their country of origin were GDF Suez (Electrabel) of which its imports increased from 8.1% in 2004 to 13% in 2008 and Wingas with the increase from 2.3% in 2004 to 6.6% in 2008.
162. SPE started to import gas in 2008 for a volume of [10-20] TWh, which represents 6% of total imports. EDF started importing gas in 2007, for a volume of [0-5] TWh in 2007 and [0-5] TWh in 2008.

b) *The gas infrastructure in Belgium*

163. As of 1 June 2005 gas transport, LNG and gas storage infrastructures are subject to a legal monopoly through licenses held by Fluxys which is responsible for managing, maintaining and developing the transmission network. The Belgian energy authority,

Commission de Régulation de l'Electricité et du Gaz ("CREG"¹¹²) undertakes supervision both for technical and tariff matters. Fluxys operates such networks through (i) an LNG re-gasification terminal in Belgium (Zeebrugge) with the capacity of about 9 bcm/year (equal to around 104.67 TWh) in 2008, (ii) a large high pressure transmission network ensuring both transportation of natural gas for internal consumption and transit from border points to other border points and (iii) a capacity of underground storage in Loenhout accounting for 0.6 bcm (equal to around 6.978 TWh) working volume. The low pressure distribution network is operated by many local companies.

164. As far as storage is concerned, the Belgian storage capacities are currently limited to one site in Loenhout, although storage facilities are available for LNG at the Zeebrugge LNG facility operated by Fluxys. Its useful storage capacity is 0.62 bcm (equal to around 7.27 TWh). Such capacity is too small to meet Belgian modulation needs. Nevertheless, Fluxys is currently working on the extension of this capacity to 0.7 bcm (equal to around 8.14 TWh).
165. The regional distribution gas network grid is being operated, maintained and developed by Distribution System Operators ("DSOs") operating on behalf of the inter-municipal utility companies for gas.
166. Given EDF's and SPE's overlapping activities on the Belgian gas market, only the hub gas trading markets and the markets for supply of gas are relevant markets with regard to the proposed transaction.

2. Product market definition

a) General

167. In previous cases concerning the natural gas industry, the Commission has generally distinguished separate markets for gas exploration/production, gas transport (via high pressure systems), gas distribution (via low pressure systems), gas storage, trading and gas supply activities¹¹³.
168. With regard to the gas markets in Belgium, the market investigation has confirmed that such a distinction is still valid today.

b) Gas hub trading in Belgium

169. In the *Gaz de France / Suez Decision*¹¹⁴, the Commission concluded that competitive conditions on the Zeebrugge hub in Belgium and on the NBP hub in the United Kingdom had considerably converged and that the two hubs could therefore be regarded as belonging to the same market. Following the Commission's assessment there are no grounds for departing from this definition.

¹¹² See details on CREG's website: <http://www.creg.be/>.

¹¹³ Case COMP/M.3696 – *E.ON / MOL*, recital 88

¹¹⁴ Case COMP/M.4180 – *Gaz de France / Suez*, recital 99.

c) Supply markets

(i) Distinction between L-Gas and H-Gas in Belgium

170. In the *Gaz de France / Suez Decision*¹¹⁵, the Commission considered that it is necessary to distinguish between L-Gas and H-Gas in all supply markets for final customers, since they (i) require the use of separate delivery infrastructures, both for transmission and storage, (ii) do not have the same characteristics or properties, and (iii) are not interchangeable for both customers and suppliers.
171. EDF submits that the distinction is still valid today for Belgium since access to L-Gas under competitive conditions is difficult to new entrants for several reasons: gas balances between H-Gas and L-Gas are clearly separated, there is no conversion service from H-Gas to L-Gas similar to the one existing in the Netherlands, very few firm exit capacity is available from the Netherlands and there are no modulation tools (storage, LNG) for L-Gas in Belgium.
172. The market investigation has confirmed the need to make a distinction between L-Gas and H-Gas.
173. Consequently, in respect of the analysis of the proposed transaction on the Belgian gas markets, a distinction is made between L-Gas and H-Gas.

(ii) Eligible customers

174. As regards gas supply activities, following the opening of competition of the European gas markets, the Commission has also drawn distinctions between eligible and non-eligible customers and between customers according to their annual gas consumption and their type of activity (e.g. power plants)¹¹⁶.

(ii) Gas supply markets in Belgium

175. The notifying party considers, based upon the relevant Commission decision making practice¹¹⁷, that the activities of (i) supply of H-Gas and L-Gas to dealers, (ii) supply of H-Gas and L-Gas to producers of electricity, (iii) supply of H-Gas and L-Gas to large industrial and commercial customers, (iv) supply of H-Gas and L-Gas to small industrial and commercial customers and (v) supply of H-Gas and L-Gas to eligible household customers constitute separate product markets. Consequently, as submitted by EDF, in Belgium supply of L-Gas to dealers and supply of H-Gas to dealers constitute separate product markets.
176. The market investigation has also confirmed the need to make this distinction.
177. The *Gaz de France / Suez Decision*¹¹⁸, clearly distinguished the activities of (i) supply of natural gas to dealers, (ii) supply of natural gas to producers of electricity, (iii) supply of natural gas to large industrial and commercial customers, (iv) supply of natural gas to small industrial and commercial customers and (v) supply of natural gas to eligible household customers. In addition, on the basis of the *Gaz de France / Suez Decision*¹¹⁹,

¹¹⁵ Case COMP/M.4180 – *Gaz de France / Suez*, recitals 64-69.

¹¹⁶ Case COMP/M.3696 – *E.ON / MOL*, recital 89.

¹¹⁷ Case COMP/M.4180 – *Gaz de France / Suez*, recital 63 – 69.

¹¹⁸ Case COMP/M.4180 – *Gaz de France / Suez*, recital 63.

¹¹⁹ Case COMP/M.4180 – *Gaz de France / Suez*, recital 69.

distinction needs to be made between L-Gas and H-Gas in all supply markets for final customers. In particular with regard to the market for supply of gas to dealers, the Commission considered in the *Gaz de France / Suez* Decision that such market includes the supply of gas to local authority utilities (DSOs) and third-party retailers¹²⁰. Third party retailers include national and international companies that obtain gas supplies in Belgium that are subsequently sold to their final customers in Belgium. With regard to the DSOs, according to EDF the liberalisation of the gas and electricity markets has transferred the responsibility of the supply from the DSOs to the different suppliers (historical players and new entrants). Prior to the liberalisation¹²¹, customers were supplied and had a contract directly with their DSOs and not with a supplier.

178. In view of the above, the Commission considers that the activities of (i) supply of H-Gas and L-Gas to dealers, (ii) supply of H-Gas and L-Gas to producers of electricity, (iii) supply of H-Gas and L-Gas to large industrial and commercial customers, (iv) supply of H-Gas and L-Gas to small industrial and commercial customers and (v) supply of H-Gas and L-Gas to eligible household customers constitute separate product markets in respect of the analysis of the proposed transaction.

3. Geographic market definition

a) Gas hub trading

179. In previous decisions the Commission took the view that with respect to the geographic scope of the trading market, the competitive conditions on the Zeebrugge hub in Belgium and on the NBP hub in the United Kingdom had considerably converged and that the two hubs could therefore be regarded as belonging to the same market¹²². The notifying party submitted the same conclusions.

b) Gas supply markets

180. The Commission took the view in its previous decisions related to the Belgian gas markets that the Belgian supply gas markets are national as for their geographic scope¹²³. However, regarding the market for the supply of gas to household customers, the Commission considered in its recent *GDF / Centrica / SPE*¹²⁴ and *Gaz de France / Suez*¹²⁵ Decisions the possibility of a sub-national regional dimension (Flanders, Wallonia and Brussels Region) while ultimately leaving the question open. In both abovementioned Decisions, the Commission contemplated the differences in regulatory conditions, which were not homogeneous across the regions, in particular as regards the opening of household customer gas supply to competition.

181. EDF specifically emphasized with respect to large industrial and commercial customers that the existence of a national transmission network to which all such customers are connected militates in favour of a national geographic scope.

182. The notifying party furthermore submits that with regard to the supply of gas to household customers, the market could not be defined as regional as the market is fully liberalised as of 1 January 2007 in all three Regions in Belgium.

¹²⁰ Case COMP/M.4180 – *Gaz de France / Suez*, recital 73.

¹²¹ In Belgium, all customers became eligible on 1 January 2007.

¹²² Case COMP/M.4180 – *Gaz de France / Suez*, recital 99.

¹²³ Case COMP/M.4180 – *Gaz de France / Suez*, recital 100-105.

¹²⁴ Case COMP/M.3883 – *GDF / Centrica / SPE*, recital 27.

¹²⁵ Case COMP/M.4180 – *Gaz de France / Suez*, recitals 100-105.

183. Most of the respondents to the market investigation carried out by the Commission held that the gas supply markets should be considered as national.
184. Some respondents to the market investigation deemed the household customer market to be regional for reasons such as local language, differences in terms of regulations and prices according to the regions and the overall legal context for the supply to household customers. By contrast, other respondents took the view that the household customer market should be considered as national since the large majority of suppliers are present on the entire Belgian gas market with equal conditions for the commodity. However, since EDF has no activities on the market for retail supply of natural gas to household customers, there is no need to conclude on this point with regard to the proposed transaction.

c) Conclusion

185. Consequently, the geographic scope of the gas trading market is limited to the Zeebrugge and NBP hubs while the wholesale and retail supply of H-Gas and L-Gas are considered to be national (with the exception of the supply of gas to household customers where the question is left open) for the assessment of the proposed transaction with regard to the Belgian gas markets.

4. Competitive assessment

a) Horizontal overlaps

186. The proposed transaction gives rise to overlaps on a few natural gas markets in Belgium, namely: (i) gas trading, (ii) retail supply of H-Gas to large industrial and commercial customers and (iii) retail supply of H-Gas and L-Gas to small customers.
187. According to the information provided by EDF, SPE and EDF would have combined market shares above [10-20]% only on the market for supply of H-Gas to small industrial and commercial customers. Consequently, the horizontal effects of the proposed transaction on the Belgian gas markets will be analysed only for that market.
188. As to supply of H-Gas to small industrial and commercial customers, the parties' combined market shares in Belgium in 2008 are [20-30]% with a relatively low increment of [0-5]% added by EDF's presence.
189. While EDF's market shares have been constantly growing since 2007 (in 2006 EDF did not have a presence on this segment of the Belgian gas market), GDF Suez (Electrabel) still maintains [50-60]% on market for supply of H-Gas to small industrial and commercial customers. Other competitors are also present on the market such as Distrigaz or Wingas with respectively [10-20]% and [5-10]%. In consequence, as a result of the proposed transaction, SPE's market shares constantly superior to [10-20]% will be slightly reinforced without however significantly modifying the competitive conditions on the market.
190. Consequently, the horizontal overlap of the parties to the proposed transaction on the market for the supply of H-Gas to small industrial and commercial customers does not give rise to competition concerns with regard to the proposed transaction on the Belgian gas market.

b) Vertical relationships

191. In respect of vertical relationships, EDF takes the view that the proposed transaction gives rise to two potential vertical relationships: (i) EDF as a gas supplier of SPE and (ii) supply of gas to SPE as an electricity producer.

192. With regard to vertical relationships, it has to be underlined that the parties' combined market shares are rather limited on both upstream and downstream markets.

(1) Supply of natural gas to SPE by EDF as a trader

193. In 2008, the OTC deals on the Zeebrugge hub between EDFT and SPE amounted to a volume of [0-5] TWh of sales of EDFT to SPE and [0-5] TWh of purchases from EDFT to SPE on market of a size of [400-500] TWh.

(2) Supply of H-Gas to SPE as an electricity producer

194. EDF Belgium only supplies gas to end-users and H-Gas to electricity producers while SPE does not supply gas to electricity producers in Belgium.

195. EDF's market share on the supply of H-Gas to electricity producers in 2008 was [5-10]% in 2008. It has to be also noted that on this market EDF's most important client is [...] (around [60-70] % of its supply to electricity producers was delivered to [...] in 2008)¹²⁶. In 2008, EDF supplied [30-40]% of all the delivered H-Gas to SPE as an electricity producer¹²⁷ while operators such as [...] supplied SPE with H-Gas for its need. SPE's need of gas with regard to electricity production equalled to [5-10] TWh in 2008 which is estimated by EDF to amount to around [20-30]%¹²⁸ of supplied H-Gas volume to electricity producers in Belgium in 2008.

196. Consequently, on the assumption that SPE purchases H-Gas for its need to produce electricity only from EDF, following the proposed transaction and also in the light of the annual [30-40] GWh long-term purchase agreements of H-Gas entered into between EDF and market players other than SPE¹²⁹, such behaviour would affect [20-30]% of the relevant product market which cannot lead to any sort of foreclosure.

197. Consequently, the proposed transaction does not give rise to vertical concerns on the Belgian gas market.

H. GAS MARKETS IN FRANCE

1. *Product and geographic markets definition*

198. For the purposes of the proposed transaction, the product and geographic market definitions of the gas markets in France can be left open since the overlaps between the parties are minimum (gas trading) or non existent (retail markets).

¹²⁶ According to EDF, EDF's volume sold to electricity producers in 2008 was [0-10] TWh while [0-10] TWh was supplied to [...].

¹²⁷ EDF supplied [0-10] TWh of H-Gas out of [5-10] TWh delivered to SPE as an electricity producer.

¹²⁸ The size of the Belgian market for supply of H-Gas to electricity producers was [45-55] TWh in 2008.

¹²⁹ [...].

2. *Competitive assessment*

199. In the context of the proposed transaction, the only overlap between the parties to the proposed transaction is on the gas trading market since SPE and EDF are both active on this market in France. EDF is active on the French markets mainly through EDF Trading on the OTC markets and on Powernext Gaz, including the Balancing GRT Gaz segment of Powernext. SPE had a very residual activity on the French gas markets in 2008 through OTC deals ([0-5] GWh in 2008 representing around [0-5]%). SPE is member of Powernext Balancing GRT Gaz since 9 October 2008¹³⁰ but not of Powernext Gas Spot or Powernext Gas Futures. In 2008, SPE sold [10-20] GWh on Powernext Balancing GRT Gaz¹³¹. The total sales of SPE OTC and on Powernext GRT Gaz in 2008 amount to [10-20] GWh. The combined position of the parties on OTC and on Powernext Gas represents [10-20]% for 2008 and [10-20]% on PEG NORD (the gas volumes traded on Powernext Gaz are only delivered on the North zone).
200. On the retail markets, the proposed transaction will have no horizontal impact on the gas markets in France since (i) SPE is not active on the French gas supply markets and (ii) EDF has only very limited market shares.
201. It is thus considered that the proposed transaction does not raise serious doubts for the gas markets in France.

I. GAS MARKETS IN THE NETHERLANDS

1. *Product and geographic markets definition*

202. For the purposes of the proposed transaction, the product and geographic market definitions of the gas markets in the Netherlands can be left open since there are currently no overlaps between the parties to the proposed transaction.

2. *Competitive assessment*

203. [Information on the contemplated activities of SPE on the Dutch gas markets].
204. EDF is only active through its subsidiaries EDF Trading, Edison and EnBW on the gas trading market with a market share of around [0-5]% of all traded volumes.
205. It is thus considered that the concentration does not raise serious doubts for the gas markets in The Netherlands.

¹³⁰ http://www.powernext.com/#sk:tp=app;n=page:f=getPage;t=page:fp=system_name:PGB_Market_Participants.

¹³¹ [Information on SPE actual and contemplated gas storage capacities outside Belgium]. The following storage capacities were owned by SPE in France until March 2009: from 1 April 2007 to 31 March 2008 in Salins Sud for 68,156 MWh; from 1 April 2008 to 31 March 2009 in Salins Sud for 39,896 MWh; from 1 April 2008 to 31 March 2009 in Ile-de-France Sud for 344,287 MWh; and from 1 April 2008 to 31 March 2009 in Ile-de-France Nord for 328,036 MWh.

VI. REMEDIES

A. PROCEDURE

206. Following its competitive assessment of the proposed transaction, the Commission concluded that there are concerns with regard to the incentives of the post-merger entity to further develop EDF's CCGT projects. The proposed transaction removes EDF as an ambitious entrant from various Belgian electricity markets because incentives for the merged entity to develop new generation capacity in Belgium will be significantly reduced in comparison to the incentives that EDF had pre-merger.
207. Consequently, preliminary competition concerns have been identified as the Proposed Transaction would lead to significant lessening of competition on the Belgian electricity markets. This raises serious doubts as to the compatibility of the proposed transaction with the common market, specifically on the Belgian wholesale and generation market which accordingly can lead to secondary effects on the Belgian electricity retail markets and the Belgian market for balancing and ancillary services.
208. In order to address the serious doubts identified by the Commission, as to the compatibility of the proposed transaction, as initially notified, with the common market, EDF submitted on 21 October 2009 a remedy package.
209. After market testing the proposed remedies, the Commission considered that a cleared definition of what constitutes a final investment decision was needed. Therefore, EDF submitted on 9 November 2009 a revised Commitments package so as to provide increased certainty that a final investment decision will result in the actual materialisation of the investment

B. DESCRIPTION OF REMEDIES

210. Currently, EDF is developing two sites in Belgium with a view to constructing up to [1,800 – 1,900] MW of CCGT based generation capacity. One site is located at Dilsen-Stokkem and the other site is located at [...]. All current assets related to these development projects are located in two separate companies, [[CCGT1 Company]] and [[CCGT2 Company]] respectively, which are both owned at 100% (minus one share) by EDF Belgium. SPE is also developing one site, in Navagne, capable of receiving generation capacity up to 850 MW site. The final decision to construct generation capacity on these sites has not been taken for any of these projects, nor have they obtained all the necessary permits
211. In order to remove the competition concerns identified by the Commission in respect of the proposed transaction, EDF has provided Commitments. The Commitments consist of:
- The immediate divestiture of the assets of either [CCGT 1] or [CCGT 2], and;
 - The divestiture of the assets of the remaining of these two companies if, by a certain date, EDF has not taken a final investment decision or has taken a negative final investment decision with regard to the remaining site.
212. The combined effect of the Commitments is that a potential maximum generation capacity of up to [1,800 – 1,900] MW will be made available to the market (constituting approximately [10-20]% of the existing Belgian generation capacity). As a result, EDF considers that this completely addresses the Commission's concern regarding the potential

removal of EDF as an ambitious entrant in the generation and wholesale market in Belgium.

C. OUTCOME OF THE MARKET TEST ON THE COMMITMENTS

213. Respondents to the market test of the Commitments included mostly competitors of EDF and SPE on the Belgian electricity generation and wholesale market and on the markets for the supply of electricity to end customers.
214. Responses from market players can be considered as partly positive and partly negative.
215. Some respondents are positive with respect to the Commitments. They agree that the Commitments remove the identified concerns, for example by stating that an "*invest or divest*" type of remedy is appropriate to counteract the reduced incentives to build generation capacity due to the proposed transaction. Moreover, the overwhelming majority of respondents agreed that the immediate divestiture of the assets of the company carrying out one of the two of EDF's CCGT projects is a positive element of the Commitments.
216. However, some players were negative in their responses. They emphasize theories of harm for which the Commission's first phase investigation did not identify any concerns. Accordingly the Commission does not consider that remedies are necessary to address those.
217. Certain market participants also sought to challenge the adequacy of the Commitments to address the concerns which the Commission has identified. Specifically, it was noted that an "*invest*" decision was not considered as a remedy at all or that an "*invest or divest*" Commitment would not change the alleged strengthened position of EDF post merger. This allegation is rejected because the Commission does not share these concerns. As regards the effectiveness of the Commitments to address the Commission's identified concerns, it has been noted that an "*invest or divest*" type of remedy (envisaged in the proposed Commitments for a second site) is not appropriate to counteract the reduced incentives to build generation capacity due to the proposed transaction, as the time to take the decision will slow down the market strategy of competitors. However, the modified Commitments make it very unlikely that EDF could delay or withdraw completely from its investment decision and delay the divestiture of the second site. Thus, EDF will not be able to delay/prevent the entry of others by stating that it has taken a final decision by the specified date when in fact its decision to invest would be merely provisional.
218. As explained below, the Commission takes the view that the modified Commitments fully address the established concerns of the proposed transaction.
219. The market test did demonstrate that a preliminary interest by potential buyers exists to buy a site that is divested immediately, as well as one later (if EDF does decide not to build a generation unit by a certain date on that site). Specifically, the majority of competitors of EDF and SPE on the wholesale and generation market appear to be willing to consider acquiring the site(s) to be divested by stating their preliminary interest.
220. It was also noted that GDF Suez (Electrabel) may need to be excluded as suitable buyer as a purchase by GDF Suez (Electrabel) may create a competition concern in view of its current position in Belgium's market for generation and wholesale.
221. Moreover, on 3 November 2009, the Belgian NCA submitted its comments to the Commission on the Commitments. In sum, the Belgian NCA considers that the

Commitments are not sufficient to remove either the Commission's concerns or the additional competition concerns identified by the Belgian NCA and accordingly proposes alternative commitments.

222. As regards the concerns identified by the Commission, it is argued by the Belgian NCA that it is not certain that the projects will materialise (i.e. building CCGTs on the site(s) that would be divested) and that the proposed Commitments will not be enough to make the potential buyer a likely new entrant in the generation and wholesale market in Belgium. For example, the Belgian NCA states that the submitted Commitments are unlikely to eliminate the competition concerns identified because they do not guarantee that a competitor will have additional production capacities following the divestment, given that it is not certain that the federal government and local authorities will grant permits to EDF's CCGT projects.
223. Accordingly, the Belgian NCA proposes alternative remedies to address those competition concerns. They suggest a divestiture by EDF of its share in Tihange-1 nuclear power plant and the divestiture of SPE's Navagne site.
224. The Commission does not share the views of the Belgian NCA. The basis for the Commission's concerns is the reduction of incentives of EDF post merger to pursue these projects. In view of the fact that the final investment decision is to be made in the future, which is uncertain by definition, the Commission's concerns are not based on a finding that the projects would be realised under all possible scenarios. What the Commission seeks to ensure with the Commitments is that the incentive to pursue the projects is not affected by the proposed transaction. By replacing EDF as the developer of the site (immediately and, possibly, later) with a market participant that has the same incentive to develop the sites as EDF had prior to the proposed transaction, the Commission's concerns are addressed.

D. MODIFICATION OF THE COMMITMENTS FOLLOWING THE MARKET TEST

225. Pursuant to the Commitments, the divestiture of the assets of the company carrying out the remaining of the two projects would take place if, by [...], EDF has not taken a final investment decision or has taken a negative final investment decision with regard to that project.
226. The original text of the Commitments proposed by EDF did not specify in more detail what constitutes a final investment decision. Therefore, during the market test of the Commitments, the Commission enquired as what constitutes an irrevocable decision to invest in building a power plant and whether the entering into a final investment decision by a company is a sufficient guarantee that the project would be pursued. This is important as the market test indicated that the "*invest or divest*" type of remedy may delay the entry of competitors should EDF finally decide not to pursue its investment on the second site. By rendering the decision irrevocable or, at least, by rendering it very unlikely that EDF could delay or withdraw completely from its decision to invest, EDF will not be able to delay/prevent the entry of others by stating that it has taken a final decision by the specified date when in fact its decision to invest would be merely provisional.
227. Even though it is impossible to ensure that a final investment decision always results in the actual investment materialising, the market test has shown that once a company has

entered into binding contracts for the building of a power plant (e.g. EPC¹³² contract), it is very unlikely that it can delay or abandon the project. It was emphasized that it is standard practice that delays caused by the purchaser lead to financial penalties being imposed after a binding contract has been signed with the contractor building the power plant. In line with the market test results, it can therefore be considered that the final investment decision is essentially the mandate to enter into a binding EPC agreement.

228. With a view to incorporating these comments and suggestions expressed by market players, EDF submitted on 9 November 2009 a revised Commitments package so as to provide increased certainty that a final investment decision will result in the actual materialising of the investment. In particular, EDF amended the part of the Commitments text which relates to the final investment decision. EDF undertakes to sign an unconditional binding purchase contract for the essential components of a CCGT of a potential maximum capacity of [900-950] MW dedicated to the [CCGT 1] Project or the [CCGT 2] Project, within [...] from "The Final Investment Decision Date". In case that contract is not entered into in that period, EDF will be deemed to have taken a "Negative Final Investment Decision" and would thus be obliged to divest the second site.

E. COMMISSION'S ASSESSMENT OF THE OFFERED MODIFIED COMMITMENTS

1. Introduction

229. As set out in the Commission Notice on Remedies¹³³, 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.
230. Commitments which are structural in nature are preferable from the point of view of the Merger Regulation. For instance, the divestiture of a business unit 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.
231. Nevertheless, as stated by the Notice on Remedies¹³⁴, others types of Commitments can be also capable of preventing the significant impediment of effective competition. The question whether a remedy, and more specifically which type of remedy, is suitable to

¹³² EPC stands for Engineering, Procurement and Construction contract.

¹³³ Commission Notice on Remedies acceptable under Council Regulation No.139/2004 and under Commission Regulation No. 802/2004, paragraph 4.

¹³⁴ Notice on Remedies, paragraphs 15-16.

eliminate the competition concerns identified has to be examined on a case-by-case basis.¹³⁵

232. 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.

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

233. EDF believes that the divestiture of the assets of either [CCGT 1] or [CCGT 2] would be attractive to a purchaser looking to develop CCGT in Belgium for the following reasons: (i) the two sites identified by EDF [...] benefit from an optimal situation and are particularly suited for the development of CCGTs; (ii) EDF has already received a positive reaction from Belgian local administrations and believes that a suitable purchaser would also benefit from such a positive reaction; and (iii) EDF furthermore believes there will be capacity shortage in the medium term in Belgium, which should enhance the attractiveness of the divestiture sites for a suitable purchaser. Consequently EDF considers that a suitable purchaser approved by the Commission will be interested in acquiring the assets of any of the two companies in charge of the two CCGT projects ([CCGT 1 Company] or [CCGT 2 Company]) within the time-frame proposed by the Commitments.

234. The Commission's assessment concluded that by acquiring SPE, which possesses the second biggest installed generation capacity in Belgium, as well as a site prepared for the construction of a 850 MW CCGT generation plant, the incentives for the combined entity to develop also EDF's sites would be reduced. By divesting the assets, EDF is replaced by another market participant that has incentives to develop the divested assets equivalent to those of EDF prior to the proposed transaction.

235. Due to the need to have clear-cut remedies that eliminate the competition concerns, the Commission considers it preferable to have a firm divestiture of the assets of one of the two EDF companies carrying out the CCGT projects immediately. In that way, EDF is immediately replaced by a different market player with incentives equivalent to those of EDF prior to the proposed transaction for one of the two sites. In view of the uncertainties related to future investment decisions, it cannot be excluded at this stage that EDF has sufficient incentives to invest in the second site alone. Should EDF however decide not to invest in the second site, then it must be ensured that this decision is not due to the fact that the proposed transaction has reduced its incentives to do so. Consequently, as a safeguard, a contingent and future divestiture of the assets of the company carrying out the second of the two projects (in other words, replacing EDF by another owner that would have incentives equivalent to those of EDF pre-merger) is adequate.

236. The [CCGT 1] and [CCGT 2] power plant projects constitute viable divestment businesses to suitable purchasers looking to build generation capacity in Belgium as transactions involving ongoing power plant projects are quite commonplace in the industry. Each project is having its assets in a separate company and such assets for example include [...], feasibility studies, network connection agreement offers as well as any other licences, connection agreements and permits to be acquired as EDF undertakes to pursue. Purchasing such a business will provides an opportunity for another market

¹³⁵ Notice on Remedies, paragraph 16.

participant to obtain one of the few suitable green-field large-scale power plant construction sites that has already been developed to a certain extent (e.g. regarding studies, permits preparation, identifying location, and securing of land rights). Consequently, it leads to reduced risks for such an entrant.

237. The majority of the participants of the market test indicated that sites for building generation capacity in Belgium can be considered as scarce. To explain this scarcity, respondents referred to a number of characteristics which a site would need to possess in order to be considered suitable for building a gas fired power plant. These included the site location relative to the high pressure gas network, to the high voltage grid (and existence of available capacity on the grid) and to cooling water, the non-proximity to urbanised areas and the need for a positive attitude of local public authorities. Many sites would be unsuitable due to them being either close to habitable areas, due to the high density of population in Belgium, or close to nature protection areas (e.g. Nature 2000 areas). The confirmation by the market test that suitable sites to construct generation capacity in Belgium are scarce confirms that a divestment of sites to suitable buyers means that an acquirer is likely to develop it and would significantly affect the potential of other competitors to enter the market.
238. Moreover, the modifications that EDF has proposed to the Commitments after the market test ensure that EDF can retain the second remaining site only if a high degree of probability exists that it will make an irrevocable decision to invest to construct a power plant before a given date and it is ensured that EDF cannot delay or prevent the entry of other competitors. Failing this, EDF will also be replaced for this site by another market player that has incentives equivalent to those of EDF prior to the proposed transaction.
239. The divestiture of more or other sites would not be proportional given that the two sites of EDF subject to divestiture essentially constitute the overlap between the two merging parties. By the (potential) divestiture of assets of the two companies carrying EDF's CCGT projects, the incentives for any remaining sites (i.e. the sites that SPE had before the proposed transaction) will also have been restored to the level that existed prior to the proposed transaction.
240. The Commitments are considered proportional because they eliminate the competition concerns, without affecting the ability of the parties of the proposed transaction to continue having an ambitious expansion programme. The construction of new generation capacity on sites on which other units are already constructed (brown sites) often constitutes a significant advantage in comparison to the construction of generation capacity on sites where this is not the case (green field sites). Brown sites, for instance, have pre-existing connections to the electricity transmission grid, (water) cooling opportunities and, possibly, pre-existing connections to the gas transmission grid. Building a generation unit on a brown field site can also provide savings in operation costs (pooling of operating staff). [Confidential information regarding SPE's sites]¹³⁶. Consequently, despite the immediate divestiture of one site, and the potential divestiture of the remaining site, there is little risk that the merged entity will be constrained should it seeks to expand its business.
241. Specifically as regards the alternative remedies suggested by the Belgian NCA for to address the Commission's concerns, such alternatives are not merger specific or proportionate to the identified competition concerns.

¹³⁶ Reply of the parties dated 5 November 2009.

242. First, EDF's capacity of Tihange-1 is [...] contracted until 2015 with [...] and, thus, not merger specific. To replace EDF as an entrant, the focus must be its incentives to develop its sites under development.
243. Second, as regards the Navagne site, it is true that this site has obtained (nearly) all the necessary permits and is therefore a more viable business than the two (less developed) sites of EDF that are currently proposed for divestiture. However, the competition concerns identified and analysed in the competitive assessment above are closely linked to the reduced incentives of EDF to develop generation capacity, in addition to SPE's Navagne site. It is considered that the parties to the proposed transaction's incentive to develop the Navagne site will not be reduced compared to SPE's pre-merger incentive as it is the only site available to the parties post-merger for immediate development. This is the contrary situation vis-à-vis the divestiture sites, where the final investment decision will take place later. A divestiture of Navagne site would in fact mean that the current investment plans will be substantially delayed due to the inevitable period needed for a divestiture. An acquirer will also have to prepare a new investment decision (all elements for a final investment decision to be taken appear already prepared by SPE). Because there is no other nearly fully permitted site for CCGT capacity in their portfolio, also the parties to the proposed transaction would be delayed by several years in building new capacity.
244. Consequently, it is considered that the remedies suggested by the Belgian NCA are disproportionate and unrelated to the concerns identified by the Commission with regard to the proposed transaction and could even defy the objective of the remedies.

3. *Conclusion on the proposed Commitments*

245. The Commission has assessed the improved remedy package and has concluded that it is sufficient to remove the identified serious doubts on the Belgian wholesale and generation market, as well as any secondary effects on the Belgian electricity retail markets and the Belgian market for balancing and ancillary services. The Commission considers that the Commitments are appropriate and proportional as they seek to restore the incentives for developing EDF's sites to the level EDF had prior to the proposed transaction.
246. The Commission considers that the Commitments including the modifications of 9 November 2009 address the concerns identified by the Commission with regard to the proposed transaction.

F. CONDITIONS AND OBLIGATIONS

247. 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.
248. 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. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(5) of the EC Merger Regulation. The

undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the EC Merger Regulation.

249. This decision is subject to full compliance with the conditions set out in Sections 2.1 and 2.3 of the Commitments submitted by the notifying party and with the obligations set out in Sections 2.2 and 3 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.

VII. CONCLUSION

1. 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 conditions set out in Sections 2.1 and 2.3 of the Commitments annexed to the present decision and with the obligations contained in the other sections of the said Commitments. 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)
Stavros DIMAS
Member of the Commission

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COMP/M.5549 – EDF/SEGEBEL

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) N° 139/2004 as amended (the “**Merger Regulation**”), EDF S.A. (“**EDF**”) hereby provides the following Commitments (the “**Commitments**”) in order to enable the European Commission (the “**Commission**”) to declare the acquisition by EDF of the 100% shareholding of Centrica in Segebel/SPE (the “**Transaction**”) compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) 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 light of the Merger Regulation, and by reference to the Commission notice on remedies acceptable under Council Regulation (EC) N° 139/2004 and under Commission Regulation (EC) N° 802/2004.

At this stage, the Commission has informed EDF during the State of Play Meeting on 19 October 2009 of its competition concerns relating to the potential removal of EDF as the most likely new entrant in the generation and wholesale market in Belgium.

In its discussion with the Commission, EDF has made clear that it does not believe that the proposed Transaction would give rise to any of this risk. On the contrary, EDF submits that the Transaction has pro-competitive effects by enhancing SPE’s ability to compete effectively with the incumbent operator in Belgium. However, in order to address the Commission’s concerns, EDF is proposing the following Commitments. Whilst EDF does not accept that there should be any antitrust concerns as regards the Transaction, EDF considers that the proposed Commitments fully address any concerns the Commission might have.

SECTION 1: DEFINITIONS

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

Affiliated Undertakings: undertakings controlled by EDF and/or Segebel and/or SPE, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in the light of the Commission's Consolidated Jurisdictional Notice.

Assets: all site-/facility-related licences, permits and authorizations issued by any federal or regional organization and all contracts, leases, commitments, credit and other records concluded for the development and construction of the [CCGT 1] or the [CCGT 2] Projects.

[CCGT 1] **Assets:** the Assets that are owned by [...] at the Effective Date and those which might be acquired at any time by EDF before the Effective Date or the Final Investment Decision Date as the case may be for the development and construction of the [CCGT 1] Project, as described hereafter in Schedule 1.

[CCGT 1] **Closing:** the transfer of the legal title of the [CCGT 1] Assets to the Purchaser.

[CCGT 1] **Project:** the project of combined cycle gas turbine currently developed by [CCGT 1 Company], a company owned at 100% less one share by EDF Belgium [...] in Dilsen-Stokkem (in the [Eastern Part of Flanders]), for a potential maximum capacity of [900-950] MW (two units of [400-500] MW each).

Divestiture Trustee: one or more natural or legal person(s), independent from EDF and Affiliated Undertakings, who/which is/are approved by the Commission and appointed by EDF and who/which has/have received from EDF the exclusive Trustee Mandate to sell the Divestment Assets.

Divestment Assets: the [CCGT 1] Assets and/or the [CCGT 2] Assets that EDF commits to divest under the conditions provided in section 1 of the Commitments.

EDF: EDF SA, a company incorporated under the laws of France and having its registered office at 22-30 avenue de Wagram 75382 Paris Cedex 08 - France (company registered 552 081 317).

EDF Belgium: EDF Belgium SA, a wholly owned subsidiary of EDF SA.

Effective Date: [...].

Final Investment Decision Date: [...].

Final Investment Decision: [...].

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

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

Negative Investment Decision: [...].

[CCGT 2] **Assets:** the Assets that are owned by [CCGT 2] at the Effective Date and those which might be acquired at any time by EDF before the Effective Date or the Final Investment Decision Date as the case may be for the development and construction of the [CCGT 2] Project, as described hereafter in Schedule 2.

[CCGT 2] **Closing:** the transfer of the legal title of the [CCGT 2] Assets to the Purchaser.

[CCGT 2] **Project:** the project of combined cycle gas turbine currently developed by [CCGT 2 Company], a company owned at 100% less one share by EDF Belgium ([...]) in [...] ([The Western Part of Flanders]), for a potential maximum capacity of [900-950] MW (two units of [400-500] MW each).

Parties: EDF and Segebel/SPE

Purchaser(s): the entity(ies) approved by the Commission as acquirer(s) of the [CCGT 1] Assets and/or [CCGT 2] Assets.

Second Divestiture Period: the period of [...] from the Final Investment Decision Date.

Trustee(s): the Monitoring Trustee or the Divestiture Trustee.

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

SECTION 2: COMMITMENT TO DIVEST EDF'S CCGT PROJECTS IN BELGIUM

1. EDF is currently involved in the permitting and development process of the [CCGT 1] and [CCGT 2] Projects in Belgium, for a potential maximum capacity of [1,800-1,900] MW, for which the earliest commercial operation date is foreseen at the end of [2010-2020] early [2010-2020].
2. The Final Investment Decision Date is expected to take place at the latest on [...] provided that [...] and [...] have obtained all the necessary permits in relation to their respective projects (environmental, construction and production permits, authorizations and connection agreements to electricity and gas networks), and that no existing appeal procedure remains pending.

2.1 **Divestment Commitment**

Commitment to divest

3. EDF commits to divest, or procure the divestiture of the [CCGT 1] Assets or [CCGT 2] Assets by the end of the Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 13. To carry out the divestiture, EDF commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the [CCGT 1] Assets or the [CCGT 2] Assets within the First Divestiture Period. If EDF has not entered into such an agreement at the end of the First Divestiture Period, EDF shall grant the Divestiture Trustee an exclusive mandate to sell the [CCGT 1] Assets or the [CCGT 2] Assets in accordance with the procedure described in paragraph 16 in the Trustee Divestiture Period.
4. EDF commits to divest, or procure the divestiture of the remaining asset (the [CCGT 1] Assets or the [CCGT 2] Assets) in the event that EDF would not have taken a Final Investment Decision or have taken a Negative Investment Decision by the Final Investment Decision Date which is [...]. The divestiture shall occur by the end of the Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 13. To carry out the divestiture, EDF commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the [CCGT 1] Assets or the [CCGT 2] Assets within the Second Divestiture Period. If EDF has not entered into such an agreement at the end of the Second Divestiture Period, EDF shall grant the Divestiture Trustee an exclusive mandate to sell the [CCGT 1] Assets or the [CCGT 2] Assets in accordance with the procedure described in paragraph 16 in the Trustee Divestiture Period.

Structure and definition of the Divestment Assets

5. The Divestment Assets, described in more detail in Schedule 1 ([CCGT 1] Assets) and Schedule 2 of the Commitments ([CCGT 2] Assets), consist of the assets owned or acquired at any time by [...] or [...] in relation to the development and the construction of the [CCGT 1] Project or the [CCGT 2] Project at the Effective Date or the Final Investment Decision Date as the case may be, and which includes:
 - (a) all site-/facility-related licences, permits and authorizations issued by any federal or regional organization (notably the environmental permit, the individual generation authorization granted by the Federal Minister for energy, the construction permit) as well as any study and application already prepared in order to obtain such licences, permits and authorizations at the Effective Date or the Final Investment Decision Date as the case may be; and
 - (b) all contracts, leases, commitments, credit and other records (notably the land-reservation contracts with land owners, connection agreements to electricity and gas networks with Elia and Fluxys), as well as any draft agreement prepared at the Effective Date or the Final Investment Decision Date as the case may be.

2.2 Related Commitments

Preservation of Viability, Marketability and Competitiveness

6. From the Effective Date or the Final Investment Decision Date as the case may be, until the date of the [CCGT 1] Closing or the [CCGT 2] Closing, EDF shall preserve the economic viability, marketability and competitiveness of the Divestment Assets, in accordance with good business practice, and shall minimize as far as possible any risk of loss of competitive potential of the Divestment Assets. In particular EDF undertakes:
 - (a) to perform with no delay and with due care all the development process activities regarding the [CCGT 1] and [CCGT 2] Projects, in order to obtain all the necessary permits (environmental, construction and production), authorizations and connection agreements to electricity and gas networks needed to take a Final Investment Decision;
 - (b) not to carry out any act upon its own authority that might have a significant adverse impact on the timing issues of the development process, regardless of whether a Negative Final Investment Decision or a positive Final Investment Decision has been taken;
 - (c) not to carry out any act upon its own authority that might have a significant adverse impact on the value viability, marketability or competitiveness of the Divestment Assets;
 - (d) to make available sufficient resources for the development of the [CCGT 1] and [CCGT 2] Projects, on the basis and continuation of the existing development plans.

Irrevocability of the Final Investment Decision

7. In order to secure the development process and avoid any further delay, EDF undertakes to sign an unconditional binding purchase contract¹³⁷ for the essential components of a CCGT of a potential maximum capacity of [900-950] MW dedicated to the [CCGT 1] Project or the [CCGT 2] Project, within [...] from the Final Investment Decision Date.
8. Should the binding purchase contract mentioned above not be entered into within [...] from the Final Investment Decision Date, EDF shall be deemed to have taken a Negative Final Investment Decision for the purpose of section 2.1. here above.

Due Diligence

9. In order to enable potential purchasers to carry out a reasonable due diligence of the [CCGT 1] Project and the [CCGT 2] Project, EDF undertakes from the Effective Date or the Final Investment Decision Date as the case may be, subject to customary confidentiality assurances to provide to potential purchasers sufficient information as regards the [CCGT 1] Project and/or the [CCGT 2] Project.

Reporting

10. EDF shall submit written reports in English on potential purchasers of the [CCGT 1] and/or the [CCGT 2] Assets 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 quarter following the Effective Date or the Final Investment Decision Date as the case may be (or otherwise at the Commission's request).

¹³⁷ Provided that the provisions of this contract remain compatible with common and usual conditions or provisions applicable in the engineering and construction industry.

11. EDF 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.

2.3 Purchaser

12. To meet the competition concerns identified by the Commission, the Purchaser, in order to be approved by the Commission, must:
 - (a) be independent of and unconnected to EDF and its Affiliated Undertakings by the time of the [CCGT 1] Closing and/or the [CCGT 2] Closing;
 - (b) have the financial resources, proven expertise and incentive to maintain and develop the Divestment Assets as a viable and active competitive force in competition with EDF and Affiliated Undertakings 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 Assets.

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

13. The final binding sale and purchase agreement shall be conditional on the Commission’s approval. When EDF or the relevant Affiliated Undertaking has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. EDF must be able to demonstrate to the Commission that the purchaser meets the Purchaser Requirements and that the Divestment Assets are 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 Assets are being sold in a manner consistent with the Commitments.

2.4 Conclusion

14. The [CCGT 1] and [CCGT 2] Projects each represent a potential maximum capacity of [900-950] MW, which represents approximately [5-10]% of the existing Belgian generation capacity. EDF underlines that it cannot be deducted from the proposed Transaction that EDF has ever contemplated not to develop the [CCGT 1] and [CCGT 2] Projects without the proposed commitment. EDF also maintains that it does not limit the ability or incentive of EDF to develop the [CCGT 1] and [CCGT 2] Projects, rather the contrary. The commitment to divest the [CCGT 1] and/or [CCGT 2] Assets reduces this risk and therefore should fully answer any concern the Commission may have.

SECTION 3: TRUSTEE

3.1 Appointment Procedure

15. EDF shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If EDF has not entered into a binding sales and purchase agreement one month before the end of the First Divestiture Period or the Second Divestiture Period or if the Commission has rejected a purchaser proposed by EDF at that time or thereafter, EDF shall appoint a Divestiture Trustee to carry out 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 Divestment Period.
16. 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 the Parties in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Assets, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by EDF

17. No later than one week after the Effective Date or the Final Investment Decision Date as the case may be, EDF shall submit a list of one or more persons whom EDF 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 or the Second Divestiture Period, EDF shall submit a list of one or more persons whom EDF 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 16 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;
 - (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

18. 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, EDF 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, EDF 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 EDF

19. If all the proposed Trustees are rejected, EDF 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 15 and 18.

Trustee nominated by the Commission

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

3.2 Functions of the Trustee

21. 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 EDF, 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

22. The Monitoring Trustee shall:
 - (a) 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.
 - (b) oversee the project development phase of the [CCGT 1] Project or the [CCGT 2] Project as the case may be with a view to ensuring their continued economic viability, marketability and competitiveness and monitor compliance by EDF with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Assets.
 - (c) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
 - (d) propose to EDF such measures as the Monitoring Trustee considers necessary to ensure EDF'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 Assets;
 - (e) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, potential purchasers receive sufficient information relating to the Divestment Assets in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process;

- (f) provide to the Commission, sending EDF 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 development process of the [CCGT 1] Project or the [CCGT 2] Project so that the Commission can assess whether the project development phase is pursued in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending EDF a non-confidential copy at the same time, if it concludes on reasonable grounds that EDF is failing to comply with these Commitments;
- (g) within one week after receipt of the documented proposal referred to in paragraph 13, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Assets after the sale and as to whether the Divestment Assets are sold in a manner consistent with the conditions and obligations attached to the Decision.

Duties and obligations of the Divestiture Trustee

- 23. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Assets 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 13. 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 EDF, subject to EDF's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
- 24. 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. 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 EDF.

3.3 Duties and obligations of EDF

25. EDF shall provide and shall cause its 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 information and documents on the [CCGT 1] and [CCGT 2] Projects necessary for fulfilling its duties under the Commitments and EDF shall provide the Trustee upon request with copies of any document. EDF shall make available to the Trustee one or more offices and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
26. EDF shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request. This shall include all administrative support functions relating to the [CCGT 1] and [CCGT 2] Projects which are currently carried out at headquarters level. EDF shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. EDF shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.
27. EDF shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the [CCGT 1] Closing and/or the [CCGT 2] 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, EDF shall cause the documents required for effecting the sale and the Closing to be duly executed.
28. EDF 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 EDF 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 the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
29. At the expense of EDF, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to EDF’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 the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should EDF refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard EDF. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 28 shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served EDF during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

3.4 Replacement, discharge and reappointment of the Trustee

30. 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 EDF to replace the Trustee; or
 - (b) EDF, with the prior approval of the Commission, may replace the Trustee.
31. If the Trustee is removed according to paragraph 30, 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 15-20.
32. Beside the removal according to paragraph 30, 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 Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

SECTION 4: REVIEW CLAUSE

33. The Commission may, where appropriate, in response to a request from EDF showing good cause and accompanied by a report from the Monitoring Trustee:
 - (a) Grant an extension of the time periods foreseen in the Commitments, or
 - (b) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.
34. Where EDF 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 EDF be entitled to request an extension within the last month of any period.

Paris,

Duly authorized for and on behalf of EDF,

(signed)

Marianne Laigneau
General Secretary and Legal Director

SCHEDULE 1

DESCRIPTION OF THE [CCGT 1] ASSETS

1. General information

- 1.1 Name of the Site: [...]
- 1.2 Location: Rotem industrial zoning, Dilsen-Stokkem (3650), Belgium
- 1.3 Type / Primary Energy Source: combined cycle gas turbine (single shaft) / natural gas
 - a. Potential maximum installed capacity: [900-950] MW (2 x [400-500] MW)
 - b. Plant Developer: [CCGT 1 Company]
 - c. Planned lifespan: 25 years
- 1.4 Technical characteristics:
 - a. Cooling water: [...]
 - b. Anticipated efficiency: 57,2%
 - c. Gas: [...]
 - d. Electricity: [...]

2. Legal Structure of Plant Developer

- 2.1 [CCGT 1 Company] is a company owned at 100% less one share by EDF Belgium ([...]).

3. Assets owned at the Effective Date

- 3.1 [...].
- 3.2 [...].
- 3.3 [...].
- 3.4 [...].
- 3.5 [...].
- 3.6 [...].
- 3.7 [...].
- 3.8 [...].

4. Assets still to be acquired

- 4.1 Environmental permit to be granted by the [Eastern part of Flanders] Province Governor. .

- 4.2 Individual generation authorization to be granted by the Federal Minister for energy
- 4.3 Construction permit to be granted by the municipality
- 4.4 Connection agreements to electricity and gas networks with Elia and Fluxys

[Information on the location of the CCGT 1 Assets].

SCHEDULE 2

DESCRIPTION OF THE [CCGT 2] ASSETS

1. General information

- 1.1 Name of the Site: [...]
- 1.2 Location: [Western Part of Flanders]
- 1.3 Type / Primary Energy Source: combined cycle gas turbine (single shaft) / natural gaz
 - a. Potential maximum installed capacity: [900-950] MW (2 x [400-500] MW)
 - b. Plant Developer: [CCGT 2 Company]
 - c. Planned lifespan: 25 years
- 1.4 Technical characteristics:
 - a. Cooling water: [...]
 - b. Anticipated efficiency: 57,2%
 - c. Gas: [...]
 - d. Electricity: [...]

2. Legal Structure of Plant Developer

- 2.1 [CCGT 2 Company] is a company owned at 100% less one share by EDF Belgium ([...]).

3. Assets owned at the Effective Date

- 3.1. [...].
- 3.2. [...].
- 3.3. [...].
- 3.4. [...].
- 3.5. [...].
- 3.6. [...].
- 3.7. [...].

4. Assets still to be acquired

- 4.1 Environmental permit to be granted by the [Western part of Flanders] Province Governor.

- 4.2 Individual generation authorization to be granted by the Federal Minister for energy
- 4.3 Construction permit to be granted by the municipality
- 4.4 Connection agreements to electricity and gas networks with Elia and Fluxys

[Information on the location of the CCGT 2 Assets].

[...].

[...].

[...].